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SOL (MSHA) v. ANTHONY MINING
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Federal Mine Safety and Health Review Commission
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. LAKE 90-87 A.C. No. 33-01314-03519
v.	
ANTHONY MINING COMPANY, RESPONDENT	Island Creek # 43 Strip Mine

DECISION

Appearances: Kenneth Walton, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Petitioner;
Gerald P. Duff, Esq., HANLON DUFF & PALEUDIS CO., LPA, St. Clairsville, Ohio, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns 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), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The respondent filed an answer contesting the alleged violations, and a hearing was held in Steubenville, Ohio. The parties did not file posthearing briefs, but I have considered their oral arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the standards as alleged in the proposal for assessment of civil penalties, (2) whether the violations were "significant and substantial," and (3) the appropriate civil penalties that should be assessed based on the civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. 30 C.F.R. 77.1605(b) and 77.1606(c).

4. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. The Anthony Mining Company is an "operator" as defined in 3(d) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. 802(d).

3. The Anthony Mining Company is a small operator.

4. The Island Creek #43 Strip Mine of the Anthony Mining Company is a mine as defined in 3(h) of the Mine Act, 30 U.S.C. 802(h).

Discussion

The alleged violations in this case all concern one piece of equipment; a Willys jeep with a water pump mounted on the cargo bed behind the driver's cab. Two of the three section 104(a) "S&S" citations issued on February 15, 1990, were issued for violations of mandatory safety standard 77.1605(b), because the service brakes and parking brake were not maintained in good operating condition in that the service brakes would not stop the jeep and the parking brake could not be applied. The third citation was issued for a violation of mandatory safety standard 77.1606(c), because the windshield wiper arms and blades wer missing and the wiper motors were inoperative. The inspector noted that it was raining at the time the violative conditions were observed and cited.

Petitioner's Testimony and Evidence

MSHA Inspector B. Ray Marker testified that he inspected the jeep in question on February 15, 1990, in the course of his inspection of the respondent's strip mine. He stated that the jeep was located in the pit area where coal was being loaded. A water pump used to pump water from the pit was mounted on the jeep, and he was informed that the pump had a defective seal

(Tr. 9-13). He observed an employee walking towards the jeep, and when he asked him what he was going to do, the employee advised him that he was going to move it out of the way because another pump was being brought to the pit. Mr. Marker then decided to inspect the jeep, and when he asked the employee to try the brakes, "the brake pedal went to the floor and there was no indication of any service brake whatsoever" (Tr. 14). He then asked the employee to apply the parking or emergency brake and "for some reason the park brake could not be applied". Mr. Marker then looked at the windshield and observed that the wiper blades and arms were missing from the motor and that the wiper motors would not work. He then issued a section 107(a) closure order to prevent anyone from moving the vehicle (Tr. 14, Exhibit P-1).

Mr. Marker stated that the jeep key was in the ignition and that the jeep could be driven and it was available for use. He spoke with pit foreman John Sperlaza who acknowledged that he was aware of the brake problems. Mr. Marker confirmed that another pump was brought to the pit, and the cited jeep was towed away (Tr. 14-15). Mr. Marker confirmed that he issued the citations in question because of the conditions which he observed (Tr. 16, 20, 23; Exhibits P-2 through P-4).

On cross-examination, Mr. Marker stated that he has never observed the jeep in operation anywhere at the mine site, and he confirmed that the pump was attached to the jeep and that "the purpose of the piece of equipment was for the water pump" (Tr. 26). He identified the employee that he spoke with as Denver Ray, and he confirmed that Mr. Ray did not start the vehicle until he (Marker) approached it. He stated that he has no evidence to contradict the fact that the jeep may have been towed to the pit, rather than being driven, and he confirmed that he never observed the jeep in any accident at the mine (Tr. 28).

Mr. Marker stated that the violations in question would be "significant and substantial" only if the jeep were operated out of the pit area and on the haul road leading in and out of the pit. There was no probability of any accident occurring in the pit area where the pump would normally be located (Tr. 28). He stated that the jeep had three forward and one reverse gears, that it would not be driven at much of a speed, and if driven in low gear it would be operated in a relatively slow powered gear. Under normal conditions, the jeep could be reasonably driven slowly by using the clutch and low gear (Tr. 29). Mr. Marker had no reason to believe that the jeep was driven on the day of his inspection (Tr. 30). Mr. Ray and one other individual were the only people in the pit. There would be no need for windshield wipers if the vehicle was not going to be operated, and he did not personally test the brakes, and simply visually observed them (Tr. 31).

In response to further questions, Mr. Marker stated that he assumed that the jeep would be driven out of the pit because the key was in the ignition and Mr. Ray started it as he (Marker) walked toward the jeep. Mr. Ray told him that the pump was going to be moved out of the pit, but he did not say that the jeep was going to be driven out (Tr. 32-33). Mr. Marker stated that the pump occupied most of the jeep cargo space, and with the exception of some additional water hose, he did not believe that the jeep could be used for hauling supplies. He confirmed that the jeep would be a "fixed object" in the pit while the pump was being operated and until it was relocated to another area. He did not know how long the brake conditions had existed and he checked no records or inspection reports (Tr. 35-37).

Mr. Marker believed that Mr. Ray moved the jeep forward a few feet when he asked him to test the brakes, and "it came to a coasting stop on its own". Mr. Marker also stated that "the brake went clear to the floor and that was enough for me" (Tr. 38). He confirmed that other than moving the jeep from one pit area to another over the haul road, the jeep would not normally be operated on the haul road (Tr. 39). If the jeep were parked with a workable pump, he would have only inspected the pump engine guarding. However, since the pump could not be used, he was concerned that the jeep would be used for transporting that pump (Tr. 40).

Mr. Marker confirmed that the jeep had a tow bar attached to the front bumper, and he indicated that Mr. Ray and another individual (Brown) told him that they did drive the jeep. He (Marker) also confirmed that the pit terrain was reasonably level with a grade 300 to 400 feet long coming out of the pit. The only occasion for using the parking brake would be for an emergency, and the jeep was towed from the premises and dismantled (Tr. 42,44). Mr. Marker also confirmed that he had no reason to believe that the jeep was used routinely for anything other than pumping water (Tr. 43). When he initially spoke with Mr. Ray, he saw no other vehicle present which would have been used to tow the jeep, but after speaking with Mr. Sperlaza a vehicle was brought in to tow the jeep (Tr.46).

Respondent's Testimony and Evidence

Pit foreman and heavy equipment operator Denver O. Ray, Jr., testified that his job on February 15, 1990, was to take care of the water pump mounted on the jeep and to insure that it was pumping water. He stated that the jeep was initially towed to the pit area by mine foreman J. C. Schiappa with his pickup and parked at the location where it was observed by the inspector. He confirmed that the jeep was equipped with a tow bar, and he denied that he ever drove or intended to drive the jeep that day. He explained that prior to the inspector's arrival, the back hoe operator informed him that the pump seal was defective and that

the pump was not operating. He then made preparations to bring in another pump and arranged for Mr. Schiappa to bring in his pickup so that the jeep could be towed out of the pit and the pump taken to the machine shop to be repaired (Tr. 52-54).

Mr. Ray denied that he intended to drive the jeep out of the pit, and he stated that he told Inspector Marker that the jeep was going to be towed out. He further stated that he started the jeep after the inspector told him to start it, and that he did so because he believed the inspector wanted to inspect it (Tr. 55). He stated that the jeep was not used to transport men or material that day and that it was towed out with a tow bar with Mr. Schiappa's pickup. The jeep had been parked in the pit for a week or two pumping water so that the main coal seam could be tapped and loaded out (Tr. 56).

On cross-examination, Mr. Ray admitted that he had previously driven the jeep approximately two weeks prior to the inspection by Mr. Marker. He stated that he had brakes when he drove it and that the brake pedal went about "halfway down". He was the only person to drive the jeep and he has never hit anything while driving it. He stated that the jeep only served as a stand for the pump because the jeep wouldn't start and Mr. Schiappa had to push it into position with his truck (Tr. 59). He asserted that he only started it after the inspector told him to get in and start it (Tr. 59). He confirmed that the brake pedal "went to the floor" and the parking brake and windshield wipers did not work (Tr. 60).

In response to further questions, Mr. Ray stated that he usually drove the jeep in first gear no more than five miles an hour and that he drove it from where it is usually parked "at the top of the hill" to the pit. The jeep was only used in the pit area to pump water and it was never used to transport men or materials. The jeep is usually blocked by placing rocks under the wheels when it is parked (Tr. 61-63).

Foreman John C. Schiappa testified that he was informed sometime between 9:00 a.m., and 9:30 a.m., on February 15, 1990, that the pump in question had quit pumping. He issued instructions to have another pump taken to the pit, and he assigned employee Bill Weaver to drive his pickup truck to the pit to tow out the jeep with the defective pump. The pump had been pumping water for 10 to 12 days before the inspection and it had not been moved from its location in the pit. The jeep was equipped with a tow bar and it was customarily towed in and out of the pit at times (Tr. 65-67).

On cross-examination, Mr. Schiappa stated that the jeep was originally driven to the pit, and that "at times" the jeep was driven and towed to the pit area. He stated that in the winter season the jeep wouldn't start, and that when it was driven to

the pit prior to the inspection, "the brakes were in good shape", and there were "no problems as far as stopping". However, he acknowledged that he did not know how far the brake pedal went down because he did not drive the jeep, and he had no personal knowledge of the condition of the brakes. He confirmed that there were no windshield wipers on the jeep (Tr. 68-69).

In response to further questions, Mr. Schiappa stated that when the jeep was driven it was only driven for a distance of one-tenth to two-tenths of a mile, and then towed into the pit. The pump would only leave the pit area when it was in need of repair and it was always towed to the repair shop. He considered the jeep to be a stand for the pump rather than a piece of mobile equipment. The pump was bolted to the bed of the jeep and it could be unbolted and removed from the jeep. If this were done, the jeep would be used as a standby for another pump (Tr. 70-73).

Findings and Conclusions

Fact of Violation - Citation Nos. 3130674 and 3130675

The respondent is charged with two violations of mandatory safety standard 30 C.F.R. 77.1605(b), because of its failure to maintain the jeep service brakes and parking brake in good operating condition. Section 77.1605(b), provides as follows:

> Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

During the course of the hearing, respondent's counsel advanced an argument that the cited jeep was not a vehicle which was normally operated in the pit, that it was not being used as a mobile piece of equipment, and that it simply served as a stand for the water pump (Tr. 50-51). Notwithstanding his statement that "obviously a Willys jeep is mobile", counsel argued that section 77.1605(b), "talks basically about trucks, front-end loaders, and rock trucks out on the haulageway" (Tr. 80). Since the jeep traveled at most a tenth of a mile to two-tenths of a mile, and was generally towed into and out of the pit, counsel characterized the jeep as "a glorified platform stand with the pump", and he concluded that within the express language of the regulation, or the spirit of the regulation, the jeep was not used as a piece of mobile equipment (Tr. 80).

The term "mobile equipment" is not defined in Part 77 of the regulations. However, it is defined in the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, at page 719, as follows:

> Applied to all equipment which is self-propelled or which can be towed on its own wheels, tracks, or skids.

The respondent's suggestion that the cited jeep was not a piece of mobile equipment subject to the requirements of section 77.1605(b) is rejected. Apart from the modification made to the jeep to accommodate the water pump in the cargo area behind the driver, there is no evidence that the jeep was other than a self propelled vehicle which was sometimes driven and sometimes towed to and from the pit area. Although it may have been driven a relatively short distance from the area where it was normally parked to the pit area, it did travel over the regular haulage road used by other vehicles. Further, although the jeep may have been parked at the pit site for as much as ten days while the pump was pumping water, there is no evidence that the jeep was a permanent fixture at any one location in the pit. Indeed, the evidence shows that the jeep was moved in and around the pit area as needed so that the pump could pump water, and when it was moved from place to place it usually traveled over portions of the haul road.

Contrary to the respondent's assertion in its answer of July 3, 1990, that the jeep was never driven, both Mr. Ray and Mr. Schiappa admitted that the jeep was sometimes driven, and sometimes towed, to and from the pit area. Further, if the pump were unbolted and removed from the rear of the jeep, the jeep could be used as a "standby" vehicle for another pump, and I find nothing to suggest that it could not be used for other purposes. Under all of these circumstances, I conclude and find that the cited jeep was a piece of "mobile equipment" within the scope and intent of section 77.1605(b), and that the brake requirements found in this regulation applied to the jeep.

The uncontroverted and credible testimony of Inspector Marker establishes that at the time of his inspection of the jeep, and after requesting Mr. Ray to depress the service brake, the brake pedal went all the way to the floor and the inspector found no indication that the brakes were operational. The inspector's belief that Mr. Ray may have moved the jeep forward a few feet while testing the service brake and that the jeep "came to a coasting stop on its own" is unrebutted. In fact, Mr. Ray testified that "after he made me start it up and take off with it, the pedal went to the floor" (Tr. 60). This corroborates the inspector's testimony that after Mr. Ray started the jeep, he moved and depressed the brake pedal, and that the pedal went to the floor and the jeep coasted to a stop.

Although Mr. Ray testified that the jeep "had brakes" when he drove it approximately two weeks prior to the inspection, and that the brake pedal went "halfway down", the fact remains that at the time the inspector observed the brakes with Mr. Ray behind the wheel, the brake pedal went to the floor and would not stop the vehicle when Mr. Ray moved it forward. Further, although Mr. Schiappa testified that the jeep brakes were in "good shape" and that there were "no problems as far as stopping" when the

jeep was originally driven to the pit prior to the inspection, he conceded that he did not drive the jeep, did not know how far the pedal went to the floor, and that he had no personal knowledge of the condition of the brakes.

The evidence in this case establishes that the jeep was equipped with a parking brake, but for some unexplained reason the brake could not be activated. Although section 77.1605(b), only requires mobile equipment to be equipped with a parking brake, and has no specific requirement that the brake be adequate or serviceable, I conclude and find that the intent of the standard is to insure the margin of safety intended by the installation of the parking brake on the equipment, and that any reasonable application of the standard requires that a parking brake be maintained in serviceable and functional condition. See: Thompson Coal & Construction, 8 FMSHRC 1748 (November 1986); Turner Brothers, Inc., 6 FMSHRC 1219, 1253 (May 1984). Further, in Wilmot Mining company, 9 FMSHRC 684 (April 1987), in affirming a judge's finding of a violation of section 77.1605(b), the Commission stated 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 braking 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).

In view of the foregoing, and based on a preponderance of all of the testimony and evidence adduced in this case, I conclude and find that the petitioner has established that the cited jeep service brakes and parking brake conditions constituted violations of the cited mandatory safety section 77.1605(b). Accordingly, the citations issued by Inspector Marker ARE AFFIRMED.

Fact of Violation - Citation No. 3130676

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 77.1606(c), because of the missing jeep windshield wipers and inoperative wiper motors. Section 77.1606(c), states that "Equipment defects affecting safety shall be corrected before the equipment is used".

The respondent has not rebutted the uncontroverted evidence that the jeep windshield wiper arms and blades were missing and that the wiper motors were inoperative. However, during the course of the hearing the respondent's counsel argued that there is no evidence that the jeep was going to be driven in the rain

on the day of the inspection (Tr. 79). Petitioner's counsel argued that the jeep was available for use because the keys were in the ignition and that it was in fact started. Counsel further asserted that it was obvious that Mr. Ray was going to move the jeep because he was inside it for the purpose of moving it in order to make room for another pump. Under these circumstances, counsel concluded that that there is an inference that the jeep was driven (Tr. 78-79; 81).

Although the jeep was "used" in the sense that it was parked and blocked at the location where the pump was pumping water until it stopped pumping and Mr. Ray and Mr. Schiappa were preparing to tow it away, there is no evidence that the jeep was ever driven with the missing windshield wipers and inoperative wiper motors. I conclude and find that the missing windshield wipers and inoperative motor "defects" would only "affect safety" while the jeep was being driven with reduced visibility in inclement weather or during a rain, rather than while it was parked and blocked for any length of time while the pump was operating. I further conclude and find that in order to establish a violation there must be some credible evidence to establish, or at least to support a reasonable inference, that the jeep was driven with defective equipment which affected safety, and that the respondent failed to correct the defective conditions before allowing the jeep to be driven. On the facts and evidence presented in this case, I conclude and find that there is insufficient evidence to establish that this was the case.

There is no evidence as to how long the windshield wiper condition had existed prior to the inspection, and Mr. Marker confirmed that he did not check any maintenance or other records, and he apparently did not pursue this issue further. He stated that if the jeep were not driven there would be no need for windshield wipers. Mr. Marker confirmed that Mr. Sperlaza acknowledged that he was aware of the brake problem, but there is nothing to indicate that Mr. Sperlaza was aware of the windshield condition.

Although the evidence establishes that the jeep was driven approximately two weeks days prior to the inspection, there is no evidence that the windshield wipers were defective when it was driven. The inspector's assumption that the jeep was going to be driven out of the pit was based on the fact that the keys were in the ignition. However, the respondent's witnesses testified credibly that the jeep was going to be towed and not driven out of the pit area. The inspector conceded that Mr. Ray never told him that he was going to drive the jeep out, and he also confirmed that the jeep had a tow bar attached to the front bumper and that it was in fact towed away.

The petitioner's conclusion that Mr. Ray was going to move the jeep to make room for another pump is based on counsel's assertion that Mr. Ray was inside the jeep. Counsel's conclusion that this supports an inference that the jeep was driven is also based on this asserted fact (Tr. 78-79; 81). However, after reviewing the testimony in this case, I cannot conclude that it clearly establishes that Mr. Ray was inside the jeep preparing to drive it out of the pit area at the time the inspector first observed the vehicle.

Inspector Marker testified that he was sitting in his car watching the mining operation when he first observed Mr. Ray walking towards the jeep, and that when he (Ray) "went to get in", Mr. Marker asked him what he was going to do, and Mr. Ray told him that he was going to move the jeep out of the way because another pump was being brought to the pit (Tr. 13). At that point, Mr. Marker advised Mr. Ray that he wanted to inspect the jeep, and Mr. Marker conducted his inspection of the brakes while "the employee was in the jeep" (Tr. 13). Mr. Marker later testified that the jeep was not started until he approached it (Tr. 27; 31). Viewed in this light, I cannot conclude that Mr. Marker's testimony establishes that Mr. Ray in fact drove the jeep, or that it supports any reasonable inference that the jeep was driven. Even if one could conclude that Mr. Ray intended to drive the jeep, there is absolutely no credible evidence that he did, and the inspector conceded this fact.

In view of the foregoing findings and conclusions, I cannot conclude that the petitioner has established a violation of section 77. 1606(c). Accordingly, the citation issued by Inspector Marker IS VACATED.

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 small mine operator and I find nothing to suggest that the payment of the civil penalty assessments for the violations which have been affirmed will adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner submitted a computer summary of assessed and paid violations for the period February 15, 1988, through February 14, 1990, and prior to February 15, 1988. The information reflects that the respondent paid civil penalty assessments in the amount of $1,634, for 24 violations issued during the 2-year period in question, and that prior to February 15, 1988, the respondent paid $989 for 20 violations. There is no evidence that the respondent has been cited for prior violations of the same standards cited in this case. Based on

the information provided, I cannot conclude that the respondent's compliance history is such as to warrant any additional increases in the civil penalties which I have assessed for the violations which have been affirmed.

Good Faith Compliance

The evidence establishes that the cited jeep was immediately removed from the mine site and scrapped. I conclude and find that the respondent rapidly abated the violations in good faith.

Negligence

Citation No. 3130674 (service brakes)

Inspector Marker confirmed that he based his "high negligence" finding on the fact that pit foreman Sperlaza admitted that he was aware of the brake problem (Tr. 20). I take note of the fact that in its answer of July 3, 1990, the respondent admitted that the pit foreman was aware of the brake problem, but took the position that the vehicle was always towed to the pit and never driven. However, the evidence shows that the jeep was at times driven as well as towed, and Mr. Schiappa admitted that it was driven to the pit before the inspection. Under the circumstances, I agree with the inspector's high negligence finding, and it IS AFFIRMED.

Citation No. 3130675 (parking brake)

Inspector Marker testified that he based his "moderate negligence" finding on the fact that pit foreman Sperlaza had no knowledge that the jeep parking brake could not be engaged. However, he believed that the respondent, as the mine operator, was responsible for having the equipment checked by a competent person, and that all defects found are required to be reported so that they may be corrected (Tr. 22). I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care. I agree with the inspector's negligence finding, 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 order to establish that a violation is significant and substantial, the petitioner must prove the following: (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. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984); United States Steel Mining Company, 7 FMSHRC 1125, 1129 (August 1985), and the cases cited therein. The operative time frame for determining whether a reasonable likelihood of injury existed "must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations". Halfway, Incorporated, 8 FMSHRC 8, 12 (January 1986).

The respondent's counsel argued that the brake violations were not significant and substantial because there was a minimal mobile use of the jeep, it was unlikely that the parking brake condition would result in an accident, the jeep was driven no more than five miles an hour, at most for a distance of tenth of a mile, and only two people were working in the pit area. Counsel further pointed out that the evidence establishes that the jeep was not going to be driven, that it was towed, and that the chances of anything happening "were certainly more than remote" (Tr. 81). The petitioner's counsel took the position that the inspector's "S&S" findings were appropriate (Tr. 82).

Citation No. 3130674 (service brakes)

Inspector Marker believed that a "permanently disabling" injury was "highly likely" because he observed several large "off road" haulage and dump trucks in operation at the time of his inspection and if the jeep were taken out of the pit "with all of this activity going on" it was highly likely that there would be an accident due to the defective brake problems and lack of control in stopping the jeep (Tr. 18). The defective brake condition would contribute to "the severity of the event" because the vehicle could not be stopped, and if an accident were to occur, it was reasonably likely that it would result in a permanent disabling injury. For these reasons, he believed that the violation was "significant and substantial" (Tr. 19).

Citation No. 3130675 (parking brake)

Inspector Marker believed that the inability to activate the parking brake would "reasonably likely" result in an accident and injury because of the inability to control or stop the vehicle. However, he believed that the lack of a parking brake would only involve the cited jeep rather than other vehicles because the jeep could be stopped by running it into a berm provided on the haul road or in the spoil area (Tr. 21). He did not believe that

this violation was as serious as the service brake violation because the vehicle backing into a berm or spoil pile without a parking brake would probably or possibly only result in a "lost work day or restricted duty" injury (Tr. 22). He believed the violation was "significant and substantial" because "we have a control problem which increases the possibility of something happening" (Tr. 22).

The credible testimony of the respondent's witnesses establishes that the jeep in question was used to transport the water pump to and from the pit, and that while the jeep was parked the wheels were blocked with rocks. Although the jeep could have been used to transport men and materials, I find that this could only happen if the pump were unbolted and removed from the cargo area. However, there is no evidence that the jeep was ever used for anything other than transporting the pump, and the inspector had never observed the jeep being driven, and he had no reason to believe that the jeep was used routinely for anything other than pumping water.

The inspector confirmed that there was no probability of any accident occurring in the pit area where the jeep and pump would normally be located. He believed that the violations would be significant and substantial only if the jeep were operated out of the pit area and driven over the haul road. He confirmed that the jeep would not normally be operated on the haul road, and it would only be on the haul road when it was moved from one pit area to another. However, the evidence establishes that the jeep was equipped with a tow bar on the front bumper, and I am persuaded that the evidence supports a reasonable conclusion that although the jeep was driven to the pit area approximately two weeks before the inspection, it was not routinely or regularly driven on the haul road.

The respondent's credible and unrebutted testimony, which is supported in part by the inspector, establishes that if the truck were driven, it was only driven a very short distance and at a very slow rate of speed utilizing the low gear and clutch. Further, when the jeep was parked, it was blocked with rocks, and Mr. Schiappa's testimony that the jeep was always towed from the pit to the shop if the pump were in need of repairs is unrebutted. Mr. Ray's testimony that he had brakes when he last drove the jeep two weeks before the inspection is also unrebutted.

Although the inspector observed other vehicular traffic on the haul road at the time of the inspection, he had no reason to believe that the jeep was driven on the haul road that day, and there is no evidence that the jeep was exposed to any traffic hazards that day. Based on the evidence presented, I can only conclude that when the jeep was last driven, it was driven no more than a tenth of mile at a speed of approximately five miles

an hour. There is no evidence as to what the road or traffic conditions may have been at that time, and given the fact that water must obviously be pumped from the pit before the coal can be extracted and hauled away, I believe one can reasonably conclude that if the jeep is driven to the pit area this is done early in the morning before full mining operations begin, and before there is any other traffic on the road. I also believe that it is reasonable to conclude that once the jeep reaches the pit area, it remains in place for a relatively long period of time while the pump is pumping water.

In view of the foregoing, and after careful review and consideration of all of evidence and testimony adduced in this case, I cannot conclude that the petitioner has established by a preponderance of the evidence that in the normal course of mining operations it was reasonably likely that the cited brake conditions would reasonably likely result in an accident or injury of a reasonably serious nature. Under the circumstances, the inspector's "S&S" findings with respect to these violations ARE VACATED.

Gravity

Although I have concluded that the violations were not significant and substantial, since the jeep was a piece of mobile equipment which was sometimes driven, and readily available to be driven, I believe that the respondent had an obligation to maintain the service brakes in an operable condition to preclude any potential accident in the event the jeep were driven. Under the circumstances, I conclude and find that the service brake violation was serious.

With respect to the parking brake violation, the inspector conceded that the parking brake condition was not as serious as the service brakes problem and he indicated that the terrain in the pit area was level. I find no evidence that the jeep was ever parked on an incline or that an emergency could develop over the short distance that the jeep may have on occasion been driven. Further, the evidence establishes that the jeep wheels were blocked with rocks when it was parked. Under all of these circumstances, I conclude and find that the parking brake violation was non-serious.

Civil Penalty Assessments

The petitioner's "special" civil penalty assessments are based on certain "narrative findings" made by MSHA's assessments office, including findings which stated that the cited jeep was a "water truck being used along the haul roads of the pit area" and "around the strip area"; that the violations "contributed to an imminent danger of a serious haulage-equipment accident" because "the truck was being used during rainy weather"; and that the

defective parking brake "increases the likelihood of a runaway of mobile-equipment accident". However, it is clear that I am not bound by MSHA's proposed assessments, nor am I persuaded by proposed assessment "findings" which have no evidentiary support.

On the basis of the evidence adduced at the hearing in this case, my findings and conclusions based on that evidence, and taking into account the six satutory 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 for the violations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
3130674	2/15/90	77.1605(b)	$150
3130675	2/15/90	77.1605(b)	$75

ORDER

1. Citation No. 3130676, February 15, 1990, citing an alleged violation of 30 C.F.R. 77.1606(c) IS VACATED.

2. The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above for the two citations which have been affirmed. Payment is to be made to MSHA within thirty (30) days of the date of this decison and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge