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SOL (MSHA) V. AMBROSIA COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 93-233 A.C. No. 36-04109-03520
v.	:	
	:	Ambrosia Tipple
AMBROSIA COAL & CONSTRUCTION COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 94-15 A.C. No. 36-04109-03522-A
v.	:	
	:	Ambrosia Tipple
WAYNE R. STEEN, Employed by AMBROSIA COAL & CONSTRUCTION COMPANY, Respondent	:	

DECISION

Appearances: Nancy F. Koppelman, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
William P. Getty, Esq., Meyer, Unkovic & Scott, Pittsburgh, Pennsylvania, for Respondent Ambrosia Coal & Construction Company;
Frank G. Verterano, Esq., Verterano & Manolis, New Castle, Pennsylvania, for Respondent Wayne R. Steen.

Before: Judge Fauver

These consolidated cases were brought under 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq, for civil penalties for alleged violations of a safety standard.

Having considered the hearing evidence, the judge's view of the mine, and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following Findings of Fact and further findings in the Discussion below.

FINDINGS OF FACT

1. The Ambrosia Tipple, owned and operated by Respondent Ambrosia Coal & Construction Company, produces about 58,000 tons of coal a year for sale or use in interstate commerce.

2. William Carr, a miner, operated a Caterpillar 966-C Highlift, Serial Number 76J 1007, on June 3, 1992, at the Ambrosia Tipple. About 11:10 a.m. MSHA Inspector David Weakland and MSHA Inspector Trainee Charles J. Thomas arrived at the tipple to conduct a health and safety inspection.

3. As they drove up to the property, Inspector Trainee Thomas saw the highlift loading a coal truck in the area behind the stacker belt, and observed that the operator was having difficulty bringing it to a stop.

4. The inspectors first went to the scale house to identify themselves, explain the purpose of the inspection, and determine who was in charge and who would be the company representative to accompany them. There they met Respondent Steen, who identified himself as the foreman and accompanied them on their inspection.

5. After leaving the scale house, Inspector Trainee Thomas asked Inspector Weakland if he could go over and inspect the 966C highlift. Inspector Weakland agreed and directed Thomas to notify him if he observed any problems.

6. Thomas approached William Carr while he was loading coal, and asked him about the condition of the brakes. Carr told him that the brakes were "bad" and had been that way for several weeks. Thomas then asked Carr to position the highlift on an incline ramp in front of the crusher. The ramp has a 30 to 40 degree incline.

7. When Thomas asked Carr to engage the parking brake, he observed that the highlift rolled down the incline ramp. He then asked Carr to reposition the highlift on the incline ramp and apply the foot brake. Thomas observed that the foot brake would not hold the vehicle, and the highlift rolled down the incline.

8. Thomas then called to Inspector Weakland, who came over to the machine. Weakland asked Carr if he had any brakes on the highlift and Carr responded that there were no brakes and there had not been any for several weeks.

9. Inspector Weakland asked Carr to try the brakes on fairly level ground. When he asked Carr to raise the bucket of the highlift and to apply the foot brake, he observed that the highlift drifted backwards. When he asked Carr to raise the bucket and to apply the parking brake, he observed that the highlift still drifted backwards.

10. After this demonstration, Inspector Weakland interviewed Carr in the presence of Respondent Steen. Carr stated that the highlift had no brakes, it had been that way for several weeks, he had notified his foreman, Steen, about it, and had noted bad brakes in his maintenance log. When Carr stated that he had notified Steen about the bad brakes, Weakland asked Steen why he did not have the brakes fixed. Steen stated that he had called the maintenance shop to try to get a mechanic to fix them, but "it's like pulling teeth to get things fixed around here." Tr. 37, 38. I do not credit Steen's statement that he had called the maintenance shop when Carr informed him the brakes were bad.

11. Inspector Weakland continued his inspection of the highlift and observed that, in addition to unsafe brakes, the vehicle had no seatbelt, there was an accumulation of combustible fuel at the pivot point of the machine and motor compartment, and the machine was not equipped with a fire extinguisher. Inspector Weakland then informed Steen that the highlift was unsafe to operate.

12. Inspector Weakland and Inspector Trainee Thomas went to the scale house around 12:30 p.m. to look for the maintenance log, discuss the violations they had observed, refer to the regulations, and write citations. When Weakland was preparing Citation No. 3700771, at issue in this case, Thomas showed him the maintenance log for the highlift. The log, entitled "Daily Work and Cost Record," contained daily entries noting "bad brakes" on May 1, 4, 5, 6, 7, 8, 22, 26, 27, and 28, 1992. Some entries were initiated "B.C." (for Carr) and some were initialed "W.S." (for Steen), indicating they operated the highlift on those dates.

13. After preparing the citations to be served on "Wayne Steen, Foreman," Weakland and Thomas met Steen in the scale house for a closing conference.

14. Steen did not raise any objection to being identified as the "Foreman" on the citations or being treated as foreman by the inspector and trainee.

15. During the inspection, Steen gave work instructions to Carr to abate some of the safety violations discovered in the inspection.

16. In two prior health and safety inspections of Ambrosia Tipple, Steen identified himself as the tipple foreman to MSHA Surface Mine Inspector Thomas Sellers, accompanied Sellers on the inspections, attended the closing conference, oversaw the abatement of conditions cited and accepted the citations issued to "Wayne Steen, Tipple Foreman" without objecting to the title.

17. Steen was the certified mine examiner for the Ambrosia Tipple. He conducted daily safety examinations and entered findings in the official MSHA record of examinations. All of his entries were signed in the place printed for "Foreman."

18. After the closing conference on June 3, 1992, Carmen Ambrosia, owner of the company, told Weakland he wanted to see a demonstration of the highlift brakes. Weakland asked Carr to back the highlift up the ramp (leading to the crusher). He then asked him to remove his foot from the foot brake and to apply the emergency brake. The highlift rolled down the ramp without any hesitation. When it was driven back up the ramp, Weakland asked Carr to apply the foot brake. The highlift slid down the incline without any hesitation.

19. Upon observing the defective brakes, Ambrosia told Steen, "We can't stay in business like this," and he further stated, "We can't operate equipment like this." Tr. 176.

20. After the demonstration of the highlift for Carmen Ambrosia, Weakland informed Ambrosia that the highlift would have to be removed from service. Ambrosia asked whether they could drive the highlift to the maintenance building and park it there. Weakland agreed, and followed behind the highlift in Weakland's vehicle while Carr drove the highlift to the maintenance building.

21. Inspector Weakland then "red-tagged" the highlift and both inspectors departed the premises. This was around 2:07 p.m.

22. The operator of the highlift, William Carr, had notified the tipple foreman, Wayne Steen, prior to June 3, 1992, that there were no brakes on the highlift.

23. During the inspection on June 3, 1992, Carr falsified the maintenance log for the highlift by adding notations of "bad brakes" for all the dates listed in Fdg. 12, above. Carr falsified the log to avoid blame for failing to record the bad brakes in May. He wrote his initials for some of the entries and Steen's initials for some of the other entries. All the falsified entries were written by Carr.

24. During May 1992 and up to June 3, 1992, Steen did not record any unsafe condition of the brakes on the highlift in the official MSHA examination record. However, William Carr notified him of bad brakes during this period. Also, Steen operated the highlift in May when the brakes were bad but did not record bad brakes in the examination book or take any steps to have them repaired or have the machine removed from service.

25. On the day of the inspection, June 3, 1992, after the inspectors left, Carr told Steen he had falsified the log to add

notations of "bad brakes" in May 1992, and had made some entries with Carr's initials (B.C) and some entries with Steen's initials (W.S.). Tr. 352-353. Steen concurred in the deception -- stating, "I guess that's okay" (Tr. 352) -- and around June 6 Steen falsified the official MSHA examination record (which he was charged to keep as certified mine examiner) by adding false entries to note "bad brakes" on the highlift for the dates May 30, 1992, and June 2 and 3, 1992. Tr. 20a ("a" denotes June 29, 1994, transcript). He falsified the book in an effort to cover-up his failure to report the defective brakes on those dates and to conform to the false records created by Carr.

26. As stated, Carr told Steen on June 3, 1992, that he had falsified the maintenance log to show "bad brakes" entries. Carr told Carmen Shick, the Company's Chief Executive Operating Officer, "shortly after that" (Tr. 342). When he told Shick, Shick said, "that wasn't a very good idea"; however, nothing was done to change the log. Tr. 352-353. I find that Shick knew about the false maintenance log before December 29, 1992, when he sat through Special Investigator John Savine's interview of Respondent Steen. Savine's investigation on December 29 was to see whether a 110(c) action should be brought against any corporate agent for knowingly authorizing, ordering or carrying out the violation cited as to the highlift on June 3, 1992.

27. When Carmen Shick attended Investigator Savine's interview of Respondent Steen, on December 29, 1992, Shick knew that Carr had falsified the maintenance log on the highlift by making numerous entries of "bad brakes" on past dates as if they had been written in the log on those dates but in fact all were written June 3, 1992. Shick sat in on Savine's interview of Steen December 29, 1992, in which Steen gave a false account to Savine about Carr's entries in the log. Steen falsely told Savine that Carr made the entries on the dates indicated and when Carr signed Carr's initials it meant Carr operated the highlift on those dates and when Carr signed Steen's initials it meant Steen operated the highlift on those dates. Steen deliberately concealed from Savine the fact that Carr had falsified the log by writing all the "bad brake" entries on the same date (June 3, 1992).

28. Carmen Shick knew through Carr's statement to him that Carr had falsified the log and that Steen gave a false account about Carr's entries in the maintenance log to investigator Savine. Despite this, he did not require that the corporate records be corrected to state the truth and did not tell Investigator Savine that Savine was given false accounts by both Steen and Carr as to the accuracy of the maintenance log for the highlift. I reject Shick's statement that Steen did not tell him about the falsified log until a week after Savine's investigation, and I find that Steen told him on or before the day of the investigation, December 29, 1992. I also reject

Shick's statement that he had only "suspicions" and not proof of the false maintenance log when he sat through Steen's interview by Savine since Carr told him "shortly after" June 3, 1992. Tr. 342. It is clear that once Shick learned the maintenance log was false, he participated in the cover-up.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

These cases involve a 104(d)(1) citation against the corporation for violating 30 C.F.R. 77.404(a) and a 110(c) charge against Wayne Steen as an agent of the corporation for knowingly authorizing, ordering or carrying out the cited violation.

Charge Against the Corporation

Citation No. 3700771 charges a violation of 30 C.F.R. 77.404(a), which provides

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Section 77.404(a) imposes two duties: (1) to maintain machinery and equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately. Violation of either duty violates the regulation. Peabody Coal Co., 1 FMSHRC 1494 (1979).

The evidence demonstrates that Ambrosia Coal violated both of these duties.

In the MSHA inspection on June 3, 1992, the highlift brakes were tested and neither the foot brake nor the emergency brake would stop the vehicle. The operator of the highlift, Carr, testified that in order to avoid hitting coal trucks being loaded, he had to "slip it into reverse and back up." I find that the highlift did not have operable brakes.

The lack of brakes was an unsafe condition. The machine operator could misjudge distances in trying to fast-reverse as a means of stopping, and could collide with a truck being loaded or strike a pedestrian (including a truck driver who might be on foot to check his truck). The danger of the inoperable brakes was increased by the fact that the highlift did not have a seatbelt. Also, the highlift was used on a ramp with a 30 to 40 degree incline.

I find that the corporation violated 77.404(a) by failing to maintain the highlift in safe condition and failing to remove it from service immediately.

I also find this was a "substantial and significant violation," which the Commission has defined as a violation that is reasonably likely to result in an injury of a reasonably serious nature. Mathies Coal Company, FMSHRC 1, 3-4 (1984). The lack of operable brakes posed a number of discrete safety hazards: (1) without operable brakes the highlift could not stop immediately and could collide with a coal truck or pick-up truck being loaded, a pedestrian or a structure at the tipple; (2) the highlift was used to load the crusher on a 30 to 40 degree ramp upon which the brakes would not hold; (3) the highlift was driven throughout the tipple yard and could roll out onto the highway causing a traffic collision since there was no berm, curb or divider separating the tipple yard from the highway; (4) the fact that the highlift was not equipped with a seatbelt significantly increased the hazards to the driver caused by inoperable brakes.

I find that this was an "unwarrantable" violation, which the Commission has defined as a violation involving aggravated conduct beyond ordinary negligence. Virginia Crews, 15 FMSHRC 2103 (1993); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987). The record demonstrates that the foreman, Respondent Steen, knew the brakes were bad and failed to have the brakes repaired or to remove the highlift from service immediately. The driver of the highlift, William Carr, told Inspector Weakland that the highlift had bad brakes for several weeks, and he had informed his foreman, Respondent Steen, about the bad brakes. In addition, during the interview with Carr, Inspector Weakland inquired of Respondent Steen, who was also present, why he did not get the brakes fixed. Steen acknowledged that he had been aware of the condition and stated "it's like getting teeth pulled to get things fixed around here." Furthermore, Steen himself operated the highlift during the period when the brakes were bad and he was the company's certified surface mine examiner as well as foreman. I find from all the evidence that the highlift had no operable brakes and the corporation, through its foreman and mine examiner, was guilty of high negligence in violating 77.404(a)

Charge Against Respondent Steen

The Secretary has charged Respondent Steen under 110(c) of the Act, which provides in part:

> Whenever a corporate operator violates a mandatory health or safety standard . . ., any director, officer, or agent of

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1. Steen's status as certified mine examiner is relevant to the issue of an "unwarrantable" violation by the corporation. However, since it was not alleged as a basis for 110(c) agency, I do not decide the issue whether a certified mine examiner qualifies as a 110(c) corporate agent.

> such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (a) and (d).

Section 3(e) of the Act defines "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine."

I find that Mr. Steen was a foreman, and therefore a corporate "agent" under 110(c) of the Act.

Steen routinely identified himself as the tipple foreman when MSHA inspectors entered the property to perform health and safety inspections. During the June 1992 inspection, Steen identified himself as the tipple foreman, accompanied Inspector Weakland on the inspection, gave work instructions to William Carr to abate some of the conditions cited by Inspector Weakland, and represented the company in the closing conference in which Inspector Weakland issued and explained citations to Steen, and Steen accepted the citations issued to "Wayne Steen, Foreman" without objecting to that title.

MSHA Inspector Thomas Sellers testified that he commences his surface mine inspections by asking who is the superintendent or foreman, and in inspections of the Ambrosia Tipple in July 1991 and March 1992 Steen identified himself as the foreman, accompanied him as the company representative, attended the closing conferences, telephoned the mechanics to arrange for

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2. In its brief, the Secretary contends that if Mr. Steen were found not to be a foreman he would still be liable under 110(c) as an agent because he was a certified mine examiner Mr. Steen contends that this theory should not be allowed because it was not alleged in the Secretary's petition or prehearing statements. I agree. A 110(c) respondent is entitled to a hearing in accordance with the Administrative Procedure Act, specifically 5 U.S.C.A. 554. Subsection (b)(3) requires timely notice of "the matters of fact and law asserted." The facts and law provided to Mr. Steen by the Secretary charged him with 110(c) liability as the foreman at the tipple or the person i charge of operations, not as a certified mine examiner.

The Secretary's theory of agency of a mine examiner, introduced after the hearing, comes too late. Accordingly, the 110 (c) agency issue is limited to the question whethe Mr. Steen was a foreman or the person in charge of operations at the tipple.

abatement of violations, and accepted citations issued to "Wayne Steen, Tipple Foreman" without objecting to that title.

On December 29, 1992, when MSHA Special Investigator John Savine interviewed Steen, Steen identified himself as the tipple foreman.

Steen was paid a flat weekly salary without overtime pay for hours over 40 per week. Rank and file employees were paid an hourly rate with time and a half for overtime. Steen was the certified mine examiner who conducted the daily surface mine examinations required by the Act and regulations. He signed the official MSHA examination record in the place for the "Foreman," not as a rank and file employee.

The corporation and Steen may not represent to MSHA through official documents and oral statements by Steen that he is the foreman and then be heard to deny that fact when a question of imputation for his conduct arises.

In addition, the behavior of Carr and that of the corporate owner support the conclusion that Steen was the tipple foreman. The highlift operator, William Carr, told Inspector Weakland that he had reported the bad brakes to the foreman, Steen. Steen was present and did not correct Carr's statement. If Steen was not his foreman, it is unlikely that Carr would make a point of telling the MSHA inspector that he reported the condition to him. When Inspector Weakland asked Steen why he did not have the bad brakes repaired, Steen acknowledged he was aware of the condition and commented on how hard it was to get the company to make repairs. Steen did not reply, as one would expect if he were merely a rank and file miner, that it was not his job to remove equipment from service and arrange for repairs. Finally, when the owner, Carmen Ambrosia, observed the demonstration of the highlift on the incline ramp, when the brakes could not stop the highlift, he exclaimed to Steen, "We can't stay in business like this" and "We can't operate equipment like this." Thus it appears that the owner of Ambrosia Coal believed that Steen held a position of authority which made him responsible for overseeing the conditions in the tipple yard.

Respondent contends that since Steen lacked authority to hire or fire employees he was not a foreman. I do not agree. Upper management held a tight reign on the hiring and firing of employees, but they still employed a supervisor at the tipple. On balance, I find that the reliable evidence establishes that Steen was the day shift foreman at the tipple, and therefore qualified as a corporate agent under 110(c).

I now consider the issue whether Steen "knowingly" authorized, ordered or carried out the cited violation.

The Commission has reviewed the legislative history for the term "knowingly" as used in 110(c) and determined that "knowingly" means "knew or should have known":

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. [Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).]

The Commission has also ruled that a "knowing violation under 110(c) involves aggravated conduct, not ordinary negligence." Bethenergy Mines, Inc., 14 FMSHRC 1232, 1245 (1992).

The record demonstrates that Steen had actual knowledge of the bad brakes on the highlift for at least five and possibly 6 working days prior to June 3, 1992, when the violation was cited. The highlift operator, William Carr, notified Steen of the bad brakes on May 27 or 28, 1992, and Steen himself drove the highlift in the period when it had bad brakes. I find that Steen, as foreman, knowingly authorized and permitted the violation by failing to have the brakes repaired and to remove the vehicle from service immediately.

The Falsified Safety Records

During the June 3, 1992, inspection, Carr falsified the maintenance log for the highlift by adding entries of "bad brakes" for 10 dates in May 1992. He did this to avoid blame or possible liability for himself and Steen for failing to record bad brakes on the days they operated the vehicle. For some entries he signed his initials (B.C.) and for other entries he signed Steen's initials (W.S.) as the operator of the highlift. Carr then placed the doctored log where the inspectors were likely to find it. The inspectors found the falsified log, and transcribed Carr's entries of "bad brakes" as evidence that the company and the foreman showed "reckless disregard" for the safety of personnel by not repairing the brakes or removing the

vehicle from service immediately. On the day of the inspection, after the inspectors left Carr told Steen that he had doctored the maintenance log. Steen concurred in the cover-up and, a couple of days later, Steen falsified the official MSHA examination record to add entries of bad brakes on various dates in order to avoid blame for failing to report the bad brakes and to conform to the false records created by Carr.

The Chief Executive Operating Officer, Carmen Shick, participated in the cover-up. When Carr told him about the false log "shortly after" on June 3 (Tr. 342), Shick took no action to correct the corporate records to show the truth, permitted Carr and Steen to continue their cover-up, and failed to tell MSHA that it was being deceived by the false maintenance log and by the statements of Carr and Steen. On December 29, 1992, the day MSHA Special Investigator Savine was investigating the events of June 3, 1992, Shick sat through Savine's interview of Steen in which Steen gave a false account of the maintenance log.

Civil Penalties

The Secretary has proposed a civil penalty of $7,000 for the violation by the corporation and a civil penalty of $3,500 for Respondent Steen's violation as a corporate agent.

Assessment of civil penalties, based upon the criteria in 110(i) of the Act, are de novo before Commission judges Consolidation Coal Company, 11 FMSHRC 1935 (1989). Section 110(i) provides:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such

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3. Steen and Carr defend their falsification of mine safety records on the ground that MSHA Inspector Trainee Thomas "frightened" them by discussing possible civil fines and "jail time" for their failure to record the unsafe brakes and have them repaired. They contend that Carr "panicked" and falsified the maintenance log to report "bad brakes" (for 10 dates in May), signing his initials for some entries and signing Steen's initials for others. Steen went along with this and falsified the MSHA examination records because he also "panicked." I reject this explanation for falsifying mine safety records. I do not decide the question of what language was used by Thomas and whether he unduly alarmed Carr and Steen. This is something MSHA may wish to consider in its further training of Thomas. However, whether Carr and Steen felt intimidated or not, there is no justification for their falsifying the mine safety records and perpetrating a deliberate deception of MSHA.

> penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

I find that Ambrosia is a small sized operator. The tipple produces about 58,000 tons of coal a year.

In the two years preceding the issuance of Citation No. 3700771, Ambrosia Coal had 19 violations, 13 of which were assessed as significant and substantial.

With regard to the negligence factor, the Secretary has charged "reckless disregard" for safety in Citation No. 3700771 and in the 110(c) charge. This allegation is based, in part, upon Carr's entries of "bad brakes" in the maintenance log for the highlift, and the fact that Steen failed to have the brakes repaired or to remove the highlift from service immediately. I find that the maintenance log was falsified by Carr post-event, and is not evidence of contemporaneous written notice of bad brakes. Also, I find that Steen's mine examination record was falsified by Steen post-event, and is not evidence of contemporaneous written notice of bad brakes. However, Steen had actual knowledge of the bad brakes and knowingly failed to have the vehicle repaired or removed from service immediately. I find that the violation by the corporation and Steen was due to high negligence and an unwarrantable failure to comply with the safety standard.

The falsifying of safety records by Steen, as foreman and certified mine examiner, has some bearing on the degree of his negligence concerning the violation of 77.404(a). He testified that when he falsified the official MSHA examination records on June 6, three days after the MSHA inspection, he did not consider whether the inspectors had photographed or transcribed the pages he was falsifying. Had he thought of this, he stated, he would not have falsified the records. This indicates that Steen was not only prepared to commit a dishonest act in an attempt to avoid liability, but took a reckless risk of exposure by not recognizing that the inspectors may have already photographed or transcribed the pages he falsified. This sheds some light upon the risk-taking nature of Steen's judgment, and his high negligence, in permitting a highlift to operate without operable brakes.

With regard to gravity, I find that the violation was reasonably likely to result in a serious injury and therefore was a "significant and substantial" violation within the meaning of 104(d) of the Act

One of the criteria of 110(i) is the good faith effort of the operator to achieve rapid compliance after being notified of the violation. Since the inspector red-tagged the vehicle, the question of the operator's abatement does not arise. That is, the red tag provided instant compliance with 77.404(a).

Once the criteria of 110(i) have been evaluated, a civil penalty should be assessed in a reasonable amount sufficient to deter the company or person charged, and others similarly situated, from committing a similar violation in the future. I find that the deliberate cover-up by Steen and Shick (both of whom were corporate agents) increases the deterrence needed concerning the amount of civil penalties for the violation of 77.404(a)

Steen, as foreman, condoned and concealed Carr's act of falsifying the maintenance log. Steen also falsified the official MSHA examination record to conform to the cover-up. Later, on December 29, 1992, Steen and Carr lied to MSHA Special Investigator Savine about the "bad brakes" entries in the maintenance log. That is, they told Savine that Carr wrote all the entries on the dates indicated and when he signed his initials it meant Carr operated the highlift and when he signed Steen's initials it meant that Steen operated the highlift.

Carmen Shick participated in the cover-up by condoning Carr's falsification of the maintenance log, failing to have the log corrected once he learned it was false, concealing the falsity of the log from the MSHA special investigator, and permitting Carr and Steen to lie to MSHA about the maintenance log. I find that Carr told Shick about the false log "shortly after" June 3, 1992.

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4. Even if Shick's statement were credited, that he did not know of Carr's falsified log until one week after Investigator Savine's investigation on December 29, 1992 (a contention I reject), the facts clearly show that Shick participated in the cover-up by Carr and Steen. Once Shick knew the log was false and Carr and Steen lied to Investigator Savine, Shick did not cause the corporate records to be corrected to show the truth and took no steps to tell MSHA that it was being deceived by the false log and false statements of Carr and Steen. Shick condoned the falsification of corporate records and the deliberate scheme of Carr and Steen to deceive the MSHA inspectors.

Considering all of the above factors, I find that a civil penalty of $11,000 is appropriate for the corporation's violation of 30 C.F.R. 77.404(a) and a civil penalty of $4,000 is appropriate for Steen's 110(c) violation as a corporate agent.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent Ambrosia Coal & Construction Company violated 30 C.F.R. 77.404(a) as alleged in Citation No. 3300771.

3. Respondent Wayne R. Steen, a corporate agent within the meaning of 110(c) of the Act, knowingly authorized and permitted the corporation's violation of 30 C.F.R. 77.404(a).

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent Ambrosia Coal & Construction Company shall pay a civil penalty of $11,000 within 30 days of this decision.

2. Respondent Wayne R. Steen shall pay a civil penalty of $4,000; provided: in light of his financial obligations he shall be permitted to pay the penalty according to the following schedule:

a. To pay $500 on the 10th day of each month, beginning December 10, 1994, for eight consecutive months.

b. If Respondent Steen fails to make any monthly payment when due, the balance of his civil penalty shall immediately become due with interest due from such date until paid at the same interest rate imposed by IRS for late payments of federal income taxes.

William Fauver
Administrative Law Judge

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