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SOL(MSHA) V. GALITE CORP.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. SE 86-137-M
A.C. No. 09-00022-05515

v.

Galite No. 1 Mine

GALITE CORPORATION,
RESPONDENT

DECISION

Appearances: Larry A. Auerbach, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia, for
Petitioner; Kenneth P. Mayeaux, General Manager,
Galite Corporation, Rockmart, Georgia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$147 for an alleged violation of mandatory safety standard 30 C.F.R. 56.9002. The respondent filed an answer denying the violation, and a hearing was held in Marietta, Georgia, on June 30, 1987. The parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties on the record during the course of the hearing.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, and (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found

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in section 110(i) of the Act. Additional issues raised by the parties are discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.

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

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

The parties stipulated to jurisdiction, and that during 1986 the subject plant and quarry, including office personnel, worked 143,705 man-hours. They also stipulated that any civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business (Tr. 5).

The parties agreed that exhibit P-1, a computer print-out of prior violations for the respondent's controller corporation reflects the controller's history of violations for the period July 9, 1984 through July 8, 1986. The print-out reflects 50 paid violations, 22 of which are "significant and substantial" violations. Petitioner's counsel asserted that for this same time period, the respondent's Galite No. 1 Mine received civil penalty assessments for nine citations which were "other than single penalty items," and that they were timely paid (Tr. 6-7).

Discussion

Section 104(a) "S & S" Citation No. 2848584, July 9, 1986, cites a violation of 30 C.F.R. 56.9002, and the condition or practice is described as follows: "One bolt was missing and others loose on the plate that connects the drive shaft to the transmission on the R-22 Euclid haulage truck."

Petitioner's Testimony and Evidence

MSHA Inspector Bobby A. Underwood confirmed that he issued the citation. He described the truck as an R-22 U model used to haul material from the pit to the primary crusher, and he confirmed that it was used daily during the full shift. The route of the truck took it over level ground, but there were declines where the truck entered and exited the pit. The truck had a 25-ton capacity and was approximately 20 years old (Tr. 11-12).

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Inspector Underwood described the truck drive shaft, and he stated that the front of the universal joint had a flange which attached to the transmission with approximately eight one-half inch bolts. He found that one of the bolts was completely missing, and that the others which he examined were loose to the point where "you could actually turn them with your fingers," and they were "backed out halfway" (Tr. 13).

Inspector Underwood stated that he was alerted to the condition of the drive shaft when he noticed a "shiny spot" in the area next to the differential which appeared to have been caused by some rubbing action. He checked the drive shaft and found the loose and missing bolts which "was making the transmission work up and down." Based on what he observed, he concluded that it would have taken several days for the bolts to work loose. He confirmed that upon inspection of the truck he also issued two additional citations, one for an inoperative horn, and one for a badly worn tie rod for the steering cylinder (Tr. 15-16; exhibits P2 and P3). The condition of the tie rod was such that it had the potential for breaking, and if it did, the truck would lose its steering capability. Both cited conditions were repaired (Tr. 16). He also observed that two bolts were missing from the left rear transmission hangar plate, but did not issue a citation for this condition. Although he did not believe that this condition in and of itself would cause an accident, "it would contribute to this drive shaft because it would move back and forth" (Tr. 17).

Mr. Underwood described the hazard associated with the cited conditions as follows (Tr. 18-19):

Q. What kind of hazard did you see associated with this problem with the drive shaft?

A. The drive shaft with the lost motion in it, if the bolts didn't come out, there was a good possibility of snapping those bolts, but this truck doesn't have a cross member underneath. The drive shaft would fall down, possibly sticking into the ground and throwing the truck out of control, or wham around and possibly hit the brake line and breaking it where you would lose your braking system.

Q. What would cause it to go around? What would cause the drive shaft to fly around like that?

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A. Well, the front end would be loose and the differential would turn the drive shaft around.

Q. The differential is hooked onto the rear end of the drive shaft? Is that right?

A. Right.

Q. The back wheels?

A. Right.

Q. And that would still be turning as the truck is moving. Is that right?

A. Right. Yes.

Mr. Underwood stated that it is not unusual to use the transmission to help brake the truck while it is on a grade or an incline (Tr. 20). He identified a copy of an MSHA fatal accident report involving another mine operator where a drive shaft on a haulage truck gave way and the operator lost control of the vehicle (Tr. 21; exhibit PÄ4). Petitioner's counsel asserted that this incident is a representative example of what could happen when a truck loses its transmission (Tr. 21). Respondent's representative took the position that the report is not particularly relevant because it states that "the direct cause of the accident could not be determined" (Tr. 23).

Mr. Underwood believed that the violative conditions which he cited with respect to the drive shaft could result in serious injuries or a fatality in the event the truck overturned or collided with another vehicle or individual. He believed that the condition was observable and that the lost transmission motion and noise from the rubbing action should have alerted the respondent. Since the result of the rubbing action was observable, a routine further inspection under the truck would have detected the loose and missing bolts (Tr. 24). Mr. Underwood confirmed that the truck was taken to the shop, and that when he next saw it, it was repaired. To his knowledge, the truck was not used after the citation was issued (Tr. 24).

In response to further questions, Mr. Underwood stated that the truck operator is required to inspect his truck before operating it. Although one would have to be under the

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truck to observe the drive shaft flange, the results of the rubbing action of the drive shaft against the transmission was noticeable to anyone simply walking around the truck. The truck was being operated when he stopped it to inspect it, and he observed the area which had been rubbing and wanted to know what caused it. The truck was empty and the driver did not seem to know anything about the conditions in question (Tr. 26-27). He believed that the driver should have been alerted to the condition in the normal course of his driving (Tr. 28).

On cross-examination, Mr. Underwood confirmed that the condition of the bolts, the wear on the side of the transmission where it had been working up and down, the loose bolts on the flange, and the missing bolts on the left rear of the transmission, led him to believe that the cited condition had existed for 2 or 3 days (Tr. 30). He could not state how long it would have taken to work the drive shaft loose (Tr. 31). He confirmed that he was aware of a prior accident at a mine where he once worked which was caused by a loose drive shaft which turned a haulage truck over on a decline (Tr. 31).

Mr. Underwood stated that in the event the drive shaft on the cited truck had come loose, it was possible that the driver could have stopped it safely with the brakes if he had the opportunity to do so. Although the brakes were adequate, if the drive shaft had fallen down while the truck was operating in loose dirt and rock and the end of the shaft caught on this material, it could have pulled the truck out of gear (Tr. 32).

In response to further questions, Mr. Underwood stated that the truck was used to haul expanded shell rock which was being mined, and that other company vehicles used the roadway. Pedestrians did not usually use the roadway, and the trucks normally travelled 35 miles an hour empty and approximately 10 miles an hour loaded (Tr. 34). Respondent's representative stated that the posted speed limit is 15 miles an hour for trucks which are empty and loaded, and that the distance from the pit to the quarry is about half a mile, and from the quarry to the crusher about half a mile. He concluded that the trucks do not attain much speed in the half mile of travel (Tr. 35). Mr. Underwood agreed with these distances, but suggested that the drivers exceeded the posted speed limit (Tr. 35). He also agreed that the haulage road is 80 feet wide for most locations over which the trucks are driven, except for an area directly where they enter the quarry. At

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that point the roadway is 50 feet wide for a distance of 100 feet (Tr. 36).

Respondent's Testimony and Evidence

Although the respondent's safety director was present during the hearing, he was not called to testify, and the respondent presented no testimony or evidence in defense of the citation other than the arguments of its representative (Tr. 36).

Arguments Presented by the Parties

The parties waived the filing of posthearing briefs and relied on their oral arguments made on the record during the close of the hearing (Tr. 43). Respondent takes the position that the cited standard, 30 C.F.R. 56.9002, as worded, does not apply to the cited condition of the drive shaft. Respondent points out that the standard speaks in terms of "defects affecting safety," and that since the alleged truck defect was in the drive mechanism rather than on the truck's safety equipment, the standard is inapplicable. Respondent concedes that a steering mechanism may affect safety, but not necessarily a drive shaft, especially one that is still intact and operating. Respondent also believes that the condition of the drive shaft was something that could have happened after the equipment was started and not prior to its operation. In this regard, respondent asserted that the bolts could have been in place and fallen off in the 3 hours that the truck was in operation prior to its being inspected and that "it's very hard to say that this did happen during the operating period" (Tr. 8-9; 37). Since the condition was not noted by the driver during his inspection, respondent concludes that it occurred during the operation of the truck immediately prior to the inspection (Tr. 41). However, respondent agreed that "we do not go over the truck completely every day" (Tr. 41).

The petitioner takes the position that the cited truck defect involving the drive shaft of a large haulage truck with a 25-ton capacity was in such a condition that it was subject to coming loose, causing lack of control of the vehicle, which could result in serious injury or death, and that it is in fact a defect which directly and perhaps substantially affected the safety of the employees (Tr. 8). The petitioner points out that it was not difficult for the inspector to observe the clue that led him to find the defect, and that he simply walked around the truck and observed this clue. Under the circumstances, petitioner believes that had

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the operator of the truck conducted the same type of inspection, he would have detected the defect and taking appropriate corrective action (Tr. 38).

Petitioner asserted that while the cited condition indicates a possible maintenance problem, such problems, as reflected by the defect found by the inspector, directly affects safety. Petitioner pointed out that the inspector found another maintenance problem during his inspection, but did not cite it because it was not, of itself, a safety defect. With regard to the respondent's suggestion that the cited condition may have occurred during the 3 hours that the truck was operated prior to the inspection, the petitioner submits that the unrefuted testimony by the inspector is that the condition of the drive shaft simply cannot reasonably happen in 3 hours. In any event, petitioner asserts that this issue goes to the question of negligence rather than to the existence of any violation (Tr. 39). In further support of its case, the petitioner cites a decision by the Commission in Allied Chemical Corporation, 3 MSHC 1544, August 28, 1984, 6 FMSHRC 1854 (August 1984), affirming a violation of an identical surface mining standard found in 30 C.F.R. 57.9002, in which the Commission held that "Defects affecting safety in equipment continuously in operation, including those occurring during the course of operation, must be corrected before the equipment is used any further," 3 MSHC 1584 (Tr. 40).

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.9002, which provides that "Equipment defects affecting safety shall be corrected before the equipment is used."

In Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (April 1981), the Commission affirmed a violation of section 56.9002, and stated as follows at 3 FMSHRC 144 with respect to its interpretation of the standard:

[W]e hold that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation. This interpretation is more likely to prevent accidents, a primary goal of the Act.

United States Steel Corporation, 4 FMSHRC 616 (April 1982), concerned a violation of an identical standard found in 30 C.F.R. 55.9002. In that case, a driver of a 2 1/2-ton

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pick-up truck detected that the dual rear wheels of the truck had shifted in the rear wheel-well while he was driving it. He reported the condition to his foreman, but the condition was not corrected. Two days later, another driver visually inspected the truck, and believing that it had been repaired, proceeded to drive it with a crew of men in it. On a straightaway, the driver noticed that the rear tires were smoking in the rear wheel-wells. Within seconds the rear end started to steer itself around the cab, and when the driver let up on the gas pedal, the truck's drive shaft dropped loose, and the truck overturned injuring the occupants.

The operator advanced an argument similar to that of the respondent in this case. The operator contended that the term "defects affecting safety" should be intended to cover detects which are normally associated with the safe operation of the vehicle, and that the question of whether the mechanical problem cited by the inspector constituted an equipment defect affecting safety should be interpreted in light of the knowledge and understanding of the operator's personnel at the time it was first observed, rather than after the truck had rolled over under circumstances which had never previously been known to cause a truck to turn over. Judge Steffey rejected this argument, and found that the shifting rear end of the truck constituted a "defect affecting safety" which was not corrected before the equipment was used, and he affirmed the violation.

The Commission affirmed Judge Steffey's decision, and observed as follows at 6 FMSHRC 1434-1435:

Substantial evidence also supports the judge's conclusion that the shifted rear end of this truck was a defect affecting safety. There is evidence in the record that a shifted rear end is a sign of mechanical defect, with a potential to cause an accident. Also, at some point, a shift in a vehicle's rear end will affect safety. In this particular instance, the shifted rear end caused the spring package to break, a punctured rear tire, the broken drive shaft to separate from the vehicle, and the truck to roll over. All of these facts point to a defect affecting safety.

The Allied Chemical Corporation case cited by the petitioner involved two missing bolts on a chock leg used for roof support on a longwall system. In affirming the judge's

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finding that the missing bolts constituted an equipment defect affecting safety, the Commission stated as follows at 6 FMSHRC 1857-1858:

In both ordinary and mining industry usage, a "defect" is a fault, a deficiency, or a condition impairing the usefulness of an object or a part. Webster's Third New International Dictionary (Unabridged) 591 (1971); U.S. Department of Interior, Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 307 (1968).

The judge further found that the absence of the two bolts in this case affected safety. We agree. Although the effect on safety of two missing leg bolts in a hydraulic chock line of some 125 units could be viewed as inconsequential and beyond the standard's purview, we are not prepared to dispute the judge's findings as to the adverse impact on safety occasioned by the two missing bolts.

The starting point for analysis is the broad language of the standard, "affecting safety." That phrase is neither modified nor limited. Although this case does not require us to describe the minimal effect on safety cognizable under the standard, it is clear that the standard has a wide reach. The safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.

And, at 6 FMSHRC 1859:

Defects affecting safety in equipment continuously in operation, including those occurring during the course of operation, must be corrected before the equipment is used any further. The contrary approach urged by Allied could result in such defects not being repaired for substantial periods of time, thus needlessly increasing safety risks.

Fact of Violation

In this case the inspector issued the citation because of his belief that the loose and missing bolts on the flange plate which connected the front universal joint to the transmission presented a potential for the drive shaft to come loose, thereby resulting in loss of control of the truck. He found one missing bolt and several other bolts which were loose to the point where they could be turned with his fingers. These conditions resulted in the transmission moving up and down, and the inspector believed that even if the loosened bolts had not come completely out as the truck was driven, there was a good possibility that they would snap off, thereby causing the drive shaft to fall out. If this had occurred, and since the underside of the truck had no restraining cross-member on its undercarriage, the fallen drive shaft could possibly stick into the ground causing gear loss and a loss of control of the vehicle. Since the truck differential is hooked to the rear end of the drive shaft at the back wheels of the truck which would be turning, had the drive shaft come loose at the front end, it could whip around and possibly strike the brake lines, thereby resulting in a loss to the truck braking system.

The inspector's testimony is unrebutted, and the respondent presented no testimony or evidence to refute his contentions with respect to the cited conditions. Further, the respondent has not refuted the testimony of the inspector, which I find credible, as to the potential consequences which may flow from the loosened and missing bolts in question. There was a real potential for the drive shaft to come loose and whip around freely under the truck while it was being driven, thereby contributing to the loss of control and possible loss of braking power. Under the circumstances, and in light of the conditions which were described and cited by the inspector, I conclude and find that the missing and loose bolts in question were equipment defects affecting safety within the meaning of section 56.9002, and the citation IS AFFIRMED.

The respondent's suggestion that section 56.9002 is inapplicable because the cited conditions related to a mechanical drive mechanism, rather than a safety component of the truck is rejected. The standard makes no such distinctions, and the decisions which have been discussed with respect to the interpretation and application of this standard hold otherwise.

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The respondent's assertion that the bolts could have been loosened and fallen off during the 3-hour period that the truck was in operation immediately prior to its inspection is not relevant to the fact that a violation occurred. As noted by the Commission in *Allied Chemical Corporation, supra*. "Defects affecting safety in equipment continuously in operation, including those occurring during the course of operation, must be corrected before the equipment is used any further" (emphasis added).

History of Prior Violations

I conclude and find that the respondent's past compliance record is not such as to warrant any additional increase in the civil penalty which has been assessed for the violation which has been affirmed.

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

I conclude and find that the respondent is a relatively small operator, and that the civil penalty which has been assessed for the violation in question will not adversely affect its ability to continue in business.

Gravity

I conclude and find that the cited conditions constituted a serious violation. Although the inspector found that the brakes on the cited truck were adequate, and that it was possible that the driver could have stopped the truck in the event the drive shaft came loose, he nonetheless believed that a loose drive shaft whipping freely under the truck could have pulled the truck out of gear, sheared the brake lines, or caused loss of control by sticking in the ground.

Negligence

While it is true that the inspector had to look under the truck to detect the cited defects, his un rebutted testimony is that the shiny spot caused by the rubbing action of the transmission which alerted him to look under the truck was readily observable to anyone walking around the truck. Given the fact that the truck driver is required to inspect the vehicle prior to placing it in operation, and given the admission by the respondent's representative that "we do not go over the truck completely every day" (Tr. 41), I conclude and find that the violation resulted from the respondent's

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failure to exercise reasonable care, and that this constitutes ordinary negligence.

Good Faith Compliance

The inspector confirmed that the truck was taken to the shop after the citation was issued, and that when he next saw it the conditions had been corrected. I conclude and find that the respondent exercised good faith in abating the violation.

Significant and Substantial Violation

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

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety 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

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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, 1574-75 (July 1984).

I agree with the inspector's finding that the cited conditions constituted a significant and substantial violation. Based on the facts of this case, I conclude and find that it was reasonably likely that the continued operation of the truck with loosened and missing bolts which obviously affected the drive shaft would cause the drive shaft to come loose, thereby contributing to a loss of control of the vehicle and a potential accident of a reasonably serious nature. The inspector's "S & S" finding IS AFFIRMED.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of \$147 is reasonable and appropriate.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$147 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge