CCASE:
SOL (MSHA) V. GREENVILLE QUARRIES
DDATE:
19870812
TTEXT:

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 86-133-M A.C. No. 15-00034-05512
v.	Docket No. KENT 86-134-M A.C. No. 15-00034-05514
GREENVILLE QUARRIES, INCORPORATED, RESPONDENT	Docket No. KENT 86-155-M A.C. No. 15-00034-05516
	Greenville Quarry

DECISIONS

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Brent Yonts, Esq., Greenville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These civil penalty proceedings concern 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). The petitioner seeks civil penalty assessments for seven alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests, and hearings were held in Owensboro, Kentucky. The respondent filed posthearing arguments, but the petitioner did not. I have considered these arguments in the course of these decisions, and I have also considered the oral arguments made by the parties on the record during the course of the hearings.

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, 29 C.F.R. 2700.1 et seq.

Issues

The primary issues presented are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory standard, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of these decisions.

The parties stipulated to the following:

1. The respondent is a Kentucky Corporation incorporated on May 27, 1948, and it owns and operates a quarry and mill located on State Highway 171 in Muhlenberg County, Kentucky.

2. The respondent produces crushed and broken limestone for sale in interstate commerce and is subject to MSHA's jurisdiction, as well as the Commission's Administrative Law Judges.

3. The respondent averages a production of 650,000 to one million tons of crushed limestone per year at its quarry and mill, and it is a medium class operation.

4. The respondent employs 30 persons at its quarry and mill, working one shift, 8 hours per day, and 5 days per week.

5. Federal Metal/Nonmetal Inspector Eric Shanholtz, a duly authorized representative of the Secretary of Labor, conducted a regular inspection of the Greenville Quarry and Mill from January 7, 1986 to January 9, 1986.

6. The following vehicles were in operation at the Greenville Quarry and Mill from January 7, 1986 to January 9, 1986:

one (1) 275 B Michigan Loader

two (2) 475 B Michigan Loaders
two (2) 35 ton Euclid Pit Haul trucks
two (2) 20 ton Plant Stockpile Haul trucks
one (1) Powder truck

7. The Euclid Pit Haul trucks in operation in January and February, 1986, were Euclid Model R35 trucks. These trucks had been in operation for several years.
8. The respondent's history of prior violations for the 2Äyear period prior to January, 1986, is reflected in an MSHA computer print-out which has been made a part of the record in this case (exhibit PÄ3).

Procedural Ruling

At the hearing, respondent's counsel moved for a continuance on the ground that he was retained by the respondent on Thursday, May 14, 1987, and that it was difficult for him to prepare for the hearing on such short notice. Counsel stated that he mailed me a letter requesting a continuance, and that he also spoke with my secretary on Friday, May 15, 1987, concerning a continuance.

The parties were informed that since I was on leave status on Friday, May 15, 1987, I was unaware of the letter requesting a continuance until the morning of the hearing. After consideration of the request, it was denied from the bench (Tr. 13). Respondent was reminded of the fact that the original notice of hearings in these cases was issued on January 8, 1987, and that the cases were scheduled to be heard on April 7Ä8, 1987, but were continued at the request of the petitioner until May 19Ä20, 1987. In my view, the respondent had more than ample time to obtain counsel if it so desired, and I concluded that its request for continuance was untimely.

The issues presented in these cases are not that difficult. Respondent's vice-president, Mr. John Stovall, who represented the respondent until the retention of counsel, appeared to be thoroughly familiar with all of the citations, and he was present and testified at the hearing on the respondent's behalf. In addition, the record reflects that Mr. Stovall discussed some of the citations with MSHA's district supervisor, and had previously attempted to settle these cases with MSHA.

Counsel's letter requesting a continuance reflects that he received the respondent's record on Thursday, May 14, 1987, including copies of the petitioner's hearing exhibits. Although no witness list was included, none was required by my pre-trial notice. However, petitioner' witnesses were identified at the hearing, and the respondent's counsel had ample opportunity to cross-examine them. Although the petitioner presented an "expert witness" who was apparently not previously known to the respondent, his testimony was not critical or pivotal to the petitioner's case, and I cannot conclude that the respondent has been prejudiced by the petitioner's failure to disclose the identity of its expert witness until the morning of the hearing. Further, I take note of the fact that the respondent failed to avail itself of any of the Commission's pretrial discovery procedures. I also take note of the fact that the respondent's answers filed in these proceedings suggest that the respondent's principal concern was its belief that MSHA's proposed civil penalties were excessive and unreasonable, and its offer to settle the violations for 50 percent of the assessments was rejected by the petitioner's counsel.

Discussion

DOCKET NO. KENT 86Ä133ÄM

Section 104(a) "S & S" Citation No. 2657368, issued on January 7, 1986, cites a violation of 30 C.F.R. 56.12016, and the cited condition or practice is described as follows:

> An safe, established lock-out procedure had not been established at the Greenville Quarry. The present procedure was to simply turn off the equipment and shut the door to the switch-house. The equipment could at anytime be energized while being worked on. A procedure shall be established to physically lock-out the equipment.

MSHA Inspector Eric Shanholtz testified as to his education, experience, and background, including a B.A. degree in mine safety, and an M.S. degree in safety from the Marshall University, Huntington, West Virginia. He identified exhibits PÄ1 and PÄ2 as sketches which he made of the respondent's Greenville Quarry and Mill property. He also identified exhibit PÄ4 as a series of photographs which are

representative of the plant area, the terrain, and the roadways, and he described the areas shown in the photographs (Tr. 19Ä30).

Inspector Shanholtz confirmed that he issued the citation after finding that the quarry had no established lockout procedure for electrical equipment. He stated that quarry superintendent Burdette Fox advised him that the procedure used at that time was to simply turn off the equipment and shut the door to the switch house (Tr. 31). Mr. Shanholtz stated that during his inspection of January 7, 1986, no locks were available or shown to him, and as far as he knew no provisions were made to use locks. The switch house contained the electrical switch gear for the plant area, and it also contained a partitioned-off control booth area from which the plant was operated by means of "push button starts." The switching gear consisted of standard electrical "square D" manual switches (Tr. 32Ä34).

Mr. Shanholtz stated that when he returned to the mine on February 26, 1986, on a follow-up inspection, he observed an electrician working on some electrical cables by the crusher area. The system being worked on was a 480 volt system, and no locks were being used. The electrician admitted that he had not locked out the equipment, and Mr. Shanholtz stated that he personally observed the system switches, and while there was a lock lying on top of the electrical switch box which would fit the box, the lock was not used to lock out the switch box (Tr. 35, 37). Under these circumstances, he issued a section 104(b) withdrawal order, No. 2657191, and petitioner's counsel confirmed that he did so because of the failure by the respondent to timely abate the previously issued citation of January 7, 1986 (Tr. 36).

Mr. Shanholtz was of the opinion that it was highly likely that the failure to have a lock-out procedure or to lock out the equipment would result in an accident. His opinion was based on the fact that there were other employees in the area and the electrical switch was not locked out. With 480 bolts, one person would be exposed to a fatal injury or accident (Tr. 38). Mr. Shanholtz stated further that he was aware of one accident which occurred after the citation was issued, during the summer of 1986, when the superintendent was working on some electrical switches and came into contact with some energized switch components and the resulting flash or arc caused burns to his face and hands. This incident involved the same switch house (Tr.39).

On cross-examination, the inspector confirmed that the power source to the switch house is from a nearby pole. In response to a question as to whether or not he had determined that the main power disconnect at the power pole was disconnected, during his inspections of January 7 and February 26, the inspector stated that he assumed that it was not because had the power been disconnected at the power center, it would have shut down the entire plant, and that did not happen (Tr. 44). The individual who operated the switches in the switch house on February 26, was not the same person doing the electrical work, nor was he the person supervising the work (Tr. 44).

The inspector testified that while there are two switch houses on the property, containing a total of 30 switches, his citation addressed the switch house at the plant area which contains 15 switches. He confirmed that he issued the citation because mine management did not have an established procedure for locking out electrical equipment or circuits while they were being worked on, and not because the 15 switches in the switch house in question did not have locks (Tr. 48). He further explained his reasons for issuing the citation as follows at Tr. 51Ä52:

> THE WITNESS: The citation was issued because there was no procedures provided to physically lock out the equipment. There had been work done in the past. As with any quarry, there will be downtime and that downtime encompasses removing motors, takingÄclimbing down into crushing areas.
>
> And you have to understand that they have to reasonably show me a way that they are physically lockout this equipment as they work on it. At the time this citation was issued, no, there was no actual work being done that would require the equipment to be locked out. But in the same sense, you rely on your experience, that they take out these motors. They replace them as they burn up, as they go. They change screens in the screening equipment. They're down in these crushing areas. It's a procedure that a good, safe manager would provide, that as they work on this equipment, that it is going to be locked out.

> Now, I asked him at that time if they had any lockout procedure or any locks. I was told, no, they didn't. As a matter of fact, they had to go to town and buy them.

Mr. Shanholtz could not recall how much time he gave the respondent for abatement of the citation, but he indicated that he usually fixes less than a week as the abatement time on citations such as the one in question (Tr. 53). He confirmed that the electrical equipment being worked on by the electrician on February 26, was not energized, and while locks were near the switches, they were not used to lock out the switch. He stated that he spoke with the electrician and the control room operator. However, the control room operator was in the control room and not with the electrician who was doing the work, and while the control room operator could not see the electrician from the switch house control room, he was aware that the electrician was doing some work (Tr. 60).

Mr. Shanholtz stated that he abated the order after the switch was locked out, and after a lockout procedure was established in writing and the employees were instructed in its use (Tr. 59Ä61). However, when he issued the citation on January 7, he spoke with several employees who worked on the equipment, and they had no knowledge about any lockout procedures (Tr. 61). The employees were aware of a procedure for de-energizing the power source by turning off electrical equipment which was being worked on, and this procedure was in effect (Tr. 62). Mr. Shanholtz stated that MSHA "doesn't recognize simply throwing a switch as a safe procedure" (Tr. 63). He reiterated that when he spoke with superintendent Burdette Fox on January 6, Mr. Fox advised him that they had no locks to physically lock out the switches and simply shut the door to the switch house (Tr. 65).

Mr. Shanholtz stated that he observed a large number of burned out motors in the yard when he was at the mine on January 7, and he believed that they were from electrical equipment in the switch house. Based on this, he assumed that since no lock-out procedures were established that work on these motors had been conducted prior to January 7 without locking out the electrical equipment (Tr. 67Ä68).

Mr. Shanholtz stated that a lock would add to the safety of the equipment if it de-energized because it would prevent the equipment from being energized or turned on electrically

or mechanically. When asked what would happen if the equipment were turned on while someone was working on it, he responded as follows (Tr. 70):

> A. Essentially the same thing that happened in our last fatality in the Southeast District, that a person came by and noticed the crusher wasn't on. It wasn't locked out. He turned it on and it crushed the guy that was inside the crusher.
>
> As long as you have people who are in that general area of that electrical switch, there is a potential that somebody is going to turn on that piece of equipment.
> Q. And I believe you've already testified you saw employees in the area of that electrical equipmentÄ
>
> A. Yes.
>
> Q.Äon January 7th.
>
> A. Yes.
>
> Q. And in February when you issued the (B) order.
>
> A. Yes.

John Stovall, respondent's vice-president and general manager testified that the mine in question is a union mine which has been represented by the United Steel Workers, and that a three-person mine safety committee composed of two union representative and one management representative has been functioning since a safety committee clause was added to the contract approximately 15 years ago. He stated that the safety committee chairman has always accompanied MSHA inspectors during their inspections, and that this was the case during January, February, and March, 1986. He also stated that mine procedure calls for the safety committee to discuss any safety problems with their supervisors, and if they cannot be resolved at that level, he was to be personally contacted (Tr. 136Ä139). Mr. Stovall also stated that he has a good working relationship with all of his employees, that he knows them all by name, and in the event they wish to speak with on the job they may do so by "flagging him down" (Tr. 140).

With regard to the citation for failure to have an electrical equipment lock-out procedure in place, Mr. Stovall stated that prior to January, 1986, he had no electricians on the mine payroll and all electrical work was done by contractors. However, since February, 1986, a certified electrician was hired and he is now on the payroll (Tr. 148). Mr. Stovall stated that there have never been any electrical fatalities at the mine, and that prior to January, 1986, no one ever reported to him that any electrical equipment was not turned off while it was being worked on. He confirmed that the then existing procedure when work was to be performed on any equipment was to disconnect the switch in the switch house. If an electrical problem existed, the outside electrician would disconnect the switch himself and then proceed to do the work. Since the electrician was a certified electrical contractor, Mr. Stovall assumed that "the man knew what the rules of the game were and did what was necessary to protect himself" (Tr. 149).

With regard to the burned out motors observed by the inspector, Mr. Stovall stated that they did not all come from his operation, and that some were either purchased from other operators, or obtained from some of his other operations at the plant site (Tr. 150).

Mr. Stovall stated that he had problems in January, 1986, because his equipment superintendent Don Joines suffered a heart attack and was off the job for about 5 months, and he was not on the job during the February, 1986, compliance inspection. He also stated that the citations which were issued in January were discussed with the inspector and Mr. Joines and crushing foreman Burdette Fox, and not with him. He discussed them with the inspector during his subsequent inspection in February 26 (Tr. 152).

Mr. Stovall stated that after the citation was issued, he immediately purchased locks, and the four or five people who had the ability and skills to perform electrical work were told to use the locks. The locks were available and "laying there in the switch house" in February, and he had no idea why they were not being used. He reiterated that the electrician and switch house operator were told to use them (Tr. 153). He confirmed that the prior oral instructions to use the locks was reduced to writing to abate the violation, and that this was accomplished by typing a two-sentence memorandum advising personnel to use the locks when they worked on electrical equipment, and the memorandum was taped to the wall of the switch house (Tr. 153).

With regard to the burns suffered by Mr. Fox, Mr. Stovall stated that his injuries had nothing to do with the lack of a lock-out since the injury "wasn't past the switch" and "he was injured behind the switch when the electricity in the box itself arced and burned his hands." Mr. Stovall was of the opinion that any lock would be "absolutely useless" in that incident. Mr. Stovall stated that at no time during prior inspections was he ever told that the lock-out procedures were inadequate (Tr. 154).

On cross-examination, Mr. Stovall stated that the work being performed by Mr. Fox at the time of his injury was not work typically performed by him, and that the work should have been performed by someone else because it was union classified work. Mr. Stovall identified the individuals who were told to use locks as Mr. Fox, the secondary plant operator who "is the guy that pushes the buttons up there," Tim Rogers, an electrician, and two welders who sometimes assisted but did not do electrical work. Mr. Stovall stated that all of these individuals acknowledged to him that they were aware of the fact that locks were provided in the switch house. He confirmed that the secondary crusher operator, and others in similar jobs, would have reason to turn on and off electrical equipment in order to perform mechanical work (Tr. 155Ä156).

Mr. Stovall confirmed that sometime in 1985, the secondary crusher operator was involved in an electrical accident at the plant, and while he was not sure, he indicated that the individual suffered burns to his hands similar to the incident involving Mr. Fox (Tr. 156).

Section 104(a) Citation No. 2657373, issued on January 8, 1986, cites a violation of 30 C.F.R. 56.9003, and the cited condition or practice is described as follows:

> The Michigan 275 front-end loader had several defects which affect the safe operation of the loader; (1) the front windshield was cracked and broken which affect the operator's vision. (2) The back-up alarm provided on the loader was not functioning, the view to the rear was obstructed, (3) the loader did not have an operable emergency brake. The brake would not function when tested, (4) the primary braking system was slow to stop the loader when tested, in an emergency condition the operator might not be

able to stop in time, (5) the loader was not provided with a fire extinguisher.

Inspector Shanholtz stated that he issued the citation after finding that the front-end loader in question had "quite a few defects that affected safety." He stated that the front windshield was cracked, broken, and shattered so much that it would impair the operator's vision. He determined this by leaning into the operator's cab and looking through the windshield (Tr. 75). He also determined that the backup alarm was not functioning in that when the operator put the loader in reverse, the alarm would not come on (Tr. 77). He also determined that the loader emergency brake was inoperable. He had the operator test the lever operated hand emergency brake by applying it and then putting the loader in gear, and the brake would not stop the loader (Tr. 77). He also determined that the primary braking system on the loader "was slow" and that it took "more than the usual length of area to stop the loader." He had the operator test the brakes on a flat surface by putting it in both forward and reverse gears, and in each case "the unit was slow to stop" (Tr. 78). He also determined that the loader did not have a fire extinguisher (Tr. 78).

Mr. Shanholtz stated that the loader was operated throughout the mine property in the stockpile area, around the jaw crusher at the primary plant, as well as at the secondary plant area. The loader was also required to cross a state highway separating the primary plant area from the secondary plant area, and he observed the loader being used in both areas (Tr. 78Ä79). He stated that the loader was used to load customer trucks at both plants, and it was used at the primary crushing area and the stockpile. He described the traffic on the highway on the day of his inspection as "light to medium," and the traffic around the other plant areas where the loader operated as "quite a bit" (Tr. 79). Except for one curved road which turns at the jaw crusher, the loader operator's visibility would not be limited by the road conditions at the other locations where it travelled (Tr. 80Ä81).

Mr. Shanholtz stated that when he returned to the mine on February 26, 1986, he determined that the loader had no service brakes. However, the windshield, emergency brake, and the back-up alarm had been repaired, and a fire extinguisher had been provided (Tr. 83). He stated that sometime between January 7, when he first issued the citation, and his return on February 26, the primary brakes had failed. He observed the loader in operation on February 26, loading

trucks at the riprap plant on the primary side of the highway. He believed that repairs were made by installing a new head on the braking system air compressor, and he further believed that this accounted for the weakness of the braking system when he first inspected the loader, and for the total loss of brakes when he returned (Tr. 84).

On cross-examination, Mr. Shanholtz stated that it would take the loader approximately 50 feet before it would stop when he had the operator test the brakes on January 7. He also indicated that the loader worked "all over the plant, wherever it was needed," and not just on flat surfaces (Tr. 87Ä88). He had no knowledge that the state highway department had issued a permit allowing the loader to cross the state highway at the crossover in question, and he acknowledged that a sign was posted at that location warning of equipment crossing the road (Tr. 89). He also indicated that during the general operation of any loader, the bucket is raised or elevated off the ground to allow free movement, and that the raising of the bucket does "prevent vision of what is out there" (Tr. 89Ä90). Mr. Shanholtz stated that while the bucket on the loader in question was not completely up in the air, it is raised enough so that the view directly in front of the loader is obstructed (Tr. 90). He did not know whether the raised bucket would be contrary to or consistent with the manufacturer's recommendations for loader travel with a loaded bucket (Tr. 90).

Mr. Shanholtz stated that the loader operator who was operating the loader on February 26, when he next returned to the mine advised him that nothing had been done to repair the brakes since he first issued the citation on January 7, and this is what prompted him to issue a section 104(b) order (Tr. 93). Mr. Shanholtz stated that the operator told him that he had verbally reported the fact that the loader had no brakes on February 25, the day before his return to the mine, and that his report was made to the acting maintenance superintendent Tom Nelson (Tr. 94, 96). Mr. Shanholtz confirmed that the gist of the citation which he issued on January 7, lies in the fact that the loader had inadequate brakes which would not completely stop it, and a totally inoperative hand brake (Tr. 97).

Mr. Stovall stated that the cited front-end loader was used to load "over-the-road trucks out of the stockpile, trucks that haul up and down the public highways." These trucks were used by commercial purchasers of rock, and he estimated that the loader would be used to load 100 trucks a day. At no time prior to January 6, 1986, did he ever receive

any reports that the loader was running into any trucks, and no supervisor or the safety committee ever report to him that there were problems with the brakes (Tr. 162). Mr. Stovall confirmed that he has a state permit to cross highway 171 with his equipment, that there are three designated crossings, and warning signs are posted north and south of the highway warning motorists of equipment crossing the highway (Tr. 163). He stated that the highway leads mainly to the quarry, that it is not highly travelled, and he estimated that three or four cars an hour may pass the property on the highway (Tr. 164).

Mr. Stovall described the haul roads and entrances and exists to the mine property, and he estimated that from the two north crossing, one can see traffic for approximately a half mile up the highway, and from the south crossing, one can see for a quarter of a mile (Tr. 165). He confirmed that the loader crosses the road, but that its operation is limited to the stockpile area loading material out of the stockpile, and it does not operate throughout the quarry. When the loader travels or crosses the road, the bucket is approximately 6 inches or a foot off the ground, or just high enough to clear the ground, and if it were in the air it would be top heavy. He has operated a loader, and while seated high in the cab over the bucket with the bucket raised as described, "you can absolutely see everything in front of the bucket." He has never had a moving vehicle accident at the mine (Tr. 166Ä167).

Mr. Stovall stated that he first learned that the loader brakes had totally failed in February when he went to the quarry and met the inspector. During the January inspection, he learned that the loader had been cited for "slow brakes" and the lack of an emergency brake. However, he believed that the emergency brake had been repaired and the brakes adjusted prior to February 26, and while he assumed that the loader stopped quicker after the brake adjustment, he did not personally test brakes, but believed that attention was given to the braking system after the January inspection, and some of the work may have been done before Mr. Joines had his heart attack (Tr. 168). Prior to the February inspection, a compressor head which generated air and controlled the braking system had blown and it was promptly replaced (Tr. 169).

With regard to the inspector's assertion that he was told that the brake condition had been reported a day before the February 26 inspection, Mr. Stovall stated that he could not confirm this. He stated that he spoke with two mechanic's helpers who did not admit that the loader operator had reported the lack of brakes and simply got into the loader and

started work. Mr. Stovall stated that "the first time we knew that he had no brakes was when the inspector stopped him and tested him" and shut the machine down. Mr. Stovall denied that anyone told the loader operator that he had to operate the loader, and stated that two spare machines were available that day. The safety committee had not reported the condition (Tr. 168Ä169).

On cross-examination, Mr. Stovall confirmed that the safety committee has the authority to shut a piece of equipment down if it believes it constitutes an imminent danger. To his knowledge, this has never been done (Tr. 170). He conceded that the loader could also have been operating in the area of the riprap plant since that is a stockpile area, and he confirmed that there are 12 or 14 stockpiles of different sized stones at difference locations at the mine (Tr. 171). Mr. Stovall stated that he learned about the brakes being repaired on the loader after the January inspection after reviewing the citation which was sent to his office by the scaleman after it was given to him by Mr. Joines and Mr. Fox (Tr. 174). Mr. Stovall could not recall any posted speed limit signs on the mine property (Tr. 175).

Donald Joines, respondent's equipment superintendent and supervisory mechanic, stated that his responsibilities include the maintenance of all equipment at the mine site, but do not include anything connected with the electrical operation of the plant. He confirmed that until his heart problem on February 8, 1986, he helped do the maintenance work in addition to his supervisory work, and since that time "I just oversee now" (Tr. 191Ä193).

Mr. Joines stated that prior to January 8, 1986, no one reported any problems with the emergency brake or primary braking system on the Michigan 275 end loader, and no report was made that the loader was not stopping while it loaded trucks. He was not aware of any customer complaints that the loader had ever run into any trucks, nor was he aware of any damage claims in this regard. Mr. Joines confirmed that he was not with the inspector when he tested the loader, did not observe him test it, and he did not know how slow it stopped (Tr. 203). After the inspection, parts were ordered to repair the emergency brake, and new pads were installed and the brake was adjusted. The primary brakes were adjusted and cleaned up, and he estimated that repairs were completed within 3 or 4 days after the citation was issued. The brakes were working before he left work because of his heart problem, and he stated that they failed after this time

because he tested them to make sure the loader stopped (Tr. 204Ä205).

Mr. Joines stated that while the loader is loading from the stockpile, the operator can see over and through the bucket as it is raised and lowered, and that while travelling for a distance, such as across the state highway, the bucket would be almost to the ground so as to allow the operator to see in front of him, and the loaders are never operated with the buckets raised in such a position to obstruct the operator's vision (Tr. 206).

Mr. Joines stated that the terrain over which the loader operated was virtually level, although there are "a couple of hills, small grades." Other than the trucks being loaded, there are no other vehicles in the area where the loader is loading, and normally, other than a supervisor, people would not be walking around where the loader is loading. The operator can see approximately one-half a mile down the state highway at the first crossing, and a little less at the other crossing. In the event of a total brake failure, the operator would "slap that bucket to the ground" to stop it, and it would stop "so fast it will throw you out of the cab." This would be the case while going forward or backward with the loader, and if the bucket were loaded, it would stop faster (Tr. 206Ä207).

On cross-examination, Mr. Joines stated that dropping the bucket to stop a loader is not a permissible alternative to brakes, but if the brakes completely fail that may be the only reasonable alternative (Tr. 208). Mr. Joines agreed that the loader may load 100 trucks over a normal 8Ähour work shift, and that the loader may cross the state highway 20 to 25 times a day (Tr. 209). He confirmed that the air compressor head is constructed of aluminum and one cannot predict when one will fail and "it just happened" (Tr. 210).

Section 104(a) "S & S" Citation No. 2657377, issued on January 8, 1986, cites a violation of 30 C.F.R. 56.9001, and the cited condition or practice is described as follows: "An equipment inspection, check-off list was not being utilized at the Greenville Quarry. Equipment operators have known of defects on equipment without reporting them. The inspection list shall be kept for 6 months."

Inspector Shanholtz confirmed that he issued the citation after determining that equipment operators were not utilizing any equipment checkoff lists to report equipment defects.

Mr. Shanholtz stated that during the course of regular inspections he had found a lot of equipment defects in the maintenance of the respondent's rolling stock which had not been reported, and he gave the respondent until January 21st to initiate a procedure to insure that such lists were made available to the equipment operators and used to report defects. Mr. Shanholtz stated further that section 56.9001 requires that such records recording defects be kept on file at the mine office for a period of 6 months. When he asked to review the records, he found that none were on file at the office, and none were filled out and turned in by the operators (Tr. 98).

Mr. Shanholtz stated that no one advised him of the existence of any union safety committee, and he saw no evidence of any union safety reporting procedure in existence (Tr. 99). He stated that he informed the respondent's representatives Donald Joines, Tom Nelson, and Burdette Fox that he was issuing the citation because of the lack of checkoff lists. At that time, Mr. Joines advised him that he had the lists, and he opened a cabinet next to his desk and Mr. Shanholtz observed "several stacks of unused checkoff lists" (Tr. 100).

Mr. Shanholtz stated that when he returned to the mine on February 26, he found that the checkoff lists were not being used and that the respondent had not instructed the employees in their use, and this prompted him to issue a section 104(b) order for noncompliance (Tr. 100). Mr. Shanholtz confirmed that he found reportable defects affecting safety on both January 8, and February 26, which should have been found during the inspection of the equipment, but that no reports had been filed. He stated that no one from management told him of any existing procedure for reporting any safety defects (Tr. 100).

Mr. Shanholtz stated that his finding that it was "reasonably likely" that a fatality would result from the lack of a reporting procedure was based on the fact that he was finding a large amount of equipment defects, and had the checkoff lists been utilized, it was his belief that many of these defects would have been corrected. He stated that the equipment operators were not supplied with the lists, nor were they instructed in their use, and he believed that such instructions should be a part of any checkoff list procedure (Tr. 101). Mr. Shanholtz stated that even if the respondent supplied the lists to the equipment operators, the fact that they were not used would still prompt him to issue a citation for a violation of section 56.9001 (Tr. 102). Mr. Shanholtz believed that the lists were not utilized because equipment

operators were aware of defects on equipment and did not report them (Tr. 104Ä105).

On cross-examination, Mr. Shanholtz was asked whether or not he made any inquiry of the equipment superintendent or anyone else in the mine office as to what had been reported to them and what was done about it. His response was as follows at (Tr. 106):

> A. I talked to just about all of the operators on that property, of mobile equipment. And I was informed by them that these defects had existed for a long time, that they were told to operate the equipment or else.

Mr. Shanholtz stated that he would have accepted any informal written record of equipment being checked and defects being reported (Tr. 110). He stated further that he asked maintenance superintendent Donald Joines whether or not any reporting system or records were being kept, and Mr. Joines simply opened a cabinet door and showed him the supply of checkoff lists, but he did not produce any list which had been turned in (Tr. 111). Mr. Shanholtz suggested that the equipment operators did not report equipment defects because they were intimidated (Tr. 114).

Mr. Shanholtz confirmed that he abated the order after the respondent posted written procedures instructing equipment operators as to the procedures for the use of the checkoff lists (Tr. 114). He confirmed that the lists were being used (Tr. 116). He also confirmed that the respondent was previously cited in 1985 for not having any checkoff lists, and that was the reason why it had them at the office (Tr. 116).

Mr. Stovall described the equipment defects reporting procedure in place at the time of the January inspection as follows (Tr. 175Ä176):

> A. Every employee on the job knew that Don Joines was the equipment superintendent and he was totally in charge of the equipment. Any equipment defects were reported by these employees to Don Joines.
>
> Q. Were there, in fact, reports?
>
> A. Yes.

Q. How were those reports logged?

A. Don would note the reports himself on his caterpillar calendar, or whatever it was, as they were reported to him.

Q. A calendar hanging on the wallÄis that what you're speaking ofÄor on a desk or someplace?

A. I think it was his desk calendar. It was a desk calendar.

Q. Then would safety committee people report this or any employee report this, or how was it reported?

A. It was reported verbally by the safety committee or the individual employees. And, of course, being around myself, too, I have discussedÄnot what I would call equipmentÄnecessarily safety, but maybe a EUC. Engine doesn't have enough power. The operator might tell me, "I need more power out of his engine." and I'll say something to Don about it. But it's all verbal though.

Q. Now, that system, how long had it been in effect?

A. Ever since I, you know, could remember. We tried to keep upÄnot only from a safety standpoint, but from a maintenance standpoint, we tried to keep up with our equipment defects the best we could.

Mr. Stovall stated that the procedure he described was in place during prior MSHA inspections. He indicated that the verbal system of reporting defects had been accepted on previous inspections, and while the checklist forms were available, he found that the verbal system worked better than any written system (Tr. 177). He stated that after speaking with the inspector after the February inspection, "we was more or less ordered to go to the checkoff system," and he complied because "that is what it took to satisfy the inspector" and not because it was a better system (Tr. 177). In response to further questions, Mr. Stovall stated as follows (Tr. 181Ä183):

JUDGE KOUTRAS: * * * But in this particular case, Mr. Stovall, obviously, the inspector found absolutely no record keeping at all and that is what prompted him to issue the citation.

THE WITNESS: Well, the records were being kept, because I discussed with Don Joines after the January inspectionÄand they were not being kept to suit him, but other inspectors had accepted them as acceptable when Don showed them the calendar.

****

On January 9 when the inspector issued this citationÄon January 8Ädid you have check lists, printed check lists?

THE WITNESS: We had printed check lists in the storage cabinet at Greenville Quarries, yes, but we were not using them.

JUDGE KOUTRAS: Let me ask you this. Aren't the individual equipment operators required to at least walk around their equipment and give it a preshift examination or at least check it before they get in and operate it?

THE WITNESS: Yes, there are and another problem we had with two or three of our operators, they couldn't read or write. So a check list wasÄnumber one, they couldn't fill it out. Number two, they didn't know what they had.

JUDGE KOUTRAS: Were these particular check lists for that purpose, for the ones that were literate?

THE WITNESS: No. It had to be verbal with them.

JUDGE KOUTRAS: The ones that could read and write, I'm saying. In other words, did you use these check lists for anything?

THE WITNESS: We tried them one time, but then went away from them because we felt like they were not working.

JUDGE KOUTRAS: In other words, you had this supply of check lists you had used before the inspector here came in on January 8.

THE WITNESS: Right.

JUDGE KOUTRAS: But you stopped using them because you felt they didn't work.

THE WITNESS: Right.

JUDGE KOUTRAS: The verbal system worked better.

THE WITNESS: That is right.

JUDGE KOUTRAS: Were you there when the inspector issued this citation on January 8?

THE WITNESS: No.

Donald Joines stated that prior to February of 1986, equipment defects were reported to him verbally, and he would write them down on a calendar. He would record the date that the condition was reported and the date that repairs were made. He stated that he maintained his records in this way after discussions with Inspector Lloyd Cloyd from MSHA's Knoxville office, and that Mr. Cloyd found this to be sufficient (Tr. 193). Mr. Joines stated that he had previously used a written checkoff list but found that system to be less effective than the verbal system because it generated "misunderstandings," and in some instances an operator would check off something and then turn in the list a week later. With the verbal system, when equipment was down, it was reported and repaired" as quick as we could repair it" (Tr. 194).

Mr. Joines explained the circumstances of the inspection conducted by Mr. Shanholtz as follows (Tr. 195Ä197):

Q. Did he question you about your reporting system for defects?

A. Yes, sir. At the time, he came in and wanted to know if I had a checkoff list,

period. I said, "Yes, sir." That is when I showed him the checkoff list.

Q. What happened then?

A. That was it. He started writing again.

Q. Did you have the opportunity to show him your calendar?

A. Well, at the time, really, I didn't.

Q. Why not?

A. Things was moving pretty fast.

Q. Explain that. That doesn't tell me anything.

A. Well, he had his pencil warmed up. I reckon he was going to keep going.

Q. Did you say, "Hey, wait a minute. I've got a calendar right here that says%y(4)27"

A. Well, really, I didn'tÄI didn'tÄyou know, I didn't really get that far. But I had the calendar there. It was there in the desk.

Q. That was the system that had been previously usedÄ

A. Yes.

Q.Äand was effective and had been approved.

A. Yes. Because this guy from out of the Knoxville

office, every time he came he wanted to see it. And, you know, and he understood what was happening and we had no problem with it.

Q. Did there get to be any heated debate between you and the inspector?

A. There was a few heated words, yes.

Q. What happened to your calendar?

A. While I was off, I guess they figured I wasn't going to make it, so they cleaned out a whole lot of stuff.

Q. You don't have your calendar today. Somebody threw itÄ

A. No. I wish I did have.

****

Q. Are you saying you didn't have the opportunity to tell the inspector about your calendar? Is that what you're saying, or you weren't allowed to?
A. I felt like I didn't have, yes.

Mr. Joines stated that the present system in use at the mine is the checkoff list. However, he still believes it is less effective than the verbal system because equipment operators may hold the lists for 3 or 4 days before turning them in, and many times 3 or 4 days pass before he sees them (Tr. 197).

On cross-examination, Mr. Joines stated that he could not remember a prior citation issued on March 13, 1985, by an inspector from MSHA's Franklin, Tennessee office because of the lack of a reporting system for equipment defects. He also denied that he had ever been advised by anyone from MSHA that his reporting system was less than adequate (Tr. 198).

When asked why he did not tell the inspector that he was using a calendar to record defects, Mr. Joines responded "maybe there was a miscommunication" (Tr. 199). Mr. Joines could not recall whether he had recorded the cracked windshield condition on the front-end loader on his calendar (Tr. 199). MSHA's counsel confirmed that Inspector Lloyd Cloud works out of MSHA's Franklin office, and she did not have a copy of the prior citation of March 13, 1985, available at the hearing (Tr. 201). Mr. Joines stated that he was not aware of any brake problems on the vehicles at the mine and none were ever reported to him (Tr. 202).

Section 104(a) "S & S" Citation No. 2657386, issued on April 22, 1986, cites a violation of 30 C.F.R. 56.4100(a), and the cited condition or practice states as follows:

Cigarette butts were observed inside the oil storage shed, on the floor. This is a posted no smoking area. A high fire potential existed in this area due to oil spillage and accumulation of oily rags, employees utilizing the oil storage area shall be instructed in the hazards of smoking in this area.

Inspector Shanholtz confirmed that he issued the citation after observing approximately five cigarette butts on the floor of an oil storage shed which is adjacent to and connected to the main outside shop. The shed is a three-sided structure, with one front opening, and it contained approximately 20 55Ägallon drums of 10 and 30 weight oil, and some hydraulic fluid. The shed area is a posted no-smoking area, and the floor area was saturated with oil spillage to the point where one could smell it and leave footprints in the cement floor. Also present were oily rags and paper, and litter. The butts were fresh, and he did not believe they were there long since they were not soaked in oil (Tr. 119Ä120).

Mr. Shanholtz stated that he had previously cited the area for not having a "No Smoking" sign posted, and had previously discussed the matter with either Mr. Joines or Mr. Burdette (Tr. 120)

Mr. Shanholtz stated that the oil stored in the shed was a Class II combustible liquid which emitted a vapor at 100 degrees. In his opinion, a thrown cigarette, or one which was not extinguished properly, could have ignited any vapor and started a fire. He also believed that a "flash fire" could occur or propagate because of the oil spillage and saturation, and the only means of escape would be out of the front of the shed (Tr. 121Ä122). His assumption that someone had been smoking was based on his observation of the cigarette butts (Tr. 122Ä123). He found no matches anywhere (Tr. 123).

Mr. Shanholtz stated that no employees are regularly assigned to the shed area, and employees simply come and go from the area while servicing their vehicles (Tr. 124). Abatement was achieved by posting a letter warning employees about smoking in posted "No Smoking" areas (Tr. 126).

On cross-examination, Mr. Shanholtz confirmed that the oil was stored on both sides of the inside of the shed, and that the large front opening was not obstructed. He observed people coming and going to service their vehicles, and he

observed no one smoking (Tr. 128). He did not believe the cigarette butts were tracked in, blew in by the wind, or dumped in from another area. Since they were fresh and were located inside the middle of the shed, he believed they were extinguished where he found them by someone who had been smoking (Tr. 130).

Mr. Shanholtz confirmed that he also issued a citation on April 22, 1986, for a violation of section 56.4102, because of spillage and leakage of flammable or combustible liquid in the same shop were he found the cigarette butts (Tr. 131Ä132). MSHA's computer print-out of prior violations, exhibit PÄ3, reflects a prior violation of section 56.4100(b), issued on January 7, 1986, for smoking in an area where flammable or combustible liquids are stored or handled, but Mr. Shanholtz could not recall the details of that citation (Tr. 132).

Mr. Stovall confirmed that a large "No Smoking" sign was posted at the oil storage shed in question and that he has never seen anyone smoking in the shed. He assumed that all employees understood the posted sign. He described the shed as a "room" located behind the metal shop building, and he stated that the south end is composed of doors which provide a 20Äfoot opening when they are opened. He stated that all employees have access to the shed while obtaining oil, and they park in a circular roadway that goes around the shed and simply walk in to get what they need. Mr. Stovall confirmed that smoking is prohibited only in posted areas, and he could not explain the presence of the cigarette butts on the floor (Tr. 188Ä189).

Mr. Joines stated that he has never observed anyone smoking in the oil shed, and he had no knowledge as to how the cigarette butts got there (Tr. 210Ä211). He confirmed that he was not at work when the citation was issued and that he had installed the "No Smoking" sign (Tr. 211Ä212).

DOCKET NO. KENT 86Ä134ÄM

Section 107(a)Ä104(a) "S & S" Order No. 2657189, issued on February 26, 1986, cites a violation of 30 C.F.R. 56.9003, and the cited condition or practice is described as follows:

> The Euclid 35 ton haul truck, S/N 69035 did not have a functional emergency brake. The emergency brake had been cited on 1/8/86 during the course of a regular inspection. Upon this compliance inspection it has also

been found that the rear brakes also do not operate on the haul truck and have not operated for several years. The fluid reservoir that provides braking fluid to the rear brakes was empty with scum like material in the reservoir, indicating that fluid had not been added for some time. The haul truck shall be parked until such time that the primary and emergency brakes are properly repaired.

Section 107(a)Ä104(a) "S & S" Order No. 2657190, issued on February 26, 1986, cites a violation of 30 C.F.R. 56.9003, and the cited condition or practice is described as follows:

> The Euclid 35 ton haul truck S/N 69036 was observed being operated without adequate brakes. The primary braking system would not stop the haul truck when tested. The emergency brake when tested would not hold the truck. When inspected it was found that the haul truck had only 1 functional wheel brake. Upon inspection of the fluid reservoir to the braking system it was found that the reservoir to the rear brakes were empty. The hoses leading from the reservoir to the brakes had been disconnected. Dirt and oil on the hose connections indicate that the hoses had been disconnected for sometime.

Inspector Shanholtz confirmed that he cited haul truck No. 69036 because the emergency brake would not hold and the primary braking system or service brakes were also not functioning. When the truck was tested on a decline going from the primary crusher down into the pit area, he told the driver to put it in low gear and to stop and put the emergency brake on. The driver began driving down the incline but he could not stop the truck and had to put it in reverse gear to stop. The inspector checked the braking system and found that it had only one functional brake on the right front.

Inspector Shanholtz stated that he also followed the same testing procedure with the No. 69035 truck and found that "it was slow to stop" when driven down the incline." This truck had been previously cited on January 7, 1985, for lack of a functional emergency brake, but he did not check the service brakes at that time because the driver told him that they were working, and he took him at his word.

Inspector Shanholtz described the truck braking system, and stated that upon visual inspection of both trucks, he found that the rear braking system reservoirs were empty and the hoses had been disconnected. Dirt had built up on the hydraulic hoses, and there was a thick "scum-like" substance in the hydraulic reservoirs which led him to believe that the brakes had not been functional for some time. He estimated that the brakes had been in that condition for a year (Tr. 6Ä12).

Referring to petitioner's photographic exhibits PÄ4, at pages 5 and 6, the inspector described the areas and service roads over which these trucks were operated, including a public highway, and he estimated that the trucks crossed the highway on an average of four times a day. He confirmed that the trucks operated primarily from the jaw crusher to the pit area, and that they travelled from 15Ä20 miles an hour over the service roads. Utility pick-up trucks and some public traffic would also be operating in these areas. The trucks were equipped with seat belts, and he cited no other truck defects during his inspection of February 26 (Tr. 12Ä14).

On cross-examination, Inspector Shanholtz confirmed that he had previously inspected both of the cited trucks during the inspection of January 7, 1985, but did not cite the No. 69035 truck for anything other than a non-functional emergency brake because he took the operator's word that the other brakes were operational, and he failed to inspect them more thoroughly (Tr. 15). During his inspection of February 26, he determined that the 69035 truck had no rear brakes, and when they were actuated during the testing there was no action on the brakes. He then traced out the lines and checked the reservoir (Tr. 17).

Inspector Shanholtz stated that the truck operator told him that he had reported the condition of the truck. He also stated that when he discussed the brake conditions with Mr. Stovall, he denied that the conditions had been reported (Tr. 17).

Kazimer Niziol, Mining Engineer, MSHA Technical Support Group, testified as to his background, education, and experience as a miner, maintenance superintendent, automobile mechanic, and prior work with a manufacturer of hydraulic braking systems. He confirmed that he has been involved in MSHA accident investigations involving haulage truck and underground equipment, and that he has discussed the braking systems on the 35 ton Euclid haul trucks in question with the manufacturer and different engineers (Tr. 23Ä25). Mr. Niziol

described and explained the braking systems on the trucks in question (Tr. 27Ä29). MSHA's counsel conceded that Mr. Niziol did not inspect the cited trucks in question, and that his testimony generally covers the truck braking systems (Tr. 28, 30).

John Stovall confirmed that on February 26, 1986, the emergency brake on the No. 69035 truck was not functional. When he checked the truck after it had been ordered out of service by the inspector, he found that the emergency brake did not work and he agreed with the inspector's finding that it was inoperative (Tr. 32). With regard to the rear brakes on that truck, Mr. Stovall stated that he spoke with the driver, Wayne Kiddinger, who informed him that when the truck was tested on the hill by the jaw crusher, it "would stop, but not fast enough to suit the inspector." Since the truck had been taken out of service, and he was instructed to take it to the shop for repairs, the truck was not tested again on the hill. When the truck was driven into the shop on a level concrete floor, the driver jammed on the brakes and the front wheels locked and skidded on the floor, but the rear wheels did not skid (Tr. 34).

Mr. Stovall stated that in his opinion, there was "approximately 50% brake on the rear wheels" of the No. 69035 truck, but that the front brakes were 100 percent. Nothing was done to repair the front brakes, but the rear brakes were repaired, and by the time the parts arrived and the work was finished, it took 3 days to complete the repair job. Mr. Stovall confirmed that there was a leak in the rear braking system, and he conceded that 50 percent of the rear brakes were not working (Tr. 35).

Mr. Stovall stated that Mr. Kiddinger informed him that he had not reported the brake conditions to anyone, and that he believed the brakes were sufficient (Tr. 35). Mr. Stovall also stated that when the brakes were applied on the level concrete floor of the shop, "he stopped quick enough that the front wheels skidded %y(3)27 the complete truck stopped just immediately, but he was on level" (Tr. 36).

With regard to truck No. 69036, Mr. Stovall stated that he checked its stopping power by having the mechanic drive it on a slight grade rock incline next to the shop, and that "the truck did hold on the hill," and that "both front wheels would scoot on the ground, the loose rock." Work was only done on the rear brakes of that truck and it was completed in 3 days (Tr. 37). Mr. Stovall could not explain why the brake hose was disconnected, and in his opinion, the disconnected

hose had no bearing on the operation of the truck. The driver of the truck, Norris Johnson, informed him that he had not reported any "bad brakes" on that vehicle (Tr. 38). Mr. Stovall confirmed that he recorded several notes concerning the citations on the face of his record copies and they were made a part of the record in this case (Tr. 38, exhibits RÄ1 and RÄ2).

With regard to the abatement work on the No. 69036 truck, Mr. Stovall confirmed that new brake shoes and wheel cylinders were installed on the rear wheels, and the hoses were reconnected (Tr. 41). He also confirmed that he did not check the emergency brake on that truck after it was cited, and had no basis for disputing the inspector's finding that the emergency brake would not hold the truck (Tr. 42).

In response to further questions, Mr. Stovall stated as follows (Tr. 42Ä43):

> JUDGE KOUTRAS: So when you get down to the bottom line on both of these citations, at least to some degree, the inspector's findings here that the truck brakes were defective was true, wasn't it, to one degree or another?
>
> THE WITNESS: They were not a hundred percent (100%), yes, sir.
>
> JUDGE KOUTRAS: They were not a hundred percent (100%).
>
> THE WITNESS: That is right.
>
> JUDGE KOUTRAS: So would you agree, then, that the brakes were less than adequate? At least the emergency brakes were less than adequate if you agree they were both inoperative.
>
> THE WITNESS: The emergency brakes on those of trucks, of course, is somethingÄthe driver might drive it for weeks and not know it wasÄ
>
> **********
>
> JUDGE KOUTRAS: What I'm saying is you at least concede that these brakes weren't a hundred percent (100%), what they were supposed to be.

THE WITNESS: That is right.

JUDGE KOUTRAS: So they were less than adequate. The standard says they have to be with adequate brakes.

THE WITNESS: My opinion of adequate brakes might be

something less than a hundred percent (100%).

Inspector Shanholtz was called in rebuttal, and he stated that his contemporaneous notes made at the time of his inspection on February 26, reflect that Mr. Kiddinger, the driver of the No. 69035 truck told him that the brakes on that truck "had been that way for years, that they had never operated and that he was told by Donald Joines never to fill the two reservoirs because the brakes didn't work. He also stated the truck was like this for approximately three years that he had worked there" (Tr. 52).

Mr. Shanholtz stated that the operator of the No. 69036 truck, Norris Johnson, told him that he too was advised by Mr. Joines not to fill the two reservoirs because they had been disconnected and the fluid would run out. Mr. Johnson also informed him that "they had been that way for several years" (Tr. 53). Mr. Shanholtz also stated that Mr. Joines told him that the operator would continually burn the emergency brakes off and that they could operate the equipment the way it was (Tr. 53).

Mr. Shanholtz confirmed that he has taken MSHA training classes covering the operation of hydraulic braking systems, and in his opinion, rear brakes which are only 50 percent operational would be inadequate to stop a truck, even though the front brakes were fully operational (Tr. 55).

Vernon Denton, MSHA Supervisory Inspector, Lexington Field Office, testified as to experience, education, and background, including work as a state mining inspector, and he confirmed that he has worked for MSHA for 17 years. Mr. Denton stated that Mr. Stovall came to his office to discuss the braking citations with him and with sub-district manager Fred Jouppery, but that Mr. Stovall did not tell him that the brakes had been repaired or were in the process of being repaired (Tr. 60Ä62).

Mr. Denton stated that Mr. Stovall told him that he had a letter from someone informing him that the brakes on the

cited trucks were adequate with the rear brakes disconnected. Mr. Denton stated that he told Mr. Stovall that he could not accept anything less than the designed brakes, and that Mr. Stovall said nothing to him about the rear brakes operating at 50 percent efficiency (Tr. 63). Mr. Denton stated that as an enforcement policy, truck brakes must be maintained as they are originally equipped by the manufacturer, and if they are not, the designed safety of the vehicle is lost. In his opinion, one cannot do away with half of the designed braking capability and expect to have a safe vehicle under all conditions. Although the vehicle may be able to operate at one mile an hour with one or two brakes, consideration must be given to the fact that the trucks are operated up and down hills during reasonable mining conditions, and in order to be adequate the brakes must be at least as safe as they were designed (Tr. 64). The fact that the trucks in question may have operated with 50 percent rear brakes over a 3Äyear period with no reported accidents is no reason for inferring that an accident will not occur with brakes in those conditions (Tr. 65). Mr. Denton stated that "adequate brakes," in terms of enforcement of the safety standard in question means brakes which are maintained to their design specifications (Tr. 65).

On cross-examination, Mr. Denton stated that he and Mr. Stovall discussed a number of matters during their meeting, including negligence and gravity, and Mr. Stovall expressed concern that he was being singled out for unusually strict enforcement (Tr. 66). Mr. Denton stated that even if the brakes were at 100 percent efficiency, this would not support a reasonable inference that one will never have an accident. However, he believed the chances were better that no accident would happen with 100 percent brakes, and that this would be a "judgment call" (Tr. 67).

Mr. Niziol was recalled, and he identified exhibit PÄ15 as a schematic drawing depicting the rear truck braking system with one set of operative lines to the rear wheel, and one set of inoperative lines to the wheel. In his opinion, if one wheel had a problem and lost pressure, the remaining two front wheels and the one other rear wheel should be able to stop the vehicle within the stopping distances established by the Society of Automobile Engineers (SAE), and that is what the system is designed to do. However, if the truck is used in that condition without being repaired, it will result in further brake abuse and the braking system will be overheating and will cause a loss of friction in the lining. While the condition may be good enough to provide a stop, it is not good for further use (Tr. 70). In his opinion, while the brakes may stop the truck on this one occasion, they

would be inadequate for continued day-to-day use (Tr. 71). The parking brake does no good for dynamic braking, and it will only hold the vehicle in a stationary position on a grade (Tr. 72).

Mr. Niziol stated that a truck with only two functional front brakes may be capable of stopping when it is first operated, but after the brakes heat up, they may not work at all due overheating of the system and that this is very common (Tr. 76).

Mr. Donald Joines was called in rebuttal by the respondent, and he denied that he ever instructed the truck drivers in question not to fill the brake fluid tanks. He also denied that he had told the drivers not to properly maintain the brakes or not to report the braking conditions. He also denied that he ever instructed the drivers to operate the trucks when the brakes did not work because to do so would damage the transmissions which are expensive (Tr. 79).

DOCKET NO. KENT 86Ä155ÄM

Section 104(a) No. 2657392, issued on April 23, 1986, cites a violation of 30 C.F.R. 56.9020, and the cited condition or practice is stated as follows:

> Adequate berms were not provided for the elevated roadway where it crosses the stream at two places in the crushing plant. Rock berms had been provided at one time but had slipped down the embankment. Haul trucks and front-end loaders utilize these crossover points.

Inspector Shanholtz confirmed that he issued the citation on April 23, 1986, after observing that the material used to berm two road crossovers of a dry stream bed that runs through the mine property had eroded and slipped down into the stream bed. There were several areas where there was either a very low berm or no berm at all. Mr. Shanholtz stated that the correct standard which should have been cited is section 56.9022, rather than 56.9020.

Mr. Shanholtz identified photographic exhibit PÄ4, page 2, as representative of the appearance of the two crossovers and the stream bed, but not the berms. The crossovers were approximately 10 to 11 feet wide, and the average width of the trucks crossing at those locations was 8 or 9 feet.

Mr. Shanholtz stated that customer trucks, and company utility, pick-up, and 22Äton stockpile trucks used the crossovers, and that the crossover shown in the exhibit was the primary crossover and heavily travelled, while the other crossover was used less. The conditions at both cited locations were the same.

Mr. Shanholtz estimated that the cited conditions had existed for at least several months. He confirmed that berms had existed at both locations at one time, but that the rocks had slipped over the bank. He identified the lower photographic exhibit PÄ4 page 2 of 11, as the rock which had slipped over the bank.

Mr. Shanholtz stated that abatement was achieved by providing more rock at the locations in question, and he confirmed that the crossovers are drawn in on the map of the main plant site, exhibit PÄ2 {Tr. 6Ä9).

On cross-examination, Mr. Shanholtz stated that the crossover shown in the photograph was approximately 15 feet wide, and that the ditch is about 8 feet deep. He confirmed that when he issued the citation he made a finding that an injury was unlikely and that the violation was not significant and substantial. He changed these findings later on April 29, 1986, when he modified the citation to reflect the gravity as "reasonably likely," and that the citation was "significant and substantial." When asked why he had changed his mind, he responded "it was simply a clerical error on my part" (Tr. 11).

Mr. Shanholtz believed that the berm conditions which he observed on April 23, were a "fairly serious and major problem." When asked why he had not cited the conditions previously during his inspections of January 8, February 26, or March 4, 1986, he responded "I have no idea. I'm human, I guess." He did not believe that the rocks which apparently slipped into the creek "just happened," and he was certain that the berm conditions had existed for several months even though they were not previously cited (Tr. 12).

Mr. Shanholtz stated that the roadway at the cited crossover locations was "elevated" at that portion where it crossed the stream bed in that there was a drop-off on both sides. The roadway at those locations was elevated above the stream bed (Tr. 15Ä17). Mr. Shanholtz believed that those elevated portions of the roadway created a hazard.

In response to further questions, Mr. Shanholtz stated that berms were required at the crossovers to prevent a vehicle from going into the stream bed and overturning (Tr. 21). He considered the fact that vehicle traffic was heavier in April when there was more production then in January (Tr. 22). He believed that any ditch over 4 feet in depth could easily cause the dump trucks or a front-end loader using the crossovers to turn over (Tr. 22).

Mr. Shanholtz stated that with the berms in place, the width of the roadway was adequate for daily truck usage (Tr. 23). The berms are constructed from whatever material is available, such as rock or fill dirt (Tr. 25).

Mr. Shanholtz stated that the three people exposed to the hazard would be the two stockpile truck drivers and the loader operator who crosses the crossover to load customer trucks or to clean up (Tr. 27). Access to the crossovers by the vehicles would depend on the direction of vehicle traffic. The flow of traffic varies, and some trucks may approach the crossovers straight across, while other vehicles could approach it at an angle or by turning into the crossovers (Tr. 28). Customer trucks also used the crossovers (Tr. 29).

Mr. Shanholtz confirmed that the width of the crossovers only allowed for one truck at a time to cross, and he made no inquiries as to the respondent's traffic procedures or controls (Tr. 29).

In response to further questions, Mr. Shanholtz stated as follows (Tr. 29Ä32):

> Q. You indicated on here that you thought that negligence was high in this case. Why did you mark it high?
>
> A. Okay. At that time, I didn't feel the crossover berm was being maintained. It had been established and had been allowed to deteriorate. The operator knew that berms were needed in that area, that they had been provided once before and that they had been allowed to deteriorate.
>
> Q. There were some berms there, weren't there?
>
> A. Partial, yes.

Q. So that is why you thought the negligence was high?

A. Yes.

Q. And you said initially the S & SÄwhen you found non S & S, it was strictly a clerical error?

A. Yes, sir.

Q. You talked to nobody on the 29th?

A. No, sir.

Q. This is not a case of your just not thinking it was S & S and then maybe your supervisor may have suggested, "Hey, this is a berm citation. This can't be non S & S."

A. No, because the citation was issued on 4/23 and the report probably wasn't issued until 4/29. So it was just a clerical error that I caught.

Q. What about the gravity part where you said initially it was unlikely and later reasonably likely, was that also a clerical error?

A. Yes, sir. That was changed due to the volume of traffic across that crossover.

Q. When did you determine the volume of traffic, at the time you issued the citation?

A. Yes, sir.

Q. And the citation of 9020, was that clerical?

A. Yes, sir.

John Stovall stated that he "paced off" the primary crossover location and found that it was 27 feet wide without the berm in place, and 20 feet with the berm. The distance across and through the crossover was 15 feet. The widest truck and end loader using the crossovers was 14 feet, and the smallest were the customer truck and pick-ups, which were 8 feet wide. He estimated that there would be 3 feet on each

side of the largest vehicle as it passed over the crossover (Tr. 34Ä36). He stated that several years ago an MSHA inspector requested him to lay a couple of rocks on each side of the roadway, and he is not aware of any truck going into a ditch since he has operated the mine from 1962 to the present (Tr. 37).

Mr. Stovall described the crossovers as a natural drainageway ditch. A drain pipe was placed in the ditch to allow water to flow through, and fill was dumped over the pipe to construct the crossover. During the prior inspections of January, February, and March, no mention was made of the ditch. The vehicles crossing the ditch travel at an average speed of 5 miles per hour, and most traffic that crosses is unloaded (Tr. 41).

On cross-examination, Mr. Stovall confirmed that the drainage ditch is cleaned out every 3 or 4 years to keep the drain tiles free of debris. He also confirmed that there is not enough clearance to permit two vehicles to pass each other over the crossovers, and this is not done (Tr. 42).

Mr. Shanholtz stated that he has observed vehicular traffic approach the crossovers from different directions, including right and left turns into and across the crossovers (Tr. 47). Mr. Stovall indicated that access to the primary crossover is by an approach of a "100 feet straight shot either side" (Tr. 48).

Mr. Shanholtz was called in rebuttal, and he stated that he had issued another citation for lack of berms over a crossover ditch by the jaw crusher, and the condition was abated. He also indicated that in that instance it was reported to him that a hydraulic hose had broken on a Euclid 35 ton haul truck and that the truck lost its steering and went into the ditch beside the haul road. However, this incident occurred "on the other side" of the location where the citation was issued, and it was not at the same location (Tr. 51).

Mr. Shanholtz stated that the "rule of thumb" for compliance with the berm standard in question is that a berm be constructed so that its height is mid-axle to the largest piece of equipment using the roadway (Tr. 52). He also stated that assuming the width of the roadway and the depth of the ditch at the crossover were as stated by Mr. Stovall, it would not change his opinion as to whether berms were required at the cited locations (Tr. 53).

Mr. Shanholtz reiterated that he observed vehicular traffic approaching and using the crossover from both directions and at different angles, and that there was no posted set traffic pattern (Tr. 53). Although he confirmed that he issued another citation for employee over-exposure to "nuisance dust" on the roadway near the secondary crushing plant, and indicated that this dust "could very well possibly" have contributed to a truck driver's visibility and could affect the gravity of the situation, he conceded that he did not consider this dust to impact on the gravity of the citation which he issued for inadequate berms (Tr. 54Ä57).

Findings and Conclusions

DOCKET NO. KENT 86Ä133ÄM

Fact of Violation

Citation No. 2657368, January 7, 1986, 30 C.F.R. 56.12016

The respondent is charged with a violation of mandatory safety standard section 56.12016, which provides as follows:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

In North American Sand and Gravel Company, 2 FMSHRC 2017 (July 1980), the judge affirmed a violation of section 56.12016, after finding that a mine operator simply removed fuses when electrical equipment was down for repairs, and had no lock-out procedure to insure that anyone working on the equipment would not be injured by someone inadvertently starting the equipment. Likewise, in Brown Brothers Sand Company, 3 FMSHRC 734 (March 1981), a violation was affirmed where it was found that an employee working on a pump deenergized the equipment by opening the power "knife" switch, but failed to lock out the switch to prevent it from being energized without his knowledge.

In Price Construction Company, 7 FMSHRC 661 (May 1985), a welder with 25 years experience lost a leg when he was injured by the rollers of a crusher he was working on. The accident occurred when the plant foreman misunderstood the welder's instructions and engaged a switch which had not been locked out and simply left in the "on" position. The plant superintendent admitted that he did not require padlocks to lock out roller switches, and the existing "lock-out" procedures was accomplished by merely turning off the generator and cutting the switches. The judge found a violation of section 56.12Ä16, and found that the company safety director admitted that he knew that a padlock had to be used on the roller switch to conform with the required lock-out procedures, and that it is a generally understood practice in the mining industry that a "lock-out" requires the use of a padlock.

Section 56.12016, requires that power switches be locked out before work is performed on any electrically powered equipment, and the locks may only be removed by the person who installed them or by other authorized personnel. In this case, the inspector found that the mine had no established lock-out procedures and the evidence establishes that no locks were available or being used to lock out the switching equipment located in the switch house. Further, the respondent has not rebutted the inspector's testimony that the quarry superintendent admitted that no locks were available to physically lock out the switches, and that the only purported "lock-out" procedure in effect called for turning off the equipment and shutting the switch house door. Although the inspector testified that several employees told him that electrical equipment was de-energized at the power source when it was worked on, they also told him that they were unaware of any established lock-out procedures.

While there is no evidence that anyone was performing any work on electrical equipment at the time the inspector noted the violation on January 7, the inspector noted some burned out motors stored in the yard and he assumed that they came from the switch house. Since he found no evidence that locks were available or used to lock-out electrical equipment, he further assumed that any prior work on the motors was done without locking out the power switches. Further, the inspector determined that motors were routinely changed out as they burn out, and that crushing and screening equipment were similarly serviced periodically, and he also assumed that this work was done without locking out the power switches.

In his posthearing brief of June 30, 1987, respondent's counsel argues that it was using independent contractors for its electrical work before hiring an in-house electrician. Counsel asserts that a lock-out policy was adopted and locks were purchased, but apparently on the occasion when the inspector was at the mine the individual doing the work did not use any locks. Counsel asserts further that the employee had been told to use a lock but failed to put it back on as required.

The citation at issue in this case is the one issued by the inspector on January 7, 1986, and the petitioner seeks a civil penalty proposal for that violation. The incident concerning the electrical work being done by an individual who did not use the locks which had been purchased by the respondent to abate the January 7, citation, occurred on February 26, 1986, when the inspector re-inspected the mine and issued a section 104(b) order. That violation is not at issue in this case, and it is not the subject of this case. Accordingly, the fact that an employee was not using a lock which had been provided on February 26, is not material to the citation issued on January 7.

The testimony and evidence advanced by the respondent does not rebut the inspector's findings with respect to the lack of a lock-out procedure mandating the use of locks to physically lock out the power switches on January 7, 1986. Mr. Stovall candidly admitted that at the time of the inspection no locks were available at the plant to lock out the switches, and only after the citation was issued was any effort made to purchase locks and make them available to service personnel. Although Mr. Stovall alluded to the fact that all prior electrical work at the site was performed by contractors who "knew what the rules of the game were and did what was necessary to protect himself," and that outside electricians would disconnect the switch itself before doing work on electrical equipment, the fact remains that respondent presented no credible evidence that any switches were ever locked out as required by the standard. With regard to the burned out motors observed by the inspector, Mr. Stovall simply suggested that not all of them came from the switch house. This suggests that some of them did.

I take note of the fact that the citation, on its face, makes no mention of the fact that locks were not provided or used to lock out the power switches in the switch house. I also note that the inspector conceded that he issued the citation because he found no written established lock-out procedure requiring the physical lock out of electrical equipment,

and not because there were no locks available to lock out the equipment.

I find nothing in section 56.12016 that specifically requires a mine operator to promulgate written procedures for locking out electrical equipment. Although one may reasonably conclude that such established procedures in writing may be a desirable safety practice, I find nothing in the standard that requires it. However, on the facts of this case where the preponderance of the credible evidence clearly establishes the total lack of locks to physically lock out the electrical equipment during maintenance work, and an inadequate system in place which simply required the turning off of equipment and simply shutting the door to the switch house, I conclude and find that a violation of section 56.12016 has been established. Although the inspector confirmed that the respondent had a procedure for de-energizing the power source by turning off electrical equipment which was being worked on, this only establishes possible compliance with the first sentence found in section 56.12016. It does not comply with the requirement that power switches be locked out while the work is being performed.

The citation IS AFFIRMED.

Citation No. 2657373, January 8, 1986, 30 C.F.R. 56.9003

The respondent is charged with a violation of section 56.9003, which provides as follows: "Powered mobile equipment shall be provided with adequate brakes."

The inspector testified that when the loader operator tested the loader emergency brake in his presence by applying the brake while the loader was in gear, the brake would not stop the loader. The operator also tested the primary braking system on a level surface with the machine in gear, and the inspector found that while operated in both forward and reverse gears, the loader "was slow to stop" and that it took more than the usual length of area to stop the loader.

In its posthearing brief, at page 2, the respondent maintains that the loader operator did not complain about the condition of the windshield, and that the inspector never got into the operator's cab to determine whether there was any problem with operating the loader with a cracked windshield. Further, the respondent points out that it received no complaint from union safety committee concerning the condition of the loader, and that it operated on level ground with "adequate" brakes notwithstanding the inspector's findings. At page 3 of his brief, respondent's counsel states that the inspector had previously inspected the loader 2 or 3Ämonths

prior to the time he issued the citation, but failed to cite it for any defects. Counsel suggests that the inspector's assertion that the equipment had operated in this condition for years defies credibility because he failed to cite it in the past.

In this case, the issue presented is whether or not the petitioner has presented credible evidence to support the inspector's findings that the cited loader had inadequate brakes. Although the condition of the windshield, the inadequate back-up alarm, and the lack of a fire extinguisher may have been contributory factors to the hazard presented, the gist of the violation lies in the inspector's finding that the brakes were inadequate, and the respondent's counsel agreed that this was the case (Tr. 97). Thus, the condition of the windshield is not particularly relevant to the question of a violation of section 56.9003, for inadequate brakes.

I believe that counsel has confused the inspector's testimony with respect to any assertion that the cited condition may have existed for years. I believe that the inspector's testimony concerning any pre-existing brake conditions came about during his testimony regarding two citations that he issued for inadequate brakes on two haulage trucks (Docket No. KENT 86Ä134ÄM). In any event, such testimony goes to the question of negligence, and not to the question as to whether the brake condition found by the inspector constitutes a violation of the cited standard. Further, the fact that the safety committee failed to report any defective brake condition is irrelevant to the question of whether a violation has been established.

On the facts here presented, the respondent has not rebutted the credible findings by the inspector with respect to the condition of the brakes on the cited loader in question. Mr. Stovall stated that he first learned about the condition of the loader brakes when he reviewed a copy of the citation after it was issued. Equipment superintendent Joines confirmed that he was not with the inspector when the loader was cited, and he had no knowledge as to how slow it may have stopped. However, he confirmed that new pads were ordered and installed to repair the emergency brakes, and that the primary brakes were adjusted and cleaned.

I conclude and find that the credible evidence adduced by the petitioner establishes that the emergency and primary brakes on the cited loader were less than adequate when the inspector inspected the loader and issued the citation. I

further find and conclude that a violation of section 56.9003 has been established, and the citation IS AFFIRMED.

Citation No. 2657377, January 8, 1986, 30 C.F.R. 56.9001

The respondent is charged with a violation of section 56.9001 which provides as follows:

> Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

The second sentence of section 56.9001 requires that equipment defects affecting safety be reported to, and recorded by, the mine operator. The citation charges that the respondent's equipment operators knew of equipment defects but did not report them, and that the respondent failed to utilize an "equipment check-off" list for the reporting and recording of such defects.

I find nothing in section 56.9001, that requires a mine operator to have any formalized written check-list system for the reporting and recording of equipment defects. The standard simply requires the pre-operational inspections of equipment, and the reporting and recording of any defects noted during that inspection. I take note of the fact that MSHA's Metal and Nonmetal Mine Safety and Health Inspection Manual, 1981 Edition, which contains guidelines and applications of the standards found in Parts 55, 56, and 57, Title 30, Code of Federal Regulations, makes no reference to any particular methods or systems which must be used for reporting and recording equipment defects.

In United States Steel Corporation, 6 FMSHRC 1435 (June 26, 1984), the Commission affirmed a judge's finding of a violation of the identical standard at issue in this case. The facts in that case reflect that the mine operator was using an oral system of reporting equipment defects, but had failed to record an oral report made with respect to certain brake defects on a truck. The violation was affirmed because the evidence established that a defect had in fact existed,

but that the person who received the oral report forgot to record it and act on it, and not because of the failure to utilize any particular written check-list form.

In the instant case, there is support in the record for a reasonable conclusion that the inspector believed that section 56.9001 required a mine operator to utilize a formalized written equipment check-off list for the purpose of reporting equipment defects. The inspector readily admitted this during the course of the hearing. He testified that "I issued a citation on 1/8 for failure to have an operator's checkoff list utilized by the company. And I gave them till the 21st to initiate a procedure that they would make the list available and utilize it" (Tr. 98). And, at transcript page 99, where he states that "when I issued the citation and Donald Joines was in the office there and there was Donald Joines, Tom Nelson and Burdette Fox. I told them at that time I was issuing a citation for the checkoff list." He also confirmed that while the respondent had the forms available and therefore "satisfied the first requirement," they were not being used (Tr. 103).

In addition to the inspector's testimony, the record establishes that the inspector subsequently issued an order after finding that the check-off lists were not being used, and it was terminated, and the violation abated, only after it was established to the inspector's satisfaction that the respondent had established a procedure for the use of written check-off lists and issued written instructions to its employees as to their use.

During the hearing, it was suggested that the respondent had the written check lists available because it had been previously cited for a violation of section 56.9001, on March 13, 1985. However, no evidence was forthcoming with respect to this prior violation, and petitioner's counsel did not produce a copy of the citation. Respondent's evidence suggests that as a result of the prior citation, a supply of written formalized check-list forms were obtained but were not used because they proved to be ineffective. It also suggests that the respondent began using an oral system for reporting and recording equipment defects on a desk calendar kept in the equipment supervisor's office, and that another MSHA inspector somehow approved of this practice as acceptable compliance with section 56.9001. However, neither party called that inspector to testify.

In further clarification of his interpretation of section 56.9001, the inspector testified that he would have

accepted any written proof that equipment defects were being reported and that such a reporting or recording system need not be formalized (Tr. 110). He confirmed that when he inquired of the respondent and asked for proof that defects were being reported and recorded, nothing was shown to him in writing (Tr. 117). In this regard, Mr. Stovall admitted that when the citation was issued on January 8, 1986, printed check-list forms were available and stored in a cabinet in the mine office but they were not being used. Mr. Stovall confirmed that he was not present when the inspector issued the citation and did not discuss the matter with him.

Respondent's equipment supervisor Donald Joines also admitted that while the check-off lists were available on January 8, 1986, they were not being used. He contended that the inspector simply asked him if he had such a list, and that he showed him the blank printed forms. Even though Mr. Joines claimed that he had his "calendar check-list" available at the time of the inspection, he did not tell the inspector about it and did now show it to him. Mr. Joines at first testified that he did not believe that the inspector gave him an opportunity to explain about his calendar system and insinuated that the inspector was pre-disposed to write the citation, but later testified that there may have been some miscommunication between him and the inspector and that they had some "heated words" over the citation. Mr. Joines could not produce the purported calendar in question during the hearing, and he confirmed that it was destroyed during the time he was off the job recovering from heart surgery, and Mr. Stovall also confirmed that this was the case.

The respondent has produced no evidence as to what may have been recorded on the calendar, nor has it produced any credible evidence or proof to establish that equipment operators were reporting equipment defects or that such reported defects were being recorded so that they would be available for inspection during the required 6Ämonth period pursuant to section 56.9001. I note that neither party in this case saw fit to call any of the equipment operators to testify in this case. I also find it amazing that the respondent would destroy the purported calendar which could have provided proof that equipment defects were being reported and recorded, and that Mr. Joines did not even mention it or show it to the inspector at the time the citation was issued.

As a condition precedent to establishing a violation of section 56.9100, the petitioner must present some credible evidence that the kinds of equipment defects required to be

reported and recorded so that repairs could be timely accomplished in fact existed. Some proof must be forthcoming that defects affecting safety existed but were not being reported or recorded prior to the time the inspector issued the citation on January 8, 1986.

The petitioner's proof that prior reportable equipment defects existed consists of the inspector's testimony that the condition of the equipment as he found it indicated a need to use a check-list, his assertion that since he found many defects which needed attention during his inspections, it was obvious that they were not being reported, recorded, or corrected, and his testimony that he talked to "just about all of the mobile equipment operators on the property and was informed that these defects had existed for a long time" (Tr. 106; 98; 101). The inspector also testified that even though the check-list forms were available to the respondent on January 8, 1986, they were not being used because the equipment operators were not reporting any equipment defects (Tr. 105).

As indicated earlier, none of the equipment operators were called to testify in this case. It seems to me that these operators would be the best evidentiary source concerning equipment defects, the length of time that they existed, and the fact that they were being reported or not reported, recorded or not recorded, or ignored. The inspector suggested that the equipment operators were intimidated and instructed to operate the equipment with known defects. However, there is a total lack of evidence in the record to support these conclusions. Further, since such charges raise the possibility of section 110(c) violations, it seems to me that if the inspector had any evidence that operators were instructed to operate equipment with known safety defects that were in violation of any mandatory safety standards, he had an obligation to report this so that MSHA could pursue the matter further. There is no information that this was done. Although petitioner's counsel expressed some reluctance about identifying the source of this information, she could have subpoenaed the equipment operators to testify about their knowledge of any safety defects, but she did not do so.

Another available evidentiary source to establish the existence of reportable equipment defects prior to the issuance of the citation on January 8, 1986, is MSHA's computer print-out listing prior violations. However, petitioner's counsel did not pursue this during the hearing, and she failed to provide any further information with regard to the prior violation of section 56.9001 which was issued on

March 13, 1985. Further, no testimony was elicited from the inspector as to his knowledge of these violations, whether or not he issued them, or whether they involved equipment safety defects required to be reported and recorded pursuant to section 56.9001. Although the inspector did refer to his observation of equipment operating with no brakes, that notation was made on his subsequent order of February 26, 1986, and he indicated that they were observed "during this compliance inspection." I take this to mean the inspection of February 26, 1986, which was subsequent to the January 8, 1986, inspection.

A review of MSHA's computer print-out, exhibit PÄ3, listing the respondent's prior violations, reflects a total of 49 violations during the period April 23, 1984 to April 22, 1986. Seventeen of these violations were issued subsequent to January 8, 1986. Eight were issued in 1984 and 1985, more than 6Ämonths prior to January 8, 1986. Six listed violations are the subject of the instant proceedings. With the exception of the instant citation, three of these violations were issued subsequent to January 8, 1986. One was issued on January 7, 1986, and did not concern equipment defects, and one was issued on January 8, 1986, and it concerns the defects noted on the front-end loader which was cited on violation No. 2657373. The remaining violations, with two exceptions, concern mandatory standards which do not involve self-propelled equipment defects. The two exceptions concern a citation issued on January 7, 1986, for a violation of section 56.6042 for failure to provide a fire extinguisher on self-propelled equipment for which the respondent paid a $20 "single penalty assessment," and one issued that same date for a violation of section 56.9003, for inadequate brakes on mobile equipment for which the respondent paid a penalty assessment of $206.

After distilling the information reflected on the computer print-out, it would appear that the two prior violations issued on January 7, 1986, concerning the lack of a fire extinguisher on self-propelled vehicles, and inadequate brakes on self-propelled equipment, which were paid, involved equipment defects which were required to be reported pursuant to section 56.9001. However, the petitioner failed to introduce these citations, provided no information with respect to the circumstances under which they were issued, and presented no testimony or evidence that Inspector Shanholtz conducted the inspections which resulted in the issuance of those citations, or that he was even aware of them at the time he issued the citation of January 8, 1986. Under the circumstances, I cannot conclude that these citations were among the "many

unreported equipment defects" that the inspector claims formed the basis for the issuance of the citation in issue.

The only available credible evidence of the existence of any equipment defects affecting safety which were present on January 8, 1986, is the front-end loader citation (No. 2657373) which was issued that same day (exhibit PÄ7). It is the subject of this proceeding, and the cited violation has been affirmed. The citation reflects that it was issued at 8:45 a.m., during the same inspection, and prior to the time the reporting citation in issue here was issued. During his testimony in connection with the loader violation, Inspector Shanholtz confirmed that he found "quite a few defects that affected safety" on the loader, including a cracked, broken, and shattered windshield that would impair the operator's vision, a non-functioning back-up alarm, an inoperable emergency brake, inadequate service brakes, and the lack of a fire extinguisher. Under the circumstances, I find that the inspector had reasonable cause to support his belief that equipment defects were not being timely reported or addressed by the respondent. Coupled with the fact that the respondent could produce no evidence that such defects were being reported or recorded as required by the regulations, I further conclude and find that the petitioner has established a violation of section 56.9001. Accordingly, the citation IS AFFIRMED.

Citation No. 2657386, April 22, 1986, 30 C.F.R. 56.4100(a)

The respondent is charged with a violation of mandatory safety standard section 56.4100(a), which provides as follows: "No person shall smoke or use an open flame where flammable or combustible liquids, including greases, or flammable gases are; (a) used or transported in a manner that could create a fire hazard; or (b) stored or handled."

The inspector issued the citation after finding approximately five fresh cigarette butts on the floor inside a storage room or shed used to store combustible motor oil and some hydraulic fluid. The area was a posted "No Smoking" area, and the shed was used by employees to service their vehicles. The inspector saw no one smoking, and the presence of the tell-tale cigarette butts led him to conclude that someone had been smoking.

In its posthearing brief, the respondent maintains that the citation should be dismissed "for a total want of proof." Respondent's assertion in this regard is rejected. The respondent does not deny the presence of the cigarette butts inside the shed, and it offered no reasonable explanation as

to how the butts may have gotten there. On the other hand, the petitioner has established that fresh cigarette butts were present inside the oil storage shed in question. While it may be true that the inspector did not observe anyone smoking, I conclude and find that the tell-tale fresh cigarette butts found by the inspector, while circumstantial, is sufficiently adequate to support a reasonable inference that someone had been smoking in or around the posted "No Smoking" area, and put out the butts on the floor where they were found by the inspector. Under the circumstances, the citation IS AFFIRMED.

DOCKET NO. KENT 86Ä134ÄM

Fact of Violations

Order Nos. 2657189 and 2657190, February 26, 1986, 30 C.F.R. 56.9003

The respondent is charged with two violations of section 56.9003, which requires that powered mobile equipment be provided with adequate brakes. In these instances, the inspector found that a 35Äton haul truck had an emergency brake which did not function, and rear brakes which were inoperative. On a second truck, he found that the primary braking system had only one functional brake and an emergency brake which did hold the truck. Further, the inspector found that the brake fluid reservoir providing fluid to the rear brakes of the first truck was empty, and that the reservoir on the second truck was empty and that the brake hoses were disconnected.

In support of the violations, the inspector testified that both trucks were tested during the inspection. With regard to the truck No. 69036, the inspector stated that when it was tested on a decline, the driver could not stop the truck with the brakes and he had to put it in reverse gear to stop it. Upon checking the braking systems, he found that the emergency brake would not work, and that only the right front service brake was functioning properly. With regard to truck No. 69035, the inspector stated that the emergency brakes were not functioning, and that the truck "was slow to stop" when tested on a decline.

Mr. Stovall conceded that the emergency brake on truck No. 69035 was not functioning, and that 50 percent of the rear braking system was defective or inoperative and that there was a leak in the system. With regard to truck

No. 69036, Mr. Stovall did not dispute the inspector's finding that the emergency brake would not hold the truck. He also did not dispute the fact that the brake hoses were disconnected, and he confirmed that new brake shoes and wheel cylinders were installed on the rear wheels and that the hoses were reconnected. He also confirmed that the rear brakes on the No. 69035 truck were overhauled.

In addition to the testimony of the inspector who issued the violations after inspecting the cited trucks, the petitioner also presented testimony from a supervisory inspector who testified that brakes which are not maintained as they were originally equipped, or which are not maintained to their design specifications, are less than adequate within the meaning the requirements of section 56.9003. This inspector also testified that a truck which has lost half of its established rear braking capacity has lost the designed safety of the vehicle and cannot be expected to be operated safely under all conditions.

The petitioner also presented testimony from an MSHA braking expert who confirmed that while a truck with a partial operative braking system may be capable of stopping when first operated, it is common for such brakes to be rendered inoperative as they heat up, and operating the trucks in such a condition will result in further brakes abuse and render the brakes inadequate for continued use.

The respondent's defense is based on Mr. Stovall's belief that even though the service brakes may not have been "one-hundred percent," they were still adequate within the meaning of the cited section. This contention is rejected. It seems clear to me from the credible evidence presented by the petitioner, that the emergency braking system on both cited trucks were not functioning at all. With respect to the primary braking systems, the credible evidence establishes that the brake fluid reservoirs on both trucks were empty and the brake hoses on one of the trucks were disconnected. Further, the evidence establishes that the driver of one of the trucks had to put it in reverse gear to stop it, and that the only functioning service brakes were those on the right front. The rear brakes on the second truck were only 50 percent functional, and there was a leak in the system.

I conclude and find that the petitioner has established the violations in question by a clear preponderance of the credible evidence adduced in this case. Accordingly, the violations and the orders ARE AFFIRMED.

Fact of Violation

Citation No. 2657392, April 23, 1986, 30 C.F.R. 56.9022

Although the citation as issued cites a violation of mandatory safety standard section 56.9020, the inspector confirmed that this was a "clerical error," and that he intended to cite section 56.9022 which provides that "Berms or guards shall be provided on the outer bank of elevated roadways." I cannot conclude that the respondent has been prejudiced by the erroneous citation, and take note of the fact that the record establishes that the respondent was well aware of the fact that it was being cited for having inadequate berms, and ultimately abated the violation. Further, the factual basis for the issuance of the citation is the "condition or practice" stated by the inspector on the fact of the citation, and the petitioner has the burden of proof. Under the circumstances, I conclude that the inspector's reference to another standard was no more than a clerical error which has not prejudiced the respondent, Old Ben Coal Co., 2 FMSHRC 1187 (1980), and the respondent has raised no objection, nor has it claimed any prejudice.

The respondent is charged with a failure to provide adequate berms at two roadway locations which crossed a dry stream bed which ran through the mine property. The inspector testified that berms consisting of rock and other fill dirt material had been provided at one time, but it had eroded and slipped down into the stream bed. He issued the citation after finding no berms, or very low berms, at several locations along the two crossovers in question.

The inspector testified that photographic exhibit PÄ4, pg. 2 of 11, depicts the cited primary crossover which was more heavily travelled than the second cited crossover, and he confirmed that the photograph is representative of both locations. The crossovers were described as a natural drainage ditch or dry stream bed which ran through the property. Drain pipes were placed in the ditch to allow water to flow through, and fill dirt was dumped over the pipes to construct the crossovers. The inspector estimated the depth of the ditch as 10 to 12 feet, and "possibly 8 feet" (Tr. 8, 10).

The inspector confirmed that his conclusion that the roadway was "elevated" was based on the fact that at the crossover locations where the roadway passed over the ditch where "drop-offs" existed on either side of the road, the

roadway was in fact elevated above the stream bed. He also confirmed his belief that the lack of adequate berms at the elevated locations above the stream bed created a hazard on each side of the crossovers in that a truck could go into the ditch and overturn, and he believed that adequate berms were required to prevent this from happening (Tr. 21). He further believed that a ditch over 4 feet deep created a hazard in that the trucks and front-end loaders using the crossovers could easily overturn if they ran into the ditch (Tr. 22).

When asked to explain his understanding of the application of the berm standard in this case, the inspector replied that if the depth of the ditch at the crossover is such that it is reasonably likely to cause an accident, such as a vehicle overturning in the ditch, he would cite a violation of section 56.9022, and that this is a "judgement call" (Tr. 32Ä33). The inspector stated that the "rule of thumb" is to require berms as high as the mid-axle height of the largest piece of equipment using the roadway, and that "we hope it helps to stop them" (Tr. 52).

In its posthearing brief, respondent's counsel takes the position that the cited crossovers are not an elevated roadway. Recognizing the fact that "the berms are supposedly there to prevent the equipment from going off into the ditch," counsel asserts that "very little danger, if any," existed in that the equipment using the road has adequate room for crossing and no more than one vehicle at a time crosses over the cited locations.

In United States Steel Corporation, 5 FMSHRC 3 (January 1983), the Commission held that proof of "inadequate" berms requires evidence as to what type of berm a reasonably prudent person would install under the circumstances. In fashioning a test for determining the adequacy of a berm, the Commission stated in part as follows at 5 FMSHRC 5:

> We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard. See Alabama ByÄProducts, supra. See also Voegele Company, Inc. v. OSHRC, 625 F.2d 1075, 1077Ä79 (3rd Cir.1980). The definition of berm in section 77.2(d) makes clear that the standard's protective

> purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." (Footnote omitted).

With regard to the question as what constitutes an "elevated" roadway, I take note of several berm decisions rendered by Commission judges and the Commission on this issue. In W.B. Coal Company, 3 FMSHRC 193, 201Ä201 (January 1981), Judge Bernstein held that a roadway with "drops on both sides" was an elevated roadway. In Golden R Coal Company, 1 FMSHRC 1843, 1848 (November 1979), I held that the location of an unprotected roadway where trucks were required to back up to begin their ascent up an incline was of sufficient height above the adjacent terrain to create a hazard in the event a truck ran off the unprotected elevated portion of the roadway and was in fact "elevated." In that case, the inspector testified that if a truck were to run off the road, it was likely to overturn, and he was aware of an accident where a truck overturned when the driver backed into a 2Äfoot hole.

In Cleveland Cliffs Iron Company, 1 FMSHRC 1965, 1969 (December 1979), Aff'd by the Commission at 3 FMSHRC 291 (February 1981), Judge Broderick held that a cited roadway location which had 10 to 12 foot drop-off to a ledge below the roadway was of sufficient height above the adjacent terrain to create a hazard in the event a vehicle ran off the roadway, and therefore was elevated.

In Burgess Mining and Construction Corporation, 3 FMSHRC 296 (February 9, 1981), Judge Fauver held that while a bridge could reasonable be found to be an elevated roadway, the cited berm standard found at 30 C.F.R. 77.1605(k), was limited to roads cut along the side of mountain, hill, pit wall, or earth bank, and not to a bridge crossing a river. The Commission reversed, and stated as follows at 3 FMSHRC 297:

> Nothing logically suggests why a roadway ceases being such when it crosses a bridge. A bridge is nothing more than that part of a road which crosses a stream. * * * Further, the hazards addressed by the standard are certainly no less serious and in need of prevention when a vehicle is elevated over a body of water that when it runs along elevated ground.

In the instant case, Mr. Stovall estimated the distance of the roadway crossovers through and across the point where it crossed the drainage ditch as 15 feet, and a sketch of the area which he prepared reflects that the depth of the ditch

from the roadway surface to the bottom of the ditch is 8 feet (exhibit RÄ3; Tr. 35). The inspector's estimate of the depth of the ditch at the points where the roadway crossed at 10 to 12 feet, and possibly 8 feet. While it is true that the roadway in question was generally on level ground, I conclude and find that the 15 feet portion of the roadway crossovers which continued across the ditches were elevated within the scope and meaning of section 56.9022, and the respondent's assertions to the contrary are rejected.

With regard to the alleged inadequacy of the berms which were in place, I find the inspector's testimony that portions of the berms had eroded or slid over the roadway to the point where they were either non-existent or too low to restrain a vehicle from going into the ditch to be credible. The respondent has not rebutted or denied the fact that the berms had slipped or eroded away. Further, I agree with the inspector's assessment of the potential hazard presented at the cited locations at the points where the elevated roadway crossed over the adjacent ditch areas which were 8 to 12 feet deep. I conclude and find that the inspector's belief that a vehicle driving across those locations would likely overturn and cause an accident with resulting injuries to the driver if it went into the ditch was reasonable. I further conclude and find that the petitioner has established that the eroded and non-existent berms at the cited locations adequately and reasonably support the inspector's conclusion that the berms were inadequate. Accordingly, the citation IS AFFIRMED.

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 medium-sized operator. Respondent has advanced no argument or evidence to establish that the payment of the civil penalties which have been proposed will adversely affect its ability to continue in business. I conclude and find that the civil penalties which have been assessed for the violations will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The computer print-out summarizing the respondent's compliance record for the period April 23, 1984 through April 22, 1986, reflects that the respondent paid civil penalty assessments totalling $8,672, for 43 violations, 17 of which are paid "significant and substantial" (S & S) violations. For an operation of its size and scope, I cannot conclude that the

respondent's compliance record is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations which have affirmed in these proceedings.

Negligence

In Docket No. KENT 86Ä133ÄM, the inspector found a "high" degree of negligence at the time he issued the citations in question, and he marked the appropriate box on the citation form to reflect this finding.

With regard to the lock-out citation, I take note of the fact that no prior citations were issued for violations of section 56.12016, and the respondent established that it at least de-energized the electrical equipment before work was performed on it, and that it also used the services of a contract electrician. With regard to the citation for failure to report and record equipment defects, the evidence establishes that the equipment operators themselves were not reporting these defects, and that the respondent did have the check-list forms available at the mine but apparently chose not to use them because it believed that its "oral" reporting system was more effective and had previously been approved by another inspector. Although the record shows one prior citation for a violation of section 56.9001, the petitioner failed to produce that citation and furnished no further details as to the circumstances under which it was issued.

With regard to the smoking violation based on the existence of the cigarette butts which the inspector found, although one prior violation of section 56.4100(b), is noted in the respondent's prior history of violations, no further explanation of that citation was forthcoming from the petitioner, and the record establishes that the respondent did have the area posted with a no-smoking sign.

The petitioner has advanced no arguments to support the inspector's "high" negligence findings, and I find no credible testimony from him in the record to support these findings. In any event, I conclude and find that the three violations in question resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of the cited mandatory safety standards. I further find and conclude that the respondent knew or should have known about the cited conditions and that its failure to address those conditions constitutes moderate and ordinary negligence.

With regard to the inoperative hand brake and inadequate primary brakes on the front-end loader, since the loader had several other defects which were readily observable and detected, a reasonable and prudent operator would have taken the loader out of service for a thorough inspection. If this were done, I believe the lack of an operable handbrake and inadequate primary brakes would have been detected. Under the circumstances, the inspector's finding of a high degree of negligence is affirmed.

In Docket No. KENT 86Ä134ÄM, the inspector's negligence findings for the two braking violations reflect findings of "reckless disregard." With regard to one of the trucks, the inspector indicated that the non-functional emergency brake condition had previously been cited during an inspection on January 8, 1986, and that the defective rear brakes had been inoperative "for several years." He also found that the brake fluid reservoir was empty, and the condition of the reservoir led him to believe that fluid had not been added for some time. With regard to the second truck, he found an empty brake fluid reservoir, and that the brake hoses had been disconnected.

I find no credible evidence to support the inspector's belief that one of the trucks had operated with defective rear brakes "for several years." However, I find his testimony to be credible as to the condition of the brake fluid reservoirs and the fact that the brake hoses on one of the trucks were disconnected and that the emergency brake on the truck had been previously cited. Under these circumstances, although I cannot conclude that the evidence supports the inspector's "reckless disregard" negligence findings, I do conclude and find that it supports a finding of a high degree of negligence as to both violations, and supports a finding that the respondent knew or should have known of the cited defective braking conditions.

In Docket No. KENT 86Ä155ÄM, concerning the berm citation, the inspector found a "high" degree of negligence. The evidence establishes that rock berms were provided but had slipped down an adjacent embankment. Although the inspector testified that the conditions had existed for "several months," he did not cite the condition on prior inspections, and I find no credible evidence to support his high negligence finding. However, I do conclude and find that the respondent failed to exercise reasonable care by failing to add additional materials to reconstruct the berms, and that this omission on its part constitutes moderate and ordinary negligence.

Gravity

I conclude and find that all of the violations which have been affirmed in these proceedings were serious. Failure to provide locks and to have an established lock-out procedure for electrically powered equipment presented a hazard in that the equipment could have inadvertently energized while someone was performing work on it. In this event, I conclude that it was reasonable likely that anyone working on the equipment would be exposed to an electrocution hazard with serious resulting injuries.

All of the braking violations presented an accident potential which would reasonably and likely be expected to result in injuries to the vehicle operators as well as to other equipment operators and miners exposed to such hazards. The failure to report and record defective equipment would result in delays in correcting any hazards, as well as permitting equipment to continue to operate with defects. One can reasonably conclude that in such a situation, there was a reasonable likelihood of accidents, with resulting injuries to those mine personnel who were expected to operate the equipment, as well as to other miners in close proximity to the equipment.

The smoking violation presented a potential fire hazard, particular in light of the evidence which established the presence of combustible oils, hydraulic fluid, fumes, and accumulated oily rags and oil spillage. In the event of a fire, I believe it is reasonably likely that miners in or around the shed would be exposed to hazards resulting in serious injuries. The lack of adequate berms presented a hazard in that a truck or other vehicle operator approaching the edge of the crossover, particularly those in large haulage trucks, would have an inadequate warning that they were close to the adjacent drainage ditch. If a truck were to drive over the edge of the ditch, it could possibly overturn, thereby exposing the driver to an accident hazard, with resulting injuries.

Significant and Substantial Violations

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 hazardÄthat is, a measure of danger to safetyÄcontributed 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, I conclude and find that with one exception (Citation No. 2657392Älack of adequate berms), the remaining violations were all significant and substantial, and the findings by the inspector in this regard ARE AFFIRMED.

I conclude and find that in terms of continued normal mining operations, the hazards noted in my gravity findings support a conclusion that there was a reasonable likelihood that the cited conditions could contribute to the hazards resulting from the violative conditions in question. In each of these instances, had the events noted occurred, I believe it is reasonable to conclude that the injuries produced could be of a reasonably serious nature.

With regard to the inadequate berm citation, the respondent's evidence, which I find credible, establishes that the roadway widths at the crossover points were wide enough to more than adequately accommodate the largest vehicle using that road, with more than adequate clearance on either side of the vehicle. Further, there is no evidence of any speeding or vehicles passing each other on the crossovers, and I believe that the respondent's testimony that the vehicles approached the crossovers on a "straight line" rather than cutting corners or approaching it at an angle to be more credible than that of the inspector. I also note that the inspector initially found upon inspection that an injury was unlikely and that the violation was not significant and substantial, but later changed his mind and modified the citation accordingly because of a purported "clerical error." I reject the inspector's explanation as to why he later changed his mind as less than credible. Although I have concluded that the violation was serious, I cannot conclude that the petitioner has established that it was significant and substantial. Accordingly, the inspector's finding in this regard IS VACATED.

Good Faith Abatement

With regard to Citation Nos. 2657189 and 2657190, concerning the defective brakes on the cited 35Äton haul trucks, the record reflects that they were taken out of service when the inspector issued the violations. Both violations were terminated on March 4, 1986, after repairs were made. Respondent's credible testimony reflects that parts were ordered and that the repairs were completed within 3 days of the issuance of the orders. Under the circumstances, I conclude and find that these violations were timely abated in good faith by the respondent

The smoking violation was timely abated when the respondent posted a letter advising employees not to smoke in posted areas, and the berm citation was terminated one day prior to the time fixed by the inspector. As to these citations, I

conclude and find that the respondent exercised good faith in timely abating the violations.

The lock-out violation (No. 2657368), front-end loader violation (No. 2657373), and check-off list violation (No. 2657377) were all initially issued as section 104(a) citations. Upon subsequent inspections, the inspector found that the cited conditions had not been timely abated within the time fixed, and this resulted in the issuance of section 104(b) orders. In each instance, the inspector noted on the face of the orders that "no apparent effort" was made by the respondent to timely abate the violative conditions cited in the notices. No information was forthcoming as to whether or not the orders were contested, and it is clear that they are not the subject of these civil penalty proceedings.

With regard to the lock-out citation, the evidence establishes that after the citation was issued, the respondent did purchase locks. However, upon his subsequent inspection on February 26, 1986, the inspector found that they were not being used, and that a lock-out procedure had not been formulated and adopted by the respondent. He also found that electrical and mechanical work was being performed without locking out the equipment. Under these circumstances, he issued the section 104(b) order. Although it is true that the purchase of locks indicates that the respondent made some effort to timely abate the violative conditions, the fact remains that total abatement was not achieved by the time the inspector returned on his subsequent inspection. Under the circumstances, I conclude and find that the respondent exhibited less than total good faith compliance in timely abating the citation.

With regard to the inoperable emergency brake and inadequate primary brakes on the front-end loader, the inspector's subsequent inspection on February 26, 1986, which resulted in the issuance of an order, indicated that the emergency brake was still inoperative, and that the primary braking system had completely failed. However, the order, on its face, reflects that a new emergency brake had been installed, and both Mr. Stovall and Mr. Joines confirmed that work had been done on the brakes shortly after the citation was issued, and Mr. Joines confirmed that repairs were completed within 3 or 4 days of the issuance of the citation. They attributed the subsequent loss of braking power after the repairs were made to a defective air compressor which subsequently blew out and had to be replaced. I find their testimony to be credible, and find no credible evidence by the inspector to support his conclusion that the respondent "made no apparent effort" to

correct the cited conditions. To the contrary, I conclude that the respondent did make a good faith effort to correct the originally cited conditions, and that after the order was issued, additional repairs were timely made to abate the conditions cited in the order.

With regard to the equipment check-list citation, when the inspector returned on a subsequent inspection on February 26, 1986, he found no evidence that the available check-lists were being used and that instructions as to their use had not been given to the equipment operators. He also found some defective brakes on equipment, and this led him to believe that the lists were not being used and that defects were still going unreported. Since the inspector found that compliance had not been achieved by February 21, 1986, the date fixed for abatement of the citation, he issued the order. Under the circumstances, I conclude and find that the respondent exhibited less than good faith compliance in timely abating the citation, and that it did so only after the order issued.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the violations which have been affirmed.

DOCKET NO. KENT 86Ä133ÄM

Citation No.	Date	30 C.F.R. Section	Assessment
2657368	01/07/86	56.12016	$ 500
2657373	01/08/86	56.9003	$ 450
2657377	01/08/86	56.9001	$ 375
2657386	04/22/86	56.4100(a)	$ 150

DOCKET NO. KENT 86Ä134ÄM

Order No.	Date	30 C.F.R. Section	Assessment
2657189	02/26/86	56.9003	$ 500
2657190	02/26/86	56.9003	$ 600

DOCKET NO. KENT 86Ä155ÄM

Citation No.	Date	30 C.F.R. Section	Assessment
2657392	04/23/86	56.9022	$ 150

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts shown above within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge