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SOL (MSHA) V. HOOVER INC.
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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	CIVIL PENALTY PROCEEDINGS Docket No. SE 87-116-M A.C. No. 40-00049-05508
v.	
HOOVER INCORPORATED, RESPONDENT	Docket No. SE 87-132-M A.C. No. 40-00049-05509 Donelson Pike Quarry & Mill

DECISIONS

Appearances: Michael L. Roden, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
James H. Neely, Safety Director, Hoover, Inc., LaVergne, Tennessee, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely answers contesting the proposed civil penalties and hearings were held in Nashville, Tennessee. The parties waived the filing of posthearing proposed findings and conclusions. However, all oral arguments made by the parties on the record during the course of the hearings have been considered by me in the adjudication of these cases.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory health standards, (2) the appropriate civil penalty to be assessed for the violation,

taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violations were "significant and substantial."

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.

Stipulations

The parties stipulated to the following (Tr. 5Ä8; Pretrial Joint Stipulations):

> 1. Hoover, Incorporated is a Tennessee corporation which is in the business of surface mining and producing crushed limestone for resale in interstate commerce, and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges.
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> 2. As of June 1987, Hoover, Incorporated operated the Donelson Pike Quarry and Mill in Nashville, Tennessee, which employed 41 men and produced approximately 5,331.33 tons of crushed limestone per day. On October 2, 1987, Hoover, Incorporated closed the Donelson Pike Quarry and Mill and is no longer operating at that site. All of its operations in the State of Tennessee are now located in Rutherford County. From June 1987 through April 1988, Hoover, Incorporated overall has employed 181 men and produced an average of 9,734.64 tons of crushed limestone per day.
>
> 3. Lawson Beech was the superintendent of the Donelson Pike Quarry and Mill in June 1987. T.S. Hoover was and is the president and majority stockholder of Hoover, Incorporated.
>
> 4. The Donelson Pike Quarry and Mill began operations in 1957, and remained in active operation until October 1987.

5. On June 1, 1987, at approximately 10:30 a.m., during a regular inspection of the quarry site, MSHA Inspector Donald Baker observed an employee sitting on an "I" beam using a hammer to hit a metal chute obstructed by crushed limestone. The employee was not wearing a safety belt or line while performing this task. The beam was approximately 8 1/2 feet above the level ground. It had been raining earlier that morning, and the employee's shoes were wet and muddy.

6. On June 18, 1987, in response to a complaint by a former employee, MSHA Inspector Lloyd Cloyd tested the brakes of a 35Äton Caterpillar truck, No. 505029, owned by Hoover, Incorporated and used at the Donelson Pike Quarry and Mill. The brakes were tested on an inclined road in the quarry, with the truck empty, and the inspector sitting in the seat beside the driver. When the brakes were applied, the truck did not come to a complete stop. The truck was traveling between eight and nine miles per hour when the brakes were applied.

7. The truck was immediately taken to the shop for repairs. A new equalizer, or slack adjuster, was installed.

8. Two days earlier, on June 16, 1987, the brakes on the truck had been worked on by a repairman.

9. The total penalty assessment for both cases of $147.00 would have a negligible effect on the ability of Hoover, Incorporated to continue in business.

Discussion

The contested citations issued in these proceedings are as follows:

Docket No. SE 87Ä116ÄM. Section 104(a) "S & S" Citation No. 3052407, issued on June 1, 1987, by MSHA Inspector Donald R. Baker, cites a violation of mandatory safety standard 30 C.F.R. 56.15005, and the condition or practice is described as follows:

An employee was observed sitting on an "I" beam using a hammer to hit a metal chute that was hung-up with crushed limestone. The employee wasn't wearing a safety belt and line to prevent a fall to ground level if he slipped off this "I" beam. The "I" beam was wet and muddy. A fall of approximately ten feet to ground level exists at this location. This work was being performed at the primary crushing and screening plant.

Petitioner's Testimony and Evidence

MSHA Inspector Donald R. Baker testified as to his experience and training, and he confirmed that he inspected the subject mine on June 1, 1987. It had rained earlier that morning, and the area around the crusher plant was wet and muddy. The respondent's superintendent Lawson Beech, accompanied him during his inspection. They proceeded to the secondary crusher plant which was down because a chute was "hung up with limestone." Mr. Baker identified exhibit GÄ1 as a photograph of the secondary plant and bins with the chute in question. As they got out of Mr. Beech's pick-up truck, Mr. Baker observed an employee sitting on an I-beam using a small sledgehammer hitting the metal chute to unclog the chute and to help the material flow. The employee was seated in front of the chute with his legs off to the side, but he was not straddling the beam, and his legs were not resting on anything. Mr. Baker took it for granted that the individual was a maintenance man, and he was not wearing a safety belt. He was located approximately 10 feet off the ground, and Mr. Baker agreed that it could have been 8 1/2 feet as stipulated to by the parties. A pile of rock was located to one side on the ground, and the ground directly under where the man was sitting was level (Tr. 10Ä21).

Mr. Baker stated that the beam was wet and muddy, but he could not tell whether or not the man's shoes were also wet and muddy. Mr. Baker's shoes were wet and muddy from walking around in the area. Mr. Baker stated that the man used a ladder shown in the photograph to reach the beam, and then walked out on the beam to reach the chute. Mr. Beech climbed the same ladder and went out on the beam to speak with the individual in question for a few minutes. Mr. Baker believed that Mr. Beech also hit the chute with the hammer while he was up on the beam, and then he and the other individual came down. Mr. Baker asked Mr. Beech if any safety lines or belts were

available, and Mr. Beech replied "we don't have any on the property, but I can get some" (Tr. 21Ä24).

Mr. Baker believed that the individual on the I-beam could have fallen off while seated on the beam, and while walking on it to reach the chute. In the event of a fall to the ground, the individual could have suffered broken bones as a minimum, or a concussion if he fell on his head. Mr. Baker believed that the individual could have tied off on one of the beam braces if he had used a safety belt. Mr. Baker confirmed that he advised Mr. Beech that he was issuing a citation, and served the written citation later (Tr. 24Ä26; exhibit GÄ2).

Mr. Baker believed that an accident and injury reasonably likely would occur because of the fact that the individual was sitting on a wet and slippery beam, and since he needed to walk the beam to reach the chute location, there were several places where he could have fallen off (Tr. 27). He also believed that any injury would be a lost work time injury because a broken bone would have required medical attention. Under these circumstances, Mr. Baker concluded that the violation was significant and substantial (Tr. 28). Mr. Baker confirmed that he made a finding of "low negligence" because on prior inspections the respondent had a good compliance record, and he did not believe the respondent realized what the hazard was, and if it did, it would have made a safety belt and line available (Tr. 29).

On cross-examination, Mr. Baker confirmed that he did not see how the individual sitting on the beam got there, but he did observe Mr. Beech climb on the ladder to the walkway, and then cross over the conveyor to the beam (Tr. 30). Mr. Baker estimated that the individual sitting on the beam was approximately 3 feet from the chute, but he did not measure the distance. Mr. Baker stated that he would not argue with Mr. Neely's assertion that the employee was 22 inches from the chute, and Mr. Baker indicated that his estimate was based on his "eyeballing it" from ground level. The individual was not really "stretched out," and he would have been "pretty close" to the chute (Tr. 33). Mr. Baker conceded that there could have been some "buildup" of crushed stone on the ground under the beam, but that "I really never noticed it" (Tr. 37). He confirmed that the distance that the individual had to stretch to reach the chute was a consideration as to the danger involved because "he's leaning forward using a hammer and if he's gong to lose his balance, he could lose his balance that way." He also agreed that a 22Äinch stretch would have placed the individual in a dangerous situation (Tr. 37).

Respondent's Testimony and Evidence

James H. Neely, respondent's safety director, testified that he did not believe there was a danger of falling in this case because "with all the framework and braces that were there, you would have had to have pushed the man off almost, tied his hands and pushed him off to have gotten him to fall" (Tr. 41). Referring to a photograph, exhibit RÄ3, similar to petitioner's photograph, Mr. Neely explained that one could not walk the beam in question without holding on to a beam "because there's not that much room" (Tr. 41).

Mr. Neely stated that his position is that the individual could not have fallen to the ground because there was ample opportunity for him to grasp the braces and framework of the structure shown in the photograph (Tr. 43). He also explained that wet rock was being processed on the day in question, and that when it "got bridged over" a hammer sometimes has to be used to loosen it, but that this does not occur frequently (Tr. 44). If it were an everyday occurrence, a walkway and handrail would have been constructed to provide working access to the chute (Tr. 45). He also believed that tieing off on a slick beam would be more difficult than simply sitting on the beam with an arm around a beam (Tr. 45).

On cross-examination, Mr. Neely stated that since the steel beams had two quarter-inch flanges, they would provide a "hand hold" for anyone to grab if he were falling, and this would be true even if the beam were wet. He agreed that any fall would occur "suddenly," but he saw no reason for anyone falling because of the presence of braces for anyone to grab or put their arms around. Referring to photographic exhibit GÄ1, Mr. Neely stated that the individual was sitting on the bottom beam as shown in the photograph, and that he could have braced his feet against the crusher feed box. However, since he did not observe the individual on the beam when the inspector did, Mr. Neely did not know for a fact that his feet were braced against the box (Tr. 45Ä52).

Docket No. SE 87Ä132ÄM. Section 104(a) "S & S" Citation No. 2862746, issued on June 18, 1987, by MSHA Inspector Lloyd W. Cloyd, cites a violation of mandatory safety standard 30 C.F.R. 56.9003, and the condition or practice is described as follows:

> The 35Äton Caterpillar Truck Co. No. 29 did not have adequate brakes. The brakes were checked on the inclined road in the quarry with the truck empty. When the foot brake was

applied the truck was going between 8 and 9 miles per hour and continued to roll for several feet before stopping. This truck was immediately taken to the shop for repairs.

Petitioner's Testimony and Evidence

In view of the unavailability of MSHA Inspector Lloyd W. Cloyd, his pretrial deposition was taken on June 28, 1988, with the respondent's representative Neely present, and the transcript of Mr. Cloyd's testimony, including two photographic exhibits, were received as part of the record in this matter (Tr. 7; exhibit GÄ1).

Inspector Cloyd confirmed that he inspected the cited truck on June 18, 1987, and the brakes were tested that day on the haulroad with an approximate grade of 15 percent. He was seated next to the driver while the truck was driven down the road at an approximate speed of 8 or 9 miles per hour, and the truck was empty. Prior to the actual test, the driver advised him that the truck brakes were "fair," and that the truck would stop "sometimes" when the brakes were applied on the incline. The driver applied the brakes while the truck was approximately two-thirds down the inclined road, or approximately 200 to 300 feet down the roadway, at the location shown by an "X" mark which he placed on a copy of a photograph shown on deposition exhibit No. 1. Mr. Cloyd confirmed that he observed the driver apply the brakes to the fullest extent possible by raising up off the seat and applying pressure to the brake pedal, and when he did, the truck slowed, but continued to roll for approximately 30 to 40 feet before coming to a stop. After it stopped, Mr. Cloyd checked the emergency brake, and found that it was in working order (Tr. 6Ä15).

Mr. Cloyd stated that after completing his inspection of the truck, Mr. Neely advised him that work was performed on the truck brakes on the Tuesday prior to his inspection on Saturday, June 18, 1987, but Mr. Neely did not advise him as to why the brakes needed work and did not identify any particular problem. Mr. Cloyd confirmed that he had received two prior complaints about the brakes from the operator who stated that "the brakes worked perfect most of the time, but sometimes he would mash on the petal and have nothing" (Tr. 16). Mr. Cloyd further confirmed that repair work was done on the brakes after the citation was issued, and that the Caterpillar Company was immediately called to do the repairs. Mr. Neely informed him that a new equalizer or slack adjuster was installed on the truck, and that the purpose of the equalizer was to provide equal air pressure to all of the wheels, and

the lack of such pressure would hinder the brakes from stopping the truck. The only reason for replacing the equalizer would be to replace one that is defective (Tr. 15Ä18).

Inspector Cloyd stated that he classified the violation as "significant and substantial" because of the steepness of the inclined roadway, and the fact that there was a 90 degree curve at the bottom of the roadway, with a solid limestone wall in front of it. He also considered the fact that the past history of the cited truck indicated that there had been previous problems (Tr. 18Ä19). Inspector Cloyd confirmed that after the truck was repaired, he checked it while it was loaded at the dump, and found that the brakes "worked perfect." He did not test the truck with a load before repairs were made because he saw no reason to load it up with 30 tons of rock, and he believed that a load would have further hindered it from stopping. Mr. Cloyd confirmed that the citation was abated on June 19, 1987, after the repairs were made, rather than September 19, as previously noted (Tr. 24).

At the hearing, petitioner's counsel introduced a copy of a work invoice indicating certain work which was done on the truck brakes on June 15, 1987, and this work included the installation of a hose to the left front wheel, two pistons on the slack adjuster or equalizer, and a diaphragm on the parking brake valve (Tr. 11; exhibit GÄ4).

Respondent's Testimony and Evidence

Safety Director James H. Neely, introduced a statement executed by William E. Reeves, the mechanic who inspected the truck and performed the work on it after it was removed from service on June 18, 1987. Mr. Reeves states that the brakes "were in good working order," and that "the retarder and parking brake were also working well." Mr. Reeves also stated that "I could find no indication that the brakes were unsafe. As a preventive maintenance measure, I did replace two pistons in the slack adjusted at the time of this brake check (Exhibit RÄ5).

Mr. Neely asserted that the slack adjuster installed by Mr. Reeves was installed "so that we could put the truck back in operation, because I wouldn't attempt to take it after the inspector would leave--take the truck back down there and put it in operation without doing something" (Tr. 13Ä14). Mr. Neely confirmed that shortly after Mr. Reeves arrived to inspect the truck, they drove the truck around the shop area, checked the hand brakes and retarder, and found that they both worked and would stop the truck (Tr. 15).

Mr. Neely stated that the 30Ä40 feet within which the truck stopped after being tested by Inspector Cloyd was just a fraction over the actual length of the truck itself, and an unloaded 80,000 ton truck going down a 15Ädegree grade on a loose rock road cannot be expected to stop any quicker than that distance. Mr. Neely explained the operation of the compressed air truck brakes, and indicated that the stopping distance of 30Ä40 feet for the truck when the brakes are applied is normal (Tr. 17). Mr. Neely also pointed out that given the fact that work started at 6:00 a.m. on the day of the inspection, and the truck was inspected by Mr. Cloyd at 9:00 a.m., the truck operator must have made 10 or 12 trips with the truck, loaded and unloaded, and did not report any problems with the brakes (Tr. 17).

Mr. Neely stated that mine management was aware of the fact that the quarry was 410 feet deep, and presented dangerous conditions, and that was the reason why they had the truck repaired. He stated that "we had it fixed at that time because it was just too dangerous to take a chance" (Tr. 17). He confirmed that after the repairs, there was no reason to know that there was anything wrong with the brakes, and when they were checked, "there wasn't anything wrong with them," and all three brake systems were working (Tr. 18).

On cross-examination, Mr. Neely confirmed that he was not at the mine site on June 18, 1987, when Mr. Cloyd conducted his inspection. Mr. Neely confirmed that when he and Mr. Reeves tested the truck after it was cited at the same location while travelling 8 to 9 miles an hour, the speed at which trucks are allowed to operate on the incline, the truck travelled approximately 30 feet after the brakes were applied before it stopped. He reiterated that this was the normal stopping distance for an empty truck of its size, but if it were loaded, it would have rolled for 3 or 4 feet before stopping because the added weight would give it more traction (Tr. 20Ä22).

Mr. Neely confirmed that mechanical problems were encountered with the cited truck, as well as the other trucks, prior to the inspection by Mr. Cloyd, and that driving up and down hills 12 hours a day does wear on the trucks. He also confirmed that prior complaints were made about the cited truck in question, but they would be taken care of immediately. He described the complaints as "the brakes weren't working adequate, or maybe the wheels would grab it before the other one would." He also confirmed that the complaints indicated that "the brakes were erratic and sometimes they would work

and sometimes they wouldn't." When asked how long before the inspection of June 18, the complaints were made, he responded "it might be two weeks or it might be six months. You never know when those things occur. It's just like any other piece of machinery, you don't have any warning." Mr. Neely stated that the complaints were not made regularly, and "no more than the rest of them were," and since the cited truck was used primarily to haul from the quarry to the crusher, "it got more wear" than the other trucks which were not using their brakes as much (Tr. 22Ä24).

Mr. Neely stated that although the operable hand brake and retarder would have stopped the truck, he conceded that they were not the principal means for stopping the truck, and that the first thing a driver would do to stop a truck would be to apply the foot brakes (Tr. 25). Mr. Neely confirmed that he was not with Inspector Cloyd when he tested the truck after the brakes were repaired, but it was his recollection that the truck was not tested at the same location where it was cited or under the same conditions (Tr. 31).

Mr. Neely stated that management had no knowledge that the cited truck had a problem until the morning of June 18, when Inspectors Cloyd and Daugherty came to the mine in response to complaint made by an employee who had been discharged. Mr. Neely confirmed that the repairs made on the truck on June 15, were made in response to the truck operator's statement that one wheel was locking before the other one while going downhill, causing the truck to slide, and the operator was concerned that he might "wind up over against the buffer over the hill." In light of this, "we took corrective action right then" (Tr. 41).

Mr. Neely stated that his truck maintenance and service records would show that similar conditions could be found for all of the trucks from time-to-time, and in each instance, the repair company would be called to the mine to make the necessary repairs (Tr. 42). In the case at hand, Mr. Neely did not believe the citation was justified because all of the information available to management did not indicate any braking problems with the cited truck (Tr. 42Ä43).

Mr. Neely confirmed that the quarry site where the citation was issued has been shut down and is no longer in operation, and petitioner's counsel agreed that with the exception of the citation in issue in this case, the respondent had not previously been cited for inadequate braking condition on any of its trucks (Tr. 44Ä45).

Findings and Conclusions

Docket No. SE 87Ä116ÄM

Fact of Violation

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.15005, which requires the use of safety belts and lines when persons are performing work where there is a danger of falling. The credible unrebutted testimony of Inspector Baker establishes that an employee was sitting on an I-beam approximately 10 feet off the ground banging on a metal chute with a hammer while attempting to free up some material which had clogged the chute. The employee was not wearing a safety belt or line, nor was he tied off in any manner. He was seated on the beam in front of the chute with his legs off to one side, and he had to reach approximately 2 to 3 feet to strike the chute with his hammer. The inspector was concerned that the employee could have fallen from the beam while seated on it and striking the chute, or when he walked on the beam to reach his work location.

The respondent agreed that the employee in question was not using a safety belt or line, and its defense is based on its belief that the employee was in no danger of falling because of the presence of the steel framework of the structure in question. Respondent believed that the employee could have grabbed the beam flange as a "hand hold" in the event of a fall, and also argued that the employee could not have fallen while walking the beam because he could have held onto the steel braces.

Respondent's Safety Director, James Neely, confirmed that he did not observe the employee sitting on the beam without a safety belt or line as did the inspector. Based on the credible testimony of the inspector who confirmed his observations of the employee sitting on the beam and striking the metal chute with a hammer, I conclude and find that a violation has been established. The position of the employee on the beam 10 feet off the ground with a hammer in one hand striking the metal chute without using a safety belt or otherwise being tied off and secured to one of the nearby braces supports a reasonable conclusion that he was in a precarious location which clearly exposed him to a falling hazard. Such falls are usually unexpected and may occur at any time while an employee is preoccupied with his work. Mr. Neely conceded that any fall could occur suddenly, and the fact that the employee could have reacted by attempting to grab part of the structure

on which he was seated while performing his work is not in my view a reasonable defense to the violation. Under the circumstances, the citation IS AFFIRMED.

Docket No. SE 87Ä132ÄM

Fact of Violation

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.9003, for having inadequate brakes on one of its haulage trucks. Section 56.9003 requires powered mobile equipment to be provided with adequate brakes. Inspector Cloyd cited the truck after he had the foot brakes tested by the driver while the truck was being operated downhill and empty on an inclined haul roadway while travelling at approximately 8 or 9 miles an hour. The inspector was seated next to the driver while the test was performed, and his unrebutted testimony reflects that when the truck was approximately 200 to 300 feet down the haulroad, the driver applied the foot brakes to their fullest possible extent by raising up on his seat, but the truck continued to roll for approximately 30 to 40 feet before coming to a stop. In Mr. Cloyd's opinion, the incline where the truck was tested was not such as to present a problem for a truck with brakes in proper working order from coming to a complete stop when the brakes were applied (Deposition (Tr. 8). Mr. Cloyd also believed that an empty truck travelling at 8 or 9 miles an hour should have no problem in stopping once the brakes were applied, and that the road conditions where the truck was tested would not have made stopping the truck a problem (Tr. 10Ä11).

In addition to the actual testing of the brakes, Inspector Cloyd confirmed that the driver advised him that the brakes were "fair," and that the brakes would stop the truck "sometimes" when the boot brakes were applied. Mr. Cloyd also confirmed that he had received prior complaints from the truck operator who advised him that while the brakes worked most of the time, there were times when he applied the brakes and "had nothing." Since the driver was not called to testify in this case, Inspector Cloyd's testimony regarding the comments of the driver are unrebutted.

The evidence establishes that after the truck was cited, it was immediately taken out of service and repairs were made by the installation of a brake equalizer or slack adjuster which provided equal pressure to all of the truck wheels, and Inspector Cloyd confirmed that the only reason for replacing the equalizer would be to replace one that was defective. A

statement by the mechanic who performed the repair work on June 18, 1987, reflects that two pistons in the brake adjuster were replaced as "a preventative maintenance measure" (Exhibit RÄ5).

The respondent asserts that repairs were made on the truck brakes prior to the time of the inspection and the issuance of the citation, and the record establishes that this was the case. In view of these prior repairs, respondent maintains that it had no reason to believe that the brakes were in other than operable condition, and that when the brakes were tested by the mechanic after the citation was issued, he found them to be in good working order and could find nothing to indicate that they were unsafe.

In defense of the violation, the respondent relies on the written statement by the mechanic expressing his opinion that the brakes were in good working order and not unsafe. However, the mechanic did not testify at the hearing, and neither he nor Mr. Neely were present when the inspector had the brakes tested in his presence under actual driving conditions. Consequently, I have given little weight to the mechanic's statements.

I take particular note of the fact that the mechanic did in fact replace some pistons in the brake slack adjusters, and Mr. Cloyd's testimony is that the slack adjusters served as a means of providing equal air pressure to all of the truck wheels, and would not be replaced if they were not defective. Given the fact that the driver had to raise up on his seat while applying full foot pressure to the brake pedal while they were being tested under actual driving conditions, I believe one can reasonably conclude that the failure of the truck to stop when the brakes were applied, and its continuing to roll, was the result of a lack of adequate and available air pressure on the foot brakes. Although Mr. Neely stated that the truck hand brakes and retarder were operable and would stop the truck when it was tested by the mechanic, he conceded that the retarder and hand brake were not the principal means for stopping the truck, and that the first thing a drier would do to stop the truck would be to apply the foot brakes. Mr. Neely also conceded that the cited truck was subjected to more brake wear than other trucks, and like other pieces of equipment, failures are unpredictable and can occur without warning.

Respondent's second defense is that the 30 to 40 foot rolling distance that the truck travelled after the driver applied the foot brakes was "normal." However, absent any indication that Mr. Neely is a brake expert, and lacking any

evidence as to the manufacturer's brake specifications or other credible evidence reflecting the actual "normal" stopping distances for an empty truck driving at 8 to 9 miles an hour, I find no basis for Mr. Neely's unsupported conclusion as to the "normal" stopping distance for the truck, and I have given it little weight. Further, I reject Mr. Neely's suggestion that the repairs made to the brakes after the citation was issued were made simply to abate the citation or to facilitate placing the truck back into operation. I believe that the repairs were made because they were needed, and the mechanic confirmed that he replaced the parts as a preventive measure. Inspector Cloyd confirmed that once these repairs were made, the brakes "worked perfect" when the truck was tested under a load.

In several 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.

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 329, 342 (February 1984), Judge Morris affirmed an "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.

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.

On the facts of the instant case, while it is true that the inspector did not physically inspect the brakes or find any specific defects, he nonetheless concluded that the empty trucks travelling at a slow rate of speed should have been capable of coming to a complete stop without rolling 30 to 40 feet after the foot brakes were applied by the driver, or without the necessity of the driver raising up on his seat to apply all of the available foot pressure to the brake pads. Coupled with the fact that repairs were made to replace a mechanism which controlled the air pressure for the foot braking system, and my conclusion that the lack of adequate air pressure to the brakes could reasonably have prevented the truck from coming to a complete stop sooner than 30 or 40 feet, I conclude and find that the petitioner has established by a preponderance of the available credible evidence that the cited truck foot brakes were in fact inadequate. 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 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).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

With regard to Citation No. 3052407, I conclude and find that the failure by the employee sitting on a wet and muddy I-beam in question to wear a safety belt or line where there was a danger of falling constituted a significant and substantial violation of section 56.15005. In the event of a fall, I believe it would be reasonably likely that the employee in question would have suffered injuries of a reasonably serious nature. I agree with the inspector's finding, and IT IS AFFIRMED.

I also agree with the inspector's significant and substantial finding with respect to Citation No. 2862746, concerning the inadequate brakes on the No. 29 Caterpillar truck. The

respondent did not dispute the fact that the inclined haulage road over which the truck normally traveled during the course of the working shift had a 90Ädegree curve at the bottom, with a solid wall in front of it. The respondent also did not dispute the fact that the depth of the quarry adjacent to the haulage road, as shown in the photograph exhibits GÄ2 and Deposition exhibit No. 1, posed a hazard, and Mr. Neely confirmed that the repairs made on the truck brakes on June 15, 1987, were in response to the concerns of the driver that one wheel was locking while going downhill, causing the truck to slide towards the edge of the roadway adjacent to the open pit below.

Given the fact that the inadequate brakes allowed the cited truck in question to roll some 30 or 40 feet before coming to a stop, I believe that one can reasonably conclude that the condition of the brakes posed a discrete hazard of the truck colliding with the wall at the foot of the haulage road or running off the roadway to the pit below in the event the driver applied his brakes while approaching the bottom of the hill while making the right turn. Inspector Cloyd confirmed that during the testing of the brakes he had the driver apply the brakes before reaching the curve at the bottom of the road at a pre-determined location out of concern for the curve in the road, as well as the wall, and he did so to allow an additional margin of safety in the event the driver was unable to completely stop the truck. The inspector confirmed that he based his "S & S" finding on the fact that the haulage road was steep and the presence of a 90Ädegree curve at the bottom with a solid limestone wall in front of it. He also considered the fact that the cited truck had a history of brake problems. Under the circumstances, I conclude and find that the inspector's finding was reasonable, and IT IS AFFIRMED.

History of Prior Violations

An MSHA computer print-out reflects that for the period October 1, 1985 through September 30, 1987, the respondent paid civil penalty assessments in the amount of $903 for 26 violations, twenty (20) of which are "single penalty" $20 assessed violations (exhibit GÄ3). For an operation of its size, I cannot conclude that the respondent's compliance record warrants any additional increases in the civil penalty assessments which have been made for the violations which have been affirmed in these proceedings.

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

The record reflects that the subject limestone quarry and mill operated by the respondent at the time the citations were issued is not in operation and was closed on October 2, 1987. During its operation, the respondent employed 41 miners at that location and the facility produced 5,331.33 tons of crushed limestone per day. From June 1987 through April 1988, the respondent employed 181 miners in all of its operations and produced an average of 9,734.64 tons of crushed limestone per day. I conclude and find that the respondent is a medium-to-large mine operator, and the parties stipulated that the payment of the proposed assessed civil penalty assessments for the violations in question would have a negligible effect on the respondent's ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

Good Faith Compliance

The record establishes that the cited truck was immediately taken out of service and taken to the shop for repairs, and a new equalizer, or slack adjuster, was installed. With regard to the safety belt citation, the record reflects that when the employee was observed sitting on the eye beam without a safety belt or line, the respondent's quarry superintendent spoke to the employee and ordered him off the I-beam, and the respondent provided two safety belts and lanyards for use by its employees in the primary crusher area. I conclude and find that the respondent exercised good faith compliance by timely and rapidly abating both of the violations.

Negligence

I conclude and find that both of the violations which have been affirmed resulted from the respondent's failure to exercise reasonable care, and the negligence findings made the inspector's with respect to both violations, ranging from "low" to "moderate," are affirmed.

Gravity

On the basis of my findings and conclusions affirming the significant and substantial findings made by the inspectors, I conclude and find that both of the violations which have been affirmed in these proceedings were serious.

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 and find that the following proposed civil penalty assessments are reasonable and appropriate for the violations which have been affirmed in these proceedings:

Docket No. SE 87Ä116ÄM

Citation No.	Date	30 C.F.R. Section	Assessment
3052407	06/01/87	56.15005	$ 42

Docket No. SE 87Ä132ÄM

Citation No.	Date	30 C.F.R. Section	Assessment
2862746	06/18/87	56.9003	$105

ORDER

The respondent IS ORDERED to pay the civil penalties assessed in these proceedings within thirty (30) days of these decisions and order. Upon receipt of payment by the petitioner, these cases are dismissed.

George A. Koutras
Administrative Law Judge