

CCASE:  
SOL (MSHA) V. TUSCOLA STONE  
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TTEXT:

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. LAKE 88-127-M  
A. C. No. 11-01657-05506

v.

Docket No. LAKE 89-26-M  
A. C. No. 11-01657-05508

TUSCOLA STONE COMPANY,  
RESPONDENT

Tuscola Stone Company

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the  
Solicitor, U.S. Department of Labor, Chicago,  
Illinois for Petitioner;  
Daniel P. Foltyniewicz, Risk Manager, Tuscola  
Stone Company, Elgin, Illinois for  
Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Tuscola Stone Company (Tuscola) with two violations of regulatory standards. The general issue before me is whether Tuscola violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3260039 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 56.9003 and charges as follows:

The service brakes on the 50 Euc haul truck # ME01 are not adequate to stop and hold the truck on the inclines and declines being traveled in the pit. The service brakes were checked with the haul unit loaded and empty and in neither check would the service brakes stop and hold the haul truck. The truck is to be removed from service until the brakes are repaired. The haul roads being traveled

are narrow and steep, with a drop off on one or both sides.

The standard at 30 C.F.R. 56.9003 requires that "powered mobile equipment shall be provided with adequate brakes."

Tuscola does not dispute the testimony of Inspector Bill Henson of the Federal Mine Safety and Health Administration (MSHA) in support of this violation nor does it dispute his gravity and "significant and substantial" findings. Henson testified that during the course of his inspection of the Tuscola limestone multi-bench open pit mine on March 2, 1988, he traveled to the loading area of the pit in the cited Euc #ME01 truck. The truck was loaded and as it started down a decline the driver was asked to apply its service brakes. The brakes were applied but the truck failed to stop and continued down the decline and partly up the next incline traveling 75 to 100 feet. In another test the brakes were applied on the decline with an unloaded truck. The brakes still did not hold and the truck continued to travel 50 to 100 feet.

The ramps in the area in which the cited truck was operating were only 20 to 25 feet wide--wide enough to allow only one of these large trucks to pass at a time--and up to 150 feet high. Inspector Henson observed that other trucks including 3/4 ton service vehicles and pick-up trucks were operating in the ramp area and he opined that it was highly likely that the haul truck in the cited condition, weighing about 100 tons fully loaded, would drive into another vehicle or pass over the side of the roadway and overturn. He also observed that the truck was used on a daily basis thereby increasing the likelihood of a fatal accident. Under the circumstances the violation is proven as charged. It is also proven that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

Henson also opined that the violation was the result of high operator negligence. The driver of the cited truck informed Henson that an effort had been made to adjust the brakes but was unsuccessful and that he knew the brakes were not working properly. The mechanic also informed Henson that he had tried to adjust the brakes but had been successful in adjusting only one of the four brakes. He told Henson that the other brakes were either "frozen" or were

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"self-adjusting". In any event the truck was returned to service with three of the four service brakes not functioning.

Tuscola maintains that it should not be charged with negligence since neither the mechanic nor the truck driver informed any management personnel of the defective brakes or that the truck had been returned to service without the brakes having been properly adjusted. Under certain circumstances a mine operator may in any event be held responsible for the negligence of its rank and file employees. See Secretary v. Southern Ohio Coal Co., 4 FMSHRC 59 (1982); Secretary v. Old Dominion Power Co., 6 FMSHRC 1886 (1984). It may reasonably be inferred from the evidence in this case that Tuscola failed to exercise proper supervision of its employees, failed to implement procedures for reporting unsafe equipment and failed to have appropriate disciplinary procedures in effect at the time of the cited violation for employees who failed to report unsafe conditions. Indeed, Tuscola management did not even inquire of the truck driver until almost a year after the incident as to why he failed to report the inadequate brakes and there is no evidence that any discipline was taken against him. Accordingly even in the absence of evidence of direct management knowledge of the defective brakes I find that the violation was the result of operator negligence.

Citation No. 3260040

Citation No. 3260040, as amended, alleges a violation of the regulatory standard at 30 C.F.R. 56.9002 and charges as follows:

The parking brake on the 50 ton Euc haul truck #ME01 is not operative. The truck was checked empty on a slight grade. The truck is being used to haul shot rock from the pit benches to the primary stockpile. The hand brake (dump brake) on this haul unit is also inoperative.

30 C.F.R. 56.9002 provides that "equipment defects affecting safety shall be corrected before the equipment is used."

Inspector Henson conceded at hearing that the test he performed on the parking brake in this case i.e. attempting to stop a moving truck with the parking brake, was not the

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"standard test" used by MSHA. He further conceded that parking brakes are not designed to bring a moving haul truck to a stop. Under the circumstances I cannot find that the test utilized by Henson in this case is an appropriate test to determine the adequacy of the parking brake. Thus that part of the citation charging Tuscola with having inadequate parking brakes on the haul truck must be vacated.

The citation also charges however that the hand brake was inadequate. It is not disputed that the hand brake is in fact designed to bring a moving truck such as the cited truck to a halt. It is also not disputed that the cited truck failed to stop upon application of the hand brake. Under the circumstances the violation is proven as charged.

Henson opined that the violation was also "significant and substantial". He considered it "reasonably likely" that the inadequate hand brake could contribute to an accident. In particular he noted that the truck driver would most likely be struck by the moving truck while dismounting after parking and application of the hand brake. There is no dispute that the injuries to the truck driver would be serious if struck by the truck. This evidence is not disputed and I agree that the violation was serious and "significant and substantial".

Henson also found the operator to be chargeable with high negligence. For the reasons previously noted in support of the negligence findings under Citation No. 3260039, I also find the operator negligent with respect to the instant violation.

In assessing civil penalties in this case I have also considered that the violations were abated in accordance with the Secretary's directions, that the operator is small in size and that the operator has a minimal history of violations. Accordingly I find the following civil penalties to be appropriate: Citation No. 3260040-\$100; Citation No. 3260039-\$300.

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ORDER

The Tuscola Stone Company is hereby directed to pay civil penalties of \$400 within 30 days of date of this decision.

Gary Melick  
Administrative Law Judge  
(703) 756-6261