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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 85-79-M  
A.C. No. 05-03920-05501

v.

Vezzani Pit Mine

WALSENBURG SAND & GRAVEL  
COMPANY, INC.,  
RESPONDENT

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for the Petitioner;  
Ernest U. Sandoval, Esq., Walsenburg, Colorado,  
for the Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), arose from an inspection of respondent's gravel pit on December 5, 1984. On that day a federal mine inspector issued a single citation for the violation of a mandatory safety standard promulgated by the Secretary of Labor pursuant to the Act. The respondent, Walsenburg Sand & Gravel Company, Inc. (Walsenburg), contested the Secretary's petition for imposition of a \$20.00 civil penalty. The case was heard at Pueblo, Colorado, with both parties presenting evidence. Both parties waived the filing of briefs or other post-hearing submissions.

REVIEW AND DISCUSSION OF THE EVIDENCE

On December 5, 1984, two federal mine inspectors, Ralph E. Billips and Carl Baron, visited Walsenburg's gravel pit in Huerfano County, Colorado. In the course of inspecting the company's heavy equipment, they observed a fluid leak from the rear differential of a Hough 70 Series front-end loader. The leak was on the right side of the differential, and the fluid was present on the exterior of the right-rear wheel.

The four-wheeled loader was dumping rock into the rock crusher at the time of the inspection. The two inspectors knew that the loader had drum brakes in the rear, and feared that the leaking differential fluid - they believed it came from a defective seal - would reduce the efficiency of the right-rear wheel brakes, or render them wholly inoperable. This, they reasoned, would endanger the operator of the loader.

Inspector Billips stopped the loader operator and questioned him about the brakes. According to Billips, the operator replied that the leaking fluid " . . . was definitely affecting the right-rear brakes of the loader" (Tr. 8Ä9). Later, Billips testified that the loader operator said that the right-rear brakes were "completely inoperable" (Tr. 15). Inspector Baron, who was present during the conversation, indicated that the operator said " . . . he was having problems with the right-rear brake" (Tr. 36).

Based upon this information, Inspector Billips issued a citation charging Walsenburg with violation of the mandatory safety standard published at 30 C.F.R. 56.9Ä2. That standard provides:

Equipment defects affecting safety shall be corrected before the equipment is used.

Mr. Louis Vezzani testified for Walsenburg. He indicated that he is the "owner and operator" of the company. Vezzani acknowledged that the rear differential was leaking some fluid. He testified, however, that he and a mechanic pulled the right-rear wheel and examined the brakes after Billips issued the citation. The bands and drums, he claimed, were wholly free of fluid and were in proper working order. He said that the seal itself was not leaking; but he found that the plate upon which the seal was seated had a small "ding" which accounted for the escape of differential oil. He found nothing which would impair the effectiveness of the brake. He and his helper repaired the "ding," and replaced the seal, but did nothing more (Tr. 22Ä24).

Moreover, according to Mr. Vezzani, no employee had reported to him any difficulty with the loader's brakes.

It is clear from the inspectors' testimony that they did not contend that the mere presence of differential fluid on the exterior of the rear wheel was a defect "affecting safety" under the cited standard. Otherwise they would not have gone on to explain the hazards of brake failure associated with the fluids reaching the interior of the wheel and specifically the bands or drums. Put another way, the presence of the fluid raised in their minds a possibility that effective braking was jeopardized. They found confirmation for that suspicion in the admission of the operator of the loader that the right-rear brake was defective.

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Counsel for Walsenburg maintained that the declarations of the loader operator should be excluded as hearsay. The statements of the operator were clearly admissible, however, under 80(d)(2)(D) of the Federal Rules of Evidence as statements of an agent concerning a matter within the scope of his employment. Such statements are not hearsay under the Rule. While the employee's statements were admissible, the question confronting us here is one of testimonial weight.

Mr. Vezzani testified that he inspected and tested the brakes and found no defect. Mr. Vezzani was a forthright witness, and I found his testimony convincing. I do not doubt that the loader operator spoke as the inspector said he did. Unlike Vezzani, however, who was present and subject to cross-examination, neither the accuracy of the operator's observations or his possible motives or biases were open to courtroom scrutiny.

I therefore conclude that the Secretary has failed in his proofs. The citation must be vacated.

#### CONCLUSIONS OF LAW

Upon the entire record herein, and in accordance with the factual findings contained in the narrative part of this decision, the following conclusions of law are made:

(1) This Commission has jurisdiction to hear and decide this matter.

(2) Walsenburg did not violate the standard published at 30 C.F.R. 56.9Å2 as alleged.

#### ORDER

Accordingly, the citation in this case is ORDERED vacated and this proceeding is dismissed.

John A. Carlson  
Administrative Law Judge