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

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

v.

PRETZEL EXCAVATING,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 89-176
A.C. No. 46-06596-03513

Pretzel Excavating Mine No. 1

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Edward Andrew Moss, Safety Consultant, Pretzel Excavating, Morgantown, West Virginia, 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 penalty assessments for four alleged violations of certain mandatory safety standards found in Parts 77 and 50, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and a hearing was held in Morgantown, West Virginia. The parties waived the filing of posthearing briefs. However, I have considered the oral argument made by the parties during the course of the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standard, (2) whether two of the alleged violations were "significant and substantial" (S&S), (3) whether one violation was the result of the respondent's

unwarrantable failure to comply with the cited standard, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of this decision.

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, 29 C.F.R. 2700.1 et seq.

Discussion

The parties settled two of the alleged violations in this case, namely, section 104(a) non-S&S Citation No. 3100981, January 17, 1989, 30 C.F.R. 50.20, and section 104(a) non-S&S Citation No. 3100743, March 7, 1989, 30 C.F.R. 77.1110. The respondent agreed to pay the full amount of the proposed civil penalty assessments for the violations in question. Pursuant to Commission Rule 30, 29 C.F.R. 2700.30, the settlement was approved from the bench, and my bench decision in this regard is herein affirmed (Tr. 5). The remaining contested citations which are the subject of this case are as follows:

Section 104(d)(1) "S&S" Citation No. 3119190, October 31, 1988, 30 C.F.R. 77.1605(k):

> A berm or guard is not provided on the right outer bank of the elevated roadway beginning at the top of the hill near the sedimentation pond and extending toward the main road a distance of approximately 1/10 of a mile. The berm is also inadequate at the outer selected areas where the berm had weathered down. All of the cited areas were shown to an agent of the operator. These conditions were observed at pit 010-0 (Howesville job).

Section 104(b) Order No. 3113195, November 2, 1988, 30 C.F.R. 77.1605(k).

> No effort had been made to provide berms or guards on the right outer bank of the elevated roadway beginning at the top of the hill near the sedimentation pond and extending toward the main road a distance of approximately 1/10 of a mile. No effort had been made to provide additional berms at three selected areas where the berms had weathered down. These conditions

existed at pit 010-0 (Howesville job). Vehicles used to transport persons had been used over this haul road. The abatement for such violation (Number 3113190, dated 10-31-88) had expired.

Section 104(a) "S&S" Citation No. 3113191, October 31, 1988, 30 C.F.R. 77.410.

The D9H dozer (Serial Number 90V5231) was not equipped with an automatic warning device which gave an audible alarm when the equipment was put in reverse (back-up alarm). The back-up alarm was present and would sound an alarm when a switch was engaged but would not alarm automatically when the equipment was put in reverse. This condition existed at pit 020-0 (campground job).

Section 104(b) Order No. 3113194, November 2, 1988, 30 C.F.R. 77.410.

An inadequate effort had been made to provide the D9H dozer (Serial Number 90V5231) with an operational automatic warning device which gave an audible alarm when the equipment is put in reverse (back-up alarm). The abatement time for such violation (Number 3113191), dated 10-31-88, had expired. The dozer was working in pit 020-0 (campground job).

Petitioner's Testimony and Evidence

MSHA Surface Mine Inspector Ronald V. Marrara, confirmed that he has inspected the respondent's mine since January, 1982, and his last regular inspection was in December, 1989. He confirmed that he issued the berm citation after finding "clear and obvious" major deterioration on the elevated haulage road in and out of the pit work area. There were three road areas where the berm "had weathered to almost nothing," and as he approached the final grade up the hill "there was no berm at all on the elevated roadway" (Tr. 18). Mr. Marrara identified exhibit 1-B as a diagram of the haulage road and pit area in question, and he stated that there were no berms at all on the left side of the roadway going to the pit for a distance of approximately 500 feet. The three additional areas where the berm had deteriorated covered distances of approximately 8 to 12 feet, and the entire berm along the roadway was "weathered and could have used an upgrading" (Tr. 19).

Mr. Marrara stated that the slopes at the three areas which were cited were "around a grade of a hundred percent, about a forty-five degree angle," and at the road elevation where there was no berm "it varied from probably forty to fifty percent grade, which would have been about twenty-two degrees to about

twenty-six or twenty-seven degrees." He believed that the cited conditions presented a reasonable likelihood of injury, because of the severe slopes, rocks and trees, and he believed that if a truck went off the roadway, there was a danger that it would roll over. He was aware of a number of accidents at other mine locations where injuries have occurred when trucks ran off the road (Tr. 21-22).

Mr. Marrara stated that he made a finding of "high negligence" because he had conducted a prior inspection of the same haulage road in May, 1988. Although the berms at the three cited locations were adequate at that time, work was in progress at the other 500 foot cited area, and he discussed the berm requirements with Mr. Pretzel. He also had cited Mr. Pretzel for berm violations in the past (Tr. 23). Mr. Marrara stated that the three cited locations had weathered down during the intervening period between May and October, 1988, and he saw no evidence that any berm had ever been provided at the cited 500 foot area. He stated that he spoke with Willard Wolf, the certified dozer man in charge of the site, and that Mr. Wolf "was hesitant to give me information that would indicate a berm had ever been placed there" (Tr. 24).

Mr. Marrara confirmed that he fixed the abatement time for the violation for Wednesday, November 2, 1988, 2 days after the citation was issued, and that he discussed it with Mr. Wolf. Mr. Marrara believed that abatement could have been achieved within 4 to 6 hours, but since he knew that any work would need the approval of Mr. Pretzel, he allowed additional time. He explained that abatement could have been achieved by providing guardrails or mounds of materials capable of restraining a vehicle. Mr. Wolf advised him that an operational dozer was available, and Mr. Marrara determined that an operational grader was available, and that earth and dirt materials were available at different sections on the roadway (Tr. 26).

Mr. Marrara stated that when he returned to the site on November 2, 1988, he observed that no effort had been made to abate the violation. Mr. Wolf was working in the pit area operating a dozer, and a contract driller had two men drilling in the pit preparing for a shot. These men had to traverse the roadway to reach the pit area. Mr. Wolf told him that he had been instructed by Mr. Pretzel to continue with the operation of the pit (Tr. 27).

Mr. Marrara stated that he spoke with Mr. Pretzel after the violation was abated, and informed him that his failure to take any action to abate the violation was very serious. Mr. Pretzel informed him that the endloader bucket was in disrepair and that he wanted to use it to repair the berm. Mr. Pretzel also informed him that he was only one capable of operating the grader

which was at the site, but that he was hesitant to do the work because he had a job at another site "making money" (Tr. 28).

Mr. Marrara confirmed that Mrs. Pretzel called his office on November 1, 1988, and left a message for him to call her. He had already left his office and was unaware of the message until the end of the day on November 2. He confirmed that he provided his home phone number to Mr. Pretzel, and that Mr. Pretzel has called him at home in the past (Tr. 29). He assumed that Mrs. Pretzel worked for the respondent and that she wanted to discuss the situation. He did discuss the matter with her at the work site after he had issued the order (Tr. 31).

Mr. Marrara confirmed that even if Mrs. Pretzel had spoken with him, he would not have granted an extension for the abatement because he did not believe it would have been warranted. If the site were not in operation, or if he observed work taking place to abate the violation, he would have extended the abatement time. He would also have considered extending the time if there had been some misunderstanding, or Mr. Wolf had shutdown and called Mr. Pretzel. However, in this case, the respondent simply continued to work and there appeared to be no effort made to abate the cited conditions (Tr. 32).

Mr. Marrara stated that he spoke with Mrs. Pretzel after the order was issued, and she informed him that she had called him to inform him that the berm violation was not abated because of some problems with reclamation, but she did not elaborate further. With regard to the unavailability of the endloader, Mr. Marrara did not believe it was necessary because the dozer and grader were more than adequate to build a berm, and he was told the endloader would be out of service for a week or longer (Tr. 34). Mr. Marrara stated that Mr. Wolf was in charge of the site in the absence of Mr. Pretzel, and that when he discussed the abatement time with him, Mr. Wolf would make no commitment as to when he believed the violations would be abated because he needed Mr. Pretzel's approval (Tr. 35-36).

Mr. Marrara stated that the entire haulage road is approximately three-quarters of a mile from the county road to the pit, and less than half of it is elevated. Little effort is needed to determine where to construct berms because they were provided previously and he specifically showed Mr. Wolf the road areas that required berms. Mr. Marrara confirmed that the violation was abated within a day, and that it took several hours. Mr. Marrara confirmed that he based his "unwarrantable failure" finding on the fact that he had discussed the necessity of berms with Mr. Pretzel during his prior May inspection, and that both Mr. Pretzel and Mr. Wolf knew that berms were required (Tr. 39). It was obvious that the three cited locations were in need of berms, and he specifically discussed the need for berms at the "top of the hill" with Mr. Pretzel in the past (Tr. 40).

On cross-examination, Mr. Marrara stated that an "adequate berm" pursuant to the standard is a "mound of material capable of restraining a vehicle" (Tr. 43). He confirmed that because of the weather conditions the road will develop ruts and become marginally eroded and will create the appearance of berms, but he denied that these were the conditions of the roadway at the time the violation was issued (Tr. 45). He explained the methods used to create berms and he conceded that the use of an endloader is the fastest method for constructing a berm (Tr. 48). He believed that there were adequate and available materials and equipment to construct the berms, particularly at the 500 foot location at the top of the hill. The roadway was approximately 20 to 30 feet wide, but the width varied (Tr. 49-50).

Mr. Marrara confirmed that a blasting crew and trucks used the roadway the day after the inspection and that eventually, coal trucks would have been using it. The roadway was posted with speed limit signs and it had established truck passing locations (Tr. 53). He confirmed that he did not measure the berms which had "weathered," and he estimated that they were "less than six inches high." He confirmed that the berms in these areas were adequate in May, and that they simply" weathered down to the point where they were inadequate" at the time of the inspection, and that it was a matter of maintenance. He also confirmed that he still uses the "axle height" standard for berms, and that a coal truck wheel height is about 32 inches, and an axle height berm would be one 16 inches or more in height (Tr. 55). It was clear to him that this standard was not met in this case (Tr. 56).

With regard to the back-up alarm violation, the inspector confirmed that while inspecting the cited dozer he asked the operator to operate it in reverse. Although the alarm sounded, the inspector felt that "the procedure he used was not quite smooth" (Tr. 57). The inspector then got into the operator's cab with the driver and when the machine was placed in reverse, the backup alarm did not sound. The inspector discovered that the operator had to manually engage a toggle switch to sound the alarm. The dozer operator and the person in charge of the work site admitted to the inspector that Mr. Pretzel instructed them to install the toggle switch on the dozer. They further explained that the toggle switch cost $2, and that a proper switch cost $27 to $28. The inspector confirmed that the toggle switch was not standard equipment for the dozer (Tr. 58-59).

The inspector explained the basis for his "significant and substantial" violation finding, and he stated that the dozer was operating in the pit area in and around equipment and men, and that the equipment operators would have occasion to leave their vehicles and would be exposed to a hazard. Although the dozer was not operating near the auger crews, there would be occasions

when it would be operated near them. In addition, coal truck drivers would be exposed to a hazard while they were in the pit where the dozer was working, and they would often be out of their vehicles on foot. He believed that lost time injuries such as broken bones or lacerations would likely occur, and that fatalities have occurred in his district when a backup alarm was not used. He confirmed that the dozer operator does not have a clear view to the rear of the machine, and that one person would be exposed to a hazard (Tr. 60-64).

The inspector confirmed that he made a negligence finding of "moderate" because he was unable to speak directly with Mr. Pretzel about the violation. He stated that he should have made a finding of "high" negligence because Mr. Pretzel deliberately altered the equipment by installing the toggle switch. The inspector believed that Mr. Pretzel should have known that the switch was not lawful because he had discussed it with him on numerous occasions and told him that the backup alarm must be automatic. The inspector could not recall specifically discussing a toggle switch, and he indicated that he had cited the respondent for previous backup alarm violations, but had never cited him for using a toggle switch (Tr. 65-66).

The inspector believed that abatement could have been achieved in 30 minutes or an hour by simply replacing the switch with a pair of pliers, a screwdriver, and wrenches, and that these tools are available at all strip jobs. When he returned after issuing the citation, abatement had not been achieved and the dozer was working in the pit area in and around the endloader and coal trucks which were being loaded, and the backup alarm was not sounding while the dozer was backing up. However, when the operator saw him, he began using it. The person in charge and the dozer operator informed him that they had the new switch with them but were given no tools to install it, and that Mr. Pretzel had instructed them to continue working. Since the abatement time passed, and the condition had not been corrected, the inspector issued the order (Tr. 69).

On cross-examination, the inspector confirmed that when he issued the citation, the dozer and endloader were working in close proximity of each other, and at different times were within a matter of feet apart while working together to prepare for coal loading the next day (Tr. 70). The auger crew was some distance away and were not exposed to any hazard. However, he has known people to stop and talk while on the ground in the proximity of a working dozer, but not at this operation (Tr. 73).

The inspector explained the operation of the toggle switch, and he confirmed that when it was switched to the "on" position, the backup alarm would sound at all times, regardless of whether the dozer was operating backward or forward. The inspector believed that the dozer operator was being deceitful by turning

the switch on when he reversed the machine, and that he did this to make him believe that the alarm was automatic, when in fact it was not (Tr. 77-79). The inspector confirmed that in order to comply with the standard, the switch must be automatic so that the backup alarm sounds when the machine is put in reverse without the operator engaging the toggle switch (Tr. 80-83).

The inspector confirmed that the existence of the toggle switch per se was not a violation, and that he issued the violation because the backup alarm was not automatic and the switch was installed in lieu of the automatic alarm. However, the toggle switch was the only control mechanism for the alarm, and since it was not operating automatically, it was improper (Tr. 85-89).

Respondent's Testimony and Evidence

David A. Pretzel, respondent's owner and operator, confirmed that he strips coal and does excavating work. He stated that he was not at the site when the berm citation was issued and did not discuss it with Inspector Marrara. He confirmed that he has constructed many berms and that a safe berm "is a judgment call" when it is constructed. In his opinion, the cited berms were "good or better than they were on the previous inspection." He stated that he graded the roadway and that there have always been berms on the roadway. The cited hill location was graded and backfilled, and after putting topsoil on it, it raised the outside edge of the roadway 18 inches and "it can still be seen just the way it was then" (Tr. 89-91).

With regard to the backup alarm citation, Mr. Pretzel conceded that the toggle switch was installed on the cited dozer. He explained that it was installed because he also uses the dozer off mine property doing work for the general public and they do not want to hear the horn sounding. He stated that the toggle switch was installed on the machine in 1982, but he could not recall whether that particular dozer had been cited during prior MSHA inspections (Tr. 92).

On cross-examination, Mr. Pretzel stated that he could not recall speaking with the inspector about the berm conditions. He believed that the roadway had been graded "within a month or less" prior to the inspection, and that the berms on the roadway have never been less than 2 feet. He confirmed that the citations were given to his wife, that he did not go to the site to view the cited conditions, and that the roadway was partially fixed when he saw it. He did not discuss the cited berm conditions with Mr. Wolf and could not determine where the berms were constructed because the entire roadway had been regraded (Tr. 94-95).

Mr. Pretzel stated that he asked his wife to call MSHA, and he expected to obtain an extension to abate the cited conditions. He confirmed that he had spoken with the inspector in the past but did not attempt to reach him at home because his wife called his office and left a message for him (Tr. 96-97).

Mr. Pretzel stated that the toggle switch shuts off a "working" automatic alarm which he installed on the dozer. He believed that it was working on the day the citation issued. He confirmed that his wife took a new automatic alarm to the job site, but he could not recall whether it was installed (Tr. 98). He did not speak with Mr. Dean, the person in charge of the work site, because "my wife gave him orders what to do" (Tr. 99).

In response to further questions, Mr. Pretzel stated that he did not know whether the new automatic alarm was ever installed on the cited dozer. With regard to the berm conditions, he confirmed that he was not present when the citation was issued, but that a week earlier the berms were in place on the roadway and it did not storm or rain before the inspection (Tr. 101-104). He did not know if the alarm would stay on all the time when the toggle switch was engaged, and while it was possible that there was a short in the wire, he was not present when the inspector issued the violation (Tr. 105).

Charlene D. Pretzel, confirmed that she keeps the books for her husband's company and helps run the business. She stated that the citations were given to her by the men in charge of the work sites. She stated that she made three telephone calls to the inspector's office in order to obtain an extension for abating the berm citation because the respondent wanted to use the highlift to construct the berm. She confirmed that her husband would have returned to the job site within a week or two and that the repairs to the highlift bucket would have taken at least a week (Tr. 109-111).

With regard to the backup alarm violation, Mrs. Pretzel stated that the morning after receiving the citation, a new switch was purchased, and she took it to the job site and told the dozer operator to install it. She believed that the dozer operator should have been able to install the new switch and she told him "if you can't put it on, park it" (Tr. 113).

On cross-examination, Mrs. Pretzel stated that if the dozer operator were unable to repair the switch, he would have gone home and would not have been paid unless he remained at the site and worked (Tr. 114). She confirmed that the dozer operator told her that the "wrong kind of switch" was on the dozer, and her husband told her what kind of new switch to purchase (Tr. 118).

Mrs. Pretzel had no knowledge of the inspector speaking with her husband in the past with regard to the berms, and she confirmed that she has never discussed the matter with the inspector because she is usually "in and out of the job" (Tr. 118).

Willard Wolf, testified that he was employed by the respondent when the berm violation was issued. He stated that he has 26 years of surface mining experience, and in his opinion the berms on the haulage road in question "were good berms, good enough at least" on the day of the inspection (Tr. 121).

On cross-examination, Mr. Wolf stated that he has worked for the respondent for 3 years and that the mine is a non-union operation. In response to further questions, Mr. Wolf stated that the inspector came back to the site the day after issuing the violation and told him that if he did not fix the berms he would shut the site down. Mr. Wolf confirmed that the inspector "did close us down from working" but that he was permitted to work on the road and constructed the berms that same day. When asked why he not installed them earlier, he responded "I wasn't told to. I mean, there was berms there." He denied that he told the inspector that he made no effort to repair the berms (Tr. 123).

The inspector was recalled by the Court, and he confirmed that while he had no reason to doubt that Mrs. Pretzel made the telephone calls to his office, even if she had connected with him, it would have made no difference since he believed the respondent had an obligation to take care of the berms. He would not have extended the abatement time unless the respondent had stopped work, but once the orders were issued, it made no difference whether the work was shutdown. He confirmed that he informed Mrs. Pretzel that pursuant to the Act there was a "possible potential" for a fine of $1,000 a day for each of the violations (Tr. 127).

The inspector confirmed that his inspection notes reflect that he issued the prior berm citations to the respondent in August, 1987 and August, 1985, and that he has discussed the berms with Mr. Pretzel on numerous occasions. He further confirmed that he has conducted 15 regular inspections at the respondent's site and that "not one regular inspection goes by that I don't mention berms one way or another to almost all operators that I inspect" (Tr. 128). He specifically recalled speaking to Mr. Pretzel in May, 1988 about berms at the cited locations (Tr. 128).

Petitioner's Arguments

In response to my request, the petitioner submitted a post-hearing argument in support of its position that a section 104(b) withdrawal order may be issued for failure by the respondent to

timely abate a violation cited in a section 104(d)(1) citation. After review of the arguments presented, I agree with the petitioner's position and I conclude and find that the order was procedurally correct.

With regard to the merits of the contested section 104(d)(1) citation regarding the cited berm conditions, the petitioner argued that the evidence presented supports a finding that the berms cited by the inspector at the three locations noted in the citation were "weathered down" and were inadequate. With regard to the cited 500 feet area of the roadway, the petitioner asserts that the evidence establishes that the area was not bermed and that no berms were ever constructed in that area. The petitioner stated that the respondent's testimony that the roadway had been graded and berms were constructed a week prior to the inspection is self-serving. The petitioner points out that Mr. Pretzel's testimony that he wanted to use an endloader to construct the berms and that the endloader was unavailable to timely construct the berms to abate the violation is contradictory because he testified that he used the scraper to construct the berms a week prior to the inspection (Tr. 137-138).

With regard to Mr. Wolf's testimony that he believed the berms adequate, the petitioner argued that Mr. Wolf's recollection was unclear and that he advanced no support for his conclusion that the berms were adequate. Petitioner concludes that the inspector's credible testimony concerning his observations of the condition of the weathered down berms at the three cited roadway locations, and the lack of any berm along 500 feet of the roadway, should be credited over the testimony of Mr. Wolf and that it clearly establishes a violation.

With regard to the inspector's "S&S" finding, the petitioner asserted that the existence of the slopes along the unprotected roadway establishes that there was a reasonable likelihood of an injury and that the respondent has not seriously challenged the inspector's reasonable belief that if a truck were out of control and left the roadway it could roll over and cause at least moderately severe injuries, and under certain circumstances, could reasonably result in serious or fatal injuries to the driver (Tr. 138).

With regard to the respondent's negligence for the violation, and the inspector's unwarrantable failure finding, the petitioner argued that the evidence supports a finding of high negligence and aggravated conduct because the inspector had previously discussed the need for berms along the cited roadway with Mr. Pretzel and advised him as to the need for maintaining and repairing the berms. The petitioner asserted that it was not unreasonable for the inspector to believe that the respondent would heed his advice and take care of the berms in a timely manner (Tr. 139).

The petitioner concedes that the respondent made an attempt to contact the inspector after the citation was issued by calling his office and leaving a message. However, the petitioner takes the position that notwithstanding these telephone calls, the respondent had an obligation to timely correct and abate the cited conditions and could have contacted the inspector at his home, as it had done on prior occasions, if it had problems in timely abating the conditions. The petitioner concluded that the telephone messages left at the inspector's office while he was absent on other inspectors were "belated and halfhearted" and do not meet the standard of making reasonable efforts to abate the cited berm conditions. The petitioner believed that the required abatement was a "fairly simply matter" and that the respondent has not established that it had insufficient time to comply and timely abate the conditions (Tr. 140).

With regard to the backup alarm violation, the petitioner asserts that the evidence and testimony establishes that the cited equipment did not have a working automatic backup alarm and was simply equipped with an alarm operated by a toggle switch which was manually activated to sound the alarm, and that the backup alarm would only sound if the toggle switch were manually turned on. The petitioner pointed out that the cited machine was not in fact equipped with an automatic alarm which would automatically sound when the machine operated in reverse and that the cited standard required the installation and use of an automatic alarm. The petitioner concluded that assuming an automatic alarm was installed on the machine, the evidence clearly establishes that it was not working and was not activated automatically when the machine was operated in reverse (Tr. 140-141). The petitioner pointed out that the toggle switch was being used in substitution for the automatic alarm switch and that this was contrary to the requirements of the cited standard (Tr. 142).

With regard to the respondent's negligence, the petitioner argued that the violation was the result of at least moderate negligence by the respondent (Tr. 143). With regard to the abatement, the petitioner argued that Mrs. Pretzel did not give anyone any clear order to repair the alarm, and that the operator continued to work without the device (Tr. 150).

Respondent's Arguments

The respondent's representative requested that I take into consideration the fact that the respondent is a small coal mine operator with an annual mine production of 30,000 tons. Although he agreed that the payment of the full amount of the proposed civil penalty assessments will not put the respondent out of business, he nonetheless argued that the magnitude of the proposed assessments will have a direct economic cost impact on the respondent's mining operation (Tr. 153-154).

The respondent's representative took the position that the cited berm conditions present an honest difference of opinion and disagreement between the inspector and the respondent with respect to the adequacy of the berms. He further asserted that the use of the dozer by Mr. Wolf to construct the berms resulted in "chopping up" the road and the further deterioration of the berms, but that the violation was abated. He pointed out that the respondent telephoned the inspector in an attempt to explain that he wished to use the endloader rather than the scrapper to abate the violation and construct the berms and to request an extension of the abatement time (Tr. 150-152).

With regard to the backup alarm violation, the respondent asserted that Mrs. Pretzel, gave the equipment operator a new switch and instructed him to fix it, and that if he could not do so, she instructed him to shut the machine down (Tr. 153).

Findings and Conclusions

Fact of Violation - Citation No. 3113190, 30 C.F.R. 77.1605(k)

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 77.1605(k), which states that "berms or guards shall be provided on the outer bank of elevated roadways." The term "berm" is defined in 30 C.F.R. 77.2(d) as "a pile or mound of material capable of restraining a vehicle."

In Secretary of Labor v. United States Steel Corporation, 5 FMSHRC 3, 6, January 27, 1983, the Commission noted as follows:

> "Restraining a vehicle" does not mean, as U.S. Steel suggests, absolute prevention of overtravel by all vehicles under all circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

And, at 5 FMSHRC 5:

> We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard.

* * * * * * * *

> Under our interpretation of the standard, the adequacy of an operator's berms or guards should thus be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. When alleging a violation of the standard, the Secretary is required to present evidence showing that the operator's berms or guards do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person would do, such as the condition of the roadway in issue, the roadway's elevation and angle of incline, and the amount, type, and size of traffic using the roadway.

Respondent's owner, David Pretzel, asserted that the cited roadway locations have always had berms, and that he constructed them by grading the roadway and using topsoil to raise the outside edges to 18 inches. He also contended that the berms have never been less than 2 feet high, and that the roadway had been graded within a month or so prior to the inspection. However, the record reflects that Mr. Pretzel was not present when the inspector viewed and cited the conditions, and Mr. Pretzel conceded that he did not visit the site to view the conditions when they were cited by the inspector, and that he did not discuss the conditions with the inspector.

Mr. Pretzel further testified that the citation was served on his wife. Although she testified in this case, she said nothing about the conditions of the roadway, nor did she dispute the findings of the inspector with respect to the berms. Mrs. Pretzel testified that her husband was working at another site, and that she instructed an employee "to take the dozer and go out and try to get a bigger berm on the road" (Tr. 110). Coupled with her attempts to contact the inspector for an extension to enable the respondent to use another piece of equipment to construct the berms, I believe that it is reasonable to conclude that Mrs. Pretzel, who went to the mine shortly after the inspector arrived, did not disagree with the inspector's observations of the berm conditions which he cited. As for the testimony of Mr. Wolf, he simply believed that "there was berms there," and I find nothing in his testimony to rebut the testimony of the inspector.

I conclude and find that the testimony of the inspector who personally observed the cited conditions during the course of his inspection of the respondent's mining operation is credible and probative, and it clearly supports his finding that no berm or

guard was provided on the right outer bank of the elevated roadway at the location cited by the inspector. I also conclude and find that the inspector's testimony also establishes that the berms at the other locations which he observed and were inadequate. The lack of berms at the one cited location, and the inadequate berms at the other cited locations, constitute violations of section 77.1605(k). Under all of these circumstances, the citation issued by the inspector IS AFFIRMED.

Fact of Violation - Citation No. 3113191, 30 C.F.R. 77.410

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 77.410, for failing to equip a bulldozer with an automatic warning device (backup alarm) which gives an audible alarm when the equipment is operated in reverse. The cited standard provides as follows:

> Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse. (Emphasis added).

The inspector confirmed that the cited bulldozer was not equipped with an automatic backup alarm which would automatically sound when the machine was operated in reverse. After inspecting the machine, he found that a toggle switch had been installed, and that the machine operator was required to manually activate the alarm by using the toggle switch. Mr. Pretzel did not dispute the existence of the toggle switch, and in fact admitted that it was installed in 1982, so that the backup alarm could be turned off when the machine was used on other jobs off mine property.

The inspector testified that the toggle switch was "simply an off and on switch for the backup alarm," and that the automatic alarm device which was apparently installed on the machine was "wired out" and that the toggle switch was "wired direct so all you had was an off and on switch" (Tr. 147). The inspector confirmed that when the toggle switch was turned on the alarm sounded, and when the switch was turned off, the alarm would not sound. He stated that when the machine operator initially sounded the alarm while backing up the machine he did so by turning the toggle switch on. When the inspector inspected the machine and switch, he found that the operator sounded the alarm by activating the toggle switch manually and that this switch was not an automatic device since the automatic device itself had been "completely wired out of the system" (Tr. 148).

I conclude and find that the credible and probative testimony of the inspector clearly establishes that the cited machine was not equipped with a functional automatic backup alarm or

device that sounded automatically when the machine was operated in reverse. I further conclude and find that a violation of section 77.410, has been established, and the citation issued by the inspector 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, 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).

Citation No. 3113190, 30 C.F.R. 77.1605(k)

The inspector found that the berms at the three haulage road locations which he described "had weathered down to nothing," and that the location where the grade of the road went up a hill had no berm at all. The inspector's unrebutted testimony establishes that there was a reasonable likelihood of an injury because of the severe unprotected road slopes, and the presence of trees and rocks. He believed that if a truck went off the roadway, particularly at the location of the unprotected hill, there was a danger that the truck would roll over once the truck left the unprotected roadway, and he was aware of a number of accidents at other mines under these same conditions. Under the circumstances, I conclude and find that the violation was significant and substantial. I agree with the inspector's finding, and IT IS AFFIRMED.

Citation No. 3113191, 30 C.F.R. 77.410

The respondent has not rebutted the inspector's credible testimony that the bulldozer which was not equipped with an automatic audible backup alarm was operating in a pit area in and around other equipment where other employees or a contractor auger crew would have occasion to be present on foot. The inspector also believed that the dozer operator did not have a clear view to the rear of the machine, and that in the event he were to operate the machine in reverse without the benefit of an automatic backup alarm, an employee would likely be exposed to lost time injuries such as lacerations or broken bones if he were struck by the machine. While it is true that the machine sounded an alarm when the inspector requested the operator to operate it in reverse, the inspector found that the operator had manually activated the alarm by using a toggle switch. In my view, reliance on such a device, which required the operator to manually activate the backup alarm, would not insure that the alarm would sound when the machine was operating in reverse and the operator could not see someone on foot to the rear of the machine. If he does not have the toggle switch turned on when he backs up, he could very well run over someone, and that individual would have no assurance that the alarm will automatically sound. Under the circumstances, I agree with the inspector's significant and substantial finding, and IT IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided

under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several subsequent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Violation of 30 C.F.R. 77.1605(k)

The petitioner takes the position that the violation resulted from a high degree of negligence amounting to aggravated conduct on the part of the respondent. In support of this conclusion, the petitioner relies on the inspector's testimony that he based his high negligence finding on the fact that he had previously inspected the haulage road in May, 1988, and discussed the berm requirements with Mr. Pretzel, and that he previously cited the respondent for violations of the berm standard.

The inspector's notes (exhibit P-3), reflect that he cited the respondent for previous berm violations on August 17, 1987, and August 12, 1985. However, copies of the citations were not produced or offered for the record in this case, and the inspector presented no further details with respect to these previously cited conditions. Although these prior citations may support a conclusion that the respondent had knowledge of the berm requirements found in section 77.1605(k), in the absence of any further information or evidence that the prior citations concerned the same berm locations cited in the instant case, I am not persuaded that they support a finding of aggravated conduct and have given them little weight. I take note of the fact that in this case, the inspector confirmed that the haulage road in question was posted with speed limit signs and that the respondent provided designated truck passing locations along the roadway. This indicates to me that the respondent made an effort to insure safe travel along the haulage road, notwithstanding the absence of berms at one location, and the deteriorated berms at the other cited locations.

With regard to the inspector's prior discussions with Mr. Pretzel concerning the maintenance of the berms, and notwithstanding Mr. Pretzel's lapse of memory that he ever discussed the berm conditions with the inspector, I find the inspector's testimony and corroborating notes, which reflect that he did discuss the matter with Mr. Pretzel, to be credible. Although it may be true that Mr. Pretzel may not have spoken to the inspector immediately following the issuance of the contested citation in this case, I am not convinced that he has never spoken to the inspector in the past about the berms on the haulage road in question, and I believe the inspector's testimony that he spoke to Mr. Pretzel during his prior inspection in May, 1988.

The inspector confirmed that he based his unwarrantable failure finding on the fact that he had discussed the necessity for berms with Mr. Pretzel during his prior May, 1988, inspection, and that he specifically discussed the need for berms at the cited locations. The inspector conceded that the question of what constitutes an "adequate" berm is subject to interpretation, and given the subjective definition of the term "berm" as found

in section 77.2(d), I am of the view that individual judgments may differ from day-to-day as to the "adequacy" of a berm, particularly when they may be subjected to adverse weather conditions.

I take particular note of the fact that in this case the inspector confirmed that the berms at the three locations which he cited during his inspection in this case were adequate when he last observed them during his prior May, 1988, inspection, when he discussed them with Mr. Pretzel, and that "work was being done at the location where the one-tenth of a mile berm was" (Tr. 23). The inspector confirmed that the berm had "weathered down" during the intervening months between inspections, and I believe that his principal concern was that the respondent was not maintaining the berms after they were initially constructed. Although the inspector was of the opinion that no berm had ever been constructed along the one-tenth of a mile elevated area which he also cited during his October 31, 1988, inspection, his prior testimony that work was taking place during his May inspection "where the one-tenth of a mile berm was," suggests that a berm may have at one time been constructed at that location. Further, the apparent failure by the inspector to issue a citation for the lack of a berm at that location raises an inference that a berm was either in place or was being worked on at the time of his May inspection. In these circumstances, I cannot conclude that the prior discussions by the inspector with Mr. Pretzel establishes any basis to support a conclusion of aggravated conduct with respect to the violation in question in this case. To the contrary, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care amounting to "thoughtlessness" and "inattention" for not insuring that the berms were constructed and maintained to the heights required by the cited standard, rather than on "inexcusable" or aggravated conduct. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) citation IS MODIFIED to a section 104(a) citation, with significant and substantial (S&S) findings.

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

The available evidence reflects that the respondent is a small strip mine operator who also engaged in excavation work. An MSHA Proposed Assessment Data Sheet, exhibit P-13, reflects that the respondent's total 1988 annual mine production was approximately 31,313 man-hours/tonnage. I conclude and find that the respondent is a small mine operator, and in the absence of any evidence to the contrary, I further conclude and find that the payment of the civil penalty assessments for the violations which have been affirmed in this case will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner did not submit a computer print-out listing the respondent's prior compliance record. However, the aforementioned exhibit P-13, reflects that the respondent was assessed civil penalties for a total of nine (9) prior violations issued during the years 1986 through 1988. I conclude and find that the respondent has a good overall compliance record and I have taken this into consideration in this case.

Gravity

In view of my significant and substantial (S&S) findings, I conclude and find that Citation Nos. 3119190 and 3119191, were serious violations.

Negligence

I conclude and find that Citation No. 3119190, concerning the violation of the berm standard, 30 C.F.R. 77.1605(k), was the result of the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

With regard to Citation No. 3113191, for the failure by the respondent to provide an automatic backup alarm on the cited bulldozer, the inspector made a finding of "moderate" negligence because he was unable to speak directly with Mr. Pretzel about the violation. I take note of the fact that the inspector testified that "on reflection," he should have made a finding of "high negligence" because Mr. Pretzel deliberately altered the alarm which was provided on the equipment by installing a toggle switch on the alarm. Although the inspector believed that Mr. Pretzel should have known that the toggle switch was not lawful because he had discussed the need for automatic backup alarms with him "on numerous occasions" and had previously cited the respondent for prior backup alarm violations, the inspector could not recall specifically discussing toggle switches with Mr. Pretzel, and he conceded that the prior citations did not involve the use of such a device. Copies of these prior citations were not produced or introduced as part of the record in this case. Under the circumstances, I find no probative evidence to support any finding of "high" negligence. I conclude and find that the violation resulted from the failure by the respondent to exercise reasonable care, and that this amounts to ordinary negligence.

Good Faith Compliance

The record reflects that the inspector issued two section 104(b) orders after finding that the respondent made no effort to timely abate the violations, and there is no evidence that the respondent filed any timely contests challenging the inspector's issuance of the orders.

Although the respondent made an effort to contact the inspector with respect to the order issued for the berm violation, the fact remains that the respondent continued working after the order was issued, and the inspector found no evidence of any attempts by the respondent to repair the berms when he next visited the mine. In my view, and notwithstanding the respondent's efforts to contact the inspector at his office, the respondent had a duty to at least begin work on the berms in order to abate the cited conditions. Mr. Pretzel offered no reasonable explanation as to why he did not attempt to contact the inspector at his home as he had apparently done in the past. Under the circumstances, I cannot conclude that the respondent exhibited good faith in timely abating the berm conditions, and its belated attempts to contact the inspector, rather than proceeding with the abatement work, is no excuse or defense to its failure to take timely abatement action.

With regard to the backup alarm violation, Mrs. Pretzel purchased a new automatic backup alarm, but she simply gave it to the machine operator with instructions to install it or to park the machine. Mrs. Pretzel believed that the operator was capable of installing the new switch, and there is no credible evidence that tools were not readily available to do the job. However, the new switch was not installed, and when the inspector next returned to the mine, he found the machine operating in the pit area with the old switch which was cited still on it.

Mr. Pretzel could not recall whether the newly purchased switch was ever installed on the cited dozer, and he did not speak with the employee who was in charge of the work where the machine was being used. As the mine operators, both Mr. and Mrs. Pretzel had a duty to insure that the newly purchased automatic alarm was timely installed on the machine. I find no credible excuse for their failure to do so. I conclude and find that the respondent failed to exercise good faith in timely abating the cited condition.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate for the two contested violations which have been affirmed, and for the two violations which have been settled:

~1330

Citation No.	Date	30 C.F.R. Section	Assessment
3113190	10/31/88	77.1605(k)	$500
3113191	10/31/88	77.410	$400
3100981	01/17/89	50.20	$ 20
3100743	03/07/89	77.1110	$ 20

George A. Koutras
Administrative Law Judge