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HOBET MINING & CONSTRUCTION v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HOBET MINING AND CONSTRUCTION
COMPANY,

CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. WEVA 84-375-R
Citation No. 2146497; 8/7/84

Docket No. WEVA 84-376-R
Citation No. 2146498; 8/7/84

Docket No. WEVA 84-377-R
Citation No. 2146499; 8/7/84

Docket No. WEVA 84-378-R
Citation No. 2146500; 8/7/84

Pine Creek No. 12 Prep Plant
Docket No. WEVA 84-379-R

Citation No. 2146461; 8/1/84
Docket No. WEVA 84-380-R

Citation No. 2146462; 8/1/84
Docket No. WEVA 84-381-R

Citation No. 2146464; 8/1/84
Docket No. WEVA 84-382-R

Citation No. 2146470; 8/2/84
Docket No. WEVA 84-383-R

Citation No. 2146471; 8/2/84
Docket No. WEVA 84-384-R

Citation No. 2146472; 8/2/84
Docket No. WEVA 84-385-R

Citation No. 2146473; 8/2/84
Docket No. WEVA 84-386-R

Citation No. 2146475; 8/2/84
Docket No. WEVA 84-387-R

Citation No. 2146477; 8/2/84
Docket No. WEVA 84-388-R

Citation No. 2146480; 8/2/84
Docket No. WEVA 84-389-R

Citation No. 2146485; 8/3/84
Docket No. WEVA 84-390-R

Citation No. 2146489; 8/3/84
Docket No. WEVA 84-391-R

Citation No. 2146490; 8/3/84
Docket No. WEVA 84-392-R

Citation No. 2146495; 8/6/84
Docket No. WEVA 84-393-R

Citation No. 2434601; 8/7/84
No. 7 Surface Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

HOBET MINING AND CONSTRUCTION COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 84-410
A.C. No. 46-02249-03510

Docket No. WEVA 84-411
A.C. No. 46-02249-03511

No. 7 Surface Mine

Docket No. WEVA 85-4
A.C. No. 46-06197-03509

Docket No. WEVA 85-9
A.C. No. 46-06197-03510

Pine Creek No. 12 Prep.
Plant

Docket No. WEVA 85-10
A.C. No. 46-02249-03512

No. 7 Surface Mine

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor; Allen R. Prunty,
Esq., Jackson, Kelly, Holt & O'Farrell,

Charleston, West Virginia, for Hobet Mining and Construction Company.

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant Hobet Mining and Construction Company (Hobet) has filed notices of contest challenging the issuance of 19 separate citations in August, 1984 at its Pine Tree No. 12 Preparation Plant and its No. 7 Surface Mine. The Secretary of Labor (Secretary) has filed Petitions seeking penalties for the violations alleged in each of the challenged citations. The proceedings were consolidated for the purposes of hearing and decision.

Pursuant to notice, the cases were heard in Charleston, West Virginia on April 16 and 17, 1985. Burel Skeens, David Mulkey and John G. Cheetham testified on behalf of the Secretary; Ira Robert Ehrlich, Dale Lucha and Delbert Ray Lawson testified on behalf of Hobet. Twenty one stipulations were read into the record at the commencement of the hearing. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because of the large number of alleged violations involved, and because many of them are factually similar, I will discuss them under descriptive headings.

I. FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS.

Hobet Mining and Construction Company is the owner and operator of the No. 7 Surface Mine and the Pine Creek No. 12 Preparation Plant both located in Logan County, West Virginia. Hobet is subject to the Federal Mine Safety and Health Act of 1977 (the Act). I have jurisdiction over the parties and subject matter of these proceedings. Payment of civil penalties in these cases will not affect Hobet's ability to continue in business. Hobet produces 1,959,233 tons of coal annually, of which 339,952 tons are produced at the No. 7 surface mine. Hobet's history of prior violations shows that it had 43 paid violations at the Pine Creek No. 12 Preparation Plant during the period August 2, 1982 to August 6, 1984. From August 1, 1982 to July 31, 1984, there were 40 paid violations at the No. 7 Surface Mine. In both facilities combined, these violations included one of 30 C.F.R. 77.206 (ladder violations) and 17 of 30 C.F.R. 77.404 (machinery shall be

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maintained in safe operating condition). This history is not such that penalties otherwise appropriate should be increased because of it.

II. LADDER VIOLATIONS

Citations 2146461 and 2146471 (Docket No. WEVA 84-410), Citation 2146489 (Docket No. WEVA 84-411), and Citation 21146499 (Docket No. 85-9) all involve defective climb ladders on equipment. The standard violated is 30 C.F.R. 77.206(a) which requires that "ladders shall be of substantial construction and maintained in good condition." Hobet concedes that the violations occurred, but contests the Inspector's findings that they were significant and substantial. The citations respectively charged that (1) the first steel step and the rope step were missing on the right climb ladder of a front end loader; (2) the first wire step was missing on the left climb ladder of a rock truck; (3) the first and second steps were bent into the frame on the right climb ladder on a front end loader; (4) the entire right climb ladder was bent into the frame on a rock truck. Each of the vehicles in question has two climb ladders, one on the right and one on the left. The inspector was concerned even though only one ladder was defective in each case, because (1) the vehicles are often operated next to a high wall, making one ladder not usable; (2) the operator of the vehicle normally uses the left climb ladder and mechanics, greasers, etc. normally use the right climb ladder and would likely be unaware of the defects; (3) the equipment is used at night and in unlighted areas. The inspector was of the opinion that the defective ladders created a slip and fall hazard which could result in a serious injury. Hobet's Safety Specialist stated that there were four means of access to end loaders: two ladders, and climbing over the rear wheels. It is common for employees to mount the vehicles by climbing over the wheels. He also stated that the equipment operators checked the equipment, including ladders, and filed daily equipment check list reports before each shift.

I find that the defective ladders contributed to safety hazards, namely slipping and falling, which were reasonably likely to result in serious injury. The citations were therefore properly denominated as significant and substantial, and the violations were moderately serious. The defects were obvious to visual observation and Hobet should have been aware of them. Therefore, they resulted from Hobet's negligence. They were all promptly abated.

III. ROCK TRUCK LOW AIR PRESSURE SIGNAL VIOLATIONS

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The Inspector testified that the air braking systems on the rock trucks are equipped with either an audible signal (buzzer), or a light which sound or come on when the air pressure is reduced below a safe level. Citations 2146464, 2146470 (Both in Docket No. WEVA 84-440), 2434601, (Docket No. WEVA 84-411), 2146497, 2146500 (both in Docket No. WEVA 85-4), and 2146472 (Docket No. WEVA 85-10), all charge that the low warning buzzer with which the truck was equipped was inoperative. Citation 2146490 (Docket No. WEVA 84-411) charges that the brake warning light with which the truck was equipped was inoperative. In none of these citations is it charged that the brakes themselves were defective. The trucks in question may carry up to 50 or 60 tons of rock, and run on grades of 10 percent or more. The inspector was of the opinion that failing to have an operative warning system when braking pressure was low could result in serious injury. The standard allegedly violated is 30 C.F.R. 77.404(a) which provides that mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Respondent does not dispute the inspector's findings that the vehicles in question did not have operative warning buzzers or lights. Clearly therefore the equipment was defective. Do these equipment defects affect safety? It is self evident that the warning systems which indicate low air pressure for the brakes were placed in the equipment as safety devices. They have no other apparent purpose. Respondent's expert witness, Dr. Ira Ehrlich, a mechanical engineer with substantial experience in heavy equipment braking systems, testified that when the air by which the service brakes are operated drops from its normal 120 psi to 60 psi, the buzzer is supposed to sound. However, as the air pressure drops, the rear emergency parking brake begins to actuate and becomes fully engaged at about 40 psi. This will stop the vehicle. If there is a sudden loss of air pressure, the buzzer will sound and the rear brakes will stop the vehicle at the same time. Dr. Ehrlich testified that the vehicles in question have automatic transmissions and have separate braking systems: the service brake which is an air brake and can be applied to the rear wheels only or to both front and rear at the option of the operator; a brake retarder system which applies to the rear wheels only and is oil cooled and is designed to be used on long downhill runs; an emergency parking brake which is automatically actuated when the oil or air pressure drops. The emergency brake can also be engaged intentionally by the vehicle operator. Hobet argues that the emergency brake system provides a fail-safe means for stopping the vehicle in the event of low air pressure even if the warning buzzer is inoperative.

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The MSHA electrical inspector, John Cheetham, testified for the Secretary that a vehicle operator travelling downhill with his retarder on who had lost partial air pressure would be unable to react in a critical situation to stop suddenly with only partially effective service brakes. The buzzer would give him prior warning. In Cheetham's opinion the automatic emergency braking system would not take full effect if the air pressure was above 40 psi.

Although the inspector assumed that the brake warning light was intended to show that the air pressure was low, it appears from other testimony that it merely showed that the parking brake or emergency brake was engaged. It did not, nor was it intended to show that the brakes were in any way defective. A defective brake warning light does not establish that the vehicle is not maintained in safe operating condition. Therefore, the violation charged in citation 2146490 has not been established. The citation will be vacated and no penalty assessed.

However, I conclude that the low air warning devices (buzzers) on the mobile equipment services brakes are intended to warn the vehicle operator that he may have a problem, giving him time to avoid potential danger. The fact that the buzzer warning device is only one of a set of safety devices does not make it unimportant. The devices are related to the safe operation of the equipment. These devices must be operative if the mobile equipment is to be maintained in safe operating condition. Therefore, I conclude that Hobet violated the mandatory standards as charged in the citations involving inoperative buzzers. In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission held that a violation is significant and substantial if it contributes to a safety hazard, and there is a reasonable likelihood that the hazard will result in an injury of reasonable seriousness. The violations being considered here contribute to a safety hazard, and I accept the testimony of Inspector Cheetham that there is a reasonable likelihood that the hazard will cause serious injury. The violations are significant and substantial. The violations were moderately serious. There is no evidence that they resulted from Hobet's negligence. They were all promptly abated in good faith.

IV. TRUCK RETARDER LIGHT VIOLATIONS

The retarder braking system, as I explained above, is primarily designed to hold back the vehicle on long downhill runs. The rock trucks (subjects of citations 2146477, 2146498, and 2146473) are equipped with a light which comes on when the

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retarder brake is engaged. The water truck (subject of citation 2146475) apparently was not equipped with such a light. According to Dr. Ehrlich the purpose of the retarder light is to remind the driver to turn the retarder off when he is no longer going down a grade. The light will not tell him whether the retarder is working but only that the control is on. If the retarder is not working, the truck could be stopped with the service brake. MSHA Inspector Mulkey testified that if the retarder is inadvertently left on while going uphill, the vehicle could stall and the driver lose control. Hobet's maintenance foreman testified that the retarder being engaged while going uphill could not cause the vehicle to stall, but would stop the vehicle. I accept Hobet's testimony on this issue and conclude that the retarder light is not a device that is related to safety. The absence of functioning retarder lights therefore does not indicate that the mobile equipment involved in these citations was not being maintained in safe operating condition. Therefore, the violations changed in citations 2146477, 2146498, 2146473 and 2146475 have not been established, the citations will be vacated and no penalties imposed.

V. UNSAFE DUMPING VIOLATIONS

Citation 2146480 charged a violation of 30 C.F.R. 77.1608(c) because rock was being pushed over a highwall by a dozer and the roadway below "was not flagged against the falling material." The Inspector, Burel Skeens, stated that two large rocks were observed in the roadway. Citation 2146495 charged a violation of 30 C.F.R. 77.1608(b) because a rock truck was dumping too close to the edge of a 20 foot bank. Dale Lucha, Hobet's Safety Specialist, accompanied the Inspector when the citations were written. He testified that he did not see the rocks in the roadway described by the Inspector (they rode in separate vehicles about 200 feet apart), and the rocks were not present 45 minutes to an hour later. When questioned by Lucha, the dozer operator denied that they had pushed rocks into the roadway. Lucha also disputed the inspector's testimony that the Inspector got out of his vehicle and examined the area where the trucks were dumping. The Inspector testified that he saw a foreman in the area; Lucha stated that he did not notice any foreman there. There is considerable conflict in the testimony concerning these citations. The Inspector's testimony is direct, detailed and positive. The contrary evidence is not sufficient to overcome it, and I find that the conditions described in the two citations did exist, and the violations charged occurred. Both of the violations were serious and were reasonably likely to result in injury. They were properly cited as significant and substantial. There is insufficient evidence that the violation

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charged in citation 2146480 resulted from Hobet's negligence. However, the violation charged in citation 2146495 was known to the operator's agent (a foreman) or should have been known. Hobet was negligent.

The citation was issued under section 104(d)(1) and alleged that the violation was caused by Hobet's unwarrantable failure to comply with the standard. Unwarrantable failure was equated with negligence in the case of Zeigler Coal Co., 7 IBMA 280. The Commission in United States Steel Corporation, 6 FMSHRC 1423 (1984) held that unwarrantable failure can be shown by a "serious lack of reasonable care." (1437). I conclude that the foreman's knowledge of the violative practice is imputed to Hobet and shows a serious lack of reasonable care. The citation was properly issued under section 104(d)(1). Both unsafe dumping citations were promptly abated.

VI. MISCELLANEOUS VIOLATIONS

Citation 2146462 was issued charging a violation of 30 C.F.R. 77.1710(i) because an end loader operator was not wearing a seat belt. The end loader was equipped with roll over protection. The standard requires seat belts to be worn in a vehicle where there is a danger of overturning and where roll over protection is provided. The Inspector was of the opinion that there was a danger of the vehicle in question overturning; the operator's witnesses stated that there was no such danger. On this issue, I accept the judgment of the Inspector, and conclude that a violation of the standard was established. The original citation was modified to remove the significant and substantial finding. The modification also indicates that the gravity and negligence were low. I accept those conclusions. The violation was promptly abated.

Citation 2146485 charges a violation of 30 C.F.R. 77.400(a) because a drive coupling to an overlimit switch on the shovel was not guarded. The switch turns very slowly, and the Inspector was obviously reluctant to "write it up." Hobet's maintenance foreman testified that there were no pinch points, and there was no possibility of a worker or loose clothing being caught. I find that the device did not constitute exposed moving machine parts which might be contacted by persons and cause injury. A violation was not established.

ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED:

1. The following citations are AFFIRMED as issued:

- a) 2146461
- b) 2146471
- c) 2146489
- d) 2146499
- e) 2146464
- f) 2146470
- g) 2434601
- h) 2146497
- i) 2146500
- j) 2146472
- k) 2146480
- l) 2146495
- m) 2146462 (as modified; not S & S)

2. The following citations are VACATED:

- a) 2146490
- b) 2146477
- c) 2146498
- d) 2146473
- e) 2146475
- f) 2146485

3. Considering the criteria in section 110(i) of the Act, I conclude that the following civil penalties are appropriate for the violations found herein.

CITATION	30 CFR STANDARD	PENALTY
2146461	77.206(a)	\$100.00
2146471	77.206	100.00
2146489	77.206	100.00
2146499	77.206	100.00
2146464	77.404(a)	100.00
2146470	77.404(a)	100.00
2434601	77.404(a)	100.00
2146497	77.404(a)	100.00
2146500	77.404(a)	100.00
2146477	77.404(a)	100.00
2146480	77.1608(c)	150.00
2146495	77.1608(b)	200.00
2146462	77.1710(i)	30.00
	TOTAL	\$1380.00

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Hobet is ORDERED TO PAY the sum of \$1380.00 within 30 days of the date of this decision.

James A. Broderick
Administrative Law Judge