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SOL (MSHA) V. HIGHWIRE INCORPORATED
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

v.

HIGHWIRE INCORPORATED,
RESPONDENT

HIGHWIRE, INCORPORATED,
CONTESTANT

v.

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 87-56
A.C. No. 15-15684-03504

No. 1 Mine

CONTEST PROCEEDINGS

Docket No. KENT 86-165-R
Citation No. 2776208; 8/27/86

Docket No. KENT 86-167-R
Citation No. 2776210; 8/27/86

Docket No. KENT 86-168-R
Citation No. 2776211; 8/27/86

Docket No. KENT 86-169-R
Citation No. 2776212; 8/27/86

No. 1 Mine

DECISIONS

Appearances: Thomas A. Grooms, Esq., Office of the
Solicitor, U.S. Department of Labor, Nashville,
Tennessee, for the Petitioner/Respondent.
Eugene C. Rice, Esq., Paintsville, Kentucky,
for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for
assessment of civil penalties filed by MSHA against Highwire,
Incorporated, pursuant to section 110(a) of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 820(a). In the

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civil penalty case, Docket No. KENT 87Ä56, MSHA seeks civil penalty assessments in the amount of \$219, for six alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations, as stated in six section 104(a) citations served on the respondent at the mine by an MSHA inspector on August 27, 1986, and November 20, 1986.

Contest Docket No. KENT 86Ä168ÄR, concerns a challenge to the legality of one of the citations which is the subject of the civil penalty case, including the inspector's special "significant and substantial (S & S)" findings. The remaining contest dockets concern Notice of Contests filed by Highwire challenging the legality of three additional section 104(a) citations, with special "S & S" findings, issued to Highwire on August 27, 1986.

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, (2) the appropriate civil penalty to be assessed for one of the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether or not the alleged violations were "significant and substantial." Additional issues raised by the parties are disposed of in the course of these decisions.

Stipulations

The parties stipulated to the following (Tr. 6Ä8):

1. Highwire, Incorporated is subject to the jurisdiction of the Commission.
2. Assuming findings that Highwire was in violation of the cited standards as stated in

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each of the contested citations, MSHA's proposed civil penalty assessments will not affect its ability to continue in business.

3. Highwire demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violations.

4. Highwire is a small-to-medium size mine operator engaged in strip and auger mining operations, with an annual production of 200,000 tons. At the time the citations in question were issued, its production was 74,440 annual tons.

5. Highwire currently employs 60 miners in its mining operation. However, at the time it began its mining operation at the subject mine in July, 1986, it employed nine miners, and during the period November, 1986 through March, 1987, it employed approximately 25-45 miners.

6. Highwire's history of prior violations for the period July 1, 1986 through March 4, 1987, reflects that it paid civil penalty assessments for 36 violations, all of which were issued as section 104(a) citations. (Exhibit M-1).

Discussion

In the course of the hearing, the parties agreed to settle five of the six citations which are the subject of civil penalty Docket No. KENT 87-56. After due consideration of the arguments presented in support of the proposed settlement disposition of those citations, and taking into account the respondent's agreement to pay the proposed civil penalty assessments in full, the proposed settlement was approved from the bench pursuant to Commission Rule 30, 29 C.F.R. 2700.30 (Tr. 255-259). The remaining contested citations are as follows:

Docket Nos. KENT 87-56 and KENT 86-168A

Section 104(a) "S & S" Citation No. 2776211, August 27, 1986, cites a violation of 30 C.F.R. 77.1605(b), and states as follows:

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The Mack DM 600 service truck, involved in a fatal accident on 8/9/86 was not provided with adequate brakes in that (1) the air line to the Lt. front brake cannister was found to be disconnected (2) the Rt. front brake lining was covered with dried mud indicating the Rt. front brake was inoperative (3) approx. 1/2 of the lining on the Lt. rear tandem was found worn into the rivets securing the lining. The rivets had worn into the brake drum, causing the lining to break up.

Docket No. KENT 86-165AR

Section 104(a) "S & S" Citation No. 2776208, August 27, 1986, cites a violation of 30 C.F.R. 48.26, and states as follows: "The operator failed to provide newly employed experienced miner training for Claude Hammond, truck driver-utility worker, who was employed at the mine on or about 8/4/86 and fatality injured in a truck accident 8/9/86. No 5000-23 Form verifying such training can be produced."

Docket No. KENT 86-167AR

Section 104(a) "S & S" Citation No. 2776210, as amended, August 27, 1986, cites a violation of 30 C.F.R. 77.1606(a), and states as follows: "The DM 600 Mack service truck, involved in a fatal accident 8/9/86 was not inspected for defects affecting safety prior to being placed in service in that no record of any such inspection can be produced."

Docket No. KENT 86-169AR

Section 104(a) "S & S" Citation No. 2776212, August 27, 1986, cites a violation of 30 C.F.R. 77.1607(b), and states as follows:

Claude Hammond, truck driver-utility worker, did not have full control of the DM 600 Mack service truck while such truck was in motion, in that he was operating such truck 8/9/86, on an inclined roadway when he lost control of such truck causing him to either attempt to exist from, or be thrown from such truck, resulting in fatal injuries.

Discussion

The accident which resulted in the issuance of the contested citations in these proceedings occurred on Saturday, August 9, 1986, at approximately 12:30 p.m. Highwire's employee Claude Hammond apparently lost control of a DM 600 Mack service truck which he was driving along an inclined roadway approximately 2 miles from the active working area of Highwire's mine. The truck failed to negotiate a curve and penetrated the berm, overturned and came to rest approximately 159 feet from the roadway embankment. Mr. Hammond was found approximately 46 feet upslope from the truck, and MSHA surmised that he was either thrown from or attempted to exit the truck and received internal chest and head injuries which resulted in his death. MSHA conducted an accident investigation of the incident, and the findings made during that investigation prompted the issuance of the citations.

MSHA's Testimony and Evidence

MSHA Surface Mine Inspector and Accident Investigator R.C. Hatter confirmed that he participated in the accident investigation, and he identified a copy of a report which he prepared (exhibit MÄ4; Tr. 15). He also identified a copy of a transcript prepared from tape recorded interviews of various witnesses who were interviewed during the course of the investigation (exhibit MÄ6; Tr. 19).

Citation No. 2776208, 30 C.F.R. 48.26

Inspector Hatter testified that he issued the citation because Highwire could produce no documentation or evidence to establish that the truck driver, Claude Hammond, had received newly employed experienced miner training. Mr. Hatter confirmed that he interviewed Mine Superintendent Herb Swiger who advised him that the only training that Mr. Hammond received was "just on a rock truck in the mine environment that he had personally given him himself" (Tr. 23).

Mr. Hatter identified copies of Mr. Hammond's training certificates, and they reflect that he received newly experienced miner underground coal training on August 30, 1985, at the Paintsville Mayo Vocational School, and annual surface coal refresher training at the Rebel Coal Company on July 29, 1985 (exhibits MÄ8 and MÄ9). Mr. Hatter also identified Highwire's training program which specifies the newly employed experienced miner training that Mr. Hammond should have received (pgs. 12, 13, exhibit MÄ10).

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Highwire's counsel opted not to cross-examine Mr. Hatter on this citation. In response to further bench questions, Mr. Hatter confirmed that he determined that Mr. Hammond was a newly employed experienced miner at Highwire, and that he was required to take the training specified in Highwire's training plan. He stated that while Mr. Swiger may have given Mr. Hammond some training, Mr. Swiger was not listed in the training plan as an approved instructor, and that only the contractors or individuals specified in the plan can administer training. Mr. Hatter believed that had Mr. Hammond received the required training, he could have recognized any truck defect and would be aware of the company's safety procedures while riding in a truck (Tr. 31).

Mr. Hatter confirmed that it was his understanding that Mr. Hammond had driven trucks similar to the one he was driving at the time of the accident during his employment elsewhere on the mining complex, and that he had a number of years of experience in driving heavy equipment (Tr. 144). Mr. Hatter also confirmed that while he had no reason to question Mr. Hammond's prior training in the actual driving or operation of the truck, he was of the opinion that had Mr. Hammond be trained a week or so before the accident occurred, he could have been reminded about the need to thoroughly inspect the truck, and to be aware of Highwire's safety rules and procedures (Tr. 243-244). It is for this reason that he considered the violation to be "significant and substantial" (Tr. 244).

Mr. Hatter confirmed that he determined that Mr. Hammond was newly employed by Highwire because "He was just employed by them. He had never worked for them before" (Tr. 245). Although Mr. Hammond had worked for three different companies and managements, he had three different kinds of experience, and he came from an underground mine to another surface mine (Tr. 247).

Citation No. 2776210, 30 C.F.R. 77.1606

Inspector Hatter identified copies of Highwire's preshift and onshift examination reports for the period September 4 through 9, 1986, and he confirmed that he issued the citation because he could find no evidence that the truck in question had been examined prior to placing it in service (Exhibit MÄ13, Tr. 34). Mr. Hatter confirmed that the cited standard requires that such examination be made, and that by reviewing the reports, he concluded that the truck had not been examined. The only person who could tell him about any personal contact with the truck was Henry Sparks, and he had been in the truck

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some 9 days earlier. Mr. Hatter confirmed that he found defects in the truck brakes and issued a citation for those conditions (Exhibit MÄ14, Tr. 36).

Citation No. 2776212, 30 C.F.R. 77.1607(b)

Mr. Hatter identified exhibit MÄ4A as a map or sketch from his accident report, and exhibits MÄ15 through MÄ28 as photographs of the roadway, parking area, and truck parts, and he described the areas shown in the photographs (Tr. 42Ä52). He confirmed that the photographs were taken on August 11, 1986, 2 days after the accident, and the area had been closed (Tr. 53).

Mr. Hatter confirmed that he came to the conclusion that Mr. Hammond did not have full control of the truck on the basis of the truck tracks indicating that the truck was "traveling at some speed" such as to throw roadway gravel outward from the right side of the truck, and the fact that Mr. Hammond "went over the bank" in the truck (photographic exhibits MÄ20, MÄ22, Tr. 52Ä53). Mr. Hatter also believed that Mr. Hammond could have put the truck in a ditch on the left side of the roadway, but he did not do so (Tr. 54). Mr. Hatter concluded that if Mr. Hammond had normal control of the truck, he would not have gone over the bank (Tr. 57).

Mr. Hatter confirmed that he came to the conclusion that Mr. Hammond either attempted to exit the truck or was thrown from the truck because he was found out of it after the accident occurred, but no determination could be made as to whether or not Mr. Hammond actually attempted to jump from the truck or was thrown out on impact (Tr. 63Ä64).

Citation No. 2776211, 30 C.F.R. 77.1605(b)

Mr. Hatter confirmed that there was some delay in bringing the truck out of the hollow for examination, and that it was brought out on August 19, 1986. He and fellow inspector Saul Taylor were present when the truck was brought out by means of a winch and bulldozer, but they did not examine it in any detail on that day. Subsequently, on August 25, 1986, Mr. Hatter and fellow inspector Wayne Weffenstette examined the truck brakes in detail, and Mr. Hatter identified exhibits MÄ43 through MÄ49 as the photographs of the brakes taken by Mr. Weffenstette on that day. Mr. Taylor was not present at that time (Tr. 65Ä68).

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Mr. Hatter testified as to the following brake defects which were found during the detailed examination on August 25, 1987:

The air line to the left front brake was found to be disconnected causing that particular brake to be inoperative. The right front brake lining was covered with mud and the shoe, which also indicated it did not work. And approximately half of the lining of the left rear tandem brake shoe was worn through into the rivets and found to be broken (Tr. 36). * * * The air line to the left front brake was disconnected and plugged up with dried mud (Tr. 40).

And, at (Tr. 69-71):

Q. * * * What did you find when you examined the left front tire?

A. That the air line going to that wheel had been disconnected.

Q. When you say disconnected, had it been -- is it possible it could have been torn loose when the accident occurred?

A. No, sir, it was not torn loose during the accident because it was wrapped around an appendage by the left front wheel. It was like an over-hand knot. The end of it was filled with dried mud. The threads on the fitting were in excellent condition.

Q. And what would you have expected to find if it had been torn loose during the accident?

A. I would have expected the hose to be damaged or the threads to be stripped if it had been pulled loose physically.

Q. What was the effect of the hose not being hooked up?

A. That means the left front wheel brake could not possibly work.

Q. Is there anything else that you observed about that that indicated that the brake might not be working?

A. There was mud all over the drum and shoe.

Q. Which indicated what?

A. That it could not work. If the brake had been applied, the mud would have been rubbed off.

Q. By the action of the brake -- how would that --

A. Right. By the action of the brake shoe in moving against the drum.

Q. Well, again, could that have occurred when the truck went over the hill and wrecked?

A. No.

Q. Why not?

A. Because it was disconnected prior to that.

Q. But I am talking about the mud now.

A. No. It was roadway mud -- gray mud.

Q. When you say roadway --

A. And well caked and dried.

Q. Could that mud have splashed up into the brake and onto the brake drum while it was sitting where it was sitting down at the bottom of the hill?

A. I would say not.

Q. Why is that?

A. It could not get on top of it.

Q. When you say on top, on top of what?

A. At the top of the left front wheel.

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Mr. Hatter identified photographic exhibits MÄ46 and MÄ47, as the left rear wheel tandem showing the place where a piece of broken brake shoe was removed after the wheel cover plates were removed, and he did not believe that the accident caused this brake shoe damage because the shoes are protected by the wheel cover and by the brake drum itself (Tr. 73, 75). The cover and drum are held on by screws, and they showed no signs of any impact damage (Tr. 76). Mr. Hatter stated that the brake shoe had been on so long that it had worn through the rivets, and he could feel that the brake drum had been scored, and the shoe had worn to the point that the rivets were exposed and the friction against the drum had actually worn the drum (Tr. 79Ä80).

Mr. Hatter identified photographic exhibit MÄ49 as the inside of the right front wheel showing the covering of dried roadway mud on the brake shoe and the drum. This lead him to conclude that the shoe and drum were inoperable, and if they were operable, the mud would have rubbed off by the friction. He also determined that the air hose to that wheel was not connected (Tr. 84Ä85). With regard to the left front wheel tandem brake drums, Mr. Hatter described them as "shiny," indicating that they "probably did work," but this could not be determined with any certainty because of damage to the truck and air line cannisters (Tr. 103).

On cross-examination, Mr. Hatter confirmed that rock trucks do have a lockout switch on the dashboard so that the brakes can be easily disconnected, but to his knowledge, the truck involved in the accident did not have such a device, and he did not observe one on the truck (Tr. 105, 109). Such devices are used to prevent the wheels from locking when the equipment is operated on slick roads. Mr. Hatter confirmed that the truck in question has six wheels where braking would be applied, and that it has four separate braking systems consisting of foot brakes, a parking or emergency brake, a dumping brake, and a Jacob's engine brake (Tr. 108). He did not know whether the front wheels of the truck were locked when it was pulled out of the hollow because he had no means for jacking it up and turning the wheels (Tr. 108).

In response to further questions, Mr. Hatter confirmed that he concluded that the right front wheel brakes were inoperative because of the presence of caked mud, and had the brakes been operative, the mud would not be there since the friction between the brake shoe and drum would keep the mud off. He confirmed that the remaining wheels were "more or less" caked with mud, but he did not determine whether the

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other drums or shoes were covered with mud because the front wheel covers were on. With respect to the rear wheels, after the covers were removed, he observed no mud on the brake linings or the shoes (Tr. 109, 111-114). In further explanation of the presence of mud on the brake drums and linings, Mr. Hatter stated as follows (Tr. 114-115):

JUDGE KOUTRAS: If they had wheel covers on the front ones, it is more than likely that the mud would not have accumulated there. Right?

THE WITNESS: I would say that would be correct.

JUDGE KOUTRAS: Then you would have no basis for concluding the mud had a direct relationship to the inoperative brakes. Isn't that true?

THE WITNESS: That is true.

JUDGE KOUTRAS: But in this case, you conclude the brakes were not operative because of the presence of mud.

THE WITNESS: True.

JUDGE KOUTRAS: And your conclusion is if the brakes were operative, the action of the brakes creating friction would dissipate the mud, get rid of the mud.

THE WITNESS: That is right.

Mr. Hatter confirmed that apart from his normal MSHA training, he is not a brake mechanic or expert (Tr. 110). He confirmed that the right front truck wheel was intact when it was examined, and apart from his observations of the presence of caked mud, no independent test was conducted to determine whether or not the brakes were operative (Tr. 116). Mr. Hatter confirmed that the right front wheel brake shoes and linings were not independently examined to determine their condition, or whether or not they were operating properly, and he commented that "we know why the left front one did not work. The air line was loose" (Tr. 119). He confirmed that assuming he had found caked mud on the other wheel brakes, he would conclude that they too were inoperative "because you are not going to have any pressure up against the drum if there is mud there" (Tr. 120).

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Mr. Hatter believed that the right front brake cannister air line was intact, but that this "did not preclude it being blocked off at another point further back. I can only say due to the presence of that mud there, that indicates inaction of movement between the shoe and drum. So there is a good possibility it may have been blocked off further back" (Tr. 132). With regard to the left front brake line, he confirmed that it had been "tied off" and disconnected, the threads were intact, and "it was sure filled with mud because I picked it out and showed it to Mr. Swagger" (Tr. 132). Mr. Hatter confirmed that the truck had 10 wheels (Tr. 135).

In response to further bench questions, Mr. Hatter stated as follows (Tr. 135-136).

BY JUDGE KOUTRAS:

Q. So, essentially what you found, according to the citation here, 2776211, you found the air line to the left front brake was disconnected. Okay. Then the right front brake lining was the one covered with dried mud. Then approximately half the lining on the left rear was found worn and all that business. So, you found essentially three out of the ten wheels did not have any brakes. Would that be a fair conclusion?

A. Somewhat akin to that, yes, sir.

Q. Where does most of the braking action come from, the rear wheels or front wheels?

A. The rear.

Q. The rear?

A. Yes.

Q. So, two of the three were the front wheels. The right front and the left front?

A. That is right, sir.

Mr. Hatter stated that assuming the other seven brakes were adequate, the remaining braking capability of the truck would be "somewhere in the neighborhood of maybe 50 or 55 percent" (Tr. 138).

Wayne Weffenstette testified that he is an MSHA Field Office Supervisor, and supervises seven surface inspectors and two underground inspectors. He confirmed that he has worked for MSHA for 10 years, and that his prior experience includes the supervision of the repair of vehicles used in rock quarries, and as a mechanic installing and repairing brakes and transmissions on "over the road trucks" for the International Harvester Company. He confirmed that he has installed, assembled, and disassembled truck brakes similar to those on the rock truck in question. With regard to the caked mud condition on the right front wheels of the truck, Mr. Weffenstette stated as follows (Tr. 148-150):

Q. Have you ever observed an operating brake with a drum and a shoe that had the type of mud on it that you observed on the front wheels of this particular truck?

A. No, I did not.

Q. Can you explain why you have never observed such a state on a brake like that?

A. If a brake is working properly, the brake shoe itself will apply pressure to the drum, which will continue to keep the drum clean; so far as you may have some mud splash up on it, but will take and clean it right off. You do not have an accumulation of dry, hard dirt, plus rust and corrosion built up on it. The friction itself keeps it polished on the inside.

* * * * *

Q. Now, if those brakes were operating, based upon your experience and your maintenance of those kind of brakes, did the mud that you saw -- could that have accumulated if the shoe were making contact with the drum?

A. No, it would not have.

Q. Why not?

A. Because of the fact, like I said, the shoe itself was not being activated at all against the drum. You could tell that by the buildup

of the dirt -- actually, grime and mud and corrosion built up between the shoe and the drum itself.

Q. If the shoe were making contact with the drum, would you see that kind of buildup of mud and --

A. No.

* * * * *

THE WITNESS: There was rust and stuff. Also, dirt and mud inside the drum itself where the brake shoe normally runs that indicates it had been some period of time since that had ever been used on that particular unit.

Mr. Weffenstette confirmed that when he and Inspector Taylor arrived at the accident scene some 6 hours after the accident, they observed the truck resting at the "bottom of the hill" and it was not dug into any dirt or mud (Tr. 151). He identified photograph exhibits MÄ17, and MÄ20 through MÄ22 as photographs of the scene which he took that evening, and he confirmed that it had not rained between the time of the accident and when he took the photographs (Tr. 153). He also identified a photograph of the truck wheels, exhibit MÄ26, and confirmed that they were not embedded in any mud (Tr. 154).

Mr. Weffenstette confirmed that when he took the dust cover off the left rear tandem wheel he observed that the brake shoe was broken, and that the rivets had worn past the normal wear of the shoe into the head of the rivets which had cut grooves into the wheel brake drum. There are two sets of brakes on that tandem, and the upper brake shoes "seemed to still have some wear on it, but the lower one being into it, I would say you reduce that one wheel by 50 percent" of its braking capability (Tr. 156). He explained the operation of the braking system of the left rear wheel tandem, agreed with Mr. Hatter's characterization of the truck defects, and explained further as follows (Tr. 158-159):

Q. And what conclusion, if any, did you come to based upon your investigation and your participation in this investigation about the effect of the defects you found on the fatality that occurred -- or the truck going over the hill?

A. Like I said, if you go by the braking system on the truck, you had two front brakes that were not working properly. They were not working at all. The left rear brake on the tandem axle, the efficiency had been reduced by forty (40) or fifty (50) percent on that one. So, if you had a total capacity of a hundred (100) percent if all was working properly, we lost in the neighborhood of thirty-five (35) to forty (40) percent of the braking power just by these three different places not working properly.

Q. In your opinion, could that have made a difference between going over the hill and not going over the hill?

A. It could have. You see, you have no way of knowing. We have three other sets of brakes -- six other wheels on this truck. Now, they show to be working. How well they are working, we do not know because there is no way of knowing. We do not know if there are brake linings there.

The drum itself was shiny, but you do not know the braking power of those individual wheels because we had no way of checking them. All we can say is they were working from the fact the shoe was coming up next to the drum and keeping rust and stuff off the drum.

Q. When you say you have no way of checking it, what do you mean?

A. We have no way of taking and putting air pressure to it and putting it under a load test to see what it will do. The linings appeared to be sufficient on the other three wheels.

Mr. Weffenstette confirmed that during his experience in private industry, he has worked on or observed 30 to 40 sets of brake drums or shoes while working in rock quarries, 15 to 20 sets while at International Harvester, and "literally dozens of them when I was with Peabody" (Tr. 160).

On cross-examination, Mr. Weffenstette confirmed that loose gravel on a roadway would cause problems similar to

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those on icy or wet roads, and the area travelled by the truck in question had some loose material on the surface (Tr. 171).

MSHA Inspector Saul Taylor, confirmed that he has been employed by MSHA for 11 years, and that he has a total of 25 to 30 years of mining experience. He previously owned and operated a fleet of trucks, including tandem and straight bed coal trucks, and he has driven the trucks and also worked on or supervised the work on the brakes. Mr. Taylor confirmed that he inspected the truck in question when it was brought up from the hill, and he described what he observed as follows (Tr. 174-175):

A. Both front brakes inoperative. I climbed up under the truck on the ground. The purpose was to inspect the brakes, of course. The left front brake, the hose was disconnected for an unknown reason, and I borrowed a rule off Mr. Hatter --

Q. A rule? Did you say a rule?

A. Well, it is whatever you call it.

Q. It is like a ruler? Something to measure with?

A. Yeah, so I could get on the right brake and pull the mud from the brake shoe and scrape some off to see how much was on there. Mr. Hatter was on the outside of the truck standing up and I told him the measurements. And the mud was across.

Mr. Taylor confirmed that a lockout valve located on the dashboard of the truck controls the two front brakes, and it is used to disconnect the front brakes and has no effect on the rear brakes. He could not locate such a valve because the cab of the truck and dashboard were "mashed in," and he explained the function of such a valve, and what would occur in the event a brake air hose were disconnected (Tr. 175-179). Mr. Taylor confirmed that mud does adhere to the outside of the brakes of a truck when the brakes are applied, and "it would be dried mud in a solid sheet. If the brake was working, it would probably be cracked and fall off because the heat would dry the mud off." Mr. Taylor further explained as follows (Tr. 181-182):

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I measured the brake lining on that thing and pulled the mud out from in between the drum and the brake shoe. And it would have been impossible for this mud to have been in there had this brake been operating.

JUDGE KOUTRAS: All right.

THE WITNESS: Now, the reason I looked farther on that was because the left hose was obviously disconnected. And if you disconnect one brake, you do not have a brake on the other wheel.

JUDGE KOUTRAS: So, you are saying that where Mr. Hatter states on here that the air line of the left front brake canister was found to be disconnected, as he said it was tied off somehow, so far as you are concerned, the right front brake, ipso facto -- that means by itself -- was also inoperative because the air was disconnected?

THE WITNESS: That is right.

JUDGE KOUTRAS: They worked in tandem?

THE WITNESS: That is right.

On cross-examination, Mr. Taylor agreed that the fact that the front brakes may have been locked out does not render the truck unsafe to drive, and he confirmed that the front brakes do not have as much braking power as the rear dual wheels (Tr. 184). In response to further questions concerning the effect of the brakes on the accident in question, Mr. Taylor stated as follows (Tr. 184-185):

Q. With all the brakes in the rear working, even though there is some indication there is a possibility one set of wheels was not working as sufficiently as it should, that would have been sufficient braking power on that grade, wouldn't it?

A. If they were all working, yes.

Q. Do you subscribe to the same theory as Mr. Weffenstette and Mr. Hatter; there can be no other earthly solution as to what caused this accident other than defective brakes?

A. No. I am not no mind reader. Had he had good brakes, he could have stopped the truck without going over the hill. That is my theory.

Q. But you are not saying he did not have sufficient brakes?

A. No.

Q. With one-third of the load going down a grade five to seven degrees, what percentage of braking power would you have to have, if you know?

A. On this particular truck, the load capacity they had on it at the time it had the accident would not have made any difference in the braking power.

And, at (Tr. 185-186):

Q. Mr. Taylor, you said if all the brakes were working, that would have prevented the accident, you believe?

A. Yes.

Q. That includes the front brakes?

A. Yes.

Q. And the rear brake that had the broken shoe?

A. That is the reason the valve is made so the operator can have instant contact. If he needs added braking power, he flips the switch and he has it.

Q. But this truck -- you did not find a switch on this truck. Is that correct?

A. Well, it either had a switch on it or the brakes were plugged off. They were not working. The front wheels were not working.

Q. But did you observe the hose that had been disconnected from the plugged left front wheel?

A. Yes.

Q. If it had a lockout switch, would they have needed to have disconnected the hose?

A. No.

* * * * *

Q. Do you believe the front brakes might have made the margin of difference in him making that curve?

A. If he was having trouble with his rear brakes, it would have made all the difference in the world.

Q. To have the front?

A. To have the extra two wheels, yes.

Highwire's Testimony and Evidence

Highwire introduced a copy of a statement executed by Mr. Carl Ray Sellards, a representative of Worldwide Equipment, Inc., with copies of photographs of the original photographs submitted by Highwire, exhibits HÄ1 through HÄ13, concerning the wheel assemblies of the truck in question. The statement is dated October 23, 1986, and it states as follows (Exhibit HÄ13):

Per the request of the above named company, I Carl Sellards, inspected the brakes on a 50,000 lb set of rear bogies and found that it had 30% braking on left rear wheel and 50 to 60% braking on the remaining 3 wheels. In my opinion truck showed sufficient braking.

Henry L. Sparks, testified that he is reclamation supervisor for one of highwire's sub-contractors, and that he was Mr. Hammond's supervisor, beginning in April, 1980, when they worked for the Rebel Coal Company. Mr. Sparks stated that Mr. Hammond was a utility farmhand and worked on the seed crew. He drove a hydroseeder, which is an 800 Mack truck similar to the one he was driving at the time of the accident. Mr. Sparks believed that Mr. Hammond was an experienced

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driver, and that he had regularly driven fuel trucks from 1980 until his death, and that Mr. Hammond taught him how to drive the truck. Mr. Sparks believed that Mr. Hammond had received training, and that he was already driving a fuel truck when Mr. Sparks came to Rebel Coal. Mr. Sparks also believed that Mr. Hammond was well acquainted with the fuel truck and needed no additional training in its operation (Tr. 192).

Mr. Sparks confirmed that Mr. Hammond would visually inspect his vehicle before driving it, and would inform him if something was wrong. He also confirmed that Mr. Hammond was trained in checking the oil, water, air pressure, tires, and making a visual walkaround inspection of the truck, and that this was a standard procedure for him. Mr. Sparks stated that Mr. Hammond was employed by Highwire a week before the accident, and that he had daily contact with him since he had returned to work for Highwire approximately 10 days before Mr. Hammond, and they worked on the same auger crew (Tr. 194).

Mr. Sparks stated that Mr. Hammond was familiar with the truck he was driving at the time of the accident and that some 6 years earlier during a strike he drove the truck at the Rebel Coal site servicing equipment. Mr. Sparks confirmed that he himself drove the same truck on July 31, 1986, when it was parked at the Minquest site. Mr. Hammond was scheduled to help him fuel and grease some equipment, and Mr. Sparks backed the truck up and waited for Mr. Hammond to arrive. Mr. Hammond was ill and could not accompany him, so Mr. Sparks parked the truck because he did not wish to work alone. Mr. Sparks confirmed that he drove the truck approximately 300 feet while backing it up and then parking it, and that he had no problem with the brakes. He confirmed that he visually inspected the truck, and that to his knowledge the truck was not moved again until the day of the accident. However, the engine was started every day because the battery was low and he had to jump start it, and the truck had to be started in order to obtain fuel, grease, and oil from it (Tr. 197, 201).

On cross-examination, Mr. Sparks confirmed that prior to driving the truck some 300 feet on July 31, he last drove it 3 to 5 years ago. Mr. Sparks also confirmed that after the accident, he drove the roadway along the same route taken by Mr. Hammond, and there were three locations where he would have had to use his brakes. Most drivers use the engine brake rather than the foot brake, and in the event Mr. Hammond did not have the truck in low gear or was not using the engine brake, he would have used the foot brake as he approached the grade at the intersection of the roadway which turned to the right (Tr. 203).

In response to further questions, Mr. Sparks stated that he considered Mr. Hammond to be a dedicated employee, and that had anything been wrong with the truck, he would have reported it to him. If there were something "minor," he would probably have driven it to the work site and reported it to him (Tr. 203). Mr. Sparks believed that the engine brake would have been sufficient to hold the truck on the roadway inclines, and that if he were driving the truck he would lock out the front brakes because it would be safer and provide better steering. When asked for an opinion as to whether the truck would have needed any front wheel braking going down the road in question, Mr. Sparks replied "Not on the loose rock on that road. It could have caused problems if the front ones could have caught first" (Tr. 206).

Wayne Messer testified that he is employed by Highwire and that he first met Mr. Hammond when he started working for Rebel Coal in 1984. Although he was not Mr. Hammond's supervisor, he had occasion to use him as a fill-in truck driver. Mr. Messer believed that Mr. Hammond was an experienced truck driver who needed no training, and he would have no reservations about assigning him to drive a 600 or 800 Mack truck (Tr. 212).

Mr. Messer stated that he was familiar with brake linings, and has worked as a mechanic or supervisory mechanic all of his adult life. He identified photographic exhibits HÄ1 through HÄ12 as the tandem differential of the truck that Mr. Hammond was driving at the time of the accident, and based on his review of the photographs and the information he had with regard to the truck, he was of the opinion that the brake linings on the drums were sufficient enough to have stopped the truck on the grade which it travelled. Even if the brake linings were bad, he believed that the engine brake could stop the truck. He indicated that his mechanic took the brake linings off the right side of three of the truck wheels, and one off the right front, and they were installed on another truck that is still in use (Tr. 215Ä216).

Mr. Messer stated that the truck in question was equipped with a brake lockout device, and that if the front brakes lost air pressure, that device would automatically lock the brakes when the air pressure is below 65. He confirmed that it is not unusual for the front brakes to be locked out, and that most drivers do not use the front brakes for their own safety because the roads are constantly watered down to keep down the dust (Tr. 218).

On cross-examination, Mr. Messer agreed that the linings are only part of the brake mechanism, and regardless of the thickness of the lining, if it does not engage the brake drum, it will not stop. With regard to the photograph of the broken brake lining, Mr. Messer believed that the brake would still be 75 to 80 percent effective (Tr. 220).

Mr. Messer stated that Mr. Hammond had operated the truck in question at Rebel Coal "maybe like once a month" in the absence of one of his regular maintenance men and that he did a good job. Mr. Messer confirmed that he was in a lay-off status for 2 to 3 weeks prior to the accident, and the last time he observed the truck was sometime in July, 1986, when it was parked at the Minquest site. At that time, he and Mr. Larry Stacy were in the process of shutting down the Rebel Coal job, and since the Minquest hill site is rather steep, he was concerned about the brakes and Mr. Stacy assured him that the engine brake was working and that the other brakes "were real good" (Tr. 223).

William Larry Stacy, Foreman, Highwire, Inc., testified that he first met Mr. Hammond approximately 2 years ago when they both worked for the Rebel Coal Company. At that time Mr. Hammond was a doing utility work on a reclamation crew, and Mr. Stacy observed him driving 600 and 800 Mack trucks, but he could recall that he saw him drive the truck which was involved in the accident. Mr. Stacy was of the opinion that Mr. Hammond was well acquainted with, and capable of driving the 600 Mack truck (Tr. 230).

Mr. Stacy confirmed that he drove the truck which was involved in the accident when Rebel Coal shut down, and he moved it to the Minquest lot. Before driving the truck, he inspected it visually and checked the oil and air, and found it to be in good running condition. Had he detected any problems, he would have informed Mr. Messer who followed him to the lot and brought him back in his pickup. Mr. Messer asked him about the brakes, and Mr. Stacy confirmed that he advised Mr. Messer that the truck had good brakes and a good engine brake. Mr. Stacy stated that he had no problem in driving the truck and that was the last time he was in it. He had no knowledge that the truck was subsequently moved, and every time he was by the lot, the truck was parked in the same place (Tr. 233).

On cross-examination, Mr. Stacy stated that he could not recall exactly when he moved the truck to the Minquest lot, but believed that it was in mid-July. He confirmed that when he inspected the truck, he did not crawl under it to check the

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front brakes. He also confirmed that he personally never uses a front brake when he drives the truck, and that he "flips the switch off." He stated that "I do not want any front brakes," denied that he ever unhooked any brake hose, but admitted that "I have backed the adjustments up to keep them from applying, run them loose" (Tr. 239). He confirmed that he did not know the condition of the front brakes when he moved the truck.

In response to further questions, Mr. Stacy was of the opinion that the truck foot pedal braking system was sufficient to have stopped the truck on the incline leading to the Old Thelma Mine road "anywhere out there," even without the use of the engine brake (Tr. 240).

Arguments Presented by the Parties

The parties were afforded an opportunity to file posthearing briefs in these proceedings. Highwire filed a memorandum, but MSHA filed no written brief. I have considered Highwire's written arguments, as well as the oral arguments made by both parties on the record in the course of the hearing in my adjudication of these matters.

Highwire points out that MSHA attempted to prove that the accident occurred as a direct result of brake failure on the truck driven by the accident victim Claude Hammond, with the evidence being the disconnection or non-working front wheel brakes and one rear wheel brake, which had the brake pad worn to the metal. Highwire contends that through its witnesses, it has substantially proved that the truck had three separate braking systems, any one of which would have been sufficient to stop the truck on the five to seven percent slope on which the driver was travelling. Highwire suggest that the preponderance of the evidence from its knowledgeable witnesses indicated that the truck was in proper working condition, had necessary braking, and that Mr. Hammond was completely knowledgeable about the operation of the truck in question, even though he had not been put through a training period again during the first few days he had started work with Highwire. Highwire concludes that the evidence of substance indicated that MSHA's effort to prove the accident was caused by failure to maintain proper braking is mere speculation, and that its contention that Mr. Hammond was not a qualified driver after he had driven this type of vehicle for many years, is not very realistic.

Findings and Conclusions

MSHA's accident investigation failed to specifically confirm exactly who owned the truck that was involved in the accident. During the course of the hearing, Highwire's counsel asserted that the truck was owned by Rebel Coal Company (Tr. 9), and the record reflects that when Rebel Coal ceased its operations, the truck was driven from Rebel's parking area to the parking area of Minquest, Inc. Mr. Messer also believed the truck was owned by Rebel Coal (Tr. 220).

Inspector Hatter believed the truck was owned by Minquip Inc., who in turn leased it to Minquest, Inc., an underground mining operation owned by Mr. B.W. McDonald, the owner of Highwire. Mr. Hatter also believed that the truck was used to transport fuel to Highwire's mining operation, and to grease the equipment used by Highwire (Tr. 29-30; 43-44).

Highwire's foreman William Stacy confirmed that Minquest and Highwire are owned by Mr. McDonald, but he believed the truck was owned by Min Mag, Inc. (exhibit M-6, pgs. 9, 12).

Highwire's Mine Superintendent Herb Swiger confirmed that Mr. McDonald owns and controls Highwire and Minquest. Mr. Swiger believed the truck was owned by Minquip, an equipment holding and leasing company also owned by Mr. McDonald. Mr. Swiger confirmed that Highwire would be responsible for the maintenance of any leased equipment. He stated that Min Mag is a "management group" controlled by Mr. McDonald (exhibit M-6, pgs. 25-26).

While there may be some dispute as to the actual ownership of the truck in question, the facts in this case establish that on the day of the accident, Mr. Hammond, who was an employee of Highwire, was performing work at Highwire's mining operation under the supervision of Highwire's foreman, Henry Sparks. Mr. Hammond intended to fuel and service some equipment to be used on that day, and when he found that the service truck he was to use was low on fuel, he suggested that another truck be brought to the area, and he volunteered to obtain another truck which was parked at Minquest's mine site. Foreman Sparks agreed that this should be done, and he gave Mr. Hammond the keys to a pickup truck so that he could drive the 2 or 3 miles to Minquest and drive the fuel truck back so that he could continue with his work at Highwire.

Foreman Sparks testified that Highwire had the right or privilege to use the truck in question and that he himself had driven the same truck at the Minquest site on July 31, 1986, a

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week before the accident, when he and Mr. Hammond planned to use it that day to perform some work (Tr. 200-201). In his prior statement to MSHA during the accident investigation, Mr. Sparks confirmed that he had previously used a lube truck parked at the Minquest site, and that Highwire's superintendent Herb Swiger gave him permission to do so (exhibit M-6, pg. 14). Mr. Stacy suggested that since Mr. McDonald "owns the companies," Highwire had the authority to use the truck in question (pg. 4, exhibit M-6). Mr. Stacy also confirmed that when Rebel Coal shut down, he drove the truck to the Minquest site and parked it there (Tr. 232).

Highwire's mine superintendent Swiger indicated that "subject to confirmation," the truck in question was owned by Minquip, a leasing company owned by Highwire's owner McDonald, and he suggested that the truck was leased to Highwire by Minquip, and stated that as the lessee, Highwire would be responsible for any required maintenance on the truck. Mr. Swiger also confirmed that he had supervised Mr. Hammond "one way or the other, since December, 1984" (pgs. 25, 26, exhibit M-6).

Highwire's mechanic, Wayne Messer, testified that Mr. Hammond drove the truck in question when he and Mr. Hammond were employed at Rebel Coal, and that he (Messer) was in charge of equipment maintenance at that operation. Mr. Messer confirmed that when Rebel Coal shut down, Mr. Sparks drove the truck to the Minquest site and parked it there (Tr. 221-223).

On the facts of this case, it seems clear to me that on the day of the accident, the truck in question was under the control and supervision of Highwire and that it was being used to perform work at Highwire's mining operation. Regardless of the actual legal ownership of the truck, the record in this case establishes that Highwire had the discretionary authority to use the truck as required as part of its mining operations, and there is a strong inference that the truck was leased to Highwire by one of the interconnected corporate entities controlled by Highwire's owner and operator, Mr. McDonald. Since the truck was under the control and supervision of Highwire, and since it was being driven by one of its employees for the purpose of performing work at Highwire's mining operation, I conclude and find that Highwire is the responsible and accountable mine operator for purposes of MSHA's enforcement jurisdiction under the Act, and that it is in fact responsible for the citations which were issued in these proceedings.

Fact of Violation - Citation No. 2776211 - Docket Nos. KENT 87 Å 56;
KENT 86Å168ÅR

Highwire is charged with a violation of 30 C.F.R. 77.1605(b), which requires in pertinent part that "Mobile equipment shall be equipped with adequate brakes." The standard provides no guidance as to how the language "adequate brakes" should be construed, and the parties have advanced no arguments with respect to the interpretation and application of that language. MSHA apparently believes that the condition of the truck braking system, as testified to by its inspectors, coupled with the fact that the truck ran off the roadway, establishes that the truck had at least three brakes which were less than adequate. Highwire takes the position that, notwithstanding the brake conditions described by the inspectors, the remaining brakes on the truck were in proper working order and provided the necessary braking power sufficient to stop the truck on the grade that it was travelling at the time of the accident.

In a number of reported cases interpreting the meaning of the term "adequate brakes," such determinations were made by the inspectors through their inspections of the braking systems where certain defects were noted, or by tests conducted on the trucks by operating them on inclines to determine their braking or stopping capability, and a summary of these decisions follow.

In Concrete Materials, Inc., 2 FMSHRC 3105 (October 1980), and Medusa Cement Company, 2 FMSHRC 819 (April 1980), Judge Melick and Judge Cook affirmed violations for inadequate brakes on haulage trucks based on tests conducted by the drivers by driving the trucks on inclines to determine their braking and stopping capability. In the Medusa Cement case, an MSHA inspector defined the term "adequate" as "capable of stopping and holding a loaded haul unit on any grade on the mine property." Judge Cook found that the test conducted by the inspector and his interpretation of the results obtained sufficiently established a prima facie case for inadequate brakes.

In Minerals Exploration Company, 6 FMSHRC 316, 322 (February 1984), Judge Morris affirmed a violation of a metal and non-metal brake standard identical in language to the standard cited in this case (56.9003). The inspector tested the brakes on a scraper by inserting a piece of paper under the brake drum with the brake depressed. Since he was able to remove the paper, the inspector concluded that the brakes were not working. Judge Morris found that "If one of four brake

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shoes on a vehicle's brake drum do not contact the drum then such brakes are inadequate as a matter of law" (6 FMSHRC 322).

In another Minerals Exploration Company case, 6 FMSHRC 329, 342 (February 1984), Judge Morris affirmed another "inadequate brake" violation based on an inspector's observation that the cited water truck was "pulling very hard to the right." Testimony by the operator's foreman reflected that the brakes on the truck had been relined 2 weeks before the citation was issued.

In Turner Brothers, Inc., 6 FMSHRC 1219, 1259 (May 1984) and 6 FMSHRC 2125, 2134 (September 1984), I affirmed violations of section 77.1605(b), for inadequate parking brakes on a coal haulage truck and an endloader based on tests which consisted of parking the equipment on an incline and setting the brakes to determine whether they would hold. In both instances, the brakes would not hold the equipment, and I concluded that the brakes were inadequate. Judge Melick made similar findings in another Turner Brothers, Inc., case, 6 FMSHRC 1482, 1483 (June 1984). He also affirmed a violation of section 77.1605(b), in Triple B Corporation, 8 FMSHRC 833, 834 (May 1986), where the evidence established that a missing parking brake shoe and drum rendered the brake non-functional, and that the brakes on a secondary braking system "were weak," thereby delaying the truck stopping time.

In Greenville Quarries, Inc., 9 FMSHRC 1390, 1430 (August 1987), I affirmed a violation for inadequate brakes on two haulage trucks based on tests conducted on an incline which indicated that the brakes would not hold the truck and that they were "slow to stop" when the brakes were applied. Upon visual inspection of one of the trucks, the inspector found that the rear brake fluid cylinder was empty, and that on a second truck, the fluid cylinder was also empty, and the brake hoses were disconnected. He also found that 50 percent of the rear braking system on one truck was inoperative.

In the Greenville Quarries case, MSHA presented expert testimony that brakes which are not maintained to their design specifications are less than adequate, and 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.

Ford Coal Company, 5 FMSHRC 608 (March 1983), concerned an alleged violation of section 77.1605(b), based on an inspector's finding that a haulage truck being operated on a steep elevated roadway of 19 percent grade had a ruptured diaphragm

in the air brake chamber which provided air pressure for the left and right front brakes. Judge Lasher made the following observations at 5 FMSHRC 611Å612:

[I]n the final analysis, the critical question in this case comes down to a determination of what facts are to govern the "adaequacy" (sic) issue. One of the difficulties is that the regulation itself provides no clear guidance as to what is to be considered "adequate brakes." Such a regulation necessarily must be articulated in somewhat general terms in order to cover the myriad of equipment used in the mining industry. In considering what constitutes adequate brakes at least some of the factors which must be considered are the overall braking system of a given vehicle, the uses to which it is to be put, and the conditions under which it is to be used--all of which should be considered in the background of the experiences and common understanding of the particular facet of the industry in question.

In vacating the violation, Judge Lasher relied on the evidence presented with respect to certain field tests conducted on the truck, which among other things, established that even with the front brakes off and locked out by means of a cut-off switch on the dashboard, the primary braking payload of the truck, which was carried in the rear braking system, was sufficient to stop the truck within its recognized performance acceptability stopping distance.

In Wilmot Mining Company, 9 FMSHRC 684, 688 (April 1987), the Commission affirmed a judge's finding of a violation of section 77.1605(b), for inadequate defective brakes on a Terex front-end loader which was involved in a fatal accident. The judge's finding was based on evidence which indicated that the brake master cylinder and an auxiliary brake cylinder were very low in brake fluid, even though the brakelines, wheel cylinder and hydraulic brake lines were intact, i.e., they had not leaked because of the accident. When tested at operating speed, the loader would not stop within the normal expected distances. Rejecting the operator's contention that the record evidence did not support the judge's finding as to the cause of the inadequacy of the brakes, the Commission stated in pertinent part as follows at 9 FMSHRC 688:

To prove a violation of this standard, however, the Secretary is not required to elaborate a

complete mechanical explanation of the inadequacy of the brakes. A demonstrated inadequacy itself may be sufficient. * * * Whatever the precise cause of the breaking defect, the evidence amply supports the judge's finding that the Terex was not "equipped with adequate brakes," in violation of the cited standard (emphasis added).

In the instant case, the evidence establishes that the impact of the accident resulted in the demolition of the truck. The cab of the truck was demolished, the rear axles were torn loose, and the tank separated from the truck chassis. Given the extent of the damage, it was impossible for the inspectors to test the brakes in the usual manner by driving the truck under regular operating conditions. The truck wheels and braking systems were dismantled and were subjected to examination by the inspectors, as well as Highwire. The inspectors found defects in the two front wheel braking systems, and on one of the rear wheel braking systems, and they concluded that these defects were pre-existing conditions which were not caused by the impact of the accident.

I take note of the fact that while mandatory safety standard 30 C.F.R. 77.1606(c) requires that all defects affecting safety be corrected before the equipment is used, Highwire is not charged with a violation of that standard. It is charged with having inadequate brakes on the truck in question. Thus, the critical question presented is whether or not the defects found by the inspectors with respect to the two front wheel braking systems, and the one rear wheel braking system, where most of the braking action comes from, caused the truck to be without "adequate brakes."

Inspector Weffenstette testified that there are two sets of wheels at four different positions on the rear of the truck, and that each wheel has a set of brake shoes consisting of two different shoes with two linings on each shoe (Tr. 157). The rear braking system, taken as a whole, consists of four wheel drums, and four sets of brake shoes (Tr. 157-158). He acknowledged that the remaining six wheels of the truck appeared to be working because the shoes were in contact with the drums and kept rust off the drums, and that the brake linings on the other three wheels appeared to be sufficient. However, he confirmed that there was no way to test the braking capacity of all of the remaining individual wheels because the truck could not be subjected to a load test (Tr. 158-159). He further confirmed that the truck had eight wheels that would have supplied some braking power for the truck, and that

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the only two wheels which would not have applied any braking power were the two front ones (Tr. 166).

Inspector Hatter testified that based on his observations of the remaining three sets of wheels on the truck, they "probably did work," but he confirmed that the extent to which they were functional could not be determined because of the damage to the wheels caused by the accident (Tr. 103-104). He also confirmed that he could not determine whether the front wheels were locked because there was no way to jack the truck up and turn the wheels (Tr. 108).

None of the inspectors could determine whether or not the truck was equipped with a lock-out switch for the front brakes. Although Inspector Weffenstette stated that due to the presence of mud and corrosion on the front drums, it would have been impossible for the brake shoe to make contact with the drum, he conceded that these conditions could readily occur if the brakes were locked out, and that it is not unusual for mud build-up to occur on brakes which are locked out (Tr. 162). However, he confirmed that the presence of rust, dirt, and mud inside the drum indicates that the front brakes had not been used for some period of time (Tr. 150).

Inspector Taylor did not believe that the locking out of the front wheel brakes per se rendered the truck unsafe to drive, and he conceded that if all of the rear brakes were working, the truck would have had sufficient braking power on the grade of the haulage road in question (Tr. 184).

Inspector Hatter testified that upon inspection of the truck brakes after the accident, he found that the airline to the left front brake was disconnected or "tied off" and plugged with dry mud, thereby rendering that brake inoperative. He also testified that the right front brake lining and shoe was covered with dried mud, thereby preventing the brake shoe from making contact with the brake drum. Although Mr. Hatter confirmed that he made no independent inspection of the condition of the brakes to determine whether they were functional, he based his assumption that the shoe would not make contact with the drum on his observation of the presence of dried mud which he believed would not be there if the shoe were making contact with the drum.

Mr. Hatter's findings are supported by Inspector Weffenstette who confirmed that upon inspection of the right front brakes, he observed a buildup of grime, mud, and rusty corrosion between the shoe and the drum. Mr. Weffenstette, whose prior experience included work as a mechanic assembling

and disassembling brakes similar to those on the truck in question, agreed with Mr. Hatter's conclusion that given the presence of the dried mud and the other conditions he observed on the brakes, the shoe and drum would not make contact. In his opinion, had the front brakes been working properly and making contact with the drum, friction and pressure resulting by the application of the brake would have dissipated the dried mud.

Inspector Taylor, who also inspected the truck, supported Mr. Hatter and Mr. Weffenstette's views that the dried mud on the front right brakes prevented contact between the brake shoe and drum. Mr. Taylor testified that he scraped the dried mud off the brake lining and shoe, and from in between the drum and the shoe, and he believed it would have been impossible for the dried mud to be there had the brakes been operating properly. Mr. Taylor also confirmed that the left front brake hose was disconnected, and since the left and right front brakes work in tandem, the disconnected hose would have rendered both braking systems inoperative.

Inspector Hatter also testified that upon inspection of the left rear truck tandem brakes, he found a broken piece of the brake shoe, and that the shoe had worn through the exposed rivets to the point where he could feel that the drum was scored and worn. Mr. Hatter stated that the grooved and scored drum effected the braking capacity of the wheel because of the lack of sufficient friction against the brake lining to stop the wheel from rolling. He believed that the action of "metal on metal," would reduce the braking capacity to less than half. He also believed that the condition of the front and left rear brakes would render the remaining truck braking systems 50 to 55 percent effective.

Inspector Weffenstette confirmed Mr. Hatter's findings, and he too observed that the rear brake shoe was broken, and that the rivets had worn through the normal wear of the shoe to the point where they cut grooves into the drum. Given those conditions, Mr. Weffenstette was of the opinion that the left rear brakes lost 40 to 50 percent of the braking capability on that wheel. Coupled with the inoperable front brakes, Mr. Weffenstette believed that 35 to 40 percent of the overall truck braking capability would be effected. Although Mr. Weffenstette found that the remaining brakes were working, he believed that the loss of full braking capability due to the condition of the front and rear brakes could have contributed to the loss of control of the truck. Inspector Taylor believed that the accident could have been prevented if all of the truck braking systems were in working order. He testified

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that if the driver were experiencing difficulty with the rear brakes, the extra braking capacity of the front wheel brakes "would have made all the difference in the world."

The loss of rear braking capability is also supported by a statement submitted by Highwire from Mr. Carl Ray Sellards, Worldwide Equipment, Inc., (exhibit HÄ13). Although Mr. Sellards was not called to testify, his statement reflects that upon his inspection of the rear set of brakes, he found that the left rear wheel had 30 percent braking, and 50 to 60 percent braking on the remaining three wheels. In his opinion, the truck "showed sufficient braking."

Highwire's reclamation advisor Henry Sparks testified that he drove the truck in question on July 31, 1987, when he backed it out of the parking area for a distance of 150 feet while waiting for Mr. Hammond who was to accompany him to do some work. However, Mr. Hammond was ill and the work could not be done, and Mr. Sparks parked the truck and did not use it that day. Mr. Sparks stated that he had no trouble with the brakes, and he did not believe that the truck was ever moved again until the day of the accident (Tr. 196).

Highwire's mechanic Wayne Messer testified that based on his observations of the truck brake pads and linings, he was of the opinion that the truck had sufficient brake linings to stop the truck on the roadway grade. He confirmed that the brake linings from three of the wheels were taken off and installed on other trucks which are still in use. In his opinion, even if the brakes had no linings, the driver could still stop the truck by using the "jake" or engine brake. Mr. Messer conceded that the brake linings have to engage against the drum before the brake will work. If the linings do not engage the drums, they will not stop the truck (Tr. 219). With regard to the broken rear wheel brake lining, Mr. Messer believed that the brake was still 75 to 80 percent effective (Tr. 220). He confirmed that the truck had a lock-out device for the front brakes, and that for safety reasons, most of the drivers do not use the front brakes when the haul roads are wet (Tr. 218).

Mr. Messer testified that the last time he had anything to do with the truck was sometime in July, 1986, when the Rebel Coal operation shut down, and Mr. Stacy drove the truck to the Minquest parking area and left it there. Mr. Messer followed Mr. Stacy in his pickup, and Mr. Stacy informed him that all of the brakes were in good working order (Tr. 223). Although Mr. Messer asserted that Rebel Coal's mechanic Larry Daniels told him that the brakes were adjusted 3 days before

the shutdown, Mr. Messer had no personal knowledge that this was true, and no further evidence was forthcoming from Highwire to confirm that this was true (Tr. 225-226).

Highwire's foreman William Stacy testified that he drove the truck and parked it at the Minquest site after Rebel Coal shut down, and he confirmed that the truck was in good running condition and that no mechanic ever advised him that any maintenance work had been performed on the truck. Mr. Stacy confirmed that he had no problems with the truck, that all of the brakes were good, and that he would have informed Mr. Messer of any brake problems. That was the last time he drove the truck, and as far as he knew it remained parked until the time of the accident (Tr. 232). Mr. Stacy confirmed that he never uses the front brakes when he drives a truck, and that he either disconnects them by means of a switch, or backs the adjustments up to keep them from applying and running loose. He confirmed that he had no knowledge of the condition of the brakes at the time that he drove the truck (Tr. 239).

After careful review and consideration of all of the testimony in this case, I conclude and find that Highwire has not rebutted the credible and probative findings of the inspectors with respect to the defective conditions of the two front brakes and left rear brakes of the truck in question. I further conclude and find that Highwire's conclusions that the remaining braking systems were sufficiently adequate to stop the truck on the grade where it was travelling at the time of the accident are based on the unsupported opinions of Mr. Sparks and Mr. Stacy who had a rather limited driving exposure to the truck and who never drove it on the haulage road where the accident occurred. With regard to Mr. Messer's knowledge of the truck braking systems, while I have no reason to discount his braking theories and conclusions, the fact is that his examination of the defective brakes in question was limited to his visual observation of the truck wheels after the accident. I cannot conclude that he subjected the braking systems to the rather detailed examination that was performed by the three MSHA inspectors who testified in this case.

Although it is true that the truck in question could not be driven, or the brakes tested, under normal driving conditions after the accident, the fact remains that the examinations made by the inspectors who testified in this case revealed serious defects in the two front wheel brakes and one rear wheel brake. I conclude that a reasonable interpretation and application of section 77.1605(b) required that all brakes on the truck in question be maintained in an operable and

serviceable condition so as to enable them to properly function for the purpose for which they were designed. It seems obvious to me that all of the braking systems on the truck are intended to function in such a manner so as to bring the truck to a stop when the brakes are applied. Here, MSHA's un rebutted testimony and evidence establishes that the two front wheels and one rear wheel had defective braking conditions which either rendered those brakes inoperative, or detracted from their braking capability.

I further conclude and find that MSHA has established a reasonably supportable inference that the defective braking conditions testified to by the inspectors may have contributed to the loss of the overall braking capability of the truck. I believe that the clear intent of the cited standard is to insure that all braking systems on such a piece of equipment are completely functional so as to insure the margin of safety intended by the installation of those braking systems. Since the standard is obviously intended for the protection of miners who are required to use the equipment, I conclude that any other interpretation would be contrary to the intent and purpose of the standard. Under all of the aforementioned circumstances, I conclude and find that MSHA has established by a preponderance of the credible evidence in this case that the cited brake conditions on the truck in question rendered them inadequate within the meaning of section 77.1605(b). Accordingly, I conclude that MSHA has established a violation, and the citation IS AFFIRMED.

History of Prior Violations

The parties stipulated to Highwire's history of prior violations. For the period July 1, 1986 to March 4, 1987, Highwire paid civil penalty assessments for 36 violations. Six of these assessments were for violations of section 77.1605(b), which occurred after the accident in question. Under the circumstances, I cannot conclude that Highwire's overall compliance record warrants any substantial increase in the civil penalty assessment for the citations which has been affirmed in this case.

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

The parties have stipulated that Highwire is a small-to-medium size mine operator and that any civil penalty assessment for the violation in question will not adversely affect its ability to continue in business. I adopt these stipulations as my findings.

Good Faith Compliance

The parties stipulated that Highwire demonstrated good faith in attempting to achieve rapid compliance after notification of the violation in question. I adopt this as my finding and conclusion on this issue.

Negligence

Although Inspector Hatter made a finding of "moderate" negligence on the part of Highwire, on the facts of this case, particularly my findings with respect to the vacated citation for an alleged failure to inspect the truck, which follows below, I find no reasonable basis for concluding that Highwire had reason to know about the defective brake conditions at the time Mr. Hammond borrowed the truck from Minquest. Under the circumstances, I cannot conclude that Highwire was negligent.

Gravity

Although I have made no findings as to the cause of the accident, based on the credible testimony of the inspectors, I conclude and find that the inadequate brake conditions on the truck in question constitute a serious violation of section 77.1605(b).

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, I conclude that a civil penalty assessment in the amount of \$150 is reasonable and appropriate for Citation No. 2776211, August 27, 1986, 30 C.F.R. 77.1605(b). With regard to the remaining citations in this case, Highwire agreed not to contest the violations further and agreed to pay the proposed civil penalty assessment in full, and they are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment
2775814	11/20/86	77.509(c)	\$ 20
2775815	11/20/86	77.502	\$ 20
2775817	11/20/86	77.704Ä8(a)(1)	\$ 20
2775818	11/20/86	77.502	\$ 20
2775820	11/20/86	77.509(a)	\$ 20

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Fact of Violation - Citation No. 2776208 - Docket No.
KENT 86Ä165ÄR

Highwire is charged with a violation of mandatory training standard 30 C.F.R. 48.26, which mandates training for newly employed experienced miners. The standard requires that such miners complete a program of instruction in seven topical categories which are as follows:

1. Introduction to work environment.
2. Mandatory health and training standards.
3. Authority and responsibility of supervisor's and miners' representatives.
4. Transportation controls and communication systems.
5. Escape and emergency evacuation plans; firewarning and firefighting.
6. Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work.
7. Hazard recognition.

Inspector Hatter confirmed that he issued the citation because he found no evidence that Mr. Hammond had ever received any newly employed experienced miner training while employed at Highwire. Although Mr. Hatter confirmed that mine superintendent Swiger advised him that he had instructed Mr. Hammond in the "introduction to work environment," since Mr. Swiger was not listed as an authorized training instructor in Highwire's training plan, Mr. Hatter was of the view that Mr. Swiger was not authorized to conduct that training (Tr. 30Ä31).

MSHA presented some documentation of Mr. Hammond's training prior to his employment at Highwire. Exhibit MÄ8 is a copy of a training certificate indicating that Mr. Hammond received newly employed inexperienced underground coal training on August 30, 1985, at the Mayo school in Paintsville Exhibit MÄ9 reflects that he received annual refresher surface coal training at the Rebel Coal Company on July 29, 1985.

Exhibit MÄ10 is a copy of Highwire's approved training program, and Mr. Glenn Kidd is listed as the MSHA approved

training instructor. Mr. Kidd was interviewed during the accident investigation, and he confirmed that while he had an oral contract in July, 1986, to conduct training for Highwire, he was never called upon to provide such training, and that Highwire never provided him with any employee training records (exhibit MÄ6, pgs. 23Ä24).

Respondent's counsel confirmed that Mr. Hammond was employed by Highwire on August 4, 1986, 5 days before the accident, and that prior to working for Highwire, he was employed by Minquest and the Rebel Coal Company. He further explained Mr. Hammond's employment status as follows (Tr. 246, 248Ä249):

MR. RICE: For our purposes, we would not consider him a newly employed employee because he had been working with Minquest. Well, he worked for Rebel then he moved into Minquest and then on to Highwire, which only involved -- it was just a continuous thing. It was just paper work.

* * * * *

MR. RICE: * * * See, B.W. McDonald is primarily involved in these companies, because of Rebel going into a bankruptcy situation, to help manage the situation. Then Claude went to Minquest until they got Highwire started. He was a good employee, so they put him at Minquest although it was an underground mine. He did not work underground. Then he moved on to Highwire.

It is not a situation -- Herb here would have been his supervisor at Minquest. He would have been his supervisor at Highwire. It was just a paper work transaction is all that was involved. And he would have gone to Highwire sooner if it had started up, when there would be a position for him.

Foreman Stacy testified that when he worked with Mr. Hammond at the Rebel Coal Company, Mr. Hammond was a utility man, and Mr. Stacy could not recall observing him in the truck in question at Rebel (Tr. 230). In his prior statement made to MSHA during the accident investigation, Mr. Stacy indicated that when Mr. Hammond first came to Highwire they drove several trips together, but that this was not recorded on any training Form 5000Ä23. When asked whether Mr. Hammond

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had received any hazard or task training at the Highwire operation, Mr. Stacy replied "Not right at this particular time. I had not given him anything like that at the mine, just what I've stated about the 777, just what I've given him at the mine, you know so far as being right on the equipment" (exhibit MÄ6, pgs. 4Ä5).

In his prior statement to MSHA, reclamation foreman Sparks alluded to prior training received by Mr. Hammond before he was employed by Highwire. However, Mr. Sparks had no knowledge of any documented training received by Mr. Hammond while in the employ of Highwire (exhibit MÄ6, pg. 20). Although Mr. Sparks testified as to Mr. Hammond's experience as a truck driver, no testimony was forthcoming with respect to any training received by Mr. Hammond while in the employ of Highwire.

Superintendent Swiger was not called to testify at the hearing in this case. However, in his prior statement to MSHA, he confirmed that Highwire's employee training is his responsibility, and that training records, Forms 5000Ä23, and copies of the training plan were available and could be presented at a later date. However, no such information or documentation has been forthcoming from Highwire. In response to Mr. Hammond's training, Mr. Swiger stated as follows (exhibit MÄ6, pg. 27):

Hatter: To the best of your knowledge and belief, had the victim, Mr. Claude Hammond, received any training by Highwire since 7/29/85, when he had annual refresher training on the auspices of now called Rebel Coal?

Swiger: The only training that Claude had since his appointment with Highwire was an introduction to his work environment on 8/4, that I personally gave him myself.

Hatter: Is that documented on a 5000Ä23 form?

Swiger: No sir.

Hatter: Had he received any hazard training with respect to this matter? By this mine, I mean Highwire?

Swiger: Not to my knowledge.

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Hatter: Had he received any task training? With respect to the task that he was employed at at the time of the event.

Swiger: On 8/4, that's encompassing all this, but there's nothing that is listed, to my knowledge, that was listed on the 5000 form.

Hatter: Was his annual refresher training current? In other words, was it up to date?

Swiger: My opinion it is.

Highwire's position is that it did not consider Mr. Hammond to be a newly employed employee of Highwire because he had previously worked for Minquest, which was under the same management as Highwire. Although Minquest was an underground mine, Highwire asserts that Mr. Hammond never worked underground at any time while at Minquest. Highwire further argues that it did not consider Mr. Hammond to be a new employee because he worked under the same supervision of superintendent Swiger while at Minquest, and that as a qualified truck driver "it would have been ludicrous to send him out and put him through training on a truck that he had been operating for years and could have trained other people on" (Tr. 250).

MSHA's position is that notwithstanding the fact that Mr. Hammond had previously worked at Rebel Coal, which is a surface mine, before going to work for Highwire, he worked at Minquest, which was an underground mine. Since Highwire started its operation on July 14, 1986, and Mr. Hammond was not employed there until August 4, 1986, he was in fact a newly employed employee of Highwire for purposes of the training requirements of section 48.26. Conceding that Mr. Hammond may have been an experienced miner, MSHA takes the position that since Highwire was a separate corporate entity and employer, Mr. Hammond would be considered a newly employed employee of Highwire subject to MSHA's training requirements. Further, since Mr. Hammond's immediate prior employment with Minquest was at an underground mine, that employment constituted a different situation unique to that mine, notwithstanding the fact that Mr. Hammond may not have worked underground (Tr. 247-252).

The record in this case establishes that Mr. Hammond was an "experienced miner" within the definition found in 30 C.F.R. 48.22(a)2(b), and that the only possible training that he received pursuant to section 48.26 while in the employ of

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Highwire was some instruction he received from Mr. Swiger concerning an "introduction to work environment." That particular topic constitutes a 2-hour session which is listed as the first course of instruction in Highwire's approved training plan for newly hired experienced miners. However, the training plan contains six additional topical areas of instructions required of such miners, and there is no evidence that Mr. Hammond ever received such training.

Highwire's suggestion that Mr. Hammond was not a newly employed employee is rejected. While it seems clear to me from the record in this case that several separate corporate coal mining companies have conducted mining operations at one time or another under the same principal ownership, they are in fact separate entities for purposes of MSHA's inspection and enforcement purposes, and the parties have treated them as such. For example, Highwire's counsel has suggested that the truck involved in the accident was owned by the Rebel Coal Company, while others have suggested that it was owned by Minquest or Min Mag, separate corporations owned and controlled by the same individual who controls Highwire. Inspector Hatter, who believed that the truck was owned by Minquest, testified that he did not review Minquest's maintenance inspection records during his accident investigation because Minquest was a separate mining operation with its own MSHA Mine Identification Number, and was not the subject of the investigation (Tr. 92).

I conclude and find that for purposes of the training requirements of section 48.26, Mr. Hammond was a newly employed employee of Highwire and that he was required to take the training required by that section, as well as Highwire's training plan. Since Highwire has not rebutted the evidence presented by MSHA, which clearly supports a conclusion that Mr. Hammond did not receive all of the required training, the violation has been established, and the citation IS AFFIRMED.

Fact of Violation - Citation No. 2776210 - Docket No.
KENT 86-167AR

Highwire is charged with a violation of 30 C.F.R. 77.1606(a), which provides as follows: "(a) Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator."

Inspector Hatter issued the citation after reviewing Highwire's preshift and onshift mine examiner's reports for

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the period August 4 through 9, 1986 (exhibit MÄ13). Since the reports did not contain any notations that the truck had been inspected, and no defects were noted, Mr. Hatter concluded that the truck had not been inspected before Mr. Hammond drove it. Mr. Hatter also considered the fact that the last person to have any contact with the truck was Mr. Stacy who was in it 9Ädays prior to the accident. Although the record shows that the truck was parked at the Minquest site prior to the accident, Inspector Hatter failed to review Minquest's inspection reports for any possible notations concerning the truck, and Highwire did not produce any such records.

Highwire's testimony reflects that Mr. Hammond was a conscientious employee, and Mr. Sparks confirmed that Mr. Hammond made it a standard practice and procedure to check out a vehicle before driving it. This would include a check of the oil, water, tires, air pressure, and a "visual walk-around" inspection. Mr. Sparks and Mr. Stacy confirmed that when they drove the truck, they conducted similar inspections before driving it, and found nothing wrong with it. They also stated that after the truck was parked at the Minquest site, and before it was driven by Mr. Hammond on the day of the accident, the truck had not been moved from its parked location.

Inspector Hatter testified that a driver is required to check the brakes and the air on the truck through visual observation, and he suggested that such a visual examination could have revealed the defects that he noted upon closer scrutiny of the truck brakes after the accident. However, he conceded that the broken rear brake lining, which was concealed by a wheel cover, would not have been detected upon a visual inspection of the truck. He also conceded that a driver is not expected to conduct a detailed inspection of a truck, and that the wheel covers would normally not be taken off unless someone had reason to suspect that there was a defect in the brake.

With regard to the front brakes of the truck, Inspector Hatter asserted that a visual observation of the mud on the outside of the front wheels, which were not protected by covers, should have alerted the person inspecting the truck that the linings were not making contact with the drums, thus rendering the brakes inoperative. However, in further clarification, Inspector Hatter stated that any mud in between the lining and drum, rather than merely on the outside of the wheel, would preclude contact between the lining and the drum, and that this was detected after the wheels were dismantled for closer inspection. Inspector Weffenstette confirmed that

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his observation of mud, rust, and corrosive build-up between the shoe and the drum itself is what prevented contact, and Inspector Taylor confirmed that it was not unusual for roadway mud to build up on the outside of the front wheels, and he discovered that the brake and drum were not making contact only after a detailed inspection which included the scraping of mud from out between the brake linings and the drums. Further, photographic exhibit MÄ49, the right front wheel, shows the caked mud inside of the wheel under the suspension, and I cannot conclude that it would be readily visible by someone walking around the truck.

With regard to the disconnected front wheel air line, Inspector Hatter was of the opinion that it was visible and that it should have been detected by the person making the inspection. When asked for an explanation of how it was "visible," Inspector Hatter replied "all you had to do was stick your head under the fender" (Tr. 87). Photographic exhibit MÄ44 shows the tied-off air line well behind and inside of the wheel between the springs and the wheel, and I cannot conclude that it would be readily observable by someone walking around the truck.

The first sentence of section 77.1606(a), requires that a piece of equipment, such as the truck in question, be inspected by a competent person before it is placed in operation. The second sentence requires that any defects noted during that pre-operational inspection be recorded and reported. Absent any evidence to the contrary, I assume that a truck driver such as Mr. Hammond, was a "competent person" for purposes of performing the inspection. Further, MSHA has advanced no evidence to support any conclusion that someone other than the driver must make the inspection. Neither the standard nor MSHA's explanatory Inspector's Manual policy statements or testimony in this case provide any guidance as to the extent or type of inspection required.

Highwire's unrebutted testimony is that the pre-operational inspections by a truck operator's consist of checks of the air, tires, gas and oil, and a "walkaround" visual observation of the vehicle. MSHA does not take issue with this, and has advanced no evidence or credible testimony to suggest that a driver is required to crawl under the truck or to look under the fenders for possible brake defects which may be "visible" if the truck is inspected from the undercarriage, but not "visible" to one merely walking around the truck. Under all of these circumstances, and on the basis of the aforementioned testimony with regard to this "inspection" issue, I cannot conclude that the brake defects found by the

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inspectors during their post-accident detailed inspection of the truck wheels could reasonably have been detected by anyone conducting a pre-operational "inspection" of the truck in question.

During oral argument at the hearing, MSHA's counsel suggested that Mr. Hammond should have crawled under the truck, taken the wheel covers off, and checked the brake linings before driving the truck. He also suggested that a representative of Highwire, other than Mr. Hammond should have conducted a preshift or onshift inspection of the truck (Tr. 87, 90). I find counsel's "hindsight suggestions" to be totally unsupported. As stated earlier, MSHA has advanced no evidence to support any conclusion that any detailed inspection of the truck, other than the normal "walkaround" inspections, which Highwire apparently routinely utilizes, was required.

MSHA's counsel also suggested that Highwire had a practice of preshifting its haulage equipment on a daily basis, and noting the results of those inspections on the daily preshift reports. Counsel produced copies of several preshift reports signed by Mr. Stacy for the period August 4 through 9, 1986, in which he entered "OK" next to the equipment which was inspected, including trucks similar to the one driven by Mr. Hammond on the day of the accident. Although Mr. Stacy testified in this case, no testimony was elicited from him with respect to the reports, or Highwire's alleged "custom or practice" with respect to preshift inspections. MSHA simply relies on an inference that the lack of any notations on those reports with respect to the truck which Mr. Hammond was driving is evidence enough that it was not inspected before Mr. Hammond proceeded to drive it.

The facts in this case establish that at the time Mr. Hammond was dispatched to bring the truck back to the Highwire work site, the truck was parked at the Minquest site. Inspector Hatter confirmed that he did not check Minquest's equipment inspection records because Minquest had a "separate mine ID number" and was not "involved in the accident investigation." Had Mr. Hatter checked Minquest's records, he may have obtained some evidence that Minquest inspected the truck, found some defects, but failed to record them, etc. But he did not do so.

Similarly, since the truck was parked at the Minquest site prior to the accident, and since there is no evidence that Highwire used it, or had a need to use it, prior to that day, one can reasonably conclude that Highwire was under no

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obligation to routinely inspect that truck at the time that it inspected its own equipment, nor was it obligated to make any entries in its preshift reports. The borrowing of the truck on the day of the accident was obviously an unexpected event brought about by the fact that one of Highwire's trucks was out of fuel and it had a need to borrow one of Minquest's trucks to continue with the servicing of its equipment. However, once Mr. Hammond took control of the truck, Highwire had an obligation to see to it that the truck was inspected before it was driven. One can reasonably conclude that following its usual practices, Highwire expected Mr. Hammond, the driver, to conduct the inspection required by section 77.1606(a), and MSHA has advanced nothing to suggest otherwise. It is also possible that Mr. Hammond inspected the truck before driving it, but since he met his demise, no one will know.

The only "evidence" adduced by MSHA to support that alleged violation, is the absence of any notations on Highwire's inspection reports. In my view, this falls far short of any credible or probative proof that the truck was not inspected before it was placed in operation by Mr. Hammond. Since I have concluded that the defects found by the inspectors could not reasonably have been detected by a routine walkaround inspection of the truck, the absence of any notations with respect to any defects cannot be deemed probative evidence that the truck was not inspected. Further, given the location of the truck, and the particular facts of this case with respect to the borrowing of the truck, the absence of any "OK" notations by Mr. Stacy on Highwire's inspection reports is likewise not probative evidence that the truck was not inspected. In short, I cannot conclude that MSHA has proved a violation. Accordingly, the citation IS VACATED.

Fact of Violation - Citation No. 2776212 - Docket No.
KENT 86Ä169ÄR

Highwire is charged with a violation of 30 C.F.R. 77.1607(b), which states as follows: "(b) Mobile equipment operators shall have full control of the equipment while it is in motion."

Inspector Hatter confirmed that he issued the citation because it was obvious that Mr. Hammond did not have full control of the truck while driving down the inclined roadway, and that if he did, he would not have driven through the berm and over the embankment (Tr. 57). MSHA agrees with this conclusion, and takes the position that the fact that the truck went over the embankment is obviously indicative of a lack of control (Tr. 56).

Although MSHA's accident investigation did not conclusively establish whether or not Mr. Hammond attempted to jump from the truck, or was thrown out when the truck went over the embankment, Mr. Hatter concluded that the truck must have been travelling at some speed, and the photographs of the roadway at the point where the truck left the roadway indicted that gravel had been thrown in an outward direction to the right side of the truck (exhibits MÄ20, MÄ22). Mr. Hatter confirmed that this indicates that the truck was "wobbling around" as it scattered the gravel, and that while Mr. Hammond could have put the truck "in the ditch," he did not do so (Tr. 53).

During the course of the hearing, Highwire's counsel suggested that Mr. Hammond may have intentionally driven the truck over the embankment (Tr. 58), or that he was the victim of foul play because of certain labor strike activities taking place in the area, or personal family problems. However, no evidence was forthcoming to support any such conclusions.

In Island Creek Coal Company, 3 FMSHRC 1265 (May 1981), 2 MSHC 1398, a case in which I affirmed a violation of section 77.1607(b), the mine operator asserted that in order to support an inference that a driver does not have full control of a truck on an inclined haulroad, there must be some evidence that the truck slid into a berm, or that an accident or near-miss occurred. I rejected this argument, and affirmed the violation on the basis of the inspector's observation of trucks slipping and sliding, and the testimony of a driver that he was experiencing difficulty in maintaining control of his vehicle due to slick road conditions. In the instant case, the evidence establishes that the truck being driven by Mr. Hammond ran through the berm and over an embankment, and that the accident resulted in fatal injuries. Under the circumstances, I conclude and find that MSHA has established a reasonable inference that Mr. Hammond did not have full control of the truck, and that it has established a violation. Accordingly, the citation IS AFFIRMED.

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

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reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

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

I conclude and find that Citation Nos. 2776211 and 2776212, are significant and substantial violations. The violations were issued as a result of the fatal accident which occurred when the truck driver lost control of the truck he was driving on an inclined haulage, drove through a berm on a curved portion of the road, and went over the embankment. The credible testimony and evidence adduced by MSHA reflects that the loss of control of the vehicle caused it to go over the

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embankment, and that the inadequate brakes may have contributed to that loss of control. Even if the accident had not occurred, I would still conclude that the violations were significant and substantial. One can reasonably conclude that operating a truck with inadequate brakes, and the loss of control by the driver while the truck is on an inclined roadway, would likely contribute to, and expose the driver to the hazards associated with running off the inclined roadway. Accordingly, the significant and substantial findings by the inspector ARE AFFIRMED.

With regard to Citation No. 2776208, for the failure to provide training to Mr. Hammond, I conclude that it is a significant and substantial violation. Although Mr. Hammond may have been an experienced miner and may have been familiar with the truck, the last documented training that he had received was his newly employed, inexperienced underground miner training on August 30, 1985, and his annual refresher surface training received on July 29, 1985, approximately 1 year prior to the accident in question (exhibits MÅ8, MÅ9). Highwire's comprehensive training plan, which included training in company rules and safety procedures for riding in mine conveyances, hazard recognition and avoidance, and company safety rules and safe working procedures, may have familiarized and alerted Mr. Hammond to certain hazards associated with driving the truck. In my view, such training promotes mine safety by making miners aware of the hazards associated with their particular job tasks. For example, in this case, Highwire suggested that had Mr. Hammond put the truck in a ditch which ran along the haulage road, or exited the truck before it went over the embankment, he could have avoided the accident and not suffered fatal injuries. However, absent any evidence that Mr. Hammond was trained to recognize and exercise those options in an emergency situation, one may reasonably conclude that the failure by Highwire to provide the training presented a reasonably likelihood that Mr. Hammond may not have been aware of the hazards associated with the loss of control of the truck as it travelled down the inclined roadway where the fatal accident occurred. Under the circumstances, the inspector's significant and substantial finding IS AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED:

1. "S & S" Citation No. 2776211, contested in Docket Nos. KENT 87Å56 and KENT 86Å168ÅR, IS AFFIRMED.

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2. "S & S" Citation No. 2776208, contested in Docket No. KENT 86Ä165ÄR, IS AFFIRMED.

3. "S & S" Citation No. 2776210, contested in Docket No. KENT 86Ä167ÄR, IS VACATED.

4. "S & S" Citation No. 2776212, contested in Docket No. KENT 86Ä169ÄR, IS AFFIRMED.

5. Highwire IS ORDERED to pay civil penalty assessments totalling \$250 for the citations which are the subject of civil penalty Docket No. KENT 87Ä56, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge