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SOL (MSHA) v. MACK ENERGY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 90-160 A.C. No. 46-06887-03519
v.	
MACK ENERGY COMPANY, RESPONDENT	Docket No. WEVA 90-180 A.C. No. 46-06887-03520 Montague Mine

DECISIONS

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Gerald P. Duff, Esq., HANLON, DUFF & PALEUDIS, St. Clairsville, OH 43950 (Certified Mail)

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Docket No. WEVA 90-160, concerns alleged violations of mandatory safety standards 30 C.F.R. 77.410(a)(1), and 71.803(a), and Docket No. WEVA 90-180, concerns two alleged violations of mandatory safety standard 30 C.F.R. 77.1605(b).

The respondent filed timely notices of contests and hearings were held in Charleston, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these cases.

Issues

The issues presented are (1) whether the cited conditions or practices constitute violations of the cited standards;

(2) whether the alleged violations were significant and substantial (S&S); (3) whether the alleged violations were the result of the respondent's unwarrantable failure to comply with the cited standards; and (4) the appropriate civil penalties to be assessed for the violations taking into account 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, 30 U.S.C. 301, et seq

2. Sections 104(d)(1) and 110(1) of the Act.

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Pretrial Rulings (WEVA 90-160)

By motions received on Friday, November 30, 1990, the respondent moved to dismiss this case on the ground that the petitioner's proposals for assessment of civil penalties were untimely filed, and that one of the citations (No. 9960563), initially listed an improper section of the regulation.

In the course of a pretrial telephone conference held with the parties on November 30, 1990, respondent's counsel was reminded of the fact that Chief Judge Paul Merlin issued a prior ruling on August 2, 1990, accepting the late filing of the petitioner's proposal for assessment of civil penalty. Respondent's counsel acknowledged that his file was incomplete and that he was unaware of this ruling when the motion was filed. I informed counsel that the record reflects that the petitioner's proposals were filed 20 days late, and that in the absence of any showing of prejudice, and in view of the decision in Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981), Judge Merlin's prior ruling would stand and I reaffirmed it and denied the respondent's motion.

With regard to the motion to dismiss Citation No. 9960563, on the ground that the citation initially cited an improper section of the Part 70 standards, counsel was reminded of the fact that the inspector subsequently modified the citation to cite section 71.803(a), instead of 70.508(a), and that the respondent has paid the proposed civil penalty assessment of $20 for the violation. Counsel confirmed that including this issue as part of his motion was an oversight and it was withdrawn.

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The respondent is the operator of the Montague Mine.

2. The respondent and the mine are subject to the Act.

3. The presiding judge has jurisdiction to hear and decide these matters.

4. MSHA Inspector Sherman Slaughter was acting in his official capacity when he issued the contested citation and orders.

5. True copies of the citation and orders were properly served on the respondent or its agent.

6. With regard to Docket No. WEVA 90-160, the respondent's history of prior violations consists of 41 assessed violations which were issued during 42 inspection days. The violation frequency rate is .97 assessed violations per inspection day, and reflects a moderate history of prior violations.

7. With regard to Docket No. WEVA 90-180, the respondent's history of prior violations consists of 43 assessed violations issued during 45 inspection days. The violation frequency rate is .95 assessed violations per inspection day, and reflects a moderate history of prior violations.

8. The cited conditions and practices were abated by the respondent within the times fixed by the inspector.

9. The respondent is a moderate size mine operator with a company annual production of 222,031 tons, and a mine production of 209,000 tons.

10. With regard to Docket No. WEVA 90-180, petitioner's exhibit G-4, is a true copy of the preshift examination report concerning the No. 71, R-50 rock truck.

The parties agreed that the respondent has paid a $20 civil penalty assessment for section 104(a) Citation No. 9960563, issued by MSHA Inspector James M. Wills on January 11, 1990, for a violation of 30 C.F.R. 71.803(a), and that this violation is no longer in issue in Docket No. WEVA 90-160.

Discussion

Docket No. WEVA 90-160

This case concerns a section 104(d)(1) "S&S" Citation No. 3334094, issued by MSHA Inspector Sherman Slaughter on December 4, 1989. The inspector cited a violation of mandatory safety standard 30 C.F.R. 77.410(a)(1), and the cited condition or practice is described as follows:

> The R-50 Euclid rock truck (Co. No. 76) being used to haul spoil at the mine was not equipped with an automatic alarm that would give an audible alarm when the truck was put in reverse or any other type of warning device (sic). This mine had ten citations issued during an eight month period (10/1/88 to 6/30/89) for violations of 77.410, 30 CFR according to violation history contained in UMF.

Docket No. WEVA 90-180

This case concerns two section 104(d)(1) "S&S" orders issued by Inspector Slaughter on January 4, 1990. Section 104(d)(1) "S&S" Order No. 3334014, issued on January 4, 1990, cites a violation of mandatory safety standard 30 C.F.R. 77.1605(b), and the cited condition or practice is described as follows:

> The Euclid R-50 rock truck (Co. No. 71) being used at the mine to haul spoil was not equipped with adequate brakes in that the truck could not be brought to a stop on the inclined haulroad where it was being used with a load and when the service brakes were applied and the truck was rolling before they were applied. The equipment operator's preshift safety check list showed that the operator of the truck had reported the condition by checking the column "needs corrected" for "foot brakes." The check list was dated 1/4/90 and signed by the equipment operator who according to the foreman, Grover Riddle, was the competent person who inspected the truck before it was placed in operation.

Section 104(d)(1) "S&S" Order No. 3334015, issued on January 4, 1990, cites a violation of mandatory safety standard 30 C.F.R. 77.1605(b), and the cited condition or practice is described a follows:

> The Euclid R-50 rock truck (Co. No. 71) being used at the mine to haul spoil was not equipped with an adequate parking brake in that when the truck was stopped in the inclined area of the haulroad with the bed loaded and the transmission in neutral (the truck

> backed up the incline and then put the truck in neutral) and the park brake applied the truck would roll off. The equipment operator's preshift safety check list showed that the operator of the truck had reported the condition by checking the column "needs corrected" for "parking brakes." The check list was dated 1/4/90 and signed by the equipment operator who according to the foreman, Grover Riddle, was the competent person who reported the truck before it was placed in operation.

Petitioner's Testimony and Evidence - WEVA 90-160

MSHA Surface Coal Mine Inspector Sherman Slaughter testified as to his experience, training, and prior private industry work experience which included the operation of rock trucks. He confirmed that he has conducted several inspections at the mine beginning in June, 1989, and has spent in excess of 20 days at the mine during these inspections. He described the mine as an open pit surface mining operation with primarily level terrain and indicated that the coal is located approximately 65 to 70 feet below the surface, and the coal is mined by removing the overburden and mining the coal "lift." He further stated that the mine has approximately 42 employees, and operates on two production shifts. The mine has six mechanics, and 13 to 16 people work the evening shift, and there are approximately 20 pieces of mining equipment at the mine at any given time (Tr. 9-15).

Mr. Slaughter stated that based on his review of the respondent's compliance and violation history, which includes "quite a few citations," he believed that the respondent had a compliance problem which required "special emphasis" by MSHA's "target mines" program. He concluded that the respondent has an "above average" compliance record for an operation of its size.

Mr. Slaughter confirmed that he conducted an inspection at the mine on December 4, 1989, and he identified exhibit G-1, as a copy of his inspection notes for November 16, 1989, when the inspection began, as well as December 4, 1989, when he issued Citation No. 3334094 (exhibit G-2). He confirmed that foreman Bud Connor accompanied him during the inspection (Tr. 16-20).

Mr. Slaughter stated that he went to the pit area and observed a back hoe, a dozer, scrapers, and surface personnel coming in and out of the pit. He also observed the cited R-50 Euclid truck in operation, and he requested the driver to operate the truck in reverse, and when he did, the reverse backup alarm did not work. Mr. Slaughter stated that the alarm is usually installed at the rear of the truck, and that when he and Mr. Connor looked for it they discovered that the truck had no alarm at all installed on it. Since section 77.410(a)(1)

required the truck to be equipped with a warning alarm which gives an audible alarm when it is put in reverse, Mr. Slaughter issued the citation (Tr. 20-22).

Mr. Slaughter stated that he based his significant and substantial (S&S) finding on the fact that the pit where he observed the truck in operation was a small area with not much room, and the haulroad leading to the pit was congested. There were approximately six people working in the pit, and two haulage trucks were operating on their normal "haul cycle," and they would have to pull in and out of the pit area ramp while loading.

Mr. Slaughter stated that he further considered the fact that service personnel would be in the pit area servicing the equipment, and if the trucks needed to be serviced they would direct the trucks to back up to be available for servicing. He also stated that personnel working in the pit would take their lunch breaks at the pit area, and that the haulage trucks would be the last vehicles to come in for the lunch period. The employees taking lunch, as well as a dozer operator, would be on the ground during this time. He confirmed that the citation was issued during the lunch hour, and while he observed people on foot, he could not recall whether any of the trucks were operating at that time.

Mr. Slaughter stated further that service personnel signalling the truck would be on foot and that the driver sometimes eats his lunch in the truck with the engine running. If he decided to back up, the lack of a reverse alarm may not serve to alert personnel on foot that the truck would be backing up. He also indicated that a foreman drives a small pickup truck in and out of the pit and may not be paying attention to a truck which may be backing up (Tr. 22-30).

Mr. Slaughter stated that the truck in question weighs approximately 100,000 lbs and has a rated payload capacity of 50 tons. The tires are approximately 6 feet high, and he confirmed that he has driven such a truck. He stated that the driver's view to the rear through the rear-view mirrors would be obscured for a large distance, but that he could see out of the side windows. Based on all of these factors, Mr. Slaughter concluded that given the weight of the truck, the congested pit area, and the presence of other equipment and people on foot, it was reasonably likely that a fatal accident would occur if it were to back over someone. If the truck struck another piece of equipment, he believed it was reasonably likely that a "lost-time" accident, rather than a fatality, would occur (Tr. 30-33).

Mr. Slaughter further stated that he was aware of at least one fatal accident incident in his district where a dozer operator left his machine on a haulage road and was killed when he got

behind a truck and was run over. He also alluded to an MSHA "fatalgram" which reflected a fatal accident when a rock truck backed over a pickup truck. He confirmed that the rock trucks "back up all the time" at the mine for different reasons (Tr. 33-36).

Mr. Slaughter stated that he based his "high negligence" findings and belief that the respondent engaged in "aggravated conduct" on the fact that the respondent had been previously cited 10 times for violations of section 77.410, which should have made it aware that it had a problem which needed to be corrected and that an inspection program was needed. He also believed that the lack of an alarm would be obvious to the back-hoe and dozer operator. He confirmed that the work shift began at 6:30 a.m., and that he issued the citation at 12:30 p.m. (Tr. 36-40).

Mr. Slaughter believed that the 10 prior citations for violations of section 77.410, was "high," and he confirmed that he discussed this with mine management and advised them that there was a need to develop a safety program to address the problem and that if this were not done any future citations for violations of this standard would be "unwarrantable" violations (Tr. 44-45).

Mr. Slaughter stated that he discussed the matter with mine superintendent Jack Wilfong. Mr. Slaughter confirmed that the respondent had a safety program, and it was his understanding that it was communicated to employees by giving them copies with their pay checks. He also confirmed that the respondent used its equipment operators as the competent persons to inspect their equipment, but he believed that the respondent needed to instruct the operators as to how they should conduct these inspections and needed to retrain them to report equipment conditions which needed attention (Tr. 45-49).

Mr. Slaughter stated that during his discussions with the superintendent, the superintendent informed him that he was having problems with equipment break downs, and that "he tried to fix these things when they occurred on a priority basis" (Tr. 49).

On cross-examination, Mr. Slaughter confirmed that he was aware of no fatalities or injuries at the mine attributable to the lack of a reverse alarm on a piece of equipment. He also confirmed that the respondent's truck operators were competent and well-trained in the operation of their equipment. He further confirmed that with the exception of the lunch hour, there was not much foot traffic in the pit area, and that those people on foot would generally observe a truck, and that service personnel would have their attention directed to the truck (Tr. 50-52).

Mr. Slaughter confirmed that he did not see any preshift inspection report concerning the cited truck. He reiterated that the truck was not equipped with a reverse alarm, but if it were so equipped, and did not sound when the truck was operated in reverse, he would have cited subsection (c) of section 77.410. He confirmed that he and foreman Connor looked for the alarm on the cited truck but could not find one installed on the truck. He agreed that a reverse alarm could break down after 6 hours of use (Tr. 53-56).

Mr. Slaughter again confirmed that the equipment operators were used to inspect their equipment, and that in the event they did not report a condition which needed attention, mine management might not know about the condition. He confirmed that he was never present during any safety meetings at the mine, but conceded that they may have been held (Tr. 56).

Mr. Slaughter confirmed that he terminated the citation on December 14, and he did not know whether the respondent may have corrected the condition earlier. All that he knew was that the reverse alarm was working properly when he again inspected the truck to terminate the citation. He believed that a reverse alarm on a truck would "get a person's attention to be on the look-out" for a truck operating in reverse. Mr. Slaughter does not recall speaking with the truck driver or what he may have said about the reverse alarm (Tr. 57-62).

Petitioner's testimony and Evidence - WEVA 90-180

Inspector Slaughter confirmed that he conducted a spot inspection at the mine on January 4, 1990, and he identified copies of his inspection notes of January 2 and 4, 1990 (Exhibit G-4). He also confirmed that he issued two section 104(d)(1) orders for inadequate service brakes and the parking brake on the cited truck in question (exhibits G-5 and G-6).

With regard to Citation No. 334014, concerning the inadequate service brakes, Mr. Slaughter stated that he went to the mine to conduct a spot inspection of a back hoe. He noticed that the cited truck was in operation and he spoke with the driver and requested him to test the truck after he left the pit with a load. He asked the driver to apply the brakes when he drove down the inclined portion of the roadway, and when the driver applied the brakes the truck would not stop. The inspector confirmed that the driver informed him that the brakes would not hold or stop the truck.

Inspector Slaughter stated that the procedure he followed for testing the truck was a normal method followed by MSHA inspectors and that this functional test is routinely done by inspectors to test the adequacy of brakes on an inclined portion of a roadway where a truck is normally used. He further stated

that the term "adequate" brakes means that a truck driver can stop and control a loaded truck while traveling on his normal route of travel after applying the service brakes, and in this case, he confirmed that the service brakes would not stop the truck when the driver applied the brakes (Tr. 84-90).

With regard to Citation No. 334015, concerning the truck parking brake, Inspector Slaughter stated that the driver put the truck in neutral gear on an inclined portion of the roadway, and the brake would not hold. He confirmed that he requested the driver to apply the parking brake a second time under similar circumstances, and when he did, the brake would still not hold the truck. Mr. Slaughter confirmed that it was sometimes necessary to stop and park the truck on an incline when there was a breakdown. He confirmed that foreman Grover Riddle was with him when the truck was tested (Tr. 90-94).

In support of his significant and substantial (S&S) finding with respect to the truck service brakes, Mr. Slaughter stated that he considered the fact that the haul road over which the truck operated was "up and down" and that there was a "swag" at the intersection with a roadway used as a normal approach to the pit. He also indicated that the main roadway would not allow two trucks to pass each other, and one truck would have to pull over and wait for the other one to pass. He also considered the fact that the left side of the roadway was elevated, as well as inclined, at an approximate grade of 7 to 10 percent, and that the swag area near the pit roadway was a "blind spot" except for a distance of 100 feet prior to the intersection (Tr. 94-99).

Mr. Slaughter stated that the speed of the truck while traveling down the inclined portion of the roadway approaching the pit roadway intersection would be approximately 20 miles per hour, and that dozers, scrapers, and other rock trucks would be operating at the intersection as they exited the pit. Although the primary roadway was bermed with 40-to-45-inch high berms, he believed that a loaded truck traveling down the inclined roadway with inadequate brakes would travel through the berm. He also believed that a truck driver who attempted to position his truck close to the pit hill to facilitate the loading of the truck would be exposed to a hazard of going over the hill if the brakes would not hold (Tr. 99-100).

Mr. Slaughter confirmed that the trucks are equipped with transmission retarders which could serve as a braking device but that they are disconnected for longer transmission torque life and that there is no requirement for the use of the retarders. Given the size of the truck, including its load, he believed that a fatal accident was reasonably likely and that one person would be at risk (Tr. 101-102).

With regard to the parking brake citation, Mr. Slaughter confirmed that he based his S&S finding on the fact that the truck is parked at different mine areas for different reasons. Although the driver informed him that the parking brake would not hold the truck and that he tried to park it in a low spot when it was necessary, Mr. Slaughter believed that the truck may be parked in an inclined area and "roll off" (Tr. 103).

Mr. Slaughter stated that a truck driver may or may not get out of his truck when it is parked, and that he has observed trucks which were out of commission parked with the operator out of the truck. He confirmed that service trucks go the pit area to service equipment, and that employees eat their lunch at the pit. If a truck was to run over someone, he believed that it was reasonably likely that it would result in a fatal injury. Further, if a driver found what he believed was a "low spot" to stop and park his truck, this may not be the case, and if the truck rolled and struck someone, it would be reasonably likely that a fatality would occur.

With regard to his "high" negligence findings with respect to both violations, Mr. Slaughter stated that the truck driver, Harold Johnson, informed him that he had reported the fact that the brakes would not work for "the past three days." Mr. Slaughter identified exhibit G-7 as the equipment check-lists filled out by the truck driver, and he confirmed that Mr. Johnson provided him with a copy of his checklist for January 4, 1990, and that he (Slaughter) only became aware of the checklists dated January 2 and 3, 1990, shortly before the hearing.

Mr. Slaughter confirmed that Mr. Johnson was designated by the respondent as the competent person to inspect the trucks, and that Mr. Johnson told him that he operated the truck because he would not have any other work to do and would be sent home if he did not drive it. Mr. Slaughter further confirmed that he discussed the matter with mine foreman Grover Riddle, but he could not recall what was specifically discussed. He further confirmed that he did not know what was wrong with the brakes and terminated the orders after finding that the service brakes and parking brakes would stop and hold the truck (Tr. 117-125).

On cross-examination, Mr. Slaughter stated that there are no MSHA guidelines for determining the adequacy of brakes pursuant to section 77.1605(b), and that he relies on his experience with the equipment to make such a determination. He confirmed that the driver, Mr. Johnson, was alone in the truck and that he (Slaughter) did not know how hard Mr. Johnson applied the brakes or whether he in fact made an honest effort to apply the brakes. He confirmed that he knew that Mr. Johnson applied the brakes because he heard the noise made by the air valves. He further confirmed that the truck brakes were air-over-hydraulic, and that

he did not ride in the cab with the driver because the truck only has one seat.

Mr. Slaughter confirmed that the truck driver on the first shift (Roach) also filled out check-lists for his inspections of the truck and found nothing wrong with the brakes. He further confirmed that he did not speak with Mr. Roach or have him test the brakes during his shift. He stated that he was not aware that the prior citations involved any injuries or fatalities at the mine as a result of improper brakes on any of the respondent's trucks, and he confirmed that the check-lists filled out by Mr. Johnson do not state that the truck was inoperative.

Respondent's Testimony and Evidence

Jerry Gomer, respondent's secretary and treasurer, identified exhibit R-A as a summary of the repairs made to the cited truck for December, 1989, and he stated that this reflects that extensive brake work was done on the truck. He also identified exhibit R-B as an MSHA Safety award presented to the respondent in 1988, and exhibit R-C as a financial statement prepared by the respondent's accountant reflecting an accrued loss of $540,000. Mr. Gomer believed that the payment of civil penalty assessments "would affect the viability" of the respondent (Tr. 158-163).

On cross-examination, Mr. Gomer stated that payment of the proposed civil penalty assessments in these proceedings would probably not put the respondent completely out of business (Tr. 164). Respondent's counsel confirmed that Mr. Gomer had no personal knowledge of the cited conditions or practices in these cases (Tr. 166). Mr. Gomer stated that the respondent has a safety program instituted by the State of West Virginia Department of Energy, that it is reviewed annually, and that he makes sure that each employee receives a copy of the respondent's safety program annually with their pay checks (Tr. 166).

Findings and Conclusions

Fact of Violation

Section 104(d)(1) "S&S" Citation No. 3334094, December 4, 1989, (Docket No. WEVA 90-160)

In this case, the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 77.410(a)(1), for failure to equip the cited rock truck with an automatic backup alarm that would give an audible alarm when the truck was put in reverse. The cited standard provides as follows:

77.410 Mobile equipment; automatic warning devices.

> (a) Mobile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that --
>
> (1) Gives an audible alarm when the equipment is put in reverse; * * *

I take note of the fact that section 77.410(a)(1), is presently included in MSHA's Part 77 regulations, which were revised as of July 1, 1990. The citation was issued on December 4, 1989, and section 77.410, which was included under the Part 77 regulations revised as of July 1, 1989, provided 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.

Although the inspector cited section 77.410(a)(1), rather than section 77.410, he testified that section 77.410(a)(1), became effective in September, 1989, and the requirements of both standards with respect to backup alarms are identical (Tr. 53). I find no procedural defect in the citation, nor can I conclude that the respondent has been prejudiced by the inspector's citation of the revised standard, rather than the previous standard which was in effect at the time the citation was issued.

The inspector testified that when he observed the truck in operation, respondent's foreman, Bud Connor, was with him. The inspector requested the driver to operate the truck in reverse, and when he did, the alarm did not sound. The inspector confirmed that when he and the foreman looked for an alarm, which is usually installed on the rear of the truck, it was discovered that no alarm was installed on the truck. The inspector's notes, made in the course of his inspection on December 4, 1989, reflect that upon inspection of the cited truck he noted that "the backup alarm would not work. (There was none on it)" (Exhibit G-1, pg. 32).

In its posthearing brief, the respondent argues that the citation issued by the inspector is not clear as to whether there was an alarm on the truck and it was not working, or whether there was no alarm. Respondent also asserts that the preshift report did not show that the alarm was missing or inoperative.

With regard to the preshift report, the inspector testified that he never reviewed any such report (Tr. 52). Further, the report is not a matter of record, and the respondent never

produced it at the hearing. Under the circumstances, the respondent's argument is rejected. The truck driver and the foreman who accompanied the inspector did not testify in this case, and the inspector's testimony, which I find credible, is unrebutted.

The inspector confirmed that he cited a violation of section 77.410(a)(1), because the cited truck was not equipped with a backup alarm that would give an audible alarm when the truck was operated in reverse (Tr. 53). He confirmed that if the truck were equipped with such an alarm, and simply did not function, he would have cited a violation of section 77.410(a)(c), which requires that such an alarm function (Tr. 53).

With regard to the clarity of the citation, the respondent's counsel pointed out at the hearing that the statement on the face of the citation that the truck "was not equipped with an automatic alarm that would give an audible alarm when the truck was put in reverse" lends itself to different interpretations and could be construed to mean that an alarm was on the truck, but that it simply did not function. Counsel asserted that it has always been the respondent's impression that this was the case (Tr. 54-55, 91). I take note of counsel's statement that "we don't have any evidence on that point," and he asserted that the respondent's defense deals with the asserted "significant and substantial" and "unwarrantable failure" findings made by the inspector with respect to the violation (Tr. 82).

In its answer of July 24, 1990, the respondent suggests that the cited truck may have been equipped with an alarm, but that it was simply inoperative. The answer was filed by the respondent's corporate president, Michael B. McCort, and he asserts that it was difficult to maintain backup alarms in proper working order because of strong equipment vibrations and bumps inherent in surface mining operations. Mr. McCort stated that "we know that the inspector had been informed by the operator of the piece of equipment, on several citations, that the backup alarm was working when he put the equipment in the dirt at the start of the shift. The inspector choose (sic) not to make note of that." However, Mr. McCort did not testify in this case, and as noted earlier, the respondent presented no testimony with respect to the violation, nor did it present any evidence to support Mr. McCort's suggestions that backup alarms may be breaking or malfunctioning because of broken wires due to any adverse working conditions. I also take note of Mr. McCort's statement in his answer that "removing a piece of equipment from service for backup alarm repairs is economically difficult."

In view of the foregoing, I conclude and find that the petitioner has established a violation of section 77.410(a)(1), by a preponderance of all of the credible and probative testimony and evidence adduced in this case. Accordingly, the violation IS AFFIRMED.

Fact of Violation

Section 104(d)(1) "S&S" Order No. 334014, January 4, 1990
(Docket No. WEVA 90-180)

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 77.1605(b), for inadequate service brakes on the cited rock truck. The cited standard provides as follows:

> 77.1605 Loading and haulage equipment; installations.
>
> * * * * * * *
>
> (b) Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

The inspector testified that he observed the cited truck in operation during the course of his inspection, and that since it had been out of service when he conducted a prior inspection, he decided to inspect it. He informed foreman Grover Riddle, who was with him, that he would inspect the truck (Tr. 88). The inspector then spoke with the driver and informed him that he wanted to determine whether the brakes were adequate. The inspector asked the driver to load his truck, and that after he left the pit with his load, he was to tram up a steep incline on the haulroad, and after reaching the top of the hill "knoll," he was to apply his service brakes as he came down the roadway on the other side. The inspector testified that he positioned himself so that he could observe the truck, and when the truck came down the hill, the driver could not stop the truck with the service brakes and it rolled down into the hill "swag." The inspector confirmed that he then spoke with the driver, and the driver informed him that the brakes would not hold or stop the truck (Tr. 89).

The inspector testified that it is difficult to determine whether the service brakes on a truck are working by simply examining and looking at the truck, and that for this reason, a "functional test" is conducted on an inclined roadway where the truck is used. In his opinion, the phrase "shall be equipped with adequate brakes" found in section 77.1604(b), means "that this equipment would have brakes that will operate and stop coal loading equipment with the size loads that it carries" (Tr. 90). Since the truck service brakes would not stop the truck in question on the inclined roadway, he believed that they were not adequate within the meaning of the cited standard (Tr. 90).

The inspector confirmed that he simply observed the driver in the truck, and that he (the inspector) did not try the brakes

(Tr. 92). The inspector confirmed that when he reinspected the truck to abate the violation, he found that the brakes would hold the truck after another similar "functional test." However, he had no knowledge of any brake repairs and did not know what was done to render them serviceable again (Tr. 129-131).

The inspector confirmed that there are no firm guidelines for determining the adequacy of service brakes, and that any determination in this regard must be based on "your experience with the equipment" (Tr. 132). He further confirmed that he was not in the truck with the driver at the time the test was conducted, and although he did not know whether the driver pressed down on the brakes "easily" or "all the way," he knew that he applied the brakes because he could hear the brake air valve (Tr. 135). The inspector stated that he had confidence in what the driver was doing, and that "I was confident by the test that I gave on the truck that those brakes weren't good" (Tr. 138). He confirmed that MSHA's policy does not permit an inspector to get into a truck and try the brakes himself (Tr. 139), and that the truck in question only has seating for one person (Tr. 144).

The inspector confirmed that he had no reason to question the competence of the driver with respect to his ability to inspect and drive the truck (Tr. 142). He stated that the driver was seated in a normal position in the truck, and he did not believe that it was difficult for him to apply the brakes (Tr. 142). He confirmed that the "functional test" which he conducted by observing the driver operate the truck after instructing him to apply the brakes, was an acceptable MSHA method that he has regularly used (Tr. 145).

The inspector could not state precisely how fast the fully loaded truck was traveling down the incline during the test, and he stated that the truck "was free rolling all the way and stopped in the swag. He didn't have any brakes on the truck" (Tr. 149). He reiterated that he knew that the driver had applied the brakes because he could hear the air valves and that the truck did not stop and eventually came to a stop in the bottom of the swag (Tr. 150).

The respondent argues that contrary to the cited truck driver's belief that the brakes "need corrected," the day shift driver of that same truck listed the brakes as "OK" and that neither driver refused to operate the vehicle or to take it out of operation by "red tagging" it. The respondent concludes that since the day shift driver found the truck "OK," this is proof from a competent driver that the brakes were adequate. The respondent also concludes that its answers to petitioner's interrogatories show that the brakes were indeed adequate.

The respondent takes the position that the test conducted by the inspector in support of the violation was inappropriate and

flawed in that the inspector was not in the truck with the driver, did not know whether the driver in fact fully depressed the brake, and simply relied on what the driver had told him. The respondent argues further that the inspector was speculating that the brakes would not hold the truck, and was not acting on his own personal knowledge, and made a subjective, rather than an objective determination with respect to the adequacy of the brakes. The respondent concludes that the cited standard sets no objective standard for such a determination, that the petitioner has failed to carry its burden of proof, and that its research "has not turned up any reported cases on facts such as are present here."

With regard to the respondent's answers to the interrogatories in question, I find nothing in those responses which may serve as an evidentiary basis to support any conclusion that the cited brake were adequate, and the respondent's conclusions in this regard are rejected. The answers are simply denials and assertions that the brakes were adequate "all circumstances considered," that the driver was experienced, and that "no accident of such a speculative nature has occurred." Such statements are hardly proof of the adequacy of the brakes. Further, although the truck driver and foreman who was present with the inspector when he conducted his test are readily identified by name, the respondent failed to call them as witnesses.

The respondent's conclusion that the foot brakes were adequate because the day shift driver (Harold Roach) indicated on his preshift safety check lists that they were "OK" and that neither driver refused to operate the truck or to take it out of service are rejected. The day shift driver, as well as the driver who was driving the truck, did not testify in this case, and the inspector's credible testimony that the truck would not stop, and continued to roll freely when the driver applied the brakes, stands unrebutted. The inspector's notes made at the time of the inspection reflect that the service brakes would not stop the truck when it started down the inclined portion of the roadway where the inspector observed it (Exhibit G-4, pg. 6).

The respondent's arguments attacking the credibility and reliability of the "function test" conducted by the inspector in support of the violation are not well taken and they are rejected. In a number of reported cases interpreting the meaning of the term "adequate brakes," such determinations were made by the inspectors through their inspections of the braking systems where certain defects were noted, or by tests conducted on the trucks by operating them on inclines to determine their braking or stopping capability. These cases are discussed in my January 15, 1988, decision in Highwire Incorporated, 10 FMSHRC 22 (January 1988), and a summary of these cases follow below.

In Concrete Materials, Inc., 2 FMSHRC 3105 (October 1980), and Medusa Cement Company, 2 FMSHRC 819 (April 1980), Judge Melick and Judge Cook affirmed violations for inadequate brakes on haulage trucks based on tests conducted by the drivers by driving the trucks on inclines to determine their braking and stopping capability. In the Medusa Cement case, an MSHA inspector defined the term "adequate" as "capable of stopping and holding a loaded haul unit on any grade on the mine property." Judge Cook found that the test conducted by the inspector and his interpretation of the results obtained sufficiently established a prima facie case for inadequate brakes.

In Minerals Exploration Company, 6 FMSHRC 329, 342 (February 1984), Judge Morris affirmed an "inadequate brake" violation based on an inspector's observation that the cited water truck was "pulling very hard to the right." Testimony by the operator's foreman reflected that the brakes on the truck had been relined 2 weeks before the citation was issued.

In Turner Brothers, Inc., 6 FMSHRC 1219, 1259 (May 1984), and 6 FMSHRC 2125, 2134 (September 1984), I affirmed violations of section 77.1605(b), for inadequate parking brakes on a coal haulage truck and an endloader based on tests which consisted of parking the equipment on an incline and setting the brakes to determine whether they would hold. In both instances, the brakes would not hold the equipment, and I concluded that the brakes were inadequate. Judge Melick made similar findings in another Turner Brothers, Inc., case, 6 FMSHRC 1482, 1483 (June 1984).

In Wilmot Mining Company, 9 FMSHRC 684, 688 (April 1987), the Commission affirmed a judge's finding of a violation of section 77.1605(b), for inadequate defective brakes on a Terex front-end loader which was involved in a fatal accident. The judge's finding was based on evidence which indicated that the brake master cylinder and an auxiliary brake cylinder were very low in brake fluid, even though the brakelines, wheel cylinder and hydraulic brake lines were intact, i.e., they had not leaked because of the accident. When tested at operating speed, the loader would not stop within the normal expected distances. Rejecting the operator's contention that the evidence did not support the judge's finding as to the cause of the inadequacy of the brakes, the Commission stated in pertinent part as follows at 9 FMSHRC 688:

> To prove a violation of this standard, however, the Secretary is not required to elaborate a complete mechanical explanation of the inadequacy of the brakes. A demonstrated inadequacy itself may be sufficient. * * * Whatever the precise cause of the breaking defect, the evidence amply supports the judge's finding that the Terex was not "equipped with adequate brakes," in violation of the cited standard (emphasis added).

I conclude and find that the unrebutted and credible testimony of the inspector, including the brake functional test which was performed under his supervision and observation, and which I find was reliable, proper, and reasonable in the circumstances, establishes that the cited truck service brakes were inadequate within the intent and scope of section 77.1605(b). While it is true that section 77.1605(b), which requires trucks to be equipped with adequate brakes has no specific requirement that the brakes be serviceable, I conclude and find that any reasonable interpretation of the intent of this standard requires that the brakes perform the function for which they are normally designed when they are on the truck, namely to stop the truck under normal operating conditions when the brakes are applied. Under the circumstances, I further conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the violation IS AFFIRMED.

Fact of Violation

Section 104(d)(1) "S&S" Order No. 3334015, January 4, 1990 (Docket No. WEVA 90-180)

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 77.1605(b), for an inadequate parking brake on the same truck which was cited for inadequate service brakes. The cited standard required the truck to be equipped with parking brakes.

The inspector testified that after completing his test concerning the service brakes, and after the truck had come to a stop in the roadway swag, he asked the driver to back the truck up the incline and to put the truck in neutral gear and to apply the park brakes. When he did, the parking brake would not hold the truck and the truck "rolled back off" (Tr. 91). This test was conducted more than once, and each time, the brake would not hold the truck, and the driver informed him that the parking brake would not hold the truck. The inspector's notes made on January 4, 1990, reflect that the truck would not stop when the parking brakes were applied (Exhibit G-4, pg. 7).

As noted earlier, the respondent called no witnesses for any testimony concerning any of the violations in these proceedings, and the inspector's testimony stands unrebutted. The respondent's arguments with respect to the inadequate parking brake violation are the same as those advanced with regard to the inadequate service brakes violation. The respondent argues that section 77.1605(b) simply requires that a truck be equipped with a parking brake, and does not require that such a brake be adequate. I have previously rejected identical arguments made in connection with violations of section 77.1605(b). See: Turner Brothers, Inc., 6 FMSHRC 1219, 1253-154 (May 1984), where I

concluded and found that a reasonable application of this standard requires that a parking brake perform the function for which it is intended, namely, to hold the truck against movement while it is in a parking mode, regardless of where it is parked. See also: Thompson Coal & Construction, Inc., 8 FMSHRC 1748, 1758 (November 1986), upholding a violation for a defective parking brake on an end loader, where I stated as follows:

> Although the language of the standard implies that brakes other than parking brakes are to be adequate, I believe the clear intent of the standard is to be insure that all braking systems on such a piece of equipment be maintained serviceable and functionable so as to insure the margin of safety intended by the installation of these braking systems. Further, since the standard is obviously intended for the protection of the miners, any other interpretation would be contrary to the intent and purposes of the Act. * * * *

For the reasons stated in my findings and conclusions, concerning the inadequate service brakes violations, which I herein adopt and incorporate by reference, including my prior decisions in Turner Brothers, Inc., and Thompson Coal & Construction, Inc., supra, with respect to the interpretation and application of section 77.1605(b), to a parking brake on a piece of mobile equipment, the respondent's arguments in defense of the violation are rejected. In the instant case, the credible and unrebutted testimony of the inspector establishes that when the parking brake on the cited truck was applied by the driver with the truck stopped in neutral gear on an incline, the brake would not hold or prevent the truck from moving or rolling. Under all of these circumstances, I conclude and find that a violation has been established by a preponderance of the evidence, and IT 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).

In Halfway, Incorporated, 8 FMSHRC 8 (January 1986), the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

The respondent asserts that the inspector's "S&S" findings with respect to all of the violations "are rather incredible." In support of its conclusion, the respondent argues that the mining areas in question are remote, with little, if any, pedestrian traffic, and that the cited trucks are large and heavy

pieces of "off road" equipment that travel slowly. The respondent asserts that the miners are knowledgeable and experienced workers who do not customarily come near the trucks or place themselves at risk by going behind them. Under these circumstances, the respondent concludes that it is highly unlikely that any miners would be careless around the trucks, and that any accidents are highly unlikely. The respondent cites the testimony of the inspector who confirmed that there has never been an accident or injury at the mine due to faulty brakes or the lack of a backup alarm, and the inspector's confirmation of the fact that the truck drivers are competent. The respondent also produced a copy of a safety award issued by MSHA in 1988, for its "Outstanding Safety Record" for a number of employee hours worked without a lost workday injury (Exhibit R-B).

The respondent further argues that there was no indiscriminate foot travel near the cited trucks, and that except for service personnel, everyone would be in their vehicles. The respondent points out that the only time anyone would be near the trucks on foot would be during the lunch hour, and it finds "preposterous" and "incredible," the inspector's belief that miners or service personnel would be eating their lunch behind a truck while it was idling or that a driver would get in the truck and drive it in reverse during this time. The respondent concludes that the inspector's belief that an injury would result from the cited brake conditions is speculative and that the inspector admitted that "This is not a normal thing, but it can happen" (Tr. 92).

Backup Alarm Violation (Citation No. 3334094)

The inspector's unrebutted and credible testimony reflects that at the time of his inspection, two rock trucks, a backhoe, dozers, and scrapers were working in the pit where the cited truck was operating, and that the backhoe was loading the trucks with fill material which would be hauled out to another area. The inspector described the pit area as "small and congested," and he indicated that one truck had to wait on a ramp outside the pit while another one was being loaded in the pit. He confirmed that during the course of a shift, the cited truck would be backed up "on numerous occasions" (Tr. 24, 28, 36). He stated that a backup alarm emits a "loud, piercing-type alarm," that anyone hearing it would "automatically know something is backing up," and that the intent of an alarm is to prevent an accident in the pit area where the truck is working in close proximity of other equipment (Tr. 60, 63). The inspector confirmed that he has operated the same type of truck which he cited, and he stated that while one can see to either side of the truck through the rear view mirrors, the driver's view to the rear would be obscured and he cannot see directly behind him for any long distance (Tr. 31).

The inspector confirmed that when he was inspecting the backhoe during the lunch hour, he observed service personnel, and dozer and backhoe operators on foot, but he could not recall whether any of the trucks were in operation at that time (Tr. 25). He further confirmed that with the exception of service personnel and the other equipment operators, who would be on foot during the lunch hour, any other miners in the pit area would be in their vehicles (Tr. 50). The inspector expressed his concern with the people who would congregate for lunch near the truck, particularly since the truck was usually the last piece of equipment to come into the pit and park during the lunch hour. He indicated that the truck driver would either pull into the area where the miners were eating their lunch, or would back the truck up to park (Tr. 27-28). Although the inspector agreed that the people having lunch would see the truck coming into the area if they were looking at it, it was possible they would not see it if there was a lot of noise and they were not looking at it (Tr. 51). The inspector believed that any miners who may be in the proximity of the truck during the lunch hour could be run over if the driver, who sometimes leaves the engine running while having lunch, were to pull out and run over them (Tr. 63-65).

Aside from any hazard exposure to the miners having lunch, the inspector believed that the greater hazard associated with the absence of a backup alarm on the cited truck was in regard to service personnel who would be greasing, fueling, or otherwise servicing the truck in the pit. He confirmed that service personnel usually are on foot next to their own vehicles when they signal the truck driver to either pull in or back in for servicing, and he indicated that they may not be paying attention to the truck or the driver, but would have their attention on the truck while it was being serviced (Tr. 24, 28, 52). The inspector also confirmed that during the hauling and loading cycle in the pit areas, which he has observed, trucks regularly backed into position next to the backhoes and dozers while loading and dumping, and the equipment operators are usually on foot when the trucks are being positioned, or they may be on foot preparing to go to lunch (Tr. 23-24; 62).

The inspector further testified that in the course of normal mining operations, he has observed smaller vehicles operating in the pit, including a pickup used by the foreman who is regularly in and out of the pit, and small trucks used by the personnel who service the larger trucks. He confirmed that he has observed these smaller vehicles operating in the pit "a lot of times in and around these trucks" (Tr. 29-30). He believed that these smaller vehicles would be exposed to a hazard if they pulled in behind a truck and were not paying attention to it, or did not know whether the truck was preparing to move. The inspector believed that any injury to someone on foot or in a smaller vehicle which may be run over by a large rock truck "tends to be a fatal type injury" (Tr. 32). A rock truck backing over a

dozer, which is equipped with a protective canopy, would likely result in a "lost time accident rather than a fatality (Tr. 33).

Although the inspector agreed that the equipment operators working in the pit area, including the truck driver, were well-trained and competent operators, he confirmed that he was aware of two fatal accidents at other mining operations in his district. In one incident, a dozer operator backed up behind a coal truck and was run over and killed when he left his dozer and the truck backed over him. In the second, incident, a rock truck similar to the one he cited backed over a small pickup and killed the individual who was in it (Tr. 34-35). No testimony was forthcoming from the inspector as to whether or not the trucks involved in these incidents were equipped with backup alarms.

The inspector believed that it was reasonable to expect that the cited truck, which operated in the small and congested pit area where other equipment was also operated, could back over someone if they failed to hear the backup alarm (Tr. 22). Taking into consideration the congested pit area where the truck and other equipment would be operating, the presence of foot traffic and other smaller vehicles, and the hazard exposure which would be present in the absence of a backup alarm, the inspector concluded that it was reasonable to expect "that some time or other this truck would back over someone that wasn't aware that it was backing up because it had no alarm on it" (Tr. 32).

After careful consideration of the testimony of the inspector with respect to the hazard associated with the miners who were on foot in the pit area during their lunch break, I cannot conclude that there was a reasonable likelihood of an accident or injury with respect to these individuals. The inspectors conclusions that an accident or injury was reasonably likely in this scenario was based on a number of speculative variable, including the possibility that the miners would not see the truck if they were not looking at it, particularly if there were a lot of noise, and the possibility of the truck driver pulling out after completing his lunch and running over the other miners eating their lunch. There is no evidence as to the source of the "noise" alluded to by the inspector, and since the equipment would be idle while the operators were eating lunch, the only other possible noise source would be the truck pulling into the area. I have difficulty believing that the miners having lunch would not see the truck or would deliberately place themselves at risk by eating their lunch in close proximity to a truck with its engine running while it was parked or while it was backing in.

I conclude and find that the credible and unrebutted testimony of the inspector establishes that during a normal working shift before and after the lunch hour, the dozer and backhoe operators, as well as service personnel servicing the truck, would at various times be on foot in close proximity of the rock

truck which would be backing in for loading and dumping, and possibly for servicing. In the context of continuing mining operations, and in the absence of a backup alarm to alert or warn these individuals that the truck was backing up, particularly in a situation where the truck is operating in a small and congested pit area, and where the truck driver's view to the rear of the truck is obstructed because of the size of the truck, I believe that one may conclude that it would reasonably be likely that a serious injury or accident would result if the truck were to strike a dozer, backhoe, or the equipment operators on foot in close proximity to the truck. I further conclude and find that the inspector's conclusion that the violation was significant and substantial was proper and reasonable in the circumstances presented, and his finding in this regard IS AFFIRMED.

Service Brakes Violation (Order No. 3334014)

The inspector testified that the inclined haulroad where the truck operates was elevated approximately 45 to 50 feet from the bottom of the pit on the left-hand side of the road at an estimated grade of 7 to 10 percent. He stated that after a truck travels over the high knoll and proceeds down the roadway into the swag, the road intersects at that point with another approach road to the pit where there is "cross traffic" consisting of other equipment and other rock trucks. The haulroad is not wide enough to permit trucks to pass at all locations, and the intersection at the approach road is a "blind area" where one truck would have to stop in order to see another truck coming down the inclined roadway. Any equipment or personnel going into the pit area would use the approach road, and the "blind area" would be "more or less 100 feet" from the intersection (Tr. 94-97).

The inspector estimated that a loaded rock truck would be traveling 15 to 20 miles an hour down the inclined roadway, and that any traffic approaching the intersection would be traveling 20 miles an hour. In addition to the rock trucks using the roadway, the inspector stated that dozers, scrapers, and service personnel and foremen would be working in the approach road area or would be using that road at different times, and they would be exposed to a collision hazard as a result of inadequate service brakes on the cited truck in question (Tr. 98-100). The inspector also believed that the truck would be at risk when it was in the pit fill area while the driver was attempting to get as close to the edge of the fill as he can to dump, and although there is a berm at that location, if the driver cannot stop because he has no brakes, he could back over the edge of the fill (Tr. 100). Further, although the roadway is bermed with 40 to 50 inch berms, if the driver were to get into the berm he could go through it because a berm is only intended to retain a vehicle, and it is not high enough to prevent a loaded truck from going through it (Tr. 100-101).

The inspector confirmed that the service brakes were the only means of stopping the truck, and that the transmission retarders are not used (Tr. 101). In view of the weight and size of the truck, and the speed at which it would be traveling, it was his judgment that any truck collision would probably result in a fatality to anyone struck by the truck (Tr. 102).

Based on the credible and unrebutted testimony of the inspector, I conclude and find that the lack of adequate brakes capable of stopping the cited truck on the inclined portion of the roadway where it would normally travel in the course of a working shift presented a reasonable likelihood of an accident which would reasonably and likely be expected to result in injuries to the driver as well as to the other equipment operators and mine personnel exposed to such a hazard. The evidence establishes that the truck driver would be at risk if he were to travel over the edge of the pit fill area where he normally dumped his load if his brakes would not stop the truck, and he would also be at risk if he were to leave the inclined portion of the haulroad with a loaded truck and go through the berm. Further, both the driver and the other equipment operators using the pit approach road which intersected the haulroad on which the truck would be traveling would be at risk in the event of any collision resulting from the failure of the truck to stop because of inadequate service brakes. Under all of these circumstances, I conclude and find that the inspector's significant and substantial finding was reasonable in the circumstances presented, and IT IS AFFIRMED.

Parking Brake Violation (Order No. 3334015)

The inspector testified that while it was not normal for a truck driver to stop or park his truck on an inclined portion of the haulroad, "it happens lots of time" if the truck were to break down or break a drive shaft coming out of the pit (Tr. 92). The inspector confirmed that the mine terrain before any pits are developed is flat, but once the coal seam itself is developed, the pits are inclined areas and trucks hauling in and out of the pit area are operating in areas which are not level. He indicated that service work may be performed on the haulroad, but that the trucks normally load, travel, and dump from one end of the pit to the other end of the pit where the fill area is located (Tr. 67-68).

In his inspection notes of January 4, 1990, the inspector noted that according to the driver of the cited truck, the truck was usually parked in a dip area were it would not "roll off" (exhibit G-4, pgs. 7, 8). However, the inspector also noted that "if for some reason the truck had to be parked elsewhere (maybe catch on fire or break down) then there was not a brake to hold it. This made it reasonable to expect an occurrence. If the

truck did roll off the most severe injury that would occur would be fatal."

The inspector testified that one of the reasons which contributed to his "S&S" finding was the admission by the truck driver that he knew the parking brake would not hold the truck and that he had to find a "dip or low point" to park the truck so that it would not roll off (Tr. 103). The inspector also testified that the truck is parked near the backhoe if that piece of equipment is down for any reason, and that the truck is also parked in a number of areas where it may be serviced, and when the driver eats lunch. The transmission will not hold the truck while it is parked, and the service brake is the only means of holding the truck while it is parked (Tr. 103). If the truck were parked in the pit area, service personnel and other equipment operators who may be parked behind the truck would be exposed to a hazard if the truck were to roll. The inspector stated that the only level area in the pit "is right on the coal," and that the pit entrances and exits are inclined (Tr. 105).

The inspector suggested that a truck driver may leave his vehicle parked unattended if he were to have a break down, or that he may leave the truck to talk to people, or for some other reason. He believed that a driver might park his truck in an area that he believes is a low place, but that it may be slightly inclined and the truck might roll back to a lower place. He confirmed that he has observed a truck parked in a position where it could roll off while it was being serviced (Tr. 106-110). The inspector also believed that a truck parked in the area where miners are eating their lunch could roll off and place these miners at risk if they were down grade from the truck and the truck was pointed in their direction (Tr. 111-112). However, the inspector conceded that he did not observe any miners eating lunch within the "zone of danger" of the truck which he cited, but he confirmed that he has observed this situation with other rock trucks (Tr. 112). There is no evidence as to whether these other trucks had any inadequate brakes, and the inspector conceded that the driver of the cited truck informed him that he used special precautions as to where he parked the truck because he knew the parking brake would not hold (Tr. 106).

The inspector testified that it would be reasonable to expect that a fatality would occur if the truck were to roll off while it was parked because "if this truck runs over a person, it's more than likely he will kill that person" (Tr. 116). The inspector stated that the driver finds what he thinks is a low spot and stops the truck and that "if he is right, it will sit there, and if he's wrong, it will move" (Tr. 116). He believed that it would be reasonably expected that a truck would roll off

in the pit area where there are not many actual level spots (Tr. 116). The inspector confirmed that the mine has never experienced any accident or injuries because of any inadequate making brakes or service brakes, and that based on the history of any such incidents at the mine in question, no accidents have occurred (Tr. 141). The inspector also confirmed that he had no reason to question the driver's competency to inspect or operate the cited truck (Tr. 142).

After careful consideration of all of the testimony of the inspector, which stands unrebutted, I conclude and find that his determination that the violation was significant and substantial is correct. Although the inspector had no reason to question the driver's competency to drive or inspect the truck, I have serious reservations about the competency of a driver who would consciously operate a truck knowing that the parking brake (and service brakes) were inadequate. Although the driver indicated to the inspector that he normally does not park on an incline, and took special precautions in this case because the brakes would not hold, the fact remains that in the normal course of business, the driver would be traveling down an inclined roadway with inadequate parking brakes, as well as inadequate service brakes, and would likely place himself and others at risk.

There is no evidence to establish whether or not the area where the truck was parked during the lunch hour was inclined or level, and I find no reasonable basis for any conclusion that those miners were exposed to any hazard. Indeed, the inspector conceded that these miners were not within the "zone of danger." However, the inspector's testimony establishes that most of the pit areas where the truck would be stopped for servicing, or while loading and dumping, were inclined and not level, and he confirmed that he has personally observed trucks parked in a position where they could roll off and injure someone. Further, while it may be true that a truck may not normally be serviced on an inclined haulroad, in the event of an emergency or a breakdown on the inclined portion of the haulroad, the lack of an adequate parking brake, which was the only means of holding the truck while it was stopped or parked, would place the driver, and possibly other vehicle drivers who used the haulroad, at risk. Further, if the truck were parked or stopped in an inclined pit area in close proximity of other servicing and operational equipment, it could roll off and collide with such equipment. Under all of these circumstances, I conclude and find that this violation was significant and substantial, and the inspector's

finding IS AFFIRMED.

The Unwarrantable Failure Issues

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 7 IBMA 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. * * *

Backup Alarm Violation

The respondent argues that there is no proof of any unwarrantable failure in that the cited backup alarm was not proven to have been listed as broken or absent, and it is not known how long it was not in compliance--if at all. The petitioner argues that the circumstances presented indicates that the respondent displayed a high degree of negligence amounting to aggravated conduct in allowing the violation to occur. In support of this conclusion, the petitioner points out that on November 16, 1990 (sic), the inspector discussed the requirements of section 77.410(a)(1) with mine management and indicated his concern with the respondent's previous compliance with this standard, as reflected in its history of prior violations, and instructed the respondent that it needed to take affirmative steps to improve its compliance with this standard. I take note of the fact that the violation in question was issued on December 4, 1989, and considering the petitioner's assertion that only "days later" after the inspector spoke with management, the respondent permitted the truck to be operated without a backup alarm, the petitioner's statement that the inspector spoke to management on November 16, 1990, appears to be a clerical error.

The petitioner further argues that the situation presented is not one in which the alarm was present, and simply failed to function for mechanical reasons. Petitioner points out that the alarm, which should have been situated on the rear of the truck, in plain sight, was simply not there, and that the truck was operated for at least 6 hours on the day in question under conditions which should have made the violation obvious to everyone in the area.

The inspector testified that his review of the "mine file" prior to his inspection reflected that the respondent had previously been cited 10 times over an 8-month period "for this condition" (Tr. 36). His inspection notes confirm that he reviewed the history of prior violations, and found 10 prior citations of section 77.410, and he noted that "violations of 77.410 should be unwarrantable based on this history" (Exhibit G-1). The inspector testified that based on this history, he concluded that the respondent had failed to make an effort or take steps to develop and implement an equipment inspection program to preclude such violations. He stated that the history "exhibits what we call aggravated conduct on their part and we determined it to be unwarrantable conduct" (Tr. 36).

The inspector confirmed that he had a pre-inspection conference with the two representatives of mine management when he started his inspection on November 16, 1989, and that he discussed the respondent's safety program and the examination of its equipment, and pointed out that the respondent had received the 10 prior citations. The inspector confirmed that he advised

management that "if a condition did exist, it was an unwarrantable type condition," and that if a safety program was not developed any future citations "would have to be unwarrantable" (Tr. 16, 44-45). The inspector testified that when he began his inspection in November, the respondent did not have a safety program posted, but that a copy was found by the superintendent and it was then posted. The superintendent informed him that copies of the program were distributed to the employees with their pay checks, but the inspector indicated that he never saw the checks or the safety statements (Tr. 45).

The inspector further testified that any safety program should include some instructions or meetings with the equipment operators "to let them know when they have a problem" (Tr. 46). He confirmed that management informed him that safety meetings were held, and he confirmed that a safety program which was in booklet form, and which the respondent had "for a long period of time," was in fact posted (Tr. 47). The inspector confirmed that he never attended any safety meetings, and was unaware of any written materials concerning section 77.410, but he conceded that safety meetings may have been held (Tr. 47). He further confirmed that foreman Conner informed him that there were a lot of equipment breakdowns and repairs to be made and that he tried to "fix these things when they occurred on a priority basis" (Tr. 49). Although the inspector indicated that he was unaware of any retraining for the equipment operators with respect to section 77.410, he confirmed that they were well trained and competent equipment operators (Tr. 47, 50).

The inspector confirmed that the respondent utilizes the equipment operators to conduct the preshift of the equipment, and he agreed that if an operator does not inform management of any condition that needs attention, or does not record it, management would be unaware of it unless it were verbally communicated by the operator (Tr. 55-56). However, the inspector believed that the lack of a backup alarm should have been obvious to the backhoe and dozer operators working the pit, and that the working shift had been in operation for 6-hours prior to his inspection of the truck. He could not recall where the foreman was located on the day in question (Tr. 38).

The inspector confirmed that in the case of an alarm which may have been rendered inoperative because of a loose or pulled wire, he attempts to ascertain what may have happened. However, in the instant case, since he did not find any alarm on the truck, he could not recall any conversation with the foreman or the driver explaining the absence of the alarm (Tr. 70). He confirmed that the driver is required to examine his equipment before he operates it, and is required to fill out a pre-inspection safety checklist. However, in this case, he was not sure that the driver filled one out, and the foreman could not find one which is normally placed in his mailbox. The inspector

stated that the checklists filled out by the equipment operator at the start of his shift is placed in the box to be picked up at the end of the shift (Tr. 70-71). He also confirmed that this checklist system used by the respondent is required by state law (Tr. 72).

The inspector stated that section 77.404(a) requires the removal of unsafe equipment from operation, and that section 77.1606(c) requires the inspection of equipment for defects, and the recording of needed repairs. However, he did not cite the truck in question with any of these violations, but did cite some other pieces of equipment (Tr. 73).

The 10 previously issued section 77.410, citations reflects that they were all issued as section 104(a) citations. Six of the citations were "S&S," and they were issued at least 1 year earlier than the contested citation in this case. Four were non-"S&S" and were issued 7-months prior to the contested citation. The remaining violations for other standards were all issued as section 104(a) citations. This record does not reflect a history of unwarrantable failure violations.

The inspector confirmed that the respondent has approximately 20 pieces of mobile equipment on the day shift that are required to be equipped with backup alarms, and he considered the previously issued 10 citations for violations of section 77.410, over an 8-month period to be "unusually high" (Tr. 42-43). However, copies of these prior citations were not produced by the petitioner, and the conditions which resulted from those violations are not known, and there were is no evidence that any of these prior citations involved rock trucks. Absent such information, I am unable to determine whether or not the previously cited conditions resulted from the absence of a backup alarm, or whether the alarms were on the equipment, and simply did not function for some reason. In the context of negligence, such information would be relevant in determining whether or not the respondent totally ignored the requirement for installing backup alarms on its mobile equipment, or whether the alarms were installed, but failed to sound because of any adverse working conditions or unforeseen mechanical malfunctions.

On the facts of this case, I cannot conclude that the evidence presented by the petitioner establishes that the violation was an unwarrantable failure. Although the foreman and driver were both present, there is no evidence that the inspector made an attempt to ascertain why the alarm was missing, or the duration of its absence. Aside from the absence of any daily preshift report, which is apparently turned in by the driver at the end of the shift, there is no evidence that the inspector made any attempt to review any prior reports to determine whether or not the missing alarm had ever been reported, and there is no evidence that the driver was aware of the fact that the alarm was

missing, or whether he had reported it to the foreman. While it may be true that the absence of the alarm should have been noted during the course of the shift, the inspector apparently made no effort to interview any of the other equipment operators who may have been working in proximity of the truck while it was in the pit, and there is no evidence to establish that management was aware of the condition.

Notwithstanding the petitioner's arguments to the contrary during the course of the hearing, on the facts of this case, I believe that the inspector was strongly influenced by the fact that the respondent had been previously cited for violations of section 77.410. I further believe that the inspector's finding of unwarrantable failure borders on a per se finding based on prior history. In my view, unwarrantable failure and negligence are distinct concepts, and the application of prior history to these determinations must be considered in context, and not in the abstract. Although prior history may be relevant in any finding of unwarrantable failure or the degree of negligence, Youghiogheny & Ohio Coal Company, supra, at 9 FMSHRC 2011, I believe it is but one ingredient which may be considered, but it is not the sole determining factor. I reject any notion that simply because a mine operator has been previously cited for a violation of a mandatory standard, he may at some future time be considered per se guilty of "aggravated conduct" for any repeat violations, regardless of the time frames or the facts and the circumstances associated with those prior violations.

As noted earlier, the prior section 77.410 citations were issued 7 months or a year prior to the contested citation in this case, and the facts and circumstances surrounding the issuance of those citations are not in evidence. There is no evidence that any of those prior violations involved circumstances similar to those which were present in this case.

I find no credible evidentiary support for the inspector's belief that the respondent had no safety program, held no safety meetings or discussions with its equipment operators, and that the operators were not retrained. The inspector himself confirmed that the respondent had a long standing and posted safety program, and that the equipment operators were well-trained and competent. The unrebutted testimony of the respondent's only witness reflects that the respondent has a safety program, that its preshift inspection system was in compliance with state law, and that MSHA had bestowed a safety award on the company for an accident free safety record. With regard to the asserted lack of safety meetings, the petitioner simply has not met its burden of proving that safety meetings were not held, and the inspector apparently spoke to no equipment operators or other mine personnel in this regard.

I find no credible or probative evidence of aggravated conduct by the respondent in connection with this violation, and I conclude and find that the petitioner has failed to establish an unwarrantable failure violation. To the contrary, I conclude and find that the violation resulted from mine management's inattention and failure to exercise reasonable care. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) citation which he issued IS MODIFIED to a section 104(a) citation with significant and substantial findings, and as modified, the citation IS AFFIRMED.

Service and Parking Brake Violations

The respondent argues that the day shift truck operator repeatedly listed the brakes "OK," and that it is uncontested that the respondent had made extensive repairs and maintenance on the equipment in December, 1989, and that only minor adjustments were made after the violation was issued (exhibits R-1 and G-8). Under these circumstances, the respondent concludes that the truck was not neglected. The respondent also relies on my bench comments concerning the prior backup alarm citation, and whether or not a history of 10 prior citations may or may not support an unwarrantable failure violation (Tr. 76), in support of its argument concerning the cited brake conditions in this case.

The petitioner points out that section 77.1606(a) requires the inspection of haulage equipment by a competent person before the equipment is used, and that any equipment defects affecting safety must be recorded and reported to the mine operator. Section 77.1606(c) requires that all equipment defects affects safety be corrected before the equipment is used. The petitioner argues that the respondent selected truck driver Harold Johnson to inspect the truck in question, and that on January 2, 3, and 4, 1990, Mr. Johnson reported defects in both the service brakes and the parking brakes in his preshift examination reports (exhibit G-7). Since the reports are signed by foreman Grover Riddle, the petitioner concludes that mine management had actual knowledge of the defects, but took no action to correct the defects before the truck was used again.

In response to the respondent's contention during the hearing that there is no proof that a defect affecting safety was reported because the form filled out by Mr. Johnson merely indicates that the parking and service brakes "need corrected," the petitioner argues that the form provides space for equipment operators to remark on "any other mechanical or safety defects," and that the plain meaning of this language is that this space is used to remark on mechanical or safety defects other than those already listed on the form. The petitioner points out that the form is one which is used by the respondent to record and report safety defects as required by section 77.1606(a), and it concludes that when taken as a whole, the part which was filled out

by Mr. Johnson is intended to be used for the reporting of safety defects.

The "narrative findings" of the special assessment officer who assessed both of the brake violations, which are included as part of the pleadings filed by the petitioner, contain statements that "numerous citations have been issued during previous inspections at this mine for failure to maintain adequate service brakes and adequate parking brakes on mobile equipment."

Two memorandums dated March 6, 1990, from MSHA's district manager to the director of the Office of Assessments, state as follows:

> Operating unsafe defective equipment at this mine appears to be normal and allowed by the operator. MSHA inspectors have issued numerous citations for these conditions in the past and the operator has not initiated any corrective action to assure adequate brakes (and adequate parking brakes) are maintained on the equipment; therefore, an extraordinarily high degree of negligence was determined.

The petitioner's assertions that the cited brake violations were repetitious and that "numerous citations" have been issued at the mine for failure to maintain adequate service brakes and parking brakes are unsupported by any credible evidence and I have given it no weight. Aside from the fact that the petitioner produced none of the prior citations, the computer print-out reflecting the respondent's history of prior violations, submitted in WEVA 90-160, reflects no prior citations for violations of section 77.1605(b). Although the parties stipulated in WEVA 90-180, that the respondent has a "moderate history of prior violations" consisting of 43 assessed violations, no further information or evidence was forthcoming with respect to those violations. Further, the "assessed violations" history served on the respondent by the petitioner during discovery simply list the total number of assessed violations issued during 1987 through 1989, and it does not include a breakdown of those violations.

After careful review of all of the evidence and testimony adduced in this case, the only support that I can find for the inspector's unwarrantable failure findings lies in the equipment safety check lists signed by truck driver Johnson and countersigned by foreman Riddle. The inspector testified that when he spoke with Mr. Johnson on January 4, he informed him that the brakes were not working that day, as well as the previous two shifts, and that he had reported this on his checklists for all of these days (Tr. 127-128). The inspector's notes for January 4, reflect the following notation with respect to his conversation with Mr. Johnson: "When asked how long this condition had existed he said several shifts, specifically 1/4/90 and

the two preceding shifts. He said he had reported it each day on the check list" (Exhibit G-1, pg. 7). With respect to the preshift report of January 4, 1990, which Mr. Johnson showed to the inspector, the inspector's notes contain the following notation: "The condition was on the preshift check list and the company knew about it" (Exhibit G-1, pg. 9).

The inspector confirmed that he discussed the brake conditions with foreman Riddle on January 4, but he could not recall the specifics of that conversation. With regard to the daily examination record books, the inspector's notes contain the following notations: "When Grover Riddle was asked to show the daily examination record book he did not have one. He said the book was in Jack Wilfong's truck which was not at the mine and he did not have any other book at the mine" (Exhibit G-1, pg. 10). The notes reflect that the inspector issued a citation, and I assume it was for not having the examination book at the mine.

The inspector confirmed that he did not speak with the day shift truck driver Roach, and that he did not see the safety check list reports filled out by Mr. Roach, or the check lists filled out by Mr. Johnson for January 2 and 3, until the hearing in this case. Even if he had seen them, they would not have changed his mine because he was confident that the truck tests indicated that "those brakes weren't good" (Tr. 137-138).

The inspector further confirmed that Mr. Riddle informed him that superintendent Wilfong picked up the checklists from the mailbox and took them with him when he left the mine on the evening of January 4, (Tr. 152). The inspector explained that except for the January 4, check list which Mr. Johnson showed him that day, and since the other reports were not at the mine, he did not at that time know that Mr. Riddle had countersigned the previous reports and had no reason for discussing them with him. With regard to Mr. Johnson's January 4, check list report, the inspector stated that Mr. Johnson produced it that same day and that Mr. Riddle signed it at the time it was produced by Mr. Johnson (Tr. 154). The inspector confirmed that Mr. Riddle then informed him that he was not aware that the brakes would not hold the truck on the hill, but that he did not discuss with Mr. Riddle the reasons for his failure to do anything about it earlier (Tr. 154).

The record reflects that the day shift driver Roach marked his check lists for January 2, 3, and 4, 1990, "OK" in the spaces provided for reporting the condition of the service brakes and parking brakes, and that evening shift driver Johnson marked each of his lists for those same days "Needs Corrected" (Tr. 119-122). In explaining the contradictory reports made by the two drivers of the same truck, the inspector stated "some operators just won't report that stuff, some will. That's the reason" (Tr. 122). With regard to the earlier backup alarm violation, the

inspector suggested that an equipment operator may not report a defective condition because there may not be an extra truck for him to drive, and if he were unable to do any work, he would be sent home (Tr. 106-107).

The evidence in this case reflects that the safety check list system used by the respondent required the equipment operator to check his equipment and to fill out the form at the beginning of his shift and to turn it in at the end of the shift. With regard to Mr. Johnson's check list for January 4, 1990, it would appear from the inspector's testimony that Mr. Johnson produced this report before his shift ended and after the inspector asked about it, and that Mr. Riddle signed it immediately. Under these circumstances, insofar as that day is concerned, I cannot conclude that Mr. Riddle had prior knowledge that Mr. Johnson had checked the brake conditions as "Needs Corrected."

With regard to the check lists signed by Mr. Johnson on January 2 and 3, 1990, they are both countersigned by Mr. Riddle, and they were received in evidence without objection. Absent any evidence to the contrary, and based on the unrebutted testimony of the inspector, I conclude and find that Mr. Johnson submitted these reports to mine management and that foreman Riddle, for at least two working shifts prior to the inspection, knew or should have known that the service and parking brakes needed attention, or "Needs Corrected," as that phrase appears on the face of the forms. Under these circumstances, and as the responsible foreman, Mr. Riddle had a duty to at least inquire further as to the condition of the brakes, or to otherwise take corrective action to insure that the brake conditions which had been reported to him over a 2-day period were taken care of. Although a maintenance work report reflects that some work had been done on the cited truck on January 2 and 3, 1990 (Exhibit G-8), I find nothing on that report to establish that any brake work was done on those days.

The fact that day shift driver Roach marked his safety check lists "OK" for the two prior shifts of January 2 and 3, 1990, is in my view irrelevant to the question of foreman Riddle's prior knowledge of the brake conditions as reported by Mr. Johnson. Mr. Roach and Mr. Riddle worked on different shifts, and Mr. Roach's check lists are countersigned by superintendent Wilfong, and not Mr. Riddle. Under the circumstances, there is a strong presumption that Mr. Riddle had no knowledge that Mr. Roach found the truck brakes "OK," and any suggestion by the respondent that it relied on Mr. Roach's "OK" assessment of the brake conditions, or that this excuses Mr. Riddle's failure to act, is rejected. Insofar as Mr. Riddle is concerned, I conclude and find that his failure to act after he knew that the truck brakes in question needed attention was inexcusable and constituted a lack of due diligence to follow up on some potentially

hazardous brake conditions which he knew or should have known existed for at least two shifts prior to the inspection of January 4, 1990. I further conclude and find that Mr. Riddle's failure to take any action constitutes aggravated conduct with respect to both brake violations. Under the circumstances, the inspector's unwarrantable failure findings with regard to the service brakes and parking brake violations ARE AFFIRMED.

The Unwarrantable Failure "Chain"

In its posthearing brief, the respondent argued that the petitioner failed to prove the section 104(d) "chain" as to all three violations. Section 104(d)(1) of the Act authorizes an inspector to issue an unwarrantable failure citation if he finds a violation of any mandatory safety standard which does not constitute an imminent danger, but does involve conditions which the inspector believes are significant and substantial and which he believes resulted from an unwarrantable failure by the mine operator to comply with the requirements of the cited standard. Section 104(d)(1) further authorizes the inspector to issue an unwarrantable failure order if, during the same inspection, or any subsequent inspection conducted within 90 days after the issuance of the initial unwarrantable failure citation, he finds another violation of any mandatory safety standard which he believes was also caused by an unwarrantable failure by the operator to comply.

The record in this case reflects that the section 104(d)(1) unwarrantable failure citation issued by the inspector was issued on December 4, 1989. The two unwarrantable failure orders were subsequently issued by the inspector 30 days later on January 4, 1990, and in each instance the inspector noted on the face of the orders that they were based on the previously issued underlying section 104(d)(1) citation. The inspector's unrebutted and credible testimony establishes that there were no intervening "clean" inspections, that "90 days did not go by without another order. The 90 day period has to elapse before you get off that chain." Under all of these circumstances, I conclude and find that the citation and orders issued by the inspector were procedurally correct, and that all of the "chain" requirements found in the Act for the issuance of such citations were followed by the inspector. However, in view of my vacation and modification of the initial underlying section 104(d)(1) citation relied on by the inspector to support his subsequently issued section 104(d)(1) orders, those orders ARE MODIFIED to section 104(d)(1) citations, with "S&S" findings, and as modified, they ARE AFFIRMED.

History of Prior Violations

The parties have stipulated that the respondent has a moderate history of prior violations and I have taken this into account in these proceedings.

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

The parties stipulated that the respondent is a moderate size mine operator. Although the respondent's secretary/treasurer Gomer believed that payment of the proposed civil penalty assessments will affect the "viability" of the company, he conceded that it would probably not put it out of business. Although the financial balance sheets produced by Mr. Gomer show an accrued loss, the accompanying letter by the C.P.A. who prepared the reports contains a disclaimer with respect to any opinion concerning the financial statements taken as a whole, and the respondent has not produced any tax returns or net worth statements relative to its current financial condition. In the absence of any further credible evidence to the contrary, I cannot conclude that payment of the civil penalty assessments which I have made for the violations which have been affirmed will adversely affect the respondent's ability to continue in business.

Negligence

On the basis of my unwarrantable failure findings and conclusions with respect to the two brake violations, I conclude and find that these violations resulted from a high degree of negligence on the part of the respondent, and the inspector's findings in this regard are affirmed. With regard to the backup alarm violation, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary and moderate negligence.

Gravity

In view of my "significant and substantial" (S&S) findings, I conclude and find that all of the violations which have been affirmed were serious.

Good Faith Compliance

The parties stipulated that the violations were timely abated by the respondent, and I have taken this into consideration in these proceedings.

Civil Penalty Assessments

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 the following civil penalty assessments are reasonable and appropriate.

Docket No. WEVA 90-160

Citation No.	Date	30 C.F.R. Section	Assessment
3334094	12/04/89	77.410(a)(1)	$275

Docket No. WEVA 90-180

Citation No.	Date	30 C.F.R. Section	Assessment
3334014	01/04/90	77.1605(b)	$650
3334015	01/04/90	77.1605(b)	$350

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions and order. Payment is to be made to MSHA, and upon receipt of payment, these cases are dismissed.

George A. Koutras
Administrative Law Judge