

CCASE:  
MSHA V. HIGHLANDS CTY. BOARD OF COMM.  
DDATE:  
19920210  
TTEXT:

~270

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 91-660-M  
Petitioner : A.C. No. 08-01139-05501  
v. :  
: Charlotte County Shell  
HIGHLANDS COUNTY BOARD OF : Pit Mine  
COMMISSIONERS, :  
Respondent :

DECISION

Appearances: Michael K. Hagan, Esq., U.S. Department of Labor,  
Office of the Solicitor, Atlanta, Georgia, for the  
Petitioner;  
J. Ross MacBeth, Esq., Sebring, Florida, 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 in the amount of \$40, for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. A hearing was held in Sebring, Florida, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory 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, 30 U.S.C. 801, et seq.
2. Commission Rules, 29 C.F.R. 2700.1, et seq.
3. Mandatory safety standards 30 C.F.R. 56.14107(a) and 56.14101(a)(2).

Stipulations

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

1. The respondent is subject to the jurisdiction of the Act, the Secretary of Labor, and the Commission.
2. The respondent is a small mine operator employing approximately two people at the subject mine site.
3. The proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.
4. The respondent's history of prior violations for the period February 14, 1989, through February 13, 1991, is reflected in an MSHA computer print-out, and it indicates that the respondent has no prior violations (Exhibit P-1).
5. The two contested violations in this proceeding were timely abated in good faith by the respondent.

Discussion

Section 104(a) Non-"S&S" Citation No. 3431917, issued on February 14, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.14107(a), and the cited condition or practice is described as follows:

The belt drive was not guarded on the pit discharge pump in the pit area. As a rule employees do not go in this area while pump is running.

Section 104(a) Non-"S&S" Citation No. 3431918, initially issued on February 14, 1991, and subsequently modified on April 15, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.14101(a)(2), and the cited condition or practice is described as follows:

The parking brake on the 950 Caterpillar front-end loader was not capable of holding the loader with its typical load on the maximum grade it travels.

Petitioner's Testimony and Evidence

Citation No. 3431917, 30 C.F.R. 56.14107(a).

MSHA Inspector J.J. Crisp testified that he inspected the mine for the first time on February 14, 1991. He proceeded to the pit area and encountered the dragline operator. While standing at the top of the bank with the operator, Mr. Crisp observed that the belt drive of the dewatering pump was not guarded. The guard was laying in the walkway and the pump was running and the belt drive was in motion. The unguarded drive was "waist high to chest high", and Mr. Crisp believed that the lack of a guard posed a hazard of someone loosing a finger or a hand if they inadvertently contacted the belt drive pinch points while it was running. He described the pinch points as the area between the drive and the sheaves (Tr. 7-11).

Mr. Crisp stated that the dragline operator told him that the guard was off because he had to replace some belts, and that pit foreman Gene Durrance told him that as a general rule employees did not go to the pump area while it was running (Tr. 12). Mr Crisp believed that if someone were next to the unguarded drive he could possible be caught and hurt. However, he took Mr. Durrance's word that no one is in the area unless the pump is turned off, and that is why he determined that an injury was unlikely and that the violation was not significant and substantial (Tr. 13). He considered the respondent's negligence to be "moderate to normal", and he confirmed that the violation was abated and that the guard was on when he next returned to the mine (Tr. 14).

Mr. Crisp explained the procedure for aligning the belts when new ones are installed and he stated that the belts are not self-adjusting and someone has to adjust them. The operator can determine whether the belts are adjusted properly by observing the belts while they are running, and if they are misaligned, "you could throw a belt or you could see misalignment instantaneous and you have to do the job all over again" (Tr. 15).

On cross-examination, Mr. Crisp identified photographic exhibit R-2, and he confirmed the location of the cited pump and motor on a platform on the water. He stated that the pump motor was turned off by a switch located on a switch box installed on a pole at the top of the bank. He estimated that the switch was approximately 20 feet away from a stairway leading down the embankment, and that the stairway was approximately 15 to 20 feet from a 15-foot walkway leading to the platform where the pump was located. The platform holding the pump was approximately eight-to-ten foot square (Tr. 17).

Mr. Crisp agreed that there would be no hazard or danger from the pump if anyone were in the pit and the pump was not running. Mr. Crisp believed that the guard should have been put back on as soon as the belt was turned on. However, if no one is in the pit and the pump is not on, it would not be negligent (Tr. 20).

Mr. Crisp acknowledged that subsection (b) of the cited standard provides an exception that does not require a guard when the exposed moving part is at least seven feet away from a walking or working surface. He confirmed that access is required in order to maintain and check the pump, that two people work at the pit, and they would maintain or check the pump as needed (Tr. 22).

In response to further questions, Mr. Crisp stated that the pump was readily accessible and that there was no barrier or locked gate preventing access to the platform area where the pump was located. He characterized the platform area around the pump as a "working platform", and he conceded that he did not measure the platform (Tr. 25).

Citation No. 3431918, 30 C.F.R. 56.14101(a)(2)

Inspector Crisp stated that he observed Mr. Durrance operating the cited front-end loader on a slight incline at the top of the levee coming out of the pit. He checked the backup alarm and fire extinguisher and found them satisfactory. He told Mr. Durrance that he wanted to check the service brakes. Mr. Durrance applied the service brakes while the machine was moving, and the brakes functioned properly and stopped the machine (Tr. 36-37). Mr. Crisp stated that the machine was not stopped completely when he asked Mr. Durrance to apply the parking brake and then let off the service brakes. When he did, the parking brakes would not hold the machine and he "rode freely on the slight incline". Mr. Crisp confirmed that the brakes were tested on a slight incline with an empty bucket, and that Mr. Durrance told him that he thought the parking brake was working (Tr. 36-38).

Mr. Crisp confirmed that he made a determination that an injury was unlikely because the service brakes were operable, and if they failed, the operator (who had a seatbelt) could steer the machine and bring it to a stop. However, if an injury did occur, it would be "lost work days and restricted duty". He did not consider the violation to be significant and substantial (Tr. 40). He considered the negligence to be "moderate to normal" because the operator is supposed to check his equipment before the shift begins and he should have known of the condition. Mr. Crisp stated that Mr. Durrance told him the parking brake was adjusted, and on a subsequent inspection visit, Mr. Crisp tested the parking brake and abated the violation. Mr. Crisp confirmed that he initially cited a violation of subsection (a)(3) of section 56.14101, but that his supervisor subsequently modified it to reflect a violation of subsection (a)(2) (Tr. 38, 41-42; 46-47).

On cross-examination, Mr. Crisp stated that when he next returned to the mine to abate the citation, he asked Mr. Durrance to engage the parking brake and the machine did not move. In response to a question as to whether he actually had Mr. Durrance test the parking brakes or simply asked him whether or not they worked, Mr. Crisp stated that "as I recall, I inspected it" (Tr. 44). In response to further questions, Mr. Crisp stated that the loader was used to load trucks, and that the loader operator would not use the parking brake during loading. However, he would use the parking brake on a ramp if he lost his service brakes, and although the trucks are normally loaded in flat areas, there are "dips and slight inclines" (Tr. 45-46). Mr. Crisp further explained the initial testing of the parking brake by Mr. Durrance as follows at (Tr. 48-50):

A. No, sir. I checked it--he had come up out of the pit area to where he loads trucks. It was right on top of the levee on a slight incline and he stopped it in this area. That's where the test was performed.

Q. And it was empty?

A. It was empty.

Q. He had his service brakes on and the engine was running?

A. Right.

Q. When he released the service brake was the transmission in neutral or drive or what?

A. In neutral.

Q. He released the service brakes--

A. The machine rolled.

Q. And it rolled. How far did it roll?

A. Well, he put his brakes on pretty quick.

Q. It's easier to pass the test if there's no load?

A. Right.

Q. And if it won't hold it and it says it has to hold it on that maximum grade, if you tested it on a slight grade is that an easier test for the equipment to pass?

A. Yes.

Q. So, in terms of what the standard requires, it failed to pass an even lower standard?

A. A minimal test, yes.

Respondent's Testimony and Evidence

Citation No. 3431917. 30 C.F.R. 56.14107(a)

Gene Durrance testified that he is employed by the respondent county road and bridge department as a finish operator at the Charlotte county shell pit operation. He confirmed that photographic Exhibit R-2, depicts the pump which was cited by Inspector Crisp on the day of his inspection. Mr. Durrance stated that the guard is located at the top of the motor at the belt drive. He stated that the platform is approximately ten feet square and that the walkway from the platform to the shore is approximately 20 feet long. The stairway leading from the end of the walkway to the top of the bank is approximately 30 feet long, and the distance from the top of the stairs to the post holding the pump switch is 20 feet. The on-off switch is located on the side of the electrical box mounted on the post, and the master switch is on the front of the box on the same post (Tr. 51-53).

Mr. Durrance stated that once the pump motor is turned off at the switch it cannot be turned on from the platform area, and one would have to return to the switch pole to turn it back on. He stated that he generally does the usual maintenance on the pump motor, and there is a rule or procedure that "you don't go there with the motor running" (Tr. 54). He confirmed that other than repairs, there is no reason for anyone to go out on the platform, and that no one goes there with the motor running (Tr. 54).

Mr. Durrance acknowledged that the guard was off the cited pump motor belt drive at the time of the inspection. He explained that he had taken the guard off in order to replace three belts. The guard was left off while the shop was obtaining the belts, and the next morning he installed the belts after turning off the motor. He then left the platform and turned the motor back on with the guard off because he wanted to let it run awhile in order to check the tension, and if it required adjustment he would have put the cover back on. However, before he could finish and put the guard back on, he had to load some trucks, and in the interim, the inspector arrived and saw that



~276

the guard was off and that the pump motor was running (Tr. 54-55). He explained the procedure as follows at (Tr. 55-56):

Q. In terms of procedure you turn the pump off or not when you went in there?

A. Off.

Q. You turn it off, you go down in there and you said you replaced three belts; is that correct?

A. Yes, sir.

Q. And then you have to go back out to turn it back on; is that correct?

A. Yes, sir.

THE COURT: Excuse me just a second. Did you replace three belts? You said it had three belts.

A. Yes, sir.

Q. Now, did you leave? Did you turn it on and leave it on to check the alignment?

A. The alignment was pretty well in line. All I had to do was just replace the belts and readjust the tension on the belt.

Q. If the alignment was okay why would it be necessary to run the equipment for a little while before putting the guard back on?

A. Just like a car. If you change a fan belt you run it a little while then you check it for tension. If you feel it needs to be tightened up some more--

Q. So, it was to make sure the tension was right and if the belts were all loose you could tighten it back up?

A. Yes, sir.

Q. And then put the guard back on; is that correct?

A. Yes, sir.

On cross-examination, Mr. Durrance stated that the pump motor switch can be locked out by inserting a lock in the lever, but that he doesn't use a lock and simply pulls the switch down. He stated that there is no written rule or procedure that no one

~277

goes on the platform with the motor running, and that "I don't like to go out there with all that electricity in the water" (Tr. 57). He stated that the belt broke the day before the inspector arrived, but that the pump continued to run with only two belts while the guard was off the day before the inspection. The new belts were put on at 7:30 a.m., the day of the inspection, and the pump was turned off while he did the work. No one else was in the area. After replacing the belts and tightening them, the guard was still off, and he went ashore and turned the motor back on and looked at the machinery from the bank and "it ran fine". He then left to load a truck and the inspector arrived at 10:30 a.m. The belts were running unguarded for approximately three hours. After the inspector left, he turned off the motor, checked the belt tension and found that it required no more adjusting. He then replaced the guard and turned the motor back on. He confirmed that he explained his belt changing work to the inspector, but that "he said he already saw it and had to write a citation" (Tr. 62-64).

In response to further questions, Mr. Durrance stated that there was no particular reason why he did not replace the guard after he replaced the new belts, but that there are four bolts which need to be removed or replaced when taking the guard on and off. He further stated that if the trucks had not come in for loading he would have finished with the belts and replaced the guard, but he would have waited 15 to 20 minutes to make sure the belt tension was correct. He told the inspector that he was going to replace the guard as soon as he finished, but the inspector left and did not know that he had replaced the guard (Tr. 65-67).

Louis Pollard, Jr., employed by the respondent as a dragline operator at the cited pit in question, testified that he was present when Mr. Crisp conducted his inspection on February 14, 1991. He stated that after Mr. Durrance learned who the inspector was he asked him if there was anything wrong, and the inspector informed Mr. Durrance that he could not run the pump without a guard. Mr. Durrance offered to replace the guard, and the inspector stated that he had already seen it (Tr. 86). Mr. Pollard confirmed that he and Mr. Durrance are the only persons who work at the pit, and that he has never been in the pit alone with the pump motor running. He has been with Mr. Durrance when pump maintenance was required, and the pump had to be removed on two occasions for maintenance (Tr. 87). Mr. Pollard stated that the ten foot platform where the pump is located is only used for the repair of the equipment, and that at the time of the inspection he was operating the dragline on the other side of the pit and Mr. Durrance changed the pump belts alone (Tr. 89).

Mr. Durrance stated that after checking the reverse alarm and horn, and with the loader on a slight incline downhill with the engine running, Inspector Crisp told him "to put it in neutral and pull out the parking brake. And the brake didn't hold". The foot service brakes were good and they held the machine, but the parking brake wouldn't hold the machine and he had to stop it with the foot brakes (Tr. 68-69).

Mr. Durrance stated that the terrain where he normally operates the loader is usually level with a few pot holes, and he explained that when the loader is initially started he must first wait for air pressure to build up before the parking brake can be automatically turned on, and the machine cannot be placed in gear until the pressure is up and the brake is turned off. When the machine is parked the bucket is lowered to the ground and the parking brake is on. The parking brake is not used when the loader is loading trucks on level ground (Tr. 70-71).

Mr. Durrance identified pages from the loader operating manual (Exhibit R-1), including the procedures for testing the parking brake, and he confirmed that the inspector did not perform this test. He also confirmed that the inspector asked him to apply the parking brake while the machine was moving, and that this is contrary to the manual which states that the parking brake should not be applied while the machine is moving except in an emergency. After the inspector left, the brakes were adjusted the next day and tested the same way as the inspector had instructed him and "it worked fine and would stop the machine while it was rolling" and it held according to the manual instruction (Tr. 72-73).

On cross-examination, Mr. Durrance stated that while the pit area was flat at the time of the inspection, the roadway which led in and out was on an incline and the loader was used on that road and was tested there (Tr. 73). He acknowledged that he did not always follow the manual instructions before starting the loader, and he explained the inspector's instructions which he followed in testing the brakes (Tr. 74-77). He stated that after the loader was stopped with the service foot brakes and in neutral gear, the inspector "told me to let it--make it roll again and then pull the parking brake" (Tr. 77). The subsequent tests after the inspector left were made after the parking brake was adjusted and the grease cleaned out (Tr. 78). When the inspector next returned, he did not test the brake again and simply asked if it had been repaired (Tr. 81). Mr. Durrance confirmed that the manual is kept on the loader, but he did not know whether the inspector knew this, and he did not show him the manual (Tr. 83).

Mr. Pollard confirmed that he was present when the loader parking brake was tested, could hear what was going on, and he described what he observed. He stated that the loader was on a slight downhill incline and the inspector told Mr. Durrance "to start rolling and put the parking brake on", and when he did, the loader did not stop. Mr. Pollard stated that he was not involved in the servicing of the parking brake and was not present when the inspector returned to abate the citation (Tr. 90, 92).

On cross-examination, Mr. Pollard stated that he was standing next to the inspector, and that after the loader backup alarm and horn were tested, the foot brake was tested first with the engine running. Mr. Durrance then shut the machine off. He was then told by the inspector to try the parking brake, and the inspector did not tell Mr. Durrance to take his foot off the service brake and let the machine roll. The loader was started again, and the inspector told Mr. Durrance to put it in gear and to apply the parking brake (Tr. 95-98).

David Butler, employed by the respondent as a mechanic, testified that he was instructed to go to the pit in question to perform some repair work on the cited loader and that he first met with Mr. Durrance who informed him "that an inspector had come in and he said that the parking brake it needed to be adjusted up" (Tr. 100) Mr. Butler stated that he adjusted the brake bands and inspected the linkage from the air pod to the brake pads, and found some grease on the outside of the drum. This was normal leakage from the hydraulic hoses, and the grease would not cause the brakes to malfunction. After making the adjustments, he and Mr. Durrance tested the loader following the same procedure as the inspector had previously instructed, and when the parking brake was applied with the machine rolling, it came to a stop. The test was performed on level ground at the bottom of the pit and not on the pit access road (Tr. 101-102).

Inspector Crisp was called in rebuttal by the petitioner, and he confirmed that while he was aware of the loader manual testing information, he did follow the manual testing procedure and he stated that "we have no rule for testing parking brakes" (Tr. 107). He stated that he tests the equipment wherever he finds it. He had no doubt that he did not ask Mr. Durrance to put the loader in motion before applying the parking brake. He stated that his procedure while testing a loader on a grade is "to set the parking brake manually, then if it rolls there's no use going through another test" (Tr. 108). He stated that when Mr. Durrance applied the foot service brakes he was fully stopped. He then asked him to put the loader in neutral and to take his foot off the service brake and to apply the parking brake, and the loader rolled (Tr. 109). He confirmed that he has followed this test procedure for parking brakes seven or eight hundred times in his career and that he has never asked the

~280

operator to put the machine in motion because "you can ruin the pads" (Tr. 109-110).

Mr. Crisp could not recall Mr. Durrance turning the machine off and then on again before testing the parking brake. He explained that the machine stopped after Mr. Durrance applied the foot service brakes. Mr. Durrance then put the parking brake on with his foot still on the service brake, and when he released his foot from the service brakes, the machine started rolling. At no time was the machine in motion while the parking brake was applied (Tr. 115-117).

With regard to the guarding citation, Inspector Crisp stated that he had no reason to doubt Mr. Durrance's testimony concerning the replacement of the pump motor belts. He confirmed that since he had already observed the condition he felt compelled to issue the citation, and that he would issue a citation whenever he finds such an unguarded piece of moving machinery in operation. If it were locked out, he would not bother, but if it were simply switched off and not locked out, he would still issue a citation (Tr. 113-114).

#### Petitioner's Arguments

The petitioner asserted that the evidence presented in this case establishes that the inspector observed that the pump motor belt drive was in motion and not guarded, and that the test performed by the loader operator established that the parking brake was inoperable. Under the circumstances, the petitioner concluded that the violations of the cited mandatory safety standards have been established and that the proposed civil penalty assessments are appropriate in view of the unlikelihood of any injuries, the limited hazard exposure, and a moderate degree of negligence (Tr. 117-118).

With regard to the guarding citation, petitioner asserted that the testimony establishes that there was a period of time when the belt drive was operating without the guard attached, and that the respondent's purported "rule of practice" was simply the operator's habit of not going on the platform when the motor was running and unguarded. Further, the petitioner asserted that in the event of an emergency, "habits may perhaps go", and that the intent of the standard is to protect individuals from their own carelessness. Petitioner disagreed that the exception found in subsection (b) of section 56.14107, applies in this case (Tr. 22, 29, 33-34, 119). The petitioner pointed out that the belt drive was not locked out, and there was no barrier preventing anyone from going to that location (Tr. 127).

With regard to the loader parking brake citation, the petitioner asserted that the inspector followed his normal testing routine when he had the loader operator test the parking

brake on a vehicle which was not in motion. Petitioner maintained that the loader went into motion when the parking brake was applied and it did not control the loader. The petitioner further pointed out that the mechanic testified that adjustments were made to the parking brake after it was tested, and this supports the fact that adjustments were needed to be made (Tr. 119).

#### Respondent's Arguments

With regard to the guarding citation, the respondent does not dispute the fact that the guard was not on the moving pump motor belt drive at the time Inspector Crisp initially observed the equipment in operation. The respondent's defense is based on an argument that the exception found in subsection (b) of section 56.14107 applies in this case. In support of this argument, the respondent asserted that the purpose of the platform area around the pump motor was to provide access for maintenance and repairs and that the only reason anyone goes to that area is to service or repair the pump. If one were required to stand seven feet away to repair the equipment, the exception would never apply. Given the fact that no one is ever in the area when the pump motor is running, the impossibility of any injury because of the manner in which the pit is operated and managed, and the fact that no one is ever there unless he were servicing the machine while it was off, respondent concludes that for the exception to have any reasonable meaning and application, one must conclude that it clearly applies in this case and that a violation has not been established (Tr. 26-28; 121, 125-126).

Respondent further argued that the platform area is not a working surface for any purpose other than to service the pump, and counsel stated "If it doesn't apply under these circumstances I can't imagine it ever applying" (Tr. 32). Respondent pointed out that subsection (b) does not require any guard or any particular restrictions on access, and it simply provides that moving parts be a certain distance from a working surface (Tr. 35). Further, respondent pointed out that the language of the citation that "as a rule" employees do not go to the platform area is erroneous in that it has been established that as a matter of policy no one ever goes to the area while the equipment is running (Tr. 120).

With regard to the loader parking brake citation, respondent asserted that the testimony suggests that the loader was not retested after the citation was issued, and that the initial test which the inspector supervised did not follow the manufacturer's instructions. Respondent maintains that the loader parking brake was tested while the machine was rolling, and there is no standard to determine how fast it was required to be stopped (Tr. 122). Respondent further argued that the test was conducted on a slight incline, and MSHA has not proved that the parking

brake would not hold the loader in accordance with the manufacturer's design specifications or testing instructions. Further, any adjustments made to the parking brake were made to accommodate a rolling stop (Tr. 123).

#### Findings and Conclusions

Fact of Violation.

Citation No. 3431918. 30 C.F.R. 56.14101(a)(2).

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 56.14101(a)(2), because of the alleged failure of the parking brake on the cited loader to hold the machine as required by that regulatory standard. The cited standard provides as follows:

If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.

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. In the case of the truck, the inspector tested the parking brake by instructing the driver to stop the truck on a small incline and set the brake. When he did, the brake would not hold and the truck rolled. In the case of the loader, the inspector asked the driver to demonstrate the parking brake. The driver set the brake and raised the machine bucket, and the machine rolled.

In Thompson Coal & Construction, Inc., 8 FMSHRC 1748 (November 1986), I affirmed a violation for a defective parking brake on a Caterpillar front-end loader because the parking brake would not hold the loader in place when the brake was set. The inspector had the driver set the brake, and when the machine was accelerated while in reverse gear, it moved backwards with the brake set. Although I observed that the validity of testing the effectiveness of the parking brake by operating the machine in reverse gear on level ground was questionable, I considered the fact that the operator conceded that the parking brake was defective because certain parts needed replacement.

In Concrete Materials, Inc., 2 FMSHRC 3105 (October 1980), and Medusa Cement Company, 2 FMSHRC 819 (April 1980), Judge Melick and former 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, the inspector specified the testing method used to support his determination that the brakes were inadequate. The inspector testified that when the driver placed the vehicle in third and fourth gear, placed his foot on the brake and depressed it to the lower limit of travel and applied acceleration, the truck began to "creep". The judge rejected the operator's contentions that the inspector did not test the truck in a loaded position for stopping and holding on a grade, and that there was no valid correlation between the test performed and the requirement that a loaded truck should stop and hold on any grade over which it had to travel.

The judge in Medusa Cement held that the respondent failed to rebut the expert testimony of the inspector regarding the adequacy of the brakes, and failed to establish that the test yielded an inaccurate result. In response to the operator's further contention that the tests could have resulted in damage to the equipment, the Judge observed that at most, the evidence relied on by the respondent "establishes a disagreement amongst experts as relates to the proper method of testing brakes", 2 FMSHRC 823. The judge further concluded that the test conducted by the inspector and his interpretation of the results obtained sufficiently established a prima facie violation.

In Island Construction Co., Inc., 11 FMSHRC 2448 (December 1989), Judge Broderick affirmed a violation of 30 C.F.R.

56.14101(a)(2) after finding that a front-end loader which was used on level ground had an inoperative parking brake. In IMC Fertilizer, Inc., 11 FMSHRC 706 (April 4, 1989), the judge affirmed two violations concerning inadequate service brakes on two front-end loaders. The inspector tested the vehicles by instructing the operators to start the loaders and drive forward until he dropped his hand and then to apply the brakes. In both instances, the vehicles continued to travel 7 to 8 feet after the brakes were applied, and the operators stated that the brakes felt "spongy". The first violation was abated after hydraulic fluid was added to the brake reservoir, and when re-tested, the vehicle stopped in 2 to 3 feet. The second violation was abated after the brakes were adjusted, and when retested, the vehicle stopped within two or three feet. Although Judge Broderick agreed that the operator's contention that the addition of brake fluid and the brake adjustments had no effect on the adequacy of the brakes was not free from doubt, he nonetheless accepted the inspector's findings based on his "extensive experience in the industry and as a Federal inspector", 11 FMSHRC 708.

In several other "brake testing" cases, violations for inadequate brakes have been affirmed on the basis of an inspector's observation that a cited truck was "pulling very hard to the right", Mineral Explorations Company, 6 FMSHRC 329, 342 (February 1984); an inspector's observation that a cited truck



was "slow to stop" after the brakes were tested on an incline and the brakes would not hold the truck, Greenville Quarries, Inc., 9 FMSHRC 1390, 1430 (August 1987); and a determination by an inspector that a brake shoe was not making contact with the drum because he could remove a piece of paper which he placed under the drum with the brake depressed, Mineral Explorations Company, 6 FMSHRC 316, 322 (February 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 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 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 take note of the fact that subsection (b) of section 56.14101, provides detailed instructions and procedures for testing service brakes on self-propelled mobile equipment. The only references to front-end loaders and parking brakes are found in subsection (3)(i), which states that "Front end loaders shall be tested with the loader bucket empty", and subsection (3)(iii), which provides that "parking or emergency (secondary) brakes are not to be actuated during the test" of braking systems which are designed to bring the equipment to a stop under normal operating conditions.

In the instant case, the loader parking brake was tested on a slight incline after the inspector observed it coming out of the pit. The inspector testified credibly that the loader operator would use the parking brake if he were parked on a ramp, or if he lost his service brakes, and that there are dips and inclines in the pit areas. Although the truck loading area was usually flat, loader operator Durrance acknowledged that the then existing roadway in and out of the pit was inclined and that the loader traveled over that road. Dragline operator Pollard, who

occasionally operated the loader, testified that he uses the parking brake after he has stopped working or loading trucks, and he characterized it as an "emergency brake" and "safety device" (Tr. 98).

The respondent's assertions that the citation should be vacated because of the inspector's failure to retest the loader before abating the citation and his failure to follow the manufacturer's manual testing procedures are rejected. While it is true that Mr. Crisp acknowledged that he did not follow the manufacturer's manual testing instruction, I cannot conclude that this renders the citation defective. I take note of the fact that the manual calls for testing the parking brake on level ground, and the cited standard section 56.14101(a)(2) requires that a parking brake be capable of holding the equipment with its typical load on the maximum grade it travels. Under the circumstances, I conclude and find that any test conducted to insure compliance with the standard must take into account the normal production or operating conditions under which the machine may be used. In this case, the machine was tested on a slight incline after the inspector observed it coming out of the pit.

Inspector Crisp has served as an MSHA inspector for 16 years and has conducted in excess of one thousand inspections. Although he indicated that there is no fixed MSHA rule for testing loader brakes, he testified credibly that he has followed the same test procedures that he described in this case seven or eight hundred times during his career as an inspector (Tr. 8, 109). In this case, the inspector determined that no further tests were necessary after the initial test reflected that the parking brake would not hold the loader with an empty load while on a slight downhill grade. Since the empty loader failed to pass this most minimal test, the inspector concluded that the parking brake would not hold the loader with a typical load on the maximum grade of travel.

Loader mechanic Butler agreed that if a parking brake which has been tested on level ground does not hold the equipment, one can probably assume that it probably will not hold on an incline. Under all of these circumstances, I cannot conclude that the inspector's conclusions were erroneous or unreasonable.

With regard to Mr. Crisp's alleged failure to reinspect the loader before abating the citation, I find Mr. Crisp's testimony that he recalled reinspecting the machine and asking Mr. Durrance to engage the brake, and that it stopped when the brake was applied, to be credible. In any event, Mr. Durrance confirmed that he tested the brake after the grease had been cleaned off and certain adjustments made, and that he followed the same testing procedures as the inspector had initially instructed him to follow at the time the citation was issued, and the brake functioned properly. Mechanic Butler confirmed that he adjusted

the parking brake and that he and Mr. Durrance followed the same test procedure as the inspector had previously instructed and that the brake functioned properly.

In Tuscola Stone Company, 11 FMSHRC 447 (March 1989), the mine operator was charged with a failure to correct a defect on a haul truck used to haul rock from a pit to a stockpile. The inspector checked the truck on a slight grade while it was empty and found that the parking brake was inoperative. However, the inspector conceded that the test he performed on the parking brake, i.e., attempting to stop a moving truck with the parking brake, was not the "standard test" used by MSHA, and that a parking brake is not designed to bring a moving haul truck to a stop. Under these circumstances, Judge Melick found that the test utilized by the inspector was not appropriate to determine the adequacy of the parking brake and he vacated that part of the citation which cited the alleged defective parking brake.

In the case at hand, the respondent asserted that the inspector instructed the loader operator to test the parking brake while the machine was in motion and that this was contrary to the testing instructions found in the manufacturer's manual and subjected the machine to possible damage. Mr. Durrance testified that the inspector "told me to put the machine in gear, make it roll down this little incline and put in neutral and pull out the parking brake. And the brake didn't hold" (Tr. 68). He further testified that when he applied the parking brake he was in gear and in motion and that the inspector asked him to put the parking brake on while the machine was moving (Tr. 72).

Mr. Durrance conceded that he did not always follow the loader instruction manual before starting the vehicle, that he did not test the parking brake according to the manual instructions prior to the inspection by Mr. Crisp, and that the parking brake did not work when he tested it following the inspector's instructions (Tr. 74, 82-84). Mr. Durrance testified that before the testing of the loader parking brake began, he and the inspector were on the ground next to the machine which was parked on a grade, and that the engine was off, the bucket was down on the ground, and the parking brake was on. After testing the horn and backup alarm, Mr. Durrance stated that the third test was "to put the machine in motion and turn on the parking brake. Make the machine roll, put it in gear and make it roll and put it in neutral and put on the parking brake". He stated that what the inspector asked him to do next after the horn and alarm were tested was to apply his service brakes, and that after he stopped the loader with the service brakes, he placed it in neutral gear and the inspector then "told me to let it--make it roll again and then pull the parking brake" (Tr. 75-77).

Inspector Crisp denied that the loader was in motion when the parking brake was applied by Mr. Durrance during the test. He stated that in all of his years of testing parking brakes he has never asked an equipment operator to put a machine in motion before applying the parking brake because it could ruin the brake pads. Although Mr. Crisp initially stated that Mr. Durrance "wasn't stopped completely and I asked him to apply the parking brake and then let off the service brakes" (Tr. 37), his subsequent detailed and consistent testimony in response to further questions on cross-examination and in rebuttal, which I find credible, reflects that Mr. Durrance initially tested the loader service brakes while the loader was moving, and that after the machine was fully stopped, Mr. Durrance engaged the parking brake, with his foot still on the service brakes, and when he took his foot off the service brakes, the machine continued rolling with the parking brake still engaged (Tr. 37-38; 48-50; 109-110; 115-117).

Mr. Pollard, who was present when the loader was initially inspected by Mr. Crisp, and operated by Mr. Durrance, testified on direct examination that after testing the horn, the backup alarm, and the foot brakes, the inspector "told him to start rolling and put the parking brake on" (Tr. 91). Mr. Pollard confirmed that Mr. Durrance was moving when he applied the parking brake and that the loader did not stop (Tr. 92). On cross-examination, Mr. Pollard reiterated that Inspector Crisp told Mr. Durrance "to start it moving and then put on the parking brake" (Tr. 95). However, in response to several follow-up questions, Mr. Pollard confirmed that the service brakes were tested first, and after they held the loader in place, Mr. Durrance "shut it off" and the inspector "told him to try the parking brake. Pull it up" (Tr. 96).

Mr. Pollard confirmed that he had no knowledge that the inspector told Mr. Durrance to take his foot off the service brake and let the machine roll, but he stated that "The equipment is loud and there's no way he could have told him without shutting down that equipment to try the parking brake" (Tr. 96). Mr. Pollard then testified that he actually observed Mr. Durrance apply the service brake while the loader was moving, and when the loader stopped, Mr. Durrance turned the machine off, cranked it up again, and the inspector then told him "to put it in gear and then put the emergency stop on" (Tr. 97). Mr. Pollard confirmed that the "emergency stop" is the "parking brake", and he indicated that if he were to test the emergency brake on his automobile, he would not do it while the vehicle was rolling (Tr. 98).

After careful examination of all of the testimony, I find Mr. Pollard's testimony to be somewhat contradictory. His initial testimony lends support to Mr. Durrance's claim that the

inspector instructed him to apply the parking brake while the machine was in motion. However, Mr. Pollard's responses to more probing questions support the inspector's version of the parking brake test. Although the inspector could not recall that Mr. Durrance turned the loader off between the time he tested the service brakes and the parking brakes, Mr. Pollard's testimony is otherwise consistent with that of the inspector.

After careful consideration of all of the testimony, and having viewed the witnesses during the course of the hearing, and taking into account the inspector's un rebutted and credible testimony concerning his many years of inspection experience, I find him to be a reliable and credible witness and I accept his contention that he did not instruct Mr. Durrance to place the loader in motion before engaging the parking brake or that the loader was moving when Mr. Durrance engaged the parking brake. Accordingly, I conclude and find that the test administered by the inspector which led him to conclude that the cited parking brake would not hold the machine was a reasonably proper and valid test, and one which the inspector had routinely followed during his many prior inspections. Under the circumstances, and in view of all of my findings and conclusions, I conclude and find that the petitioner has established a violation by a preponderance of the credible and probative evidence presented in this case. The citation IS AFFIRMED.

Fact of Violation

Citation No. 3431917. 30 C.F.R. 56.14107(a).

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 56.14107(a), because of an unguarded belt drive on a pit discharge pump. The cited standard provides as follows:

56.14107 Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The respondent does not dispute the fact that the guard was off the cited running pump belt drive when the inspector observed it on the day of the inspection, and the evidence establishes that the pump was running without the guard in place for at least

three hours prior to the inspector's arrival, as well as the day prior to the inspection.

The respondent established that the pump can only be turned on and off by a switch located on a pole on shore. Although the switching lever was equipped to accommodate a lock, the individual who generally serviced the pump (Durrance) acknowledged that he simply pulled the switch down to turn off the pump and did not lock it out before servicing it or going to the platform area. Further, although the respondent suggested that its "policy and procedure" prohibited employees from being on the platform while the pump was running, there is no evidence that this policy was in writing or incorporated in any work procedures given to employees. The "policy and procedure" consisted of Mr. Durrance's "habit and practice" of not going to the platform with the pump running, and his personal dislike for being on a platform over water with electrical equipment in operation.

On the facts of this case, it would appear that the respondent's pit operation is essentially a two-man operation, and that Mr. Durrance performed many job tasks in addition to servicing the pump. The fact that he had to leave the pump motor unguarded and running while awaiting the belts and loading trucks suggests that he was busy. In light of Mr. Durrance's admissions that he did not lock out the pump before servicing it, and that he did not always follow the loader manual instructions before starting the loader, I suspect that these omissions may be attributed in part to the fact that he had many jobs to perform. Although I have no reason to disbelieve that Mr. Durrance always turned off the pump before he actually serviced it, I have some reservations and doubts with his assertions that he always traveled back and forth from the pump switch location on shore to the platform each time he turned the pump on to observe the belt tension and adjustments, and that there was no need for him to be on the platform to observe the running belt because he could see from the top of the bank whether the belts had the proper tension or were properly adjusted.

Thompson Brothers Coal Company, 6 FMSHRC 2094 (September 1984), concerned an interpretation and application of guarding standard 30 C.F.R. 77.440(a), which provided as follows:

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded. (Emphasis added).

Judge Broderick rejected Thompson Brothers' argument that it was virtually impossible for a person not suicidally inclined to

contact the cited unguarded moving parts, and he accepted the testimony of the inspector that the unguarded parts were accessible and might be contacted by persons examining or working on the equipment. In affirming Judge Broderick's decision, the Commission stated as follows at 6 FMSHRC 2097:

The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

In Leblanc's Concrete & Mortar Sand Company, 11 FMSHRC 660 (April 1989), I vacated a citation for an alleged violation of guarding standard 30 C.F.R. 56.14001, which contained language identical to the section 77,400(a) guarding requirement considered by the Commission in Thompson Brothers Coal Company. The factual setting in the Leblanc's Concrete case was virtually identical to the facts presented in the instant case. Leblanc was a very small sand operator who was cited for failing to guard a belt drive on a "floating" fresh water pump which was located on a 6 x 6 foot barge supported by floats approximately 20 to 30 feet from shore. The pump motor was activated by a switch located in a plant on shore approximately 200 to 300 feet from the barge, and any priming of the pump was done on shore. The inspector believed that it would be unlikely that anyone would be on the barge when the pump started from the plant, and because of the location of the pump, the inspector did not believe that it was likely that anyone would be exposed to a hazard. Leblanc established that no one was required to be on the barge during the normal operation of the pump, and although the pump may have been serviced once a week, it was deenergized and shut down when service was performed. If major repairs were required, the pump was lifted out of the water with a cherry picker and taken ashore

for repairs. Under these circumstances, I found that a violation had not been established, and I vacated the citation for the following reason (11 FMSHRC 678):

I find no evidence to support any reasonable conclusion that there existed a reasonable possibility of anyone contacting the unguarded pump belt drive unit in question, and the petitioner has presented no evidence to establish that anyone would ever be near the belt drive while the pump was in operation.

I take note of the fact that in the Thompson Brothers Coal Company case, the Commission adopted its "likelihood of contact and injury" test after analyzing the "may cause injury" language of section 77.400(a). The comparable standard for surface metal or nonmetal mines, including open pit mines, 30 C.F.R.

56.14001, contained the identical language found in section 77.400(a), and it was in effect at the time of my decision in Leblanc's Concrete & Mortar Sand Company. However, section 56.14001, has since been revised and renumbered, and the respondent has been charged with a violation of the newly designated section 56.14107, which does not contain the language which the Commission considered in Thompson Brothers Coal Company, and which I relied on in vacating the citation in Leblanc' Concrete and Mortar Sand Company.

The present language found in the cited mandatory standard, 30 C.F.R. 56.14107(a), specifically and unequivocally requires guarding for any of the enumerated moving machine parts, as well as any similar moving parts that can cause injury if contacted. The obvious intent of the standard is to prevent contact with a moving part. Although the parties presented no specific evidence with respect to the physical or technical characteristics of the cited pump belt drive, the respondent does not dispute the fact that the cited equipment was not guarded, nor has it asserted that the equipment was not the kind covered by the standard. I conclude and find that the cited pump belt drive was a moving machine part within the meaning of section 56.14107(a), and based on the un rebutted and credible testimony of the inspector, contact by anyone with the unguarded belt drive in question could have resulted in an injury.

After careful review and consideration of all of the evidence in this case, I conclude and find that it supports the petitioner's contention that the cited moving machine part which could have caused an injury if contacted by anyone was not guarded. Although it is true that the pump was located on a platform some 20 feet from shore, access to the stairway, walkway, and platform where the pump was located were not blocked, and the pump was positioned "waist high" within reach or contact by anyone walking or standing next to it. Further, while it may be true that no one is on the platform when the pump is



running, and that it is turned off when maintenance is performed, I conclude and find that these preventive measures may mitigate the gravity and potential hazards against which the standard is directed, but they may not serve as a defense to the violation.

After further consideration of the arguments concerning the application of the exception found in subsection (b) of the cited standard, I agree with the petitioner's position that the exception does not apply, and I reject the arguments of the respondent to the contrary. I conclude and find that the exception is clearly inapplicable on the facts of this case. Under the circumstances, and in view of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation and the citation IS AFFIRMED.

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

I conclude and find that the respondent is a very small operator, and that the payment of the civil penalty assessments for the violations in question will not adversely affect its ability to continue in business.

#### History of Prior Violations

The respondent has an excellent compliance record and has not previously been cited with any violations of the Act.

#### Gravity

The inspector concluded that any injuries resulting from the violations were unlikely and he concluded that the violations were not significant and substantial. I agree with those determinations, and I conclude and find that the violations were non-serious.

#### Negligence

The Act imposes a high degree of care on a mine operator to insure compliance with all mandatory safety standards and to preclude injuries to miners. The inspector found a moderate degree of negligence with respect to both of the violations. I conclude and find that both violations were the result of the respondent's failure to exercise reasonable care. I agree with the inspector's moderate negligence finding with respect to the guarding violation, and with respect to the parking brake violation, I conclude and find that it was the result of a low degree of negligence on the part of the respondent.

~293

Good Faith Compliance

I conclude and find that the respondent demonstrated rapid good faith compliance in correcting the cited conditions and abating the violations.

#### Civil Penalty Assessments

Based on the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$20 is reasonable and appropriate for Citation No. 3431917 (guarding violation), and that a civil penalty assessment in the amount of \$15 is reasonable and appropriate for Citation No. 3431918 (parking brake violation).

#### ORDER

The respondent IS ORDERED to pay a civil penalty assessment of \$20 for section 104(a) Citation NO. 3231917, February 14, 1991, 30 C.F.R. 56.14107(a), and a civil penalty assessment of \$15 for section 104(a) Citation No. 3431918, February 14, 1991, 30 C.F.R. 56.14101(a)(2). Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras  
Administrative Law Judge

#### Distribution:

Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 339, 1371 Peachtree Street, NE., Atlanta, GA 30367 (Certified Mail)

J. Ross MacBeth, Esq., 2543 US 27 South, Sebring, FL 33872 (Certified Mail)

/ml