CCASE:
SOL (MSHA) V. POWER OPERATING COMPANY
DDATE:
19940630
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 93-22
	:	A. C. No. 36-02713-03575
v.	:	
	:	Docket No. PENN 93-73
POWER OPERATING COMPANY, INC., Respondent	:	A. C. No. 36-02713-03577
	:	Docket No. PENN 93-360
	:	A. C. No. 36-02713-03585
	:	
	:	Docket No. PENN 93-386
	:	A. C. No. 36-02713-03586
	:	
	:	Docket No. PENN 93-166 (Footnote 1)
	:	A. C. No. 36-02713-03579
	:	
	:	Frenchtown Mine
	:	
	:	Docket No. PENN 93-165
	:	A. C. No. 36-04999-03535
	:	
	:	Docket No. PENN 93-287
	:	A. C. No. 36-04999-03537
	:	
	:	Leslie Tipple Mine

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

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1 This decision is only a partial decision as it relates to Docket No. PENN 93-166. Only one of the two citations in this docket number was litigated on March 8, 1994. The remaining citation (No. 3709746), will be heard on August 30, 1994.

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 discovery,(Footnote 2) and pursuant to notice, the cases were heard in Bellefonte, Pennsylvania on March 8, 9, and 10, 1994.

Findings Of Fact and Discussion

I. Docket No. PENN 93-22, (Citation No. 3490508)

A. Violation of 30 C.F.R. 1606(c)

1. Loose Ball Stud

Charles S. Lauver, an MSHA inspector, testified that on August 28, 1992, while inspecting Respondent's facilities, he asked the driver of a Unit Rig Electra haul truck to move the steering wheel back and forth. Lauver observed the vehicle, which was stationary at the time, and looked under the front wheels. He observed that the left ball stud moved back and forth. He estimated that it moved one quarter of an inch in each direction. He issued a citation alleging a 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."

The vehicle in question is equipped with two steering jacks on each side of the truck that turn the front wheels. Each jack is attached to a cylinder, which in turn is attached to the main truck frame by a ball stud. Because the stud tapers down towards the end that protrudes through the outside of the frame, the hole in the frame through which the stud is positioned has a smaller

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2 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 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.

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.

diameter on the outside of the frame, as opposed to the diameter of the hole inside the frame. The stud is attached to the frame by way of a washer and bolt, both of which are located on the outside of the frame. According to Lauver, because the stud was loose, it could shear off or become detached from the frame, should the truck be driven over rough roads, or hit a hole in the road. Lauver opined that should the stud either shear or separate from the mainframe, extra strain would be placed on the jack on the other side of the vehicle, and the effectiveness of the steering would be reduced.

William Bratton, a maintenance foreman employed by J.E.M. Industries, has repaired and assembled Unit Rig Electra trucks. He indicated that since each steering jack turns the wheels in both directions, should one steering jack become inoperative due to failure of the stud, both wheels would still turn. He also opined that a quarter inch movement of the stud would not affect the steering on the truck, as long as the stud and cylinder are attached, and the stud is attached to the frame.

Lauver indicated there were no cracks in the stud or on the frame, and that when he observed the vehicle being operated it appeared to "steer fine." (Tr. 44, March 8, 1994). He also agreed that if the stud did shear off, the vehicle could still be steered.

On cross-examination, Bratton agreed that the conical portion of the stud should be stationary. He said that if, upon inspection, he had found play in the stud to the extent noted by Lauver, he would have repaired it. He was concerned that if the steering jack should become detached, "it would slow the steering" (Tr. 70, March 8, 1994).

Within the framework of the above evidence, I find that a separation of the stud from the frame was not likely to occur, due to the manner in which it was attached, and the tapering of the hole in the frame in which the stud was placed. However, I find that it is possible that with continued operation of the truck over rough roads, because the stud was not stationary it could shear, resulting in some decreased efficiency in the steering. Accordingly, I find that the looseness of the stud was a defect which could affect safety. (See, Pittsburgh and Midway Coal Mining Company, 8 FMSHRC 4 (1986)). I thus find that since the loose stud had not been corrected, the use of the truck in question constituted a violation of Section 1606(c) supra.

2. Emergency Steering System.

The emergency steering system in the vehicle at issue is designed to operate automatically should there be an engine failure. According to Lauver, he asked the operator of the truck to shut off the engine, and try the emergency system. Lauver indicated that the operator attempted to activate the system, but the steering wheel moved only an inch, and the wheels did not move.

Although the emergency system applies only when the engine fails, it is nonetheless designed to provide limited steering ability in the event of an engine failure. Since this emergency feature did not work, it is conceivable that there could have been some impact on safety, should the engine have failed. Thus, under Section 1606(c) supra, this condition should have been corrected.

B. Significant and Substantial

According to Lauver, a loss of steering control was reasonably likely to have resulted in a collision with another vehicle, since there was extremely heavy traffic on the haul road in question. In this connection, Petitioner argues that, given continued operation on bumpy roads, the cited loose ball stud would become looser to the point where it would shear off, or become detached. Petitioner also cites the loss of steering control that would have occurred as a result of the inoperative emergency system. I do not find much merit in Petitioner's arguments.

The record before me establishes the following: (1) the cited truck operates at a slow speed; (2) the lack of any crack in the stud or in the frame; (3) the stud was securely attached to the frame; and (4) the lack of any condition that would indicate that engine failure was reasonably likely to have occurred. Considering these facts, I conclude that it has not been established that there was a reasonably likelihood for any injury producing event as a consequence of the violative conditions found herein.(Footnote 3) (See Mathies Coal Co. 6 FMSHRC 1, 3-4 (1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)). Accordingly, I find that it has not been established that the violation is significant and substantial.

According to Lauver, the driver of the vehicle in question told him that he was unaware that the stud was loose, and that he had not had the opportunity to report the lack of emergency steering. There were no apparent problems steering the cited truck. The loose stud was not obvious. Respondent's management did not have notice or knowledge of the lack of the emergency steering. Based on these factors, I conclude that Respondent

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3 It also has not been established that an injury producing event was reasonably likely to have occurred as a result of the lack of emergency steering. This system activates only when the engine fails. There is no evidence of the presence of any condition that would have made it reasonably likely for the engine to fail. Also, in the event of engine failure, an emergency braking system allows the brakes to be operated 8 to 10 times.

was negligent to a less than moderate degree. I find that a penalty of $200.00 is appropriate for this violation.

II. Docket No. PENN 93-73, (Citation No. 3709641).

Accordingly to Lauver, when he inspected the 009 Pit on September 15, 1992, he observed a fully loaded Caterpillar 777 rock truck. He said that he observed a very large rock balanced on top of the load. Lauver said that the rock was teetering back and forth, and appeared ready to fall. Lauver measured the rock in question after it was dumped and found that it was 16 feet long, nine feet wide, and 47 inches thick. Lauver issued a citation alleging a violation of 30 C.F.R. 77.1607(aa) which provides as follows: "Railroad cars and all trucks shall be trimmed properly when they have been loaded higher than the confines of their cargo space."

James Hepburn, an MSHA inspector who was present at the site on September 19, 1992, corroborated Lauver's testimony, and indicated that he observed the rock teetering when the truck backed up.

Ronald L. Krise, Respondent's shift foreman, indicated that he would have "tampted" the rock down (Tr. 142, March 8, 1994) to make it settle on the truck bed. Richard DuFour, who was operating a grader on September 19, observed the vehicle in question from a point approximately 100 feet removed. He stated that the rock on the truck was not swaying or teetering, but that the truck "was rocking back and forth", as there were a few "rough spots" on the road. (Tr. 154, March 8, 1994).

Based on the testimony of Lauver, corroborated by Hepburn, I find that a rock 16 feet long, 9 feet wide, and 47 inches thick, was higher than the cargo space of the truck.

The term "trimmed properly" as contained in Section 77.1607(aa) supra, is not defined in the Act, or Title 30 of the Code of Federal Regulations. "Trim" is defined in Webster's Third New International Dictionary (1970 Edition) ("Websters"), as pertinent, as follows: "to reduce by removing excess or extraneous matter." Hence, applying the common meaning of the term "trim" I find that, the term "trimmed properly" means that if a truck contains excess material that is over the height of the cargo area, and is unstable, the material must be trimmed. (See, Peabody Coal Company 2 FMSHRC 1072, May 7, 1990 (Judge Laurenson); Power Operating Company, 16 FMSHRC 591 (March 23, 1994) (Judge Weisberger). I accept the testimony of Lauver, as it was corroborated by Hepburn, and find that a large rock extended above the cargo area, and was not stable. I thus conclude that Respondent did violate Section 77.1607(aa) supra.

According to Lauver, the rock was teetering back and forth, and appeared ready to fall. DuFour testified that when he observed the truck traveling on the haul road, the rock was not swaying or teetering. Krise opined that the rock was not likely

to fall off due to it's size, and the fact that it "was settling into the soft material." (Tr. 145, March 8, 1994). I accept the testimony of Lauver, inasmuch as Hepburn corroborated that the rock was teetering. I accept Lauver's opinion that due to the way the rock was balanced, it could have fallen off at any time. Lauver's testimony also was not contradicted that other vehicles traveled the same road.

Within the framework of this record, I find that as a consequence of the violation herein, an injury producing event, i.e., the rock in question falling off the truck, was reasonably likely to have occurred. I also accept the uncontradicted testimony of Lauver that, due to the size of the rock, should it have fallen, any person in the vicinity would have been crushed. I conclude that the violation was significant and substantial. (See, U.S. Steel supra).

Lauver indicated that within the preceding three months of the issuance of the citation at issue, he had cited Respondent three times under Section 77.1607(aa) supra. He said that in connection with the issuance of these citations, he had discussed with Respondent's management the hazards of materials falling off loaded rock trucks. He also met with the shovel operators who load the rock trucks, and explained to them the hazards involved in loading trucks when materials no longer stay in the bed of the truck. He also indicated that after each cited violation, he discussed the issue of loading trucks with Krise. However, on cross-examination, he indicated that the specific condition cited herein was "unusual", and that none of the other citations that he had issued were for the same condition. (Tr. 108, March 8, 1994).

Lauver also indicated that on the day of the inspection at issue, he had a discussion with an individual at the mine who informed him that "it was normal procedure to load the trucks in this manner" (Tr. 98, March 8, 1994). Petitioner did not divulge the identity of this individual claiming the informant's privilege, and the claim of privilege was upheld. Petitioner did not produce this individual to testify. Accordingly, I do not place much weight upon this hearsay testimony.

According to Krise, it is not Respondent's usual procedure to load trucks in the fashion the truck at issue was loaded. Lauver also indicated that Kanour had told him that the shovel operators would be disciplined "for this type of loading" (Tr. 121, March 8, 1994). Krise indicated that once he saw the rock on the truck he told the shovel operator who had loaded the truck, that he had made a mistake loading it that way. Krise also indicated that the positioning of the rock on the truck is not the way operators are instructed to load a truck. He indicated that there was no time to do anything about the improperly loaded truck prior to the issuance of the order at question. He testified that he would have made the rock more stable had he been aware of the condition before it was cited. Within this framework, I conclude that it has not been

established that there was any aggravated conduct on the part of Respondent. I thus conclude that it has not been established that the violation was the result of Respondent's unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987)).

Since the violative condition was obvious, and could have led to a serious injury, I find that a penalty of $2,000 is appropriate.

III. Docket No. PENN 93-287, (Citation No. 3709741).

Lauver issued a citation alleging a violation of 30 C.F.R. 48.25(a), inasmuch as an employee of an independent contractor, Michael Baney, working on the subject site, had not received any newly employed miner training. Respondent has conceded the violation. In light of this concession, and considering the testimony of Lauver, I find that Respondent did violate Section 48.25(a) supra.

According to Lauver, he testified that Baney was operating the front-end loader in a "very hesitant manner", and that he appeared inexperienced (Tr. 169, March 8, 1994). Lauver opined that an operator of a front-end loader must be aware of the specific hazards of operating at the subject site. He explained that the operator must keep in mind the positions of stationary structures such as belts, and their supports. Also, one must be careful not to run under the belt, and must be aware of the presence of standing water located in a shallow pit near the end of the belt. Lauver also noted the hazards of driving on the road in the area in question which he indicated was not level.

Section 48.25(a) supra, provides, in essence, that a newly employed inexperienced miner shall be given eight hours of training before he is assigned to work duties. The training consists of the following: "Introduction to work environment, Hazard recognition, and Health and safety aspects of the tasks to which the new miner will be assigned. The employee in question did not receive this training, due to a mistake. However, he was given, along with three other individuals, newly employed experienced miner training. Section 48.26 provides, in essence, that newly employed experienced miners shall receive, inter alia, the following training before being assigned to work duties: Introduction to work environment, Mandatory health and safety standards, Transportation controls, communication systems, and Hazard recognition. Larry Kanour, Respondent's safety director, indicated that he did provide such training. There are no specific facts in the record to predicate a finding that, as a consequence of the lack of the eight hours of inexperienced miner training, there was a reasonable likelihood of an injury producing event. Although Baney may not have been operating the loader properly, the initial eight hours of inexperienced miner training would not have covered instruction in this area. Thus, I find that it has not been established that the violation was significant and substantial (See, U.S. Steel, supra.)

On the day of the initial training, Kanour had a telephone conversation with Allen Albert, the independent contractor (Albert Contracting). Albert explained that he was sending two additional men for training, one of whom, Baney, was subsequently cited in the citation at issue, and that these men needed newly employed experienced miner training. Kanour indicated that Albert told him, that these two men had worked for him, and they were experienced in working as operators of loaders, dozers and trucks. Kanour said that he asked Albert if he had the certificates for these men and Albert indicated in the affirmative. Kanour did not ask Albert to produce these certificates.

According to Kanour, when the men arrived for the training, he asked them the level of their experience and they "replied the same way" (Tr. 205, March 9, 1994). Kanour indicated that he asked these men whether they had MSHA training, and they indicated that they had eight hours of annual training.

I observed Kanour's demeanor and found him credible in his testimony on these matters, and I accept his version. Within the above framework, I conclude that Respondent was negligent to a less than moderate degree. I find that a penalty of $50 is appropriate for this violation.

IV. Docket No. PENN 93-165, (Citation No. 3709742).

On November 19, 1992, Lauver tested three occupations for exposure to coal dust. One of the occupations tested was that of plant operator. According to Lauver, he asked the plant operator where he spent most of his time. The operator showed him a stool located in front of the control panel in the control room on the second floor of the preparation plant. Lauver then placed a dust collecting device on a small bench or ledge within two feet of the stool. Lauver indicated that the stool was 2 1/2 to 3 feet high, and the bench or ledge was 4 feet off the ground.

Lauver estimated that the plant operator spent over half his time in the control room monitoring controls. Lauver indicated that he decided not to place the sampling device on the person of the operator. Lauver reasoned that since the operator did not remain in one place, if he were to wear the sampling device, it could get dumped by accident, thus voiding the sample. He said, in essence, that it is MSHA policy to either place the sampling device on a miner, or in the dirtiest place that he is exposed to.

Sample dust collection over five consecutive days indicated an average concentration of 2.1 milligrams of respirable dust per cubic meter of air. Lauver issued a citation alleging a violation of 30 C.F.R. 71.100 which requires the maintenance of ". . . the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active

working is exposed at or below 2.0 milligram of respirable dust per cubic meter of air."

Gary Crago, the assistant manager of the preparation plant, indicated that the plant operator has the responsibility of overseeing the operation of the plant. In essence, he said that normally the operator spends 5 minutes each hour in the control room, but that he can spend up to 15 minutes if there is a problem with a pump. He indicated that aside from checking the controls in the control room, the operator also checks the belts, hoses, and all machinery.

In essence, Section 71.100 supra, provides for the maintenance of coal dust in concentrations at or less than 2.0 milligrams per cubic meter of air in the mine atmosphere ". . . during each shift to which each miner in the active workings is exposed." Hence, the critical question is whether the samples collected from a ledge in the control room represented the average concentration of dust "during each shift" to which the plant operator was exposed while in the active workings i.e., the control room.(Footnote 4) In other words, at issue is the amount of time during each shift that the plant operator spent in the control room. Lauver did not testify based upon any personal knowledge of the amount of time the plant operator actually spent in the control room. I do not accord much weight to Lauver's hearsay testimony that the operator told him(Footnote 5) that he spent most of his time in the control room sitting on the stool. Crago indicated that in normal operations, the operator does not remain in the control room, but goes in and out. I found his testimony credible based on my observations of his demeanor. Within the framework of this evidence, I conclude that it has not been established that the atmosphere tested, i.e., the control room, was the atmosphere in which the plant operator was exposed for all, or a significant portion of the shifts tested.(Footnote 6)

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4 "Active workings", is defined in 30 C.F.R. 71.2(b) as "any place in a surface coal mine or the surface area of an underground coal mine where miners are normally required to work or travel" (Emphasis added).

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5 The operator was not called to testify.

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6 In essence, Petitioner argues the inspector had the discretion to place the testing device at a location representing the maximum concentration of dust to which the operator was exposed, i.e., in the control room. Petitioner's cites 30 C.F.R. 71.208(g)(2) to support its position. I reject Petitioner' argument since 30 C.F.R. 71.208 pertains to bimonthly sampling by the operator of designated work positions. As such, Section 71.208(g)(2) supra, does not control the location of a testing device placed by an MSHA inspector in determining whether an operator is in compliance with Section 71.100, supra.

Accordingly, I find that it has not been established that Respondent violated Section 71.100 supra. Therefore, Citation No. 3709742 is to be vacated.

V. Citation No. 3709806, (Docket No. PENN 93-287)).

The parties stipulated that the disposition of Citation No. 3709806 will depend entirely on my decision regarding Citation No. 3709742. I found that Citation No. 3709742 is to be vacated, (IV, infra). Hence, consistent with this finding, and taking into account the parties' stipulation. I find that Citation No. 3709806 is to be vacated.

VI. Docket No. PENN 93-386 (Citation No. 3709996).

On April 28, 1993, at approximately 7:00 a.m., MSHA inspector Perry Raymond McKendrick, observed a road or ramp, that he estimated was elevated 20 feet, that did not have any berms on the outer bank for the entire approximately 100 feet of the road. He issued a citation alleging a violation of 30 C.F.R. 77.1605(k) which provides as follows: "Berms or guards shal be provided on the outer bank of elevated roadways."

According to Robert Greenawalt, Respondent's foreman, on April 28, 1993, at approximately 6:00 or 6:30 a.m., he had assigned a bulldozer operator to make a ramp for drill trucks to travel to "the drilling area" (Tr. 271, March 8, 1994). The ramp was only to be used for 1-2 days as is the practice with this type of ramp. He indicated that the outside edge of the ramp was approximately one to two feet higher than the inside edge. He estimated that the ramp was between 15 and 20 feet wide. He opined that it was safe for drill rigs to travel the ramp. He said that the road gradually sloped from the outside to the inside. He described the outside edge as being compacted from the tracks of the bulldozers, for the entire length of the road.

The plain language of Section 1605(k) supra, provides that berms shall be provided on the outer bank of elevated roadways. Since the roadway at issue was elevated, and did not have any berm or guard, I find that Respondent did violate Section 1605(k) supra.(Footnote 7)

According to McKendrick, due to the violation herein, it was reasonably likely that a vehicle would have run off the roadway because the outside edge contained loose consolidated material, and it was standard procedure for trucks to travel on the left

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7 I reject Respondent's argument that Section 1605(k) does not apply as the ramp in question was only "a temporary access ramp." Since the ramp was traversed by trucks as a path to the drill site, I find that it constituted a roadway as that term is commonly understood (See, Webster's New Collegiate Dictionary, at at 993 (1979 ed.)).

side. He indicated that two drill trucks could not pass side by side on the road. He also noted that one truck that traveled this ramp had a loose tie-rod. He opined that should a vehicle run off the road, the operator of the vehicle could possibly suffer broken bones in an extremity.

The record does not establish, by way of actual measurement, the width of the vehicles that traverse the road, and the width of the road. Nor does the record establish that the road was slick or slippery, or that vehicles traveling the road would not have had good traction. Further, McKendrick indicated that there was not a sharp drop off from the road. McKendrick indicated that the outside edge of the road contained loose unconsolidated material. I observed the demeanor of the witnesses, and found Greenawalt's testimony more credible that the outside edge was one to two feet higher than the inside edge, and the outside edge was compacted from the tracks of the bulldozer. Within the framework of this record, I conclude that it has not been established that an injury producing event was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

I find Greenawalt's testimony reliable that on April 28, 1993, between 6:00 and 6:30 a.m., he had ordered the construction of the ramp at issue, and that he did not see the ramp until it was cited at 7:30 a.m. I further find Greenawalt's testimony credible that had he observed the road beforehand, and noted that it did not have a berm, he would have required that a berm be provided. I find that Respondent was negligent to only a low degree. I find that a penalty of $50.00 is appropriate.

VII. Docket No. PENN 93-386 (Citation No. 371000).

On April 28, 1993, McKendrick, while driving onto a roadway to the highwall, observed three fist sized rocks falling in the air. He said that they landed on the roadway six feet out from the highwall. McKendrick indicated that the rocks rolled six more feet on the road.

McKendrick described the highwall as being 300 feet long, and containing loose rock along the top edge and face. He said that there was loose material "like a roll of dirt" along the top edge (Tr. 26, March 9, 1994). According to McKendrick, there were rocks on the highwall that ranged in size from smaller up to larger pebbles that were one foot in diameter. He also said that there were loose rocks on the face. However, on cross-examination he agreed that the highwall could not be characterized as "Loose unconsolidated material" (Tr. 39, March 9, 1994).

McKendrick issued a citation alleging a violation of 30 C.F.R. 77.1001 which provides that "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

Greenawalt testified that on the day the citation was issued he did not see any loose material. He also indicated that in his daily inspections of the highwall during the previous six months, he had not observed any loose material. I find Greenawalt's testimony insufficient to contradict McKendrick's specific testimony that he saw three rocks falling, that these rocks fell within six feet of the highwall, that there were loose rocks along the top edge and the face of the wall, and there were loose rocks on the face. Based upon the testimony of McKendrick, I conclude that on the date cited, loose hazardous materials were present on the highwall. There is no evidence that the materials were either stripped, sloped, barricaded or that other devices were provided that afforded equivalent protection. Hence, I find that Respondent did violate Section 77.1001 supra.

McKendrick indicated that trucks on the site in question drive on the left side of the road. He opined that a rock falling from the highwall could have hit a windshield, or gone through a window of a truck traveling on the road below the highwall. He opined that should such an event have occurred, it could have resulted in a broken arm, abrasions, or scratches. He opined that such injuries were reasonably likely to have occurred, as he observed rocks falling off the wall. He also noted that the road in question is heavily traveled. According to the uncontradicted testimony of Greenawalt, although the pick-up trucks and service trucks that travel this road do not have canopies, rock trucks and coal trucks, which are the most common vehicles on the road, are equipped with canopies. These extend approximately one-half to two feet beyond the windshield. Also, these vehicles have guards over the driver's door that extend about one foot.

The record does not indicate the amount and location of loose material on the wall, or on the top. Within this framework I conclude that although an injury producing event was possible, it has not been established that it is reasonably likely to have occurred. Thus, I find the violation was not significant and substantial.

McKendrick opined that the loose rocks should have been seen by the foreman, or the safety director, who travel along the road once a day. However, McKendrick who traveled on the same road earlier that morning, had not noticed the cited conditions at that time. I thus find that Respondent's negligence herein was moderate. I conclude that a penalty of $400.00 is appropriate for this violation.

VIII. Docket No. PENN 93-386 (Citation No. 3715154).

Mervin M. Himes, an MSHA inspector, testified that on April 28, 1993, he was informed by an employee of Respondent that a windshield wiper on the driver's side of a bus did not work. According to Himes, at approximately 1:00 p.m., he observed this bus parked at least 100 feet from the changing rooms. According

to Himes, he was told that this bus was used to transport employees from the changing room to the pit area.

Himes stated that he inspected the bus, and the windshield wiper "would not activate" (Tr. 61, March 9, 1994). Himes stated that he looked through the windshield from the inside of the bus, and there was dust on the windshield, and the visibility was "poor" (Tr. 65, March 9, 1994). He also indicated that there were "real dusty conditions" (Tr. 65, March 9, 1994). He opined that because of the dust on the windshield, the operator of the bus would have impaired vision, and "it could create a hazard" (Tr. 65, March 9, 1994). He also noted that due to the absence of a wiper, should it rain, the driver's vision would be impaired. He issued a citation alleging a violation of Section 77.1606(c) supra.

Himes did not see the bus in operation on the day he issued the citation. According to Greenawalt, had it rained, another bus parked within 300 yards from the bus in question would have been used to transport miners, as the cited bus is not used when it rains. Greenawalt also indicated that wipers are not used when there is dust on the windshield, as the windshield could get scratched. He also opined that, in general, when the bus is being driven, operators of trucks and other equipment that kick up dust would be in the bus, thus reducing dusty conditions.

I accept the uncontradicted testimony of Himes that the windshield wipers on the driver's side did not work. Hence, it would not have been possible to clear dust from the windshield with the use of the windshield washer. Therefore, the operator's vision would have been diminished to some degree. Clearly safety can thus be affected. In the same fashion, it is possible that the bus could suddenly be exposed to falling rain while being operated, thus causing the operator to suffer from some degree of diminished vision. I thus find that Respondent herein did violate Section 77.1606(c) supra.

According to Himes, because the violative condition cited causes diminished visibility, it was reasonably likely that an accident could have resulted inasmuch as other vehicles travel the same road as the bus in question. Himes opined that should such an accident have occurred, a broken arm or leg or laceration would have resulted. He opined that an accident was reasonably likely to have occurred.

Greenawalt indicated that although the bus is used twice a shift, in general, it is used for a total of only 1/2 hour a day.

Within the above framework, I conclude that although an injury producing event could have occurred, there is a lack of evidence that such an event was reasonably likely to have occurred. Accordingly, I find that the violation was not significant and substantial.

According to Himes, one of Respondent's employees told him that, in essence, the wiper blade had not been in operation "for days." (Tr. 77, March 9, 1994). Greenawalt indicated that, in general, the bus does not operate in the rain. I find Respondent's negligence to have been moderate. I find that a penalty of $500.00 is appropriate for this violation.

IX. Docket No. PENN 93-386, (Citation No. 3709681).

One of Respondent's O&K shovels is used in the pits to load various trucks. Partash testified that on April 28, 1993, as part of his inspection, he sat on a seat located in the rear of the cab shell (Cab) of the shovel behind the operator's seat. He stated that the shovel was shaking back and forth, and up and down. He indicated that 3 out of the 6 bolts that attached the cab of the shovel to the mainframe, were loose. He opined that because of the shaking, the operator of the shovel could be injured. Partash also was concerned that the cab itself might be torn loose. He issued a citation alleging a violation of 30 C.F.R. 77.1606(c) supra.

Richard DuFour, who was operating the shovel when it was cited by Partash, testified, in essence, that although the cab shell would move "a little bit" (Tr. 150, March 9, 1994) it did not impair his ability to operate the shovel. He opined there was no danger of the cab falling off.

Bratton, who helped erect the shovel in question when it came from the manufacturer, indicated that the cab shell is five feet wide, and 10 feet long. He said that eight bolts inserted through a two inches wide horizonal member located on the bottom of the cab, attaches the cab to the mainframe of the shovel. Due to the extent of Bratton's experience with the shovel, I accord considerable weight to his testimony as to its physical characteristics. In contrast, I place less weight on the testimony of Partash whose testimony was based upon the recollection of one inspection almost a year prior to the hearing. I thus find that the cab shell was attached to the shovel mainframe by eight bolts, but three of these were loose. I accept the testimony of Partash that the cab shell was shaking, inasmuch as this testimony was not contradicted by DuFour. Bratton explained that if the cab was vibrating up and down a quarter of an inch, it would bounce on the rubber strip upon which it was seated. He also indicated that there was no danger of the shell coming off, as it was still attached by five bolts. However, since three of the eight bolts attaching the cab shell to the platform of the shovel were not secured, and since the cab shell was vibrating, it is possible that, over time, other bolts could work loose due to the vibration which could in turn exacerbate. In this situation, an injury to the operator could possibly result. I thus find that the loose bolts were defects that did affect safety. I conclude that Respondent did violate Section 1606(c), supra.

In essence, Partash testified that since the shovel is used 24 hours a day, 7 days a week, an injury to the operator as a result of the vibration of the cab shell was reasonably likely to have occurred. However, the shell was still secured by five out of eight bolts, and the bottom edge of the shell was seated on a rubber strip. In this context, I conclude that a reasonably serious injury was not reasonably likely to have occurred.

According to Partash, the operator of the shovel told him that the problem with the bolts was reported to management on February 24, 1993. DuFour, the operator, indicated that he had reported loose bolts in the daily sheet. However, he indicated that the three bolts by the door that were loose or broken on the day the citation was issued, were not loose the day before "that I can recall." (Tr. 153, March 9, 1994). I find that Respondent's negligence herein was moderate. I find that a penalty of $200 is appropriate for this violation.

X. Docket No. PENN 93-166 (Citation No. 3490532).

On December 3, 1992, Partash inspected a Caterpillar grader. When the operator lifted up the front of the grader, it rose an inch and a half before the four wheels rose. Partash said there was excessive play where the vertical kingpins attached the axle to the front wheels. He opined that because of this play, it was possible that the wheels could come off, as the grader travels over rough haul roads. He also observed engine oil leaking from the fuel line onto the hot engine. He opined that this condition created a possible fire hazard. In addition, he observed an accumulation of hydraulic oil under the cab, and on the hydraulic tank. He described the oil accumulations as follows: "It was a coating to a dripping running off of the tank in the lines" (sic) (Tr. 172, March 9, 1994). He indicated these conditions also contributed to a fire hazard. Additionally, he stated that the operator had to keep fiddling with both door handles of the cab in order to open these doors. He opined that in an emergency such as a fire it would be difficult for the operator to open the doors quickly and escape. Lastly, the wiper blade for the lower left window on the grader was missing. The top of this window was about the same level as the seat upon which the operator sits. Partash opined that because the wiper blade was missing, there would not be adequate visibility for the operator to operate the grader. Partash issued a citation for all these conditions citing a violation of 30 C.F.R. 77.1606(c).

Bratton, who worked on the grader the day it was cited, indicated that he did not have any problems steering it. Muth, who repaired the vehicle in question, indicated that the kingpins in question were covered by retainer caps at the top and bottom, and were secured by bolts. He said that although the kingpins were worn, they were not near the breaking point. Muth indicated that, after the grader was cited, he replaced the bearings, kingpins, seals, caps, and bolts.

Bratton indicated that he observed just a few drops of engine oil seeping down the side of the engine, but that no oil was spraying out under pressure. He did note that there was oil running on the side of the block. He opined that there was no hazard. Muth observed that there was an oil leak from or near the injectors. He indicated that the oil was not pressurized. He said that the turbo and exhaust were on the other side of the engine, approximately 20 inches away. He also observed hydraulic oil beneath the cab, on a "couple" of hydraulic lines, and "occasionally" dripping off the pilot control system (Tr. 265, March 9, 1994).

Bratton indicated that the left front window which did not have a wiper blade, is used to view the road when grading. He also indicated that the window can be opened. Bratton also indicated that he inspected the door handles, and found that the linkage was worn, and that accordingly there would be excessive movement in the door handle.

Based on the testimony of Partash, that in the main was not contradicted or impeached, I find that, when cited, the grader had the following defects: play between the front wheel and axle, an engine oil leak, a hydraulic oil leak, a missing wiper blade, and two door handles that were difficult to open from the inside. Essentially for the reasons stated by Partash, I conclude that these conditions can possibly have an affect on safety. I thus conclude that Respondent did violate Section 77.1606(c) supra.

I find that the worn/loose kingpins was a violative condition that was significant and substantial. My conclusion is based on the following factors: the constant use of the grader, the road conditions, and the volume of other traffic in the areas the grader traveled. In addition, the violative oil leaks were significant and substantial. My conclusion is based upon a finding that oil was leaking on a hot engine.(Footnote 8) The likelihood of serious injuries in the event of a fire is exacerbated by the violative conditions of both doors, which would delay the operator's exit from the cab.

According to Bratton, operators of the grader at issue are to indicate on a form under the section headed "REPAIRS NEEDED" when repairs are needed on the grader. (See, Government Exhibits 26, 27). These forms, contain the following notations for the following dates: 11/11 "Hyd leak"; 11/13 "Hyd leak"; 11/15 "Hyd oil leak under cab"; 11/16 "Hyd leak"; 11/20 "Injector leaking fuel on motor"; ll/24 "Hyd hose leaking", "Injector leaking"; 11/12 "door handle mess up" (sic); 11/13 "door handle mess up"

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8 I accept Partash's testing in this regard as it was not specifically rebutted or contradicted by Respondent's witnesses.

(sic); 11/15 "door handles"; 11/16 "doors handle mess up" (sic); 11/20 "door latches needs fixed" (sic); 11/24 "door latches are hard to get open"; 11/11 "need bottom wipers left side"; 11/12 "Need bottom wipers"; 11/13 "need bottom wipers"; 11/15 "wiper missing;" 11/16 "need bottom wipers." (Gov't Exhibits 26, 27)

Bratton indicated that the clip securing the blade to the wiper often breaks, and that he has replaced them more than once on the same shift.

There is no evidence that any of the conditions reported in the forms were repaired prior to the issuance of the citations at issue. Within this framework, I conclude that Respondent's negligence herein regarding the violative defects pertaining to the doors, oil leaks, and wiper blade was more than ordinary negligence, and constituted aggravated conduct. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)). Thus, I find that the violation herein resulted from Respondent's unwarrantable failure. (See, Emery, supra). I find that a penalty of $7000 is appropriate.

XI. Docket No. PENN 93-386 (Citation No. 3709684).

Respondent utilizes a water tank, transported by a caterpillar engine, on all its roads to control dust. The water tank has a capacity of approximately seven thousand gallons of water, and weighs approximately 25 tons. It is welded to frame rails that surround it on the top and bottom. The rails support the tank on the main body of the equipment.

Partash testified that he observed water "squirting" (Tr. 11, March 10, 1994) out of the frame rails. He said that he observed four cracks on both sides, approximately three to four inches long, where the frame and tank met. He was concerned that if the equipment should bounce while being transported, the tank could break free of the front of the machine, especially considering the heavy weight of the water when the tank is full. Partash issued a citation alleging violation of 30 C.F.R. 77.1606(c)

Greenawalt stated that after repairs had been made to the tank after it was cited, he did not observe the cracks that were cited. He indicated that the rails do not contain any water. He said that the tank was welded all around its perimeter, and the welds were solid. He said neither the frame rails nor the tank was bowed and there was nothing to indicate that the frame was breaking.

I resolve the conflict in the testimony regarding the existence of cracks, in favor of Partash, as I give more weight in this instance, to his disinterested testimony in his capacity as an MSHA inspector (See, Texas Industry, Inc., 12 FMSHRC 235 (February, 1990) (Judge Melick)). It thus is possible, considering the weight of water being transported, that, over time, the cracks might spread and endanger the integrity of the

members supporting the tank, and the tank could fall, and possibly cause an injury. I thus find that the violation herein did, to some degree, affect safety, and hence Respondent did violate Section 77.1606(c) supra.

Considering the fact that the tank was welded to a support frame over its entire perimeter, and the welds were intact, I find that any injury producing event was not reasonably likely to have occurred. I thus find that the violation was not significant and substantial.

According to Partash, he observed water squirting out and that this should have been seen by anyone. However, such a squirting of water would have alerted a person to a possible leak in the tank, but would not have alerted a person necessarily to a crack in the weld or supporting frame which do not contain water. I thus find that Respondent's negligence herein was less than moderate. I find that a penalty of $50 is appropriate for this violation.

XII. Docket No. PENN 93-360

The parties stipulated as follows: (1) an independent contractor employee, John Leitzinger was injured on February 6, 1993; (2) Leitzinger was an employee of the independent contractor, J.E.M., Inc.,; (3) the injured miner was a welder for J.E.M.; (4) Leitzinger was injured on the first day of the job with J.E.M.; (5) Leitzinger was injured on the first day on Power Operating property; (6) the injured miner had 22 years of experience welding in the strippings (surface coal mining); (7) Leitzinger had probably been laid off within the last 2 years; (8) the injured miner had a valid annual refresher training; (9) the injured miner had not been provided any hazard or newly employed experienced miner training upon starting employment with J.E.M.

Partash explained that Leitzinger was injured while lifting a piece of steel with a chain and boom truck. According to Partash, the chain hook either slipped or opened up, and the steel fell on Leitzinger dislocating his shoulder and breaking his hip. Partash said that Leitzinger had received annual refresher training at another mine more than a year prior to the accident. He issued Order No. 3490538 alleging a violation of 30 C.F.R. 48.31(a), and Order No. 3490539 alleging a violation of 30 C.F.R. 48.28(a). (Footnote 9)

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9 On August 31, 1993 Partash modified Order No. 3409539 to allege a violation of 30 C.F.R. 48.26(a) instead of Section 48.28(a) supra. At the hearing, Respondent's motion to dismiss this order on the ground that it was modified after the petition and answer were filed, was denied. Petitioner's motion to amend its petition was granted.

A. Order No. 3490538.

In its brief, Petitioner moved to vacate Order No. 3490538 on the ground that the issues presented in this order were litigated and decided in L & J Energy Company, Inc., 16 FMSHRC 424 (February, 1994) (Judge Weisberger). For the reasons set forth in L & J supra, Petitioner's motion is granted.

B. Order No. 3490539

Because Leitzinger, a newly employed experienced miner, did not receive training pursuant to Section 48.26(a), I find Respondent did violate Section 48.26 supra.

According to Partash, this violation resulted from Respondent's unwarrantable failure in that a sign posted at the entrance to Respondent's mine states that all persons must be trained. In addition, he referred to the fact that Respondent had been cited within the past year for failure to train independent contractors' employees.

Kanour, testified that in the first part of January, 1993, he notified J.E.M. of the training required to be provided of their employees. He also said that the Wednesday prior to the Saturday when Leitzinger was injured, he checked all J.E.M. training records, and their employees were in compliance. Kanour testified that he was on the site the day of the accident, but did not see Leitzinger on the site prior to the accident. He said that he had seen him prior to the accident, he would have provided him with hazard training. Bratton, testified that on the Friday prior to the accident, he told John Wilkinson, an agent of J.E.M., that repairs were needed to be made to a boiler, and a truck. He asked the latter to send him a list indicating which employees were to work on which equipment. Bratton stated that he received this list on late Friday, but that Leitzinger's name was not on the list. Also, he stated that on the day of the accident a J.E.M. supervisor reported to him, and he met the crew from J.E.M. He said that specifically he never saw Leitzinger prior to the accident.

Based upon the testimony of Respondent's witnesses, that was not contracted or impeached, I find that Respondent's conduct herein was not aggravated, and thus was not the result of its unwarrantable failure (See, Emery, supra).

Partash in explaining the injury to Leitzinger stated that "it appears" that he was in the process of lifting up a piece of steel with a chain, and "it appears" that either the chain hook slipped, or the chain hook opened up causing the steel to fall on him. (Tr. 82, March 10, 1994). There is no other evidence in the record contradicting or impeaching this testimony, and I accept it. I find that there is no nexus between the hazardous conditions that caused the accident, and the specific subject

matter that would have been covered in the newly employed experienced miners training (See, 30 C.F.R. 48.26(b) 1-8; Government Exhibit 45, pg. 4-5). In this context, I find that the violation was not significant and substantial (c.f., Mathies, supra). I find that a penalty of $300 is appropriate for this violation.

XIII. Citation No. 3490513 (Docket No. PENN 93-22), and Citation Nos. 3715153 and 3715236 (Docket No. PENN 93-386).

Subsequent to the hearing, Petitioner filed motions to approve settlement agreements that were negotiated by the parties. A reduction in total penalties from $10,438 to $4,893 is sought. I have considered the representations and documentation presented in these motions, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the motions to approve settlement are GRANTED.

XIV. Citation Nos. 3709682 and 3709683 (Docket No. PENN 93-386).

The parties stipulated at the hearing, that these two citations involve the same piece of equipment, and almost identical facts as those cited in Citation No. 3709821 which was previously heard by me in December 1993 as part of Docket No. PENN 93-152. The parties further stipulated that the evidence they were to present regarding Citation Nos. 3709682 and 3709683 would essentially be the same as that presented in the hearing regarding Citation No. 3709821.

Based on these stipulations, and for the reasons set forth in my decision regarding Citation No. 3709821 (Power Operating Co., 16 FMSHRC 591, 596-597 (March 1994)), I find that a violation has not been established regarding Citation Nos. 3709682 and 3709683, and they should be DISMISSED.

ORDER

It is ordered as follows:

1. The following orders/citations are to be dismissed: 3709742, 3709806, 37090538, 3709682 and 3709683.

2. The following order/citations are to be amended to reflect the fact that the violations cited therein are not significant and substantial: 3490508, 3709741, 3709996, 3710000, 3715154, 3709681, 3709684, and 3490539.

3. The following orders are to be amended to reflect the fact that the violations cited are not the result of Respondent's unwarrantable failure: 3709641, and 3490539.

4. Respondent shall within 30 days of this decision, pay a total civil penalty of $11,643.

Avram Weisberger
Administrative Law Judge

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