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SOL (MSHA) v. WHIBCO, INCORPORATED
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Federal Mine Safety and Health Review Commission
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5203 LEESBURG PIKE
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. YORK 90-11-M A.C. No. 30-01212-05519
v.	McConnellsville Plant
WHIBCO, INCORPORATED, RESPONDENT	

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Mr. David E. Hergert, Vice President, Production, Whibco, Inc., Leesburg, New Jersey, 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 a civil penalty assessment in the amount of $300, for an alleged violation of mandatory safety standard 30 C.F.R. 56.14101(a)(1). The respondent filed a timely answer denying the alleged violation, and a hearing was held in Syracuse, New York. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the hearing record in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standard as alleged in the proposal for assessment of civil penalty, (2) whether the violation was "significant and substantial," and (3) the appropriate civil

penalty that should be assessed for the violation based upon the civil penalty assessment criteria found in section 110(i) of the Act.

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 agreed that the respondent is subject to the Act and that the presiding judge has jurisdiction to hear and decide this matter. The respondent's representative stated that the respondent has annual mining revenues of approximately 12 million dollars, and that its McConnellsville plant generates revenues of approximately $700,000 annually. He confirmed that the plant has five employees and a plant manager, and the parties agreed that the plant is a small mining operation, and that the respondent is a small-to-medium size operator.

Discussion

Section 107(a) - 104(a) "S&S" Order-Citation No. 3045987, issued on December 12, 1989, by MSHA Inspector Harold Adams, cites a violation of mandatory safety standard 30 C.F.R. 56.14101(a)(1), and the cited condition or practice is stated as follows:

> Service brakes on Terex loader, Ser. # 53437, are in very poor condition. Loader could not be stopped with an empty bucket on a 2 percent grade (approx) by use of service brakes.
> Condition has existed for approx. 30 days. Suspected cause as stated by supervisor is cold weather. When loader was checked, air pressure gauge did not register. Loader was removed from service.

Petitioner's Testimony and Evidence

MSHA Inspector Harold Adams confirmed that he inspected the respondent's plant on December 12, 1989, and issued the contested citation after finding that the service brakes on the cited Terex loader would not hold the loader when it was tested on an approximate grade of 2 percent. He stated that the loader had just dumped a load of sand into the processing plant, and the loader operator advised him that the brakes were "not very good." The

loader normally operates on level ground, but it travels up a ramp of approximately 2 percent grade to the plant where it dumps its bucket load of sand. After dumping the load, the operator applied the brakes at the top of the ramp, and the loader, with an empty bucket, drifted backwards down the ramp to level ground, and the brakes had no effect and would not hold the loader.

Mr. Adams described the route of travel taken by the loader, and he confirmed that it made several trips a day with a loaded bucket along the same route. He stated that service and vendor trucks use the same roadway traveled by the loader, and that mine personnel also walk along the roadway on occasion. He confirmed that the loader operator informed him that the cited brake condition had existed for about 30 days, and that Jeff Scott, the plant manager, told him that the condition was caused by the cold weather and that the loader air receiver had to be drained nitely because of moisture accumulations in the air line caused by the cold weather conditions. Mr. Adams confirmed that the brakes would not stop the loader when it was tested, and he also issued an imminent danger order taking the loader out of service.

Mr. Adams stated that he discussed the citation and order with Mr. Scott when he issued them, and that Mr. Scott informed him that there was an air leak. Mr. Adams stated that his supervisory inspector was with him when he cited the loader and that his supervisor got into the cab of the loader and observed that the air pressure gauge showed no air pressure. Mr. Adams believed that the lack of pressure could have resulted from an air leak or a defective pressure gauge, but that when he next returned to the plant he was advised that an air leak had caused the brake condition and that an air line or hose had to be replaced. He then checked the brakes again with a full bucket of sand on the ramp and found that the brakes would hold the loader and that the air pressure gauge indicated 120 pounds of air pressure in the system.

Mr. Adams confirmed that he made a gravity finding of "reasonable likely" and that he based this on the fact that the loader routinely traveled along the roadway to and from the plant with a full and empty bucket and that its route of travel took it by the plant office and employee parking lot. In view of the presence of other vehicular traffic on the roadway, and occasional foot traffic by employees who used the roadway, he believed that the loader with inadequate service brakes would reasonably likely have an accident. If an employee or other vehicle were struck by the loader, which is a heavy piece of equipment, he believed that an injury resulting in lost work days or restricted duty would reasonably likely occur if the loader were continued to be used with service brakes which would not stop it.

Mr. Adams confirmed that he made a negligence finding of "moderate." He believed that Mr. Scott knew that the brake condition had existed for approximately 30-days prior to the inspection and that the loader had a leaky hose. Mr. Adams confirmed that he made no inquiry as to whether the loader had been used during this 30-day period, but based on his observations and the fact that this may have been the only loader, he concluded that it had been used during this time. He further confirmed that in making his negligence finding he considered the fact that Mr. Scott had taken steps to try and correct the condition by bleeding the brakes of all moisture on a daily basis prior to the inspection. Mr. Adams also confirmed that he issued a separate citation on the loader after finding that it had a cracked windshield and cracked side windows (Tr. 9-19).

On cross-examination, Mr. Adams confirmed that he had previously visited the plant, but he could not recall whether it was during the summer or winter months. He confirmed that his supervisor Jim Green was with him on the day of the inspection in question. Mr. Adams further confirmed that he has not inspected any other plants operated by the respondent and that his prior inspection experience with "cold weather operations" were limited to open pit copper mines in Arizona, but that they did not present any equipment freezing problems. He confirmed that the weather conditions at the time of the inspection were "cold and freezing" and that there was "a couple of inches of snow" on the ground. He further confirmed that the respondent did explain to him that the loader air pressure tank was being bled at the end of each shift prior to the inspection and that this was done to remove the moisture from the air system to prevent freezing.

In response to further questions, Mr. Adams confirmed that there were no particular hazards on the plant ramp where the loader dumped its load, and that the loader was equipped with an adequate hand brake and operable backup alarm. He also confirmed that the loader bucket could also be used as a braking device and that the loader normally travelled at a speed of 5 miles per hour or less. Mr. Adams further stated that he checked the respondent's "accident lost time" records, and had no knowledge that the respondent had any prior lost time accidents (Tr. 19-22).

Respondent's Testimony and Evidence

Jeffrey Scott, plant manager, testified that at the time the problem developed with the cited loader, Inspector Adams was in the plant conducting his inspection. Mr. Scott stated that there was approximately 6 to 8 inches of snow on the ground, and that once the loader brake problem was identified the loader was put in the garage and the air pressure gauge line was replaced and the loader was allowed to warm up before being used. He believed that the freezing weather conditions and moisture in the air line caused the braking problem found by the inspector and Mr. Scott

did not believe that there was any serious risk with the loader prior to the time it was cited. He identified the loader operator as Philip Pike and stated that he was an experienced loader operator. Mr. Scott confirmed that the respondent had no lost time accidents (Tr. 27-28).

On cross-examination, Mr. Scott confirmed that he was not with Inspector Adams when he asked the loader operator to test the loader brakes on the plant ramp. Mr. Scott further confirmed that he was aware of the braking problem, and that due to the cold weather, the loader had experienced similar freezing problems "off and on" on three or four occasions, and each time, the loader was taken to the garage so that the air lines could be bled to remove the moisture and to permit the loader to warm up in the garage. He experienced no braking problems with the loader when the weather was not cold and freezing. He described the loader as an old machine, and he indicated that the air dryers were not too efficient.

Mr. Scott stated that the roadway used by the loader was 75 to 80 feet wide, and he confirmed that seven or eight large trucks or tractor trailers were in and out of the plant roadway area on any given day and that employees would also be travelling on foot along the roadway. He stated that the air leak was in the air pressure gauge itself and did not directly affect the braking system. He did not believe that the lack of pressure in the air gauge would affect the efficiency of the brakes, and that the only hose or line which was replaced was the one connected to the air pressure gauge (Tr. 29-32).

Mr. Scott stated that after the loader was taken out of service by the inspector on December 12, 1986, it was returned to service that same afternoon within approximately 5 hours. During this time, no servicing was done on the brake system, and the brakes "worked good" (Tr. 34). However, when the loader was tested, one brake was not adjusted properly and three of the four wheels were locking up. The brake pads had to be adjusted so that the one wheel would brake (Tr. 34). He did not believe that the three wheels which were locking up made much difference in stopping the loader (Tr. 35).

Mr. Scott stated that the cited loader was not used on a daily basis at the plant and it is only used when another loader which is normally used at the plant is at the pit area doing other work (Tr. 35). Mr. Scott stated that the inspector allowed him to use the loader after the brakes were adjusted on December 12, and after he retested it because it was needed on the night shift (Tr. 37).

Mr. Scott stated that he was not aware of the condition of the loader when it was tested by the inspector on December 12, but he confirmed that he had problems with the loader prior to

this time and the operator would leave it in the garage for as long as it took to thaw out. He further confirmed that no one would observe the loader during the shift to determine whether the brake system was operating correctly (Tr. 38).

Mr. Scott confirmed that the drivers of the contractor trucks at the plant were familiar with the plant, and that the drivers and plant employees were familiar with safely maneuvering around a loader (Tr. 39).

In response to further clarifying questions, Mr. Scott confirmed that the pressure gauge line was replaced and the loader was allowed to warm up in the garage after it was cited by the inspector and that nothing was done to the loader prior to the inspection. The inspector observed the loader "fresh for the first time" on the morning of his inspection "in the condition that it was in" (Tr. 40). He confirmed that he was not present when the operator applied the brakes and the loader drifted, but that he was present and did observe it drift down the ramp when the brakes were applied when the inspector took him to the loader and had the operator test it a second time. Mr. Scott did not dispute the fact that the loader brakes would not hold the machine on the ramp, regardless of what caused the condition (Tr. 41).

Inspector Adams was recalled by the petitioner and he stated that he did not recall informing Mr. Scott that he could place the loader back in service on December 12. He stated that he next inspected the loader on December 14, when he terminated his order (Tr. 42). He stated that on December 12, the mechanic who was working on the loader informed him that there were air leaks. Mr. Adams stated he did not observe the loader in operation before leaving the mine that day and December 14, and did not see it in operation after he cited it (Tr. 43-44).

Mr. Adams stated that he returned to the plant on December 14, at which time Mr. Scott provided him with information about the corrections made to the loader, and he terminated the order on that day (Tr. 44). Mr. Adams stated that once a section 107(a) order is issued taking a piece of equipment out of service, the mine operator must advise MSHA that the cited condition has been corrected before he can place the equipment back in service. However, if a citation is issued, the equipment may be placed in service after the condition is corrected and MSHA need not be notified (Tr. 47). Mr. Adams could not recall any conversation with Mr. Scott which would have led him to believe that once the loader was repaired it could be placed back in service (Tr. 47). Mr. Adams could not recall whether there were two loaders at the plant (Tr. 48).

Mr. Scott was recalled by the court, and he reiterated that after the loader brakes were adjusted on December 12, after it

was taken out of service, the inspector allowed it to be placed back into service that same day (Tr. 49).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.14101(a)(1), which provides as follows:

> (a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

The credible and unrebutted testimony of the inspector establishes that the cited loader service brakes were in poor condition and would not hold the loader and keep it from drifting down the plant ramp when the brakes were tested. The respondent does not dispute the fact that the brakes would not hold, and its defense is that the loader is required to be used at all times while the plant is in operation during the winter season and that the poor braking condition was caused by the operation of the loader in sub-freezing weather. Although I recognize the operational difficulties in operating equipment under adverse weather conditions, the cited standard makes no allowances or exceptions and it requires as a minimum that the service brakes be maintained so that they are capable of stopping and holding the equipment with its typical load on the maximum grade it travels. In this case, the evidence establishes that when the loader operator tested the loader brakes in the presence of the inspector, they would not hold or stop the machine, and plant manager Scott did not dispute this fact. Accordingly, I conclude and find that the petitioner has established a violation by a preponderance of the credible testimony and evidence adduced in this case, and the contested 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, (August 1985), 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).

I take note of the fact that the "narrative findings" supporting the "special assessment" made by MSHA in this case reflects that when the cited loader was tested on the 2 percent grade it could not be stopped and that it could have become uncontrollable and collided with another vehicle, a stationary object, or a pedestrian. However, there is no evidence in this case that the loader was "uncontrollable" when it drifted down the ramp, nor is there any evidence that any other vehicular traffic or people were present, or are normally present, in the ramp area. Further, except for the ramp area, there is no evidence that the roadway where the loader travelled was other than level, and the inspector confirmed that he perceived no collision hazards in the immediate ramp area.

Although the loader travelled at a relatively low rate of speed, it nonetheless was driven on the roadway traveling to and from the stockpile area to the processing plant. Although the roadway was 75 to 80 feet wide, there is no evidence that the loader, other traffic, or individuals on foot, were restricted to any particular part of the roadway, and the respondent confirmed that seven or eight large trucks or tractor trailers were on the roadway on a daily basis coming and leaving the plant area, and that employees would also be walking on the roadway. Since the loader was apparently used throughout the winter season with snow on the ground, I believe one can reasonably conclude that in the normal course of travel, any slippery or adverse road conditions would contribute to the hazard presented by a loader whose service brakes would not hold or stop the loader when they were applied. Although the loader was equipped with a serviceable parking brake and backup alarm, and the bucket could be used as a braking mechanism, these devices would only be relevant when the loader is backing up or parked. There is no evidence that the loader operator would lower his bucket if it were full to stop the machine in an emergency situation to avoid a collision with another vehicle or someone on foot on the roadway, and the inspector's unrebutted testimony reflects that it would be more difficult to stop the loader with a full loaded bucket than it would if the bucket were empty.

In view of the presence of other large trucks coming and going from the plant at any given time while using the roadway, and the presence of plant employees on foot on the roadway, particularly under inclement weather conditions, I conclude and find that the operation of the cited loader on the roadway with brakes which would not stop or hold the loader when they were applied, presented a situation which would reasonably likely result in an accident. In the event the loader collided with another vehicle, or struck someone walking along the roadway, I believe that this would result in injuries of a reasonable serious nature. Although there is no evidence that the loader brakes were tested on a level portion of the roadway, and the parties offered no evidence to establish whether the loader was capable of stopping on a level area if the brakes were to be applied, I nonetheless conclude and find that a loader with brakes which were incapable of holding or stopping the machine on the 2-percent grade where they were tested presented a hazard to vehicles and pedestrians using the roadway. The roadway was at the bottom of the ramp, and the loader would be backed down the ramp after dumping its load (Tr. 11, 15).

Although there is a dispute as to whether or not the inspector permitted the loader to be placed back into service after he issued the order-citation, the fact remains that at the time the inspector observed the loader in operation and had the brakes

tested, they would not hold or stop the machine. Under all of the aforementioned circumstances, I conclude and find that the inspector's significant and substantial (S&S) finding is supportable, and IT IS AFFIRMED.

History of Prior Violations

The petitioner did not produce a computer print-out reflecting the respondent's history of prior paid assessed violations. However, petitioner's counsel stated that according to the information he has received the respondent was assessed for 26 violations in 1987, two in 1988, and three in 1989. Counsel confirmed that this information may apply to the respondent as the corporate operate and that the violations may apply to all of the plants which it operates rather than the particular plant in question. He further confirmed that he had no information to indicate that the respondent had been previously cited for a violation of the same mandatory standard cited in this case (Tr. 50-53).

The respondent's representative confirmed that the plant in question has been inspected two or three times annually by MSHA, and he believed that two or three citations may have been issued during each of these inspections. He agreed that the 22 violations for the past 24-months noted as part of MSHA's proposed assessment information found on MSHA Form 1000-179, which is part of the pleadings, appears to be accurate. Under all of these circumstances, and in the absence of any further evidence of record, I cannot conclude that the respondent's compliance record warrants any additional increase in the amount of the civil penalty which I have assessed for the violation in question.

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

I conclude and find that the respondent is a small-to-medium size mine operator, and that the civil penalty assessment which I have made for the violation is appropriate. In the absence of any evidence to the contrary, I cannot conclude that the payment of the assessment will adversely affect the respondent's ability to continue in business.

Good Faith Compliance

The respondent's representative stated that the respondent has always timely corrected any cited conditions and has in the past paid the civil penalty assessments for those violations which is has not contested. The parties are in agreement that the cited loader brake conditions were corrected and that the

respondent abated the violation in good faith (Tr. 53-55). I conclude and find that this was the case, and I have taken this into consideration.

Gravity

Based on the credible testimony of Inspector Adams with respect to the hazards associated with the violation, I conclude and find that it was serious.

Negligence

Although plant superintendent Scott acknowledged that he was aware of the cited loader brake condition, the evidence establishes that he at least made an effort to check the condition by taking the loader to the garage to bleed the moisture out of the air pressure system and to allow the loader time to warm up. Although Mr. Scott's assertion that the inspector allowed the loader to be placed back into service after it was taken to the garage on the day of the inspection was disputed by the inspector, the fact remains that the loader brakes would not hold when the inspector had it tested and Mr. Scott was not with the inspector at that time. Under the circumstances, I agree with the inspector's moderate negligence finding and it is affirmed.

Civil Penalty Assessment

In its answer, the respondent took issue with MSHA's proposed "special assessment," including the "narrative findings" supporting the proposed assessment. However it is clear that I am not bound by MSHA's proposed civil penalty assessment, and that once a penalty is contested and Commission jurisdiction attached, a judge's determination of the amount of the penalty is de novo, based upon the statutory penalty criteria and the record developed in the adjudication of the case. See: Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); United States Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $150 is reasonable and appropriate for the violation which I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $150 for the violation in question, and payment is to be made

to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge