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MSHA V. MISSOURI ROCK  
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FMSHRC-FCV  
APRIL 29, 1988

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 87-65-M  
A.C. No. 23-01670-05504

v.

Missouri Rock Plant No. 2

MISSOURI ROCK, INC.,  
Respondent

DECISION

Appearances: Tobias B. Fritz, Esq., Office of the Solicitor,  
U.S. Department of Labor, Kansas City, Missouri,  
for Petitioner; James L. Burgess, Esq., Johnson,  
Lucas, Bush, Snapp & Burgess, Kansas City,  
Missouri, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary of Labor (Secretary) seeks civil penalties for three alleged violations of the mandatory safety standard contained in 30 C.F.R. § 56.9003. Respondent challenges the allegations that the violations occurred, and contests the proposed penalties as excessive. Both parties engaged in pretrial discovery. Pursuant to my prehearing order, the Secretary filed its responses on November 30, 1987. It listed its witnesses as Eldon Ramage, Richard Laufenberg, and Representative of Caterpillar Tractor Co. (specific identity as yet unknown). Respondent filed its response on December 1, 1988, and listed its witnesses as W. A. Ellis, Jesse B. Case, Merrill Gordon, John Strosnider, Jim Fiser, Bill McClanahan, and Ken Messerli. I issued a notice of hearing on December 7, 1987, scheduling the matter for hearing commencing February 10, 1988, in Kansas City, Missouri. On February 8, 1988, I received copy of a letter from counsel for the Secretary to counsel for Respondent informing him that John L. Robinson, an employee of Everett Quarries, would testify on the Secretary's behalf pursuant to subpoena, "in lieu of a representative of Caterpillar Co., as indicated in the prehearing exchange." On February 8, 1988, Respondent filed a motion to exclude the testimony of John L. Robinson.

The case was called for hearing on February 10, 1988, in Kansas City, Missouri. The parties argued the motion to exclude on the record, prior to the calling of any witnesses. I reserved my ruling on the motion and stated that I would permit the Secretary to call Mr. Robinson and would rule on the admissibility of his testimony when I decided the merits of the case. Counsel for Respondent then indicated that he wished to call a Robert Matter to testify; the Secretary objected and I again ruled that he would be permitted to testify, and I would rule when I decided the case, whether the testimony was properly received.

Eldon E. Ramage and John Robinson (in rebuttal) testified on behalf of the Secretary. Kenneth Messerli, William Ellis, Robert Matter, Merrill Gordon, Jesse Case and William McClanahan testified on behalf of Respondent. Both parties filed posthearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

#### MOTION TO EXCLUDE TESTIMONY

As I indicated earlier, each party has engaged in pretrial activity. My prehearing order was originally issued on August 28, 1987, and required responses, including disclosure of the names of witnesses, by October 30, 1987. By order issued October 5, 1987, I extended the time to November 30, 1987. Responses were filed by both parties, and on December 7, 1987, I issued the notice of hearing for February 10, 1988. The failure of counsel to notify each other and the court of the identity of proposed witnesses Robinson and Matter precluded the possibility of their being interviewed or deposed. No sufficient justification for the failure to disclose the names of the witnesses has been advanced. (I reject the notion that Robinson's identity is protected under 29 § C.F.R. 2700.59 as a "miner witness"). Therefore, I will not consider the testimony of either Robinson or Matter in making this decision.

#### FINDINGS OF FACT

Respondent was at all pertinent times, the owner and operator of a limestone quarry in Clay County, Missouri. During the calendar year 1986, 26,527 man hours were worked at the mine. In the 24 month period prior to the citations and orders involved in this case, there were two paid violations of mandatory health and safety standards at the mine. The penalties proposed herein would not affect Respondent's ability to continue in business.

On February 3, 1987, Federal Mine Inspector Eldon Ramage performed a regular inspection of the subject mine. Caterpillar

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tractor scraper No. 643 was removing overburden in the Northwest corner of the quarry. The terrain was relatively hilly, with a 10 to 15 percent grade between the cut and the fill. The inspector wished to test the brakes on the scraper and directed the driver to apply brakes while the equipment was moving. The scraper was on a slight downgrade at the time. The driver dropped the pan and the unit stopped. The Inspector then directed him to stop by using the wheel brakes. The wheel brakes did not stop the vehicle. The driver stated that he had no air pressure for the wheel brakes. The Inspector then issued citation 2846910 charging a violation of 30 C.F.R. § 56.9003 for failure to provide adequate brakes on powered mobile equipment. The citation directed that it be corrected by February 4, 1987. On February 20, 1987, the Inspector modified the citation, increasing his evaluation of the gravity of the violation and denominating the violation as significant and substantial. The original citation was served upon Merrill Gordon, Respondent's safety director, who accompanied the inspector. He had the scraper sent to the mechanics. The Superintendent Jesse Case left on vacation at the end of the week and apparently did not tell his successor about the brake problem on the scraper.

On February 25, 1987, Inspector Ramage returned to the mine. He had scraper 643 tested and again found that it had no brakes. He issued a 104(b) order for noncompliance with the previous citation. He also tested scrapers 648 and 641 which were being operated in the quarry stripping overburden, and found that they had inadequate wheel brakes. He thereupon issued citations 2846916 and 2846917.

All of the scrapers are operated both in the quarry and in the parking area where maintenance work was performed.

The scrapers weigh about 35 tons empty. A fully loaded pan or bowl weighs an additional 35+ tons. Respondent's equipment operators customarily stop the unit by dropping the bowl. The wheel brakes, in Respondent's practice, are used only when moving the equipment from one location to another.

After the order and citations were issued on February 25, 1987, the brakes were repaired and the citations and order were terminated on March 16, 1987.

#### REGULATION

30 C.F.R. § 56.9003 provides:

Powered mobile equipment shall be provided with adequate brakes.

1. Whether the fact that a powered mobile tractor-scraper can be and ordinarily is stopped by dropping the pan or bowl establishes that the scraper is provided with adequate brakes?

2. If the violations charged are established, what are the appropriate penalties.

#### CONCLUSIONS OF LAW

##### JURISDICTION

Respondent is subject to the provisions of the Federal Mine Safety and Health Act (the Act) in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

##### VIOLATION

The scrapers cited in this proceeding were clearly powered mobile equipment. The wheel brakes or service brakes were clearly defective. Respondent's position is that the pan or bowl provided adequate brakes.

The term "brake" is defined in the American Heritage Dictionary of the English Language (New College Edition 1976) as:

1. A device for slowing or stopping motion, as of a vehicle or machine, especially by contact friction.
2. Often plural. Any check that slows or stops action.

The same term is defined in A Dictionary of Mining, Mineral and Related Terms (U.S. Dept. of the Interior 1968) in part as

A device (as a block or band applied to the rim of a wheel) to arrest the motion of a vehicle, a machine or other mechanism and usually employing some sort of friction. . .

In an early case under the Act, a caterpillar loader was found to have a substantial air leak in its braking system. The mine operator was charged with violating 30 C.F.R. § 56.9-2 which requires that equipment defects affecting safety be corrected before the equipment is used. In affirming the citation, Commission Judge Koutras rejected as a defense "Respondent's arguments and suggestions that the loader could be stopped by dropping and dragging the bucket or by using the transmission." Secretary v. Evansville Materials, Inc., 2 FMSHRC 2321, 2326

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(1980). In the case of *Mineral Exploration v. Secretary*, 6 FMSHRC 316 (1984), Judge Morris considered citations charging two scrapers with having inadequate brakes. The scrapers were also equipped with retarders. In upholding the citations, the Judge said at page 321:

I conclude that retarders under certain conditions will reduce an engine's RPMs and, consequently, they will reduce the speed of a vehicle. However, down shifting the transmission on an automobile also will reduce its speed but no one considers that a transmission is part of a braking system.

In the recent case of *Secretary v. Brown Brothers*, 9 FMSHRC 636 (1987) involving a citation for inadequate brakes on a truck, Judge Koutras said at page 656:

The fact that the respondent used a variety of methods to stop the truck is irrelevant.

In the same case, MSHA's argument that "'Adequate brakes' clearly requires at least service brakes and not the use of other methods or the ingenuity of the employee to stop a vehicle" was adopted by the Judge. *Id.* at 657.

The testimony in the case before me establishes that dropping the pan is the usual method of stopping the scrapers while operating in the quarry. In many situations it is the quickest and safest way to stop it. However, there are instances when dropping the pan is not safe or effective: when operating on pavement or on other hard surfaces, dropping the pan cannot be used; when the scraper engine fails while ascending a hill, dropping the pan will not stop the scraper going backwards downhill; in the case of buried rock or a limestone knoll, dropping the pan could injure the scraper operator.

The primary purposes of the pan or bowl on a scraper are, of course, to scrape, to strip, to load. Stopping the vehicle is not a primary function of the pan. Wheel or service brakes are intended to stop the vehicle; they are installed for that purpose.

I conclude that the term "brakes" in the standard involved here refers to the wheel or service brakes. They are required to be adequate, i.e., to be able to stop the equipment in a reasonable distance. The fact that there are other effective means of stopping the equipment does not satisfy the standard. Therefore I conclude that the violations charged in the citations involved here have been established.

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PENALTY

DE NOVO

Under section 110(i) of the Act, the Commission has de novo authority to assess civil penalties for violations of the Act considering the six statutory criteria. Therefore the fact that the Secretary assessed penalties under the "special assessment" provisions of 30 C.F.R. Part 100 is irrelevant. Sellersburg Stone Co., 5 FMSHRC 287 (1983) aff'd, Sellersburg Stone Co. v. FMSHRC, 736 F2d. 1147 (7th Cir. 1984).

SIZE AND PRIOR HISTORY

Respondent is a large operator. Its history of previous violations is small, and penalties otherwise appropriate should not be increased because of its history.

GRAVITY

The scrapers are normally operated at no more than 12 to 15 miles per hour, and ordinarily at much less than that. I have found that they are normally stopped by dropping the pan. However, I further found that the service brakes may be required in some situations. The scrapers are extremely heavy and in the event they collided with a pedestrian or another piece of equipment could cause serious injury. I conclude that the violations were moderately serious.

NEGLIGENCE

Normal routine inspection and maintenance would have shown Respondent that the brakes were defective. It either knew or should have known that they were inadequate. In the case of scrapers 648 and 641 cited on February 25, 1987, Respondent had been put on notice by the citation issued February 3, 1987, on scraper 643 that the brakes should be inspected on its equipment. The violation charged in citation 2846910 was the result of Respondent's negligence; the violations charged in citation 2846916 and 2846917 were the result of gross negligence.

GOOD FAITH COMPLIANCE

Respondent did not abate the violation charged in citation 2846910 until a 104(b) order was issued three weeks later. It did not demonstrate good faith in attempting to achieve rapid compliance, and the penalty will be increased because of its failure. With respect to the violations charged in the other

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citations (2846916 and 2846917), it did show good faith compliance.

PENALTY AMOUNTS

Considering the criteria in section 110(i) of the Act, I conclude that the appropriate penalties for the violations are:

Citation	Penalty
2846910	\$ 800
2846916	600
2846917	600
	\$2000

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Respondent pay the sum of \$2000 within 30 days of the date of this decision for the violations found herein.

James A. Broderick  
Administrative Law Judge

Distribution:

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