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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. SE 86-23-M A.C. No. 09-00265-05506
v.	
BROWN BROTHERS SAND COMPANY, RESPONDENT	Junction City Mine

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner; Carl Brown and Steve Brown, Brown Brothers Sand Company, Howard, Georgia, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed 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 $1,940, for four alleged violations of certain mandatory safety and reporting standards found in Parts 50 and 56, Title 30, Code of Federal Regulations. Hearings were held in Macon, Georgia, on September 15, 1986, and February 19, 1987. The petitioner filed posthearing briefs, but the respondent did not. However, I have considered the oral arguments made by the respondent during the course of the hearings in the adjudication of this matter.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety and reporting standards,

and if so, the appropriate civil penalty 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.

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 that the respondent is subject to the Act, as well as to the jurisdiction of MSHA and the Commission. They also agreed that the respondent is a small sand mine operator employing 9 to 10 employees, and that the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business. They agreed that the respondent's history of prior violations for the period October 3, 1983 through October 2, 1985, is reflected in exhibit PÄ1, an MSHA computer print-out listing 18 violations. They also agreed that three of the violations issued in this proceeding were timely abated, but MSHA asserted that Citation No. 2521411, concerning the lack of service brakes on a welding truck was not (Tr. 16Ä18).

Bench Rulings

I ruled that the question concerning the alleged "unwarrantable failure" on the part of the respondent as stated in the section 104(d)(1) and (2) orders and citations issued by the inspector was not an issue in this civil penalty proceeding. See: MSHA v. Black Diamond Coal Mining Company, Docket No. SE 82Ä48, 7 FMSHRC 1117 (August 1985) (Tr. 12-13).

MSHA's oral motion to modify section 104(d)(1) Order No. 2007656, July 19, 1985, 30 C.F.R. 50.30(a), to a section 104(a) non-"S & S" citation was granted (Tr. 12, 14).

MSHA's motion to amend its proposed civil assessment for section 104(d)(2) Order No. 2521411, 30 C.F.R. 56.9087, from $400 to $150 was granted (Tr. 4, February 19, 1987).

Findings and Conclusions

History of Prior Violations

Exhibit PÄ1 is an MSHA computer print-out summarizing the respondent's compliance record for the period October 3, 1983 through October 2, 1985. That record reflects that the respondent was issued 18 citations and orders, for which civil penalties in the amount of $3,031 were assessed. The information submitted reflects that the respondent has paid no civil penalty assessments for the 2Äyear period in question, and has either contested the violations or has been issued delinquency letters by MSHA for non-payment of some of the violations. For an operation of its size, I cannot conclude that respondent's compliance record is such as to generally warrant any increases in the civil penalties which I have assessed for the violations which have been affirmed in this case.

With respect to the respondent's past non-compliance with the reporting requirements of 30 C.F.R. 50.30(a), I have taken this into consideration in the civil penalty assessment for the violation of that standard which has been affirmed in this case.

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

The parties have stipulated that the respondent is a small operator and that the civil penalty assessments proposed by the petitioner in this case will not adversely affect the respondent's ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

Section 104(a) non-"S & S" Citation No. 2007656, issued on July 19, 1985, cites a violation of 30 C.F.R. 50.30(a), and the condition or practice is described as follows: "The operator failed to file a quarterly employment MSHA Form 7000Ä2 on time for the 1st and second quarter of 1985 as implemented by Part 50.30A of title 30 C.F.R. The operator constantly fails to submit the man hours report to MSHA. This is an unwarrantable failure."

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MSHA's Testimony and Evidence

MSHA Supervisory Inspector Reino Mattson confirmed that he issued the citation in question. Mr. Mattson produced a blank MSHA Form 7000Ä2, and explained the information required (exhibit PÄ4). He confirmed that the respondent filed two signed report forms for the first two quarters of 1985, but failed to fill in the required information, including the employee man-hours worked during these time periods. The forms contain the signature of Carl Brown, and the following typewritten statements:

> This report is average for and any report filed by Reino Mattson's forced upon me and my company (exhibit PÄ4).
>
> This is an average of any and all previous reports forced upon me and my company by Reino Mattson Supervisor for MSHA (exhibit PÄ5).

Mr. Mattson explained the reasons for requiring information concerning a mine operator's working personnel, hours worked, and production, and stated that it is required to compile statistical reports reflecting the accident incident rate nationwide and for the State of Georgia. The information which is compiled is used to increase enforcement efforts and to assist mine operator's in reducing the accident incident rate. Mr. Mattson produced copies of the type of reports compiled by MSHA, utilizing the information submitted by mine operator's on MSHA Form 7000Ä2, (exhibits PÄ6 and P-7).

Mr. Mattson stated that the reporting citation which he issued is the fifth citation issued to the respondent for non-compliance with section 50.30(a). He cited two prior decisions by Commission Judges who affirmed two prior citations and imposed civil penalties for these violations (Tr. 21Ä34).

On cross-examination, Mr. Mattson confirmed that the respondent submitted the forms, but failed to provide the information on the form as required by section 50.30(a). He reiterated the necessity for providing the required information so as to enable MSHA to assist mine operators in their safety efforts to reduce mine reportable accidents.

Mr. Mattson confirmed that to his knowledge the respondent has had only one reportable accident incident during all of the years it has been in operation, but he was unable to

provide any specific information with respect to this incident.

Mr. Mattson confirmed that he personally had nothing to do with the "special civil penalty assessment" made by MSHA's Office of Assessments with respect to the citation in question. He expressed his view that the proposed penalty reflected the fact that the respondent has in the past refused to file the form with the required information, or simply ignored the filing requirements of section 50.30(a).

Mr. Mattson denied that he has ever threatened the respondent with any criminal sanctions for its refusal to comply with section 50.30(a). He explained that several years ago he simply brought to the respondent's attention the printed information which appears in the first paragraph on the face of MSHA Form 7000Ä2, concerning possible criminal sanctions for non-compliance.

Mr. Mattson confirmed that he issued the citation on the basis of information received from MSHA's Health and Safety Analysis Center in Denver, Colorado. He explained that MSHA's computerized compliance records confirmed that the respondent had failed to submit the required man-hour and mine personnel information as required for the first and second quarters of calendar year of 1985, and that he issued the citation on the basis of this information which reflected non-compliance. He also indicated that the forms were not timely filed as reflected on the face of the submitted forms.

Mr. Mattson confirmed that due to certain personnel and funding reductions, including a suspension of funding for the enforcement of the Act against sand and gravel mine operators, the respondent's mine was not inspected by his office for a period of 4 years. He also confirmed that the first regular inspection of the respondent's mine during this period was initiated in July, 1985 (Tr. 34Ä52).

With the court's permission, respondent operator Carl Brown produced a 45 minutes taped conversation concerning a conference held in Inspector Mattson's office on January 22, 1985, concerning a citation for another alleged violation of the reporting requirements of 30 C.F.R. 50.30(a). Excerpts from the tape, which was played off the record, reflect that the respondent failed to file the required reports for the first three quarters of 1984, and that the single contested citation was issued for this reason.

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Fact of Violation

The respondent here is charged with a violation of mandatory reporting requirement 30 C.F.R. 50.30(a), which states as follows:

> (a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000Ä2 in accordance with the instructions and criteria in 50.30Ä1 and submit the original to the MSHA Health and Safety Analysis Center, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.

Aside from his displeasure with the requirements of section 50.30(a), and unsupported allegations of reprisals on the part of the inspector, the respondent offered no testimony in defense of the citation, nor has it rebutted MSHA's prima facie case (Tr. 68).

The respondent has not rebutted the fact that it failed to file the completed forms as required by section 50.30(a). During the course of cross-examining Inspector Mattson, respondent's representative Steve Brown, part owner of the company, implied that since the quarterly reports were filed, it has complied with section 50.30(a). This defense is rejected. It seems clear from the evidence in this case that the information required to be included on the form by section 50.30(a), and the instructions for completing the form found in section 50.30Ä1, was not submitted by the respondent.

I conclude and find that MSHA has established a legitimate enforcement need for requiring the submission of the information required by mandatory standard section 50.30(a), and that the submission of such information will enable the Secretary of Labor to prepare and disseminate statistical analyses of mine injury frequency rates as mandated by the Act.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has established a violation of

section 50.30(a) by a preponderance of the credible evidence adduced in this case. Accordingly, the citation IS AFFIRMED.

Gravity

Inspector Mattson was of the view that the failure by the respondent to file the necessary reporting information would not result in the likelihood of an injury. He confirmed that he did not consider the violation to be significant and substantial. I agree with these findings by the inspector, and I conclude and find that the violation is non-serious.

Negligence

This is not the first time this respondent has been charged with a failure to comply with the mandatory reporting requirements of section 50.30(a). In a prior decision issued by me on May 1, 1981, Docket No. SE 80Ä124-M, 3 FMSHRC 1203 (May 1981), a violation was affirmed and a civil penalty of $10 was assessed. In a decision rendered on December 7, 1983, Docket No. SE 83Ä42-M, 5 FMSHRC 2065 (December 1983), Judge Broderick affirmed a violation and assessed a civil penalty of $100.

MSHA's computer print-out, exhibit PÄ1, includes two section 104(a) citations issued on February 29, 1984, and January 3, 1985, for failure by the respondent to comply with the requirements of section 50.30(a). The first citation was assessed at $20, and the second at $150, and the print-out reflects that the respondent failed to pay these assessments and was issued delinquency letters by MSHA for its failure to pay. I assume that the January 3, 1985, citation was the subject of the MSHA conference alluded to by the respondent in the tape referred to earlier.

The tape in question also reflects Mr. Brown's displeasure with the reporting requirements of section 50.30(a), the fact that other mine operators purportedly have not responded to MSHA's reporting requirements, and his assertion that Inspector Mattson "threatened" him with possible criminal sanctions some 8 years ago when he discussed with him the reporting requirements of section 50.30(a).

It seems clear to me that MSHA has been more than patient with the respondent with respect to its continued refusal to comply with the reporting requirements of section 50.30(a). As a matter of fact, in at least two instances, including the instant case, where the respondent has failed to file more than one quarterly report, MSHA has issued single citations,

when it could have issued separate citations for each required quarterly report which was not filed.

The respondent has not presented any mitigating excuses for its continued failure to comply with section 50.30(a). As pointed out in my prior decision of May 1, 1981, Mr. Carl Brown considers MSHA Form 7000Ä2 to be so much "junk mail," and he does not take kindly to being "coerced or forced" to file these forms. I find no such coercion in this case, and Mr. Brown's claims of threats by Mr. Mattson were rejected in my prior decision, and they are rejected here.

I believe the time has come for the respondent to realize the serious consequences which may flow from his continued refusal to comply. As previously stated by Judge Broderick, the fact that the respondent believes the required reports are onerous or unnecessary is no defense to the citations which have been issued by MSHA for its continued non-compliance.

I conclude and find that the evidence adduced in this case, including the respondent's history of non-compliance, reflects a conscience and deliberate disregard and flaunting of the requirements of section 50.30(a). Under the circumstances, I conclude and find that the respondent has exhibited a reckless disregard for the mandatory requirements stated in section 50.30(a), and that its failure to comply is the result of gross negligence on its part.

Good Faith Abatement

MSHA has stipulated that the respondent exhibited good faith in timely abating the violation after the issuance of the order, and I adopt this as my finding.

Civil Penalty Assessment

Although MSHA has modified the original order to a section 104(a) non-"S & S" citation, I am not bound by the $20 civil penalty assessment which is normally assessed by MSHA for such citations. MSHA's proposed civil penalty for the violation is $250. Based on the respondent's history of non-compliance with this standard, and my finding of gross negligence, I conclude and find that a civil penalty of $250 is reasonable and appropriate. Accordingly, I accept and adopt MSHA's civil penalty proposal for the violation in question, and I assess a civil penalty of $250 for the violation which has been affirmed.

Section 104(d)(2) "S & S" Order No. 2521412, issued on September 4, 1985, cites a violation of 30 C.F.R. 56.14006, and the condition or practice is described as follows:

> The guard for the tail pulley on the railroad car loadout belt conveyor was left off. The guard was laying across the walkway and the belt conveyor was operating. This violation is an unwarrantable failure and this equipment shall not be operated for any purpose until inspected and released by an MSHA inspector.

MSHA's Testimony and Evidence

MSHA Inspector Steve Manis confirmed that he issued the order, and he described the location of the belt conveyor in question. He stated that the conveyor runs horizontally out of a tunnel onto an elevated conveyor belt used to load material onto railroad cars. He identified two photographs of the cited conveyor belt, and identified the location of the tail pulley and unguarded pinch-point, as well as a nearby walkway. He also identified the guard which was left off the tail pulley, and stated that it was lying to the right of the tail section approximately 15 feet across the walkway on the ground (exhibit PÄ9; Tr. 96-99). He stated that Mr. Greg Brown confirmed that the guard was in fact the guard for the tail pulley, but that he did not know how long it had been off (Tr. 100).

Mr. Manis stated that the conveyor belt was running when he observed the cited condition, and he believed that the failure to replace the guard presented a hazard of someone getting caught in the pinch points between the tail pulley and the conveyor belt. He stated that employees would have a reason to be in the area adjusting idlers, performing welding work, cleaning up, or greasing or servicing the moving parts of the belt. Although there was no one exposed to the hazard when he discovered the condition, Mr. Manis confirmed that he observed footprints in the area, and that there was evidence that someone had been there to clean around the conveyor that morning or late in the afternoon (Tr. 102). He stated that no one knew how long the guard had been off, but since it was partially covered with sand, "it appeared to be off some time." The guard was replaced, and while it may have been put back that same day, he terminated the violation the next day (Tr. 102).

On cross-examination, Mr. Manis stated that the walkway was about 3 feet from the tail pulley, and that it was guarded by a handrail. He stated that someone could get into the unguarded pulley pinch point while cleaning up on the side of the pulley, and that cleanup could not be done in that area from the walkway. Upon examination of three photographs taken by the respondent purporting to be the cited conveyor belt area, Mr. Manis could not state whether they were in fact of the area he cited (exhibits RÄ1 through R-3; Tr. 102-105).

In response to further questions, Mr. Manis identified the steel structure across that portion of the belt tail where the guard had been removed, and while he agreed that it provided some protection on the sides, the required guard should cover the entire tail section. He agreed that the "square box-type" guard which had been removed would be adequate for this purpose. Although he did not know the specific procedures followed by the respondent in cleaning the area, he stated that the correct procedure is to lock out the belt and shutdown the power before servicing it, and then replacing the guard after the work is completed (Tr. 113). He confirmed that he cited a violation of section 56.14006, because the tail pulley was guarded at one time, but was removed and not replaced (Tr. 114). He did not consider the cited tail pulley area to be "guarded by location" because someone could simply walk up to it, as he did, and it was not up in the air where no one could get to it or reach it (Tr. 116).

Mr. Manis stated that anyone could walk up to the unguarded tail pulley and stick their hand or foot into it "if they wanted to" while cleaning or servicing it, or doing welding work (Tr. 117). He believed someone could do this by bending over while cleaning the belt with a shovel, and he did not believe that one had to get on their hands and knees to reach the pinch point. He stated that while the tail pulley was 3 feet off the ground, the pinch point was at the bottom "right on the ground" (Tr. 119). He stated that clean-up would be done by a long-handled shovel, and the removal of the guard while cleaning would depend on whether there was any sand "runover" (Tr. 121). He confirmed that in order for someone to reach the pinch point, he would have to reach in over or under the steel structure of the conveyor belt as shown in photographic exhibits PÄ9 (Tr. 121).

Respondent's Testimony and Evidence

Greg Brown testified that the cited area is normally cleaned up by a water hose which sprays water up through the tail pulley and anywhere on the walkway. A shovel is not

usually used unless the belt is "overloaded so much that it's got spillover." In that case the clean-up man "gets as much as he can out with a shovel . . . and we use water as much as possible" (Tr. 123). Mr. Brown identified the three photographs (exhibits RÄ1 through R-3) as the identical cited area in question. He identified the location of the unguarded pinch-point as the area at the bottom and behind the steel belt tail structure at the approximate same location identified by Inspector Manis (Tr. 124).

Mr. Brown stated that since water is used to wash off the tail pulley area, the only reason for removing the guard would be to loosen or tighten the belt, and that this would be done with the belt turned off. He stated that the pinch point in question was an inch or two off the ground, and that someone would have to be on their hands and knees below ground level in order to stick his hand into the tail pulley (Tr. 126).

On cross-examination, Mr. Brown stated that when the belt is cleaned with water, it may or may not be running, but that when shovels are used, it is turned off. When asked whether it makes a difference to the clean-up man whether it is turned off while cleaning it with water, he replied "I don't reckon it does to them" (Tr. 127). He confirmed that any accumulated material which is cleaned from the belt tail by water goes out of a drain pipe located some 5 or 6 feet away and out of the view of the photographs (Tr. 127). He confirmed that the cited tail pulley area has always been guarded during the 2 years he has been at the mine, and he agreed that the photograph of the guard which was removed as depicted in exhibit PÄ9, looks like the same guard (Tr. 128). The only reason for the removal of the guard would be to tighten the belt, and he confirmed that the walkway is approximately a foot or a foot and a half from the the pinch point area. He stated that the belt is on roller wheels and is swung away from the walkway when it is not in use. He confirmed that the belt was operating when the inspector issued the citation (Tr. 130).

Mr. Brown stated that to reach the pinch point area from the walkway, one would have to be kneeling on the walkway and reaching down for a distance of 1 to 2 feet. He stated further that any washing down of the tail section is done from the walkway because the clean-up man can reach just about every spot from that location, and he knows of none which cannot be reached from the walkway. The walkway has a standard 4Äfoot high guardrail that extends the full length, and it also has a mid-rail (Tr. 133).

Mr. Steven Brown confirmed that the tail section guard was initially installed because MSHA required it, and he agreed that unless it is taken off to make some adjustments to the belt, it is required to stay on. He also agreed that if the guard is taken off after the belt is adjusted, it should be put back on (Tr. 135). He stated "that may have been what he was doing that morning. I don't know" (Tr. 136).

With the Court's permission, the respondent produced a video tape showing the cited tail pulley area in question, and pointed out the pinch point area below the adjacent walkway. Mr. Carl Brown confirmed that he made the video the night before the hearing, and MSHA counsel Welsch pointed out that the video reflects that the cited tail pulley was a "wing pulley" rather than a "smooth cylinder pulley" (Tr. 141).

MSHA's Arguments

In its posthearing brief, MSHA asserts that there is no question that at the time of the inspection, the guard for the tail pulley section of the railroad car loader was off and no testing was being conducted. In fact, the conveyor was operating and loading sand. Although the pinch point of the tail pulley was close to floor level, MSHA states that it is important to note that it was close to the walkway and capable of catching loose clothing. Also, it may have been hazardous to employees doing cleanup around the conveyor, and without the guard, there was nothing to prevent an employee from being caught in the pinch point.

MSHA asserts that it is relevant to note that the cited standard only requires the guard to be securely in place, and does not require a showing of any hazard to employees. Since the guard had been removed and not replaced, MSHA concludes that a violation has been established.

MSHA concludes further that in accordance with the criteria of National Gypsum Co., Cement Division, 3 FMSHRC 822 (April 1981), it is clear that the lack of a guard would likely have caused serious injury to employees who worked in maintaining the tail pulley and to employees who regularly used the walkway in the area. Therefore, MSHA further concludes that the violation should be considered "significant and substantial."

Fact of Violation

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 56.14006, which provides that "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

After careful consideration of all of the testimony and evidence adduced with respect to this violation, I conclude and find that MSHA has established a violation by a preponderance of the credible evidence in support of its case. The respondent has not rebutted the fact that the guard which is normally in place at the tail pulley location was not in place at the time the inspector observed it, and that the conveyor belt was indeed operating loading sand. As correctly stated by MSHA, no testing was taking place and the guard was not in place. Accordingly, the violation IS AFFIRMED.

With regard to the "significant and substantial" finding by the inspector, MSHA's assertion that it was likely that someone could catch their clothing in the exposed pinch point from the walkway, is rejected. The walkway was guarded by a handrail, and I find it highly unlikely that anyone standing on the walkway while hosing down the tail pulley, or simply walking by, could inadvertently catch their clothing in the pinch point. Such a person would have to fall through or over the protective railing, and contort their body under the steel framework of the conveyor to reach the pinch point.

With regard to the likelihood of anyone reaching the pinch point while servicing or cleaning the tail pulley area while inside the protective walkway immediately adjacent to the unprotected tail pulley assembly, I conclude and find that the facts here support the inspector's "significant and substantial" finding in that respect. Although Greg Brown testified that normal cleaning is conducted by means of a water hose, he confirmed that the cleaning of belt spillage or overloading is also done by means of a shovel, and that the clean-up person "gets as much as he can with a shovel." Any cleanup would require the person handling the shovel to get in and behind the tail pulley apparatus beyond the steel conveyor framework.

I am not convinced that any cleanup with a shovel would always be done from the walkway, but would require the cleanup person to be in close proximity of the pulley assembly itself. Further, any belt adjustments would necessarily be made by someone in close proximity to the tail pulley assembly rather than from the walkway. More importantly, although Mr. Brown

stated that any cleanup work accomplished by means of a shovel would normally be done with the belt turned off, he conceded that it made no difference to the cleanup person whether the belt was turned on or off while it was being cleaned with water. Under these circumstances, any cleanup person who would be indifferent as to whether the belt was shutdown or not, would likely place himself in a hazardous situation should he venture close to the unguarded tail pulley assembly while attempting to hose it down or clean it up by means of a shovel, and would reasonably likely suffer injuries if he were to contact the unguarded tail pulley assembly. The fact that it may require him to be on his hands and knees to reach the particular pinch point in question, does not detract from the fact that he could become entangled in the tail pulley assembly which is normally guarded by a large "box-type" steel mesh guard which is required to be in place. Under these circumstances, the inspector's "significant and substantial" finding IS AFFIRMED.

GravityÄThe violation was serious in that the lack of guarding could have contributed to an accident. The pinch point, and more so the unguarded conveyor tail pulley assembly, were readily accessible to any cleanup or maintenance man in the area.

NegligenceÄThe violative condition was readily observable and should have been detected by the respondent exercising reasonable care. I conclude and find that the violation was the result of ordinary negligence on the respondent's part.

Good Faith Compliance

MSHA agrees that the respondent abated the violation in good faith, and I adopt this as my finding on this issue.

Civil Penalty Assessment

Taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $175 is reasonable for the violation which has been affirmed.

Section 104(d)(1) "S & S", Citation No. 2521744, issued on July 19, 1985, cites a violation of 30 C.F.R. 56.9003, and the condition or practice is described as follows: "The Dodge welding truck was not provided with service brakes and the brake pedal was missing. This welding truck was cited for

service brakes in the past and was taken out of service for termination. This is an unwarrantable failure."

On September 4, 1985, Inspector Steve Manis issued section 104(b) Order No. 25221410, removing the truck from service. The order reads: "No apparent effort was made by the mine operator to repair the service brakes on the Dodge welding truck. This equipment shall not be operated for any purpose until inspected and released by an MSHA inspector."

MSHA's Testimony and Evidence

MSHA Inspector Ron Grabner confirmed that he inspected the respondent's mine on July 19, 1985, and issued the citation on the welding truck. He also confirmed that during a subsequent inspection of the truck conducted with Inspector Manis on September 4, 1985, three photographs of the truck were taken, and he identified them as exhibit PÄ11. Other than the repair of certain axle bolts that were loose and missing on July 19, he was aware of no other changes made to the truck from July 19 to September 4, and the truck looked the same on both days (Tr. 147Ä151).

Mr. Grabner stated that the truck was converted so that it could be used as a "welding truck," and that it was moved about the plant to service and repair equipment. When he first observed it in July, it was located at the new shaker screen which was under construction, and when he observed it in September, it was located at the old shaker screen. He confirmed that the service brake which normally activates the rear wheels to stop the truck was completely removed from the truck, and the brake pedal itself was missing (Tr. 151Ä154).

Mr. Grabner stated that during his inspection on July 19, leadman Jim Miller informed him that the truck had been driven to the new shaker screen location (Tr. 154Ä166). Mr. Grabner believed that the missing brake condition constituted a significant and substantial violation because it was reasonably likely that an accident resulting in serious injuries could occur before the condition was corrected (Tr. 155). When he returned to the mine in September, the brakes had not been repaired, and Mr. Manis issued an order. At that time, Greg Brown confirmed that no effort had been made to repair the truck (Tr. 157).

On cross-examination, Mr. Grabner confirmed that he has never observed the cited truck moving, but that Mr. Miller advised him that it would run. However, when he was there in September the battery was dead, and the truck could not be

started. He confirmed that section 56.9003, does not specifically require a brake pedal, but does require the truck to have "adequate brakes" that will stop the truck within a reasonably safe distance. He agreed that a truck travelling 10 miles an hour would stop quicker than one going at 40 miles an hour (Tr. 159).

In response to further questions, Mr. Grabner stated that the truck had a hand brake which is used to hold the truck after it is stopped, but he did not consider this to be the service brake (Tr. 160). He believed that the loose axle bolts which he detected on July 19, would affect the hand brake if they came loose from the axle and the truck would not stop (Tr. 161Ä163). He confirmed that no citation was issued for the axle condition (Tr. 164).

Mr. Grabner agreed that the truck is moved from one location to another at the plant as needed for the purpose of performing construction work that requires welding, and that it may remain in one location for days before being moved to another location. He confirmed that he was told the truck was driven to the first location on July 19, and towed by means of a front-end loader to the second location on September 4 (Tr. 168Ä169). The truck did not have any doors, windshield, and one of the headlights was broken. However, no citations were issued for these conditions (Tr. 171). He cited it because it had no service brakes or a brake pedal to indicate that service brakes were indeed on the truck (Tr. 173).

Mr. Grabner stated that the truck at one time was a four-wheel drive truck, and he identified respondent's photographs, exhibits RÄ4 through R-6 as the sited truck (Tr. 174). Mr. Grabner confirmed that the axle condition was repaired when he returned to the plant in September, but he could recall no explanation by the respondent as to why the brakes were not repaired. He also confirmed that during a conference with Carl Brown, Mr. Brown took the position that the hand brake was sufficient to stop the truck, and that it is driven in first or second gear at low speed (Tr. 177, 181). Although the truck was never tested, and Mr. Grabner did not ride in it, Mr. Miller did show him in July how the hand brake was used, and Mr. Grabner had no reason to believe that the hand brake would not hold the truck once it was stopped (Tr. 178). However, he would not accept the hand brake as compliance because it was not intended to be used for stopping the truck when it's moving (Tr. 180Ä181).

Mr. Grabner was not aware of any thorough MSHA inspection of the truck to determine whether or not it was otherwise equipped with a braking system or parts (Tr. 182). However, he was not aware of anything inside the cab of the truck which could be used to activate any service brake system, and the respondent never informed him of any mechanism inside the truck which could be used to activate any such brake system (Tr. 183).

Inspector Reino Mattson testified that he first became familiar with the cited truck in June, 1977, when MSHA Inspector Michael Denny cited it as an imminent danger because it was operating without service brakes, and the brake pedal was cut off (exhibit PÄ13). Since the truck was drivable, Mr. Mattson would not permit the installation of a tow bar to serve as abatement, and the order remained in effect. Eighteen months later, the respondent was advised by MSHA that the installation of the tow bar for the purpose of towing the truck would serve as compliance, but that the order would remain in effect in case the truck were driven under its own power. Subsequently, in November, 1978, the welding apparatus was removed from the truck, and it was parked with the engine frozen. Under the circumstances, since the truck was out of service, the order was terminated (Tr. 184Ä187).

Mr. Mattson stated that after the order was lifted, he met Mr. Carl Brown at a subsequent hearing sometime in 1980, and Mr. Brown asked him about putting the truck back in service. Mr. Mattson stated that he informed Mr. Brown that if he repaired the brakes there would be no problem. Mr. Brown replied "I'm not touching the brakes," and Mr. Mattson informed him that "we're probably going to have some more problems." Subsequently, when Mr. Mattson was at the plant with Mr. Grabner on July 19, 1985, he discovered that the welder and cutting torches were put back on the same truck, and Mr. Miller and Greg Brown informed him that the truck had been driven to the location where it was discovered and that it had also been used around the plant. Under the circumstances, Mr. Grabner issued the citation (Tr. 187Ä188). Mr. Mattson could not state when the truck was actually put back into service (Tr. 191).

On cross-examination, Mr. Mattson confirmed that from the time the truck was taken out of service in 1978, until the inspection of July 19, 1985, he never observed the truck being driven and it was parked "in the bone yard. And the weeds were as high as the truck and it was not in operation" (Tr. 192).

Respondent's Testimony and Evidence

Carl Brown testified that he acquired the truck in question 18 to 20 years ago as government surplus. He described the truck as a four-wheel drive 1935 Army weapons carrier. He exchanged scrap iron worth $50 for the truck, and when he got it, it did not have a brake pedal or a windshield, and it was used to transport the welder. He stated that the hand brake was used and "it would drag the wheels in that sand." Even without a hand brake, with four-wheel drive travelling at 3 or 4 miles an hour, the truck would stop itself (Tr. 192Ä193).

Mr. Brown stated that after the truck was cited as an imminent danger it "was parked in the weeds," and the order was lifted when a tow bar was installed to the truck, but the truck still "sat in the weeds." Subsequently, his grandson Daryl, who was then 15 years old, performed some work on the motor and got the truck running again and drove it to the plant office area (Tr. 194). Mr. Brown did not know whether the truck was driven to the location where it was found by the inspectors on July 19, 1985 (Tr. 196).

MSHA's counsel Welsch stated that the truck was cited on July 19, 1985, because it had no service brakes, and the inspectors were led to believe that it was driven from the weeded area to the location where they observed it, and the tow bar had been removed (Tr. 199). MSHA was previously under the impression that the truck was to be towed or moved around by a front-end loader using the tow bar (Tr. 200Ä201). Mr. Brown confirmed that the cited truck has never been involved in an accident and has never run into anything (Tr. 208).

Greg Brown confirmed that when the inspectors came to the plant in September 1985, he informed them that the truck "would not run or crank." He confirmed that the truck was towed to the old screen location a week prior to the inspection, and it remained there until it was again towed to the shop sometime in December and the back axle would not roll free because the "rear end gummed up on us." He confirmed that the truck was used to haul a welder, and when it was moved from the shop to the plant it travelled less than a quarter of a mile. If it were driven, the top speed was 10 to 15 miles an hour, and he never had any trouble stopping it with the hand brake, and it never ran into anything or anybody (Tr. 211Ä212). If the clutch were engaged, the truck would "roll free" depending on its speed (Tr. 213).

On cross-examination, Mr. Brown admitted that either he or Mr. Miller drove the truck from the shop to the location where it was observed by the inspectors on July 19, 1985. He confirmed that he started working at the plant 2 years ago, and that the truck was in operation when he got there. He did not know how long it had been operational prior to that time. The truck would be "towed some" and depending on the distance, it would also be driven, "if it cranked" (Tr. 217). The truck had a hand brake, and it was driven in four-wheel low gear drive at speeds less than 10 to 15 miles an hour because of the muddy and sandy conditions and for traction.

Mr. Brown stated that the mine grounds do have hills, inclines, and declines, and the main road areas consist of hard compacted dirt. When the truck is driven, it is kept in four-wheel drive and it is slowed down by use of the hand brake and normal deceleration, and he does "what's necessary to stop the vehicle" (Tr. 220). One of the "hired hands" who did the welding usually drove the truck, but if he were not available, he and his brother, or Mr. Miller would drive it. He confirmed that the truck had no brake pedal or service brake, and while he has never examined the truck to determine whether it had a master cylinder or brake pads, there was no way to engage such a system from the cab while driving it. He confirmed that the hand brake is a system separate from any service brake system, but that the truck can be driven with the hand brake on, and it will stop the truck. He never experienced any trouble travelling down an incline using the hand brake (Tr. 221Ä223).

Mr. Brown confirmed that since the 104(b) order was issued, the truck has been parked at the shop and has not been used. The welder was removed and another portable welder has been purchased (Tr. 224). Counsel Welsch confirmed that the order has never been terminated, and as long as the truck is out of service, the respondent is in compliance with that order. Mr. Welsch confirmed that he is satisfied that the truck has been taken out of service (Tr. 225).

Jim Miller testified that he has worked for the respondent for 10 years, and confirmed that he has driven the truck in question during this period but never had any trouble stopping it with the hand brake. The truck has never run into anything, and it can possibly travel at a speed of 15 miles an hour. The distance from the shop to the pit area is a quarter of a mile. The truck was towed from the new screen area to the old screen area and remained there for a couple of months. Since the rear end was locked up, it would not be used for welding, and it was taken to the shop where it has

been parked ever since (Tr. 227). Mr. Miller stated that he has never "demonstrated" the truck to any inspector, and has never been asked to (Tr. 227).

Daryl Brown, testified that he is 20 years of age, and that he was 14 or 15 when he discovered the cited truck "in the weeds" in the pit during the summer. He confirmed that he cleaned the plugs, filed the points, cleaned out the gas tank, and installed a new battery and drove the truck to the plant office to show his grandfather, Carl Brown. His grandfather had him drive the truck "to the edge of the hole" where he took a picture of him in the truck. He had no trouble stopping the truck with the hand brake. Since that time, he has driven the truck while working at the site 2 months a year and has had no trouble stopping it (Tr. 230).

Mr. Carl Brown stated that the truck has not been used since the order was issued in September, 1985, that it has been taken out of service and he does not intend to use it again. He conceded that on the basis of the testimony adduced in this case, the truck was operated and driven prior to the time it was inspected and cited, but he insisted that it had an adequate hand brake (Tr. 238Ä239).

At the conclusion of the testimony, Mr. Carl Brown informed the Court that the truck in question was on a flat-bed truck parked across the street from the courtroom, and he requested that I view it. In the presence of the parties and all of the witnesses, I climbed onto the flat-bed truck and looked into the cab and the truck and observed that it was equipped with a handbrake, but that the foot pedal for the service brakes was missing. I also observed that the doors, windshield, and one headlight were missing. Mr. Steve Brown demonstrated the hand brake, and I observed the hand brake mechanism in place on the undercarriage of the truck (exhibit RÄ6; Tr. 249).

MSHA's Arguments

During oral argument at the conclusion of his case, MSHA counsel Welsch took the position that as long as the truck in question is towed and not driven, and complies with mandatory standard 30 C.F.R. 56.9Ä70 (now 56.9070), with respect to the installation of a substantially constructed tow bar, the truck would not have to be equipped with service brakes. It was counsel's understanding that this was precisely the compromise agreed upon by MSHA when the previously issued imminent danger order was terminated in 1978, after the truck was taken out of service, and MSHA was under the assumption that

the truck would thereafter be towed and never driven (Tr. 233Ä237).

Mr. Welsch took the further position that even though the truck may have been driven a short distance at low speed and could be stopped by means of the hand brake, in order to comply with the cited standard, the truck must be equipped with separate service brakes, notwithstanding the fact that the broad language of section 56.9003 requiring "adequate brakes" does not specifically differentiate between hand brakes or service brakes. Mr. Welsch stated further that the hand brake was not designed to stop the truck while it is moving (Tr. 239Ä241).

In its written posthearing arguments, MSHA argues that it is uncontroverted that the cited welding truck was being operated without any service brakes, and that the brake pedal had been removed and had not been replaced during the 20 years the truck had been owned by the respondent. In order to stop the truck, the driver operated the truck in the low gear and used the clutch and hand brake. However, this should not replace the need for service brakes as required by the standard, and as conceded by the respondent, the hand brake was designed as an emergency brake to hold the truck once stopped. It was not designed to be used as a service brake to stop the truck.

MSHA maintains that the phrase "adequate brakes" as used in the standard clearly implies that service brakes exist and are used as designed by the manufacturer, and that the respondent's use of hand brakes or any other means to stop the truck is beyond the manufacturer's design and should not be considered compliance with the standard. The fact that respondent's employees testified that they had no problem in stopping the truck, using a variety of methods, should be considered irrelevant to finding a violation.

MSHA further maintains that the purpose of the standard is to prevent accidents. "Adequate brakes" as required by the standard should be given its commonly used meaning which would include service brakes on the vehicle designed for stopping, as well as hand brakes to hold the vehicle in emergencies. Section 56.9Ä3 prohibits operator conduct unacceptable in light of common understanding and experience in the industry or when the operator has actual knowledge that a condition or practice is hazardous. Concrete Materials, Inc., 2 FMSHRC 3105 (October 22, 1980). "Adequate brakes" clearly requires at least service brakes and not the use of other methods or the ingenuity of the employee to stop a vehicle.

To hold otherwise would negate the intent of the standard and place compliance within the whimsical imagination of the operator. Medusa Cement Company, 2 FMSHRC 819 (April 8, 1980).

MSHA concludes that the respondent's violation of section 56.9Ä3, was cited as "significant and substantial" within the meaning of section 104 of the Act and the Commission's decision in National Gypsum Co., Cement Division, 3 FMSHRC 822 (April 1981). In support of this conclusion, MSHA asserts that clearly, the lack of any service brakes presented a "significant and substantial" hazard to the driver and employees working in the vicinity, and, as noted by the respondent, the plant had hard compact roads and steep inclines which would require a good braking system. Respondent's need for service brakes was substantial.

Fact of Violation

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 56.9003, which provides that "Powered mobile equipment shall be provided with adequate brakes."

I conclude and find that MSHA has clearly established that the cited truck in question was not equipped with any service brakes, and that the only means of stopping it while it was being driven was by the use of the hand brake and low gears and clutch. The respondent's suggestion that the hand brake constituted an "adequate" braking system within the meaning of section 56.9003, is rejected. As correctly argued by MSHA, the hand brake was designed to hold the truck once it was stopped, and it was not designed to be used as a regular service brake to stop the truck while it was being driven about the plant site. The fact that the respondent used a variety of methods to stop the truck is irrelevant, and MSHA's interpretation and application of the facts here presented to the requirements stated in the cited standard are correct and I adopt them as my findings and conclusions on this issue. The violation IS AFFIRMED.

Significant and Substantial Violation

I agree with MSHA's assertion that the lack of service brakes on the truck was a significant and substantial violation. In view of the condition of the truck, including the total lack of a brake pedal or service brakes, and the fact that it was driven periodically over a long period of time with no service brakes, I believe it is reasonably likely that the lack of brakes could contribute to a potential

hazard to anyone driving it, particularly on inclines. In the circumstances, I conclude that the cited condition would likely contribute to the hazard. Accordingly, the inspector's "significant and substantial" finding IS AFFIRMED.

Gravity

While it is true that the truck in question was sometimes towed and left for several days at several construction sites where it was used for welding and repairs, the tow bar had been removed, and it seems clear to me from the testimony in this case that it was also driven without a service brake by Greg and Daryl Brown, leadman Miller, and the person who was doing the welding work.

Although the distance from the shop to the pit area was approximately a quarter of a mile, I am not convinced that the use of the truck was restricted to that particular route as a matter of routine. Daryl Brown testified that for the 2 years he has worked at the site, he has driven the truck while working there during time off from school. As a matter of fact, he admitted that his grandfather had him drive the truck to the edge of the pit, using only the hand brake to stop it, so that he could take his picture. Mr. Miller testified that he has driven the truck during the 10Äyears he has worked at the site. Greg Brown testified that "depending on the distance," the truck would be driven rather than towed, and that he had no problem stopping it while driving down inclines.

Although the respondent has established that the truck may not have been driven faster than 10 to 15 miles an hour, the total lack of any service brakes exposed the driver to a potential hazard likely to cause serious injury in the event of an accident. Having personally viewed the truck, I am of the view that the lack of doors, no windshield, and a make-shift driver's seat were conditions that posed additional hazards to the driver. Further, the position of the hand brake is such that the driver would have to bend down to reach it, rather than simply engaging a foot pedal, and in an emergency situation, this would impact on his reaction time. Under all of these circumstances, I conclude and find that the violation is serious.

Negligence

I agree with MSHA's argument that the respondent exhibited a high degree of negligence with respect to this

violation. The evidence clearly establishes that the respondent has for many years known that the truck should not be operated without service brakes.

Good Faith Compliance

The evidence establishes that the respondent failed to repair the service brakes or to otherwise abate the conditions cited on July 19, 1985, and that an order had to be issued on September 4, 1985. Further, I believe it is clear from the facts in this case that the respondent has exhibited total indifference with respect to the conditions cited. Under the circumstances, I conclude and find that the respondent has demonstrated a lack of good faith with respect to the violation in question.

Civil Penalty Assessment

Taking into account the requirements of section 110(i) of the Act, particularly the respondent's high degree of negligence and lack of good faith compliance with respect to the violation, I believe a civil penalty assessment in the amount of $600 is reasonable and appropriate.

Section 104(d)(2) Order No. 2521411, issued on September 4, 1985, cites a violation of 30 C.F.R. 56.9087, and the condition or practice is described as follows:

> The automatic warning device which would give an audible alarm when the 644 C John Deere Front-end loader was put into reverse was not operating. Greg Brown stated that an electrical short was causing the back-up alarm not to work. This violation is an unwarrantable failure and this equipment shall not be operated for any purpose until inspected and released by an MSHA inspector. 644C John Deere Front-end loader, Serial No. 644 CB 4033930.

MSHA's Testimony and Evidence

MSHA Inspector Ronald Grabner stated that while conducting an inspection at the mine on July 19, 1985, he observed the front-end loader in operation that morning at the load out bins and the back-up alarm was working. Later in the day when the loader was inspected, the alarm was not working. Mr. Greg Brown determined that a fuse had burned out, and he replaced it. However, the new fuse burned out, and Mr. Brown surmized that there was a short circuit in the system. Since

the loader was parked, and since it appeared that something had malfunctioned between the time the loader was first observed in operation and the time it was inspected, no citation was issued. Mr. Brown stated that he would correct the condition (Tr. 9Ä15).

On cross-examination, Mr. Grabner stated that the loader was originally equipped with a backup alarm, and since there is an obstructed view to the rear, a backup alarm is required. When asked why he did not cite a second 644ÄB loader, Mr. Grabner stated that when he observed it operating in the stock pile area near the service tunnel, he did not believe that the view to the rear from the driver's seat was obstructed (Tr. 15, 17).

MSHA Inspector Steve C. Manis confirmed that during an inspection on September 4, 1985, he observed the front-end loader in question in operation, and he identified a photograph of the loader which he took that day (Tr. 23, exhibit PÄ1). Mr. Manis stated that the loader was operating at the surge tunnel area pushing sand into the surge pile where it falls through the tunnel top and is carried away on conveyor belts. Although the tunnel is not a normal travelway to get from the front of the plant to the back, it could be used as a travelway since it is closer than walking around the surge pile and bins. The loader was equipped with a back-alarm, but it was not working. Mr. Greg Brown confirmed that the alarm had a short, and when asked why it had not been repaired, Mr. Brown replied that "he just hadn't had time." Mr. Manis issued the citation, and subsequently terminated it on September 6, 1985, when repairs were made (Tr. 28).

Mr. Manis confirmed that he got into the loader next to the operator and looked out the rear view window and found that the engine hood, air cleaner container, and the muffler and tailpipe constituted an obstructed view to the rear of the machine (Tr. 29). Mr. Manis observed no one serving as an observer, and the machine was not equipped with rear view mirrors. He believed the violation was "significant and substantial" because the loader was operating in an area where there was a potential for people walking through the area, and there is a blind spot to the rear of the machine (Tr. 31).

On cross-examination, Mr. Manis confirmed that he saw no one around the loader while it was in operation. He also confirmed that the photograph he took was in connection with a broken windshield violation, and that it was not taken to support the backup alarm violation (Tr. 32Ä34). Mr. Manis

also confirmed that he did not observe the loader at the end of the surge tunnel, but saw it operating in the surge pile area (Tr. 37). He also confirmed that he made a notation of the serial number of the cited loader (Tr. 39).

Mr. Manis confirmed that he was aware of the fact that the loader in question had previously been inspected by Inspector Grabner, and that Mr. Greg Brown assured Mr. Grabner that he would repair the defective backup alarm (Tr. 51).

Respondent's Testimony and Evidence

Greg Brown confirmed that he accompanied Inspectors Grabner and Manis during their inspections on July 19 and September 4, 1985. He confirmed that he advised Mr. Grabner that the 644C loader may have had a short, but that he also advised him that he was not sure and that "it could be anything" (Tr. 55). Mr. Brown stated that none of the equipment operators have ever advised him that their view to the rear is obstructed, and he confirmed that he has operated both loaders and has had no problem with any obstructed view to the rear (Tr. 57). Mr. Brown conceded that if someone 5 feet 8 inches tall were to stand behind the machine "jam up to the radiator," he would probably not be seen by the equipment operator (Tr. 58Ä59). Mr. Brown could not state how far back from the machine the person would have to stand before he could be seen by the operator (Tr. 59). He confirmed that when he backs up the loader, he looks to the rear because "I don't want to hit nobody, or hit anything else. I run over a chainsaw before, like that" (Tr. 62).

Mr. Brown confirmed that the respondent traded the 664ÄB end-loader, and purchased another 644ÄC model which was not equipped with a backup alarm, and no citation has been issued for a lack of a backup alarm (Tr. 63). MSHA counsel Welsch explained that this new 664ÄC end-loader has factory equipped convex backup mirrors, and supervisory Inspector Reino Mattson confirmed that MSHA's district office has given verbal approval for the use of the mirrors in lieu of a backup alarm, as long as the visibility to the rear is good and there are no obstructions to the rear (Tr. 65Ä69).

Carl Brown stated that 40 to 50 trucks are on his property every day, and they are regulated by OSHA and have no backup alarms. Mr. Brown claimed that loaders and tractors received by other operators regulated by OSHA have told him that when they receive this equipment they take the backup alarms off "because it's a nuissance around the working place" (Tr. 20). For demonstration purposes, Mr. Brown played a

video tape of several front-end loaders, included the one cited in this case, operating in the same area of the mine as the one which was cited (Tr. 75Ä76).

Inspector Grabner was called in rebuttal, and he confirmed that the day prior to the hearing, he and Inspector Manis observed a John Deere front-end loader model 644ÄC, similar to the one cited in this case, at another sand mining operation. They took measurements to determine the distance of any obstructed view to the rear in relation to any foot traffic to the rear of the machine. Mr. Grabner stated that he sat in the driver's seat and Mr. Manis, who is 5Äfeet 10-inches tall, stood at the rear of the machine, and after taking measurements, they determined that looking over Mr. Grabner's left shoulder, Mr. Manis first came into view at a distance of 8 feet 5 inches from the rear of the machine to where he was standing when the measurement was taken. Although the distance to the rear looking over his right shoulder was not measured, Mr. Grabner believed that it would have been considerally further back from where Mr. Manis was standing because of the obstruction of the muffler and air cleaner (Tr. 77Ä78).

On cross-examination, Mr. Grabner stated that the front-end loader in question is used for a multitude of purposes and at different locations at the mine site and is not used solely for one job at one particular location. He could not state whether he observed anyone around the loader in question when he first observed it. While it may operate in an area with no people around it, the next day it may be operating in an area where there may be people or other equipment working around it. Under these circumstances, he believed that the lack of an operable backup alarm on the cited loader constituted a "significant and substantial" violation, and he agreed with Inspector Manis' finding in this regard (Tr. 81Ä87).

Fact of Violation

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 56.9087, which provides as follows:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level

or an observer to signal when it is safe to back up.

I conclude and find that MSHA has established by a clear preponderance of the evidence that the cited end-loader in question had an inoperable backup alarm at the time the inspector cited it. I also conclude and find that MSHA has established that the view to the rear of the cited end-loader is obstructed, and that an operable backup alarm was required. This conclusion is supported by the testimony of the inspectors who made measurements of a similar end-loader, and it is corroborated as well by the photograph produced by the respondent, exhibit RÄ2, which shows that the air cleaner, muffler, and tailpipe behind the operator's compartment constitute obstructions to the operator's view to the rear of the machine. The respondent has not rebutted this fact, and the inspector's findings are further corroborated by the testimony of Greg Brown who testified that he ran over a chainsaw while operating the machine in reverse because he obviously did not see it, and that he always looks to the rear because he does not want to run over anyone or hit any equipment which may be operating to the rear of the machine. The violation IS AFFIRMED.

Significant and Substantial Violation

I agree with the inspector's finding that the lack of an operable backup alarm constituted a significant and substantial violation. While it may be true that the inspector could not recall observing anyone working the proximity of the machine while it was operating, the respondent had not rebutted the fact that the machine is used for a multitude of purposes at different locations at any given time. Under these circumstances, it is reasonably likely that the lack of an operable backup alarm could contribute to a potential hazard to equipment operating in the same area on any given day, or to mine personnel working in the area. Accordingly, the "S & S" finding by the inspector IS AFFIRMED.

Gravity

I conclude and find that the lack of an operable backup alarm constituted a serious violation. Although the respondent had two serviceable end-loaders, there is no evidence that it only used one of them, and I believe that given the volume of truck traffic on the site on any given day, one may reasonably conclude that both end-loaders were regularly used by the respondent in the course of its mining operation. Further, since it would appear that the defective backup

alarm was not repaired for over a month after it was first noted by the inspectors, one may reasonably conclude that the hazard exposure continued during this same time frame.

Negligence

I conclude and find that the respondent exhibited a high degree of negligence with respect to this violation. Respondent was put on notice on July 19, 1985, that the defective backup alarm needed attention, and Mr. Greg Brown knew that this was the case and assured the inspectors that it would be taken care of. However, more than a month past before any repairs were made, and they were made only after the inspector issued an unwarrantable failure order during his next visit to the mine.

Good Faith Compliance

Petitioner has stipulated that the violation was abated in good faith after the order was issued, and I accept this as my finding on this issue.

Taking into account the requirements of section 110(i) of the Act, particularly the respondent's high degree of negligence, I believe a civil penalty assessment in the amount of $100 is reasonable and appropriate.

ORDER

On the basis of the forgoing findings and conclusions, the respondent IS ORDERED to pay to the petitioner the following civil penalty assessments within thirty (30) days of the date of this decision:

Citation Order No.	Date	30 C.F.R. Section	Assessment
2007656	07/19/85	50.30(a)	$ 250
2521412	09/04/85	56.14006	$ 175
2521744	07/19/85	56.9003	$ 600
2521411	09/04/85	56.9087	$ 100

George A. Koutras
Administrative Law Judge