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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

v.

THOMPSON COAL & CONSTRUCTION,
INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 86-287
A.C. No. 46-06646-03505

River Mine

DECISION

Appearances: Therese I. Salus, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Petitioner;
James W. Thompson, President, Thompson Coal and
Contruction, Inc., Clarksburg, West Virginia, pro se.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of $84 for two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, and a hearing was held in Morgantown, West Virginia, on August 27, 1986. The parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the course of the hearing.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalties to be assessed for those violations based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S & S) findings concerning the violations are supportable.

3. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4Ä6):

1. The subject mine is owned and operated by the respondent, and the respondent is subject to the jurisdiction of the Act and the presiding judge.

2. The subject citations and terminations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent on the dates, times and places stated therein. They may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statement asserted therein.

3. The parties stipulate to the authenticity of the exhibits, but not to the relevance nor to the truth of the matters asserted therein.

4. The alleged violations were abated in a timely fashion.

5. The River Mine produced twenty-one thousand, seven hundred and twelve (21,712) annual production tons in 1985, and Thompson Coal & Construction, Incorporated, also produced twenty-one thousand, seven hundred and twelve (21,712) production tons in that year.

6. The proposed penalty assessments will not affect the respondent's ability to continue in business.

With regard to the respondent's history of violations, MSHA's counsel stated that the respondent was issued four section 104(a) "S & S" citations during the 24Ämonth period prior to the issuance of the violations in this case, and that the respondent has paid civil penalties in the amount of $170 for these violations. Counsel agreed that the respondent has a good compliance record (Tr. 7).

Bench Ruling

Respondent proposed and agreed to make full payment in the amount of $42 for contested Citation No. 2706004, January 30, 1986, 30 C.F.R. 77.410, and stated that it no longer wished to contest the citation. The citation was issued because of an alleged defective backup warning device on an end loader. I treated this proposal by the respondent as a settlement proposal pursuant to Commission Rule 30, 29 C.F.R. 2700.30, and it was approved from the bench (Tr. 8). Testimony and evidence was then received with respect to the remaining citation.

Discussion

Section 104(a) "S & S" Citation No. 2706002, issued on January 30, 1986, cites an alleged violation of 30 C.F.R. 77.1605(b), and the condition or practice is described as follows (Exhibit GÄ1): "The caterpillar front-end loader, Serial No. 25K339 has a defective parking brake due to when the parking brake is set, it will not hold the end loader in place. Located on the job site. Larry Reall is the area foreman."

MSHA's Testimony and Evidence

MSHA Inspector David D. Workman, testified as to his background and experience, and confirmed that he conducted a regular inspection of the respondent's mine on January 30, 1986, and that three miners were there at the time (Tr. 13).

Mr. Workman identified a copy of Citation No. 2706002, and confirmed that he issued it because of a violation of mandatory safety standard section 77.1605(b), which requires that parking brakes be provided on any equipment being operated on the surface areas of strip mines (Tr. 15).

Mr. Workman stated that after beginning his inspection, he observed the cited end loader "setting over to the side," and spoke with the loader operator, a Mr. Bays. Mr. Workman stated that the day was cold and that it had snowed. He described the mine terrain as frozen, but containing ruts and soft mud caused by equipment travelling through the mine surface areas. He stated that work was being done in a pit area, and that the end loader was "parked up and out of the pit area, over to the left." The loader was not in operation, and its bucket was down on the ground (Tr. 16).

Mr. Workman testified that he requested Mr. Bays to start up the end loader so that he could check it for safe operation. Mr. Bays informed him that the parking brake was not functioning properly and that he had reported the condition to foreman Larry Reall, but that the condition was not repaired. Mr. Workman confirmed that the loader was not tagged out, and Mr. Bays started it up, and it was functional and not mechanically disabled. Mr. Workman did not believe that a lowered bucket on such an end loader would serve as a brake in the event it were parked on a grade (Tr. 18).

Mr. Workman confirmed that foreman Reall advised him that he did not make a record of the defective brake condition. Mr. Workman stated that he got into the loader operator's compartment with Mr. Bays. The brake was set, and when Mr. Bays accelerated the machine while in reverse gear, it moved backwards with the brake set (Tr. 19). The machine was removed from service, a record was made of the defective brake, and parts were ordered to repair it. The abatement time was extended because of difficulties in obtaining parts, but once the end loader was repaired, Mr. Workman abated the citation (Tr. 20Ä22).

Mr. Workman stated that the purpose of the parking brake is to prevent the end loader from drifting if parked on a grade. If the machine drifted, it could run into someone or a piece of equipment. Three employees and a foreman were in the "immediate area," and if the machine drifted and hit someone, it would reasonably be expected to cause injuries or even death. Mr. Workman also believed that it was reasonably likely that the end loader could drift, and that this has

occurred several times in work areas in MSHA District 3 (Tr. 21).

On cross-examination, Mr. Workman testified that while he has operated DÄ8 and DÄ9 dozers, he has not operated any larger surface "high lifts" and is not familiar with the mechanics of braking system. He also confirmed that he had no knowledge of the mechanical operation of the particular parking brake in question (Tr. 26Ä27).

Mr. Workman confirmed that the end loader was not in operation when he cited it, and that it was parked in a level area with the bucket down. He looked at the "daily book" kept by the loader operator, and found no record concerning the parking brake (Tr. 27). He confirmed that except for the parking brake, the rest of the braking system was functioning properly (Tr. 28). Mr. Workman stated that when the loader is not in operation and parked, the parking brake must be set in order to keep the machine from moving in any direction. While the machine bucket lowered and dug into the soft ground would hold a machine pointed downhill, this does not satisfy the law (Tr. 29).

In response to further questions, Mr. Workman stated that he also cited another end loader at the same work site, and when he returned the next day to abate that citation, he had the machine tested on a steep elevated area, and when the parking brake was set with the machine in neutral, it would not move. With regard to the end loader cited in this case, Mr. Workman confirmed that he tested it by having the operator operate the machine in reverse, and then putting it in neutral to see if it would continue to move (Tr. 31).

Mr. Workman confirmed that at the time of the inspection, he did not know whether or not the respondent intended to use the end loader. However, if the machine is not tagged out or dismantled, he assumes that it can be used and will inspect it and issue a citation if he finds any defective conditions (Tr. 32). Mr. Workman conceded that it was unlikely that the machine would move and strike someone from the location where he found it parked. His concern was that the machine would be put in operation with a defective parking brake, and if this were done, one could reasonably expect an accident to occur (Tr. 36).

Mr. Workman confirmed that his inspection of the pit area was his first inspection of that site, and he stated that he was familiar with strip mining operation. He stated that the pit had only enough room for one end loader and a

truck, and that work on the pit was being finished up in order to move to another site. He observed other pieces of equipment which were not operational parked "off to the left," and reiterated that the cited end loader "was sitting on a very flat area, with the bucket down" (Tr. 37). In response to further questions, he stated as follows (Tr. 37Ä38):

> Q. What I am driving at is: How do you know, or how did you come to the conclusion, that there was a reasonable likelihood here that there would be an accident? Is it based on your experience, generally, about end loaders; that they are sometimes parked in elevated areas and sometimes you have runaways with parking brakes? Or is there something specific about this operation?
>
> A. No, sir. We have had, in the past, in different operations where end loaders were found in areas--in elevated areas, where they would drift, and come into other equipment. And this is from different work sites, and even surface areas of underground mines. It's not uncommon to find Mack packs or end loaders working in surface areas of underground mines.
>
> Q. Okay.
>
> A. It's quite common toward our inspections.
>
> Q. Now, if Mr. Thompson can establish in this case that he has a nice little tidy parking lot, paved area, where he puts his end loaders all of the time, and if he can establish, for example, that they're never parked in elevated areas or on ramps, and once they have finished their business in the pit, they are simply taken out and parked someplace in a level area, would your opinion change as to whether there would be a likelihood of an injury in this case?
>
> A. No, sir.
>
> Q. Your opinion would be the same?
>
> A. Yes, sir.

Q. Based on your experience?

A. Of accidents that are recorded and accidents that have occurred throughout our industry.

Respondent's Testimony and Evidence

Junior L. Bays testified that he is employed by the respondent as an end-loader operator, and has been so employed for 17 years. He confirmed that he was the operator of the end loader inspected and cited by Inspector Workman on January 30, 1986. He stated that the end loader was not in operation and had been parked for 3Ädays prior to the inspection. He confirmed that he advised the mine superintendent that the loader had defective brakes and that he also made an entry to this effect in a personal log book. Mr. Bays did not know whether parts had been ordered to repair the machine, and he confirmed that he never attempted to operate the machine after the superintendent told him to park it (Tr. 40Ä41).

Mr. Bays stated that if the loader engine were shut off, all four wheels will lock and it would be impossible to move the machine, regardless of whether it were parked on the level or on a slope. He explained that the machine radiator blew one day, and when attempts were made to move the machine while hooked to a dozer with a cable, the machine would not move. Mr. Bays confirmed that he had the keys to the loader in his pocket, and was told not to run it (Tr. 42). He earlier testified that the superintendent said nothing to him about not running it, and simply told him to park it (Tr. 41).

Mr. Bays stated that the most effective braking for the loader occurs when it is operated in the forward mode, and that operating it in reverse "is next to no brakes at all" (Tr. 43). He confirmed that the machine had a good foot brake, and that if left with the engine shut off and the parking brake on, the machine cannot be moved (Tr. 43). He also confirmed that because of the cold day the only piece of equipment operating on the day of the inspection was a "275 Michigan" (Tr. 43).

On cross-examination, Mr. Bays confirmed that on the day in question, he parked the machine on the level with the bucket down, and he had the key in his pocket so that no one else could operate it. He gave his daily log book to Mr. Reall, and confirmed that he had entered a notation "No

parking brake" in the book, but Mr. Reall did nothing about it other than to tell him to park it (Tr. 46).

Mr. Bays stated that the purpose of the parking brake is to serve as a safety device if the loader is parked on a grade. Although the parking brake helps to hold the machine while on a grade, if the machine is on a 10 or 12 percent grade and operated in gear, it will still move, even with the parking brake set (Tr. 47). The machine cannot be moved with the engine off and all four wheels locked, and the foot brake will hold the machine when it travels in reverse (Tr. 49).

In response to further questions, Mr. Bays stated that he first discovered the defective parking brake when he was operating the loader in the pit stripping away the dirt in preparation for loading out the coal. He explained that a buzzer signal device on the machine alerted him to the fact that the parking brake was defective and that this occurred 3 days before the inspection. He further explained that certain disks and plates had to be ordered to repair the parking brake. When he discovered the condition he was told to take the machine out of service and park it, and that is what he did (Tr 50Ä51). Once the machine was repaired, he intended to use it again (Tr. 52).

Mr. Bays stated that the pit was only large enough to permit the operation of two end loaders, but that no trucks enter the pit while he is there. Once the coal is reached in the pit, it is loaded out by an end loader and loaded onto trucks which are out of the pit. However, a truck would enter the pit if the pit were large enough, but in this instance there was only enough room for one end loader in the pit, and he would not have used the end loader in question in the pit (Tr. 53). At the end of the day, he would fuel the loader, grease it, and take it out of the pit and park it on good solid level ground (Tr. 54).

MSHA's Arguments

In closing oral argument, MSHA's counsel asserted that the evidence adduced in this case establishes that the cited end loader was parked on the respondent's mine site, and had the vehicle been parked on a grade, it could have moved as a result of the malfunctioning parking brake, and could have struck employees working in the area. Counsel asserted that one employee was exposed to this hazard (Tr. 56).

In further support of her case, MSHA's counsel cited a decision by former Commission Judge John Cook in MSHA v.

Middle Kentucky Construction, Inc., 2 MSHC 1044 (1980), 2 FMSHRC 2589, September 12, 1980, in which Judge Cook affirmed a similar violation for a defective parking brake on a truck and an end loader. Judge Cook rejected an affirmative defense advanced by Middle Kentucky, similar to the one in this case, that the cited equipment had been removed from service prior to the inspection. In rejecting this defense, Judge Cook relied on the Commission's decision in Eastern Associated Coal Corporation, 1 MSHC 2209, October 23, 1979, holding that the mere placement of a danger tag on a piece of equipment and permitting it to remain in the mine's active workings, was insufficient to render the machine "removed from service" within the meaning of the Act. In Eastern Associated Coal, the Commission stated as follows at 1 MSHC 2210:

> It is undisputed that the inoperable parking brake was a violation. For a violation such as this, there are two basic ways to abate--repair or withdrawal from service. Assuming that the jitney could not have been repaired safely in the time set for abatement, the question in this case is whether a danger tag alone constitutes withdrawal from service. We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored. To abate under these circumstances, the jitney should have been made inoperable. There is no suggestion in the record that the jitney could not have been rendered inoperable safely, thus eliminating the danger posed within the abatement period.

On the facts of the instant case, MSHA's counsel pointed out that the end loader was not tagged out, and nothing prevented the actual use of the equipment since the operator had the keys in his pocket. Although the respondent may have established that the operator was directed not to use the end loader, counsel suggested that a breakdown in communication could result in a miner remaining unapprised of respondent's decision to remove the equipment from service. Counsel also pointed out that in the Middle Kentucky Construction case, Judge Cook ruled that the term "parking brake" as used in the standard, referred to a braking system separate and independent from any service or emergency brakes on the front-end loader (Tr. 55Ä58).

Respondent's Arguments

Respondent argued that the cited end loader was taken out of service and parked 3Ädays prior to the citation, and that no one but the operator had the key. Respondent asserted that it only works one shift and that Mr. Bays was the only end-loader operator, and he had the key in his possession. He parked the end loader on level ground, and since the automatic braking system he described had taken over, the end loader was rendered unmovable. The respondent also pointed out that any vehicle with the parking brake set will move in reverse if placed in reverse gear, but will not move forward. Assuming it is parked on a down grade, the parking brake will in all probability hold it, but if it were parked so that it could run backwards on the same grade, it probably would not. The respondent also suggested that the cited standard only required that the end loader be equipped with a parking brake, and does not state that it must be an operating parking brake. The respondent also pointed out that the parking systems on trucks are different from braking systems on end loaders and "high lifts" (Tr. 59Ä60).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R.   77.1605(b), because of the defective parking brake on an end loader. Section 77.1605(b), provides as follows: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

The evidence adduced in this case establishes that the cited end loader was not equipped with an adequate parking brake and that the brake was defective and in need of repair at the time it was inspected and cited by Inspector Workman. Although one may question the validity of testing the effectiveness of the parking brake by operating the machine in reverse gear on level ground, the respondent here concedes that the parking brake was defective because the loader operator was alerted to this fact when the alarm sounded, and he confirmed that certain brake disks and plates needed replacement.

The respondent's suggestion that section 77.1605(b) only requires that an end loader be equipped with a parking brake, without the necessity for maintaining it in a serviceable or

safe condition is rejected. Although the language of the standard implies that brakes other than parking brakes are to be adequate, I believe the clear intent of the standard is to insure that all braking systems on such a piece of equipment be maintained serviceable and functionable so as to insure the margin of safety intended by the installation of these braking systems. Further, since the standard is obviously intended for the protection of the miners, any other interpretation would be contrary to the intent and purposes of the Act. In this case, the loader operator conceded that the purpose of the parking brake is to serve as a safety device when the machine is parked on a grade.

The unrebutted evidence in this case establishes that the respondent took the end loader out of service and parked it on level ground when the operator discovered the defective parking brake condition. The respondent's suggestion that it may avail itself of this voluntary withdrawal of the equipment as a defense to the citation is rejected. The facts reflect that the end loader was not tagged out, nor was it rendered inoperable. Even if it were tagged out, the respondent may not avail itself of this fact as an absolute defense to the citation, and my suggestion during the course of the hearing that it may was in error (Tr. 63Ä64). The case law as enunciated in the Middle Kentucky Construction and Eastern Associated Coal Corporation cases, supra, is to the contrary. In Eastern Associated Coal, the Commission ruled that even though the equipment was tagged out, it was not rendered inoperable and the danger tag could have been ignored.

Although the facts in the instant case reflect that the end-loader operator was the only person with the key, was clearly aware of the defective brake, and testified that he would not have attempted to use the end loader until it was repaired, the fact remains that the machine was not rendered inoperable until such time as the parts could be ordered and repairs made. The unrebutted evidence establishes that the foreman did nothing to immediately order parts or attempt to repair the machine before the inspector found it. The inspector found no evidence that the machine was dismantled or disabled (Tr. 18). Although the respondent presented unrebutted evidence that the machine, with its engine shut down, effectively resulted in the locking of all four wheels, thus rendering the machine immovable, in light of the Commission's holding in Eastern Associated Coal Corporation, I cannot conclude that this fact rises to the level of rendering the machine inoperable.

In view of the foregoing, I conclude and find that MSHA has established a violation of section 77.1605(b), by a preponderance of the credible evidence adduced in this case, and the violation IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

On the basis of the stipulations by the parties, I conclude and find that the respondent is a small mine operator and that the civil penalty assessed for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

The record establishes that the respondent paid $170 in civil penalty assessments for four section 104(a) citations issued during the 24Ämonth period prior to the issuance of the contested citation in this case. I conclude and find that the respondent has a good compliance record, and this is reflected in the civil penalty assesment for the violation which has been affirmed.

Good Faith Abatement

The parties have stipulated that the violation was abated in good faith by the respondent. I adopt this is my finding and conclusion on this issue, and it is reflected in the civil penalty assessment.

Negligence

There is no evidence in this case that the respondent or the end-loader operator continued to operate the machine once aware of the defective brake condition. The unrebutted testimony by the respondent reflects that the loader operator first became aware of the condition while operating the machine, and that he immediately notified his foreman who instructed him to take the machine out of service and park it. MSHA presented no evidence that the respondent should have been aware of the condition prior to the operator using the machine, or that it failed to inspect or test the brake before allowing the operator to run the machine. Although foreman Reall was made aware of the brake defect after it was discovered, there is no evidence that he had prior knowledge of the defect, nor is there any evidence of any attempts to use the machine after the operator took it out of service. Under the circumstances, I cannot conclude that the respondent was negligent.

Gravity

On the facts of this case, I cannot conclude that the violation in question was serious. MSHA has presented no credible evidence to support its conclusion that one miner was exposed to a hazard resulting from the defective parking brake. Although I agree that if someone is struck by a piece of free rolling equipment he would likely be injured, the record in this case is devoid of any evidence that anyone was ever placed in jeopardy by the defective parking brake.

I take note of the fact that in the Middle Kentucky Construction case, the inspector who cited the truck and end loader for defective parking brakes, found the equipment parked on grades. Judge Cook also found that the equipment was parked in close proximity to other equipment and mine personnel, and that if it moved, it could have rolled down the incline thus exposing miners and other equipment to a hazard. The facts in the instant case establish that the end loader was parked on a level grade and out of the pit with the wheels locked and the engine turned off. The available key was in the pocket of the operator who was aware of the defective braking brake and who took the machine out of service and parked it until it could be repaired. The inspector conceded that from the location where the machine was parked, there was no likelihood of the machine even moving, let alone rolling anywhere and striking someone (Tr. 35). The inspector's conclusion of the existence of a potential hazard was based on his presumption that the equipment would be operational in the pit (Tr. 35).

Inspector Workman conceded that his inspection on January 30, 1986, was the first time he had inspected the site, and that his citation was not based on any specific operational procedures at the site in question (Tr. 37). His conclusion that a hazard existed, or was likely to exist had the machine been in operation with a defective parking brake, was based on his knowledge of other mine sites where equipment on elevated areas were known to drift free and strike other equipment, and from recorded incidents industry wide (Tr. 37Ä38).

MSHA presented absolutely no credible evidence to suggest that the respondent's end loaders are ever parked on elevated grades in proximity to any equipment or miners. The loader in question was parked on level ground, with its bucket down, with the engine off and all four wheels locked. The loader operator testified that his usual and normal procedure at the

end of the work shift is to take the end loader out of the pit and park it on level ground with the engine off, and MSHA has not rebutted this fact. Further, the loader operator's unrebutted testimony is that no trucks actually enter the pit for loading, and that the end loader comes out of the pit to load the trucks. In the instant case, he testified that the pit was only large enough to accomodate one end loader, and he would not have used his loader in the active pit. The inspector confirmed that this was the case (Tr. 37).

Although Inspector Workman stated that the terrain at the mine included up-and-down grades, he conceded that any conclusion concerning a hazard from a defective parking brake would depend or where the end loader would be operated and where it would be parked (Tr. 20). On the facts of this case, I find no credible evidence to support any conclusion that any of the respondent's end loaders are ever parked, operated, or stopped on grades requiring the use of the parking brake.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

Incorporating by reference my gravity findings, and applying the principles of a "significant and substantial" violation as articulated by the Commission in the aforementioned decisions in terms of continued normal mining operations, and in the absence of any credible evidence or facts to support any conclusion that the defective parking brake in question could contribute to a hazard, I cannot conclude that MSHA has established that there was a reasonable likelihood that an accident or injury would occur. Accordingly, the inspector's "significant and substantial" finding IS VACATED, and the citation is modified to reflect a non-"S & S" violation.

Civil Penalty Assessment

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of $20 is reasonable for the citation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $20 for section 104(a) non-"S & S" Citation No. 2706002, January 30, 1986, 30 C.F.R.   77.1605(b), and a civil penalty assessment in the amount of $42 in settlement of section 104(a) Citation No. 2706004, January 30, 1986,

30 C.F.R.   77.410. Payment is to be made to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge