CCASE:
SOL (MSHA) V. POWER OPERATING
DDATE:
19940323
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
REVIEW COMMISSION,	:	Docket No. PENN 93-51
Petitioner	:	A. C. No. 36-02713-03576
v.	:	
	:	Docket No. PENN 93-152
POWER OPERATING COMPANY, INC.,	:	A. C. No. 36-02713-03578
Respondent	:	
	:	Docket No. PENN 93-202
	:	A. C. No. 36-02713-03582
	:	
	:	Frenchtown Mine
	:	
	:	Docket No. PENN 93-133
	:	A. C. No. 36-04999-03534
	:	
	:	Leslie Tipple

DECISION

Appearances: Linda Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Tim D. Norris, Esq., and Farrah Lynn Walker, Esq., Stradley, Ronon, Stevens & Young, Philadelphia, Pennsylvania for Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

These cases, consolidated for hearing, are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner), alleging violations by the Operator (Respondent), of various mandatory safety standards. Subsequent to a discovery,(Footnote 1) and pursuant to notice, the cases were heard in

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1 On July 19, 1993, Respondent filed a Motion to Compel Response to Interrogatories, Response to Request for Production and Deposition Testimony. On August 3, 1993, Petitioner's filed a Response in Opposition. On August 16, 1993, an Order was issued requiring Respondent to file a statement identifying the specific requests it wanted to compel Petitioner to answer along with a statement setting forth facts to establish its need for the information sought. Petitioner was ordered to describe and summarize the documents it claimed were privileged, and to file a formal claim of privilege. On October 29, 1993, oral argument

was held on the issues raised by Respondent's Motion and Petitioner's Response. On the record, at the oral argument, Orders were issued regarding all the issues raised by the Motion and Response.

Also, prior to the hearing, on September 21, 1993 Petitioner filed a Motion to amend its Petition in Docket No. Penn 93-133 to add "eight additional citations". Respondent filed a Response. On November 19, 1993, an Order was issued denying the motion.

Johnstown, Pennsylvania, on December 7, 8, and 9, 1993. The parties each filed a brief along with proposed findings of fact on February 18, 1994. Respondent filed a Brief in Reply on February 28, 1994.

Findings of Fact and Conclusions

I. Citation No. 3709903 (Docket No. PENN 93-152)

Perry Ray McKendrick, an MSHA inspector, testified that on December 3, 1992, he observed that there was no bulb in the light on the right side of the rear of a 4600 Ford Tractor that was parked adjacent to an office. He indicated that the wires were hanging loose, and that this condition was "very visible". (Tr. 21, December 7, 1993). He issued a citation alleging a violation of 30 C.F.R 77.1605(d) which, as pertinent, provides that, with regard to mobile equipment, "Lights shall be provided on both ends when required."

Peter Baughman, an employee of Respondent who operates the tractor in question, indicated that it is used on paved areas to clean up coal from the road. He said that the tractor has a yellow beacon light on top of the tractor towards the rear of the tractor. He said this light is visible from the rear of the tractor. He indicated that the tractor is not operated at night.

Based upon the clear language of 77.1605(d) supra "lights" are to be provided "on both ends" when required. Hence, if there are not "lights" at both ends Section 1605(d) supra, has not been complied with. In other words if there is only one light at either end, Section 1605(d), has not been complied with. According to the uncontradicted testimony of McKendrick, the rear of the tractor, which was equipped with two lights, had only one light in working order. Hence, although the vehicle did have a light on top, there were not "lights" at both ends.

Baughman testified that the tractor is not used at night. Since he works the day shift, from 6:00 A.M. to 6:00 P.M., not much weight is accorded his testimony regarding the use of the vehicle at night, as it is beyond his personal knowledge.

The vehicle was used during the 6:00 A.M. to 6:00 P.M. shift. I take administrative notice of the fact that there are times during the year, when there is no sunlight for that entire 12 hour period. Thus, lights would be required, during the period before the sun rises, and after the sun sets, when this occurs in the 6:00 A.M. to 6:00 P.M. shift. Hence, I find that it has been established that Respondent herein did violate Section 1605 supra.

The vehicle in question had one functioning rear light along with a beacon located towards the rear of the vehicle that was visible from the rear of the vehicle. Also there is no evidence that it is used not during daylight for significant periods during the year. I conclude that the gravity of the violation herein is low. Considering also the additional factors set forth in Section 110 of the Act, as stipulated to by the parties, I conclude that a penalty of $50.00 is appropriate for this violation.

II. Citation No. 3709643 (Docket No. PENN 93-51).

Charles S. Lauver, an MSHA inspector, testified that on September 16, 1992, he observed a truck dumping its load on a ramp. The truck was not dumping parallel to the slope of the ramp at the designated dump area which is level. Instead, the truck was dumping "sideways" perpendicular to the ramp. Based on measurements that he took, Lauver indicated that the grade of the ramp was 13 percent.

Lauver issued a citation alleging, in essence, that Respondent was not in compliance with 30 C.F.R. 77.1000, in that it was not following its Ground Control Plan which, as pertinent, requires as follows: "Truck dumps and similar areas shall be maintained reasonably level."

According to Robert A. Greenawalt, Respondent's foreman, in general, a ramp is built in order to get access to a pit. In essence, he explained that in normal operations, ramps are built frequently" (Tr. 83, December 7, 1993), and that in building a ramp, it is necessary to dump on a grade (Tr. 85, December 7, 1993). It appears to be a Respondent's position, that to require trucks to dump only on level areas, would preclude an operator from building a ramp.

According to Lauver, if a truck dumps sideways on a sloped ramp, it could become unstable and roll over, because the bed of the truck is raised nearly vertical.

The Ground Control Plan, does not regulate the manner in which loads are to be dumped. It requires only that "truck dumps", and "similar areas," shall be maintained "reasonably level". The designated truck dump areas was level. There is no evidence that the specific area where Lauver observed the truck dumping sideways, was used as a dump area more than the one time observed by him. In the absence of such evidence, it must be concluded that the area of in question was not a "truck dump" or a "similar area", as it was not an area used on any regular basis for dumping. Accordingly, I conclude that it has not been established that Respondent violated its Ground Control Plan, and hence there was no violation of Section 77.1000 supra. Accordingly, Citation No. 3709643 is to be dismissed.

III. Citation No. 3709904 (Docket No. PENN 93-152).

McKendrick indicated that he observed an accumulation of grease, oil, and coal dust on the top and lower center "pins" of the "5500 Trojan mover". He said that the material was approximately 1 foot in diameter at the top and lower "pin", and was up to 1 inch thick. He also said that the approximately 3 foot by 5 foot engine area was coated with coal dust. He indicated that heat from the manifold and turbo constituted ignition sources. He also indicated that if a wire would become bare it could cause a spark.

McKendrick issued a Citation alleging a violation of 30 C.F.R. 77.1004 which, as pertinent, provides that combustible materials shall not be allowed to accumulate, ". . . where they can create a fire hazard."

On cross-examination, McKendrick indicated that he was concerned about the possibility that heat from the manifolds or turbos, could ignite the accumulated materials should contact occur. In this connection, he estimated that the coal was "at the most" 2 to 3 inches from the manifold and to the turbo, but that the materials were not in contact with the turbo or manifold. In contrast, Philip D. Smeal, who has operated the loader in question for approximately 6 years, indicated that the center pin is approximately 8 feet from the turbo and manifold. I place more weight upon Smeal's estimate due to his greater familiarity with the equipment in question, based upon the amount of time that he has spent operating it. I thus find that it has not been established that there was a hazard of the materials being ignited upon contact with either the manifold or turbo. Similarly, although McKendrick was concerned about a bare wire causing a spark, the record does not established that sparks do occur in the area in question, or that sparks are sufficient to ignite the accumulated material. Hence, I find that it has not been established that the accumulation of materials were in an area "where they can create a fire hazard." Hence, I conclude that it has not been established that Respondent violated Section 77.1004 supra.

IV. Citation No. 3490531 (Docket Penn 93-152).

Thomas George Partash, testified that on December 3, 1992, he observed that there was no guard protecting the V-belts and pulleys on a caterpillar bulldozer. He issued a citation alleging a violation 30 C.F.R. 77.400(a), which in essence, provides for the guarding of exposed moving machine parts which may be contacted by persons. Respondent does not challenge the Citation. Hence, and taking into account the testimony of Partash, I conclude that Respondent did violate Section 77.400(a) supra.

a. Significant and Substantial

The Commission has set forth the elements required to establish a significant and substantial violation in Cement Division, National Gypsum Co., 3 FMSHRC 822, (April, 1981). A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Id. at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January, 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December, 1987)(approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury". (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August, 1984)).

According to Partash, the operator of the vehicle is required to travel the area in question in order to access the cab. He indicated that he observed persons getting on and off the bulldozer while it is in operation. In essence, he stated that in getting on and off the bulldozer, an operator would utilize a step to climb on the dozer at the lowest access point, and would thus traverse the area in question. Partash did not

describe with any degree of specificity the horizontal, vertical, or diagonal distances of the exposed moving parts to the path that would be taken by a person on the way to the cab. On the other hand, Smeal who operated the bulldozer in question, estimated that in walking to the cab, the operator would be, at the closest, 2-1/2 to 3 feet, from the V-belt in issue. Also, on cross-examination, Partash indicated that it is possible to access the cab by entering from the guarded side. Since Smeal operated the bulldozer, I place more weight on his testimony regarding the path actually travelled to the cab. In contrast, I place less weight on the theoretical testimony of Partash.

The evidence does establish that Respondent violated a mandatory safety standard and that this violation contributed to a hazard, i.e., contact with moving machinery. However, within the framework of the above evidence, I conclude that it has not been established that such contact was reasonably likely to have occurred. Thus, I find that it has not been established that the violation was significant and substantial.

There is no evidence concerning the length of time that the area in question was not guarded. I accept the uncontradicted testimony of Greenawalt that this bulldozer was only used if another one was broken. I find that a penalty of $250 is appropriate for this violation.

V. Citation No. 3709821 (Docket No. PENN 93-152).

According to Partash, on December 4, 1992 he observed an accumulation of oil underneath the operators' cabin and on the engine of the G-3 Caterpillar road grader. He indicated that there was electrical wiring under the cab, and a turbo charger and hydraulic pumps in the area. According to Partash, the hoses underneath the cab of the caterpillar grader were covered in coal dust and oil. The inspector testified that all 150 to 200 feet of hoses underneath the cab were covered in oil. No firewall separated the engine from the oil an dust covered hoses. According to Partash, the turbo and the engine, ignition sources that generated heat, were two inches away from the oil soaked hoses.

Partash issued a citation alleging violation 30 C.F.R. 77.1104 which, as pertinent provides that combustible material should not be allow to accumulate ". . . where they can create a fire hazard."

On cross-examination, Partash indicated that there was no oil on the turbo or manifold, and that oil in the absence of hot wires is not a hazard. He also indicated that just sparks could not ignite the oil. There is no evidence of any lack of insulation of any the wires in the area. I conclude that the

evidence does not establish that the oil and coal dust accumulation was in any area where they can create a fire hazard. Hence, a violation of Section 77.1104 supra, has not been established.

VI. Citation No. 3709822 (Docket No. PENN 93-152).

According to Partash, the reverse alarm on a caterpillar 777B rock truck did not operate. Respondent does not dispute this fact. Accordingly, I conclude that Respondent did violate Section 77.410(c) as alleged in the citation issued by Partash.

In the citation, Partash alleged that the violation was significant and substantial. He testified that as a consequence of the violation, an injury was reasonably likely to have occurred as rock trucks, pickup trucks, shovels, and bulldozers operated in the immediate area. He explained that it was possible that, since the backup alarm did not work, other equipment operators might not be aware when the rock truck would back up. He said that if another piece of equipment would be hit the operator of the rock truck could be injured.

The presence of other vehicles in the area raises the possibility of collision as a consequence of the violation herein. However, no specific facts were adduced to established that such was reasonably likely to have occurred. Hence, I conclude that it has not been established that the violation was significant and substantial. (See, Mathies, supra, U.S. Steel, supra.

Contemporaneous note take by Partash indicate that the operator of the vehicle informed him that the alarm was functioning at the start of the shift. Hence, it was only inoperative for a short time until it was cited. Ronald E. Gresh, an MSHA Supervisory Inspector, stated that he had several discussions with Respondent's Management regarding the need to improve inspection and maintenance, of trucks, dozers, shovels, loaders, and tractors. However, he indicated that in the discussions there was no specific identification of each item. He said that problems with steering, breaking, were discussed. Also discussed were the presence of grease on rock trucks, and tire maintenance. According to Gresh, he meet with Respondent's officials on a monthly basis to discuss improvements regarding maintenance at the mine.

Although Respondent was made aware, in general, of the need to make careful inspections and to perform maintenance, there is no evidence as to how long the specific violative condition at

issue existed. Partash's notes indicate that the operator had told him that the alarm did function at the start of the shift. I fin8d that Respondent was negligent to a moderate degree. I conclude that a penalty of $300 is appropriate for this violation.

VII. Citation No. 3709754

A. Violation of 30 C.F.R. 77.160(a)(a)

Lauver testified that, on December 4, 1992 he observed a rock truck parked at the hard stand area. He said the truck was fully loaded, and rocks were "jutting out" all around the top of the bed.

He said that nothing was falling of the truck, but that the rocks appeared ready to fall at any time. He said that the rocks were above the top of the bed, and were lying off the back of the truck. He said that the center of the pile of rocks on the truck was approximately 5 to 6 feet higher than the sides. He estimated the rocks on the trucks were approximately 1 foot long, 10 inches wide, and 1 inch thick. McKendrick, who was present, corroborated Lauver's testimony that rocks were sticking out at the back of the truck.

Lauver issued a citation alleging a violation of 30 C.F.R. 77.1607(a)(a), which in essence, requires trucks to be trimme properly when loaded higher than their cargo space.

According to Greenawalt, the truck was loaded in a normal fashion and was not overloaded. He indicated that he did not notice a "piece of rock" sticking out the side of the truck. (Tr. 289, December 7, 1993). On cross-examination, Lauver indicated that once a truck is loaded, it cannot be trimmed. He also indicated that the only way to insure that a load is within the confines of the truck, is to load it properly.

I accept the testimony of Lauver, inasmuch as it was corroborated by McKendrick, that the rocks in the truck were lying beyond the cargo space. I also accept the uncontradicted testimony of Lauver that the center of the load was approximately 6 feet higher than the sides, and that there were rocks jutting out around the top of the bed. Further, the center of the pile was approximately 6 feet higher than the sides. Hence, I conclude that the truck was loaded higher than the cargo space.

The term "trimmed properly" is not defined in the Act, or in Title 30 of the Code of Federal Regulations. "Trim" is defined in Webster's Third New International Dictionary (1979 ed), as pertinent, as "to reduce by removing excess or extraneous matters." Hence, the term "trimmed properly" herein means that if a truck contains excess material that juts out beyond the

confines of the cargo area, the material must be trimmed. (See, Peabody Coal Company, 2 FMSHRC 1072 (1980) (Judge Laurenson)). I accept the testimony of Lauver, as it was corroborated by McKendrick, and find that material jutted out beyond the confines of the cargo area. I thus conclude that Respondent did violate Section 77.1607.

B. Significant and Substantial

According of the testimony of Lauver, "rocks jutted out all the way around the top of the bed and off the back of the bed . . . the material was --- appeared to be about to fall" (sic.) (Tr. 266, December 7, 1993). Since his testimony was corroborated by McKendrick, I accept it, and reject the testimony of Greenawalt that rocks were not sticking out of the truck. Respondent did not impeach or contradict Lauver's testimony that he observed ". . . a man walk from the other side across beneath the bed of the truck and around the side" (Tr. 269, December 7, 1993). I thus find that an injury producing event was reasonably likely to have occurred resulting in injuries of a reasonably serious nature. I find that the violation was significant and substantial (See, U.S. Steel, supra.

Taking into account the fact that the truck was not in operation but was parked at the repair station as it had mechanical problems, I find that Respondent's negligence was less than moderate. I find that a penalty of $200 is appropriate for this violation.

VIII. Citation No. 3709751 (Docket No. PENN 93-152)

On December 3, 1992, Lauver asked the operator of a Caterpillar rock truck which was not loaded, to start down the grade and apply the brakes. According to Lauver, when the brakes on the truck were applied, the left rear wheel locked up and slid, and the other three wheels continued to roll. He estimated that the truck traveled 30 to 35 feet before it came to a full stop. Lauver indicated that the road was well packed, very hard and contained gobs of mud. According to Lauver, all the wheels were on the same type of material. He said that he did not recall any ice on the road. Lauver issued a citation alleging a violation of 30 C.F.R. 77.1605(b) which, as pertinent, provides that mobile equipment shall be equipped with "adequate brakes".

A. Violation of Section 77.1605, supra

Melvin James Muth, a field service technician employed by Beckwith Machinery Company, repairs Caterpillar equipment. Muth testified that the rear brakes on the vehicle in question were rebuilt in July 1992. According to Muth, after he was informed that Lauver had issued his citation, he backed the truck up a grade, applied the brakes, and the truck stopped. He said that

it went a "short distance" but it did not take long for the truck to stop. He said that he has not seen any caterpillar specifications regarding the distance in which the vehicle in question should stop once brakes are applied.

In addition, while the truck was parked, Muth checked the brake pressure at the rear and front wheels when by the retarder system was applied.(Footnote 2) Muth also tested the wear on the brake pads. All of the tests were where within Caterpillar specifications. In essence, Muth opined that the breaks were working properly.

Muth indicated that if the service brakes are applied, all four wheels should stop fairly close to the same time. He opined that if one rear wheel locked-up when the service brakes were applied, it is conceivable that the vehicle was on mud or ice. Also, he opined that it is possible that the front brakes might have been turned off. In that event, it is possible that the front brakes only the rear breaks would be activated.

Muth indicated that in testing the brakes, he noted a little air in the brake system. He surmised that the air had entered the system when he opened a screw to bleed the brakes earlier that morning when he tested the vehicle. Muth did not consider the air in the system to be significant, since all tests on the braking system were within the specifications of the manufacturer.

Although the tests performed by Muth where within Caterpillar's specifications, I accept the testimony of Lauver, in as much as it was not contradicted, that he observed one wheel lock-up when the brakes where applied on a grade. Muth indicated that, as designed, all four wheels are to stop very close to the same time when the service brakes are applied. He indicated that a rear wheel might lock if there is mud(Footnote 3) or ice on the road, or

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2 The retarder system actives only the rear brakes and applies less pressure than the service brakes which are designed to operate the front and rear brakes. The retarder system is used to slow the vehicle when it is going down hill, but not to stop it. The retarder system applies variable pressure.

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3 According to Lauver, the road was handpacked and there was no ice. He stated that there were "gobs" of mud. However, there is no evidence that there was mud in the specific path the tires travelled when the operator applied the brakes when requested by Lauver.

if the front brakes are not applied(Footnote 4). The evidence does not establish any of these factors. Within this framework, I conclude that vehicle in question was not equipped with adequate brakes, and as such Section 77.1605, supra was violated.

B. Significant and Substantial

Lauver opined that since the brakes were not adequate when the vehicle was not loaded, an injury was reasonable likely to occur when the vehicle was fully loaded. He explained that it is possible for the operator to loose control, and hit an object. He indicated, however, that due to the slow speed at which the vehicle operates, he did not feel that a major collision was likely, and that an injury that could occur would be comparatively minor. Taking in account the following: (1) all the tests performed by Muth did not reveal any abnormality; (2) Lauver did not measure the amount distance the truck rolled after the brakes were applied; (3) the lack of evidence as to the specific distance the truck should roll once the brakes are applied, and (4) the fact that in normal operations the truck travels at a slow speed, I conclude that it has not been established that an injury producing event was reasonably likely to have occurred. (See, U.S. Steel, supra). I thus, conclude that it has not been established the violation was significant and substantial. (See, U.S. Steel, supra).

C. Penalty

According to Lauver, he inspected the equipment examination records, filled out by drivers of the vehicle in question. He indicated that these records, for the period subsequent to November 4, 1992, indicate that brakes problems have been reported by three drivers. However, he did not recall the wording in the records, and the records themselves were not offered into evidence. Gresh indicated that he had discussed maintenance of brakes previously with Respondent's management. There is no evidence regarding the specifics of these discussions. It is significant that when the brakes were tested by Muth, all tests were within the manufacturer's specifications. Within this framework, I conclude that Respondent's negligence was less than moderate. I conclude that a penalty of $200 is appropriate for this violation.

IX. Citation No. 3709642 (Docket No. PENN 93-51)

On September 16, 1992, Lauver observed a three inch long crack on the front surface on the cross member of a rig truck. He also observed a 4 inch long crack across the top of the cross-member. Lauver estimated the width of the cracks, i.e,. the gap in the crack, from a hairline to up to a 16th of an inch.

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4 There is no evidence that anyone observed that the front brake switch was in the "off" position."

According to Lauver, the cross-member connects the two sides of the mainframe, and is also one of the supports for the engine. Lauver opined that since the roads upon which the truck travels are hard packed, rough, and contain bumps and dips, the cracks at issue can only get worse. He opined that failure of the cross-member will cause a jolt which can injure the driver. He issued a Citation alleging a significant and substantial violation of 30 C.F.R. 77.1606(c) which provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used." (Emphasis added).

William Dean Bratton, a mechanic employed by JEM Industry, explained that the two main side members of the frame of the vehicle in question, provide the majority of the strength to support the truck and its load. He said that "item "C" depicted on Exhibit R-2, is the main support beam for the suspension cylinders, and it also ties the main side together. In addition, the front bumper and three other cross-members hold the frame together. He indicated that cross-member "E" (Ex. R-2) is the more significant cross-member in holding the sides of the frame together. According to Bratton, that the cross-member in question "assists somewhat" in holding the frames together and is the least significant cross-member. He explained, as depicted in Exhibit R-2, that the two side members of the frame contain the mounts for the engine, and the cross-member at issue does not have, any engine supports, and does not support the engine. None of this testimony was specifically rebutted by Lauver or any other witness. Based upon Bratton's experience and background, it is accepted.

Bratton testified that on September 16, he examined the cracks at issue. He said that the circumference of the cross-member upon which the cracks were noted is 52 inches. He indicated that the cross-member is approximately 12 feet in length. Bratton said that the top surface where one crack was located is 14 inches wide, and the other surface where another crack was located is 12 inches wide.

The testimony of Bratton tends to established that should the cross member at issue fail due to expansion in the crack, there would not be a significant impact upon support of engine, and the structural integrity of the vehicle. However, he did not specifically contradict Lauver's testimony that should this member fail, the resulting jolt could injure the operator of the vehicle. Hence, I conclude that the cracks, are defects that do, to some degree, affect safety. Since they were not corrected prior to use, I conclude that Respondent did violate Section 77.1605 supra.

Considering the credible testimony of Bratton that the cross member at issue does not support the engine, and only assists somewhat in holding the sides together(Footnote 5), I conclude that it has not been established that an injury producing event was reasonably likely to occur as a consequence of the cracks. Accordingly, I conclude that it has not been established that the violation was significant and substantial.

Lauver testified the same condition had been cited in the past, and should have been noted in the reports on this piece of equipment. However, there is no evidence as to how long these specific cracks had been in existence. In this connection, Bratton opined on cross-examination that the cracks most likely developed from wear and tear, and from being bounced on the roads. On re-direct examination he opined that a rock strike could have cause the cracks. I find that a penalty of $100 is appropriate for this violation.

X. Citation No. 3709869 (Docket No. PENN 93-133)

On November 3, 1992, Lauver observed a layer of coal and small chunks of coal on the feeder belt walkway at the Leslie Tipple. He issued a Citation alleging a violation of 30 C.F.R. 77.205(b). Respondent does not challenge the violation Accordingly, and based upon the testimony of Lauver I find Respondent did violate Section 77.205(b) supra as alleged.

Lauver termed the violation significant and substantial. He said that the entire width of the walkway was covered with the material for approximately 15 feet. According to Lauver, the handrail next to the walkway was twisted and bent in the area at issue so that a person could fall between walkway and handrail. He opined that it was reasonable likely that one would stumble and fall. However, according to Lauver, this would not result in a serious injury, as the walkway was only 5 or 6 feet above the ground. According to Lauver, he had observed persons using the walkway.

Gary Crago, the assistant manager at the tipple, indicated that the walkway at issue was at an 8 percent incline, and was 30 inches wide, and the handrail was 3 feet high. He described the presence of a cover over the belt to keep persons from falling onto the belt. He also noted the purpose of a safety pull cord

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5 I place more weight on the testimony of Bratton, as I found it well-reasoned, and supported by a diagram set forth in the Unit Rig service manual (Respondent's Exhibit 2). In contrast, I place less weight on Lauver's testimony on this point, as his experience with this specific vehicle is not as extensive as Bratton's. Also Lauver's testimony is not supported by the Unit Rig manual. (Ex. R-2)

to stop the operation of the belt. He said normally persons travel the walkway a couple times a day to check the feeder. The walkway is lit by two lights, and during the day it is visible.

Lauver did not describe with specificity the traction on the walkway, and the size and placement of the materials at issue. Nor did he describe their depth. Within the framework of this record, I cannot find that it has been established that an injury producing event, i.e., stumbling, or tripping, was reasonably likely to have occurred. For these reasons it is concluded that it has not been established that violation was significant and substantial.

According to Crago the four employees at the plant were engaged in repairs so that the plant could be restarted, and that the spill was to be cleaned prior to startup. There is no evidence as to the length of time that the spill existed on the walkway. I conclude that a penalty of $50 is appropriate for this violation.

XI. Citation No. 3709878 (Docket No. PENN 93-133)

According to Lauver, on November 5, 1992, he observed fine, dry, float coal dust on the belt structure in the preparation plant. He said that it covered the entire belt structure i.e., the belt and the supporting elements as well as the drive motors and pulleys. Lauver said the materials were up to a half-inch thick, but "tapered down to nothing at certain points" (Tr. 166, December 8, 1993). He estimated the belt was between 50 and 75 feet long, and was in operation at the time.

According to Lauver, dry float coal dust in suspension can be ignited by a spark. However, he did not see any coal dust in the air. Lauver opined that dry float coal dust on a surface can be placed in the air by a breeze or by vibration, and then a spark can cause it to explode. He said that he did not note any frozen rollers which could have caused a friction ignition. According to Lauver the electric drive motors for the belt are an ignition source, although there was nothing wrong with the motors at the time of the inspection. Lauver issued a Citation alleging a violation of 30 C.F.R. 77.202.

Crago indicated that all rollers where running free, and the were no problems with any motor. He also indicated that he tested fine coal by placing it 2 inches away from a heat lamp for 15 minutes, and it did not burn. He was with the Lauver during the inspection, but he did not contradict any of Lauver's factual testimony.

Although there were no actual ignition sources present the rollers presented a potential ignition source should they freeze, and cause friction sparks. Also, the electric motors presented a

potential ignition source. Since there were potential ignition sources present in the vicinity of the accumulation, it is concluded that the accumulation existed in dangerous amounts (Pittsburgh and Midway Coal, 8 FMSHRC 965, (January 1986)). Accordingly, it is concluded that Section 77.202 supra which provides that coal dust on surfaces or structures shall not be allowed to exist or accumulate "in dangerous amounts", has been violated as alleged by Lauver.

Since there were no actual ignition sources present in the vicinity, I conclude that the likelihood of an injury producing event i.e., fire or explosion was not likely. Accordingly it must be found that the violation was not significant and substantial.

Lauver opined that due to the extent of the accumulations, they built up over a minimum of 24 hours. Crago, who was present at the time, did not contradict Lauver's testimony on this point. There is no evidence as to the actual amount of time the accumulations had been in existence. I find that a penalty of $150 is appropriate for this violation.

XII. Citation Nos. 3709748 and 3709749 (Docket No. PENN 93-152)

On December 3, 1992, Lauver observed that a guard was missing at the fan inlet for the left engine on a O & K shovel, ("shovel") and at another shovel, guards were missing on both engines. He issued two citations, one for each shovel, alleging a violation of 30 C.F.R. 77.400(a) which provides, in essence, that exposed machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded. Respondent does not challenge the violation. Based upon this admission, as well as the testimony of Lauver, I conclude that Respondent did violate Section 77.400(a) supra.

According to Lauver, the exposed moving parts on the engines in question are located in a compartment that is accessed by the way of a ladder which one descends through a 3 foot square opening. He indicated that if a person stands in the center of this compartment, one or two steps in either directions would bring that person in contact with the engine. Accordingly, he opined that an injury was reasonably likely to have occurred. He said that contact with the fan belts or pulleys would cause bruises resulting in loss of work days or restricted duties.

Ronald L. Krise, who had operated one of the shovels for 2 years, indicated that maintenance personnel go down to the compartment in question to check the oil for the engines.

Lauver conceded on cross-examination that in order for an injury to occur, there must be contact with the exposed parts when the engine is being operated. The record does not established that, in the ordinary operation of the equipment in issue, persons descended to the compartment where the engines are located. Although Lauver testified that a persons standing in center of an compartment would be nearly in contact with the engine, he did not describe in specificity the location of the unguarded area. There is no description of the dimension of the exposed area, its distance from the floor, and its distance from the center of the compartment. Within the framework of this evidence, I conclude that it has not been established that an injury producing event i.e., contact with moving exposed parts, was reasonably likely to have occurred. Hence, I conclude that it has not been established that the violation was significant and substantial.

Lauver opined that the operator was aware of guarding requirements, and that there was no reason why the area in question was not guarded. Respondent did not offer any evidence to explain why the area in question was not guarded. I conclude that a penalty of $300.00 is appropriate for the violation alleged in citation no. 3709748, and a penalty of $300 is appropriate for the violation alleged in Citation No. 3709749.

XIII. Citation No. 3709644 (Docket No. PENN 93-51).

On September 16, 1992, Lauver observed an employee of Respondent steam cleaning a rock truck with a steam jenny, which applies water under high pressure. Lauver testified that the employee was not wearing goggles or a face shield. He issued a citation alleging a violation of 30 C.F.R. 77.1710(a) which in essence requires the wearing of face shields or goggles when a hazard to the eyes exists. Respondent has conceded the violation. Based upon this concession, and Lauver's testimony I conclude that Respondent did violate Section 77.1710(a) as alleged.

According to Lauver, the application of the high pressure steam and liquid from the steam jenny dislodges dirt and grease from the truck, which splattered in all directions. He opined that it was extremely likely that the operator of the steam jenny would get hit by the splattered material. Lauver indicated that the face of the operator was splattered with black materials. He concluded that the violation was significant and substantial.

Peter Baughman testified that he operates the steam jenny two to three times a week. He said that he has used the jenny without wearing goggles, and his has never gotten anything in his

eyes. He said that when he operates the jenny and places the nozzles at a distance of 3 feet away from a truck, water gets splashed on him, but that the solid material loosened from the truck falls down the truck.

The observation of Lauver that the employee who was operating the jenny in question was observed with black materials splattered over his face was not rebutted or contradicted. Neither was Lauver's opinion that dirt and grease dislodged by the jenny splatters in all directions. Baughman indicated that usually the nozzle of the jenny is kept about 3 feet away from the truck when it is being used. He also indicated that water does splash upon him.

Based on this record, I concluded that an injury producing event, i.e., some materials dislodged from the truck being splattered in the eye of an operator who was not wearing goggles was reasonable likely to have occurred. However, the record does not established any evidence regarding the level of severity of an injury occasioned by contact of the materials with an eye. I thus cannot conclude that an injury of a reasonably serious nature was likely to have occurred as a consequence of the violation found herein. I conclude that it has not been established that the violation was significant and substantial.

Baughman indicated that the Respondent does require the wearing of safety goggles. Greenawalt testified that persons who run the jenny are supplied with goggles, and Respondent does enforce the rules of wearing safety goggles. He indicated that if he catches a person operating the jenny without safety goggles, he tells him to put them on. I find that Respondent's negligence is less than moderate. I conclude that a penalty of $100 is appropriate for this violation.

XIV. Citation No. 3709905 (Docket No. PENN 93-152).

On December 3, 1992, McKendrick issued a citation alleging a violation of 30 C.F.R. 77.1103 which, in essence, requires flammable liquids to be stored in accordance with the standards of the National Fire Protection Association. He indicated that gasoline was being kept in containers that were not approved as safety cans. Respondent indicated that it conceded the violation. Based upon this concession and testimony of McKendrick, I concluded that Respondent did violate Section 77.1103(a). Supra

McKendrick indicated that he could smell fumes in the building that contained the gasoline cans. McKendrick explained that the gasoline at issue is stored in cans that do not have safety lids to prevent spillage in transportation. He related an incident, contained in an accident report he read, wherein an individual was driving a vehicle containing gas in plastic

containers that did not have safety lids, and gas fumes escaped causing the individual to become overcome with fumes which resulted in a fatal accident. McKendrick opined that was an injury was reasonably likely to have occurred as a result of the violation herein.

Baugaman testified that approximately once a week he goes to the area in question, removes a container of gas, and carries it to a bus where it is consumed.

Within the framework of this evidence, I find that it has not been established that any reasonably serious injuries were reasonably likely to have resulted as a consequence of the storage of gasoline herein in containers that were not within the standards of the National Fire Protection Association. I find that the violation was not significant and substantial.

McKendricks indicated that the area in which the gasoline was stored is required to be inspected, and that an inspection would be revealed that the gas cans did not have safety lids. I find the Respondent negligence to have been of a moderate degree. I conclude that a penalty $100 is appropriate for this violation.

XV. Citation No. 3709907 (Docket No. PENN 93-152).

On December 3, 1992, McKendrick inspected a pavilion (storage area). He indicated that an area of the floor of the pavilion approximately 8 feet by 15 feet, had been removed. He issued a citation alleging a violation of 30 C.F.R. 77.204 which requires as follows: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers covers, or other protective devices." Respondent conceded the violation, and based upon the testimony of McKendrick, I find that Respondent did violate Section 77.204, supra.

He said that some of the areas when the floor was removed was were two feet in depth, and that it was possible that in some areas the depth was a foot and a half. McKendrick's testified that he saw fresh foot prints on the floor of the pavilion within less than a foot from the area where the floor had been removed. He indicated that throughout the day that he was at the subject premises, he saw two persons on the pavilion. McKendrick concluded that an injury was reasonable likely to have occurred as there were boards lying in the vicinity which created a stumbling hazard. He indicated that should one stumble and fall, a broken limb was possible.

McKendrick did not testify regarding the dimensions of boards scattered in the area, the precise manner in which they were placed, and their distance relative to the area in which the floor had been removed. Greenawalt indicated that some of the

floor was just about a foot off the ground, and that employees worked on the pavilion only during the day. He testified that the day prior to the citation, he created the hole in question by removing six boards. He said that the resulting hole was 4 feet by 4 feet, and 2 feet below the surface of the rest of the pavilion platform. He said that the hole was backfilled with material that was taken out of the hole. I accept Greenawalt testimony regarding the dimension of the hole, and the dimensions of the platform, 30 feet by 40 feet, due to his having had personal knowledge of the creation of the hole.

Within the framework of this record, I conclude that it has not been established that tripping or stumbling was reasonably likely to have occurred as consequence of the violation herein. It has also not been established that any serious injury was reasonably likely to have occurred as a consequence of violation herein. I thus find that the violation was not significant and substantial.

According to McKendrick, the hole was visible from the office, and from the hard stand where repairs are made, and where persons work. This testimony has not been rebutted. However, Greenawalt explained that the hole was made the previous day on the orders of Pennsylvania Department of Environmental Resources personnel who wanted to take a soil sample. I thus find that Respondent was negligence to a moderate degree regarding this violation. Within this framework I conclude that a penalty of $100 is appropriate for this violation.

XVI. Citation No. 3490533 (Docket No. PENN 93-202).

Partash indicated that on December 3, 1992 he was informed by Respondent's employee Larry Kanour, that Ronald L. Krise was no longer in charge of safety. Contemporaneous notes taken by Partash indicate as follows "Krise removed from foremen position on October 26, 1992". Partash issued a Citation alleging a violation of 30 C.F.R. Section 41.12 which requires an operator to report, in writing, to the appropriate district manager of MSHA, any change in information required by Section 41.11. Section 41.11 requires an operator, in its legal identity report to provide ". . . the name and address of the person at the mine in charge of health and safety". . . .

The legal identity report filed by Respondent (Government Exhibit 34) indicates as follows under the section headed. Person at mine in charge of health and safety (Superintendent or Principal Officer:
"Name and Title
Ronald L. Krise
Robert Greenawalt"

The legal identity report contains the names of two persons in charge of health and safety, in conformity with the requirements of Section 41.11(d)(2). Although only one person is required in order to comply with Section 41.11 supra, Respondent chose to include two names. Any change in this information is thus required to be reported to MSHA pursuant to Section 41.12 supra. In essence, Partash's evidence indicates that Krise was no longer in charge of safety as of October 26. Respondent did not offer any testimony to contradict Partash, nor did it impeach the testimony of Partash in this regard. Accordingly, I accept his testimony and I conclude that Section 41.12, supra has been violated by as alleged by Partash. I conclude that since the Section 41.11 is satisfied by reporting only one individual being in charge of health and safety and since there was no change regarding one individual previously reported, that the failure to report the fact that Krise was no longer also in this position is not of great consequent. I find that a penalty of $10 is appropriate for this violation.

XVII. Citation No. 3709908 (Docket No. PENN 93-152).

According to McKendrick on December 3, 1992, he observed a bus used to transport persons at the mine. He noted that two left front head lights were broken, and were not functioning. The bus traveled over mine roads each day for about a mile in each direction. The bus traveled in the dark, as the shifts began at 5:45 a.m. and ended at 5:45 p.m. in December, 1992. McKendrick issued a Citation alleging a violation of 30 C.F.R. 77.1605(d) which provides, that, relating to mobile equipment "Lights shall be provided on both ends when required."

The bus was equipped with rear tail lights and four front headlights. At the time of the citation, all of these lights were operational except two of the headlights which were broken. Hence, since the bus had rear tail lights that were operational, and two headlights that were operational, it did have functioning lights on both ends. Accordingly, the vehicle satisfied the plain language of Section 77.1605(d) supra, which requires the provision of lights on both ends.(Footnote 6)

ORDER

It is Ordered that (1) the following citations shall be Dismissed: Nos. 3709643, 3709904, 3709821, and 3709908; (2) the following citations be amended to violations that are not

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6 In contrast, the vehicle cited in Citation No. 3709903, (I, infra) which was found to violate Section 77.1605(d), supra, had only one functioning light in the rear.

significant and substantial: Nos. 3490531, 3709751, 3709642, 3709869, 3709642, 3709505 and 3709707; and (3) Respondent shall pay, within 30 days of this decision a penalty of $2,210.00.

Avram Weisberger
Administrative Law Judge

Distribution:

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/efw