

CCASE:  
SOL (MSHA) V. NEW POINT STONE  
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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 PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 94-158-M  
Petitioner : A.C. No. 12-00038-05510  
v. :  
 : Mine: Harris City  
NEW POINT STONE COMPANY, INC. :  
Respondent :

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor,  
U. S. Department of Labor, Chicago, Illinois,  
for Petitioner;  
Kenneth T. Wanstrath, President, New Point  
Stone Company, Inc., Greensburg, Indiana,  
Pro Se, for Respondent.

Before: Judge Amchan

On October 13, 1993, MSHA representative Jerry Spruell inspected Respondent's Harris City, Indiana, stone quarry. He observed that on one of the company's Mack dual axle haul trucks a brake chamber was missing (Tr. 14-15). The brake chamber is an air-actuated diaphragm which causes the brake shoes to contact the stopping surface of the wheel drum (Tr. 23).

Respondent's truck has a brake chamber for each of the six wheel assemblies. Two of the wheels are connected by an axle on the front of the truck. There are two axles on the rear of the truck with four tires on each axle. The brake chamber had been removed from the right front tires of the rear dual axles (or the middle tires on the right) (Tr. 26).

Scott Moffitt, a mechanic and truck driver employed by Respondent, had removed the brake chamber in question a month, or month and a half, earlier at the direction of foremen Russ Wanstrath and Rod Borgman (Tr. 40). The chamber was removed because it was leaking air which could have caused the truck to have braking problems (Tr. 45). After removal, the line to this chamber was plugged to prevent further leaks (Tr. 45).

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On the day of the inspection, MSHA representative Spruell observed the truck stop on level ground without difficulty (Tr. 15). Mr. Moffitt had driven the truck approximately once or twice a week since the brake chamber had been removed without experiencing any braking problems (Tr. 41-42). Foreman Rod Borgman had also driven the vehicle with the brake chamber removed and was able to make a sudden stop to avoid hitting a truck that pulled out in front of him (Tr. 55, 58, 60). Additionally, the primary operator of the truck, Richard Van Dyke, apparently experienced no braking problems during this period (Exh. R-3).

Inspector Spruell issued Respondent Citation No. 4308134 pursuant to section 104(d)(1) of the Act. This citation alleged a "significant and substantial" violation of 30 C. F. R. 56.14101(3) due to Respondent's "unwarrantable failure" to comply with the regulation. The cited standard requires that all braking systems on self-propelled mobile equipment "be maintained in functional condition."

Were the brakes on Respondent's Mack Haul Truck maintained in functional condition?

Inspector Spruell opined that the absence of the one brake chamber could cause the truck to swerve when the brakes are applied in a panic situation (Tr. 18) and would increase the distance within which the vehicle would stop (Tr. 20). I decline to credit this testimony as there is nothing in the record that would indicate that the inspector has sufficient expertise to determine the impact of operating the truck without one of six braking chambers. I note that the Secretary apparently did not contact the manufacturer to determine the effect of this alteration.

The Secretary also contends that a braking system with a missing component is per se not in functional condition. He relies in part on a directive in the MSHA Program Policy Manual. The Manual directs that a citation should be issued for violation of section 56.14101 if a component or portion of any braking system is not maintained in functional condition--even if the braking system is capable of stopping and holding the equipment with its typical load on the maximum grade it travels, (Secretary's brief at page 4, citing MSHA Program Policy Manual, Vol. IV, Part 56/57, p. 55a).

Respondent, on the other hand, contends that the braking system worked acceptably and that there is no evidence that the missing brake chamber presented a hazard to its employees. One reason advanced for this contention is that this truck is driven only within the quarry, at speeds of 10 to 15 miles per hour, while it was manufactured to be driven on the open highway (Tr. 43, 63-64).

On balance, I conclude that the Secretary has the better argument and affirm the citation. First of all, the Commission recognizes the MSHA Program Policy Manual as evidence of that agency's policies, practices and interpretations, to which it gives deference in interpreting MSHA regulations, Dolese Brothers Company, 16 FMSHRC 689, 692-93, and n. 4 (April 1994). I find that the Secretary's interpretation is a reasonable one which furthers the safety objectives of the Act. I therefore defer to that interpretation.

Further, it is inconsistent with the objectives of the Act to sanction the prolonged use of equipment on which the braking system has been altered without some reliable evidence that this practice poses no hazard to employees. Although I find Inspector Spruell's conclusions somewhat speculative, I have the same view of the opinions of Respondent's witnesses, who also have not been shown to have sufficient credentials to determine that the removal of a braking chamber posed no hazard.

One can only assume that had it not been for the instant citation the truck in question would have been operated with the missing brake chamber indefinitely. Both Respondent's mechanic, Moffitt, and foreman Borgman recognize that this is not a sound practice (Tr. 44, 60-61). I therefore conclude that there is a presumption that a braking system is not in functional condition when a component has been removed, unless this presumption has been rebutted by reliable evidence from the manufacturer, or equally competent authority, that it is safe to operate the vehicle with the missing component.

#### Unwarrantable Failure

The Secretary contends that the instant citation was the result of Respondent's unwarrantable failure to comply with the regulation. He argues that "unwarrantable failure" is established by the fact that the brake chamber was intentionally removed at the direction of management and that the truck in question was used with the brake chamber missing for an extended period of time.

The Commission has held that the term "unwarrantable failure" means aggravated conduct amounting to more than ordinary negligence, Emery Mining Corp., 9 FMSHRC 1991, 2001 (December 1987). While it is true that the brake chamber on the cited truck was removed intentionally, I conclude that Respondent's conduct was not sufficiently "aggravated" to constitute an unwarrantable failure for the following reasons.

First, it has not been established that operating the truck with one of six brake chambers missing was in fact dangerous. Secondly, there is no evidence from which I would conclude that Respondent should have suspected that its conduct exposed its employees to a hazard. Finally, only reference to the MSHA

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Program Policy Manual would have apprised Respondent of the fact that MSHA regarded operation of the truck under these conditions to violate its regulations.

#### Significant and Substantial

The Commission's formula for a "significant and substantial" violation was set forth in Mathies Coal Co., 6 FMSHRC 1 (January 1984):

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Since I have previously concluded that the inspector's testimony is insufficient to persuade me of the hazards resulting from the violation, I conclude that the Secretary has failed to meet steps 2 - 4 of the Mathies test. I therefore affirm Citation No. 4308134 as a non-significant and substantial violation of section 104(a) of the Act.

#### Assessment of Civil Penalty

The Secretary proposed a civil penalty of \$2,500 for this citation. While I have vacated the unwarrantable failure characterization of the violation, I conclude that Respondent exhibited considerable negligence in operating the truck in question for a month or month and a half after altering the braking system installed by the manufacturer.

On this record, it is difficult to determine the extent of the gravity of the violation. Respondent quickly abated the violation. In the absence of any evidence to the contrary, I conclude that Respondent is a relatively small operator and that its prior history of violations would not lead me to impose a higher penalty than I would otherwise. Finally, there is nothing in the record to indicate that a penalty of \$2,500 or less would threaten Respondent's financial viability.

After considering these factors pursuant to section 110(i) of the Act, I assess a civil penalty of \$500. I arrive at this figure primarily on the negligence factor. I deem it very important for the safety of miners that operators not alter safety equipment such as brakes and then assume that their

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equipment poses no hazard to their employees. I conclude that a \$500 penalty is an appropriate deterrent to such conduct. Assessment of this penalty provides this operator and others an incentive to quickly repair such safety equipment, or at least establish through competent authority that operation of their equipment with the alteration does not compromise the safety of miners.

ORDER

Citation No. 4308134 is affirmed as a non-significant and substantial violation of section 104(a) of the Act. Respondent shall pay the assessed civil penalty of \$500 within 30 days of this decision.

Arthur J. Amchan  
Administrative Law Judge

Distribution:

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