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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 PROCEEDING

Docket No. WEVA 88-136
A.C. No. 46-05682-03502

v.

Ward Mine

TEN-A-COAL COMPANY,
RESPONDENT

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Patrick H. Cunningham, Partner, Ten-A-Coal
Company, Clarksburg, West Virginia, pro se, for
the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 assessments in the amount of \$504 for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The respondent filed an answer denying the alleged violations, and a hearing was held in Clarksburg, West Virginia. The petitioner filed a posthearing brief, but the respondent did not. I have considered the petitioner's arguments, as well as the oral arguments made on the record by the parties during the hearing in my adjudication of this case.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(a) of the Act. Additional issues include the question of whether the violations are "significant and substantial," and the effect of

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any assessed civil penalties on the respondent's ability to continue in business.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-7):

1. The respondent is the owner and operator of the Ward Mine, a strip mine located in Clarksburg, West Virginia.
2. The respondent and the mine are subject to the jurisdiction of the Act, and the presiding Judge has jurisdiction to hear and decide this matter.
3. The contested citations were properly served on the respondent by Frank J. Cervo, a duly authorized representative of the Secretary of Labor.
4. The respondent is a small operator, and its annual company coal production for the year 1988 was 90,569 tons. The Ward Mine had an annual production of 37,544, for this same time period.
5. The respondent's history of prior violations consists of two violations issued during four inspection days during the 24-months prior to the date of the issuance of the contested citations.

Discussion

All of the citations in this case are section 104(a) "S&S" citations issued by MSHA Inspector Frank J. Cervo during the course of an inspection conducted on November 16, 1987, and they are as follows:

Citation No. 2944563, cites a violation of 30 C.F.R. 77.410, and the condition or practice states as follows:

The audible warning device provided for the Fiat-Allis dozer in service was inoperative in that when put in reverse the device would not give an alarm.

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Citation No. 2944565 cites a violation of 30 C.F.R. 77.410, and the condition or practice states as follows:

The audible warning device provided for the 400 payloader in service was inoperative, when the payloader was put in reverse the device would not given an alarm.

Citation No. 2944564, cites a violation of 30 C.F.R. 77.1605(a), and the condition or practice is described as follows:

The windshield provided for the Fiat-Allis 31 Dozer in service was cracked at several locations.

Petitioner's Testimony and Evidence

MSHA Inspector Frank J. Cervo, testified as to his back-ground and experience, and he confirmed that he issued Citation No. 2944563 (exhibit P-1), after determining that a bulldozer which was pushing spoil, or dirt, against a bank so that the coal could be removed, and the dirt replaced, had an audible warning device which was inoperative. Although the device was on the equipment, it did not work. He was informed that it was working when it was checked several hours prior to his inspection (Tr. 7-10).

Mr. Cervo stated that the mine is located between two public and busy highways, and the equipment was operating approximately 400 feet from the road. He estimated that the bulldozer had to travel approximately 200 feet while pushing the spoil material, and other than the three pieces of equipment which were operating in close proximity to each other, he observed no one on foot in the area where the bulldozer was operating. Mr. Cervo stated that the visibility to the rear of the bulldozer was very poor because it is high, and if someone had ventured on the property and walked behind the machine while it was in reverse, it would be highly unlikely that the operator would see him. He confirmed that the machine would likely operate in first or second gear, and he estimated the speed at 3 or 5 miles an hour. The weather was clear and sunny, and other than the noise from the equipment being operated at the same time, there were no other noise sources present (Tr. 11-13).

Mr. Cervo stated that he was concerned that curiosity seekers using the public highway, salesmen, or job applicants could have come on the mine property without the knowledge of the equipment operators. He believed that it was reasonably likely that anyone could be in the area at any given time, and that given the fact that there have been serious haulage accidents in the past at other mines involving people "wandering around" mine property, he believed it was reasonably likely that an accident

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would occur, and that is the reason he considered the violation to be significant and substantial. He also believed that one individual would be affected by any accident or injury, and stated that "S&S is negligence on the part of the operator" because the foreman examined the equipment before it started in operation, but 3 or 4 hours had passed since the initial examination, and the operators of the equipment should have been trained to be alert for inoperative audible warning devices. It was the equipment operator's responsibility to stop the equipment and make the necessary repairs as the need occurs (Tr. 16). Mr. Cervo believed that a prior violation for inoperative alarms was issued during a prior inspection, but he was not sure (Tr. 17).

Mr. Cervo confirmed that it is not unusual for a backup alarm to malfunction because of vibration, weather, or normal wear and tear, but he did not know what caused the problem in this particular instance. He confirmed that the condition was corrected within a half hour. Mr. Cervo agreed that the equipment which was operating in the pit stripping coal would not be a hazard to any automobiles or people using the highway, and that any hazard would be confined to the pit area. He confirmed that the mine office is located in a garage, which is kept locked, and which was located 2,000 feet from the pit. The garage door has a sign on it which identified it as the mine office, and he did not believe that anyone would be in the office after work starts in the pit. He confirmed that the mine has two entrances along the roadway, and while there are no signs identifying the mine at those locations, there are stop signs present (Tr. 20).

Mr. Cervo confirmed that he has observed salesmen at the mine, and he believed that it was possible for a salesman to venture into the pit and walk behind a bulldozer while it was operating in reverse. He also confirmed that he has observed general curiosity seekers at other mines wandering around mine property observing coal extraction (Tr. 21). Although he was generally aware of prior accidents involving bulldozers backing over people, he could not recall any specific cases where this has happened (Tr. 22).

Mr. Cervo confirmed that an endloader and shovel were also operating in the pit area where the cited bulldozer was operating, and he estimated that they operated within 20 to 25 feet of each other, and if an accident did occur, it would involve one piece of equipment colliding with another. He also indicated that "it could very well be that an operator would get off his piece of equipment for some reason." He conceded that he issued the citation "to cover all eventualities" (Tr. 23).

Mr. Cervo stated that when he stopped the bulldozer and cited it, the other two pieces of equipment stopped operating within 2 minutes, and the operators got off their equipment to

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see what the problem was, and he explained the situation to them (Tr. 25). Mr. Cervo believed that more than one piece of equipment operating without workable audible backup alarms would present a collision hazard, and he believed that the equipment operators were experienced individuals (Tr. 26).

Inspector Cervo confirmed that he issued Citation No. 2944565 (exhibit P-2), after finding an inoperative backup alarm on a payloader which was also pushing dirt. His inspection notes reflect that the payloader was not "surrounded by any other piece of equipment" (Tr. 28). Since the payloader is high, and the operator looks through the back window when he is backing up, Mr. Cervo believed that anyone on the property who may be walking or wandering through the area could have been run over. He believed that the operator's negligence was moderate because the equipment operators should take care of such problems as they arise (Tr. 29). He believed the violation was "S&S" because "if any employee got off his piece of equipment for any purpose and go walking across the roadway where this piece of equipment was operating, he could very well be ran over" (Tr. 30). Mr. Cervo confirmed that the violation was abated within a half hour, and he believed that the inoperative alarm condition may have been caused by a wire which may have loosened due to vibration (Tr. 30).

Inspector Cervo confirmed that he issued Citation No. 2944564 (exhibit P-2), after observing that the windshield of the cited bulldozer was cracked in several locations. He believed that the operator's visibility would be impaired because "the cracks were so designed and with the weather being a nice sunny day you get a rainbow effect" (Tr. 32). Mr. Cervo did not know how long the condition had existed, and he confirmed that the bulldozer was the same one he cited for an inoperative alarm (Citation No. 2944563). Mr. Cervo stated that the cracked windshield was obvious, and "anytime a windshield gets broken during the day in such a manner that it affects visibility this is the time to park it" (Tr. 32). He confirmed that section 77.1605(a) requires that all windshields be maintained in a safe and clean condition.

Mr. Cervo stated that the windshield in question was cracked in several locations near the center, and that any cracks started on the edge would work their way up near the center. He believed that the cracks in question would be in the line of vision of the equipment operator, and this would affect his safety because impaired visibility from shattered or cracked glass would not allow the operator to see anyone because the machine is high, and "it only takes a split second. You could be on top of somebody" (Tr. 34). He explained further at (Tr. 32-34), as follows:

Q. At what point do cracks in the windshield become severe enough to be considered not in good condition?

A. Cracks in safety glass will spread due to the stress of the machine, the vibration. Just a very small crack. However, there were several cracks in this one. For example, if it is in the center or around the edges that is pointing away from the corner it is subject to crack at any given time. And in addition to that, it has been known that glass, the machine gets on a stress and the glass kind of rubs where the crack is and can throw a little bit of debris back on the operator.

Q. But at what point would you say that a windshield is not in good condition, when it has a few cracks or what?

A. If a crack is from the edge like the corner and it goes from one corner to the other, a small crack of that nature, it makes like a half circle. It is very unlikely that will spread. But if it doesn't go from corner to corner then it will spread.

In addition to that, once a crack appears with the strain that the machine gets on and the stress and vibration with a very small crack even, it is subject to throw a piece of glass out because it is the weakest part of that glass now where the crack is.

* * * * *

Q. How would this cracked windshield affect the equipment operator himself, if at all?

A. It could possibly be since it is cracked even though there is no big sharp edges, if there were sharp edges it would be different. But since it is cracked at several places and you get on a strain from stress it could throw out a piece of glass between the cracks and strike the operator.

Mr. Cervo believed that the respondent was negligent for not ordering a new windshield when the crack first appeared (Tr. 35). Mr . Cervo confirmed that he permitted the respondent to remove the windshield in order to have time to order a new one, and that the equipment was allowed to continue in operation without a windshield (Tr. 36). Mr. Cervo confirmed that a windshield is not required, but if it is installed on the equipment, it must be maintained in good condition (Tr. 37). He agreed that it was not unusual to have cracks in windshields on equipment operating in pits (Tr. 38). He also agreed that the phrase "being in good condition" is subject to different interpretations, and that depending on the location of a crack, an operator is required to

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replace cracked windshields as they occur. Impairment of vision and possible shattering would be two factors to be considered in making any determination as to whether or not a windshield is in "good condition" (Tr. 39).

On cross-examination, Mr. Cervo could not recall whether or not the cited windshield was installed in three sections, i.e., one big glass in the center and two smaller ones on each side of the back. He confirmed that he did not climb into the bulldozer for a view from the operator's compartment to determine whether the operator's visibility would be affected by the cracks in question. He also confirmed that the windshield glass is safety glass which is designed so that it will not shatter and fly (Tr. 41). When asked how he could determine that the operator's visibility would be impaired without his getting into the equipment and looking out from the operator's seat, Mr. Cervo stated "because if I have difficulty distinguishing, looking from the ground up, I am sure sitting in that seat you would have equal or greater visibility impairment than I do looking up there. If I had to look up and see, I kept watching to get the operator's attention" (Tr. 41). Mr. Cervo believed that the bulldozer in question was a second-hand piece of equipment purchased by the respondent at a sale (Tr. 41).

Mr. Cervo confirmed that when he was attempting to get the operator's attention by signalling to him, he was standing to the side of the machine, and that the operator could see him if he looked out of the side of the machine because there was no glass there and the windshield would not have impaired his vision (Tr. 43). When asked how he determined that the line of vision of the operator was impaired, Mr. Cervo responded as follows at (Tr. 44-45):

A. I went around to the front of the machine after he had parked it and turned it off. I went around to the front of the machine and I looked up to see if I could see inside from the ground and it was difficult for me to look up to make any distinguishment of anything being in there.

MS. EVE: Thank you.

JUDGE KOUTRAS: That would be virtually impossible. This machine sets up pretty high, doesn't it?

THE WITNESS: Yes. That machine sets up pretty high.

JUDGE KOUTRAS: You could not very well see what was in there?

THE WITNESS: Well, you can see the seats, you can see the steering wheel. You can see the operator.

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JUDGE KOUTRAS: Did you have any difficulty seeing the operator or the seats or the steering wheel?

THE WITNESS: As well as I can remember, Your Honor, I had to, after he stopped I looked and looked and yes, there was a little impairment for me to look up in there from the ground and I am sure if I had been in the seat looking out it would have been the same thing.

JUDGE KOUTRAS: But you didn't sit in the seat?

THE WITNESS: No. I did not.

JUDGE KOUTRAS: You just did not think of it?

THE WITNESS: No. It is not that I did not think of it.

I go up in the cab on a lot of occasions to check for other things. But like seat belts, if they are in a position where they required to wear them and the cleanliness of the machine, the fire extinguisher and things of that nature.

Respondent's Testimony and Evidence

Patrick H. Cunningham, the respondent owner and operator of the mine, testified that his foreman Bob G. Eubanks informed him that he had checked the cited audible backup alarms on the morning of the inspection, and that they were operating properly. Mr. Cunningham stated that the alarms are difficult to maintain because of the vibration of the equipment, and his equipment operators are instructed to check them in the morning and at noon to make sure they are operating. With more than one piece of equipment operating, the noise is such that equipment operators "get kind of immune to the warning devices and they don't hear them unless it is for an inspection" (Tr. 48). He confirmed that he has operated the equipment and may not hear the alarms except for periods when he stops to check them (Tr. 48).

With regard to the cracked windshield, Mr. Cunningham conceded that he was aware that it was cracked, but he did not believe it was cracked enough to cause it to be removed or replaced. In his opinion, the cracks did not hamper the visibility of the operator, and that given the fact that it was safety glass, he did not believe that it was likely that the glass would be fractured. He also stated that equipment vibration causes cracks and that "it is tough to keep windshields in this equipment because of the vibration" (Tr. 49).

On cross-examination, Mr. Cunningham stated that he has experienced cracking in safety glass, but when this occurs, the glass breaks into small fine pieces, and he has never seen it

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"fly at any distance." He confirmed that he probably last inspected the windshield a few days before the inspection, and that the cracks in question were down low and would not hamper vision. He confirmed that the cracks could possibly have travelled in the line of vision of the operator between the time he observed the windshield and the time Mr. Cervo observed it on the day of his inspection (Tr. 51). He confirmed that he did not observe the windshield after it was removed because it was broken up during the process of removing it (Tr. 51, 53-54).

Mr. Cunningham confirmed that he operated the cited bull-dozer 2 or 3-days prior to the inspection and that his vision was not impaired by the cracks in the windshield (Tr. 51). He believed that the cracks were present when he purchased the machine 3 or 4-months prior to the inspection (Tr. 53).

Mr. Cunningham stated that he has posted "no trespassing" signs at the entrance to the mine pit, and that he does not permit anyone on his operation unless one of his men are with them. He believed that it was unlikely that anyone could drive down to the pit area without one of his operators observing him and stopping him to determine his reason for being on the property (Tr. 54).

Mr. Cunningham confirmed that he employs three full-time employees consisting of a working foreman and two equipment operators (Tr. 6-7). He also indicated that his current mine production is down from past years, and that he averages 1,200 to 1,500 tons a month, and that he is behind in his taxes, and that his financial condition "is real bad" (Tr. 58). He believes that the proposed civil penalty assessments for the citations in question "would hurt us real bad, possibly cause me to have to close the mines down. It doesn't seem like a big amount to some people but a small operator with all the other expenses that we have, it means quite a bit to us" (Tr. 56). Mr. Cunningham confirmed that in addition to the pit in question, he operates two other pits which "are bad" in terms of being profitable (Tr. 57). He conceded that the cited windshield was cracked, and that the cited backup alarms were inoperative (Tr. 57).

Findings and Conclusions

Fact of Violations

Citation Nos. 2944563 and 2944565

The respondent is charged with two violations of mandatory safety standard 30 C.F.R. 77.410, because the warning devices which were installed on the cited bulldozer and payloader were inoperative when the equipment was operated in reverse. The standard requires that such devices give an audible alarm when operated in reverse. The respondent admitted that the alarms

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were inoperative, and the evidence presented in support of the violations establishes that this was the case. Accordingly, the violations ARE AFFIRMED.

Citation No. 2944564

The respondent is also charged with a violation of mandatory safety standard 30 C.F.R. 77.1605(a), because of a cracked windshield on a bulldozer. The cited standard, which covers loading and haulage equipment, states that "Cab windows shall be of safety glass or equivalent, in good condition, and shall be kept clean." The inspector testified that he cited the condition after observing several cracks near the center of the windshield which he believed would impair the operator's visibility. He also believed that the cracked windshield was subjected to stress through machine vibration while it was in operation, and that a piece of glass could be dislodged and thrown back in the direction of the operator from the area where it was cracked.

The inspector conceded that he did not enter the cab to sit behind the operator's controls in order to determine whether the cracks would affect the operator's visibility. He contended that he had difficulty in getting the operator's attention while waving to him from the ground, and implied that this was due to the operator's impaired visibility due to the cracks. However, given the fact that the inspector confirmed that he was standing to the side of the machine while attempting to signal the operator, and conceded that the operator could clearly see him from the side of the machine from where he was standing, I find the inspector's testimony to be lacking in credibility.

The inspector also testified that after the machine was parked, he went to the front and looked up and found it difficult to see inside of the cab from the ground. However, he confirmed that even though the machine is "pretty high," he could see the seats, the steering wheel, and the operator, and that "there was a little impairment for me to look up in there from the ground and I am sure if I had been in the seat looking out it would have been the same thing." I find nothing in this testimony to establish that the windshield cracks impaired the inspector's ability to see into the cab from his position on the ground.

Mine operator Cunningham testified that he operated the cited piece of equipment 2 or 3-days prior to the inspection, and that his vision was not impaired. He believed that the windshield was cracked when he purchased the equipment 3 or 4-months prior to the inspection, and he did not believe that the glass would fracture because it was safety glass. The inspector confirmed that the windshield was constructed of safety glass, and that such glass is designed so that it will not shatter or fly. Further, the inspector agreed with Mr. Cunningham that it was not

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unusual to have cracks in windshields of the equipment operating in the pits due to the vibration of the equipment.

The inspector confirmed that windshields are not per se required to be on the equipment. However, if a windshield is provided, it must be kept in "good condition." The standard contains no guidance as to what constitutes "good condition," and the inspector conceded that this phrase is subject to different interpretations, and that depending on the location of a crack, windshields are required to be replaced as they occur. He believed that impairment of vision and possible shattering were two factors to be considered in making any determination as to whether or not a windshield is in "good condition."

I agree with the inspector's opinion that impaired vision and the possibility of shattering are determining factors in any assessment as to whether a windshield is in good condition. However, based on the evidence adduced in this instance, I conclude and find that it is insufficient to establish that the cracks observed by the inspector impaired the operator's visibility or presented a possible shattering hazard. I find Mr. Cunningham's testimony that his vision was not impaired when he operated the machine with cracks in the windshield to be credible, and I find it highly unlikely that the safety glass, which is designed to preclude shattering, would shatter because of the cracks. I also take note of the fact that the inspector permitted the respondent to remove the windshield and to continue to operate the machine with the windshield completely removed while a new one was on order. Under all of these circumstances, I conclude and find that the petitioner has not established that the cited windshield was not in "good condition." Accordingly, I cannot conclude that a violation has been established, and the citation IS VACATED.

Significant and Substantial Violation

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

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (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, 1574-75 (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).

Inspector Cervo confirmed that his significant and substantial finding was based on his general awareness of prior accidents at other mines involving people "wandering around" the mine and placing themselves in a position of being run over by an equipment operator who may not see them while backing up his machine with an inoperative backup alarm. Although Mr. Cervo could not cite any specific cases where this has occurred, he was concerned that "curiosity seekers" using the adjacent highway, salesmen, or job applicants, may venture onto the respondent's property without the knowledge of the equipment operators, and place themselves in a position of being run over by one of the machines. Mr. Cervo stated that he has observed salesmen visiting the respondent's mine, and has observed "curiosity seekers" "wandering around" other mines observing coal extraction. He also stated that he based his significant and substantial finding on his belief that an equipment operator leaving his machine and walking in the proximity of another operating piece of equipment could be run over, expressed a concern over a possible equipment

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collision, and confirmed that he issued the citations "to cover all eventualities."

The evidence in this case establishes that the respondent's mining operation is very small and that the work force consists of two equipment operators, and a working foreman. The inspector conceded that any hazards would be confined to the mine pit area, and he agreed that the equipment operators were experienced miners, and that the normal operating speed of the equipment in question was 3 to 5 miles an hour in first or second gear. The inspector observed no one on foot, and there is no evidence that any salesmen, job applicants, or trespassers were on the property, or that such visitations occurred rarely or frequently. Although the inspector believed that an equipment operator would have reason to leave his machine, he apparently made no inquiries of the equipment operators as to whether or not they had any reason to leave their equipment and be on foot during the course of their normal work shift. Aside from the cited inaudible backup alarms, there is no evidence that any of the equipment was otherwise defective or had inoperable or defective brakes. Although one of the machines was cited for a cracked windshield, the inspector allowed it to continue to operate with the windshield removed, and there is no evidence that this condition impacted on the operator's view to the rear of the machine. While the inspector believed that the height of the equipment created poor visibility to the rear of the machines, the inspector did not climb into the machines to determine whether this was true or not, and none of the equipment operators were called to testify in this case.

With regard to the presence of any invitees or trespassers on the property, Mr. Cunningham's credible testimony reflects that "no trespassing" signs are posted at the entrance to the mine, and that the mine office was located 2,000 feet from the pit, and a sign was posted identifying it as the mine office. Although Inspector Cervo believed that no one would be at the mine office during the work shift, I find no credible evidence to support that conclusion, and Mr. Cunningham's un rebutted credible testimony reflects that no one is permitted on the site unless he is accompanied by one of his employees, and Mr. Cunningham found it highly unlikely that anyone would be in the pit area without being observed or stopped by one of the equipment operators. Under these circumstances, I conclude and find that any salesmen or job applicants would likely go to the mine office to state their business, and I find it unlikely that they would venture 2,000 feet into the pit area and place themselves in close proximity to a piece of equipment operating in reverse without being observed.

With regard to any equipment collision hazard, given the size of the equipment, and the fact that it is normally operated at very slow speeds by experienced operators, and in the absence

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of any past accidents or incidents of this kind, I find it unlikely that such an accident would occur, and if it did, I find it unlikely that it would result in any serious personal injury to the operator of the equipment.

I take particular note of the inspector's admission that he issued the citations to cover "all eventualities." Although I agree that a surface pit mining operation such as the one operated by the respondent generally involves a working environment exposing miners to potential hazards, the question of whether any particular violation is significant and substantial must be based on credible evidence as to the existence of a hazard rather than on assumptions and speculation. On the facts of this case, and after careful review and consideration of Inspector Cervo's testimony in support of his "S&S" findings, I conclude and find that they were based on general and speculative assumptions with respect to any hazards exposure, rather than on any specific prevailing mining conditions from which one could reasonably conclude that the equipment operators or anyone else were in fact exposed to mine hazards likely to result in injuries of a reasonably serious nature. I further conclude and find that the petitioner has failed to establish by a preponderance of the credible and probative evidence adduced in this case that the violations were significant and substantial. Accordingly, the inspector's findings in this regard are rejected, and they ARE VACATED.

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

The respondent is a very small mine operator, and although I have taken into consideration Mr. Cunningham's assertion that his operations may be marginally profitable, I conclude and find that the payment of the civil penalties assessed for the violations which have been affirmed will not adversely affect his ability to continue in business.

History of Prior Violations

The parties stipulated that the respondent's history of prior violations consists of two violations issued during the course of four inspection days in the 24-months prior to the issuance of the contested citations in this case. I conclude and find that the respondent has a good compliance record, and I have taken this into consideration in the assessment of the civil penalties for the violations which have been affirmed.

Good Faith Compliance

The inspector confirmed that the respondent took immediate steps to repair the equipment backup alarms, and that the violations were abated within a half hour. I conclude and find that

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the respondent exercised rapid good faith compliance, and I have taken this into consideration.

Negligence

The inspector made a finding of "moderate" negligence for both violations, and he believed that the equipment operators are responsible for stopping the equipment and having it repaired as the need arises. He also agreed with Mr. Cunningham that the backup alarms could become inoperative at any time due to the vibration of the equipment. I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Gravity

On the facts of this case, and for the reasons stated in my "S&S" findings, I conclude and find that the violations were non-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 civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2944563	11/16/87	77.410	\$ 25
2944565	11/16/87	77.410	\$ 25

ORDER

Section 104(a) "S&S" Citation No. 2944564, November 16, 1987, 30 C.F.R. 77.1605(a), IS VACATED. The respondent IS ORDERED to pay civil penalty assessments for the two remaining violations in the amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge