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

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

BLUESTONE COAL CORPORATION, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 93-165-R
: Order No. 2723399; 1/13/93
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Keystone No. 6 Strip
ADMINISTRATION (MSHA), : Mine ID 46-03404
Respondent :
:
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 94-117
Petitioner : A. C. No. 46-03404 03509
v. :
: Keystone No. 6 Strip
BLUESTONE COAL CORPORATION, :
Respondent :

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary;
David J. Hardy, Esq., Jackson & Kelly, Charleston,
West Virginia, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this consolidated contest and civil penalty proceeding Bluestone Coal Corporation (Bluestone) contested the validity of an imminent danger order of withdrawal issued at its Keystone No. 6 Strip Mine pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C.

817(a) and the Secretary of Labor (Secretary) sought th assessment of civil penalties for alleged violations of 30 C.F.R.

77.1600(b), 77.1607(c) and 77.1600(a). The violations we charged in citations issued pursuant to section 104(a) of the Act, 30 U.S.C. 814(a), and in association with the order of withdrawal. The Secretary further alleged that the violations were significant and substantial contributions to mine safety hazard (S&S violations).

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Pursuant to notice, the cases were heard in Beckley, West Virginia. Subsequently, the Secretary's Mine Safety and Health Administration (MSHA) vacated the withdrawal order. Counsel for the Secretary stated, "[After] considering all of the evidence of record, the Secretary determined that [the] [order] ... could not be sustained" (Sec. Br. 3, Apex. A). For the same reason MSHA vacated the citation alleging a violation of section 77.1600(a) (failure of Bluestone to restrict haulage roads to authorized persons) (Sec. Br. 3, Apex. B).

Issues left for resolution are whether the alleged violations of sections 77.1600(b) and 77.1607(c) occurred, if so, whether they were S&S, and the appropriate penalties to be assessed. I will discuss evidence relating to the vacated order and citation only to the extent it bears upon these issues.

STIPULATIONS

At the commencement of the proceedings the parties stipulated as follows:

1. Bluestone is subject to the jurisdiction of the Act.
2. The Administrative Law Judge has jurisdiction to hear and decide the case.
3. The orders of withdrawal and citations were issued by authorized representatives of the Secretary of Labor and were properly served upon Bluestone.
4. Penalties proposed for the alleged violations if assessed will not affect Bluestone's ability to continue in business.
5. Bluestone is a small operator with an excellent history of compliance.
6. The alleged violations were abated in a timely fashion.

(Tr. 11 for all six stipulations.)

THE EVIDENCE

THE SECRETARY'S WITNESSES

LARRY K. MURDOCK

Larry K. Murdock, is a federal mine inspector for surface coal mines. His duties require him to inspect all aspects of a mine, including haulage roads. Murdock has inspected Bluestone's

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Keystone No. 6 Strip Mine since March 30, 1990 (Tr. 17). Prior to January 1993, he inspected it approximately five times (Tr. 18, 58).

The Bluestone operation consisted of a large land tract, portions of which are leased to various independent contractors. The contractors develop and operate underground coal mines. The number of mines on the Bluestone property varies between 8 and 13 (Tr. 19.) A mix of county, state, and private roads are used on the operation - they include two main haulage roads. The haulage roads lead to Bluestone's preparation plant where coal from the contractors' mines is processed (Tr. 20).

On January 11, 1993, Murdock traveled to the Bluestone property to inspect the preparation plant. Between 1:50 p.m. and 2:00 p.m., while in the central control room of the plant, he heard that a coal truck had overturned on the property and that an ambulance was needed (Tr. 21-22). He went immediately to the mine foreman's office. While the foreman called the ambulance, Murdock left the office, got in his automobile, and drove to the accident scene (Tr.22).

The coal truck was lying on its side. Fuel had leaked from the truck and the fire department had been called to wash down the gasoline (Tr. 28). The truck driver, Theodore Payne, was dead. His body was lying in the haulage road some distance from the truck (Tr. 24).

Murdock began to gather information about the accident (Tr. 25.) Murdock also called his supervisor (id.). Murdock then issued to the mine foreman an order of withdrawal pursuant to section 103(k) of the Act, 30 U.S.C. 813(k). The order sought to preserve the accident scene by closing to coal trucks the road Payne had traveled (Tr. 26).

MSHA personnel -- including Jerry Sumpster, an accident investigator and John Cheetham, an electrical inspector -- soon arrived. They were joined by personnel from the State of West Virginia, Bluestone officials and Thomas Mullins, the owner of Mullins Trucking Company, Payne's employer (Tr. 29-30).

According to Murdock, the accident occurred when the truck failed to negotiate one of the last turns in the road. At the turn two parallel roads of different elevations -- an upper road and a lower road -- entered the haulage road. After failing to make the turn, the truck left the haulage road and traveled onto the upper road. It hit the berm on the right side of the upper road, fell on its side, and slid onto the lower road ("T" on Joint Exh. 1; Tr. 33-34).

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Payne started the fatal trip at the No. 39 Mine, a mine operated by Blackstone Coal Company (Blackstone), a contractor of Bluestone (Joint Exh. 1, upper left had corner; Tr. 36, 85.)

Murdock described Payne's route. From No. 39 Mine, Payne traveled along County Road 52/6 until he reached County Route 6. Payne turned right onto Route 6 and proceeded until shortly before the Bluestone Shop where he bore left onto County Route 6/2. After traveling a short distance Payne crossed onto the Bluestone's property ("X" on Joint Exh. 1). At this point, the road's name changed from County Route 6/2 to Company Road D-11-82 (Tr. 36-37; Joint Exh. 1).

Payne proceeded along D-11-82, past a box cut (a "Y" intersection) where D-11-82 was joined by another road. Further along, Payne passed an impoundment on the left. To this point the road contained only slight grades (Tr. 38). However, just past the impoundment the grade increased greatly and the road entered an area where it turned several times (Tr. 37).

Near the bottom of the steep grade the road came to another "Y" where a vehicle had to bear left to go the plant. Here the road contained some final sharp turns (Tr. 38). Payne failed to complete a turn and the truck went straight ahead onto one of the access roads where it overturned (Tr. 39).

Murdock stated that the investigation team surveyed the scene and because of early darkness, left the mine shortly afterward.

Murdock had last inspected the mine in October 1992. At that time he had not noted any imminent danger that involved the haulage road. Murdock also agreed that in October he had written no citation for the lack of, or the inadequacy of, traffic signs (Tr. 68).

When he traveled the road during prior inspections he never observed trucks going in excess of five to seven miles per hour (Tr. 75, 97). He agreed that a truck driver was best equipped to control the speed of a truck and when asked whom he would cite if he observed a truck using excessive speed on a haulage road, Murdock stated that he would cite the operator of the truck -- i.e., the person or company who owned or controlled the truck. However, he added that he might cite the operator responsible for the haulage road also since a speeding truck would endanger others using the road (Tr. 77). Murdock acknowledged that portions of the haulage road near the accident site were traveled by the general public going to or from their homes (Tr. 74-75).

With respect to the cause of the accident, the truck appeared to have gone out of gear during its descent of the road. Murdock agreed that Bluestone had no ability to control the loss

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of gear and that "[t]he only possibility to help... [Payne] not lose control of the truck is if there is any other means that they could have provided that would keep him from getting into excessive speed and not [be] able to control [the truck]" (Tr. 79).

JERRY SUMPTER

Jerry Sumpter, an accident investigator for MSHA, was the leader of the MSHA investigation team. Sumpter stated that he was informed of the accident and arrived at the mine late in the afternoon on January 11. Payne's body had been removed but his overturned truck was blocking the access road. The MSHA team photographed the scene. Because people had to use the road to get to and from their homes, Sumpter permitted the truck to be pulled out of the way (Tr. 146). It was growing dark and the team decided to continue the investigation the next day.

On January 12, Sumpter assisted in inspecting the truck's brakes. The brakes were out of adjustment. Also, there was not enough air pressure in the system to apply the brakes to the brake drums. As a result, the brakes were ineffective (Tr. 148). Sumpter stated that if he had found the brakes in this condition during a regular inspection, he would have removed the truck from service (Id.). As a result of the investigation Mullins Trucking was issued a citation for inadequate brakes (Tr. 228, 231; Bluestone Exh. 5). Sumpter speculated that with good brakes Payne might have been able to control the truck (Tr. 264).

On January 12, Sumpter walked the haulage road. He was accompanied by Skip Castanon, his supervisor. Sumpter tried to determine if the roughness of the road had caused the truck's transmission to slip out of gear. The only thing Sumpter noticed was a "washboard area," near the impoundment. Sumpter described the area as "very rough" (Tr. 151). Gravel that had been used to fill some of the washboard-like ruts had been worn away by traffic (Tr. 151-152).

As a result of the investigation, Sumpter issued an imminent danger order of withdrawal (Gov. Exh. 3). Sumpter stated:

I issued it because of the steepness, number one, of the grade, and the payload that the truckers were using to come off of this steep grade. And also ... there was no means available in case of a runaway with this truck. Also, I didn't observe very many signs. I observed two that particular day (Tr. 159).

With regard to the signs Sumpter stated that there was a 20 miles per hour sign at the top of the steep grade. Also, there was a sign stating that all visitors were required to

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report to the preparation plant (Tr. 160). With regard to the payloads, Sumpster believed a coal truck should haul 28 tons of coal. MSHA's investigators reviewed Bluestone's records and found that loads at Keystone No. 6 Strip Mine averaged 34 to 36 tons. These heavy loads put inordinate stress on the brakes.

Another problem was that as the trucks came down the hill the drivers changed gears to control the speed of their descent. Sumpster stated that during upshifting or downshifting it was not unusual to miss a gear. When this happened a truck could run away (Tr. 163). He added, "[T]hat is basically what we thought may have happened, that the truck either jumped out of gear or the brakes was overheated. Then the victim has ... two choices. If he jumps, he may die; if he stays with the truck, he may die... . When he ran away toward the last curve ...he rode the truck out. Then he decided to jump and the end result was fatal" (Tr. 163-164).

Sumpster was shown a copy of a memorandum from Castanon to MSHA District Manager L.D. Phillips (MSHA District 4) regarding the results of a survey of road grades in the district. The December 28, 1992 memorandum indicated that in District 4 there were 41 haulage roads with grades of 15 percent or greater (Bluestone Exh. 6). Sumpster understood that if a grade was over 12 percent he could require the operator to install a vehicle escape ramp or some other kind of safety device (Tr. 282). Sumpster noted that following the accident the company installed both escape ramps and "Australian barriers" along the road (Tr. II 15-16). ("Australian barriers" are dirt mounds that are approximately three feet high and that are placed at intervals along a road. A truck can stop if it runs on top of the mounds and "bottoms out" (Tr. II 16).)

In addition to the imminent danger order, Sumpster issued the subject citations. Citation No. 2723400 was issued because Bluestone did not properly post the haulage road with rules, signals or warning signs (Gov. Exh. 4). Sumpster was asked what signs he believed should have been posted in order to comply with section 77.1600(b). He stated that a sign was needed prior to the start of the steep grade to warn truckers to use a lower gear and a stop sign was needed on the flat, before reaching the steep part of the grade. The signs should have required drivers to stop and select a lower gear to descend the grade (Tr. 168-169). He suggested the signs should have been located "in a conspicuous place" (Tr. 169). In addition, signs should have pointed out the particular hazards of the road -- for example, the washboard area or the curves. They should also should have indicated the speed at which it was safe to descend (Tr. 170).

The area involved in the violation was from the impoundment to the preparation plant, a distance of nearly one mile (Tr. 170-171). In addition to the previously mentioned signs, he believed

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yield signs or stop signs should have been installed where roads crossed or entered the haulage road, and in the flat areas signs should have limited speeds to 15 miles per hour (Tr. 171). Finally, signs should have advised drivers of vehicles traveling the road to use their C.B.s to monitor conditions on the roads (Tr. 172).

Sumpter explained that Citation No. 2723400 was abated when various signs were posted. Specifically, at the start of the steep grade a sign was posted instructing truck drivers to use a lower gear. Also, signs were installed at the top of the hill instructing truckers to stop, to shift to a lower gear and to reduce speed to 15 miles per hour (Tr. 180-181). In addition, a sign was posted instructing truck drivers to monitor their C.B.'s.

Section 77.1600(b) states in part that "traffic rules, signals and warning signs" shall be "standardized." When asked to state what the word "standardized" meant to him, Sumpter replied that it "meant a uniform system throughout the property that each and every employee ... could understand" and that signs should be repeated every so often (Tr. 183).

Sumpter believed the lack of signs was an S&S violation in that it was going to result in a serious or fatal accident "sooner or later". He also believed the violation contributed to Payne's death (Tr.172-174).

Sumpter was asked about Bluestone's negligence in allowing the alleged violation to exist. He had indicated on the citation form that the company exhibited a "moderate" degree of negligence. However, he stated that if he were to cite the company again for the same violation, he would consider the company's negligence "low" (Tr. 269).

Sumpter also observed that many of the company's rules and regulations were vague and that Bluestone should have included in the rules a specific instruction for truckers to use low gears on steep grades rather than provide that the speed limit on haulage roads was 20 miles an hour (Tr. 178, 179). The rules also should have specified the tonnage that was safe to haul. The company should have known that there would be a temptation to overload the trucks since the drivers were paid on the basis of the weight of the coal they hauled (Tr. 179).

After being cited for the alleged violation Bluestone updated the rules and regulations (Bluestone Exh. 1) and retrained "everybody on their property" to make sure they understood the rules (Tr. II 30). Although Sumpter had not seen the undated rules, he understood they specified which gears

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should be used in descending the roadway, indicated where to stop before proceeding down the grade and required trucks to maintain a speed limit of ten miles per hour (Tr. II 31-32).

Sumpster testified he also issued Citation No. 2723974, which alleged a violation of section 77.1607(c), a mandatory standard requiring that "[e]quipment operating speeds ... be prudent and consistent with conditions of roadway, grades ... and the type of equipment used" (Gov. Exh. 5). When asked to explain why he believed the standard had been violated, Sumpster stated that he had spoken with several truck drivers and that there was no consistency regarding the gear they used to descend the grade. This resulted in trucks traveling the grade at different speeds. He also noted the condition at the road near the impoundment and stated that the washboard area might have caused Payne's truck to go out of gear. However, he did not know for certain why Payne lost control of the truck and did not know the speed of the truck or the exact spot at which Payne lost control. (Tr. 185-186, 187, 271). Although there were no eyewitnesses, Payne had been heard over the truck's C.B. to say that he had lost control of the truck and it was believed the truck was moving "pretty fast" (Tr. 189, 240).

In Sumpster's opinion the alleged violation lead to Payne's death. It was logical that if the truck was not kept under control a serious or fatal injury was reasonably likely to result. 188-189).

While in Sumpster's view Bluestone management was negligent in allowing the violation to exist, its negligence was mitigated by the fact it kept the haulage road relatively well surfaced, except for the washboard area (189-190).

Finally, Sumpster stated that in his opinion 30 trucks daily traveled the haulage road to the plant. He described the road as having been used for "years" (Tr. 224). He knew of no other reportable accident on the road, and there was no evidence Payne was an unsafe driver. In fact, some of those interviewed by the investigation team stated that he was a good and well-respected driver (Tr. 225, 243-244).

AUBREY T. CASTANON

Aubrey T. "Skip" Castanon, is an MSHA supervisor and specialist in accident investigation. In his capacity as an accident investigator Castanon researched the hazards associated with haulage roads. In July 1992, a fatal accident involving a coal haulage truck lead MSHA to survey haulage road grades at all coal mines in District 4. The survey resulted in Castanon's memorandum of December 28, 1992, to District Manager Phillips (Tr. II 40-41; Bluestone Exh. 6). Castanon testified that MSHA discovered that when a coal truck is loaded at or above its

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maximum recommended capacity, and is descending a steep grade, the load shifts toward the front of the truck and the front brakes and drive train come under a strain that can cause them to fail (Tr. II 43). MSHA advised mine operators of this and other hazards associated with steep grades. MSHA also sent to operators a 1977 Bureau of Mines Informational Circular titled "Design of Surface Haulage Roads" (Tr. II 50).

Despite these initiatives, Castanon did not believe that MSHA's response to haulage road accidents had been adequate. He stated, "[W]e probably recognize some of the problems with haulage road design.... And I just don't think we have taken the data that we're supposed to be taking ... and disseminate[ed] that information to the mining industry the way we should, or develop[ed] regulations based on that information" (Tr. II 53).

Castanon was at the Mine on January 12. In addition, on January 13 he participated in interviews conducted by MSHA concerning the accident. Castanon believed that Citation No. 2723400 correctly cited a violation of section 77.1600(b) because the only sign he saw along the haulage road was one stating "All first-time visitors report to the preparation plant" (Tr. II 62). He observed no signs concerning speed or grades.

In Castanon's opinion a speed limit sign should have been posted at the top of the grade. In addition, signs were needed about not passing on the haulage road, and about truckers monitoring their C.B. channels (Tr. II 63). Had such signs been in place they would have reminded Payne to descend the hill in a safe manner. The failure to remind Payne of the dangers presented by the grade played a part in his death (Tr. II 81). In addition, Bluestone only gave a 20 miles per hour speed limit for the roadway in its rules and regulations, this was adequate for the top of the road where the grades were less, but where the grade became steeper, the limit should have been eight or ten miles an hour (Tr. II 68-69).

With respect to an interpretation by MSHA of section 77.1600(b), Castanon stated that as far as he knew, there was no official interpretation. (Tr. II 142-143).

Castanon also believed Citation No. 2723974 properly cited a violation of section 77.1607(c). In his opinion, Payne down-shifted and the truck went out of gear; or, the truck hit the washboard area of the road and went out of gear. Failure to subsequently control the truck's speed contributed to Payne's death (Tr. II 82, 144). (However, there was no indication that Payne was traveling at an excessive speed when he lost control of the truck (Tr. II 115). Nor was there any evidence Payne was driving recklessly prior to the accident (Tr. II 132).) In his view, Mullins Trucking also should have been cited for Payne's failure to control the truck (Tr. II 126-127).

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Castanon believed the Bluestone was moderately negligence in allowing the violation to exist (Tr. II 84).

BLUESTONE'S WITNESSES

JOHN G. CHEETHAM, JR.

John G. Cheetham, Jr., an MSHA inspector who investigates accidents involving heavy equipment, appeared under subpoena and as an adverse witness. He estimated that during the proceeding 16 or 17 years he had investigated approximately 65 accidents involving coal haulage trucks (Tr. 107). As part of the investigation of the January 11 accident Cheetham examined the truck's braking system. There were six wheels on the truck -- four in back and two in front. Consequently, there were six brake drums (Tr. 108, 115). The brake drums were "worn excessively, with grooves and heat cracks" (Tr. 108, see also Tr. 116-117). In addition three of four back brakes were out of adjustment (Tr. 118-120). Cheetham estimated that 60 to 70 percent of the truck's breaking capacity had been lost (Tr. 121). The truck was dangerous to operate; so much so that he would have removed it from service (Tr.122).

Cheetam was asked about the cause of the accident. In his opinion Payne had attempted to change gears -- to downshift. When he could not get the lower gear, the truck ran away (Tr. 122). With the braking capacity essentially gone, it was not possible to stop the truck on the steep grade (Tr. 122-123).

BYRD E. WHITE, III

Byrd E. White, III, is vice president and secretary of Bluestone. White has been affiliated with the company for more than 17 years. White testified that at the time of the accident Bluestone employed 13 miners. There was a superintendent (Dale Wright), an assistant superintendent, a chief engineer, seven hourly employees and three other employees who did general engineering work (Tr. II 150-151).

White described the mining arrangements at the Keystone No. 6 Strip Mine. According to White, Bluestone leased the land, portions of which it subleased to independent contractors. The contractors mined coal and delivered it to Bluestone's preparation plant. Bluestone's standard contract required the contractors to mine in accordance with federal and state law, to hire their own employees and buy their own equipment. Bluestone prepared the leased sites for mining, but the contractors developed their own mines. Bluestone paid the contractors a specified sum per ton for coal brought to the preparation plant. After mining was finished, Bluestone reclaimed the land (Tr. II 152-153).

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Bluestone maintained the roads on its property, whether they were haulage roads or county roads (Tr. II 153, 158-159). Bluestone's contract did not specify how coal was to be transported to the plant, nor did it specify how the contractor was to hire truckers (Id.).

In total, Bluestone leased approximately 26,000 acres of land. In January 1993, there were between 12 and 15 mines on the property. As White explained, "The number changes; somebody quits, somebody else comes in. Sometimes a mine is vacant for 2 or 3 months before we get somebody to replace them" (Tr. II 154).

Blackstone was one of the companies operating a mine in January 1993. As with other contractors, Blackstone contracted to mine the coal, bring it to the plant and be paid on a per-ton-delivered basis (Tr. II 155). Blackstone hired Mullins Tucking.

DALE WRIGHT

Dale Wright is Bluestone's superintendent. He testified in detail about the Bluestone property and the roads thereon. Wright stated that the grade of the haulage road traveled by Payne varied. From the box cut to the impoundment the grade was 5.9 percent. From the impoundment to the spot where the truck overturned the grade was 12 percent (Tr. II 185).

Wright also testified that he had been involved in writing Bluestone's rules and regulations for haulage roads. In fact, he was the author of those in effect at the time of the accident (Tr. II 189; Bluestone Exh. 1). Bluestone gave the rules and regulations to its contractors, along with a cover letter instructing the contractors to make certain they and their subcontractors complied. In addition, some copies were handed out to individual truckers (Tr. II 189-190). The purpose was to make sure mining contractors understood the truckers they hired were the contractors' responsibility and that it was the contractors' duty to make sure the truckers understood the rules and regulations (Tr. II 190). The rules were also posted at the mine (Id.).

On an average day approximately 20 different trucks traveled to the preparation plant. The trucks made approximately 60 trips downhill from the box cut to the plant (Tr. II 191). This portion of the road had been used since 1987. Approximately 300 trips per week were made by coal trucks from the box cut to the plant. Wright estimated that since 1987 there were approximately 46,000 trips down this portion of the road (Tr. II 192). Aside from the accident involving Payne, Wright knew of no other reportable accident on the road (Tr. II 193).

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Using photographs and the mine map, Wright identified signs posted on the property. There were three signs notifying first time visitors to report to a mine office, there were nine "no-trespassing" signs, there was a sign stating "Danger, watch out for coal trucks" and one stating "Proceed with caution. Coal truck traffic."), there were two environmental permit signs and there was a sign warning that the property was patrolled by security police (Tr. II 197-206; Bluestone Exh. 8; Joint Exh. 1). After the citation was issued Bluestone added yield and speed limit signs that were virtually identical to those used on public roads (Nos. 3 and 6 on Bluestone Exh. 8; Tr. II 230, 232).

Wright stated that he was surprised to be served with a citation alleging a violation of section 77.1600(b). He explained that many inspectors had traveled the roads -- inspectors who were inspecting Bluestone's facilities and those who were traveling to the contractors' mines -- and he had no knowledge of any previous citation for a such violation nor of comments about the signs and rules (Tr. II 207).

THE MERITS

CITATION NO.	DATE	30 C.F.R.	PROPOSED PENALTY
2723400	1/13/93	77.1600(b)	\$ 6000

The citation states in part:

Management did not have traffic rules, signals or warning signs standardize [sic] on the steep mountain incline to provide the coal haulage equipment a warning of the steep incline on [B]urke [M]ountain road to the preparation plant. This was revealed after a fatal truck haulage accident (Gov. Exh. 4).

Section 77.1600(b) states that, "Traffic rules, signals, and warning signs shall be standardized at each mine and posted."

THE ARGUMENTS

The Secretary argues that "The failure to have any signs indicating the safe manner for travelling on the road clearly is a failure to comply with the regulation, which requires that rules, signals and warning signs be posted ...[T]o adequately ensure the safety of those driving on the hill, signs warning of hazardous conditions, steep grades, speed limits, and curves, are necessary. Likewise, to insure that drivers were consistent in how they travelled on the hill, Bluestone should have had a sign reminding drivers to stay in a low gear and to avoid shifting as they descended the hill" (Sec. Br. 8-9 (citations omitted)).

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The Secretary also argues that Bluestone's haulage rules and regulations were not enforced by Bluestone and that "rules not consistently enforced or followed cannot be considered 'standardized' as the regulation requires" (Sec. Br. 10). Further, the Secretary attacks the rules because they were inadequate in that they indicated a speed limit -- 20 miles per hour -- that was too fast for the road where the accident occurred and because they did not address steep grades, sharp curves, or remind drivers to stay in low gear.

Bluestone argues that section 77.1600(b), as applied in this case, is void for vagueness. Bluestone points to the conflicting testimony among MSHA witnesses as to the meaning of the standard and the absence of any MSHA interpretive policy (Bluestone Br. 11-15).

THE VIOLATION

When the Secretary alleges the violation of a mandatory safety standard, it is essential first to determine what the standard requires. The wording of section 77.1600 (b) is simple. At each mine, traffic rules, signals, and warning signs are to be standardized and posted. The word "standardized" conveys the act of bringing the rules, signals and warning signs into conformity with a standard in order to make them uniform. See Webster's Third New International Dictionary (1986) at 2223. The word "posted" conveys the act of displaying the standardized rules, signals and warning signs where they may be observed and read. Id. at 1771.

The standard is broadly worded, and, as Bluestone notes, the Commission has enunciated a "reasonably prudent person" test for such a standard -- "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." See e.g., *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

Uniformity of signals and warning signs would, I believe, be understood by a reasonable person to refer to both the physical nature of the signal or sign and to its wording (See Tr. II 141-142). The uniformity of written rules would be likewise understood. Uniformity would also be understood to refer to the location of the rules, signals, and warning signs. That is to say, at substantially similar areas requiring the invocation of a rule, signal or warning sign, the same rule, signal or warning sign would be required to be placed in substantially the same location. As Sumpter stated, if a warning sign was required at the top of a certain grade, a similar sign should be placed at the top of each similar grade (Tr. 183). Given the simple language of the standard, this is hardly a revolutionary or convoluted interpretation and because such an understanding is, in my

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opinion, well within the keen of a reasonably prudent person familiar with the industry, I decline Bluestone's invitation to find section 77.1600(b) void for vagueness.

However, the question remains whether Bluestone violated the standard as charged. In this regard, it is important to keep in mind that the standard does not specify which rules, signals or warning signs are required to be exhibited at certain places. Rather, it mandates that if they are exhibited they be uniform in appearance and location and they be posted, that is, placed where they may be observed and read.

It is clear from the testimony that Bluestone was not cited because its rules, signals and signs lacked uniformity or were exhibited improperly. Rather, it was cited because it did not have certain specific signs in the places MSHA believed they should have been and because it did not include among its rules and regulations those MSHA thought necessary.

The testimony of Sumpter, who issued the citation, is telling:

Counsel for the Secretary: You only saw two signs on the haul road. Is that correct?

Sumpter: Yes that is all I saw.

Counsel for the Secretary: Now, what signs would be necessary to comply with the regulation, in your opinion?

Sumpter: By looking at that particular property and the haul roads, you need [a sign], where you descend the steep grades ... [to] warn the truckers to use a lower gear, or maybe even a stop sign if they want to stop on the flat before going over the steep ... if you select a lower gear, it keeps your miles per hour down, under say a ten-mile-an hour; not what management had posted, which was twenty (Tr. 168-169).

* * *

Counsel for the Secretary: Are there any other signs you feel are necessary on the haul road?

Sumpter: I would try to take control ... saying how many miles an hour to descend that haul road in a safe manner and ... let them know that the hazards are all up and down the haul road. It would be various signs is what I'm saying (Tr. 170).

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The signs should be posted all over the haul road ...
Just take control of the area and say certain things.
If you need to yield -- there are several roads there
that cross each other; a yield signs or a stop
(Tr. 171).

Counsel for the Secretary: Should there be any signs
regarding communication?

Sumpter: There should be for your C.B. It should
tell you what channel and no monkey play....You need to
take control of that, also (Id.).

What troubled Sumpter was the fact that Bluestone had not
installed the type and number of signs he believed were required
where he believed they should be. Lacking a standard mandating
operators install warning signs at hazardous areas and install
signs advising those entering the property of the reporting and
communication rules to be followed, Sumpter sought to enforce
such requirements through section 77.1600(b), a standard designed
for another purpose. (In this regard it is instructive to
compare the Traffic Safety regulations in Subpart H of the
standards for surface metal and nonmetal mines.
30 C.F.R. 56.9100(b) requires "signs or signals that warn of
hazardous conditions ... [to be] placed at appropriate locations
at each mine.")

In like manner, Sumpter was troubled by the content of
Bluestone's rules, not whether they were uniform and exhibited
where they could be read.

Counsel for the Secretary: Did you consider these
rules and regulations [Bluestone Exh. 1] adequate?

Sumpter: No, I do not (Tr. 177).

* * *

They should have put in here the steepness of the
grades or, "Truckers Use Lower Gears," for example
It's just saying speed limit on haul roads is twenty
miles an hour. To me, that is vague. It mentions
trucks in here, but it doesn't get into the actual
haulage, what the truckers are really supposed to do
(Tr. 178).

* * *

Take control of the coal trucks as far as telling
them how much coal....I feel that should be in part of
this policy (Tr. 179-180).

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Lacking a standard specifying what the rules should contain, Sumpter tried to dictate their content through section 77.1600(b). (Again, it is instructive to reference the Traffic Safety standards in Subpart H of the mandatory standards for surface metal and nonmetal mines. 30 C.F.R. 9100(a) requires, "Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, ... shall be established and followed at each mine.")

Because I find that Bluestone was not cited for a violation of section 77.1600(b), but rather for failing to conform to requirements that are outside the purview of the standard, I conclude that Citation No. 2723400 is invalid. I will order its vacation at the close of this decision.

CITATION NO.	DATE	30 C.F.R.	PROPOSED PENALTY
2723974	1/13/93	77.1607(c)	\$ 6,000

The citation states in pertinent part:

Based on evidence obtained during a fatal accident investigation it was determined that the 1979 DM 600 Mac coal haulage truck was being operated at a speed that was not consistent with the conditions of the roadway, grades, visibility and traffic while descending the Burk Mountain coal haulage road with a full load of coal. An accident occurred on 01/11/93 about 1:55 P.M. when the truck ran away and turned over at the switchback (Gov. Exh. 5).

Section 77.1607(c) states:

Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used.

THE ARGUMENTS

The Secretary's position is that "for whatever reason the victim lost control of the truck ... [and] that once he lost control he was not operating at a speed consistent with the conditions [of the roadway]" (Sec. Br. 15).

Bluestone focuses on the requirements of abatement imposed by MSHA -- the construction of Australian barriers and escape ramps and the limitation of haulage truck payload weights -- and asserts the Secretary is trying to impose requirements that can only be established through rulemaking (Bluestone Br. 17-22).

Bluestone also argues that MSHA should not be permitted to hold it responsible for an accident that resulted because the subcontractor (Mullins Trucking) of the independent contractor (Blackstone) failed to properly maintain or assure the safe operation of the subcontractor's truck (Bluestone Br. 9).

THE VIOLATION

The first question is whether a violation of the cited standard existed. If not, the issue of who should be held responsible is immaterial. As the Secretary notes, section 77.1607(c) is subject to the same "reasonably prudent person" test as section 77.1600(b). In the context of the alleged violation, this means whether a reasonably prudent person familiar with the mining industry, including the factual circumstances surrounding the January 11, 1993 accident, would have recognized the speed of Payne's truck as imprudent and inconsistent with the conditions of the road and truck.

All of the witnesses agreed that the accident occurred near the bottom of the grade when the truck failed to negotiate one of the last turns in the road. Cheetham thought the grade at its steepest point was between 13 percent and 16 percent (Tr. 126). Wright believed that the grade from the box cut to the accident site averaged 12 percent (Tr. II 185). Sumpter described the grade as "steep" (Tr. 159). All three witnesses agreed the grade was significant, and it is certain that unless the speed of a truck was fully controlled, the grade was hazardous.

Cheetam's testimony establishes that the brakes on the truck were substantially impaired. However, whether or not brakes that were fully functional would have allowed Payne to retain control of the truck, as Sumpter believed might have been possible, is not significant (Tr. 264). The fact remains that Payne did not retain control, as Payne himself exclaimed over his C.B. moments before his death (Tr. 189).

The record does not support a finding as to why Payne lost control. As the company points out, although MSHA's witnesses had their theories -- that the truck had gone out of gear or that the brakes had locked or that a combination of both had occurred (see for example Tr. 187)-- they were candid in stating they did not know for certain what had happened (see for example Tr. 79).

Further, none of the witnesses knew exactly where Payne lost control. Nor could they cite to any evidence that Payne was speeding or driving recklessly prior to losing control (Tr. 271, Tr. II 132).

Nonetheless, the inescapable fact is that at some point and for some reason, the loaded coal truck went out of control while descending the steep and potentially hazardous grade and that

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near the bottom of the grade Payne failed to maneuver around one of the road's final curves. It is reasonable to infer that given the fact the accident occurred near the bottom of the grade and given the condition of the truck, the truck was traveling too fast to negotiate the curve. It is equally reasonable to conclude the truck's speed was neither prudent nor consistent with the grade, curve, and condition of the brakes and that this constituted a violation of section 77.1607(c).

In finding the violation existed I am not unmindful that MSHA might have chosen to cite a violation of section 77.1607(b), a standard that requires mobile equipment operators to have full control of moving equipment, and that such a citation might have been as appropriate, perhaps even more appropriate, than the citation of section 77.1607(c). see *Island Creek Coal Co.*, 3 FMSHRC 1265 (ALJ Koutras). However, the fact that one set of circumstances can engender violations of more than one standard does not render invalid MSHA's choice of a standard or standards to cite. The fundamental question is whether the standard chosen has been violated.

The violation was terminated on February 2, 1993. The termination notice states in part:

As an additional safeguard four speed berms [i.e., Australian barriers] and three escape ramps have been provided on the haulroad in the event another truck should become a runaway (Gov. Exh. 5).

MSHA's rationale for requiring the barriers and ramps as a condition for abatement was explained by Murdock. When he was asked about Bluestone's ability to influence a driver's control over a truck Murdock responded, "The only possibility to help ... [a driver] not lose control of the truck is if there is any other means that ... [Bluestone] could have provided that would keep ... [the driver] from getting into excessive speed and not being able to control it and lose it" (Tr.79). The barriers and ramps were part of the "other means" upon which MSHA insisted. In fact, Sumpter stated that he and other MSHA inspectors were told that if they found a grade over 12 percent, escape ramps or some other kind of safety device should be required (Tr. 282).

There are two reasons why Bluestone's argument that the citation is invalid because it is based upon a failure to fulfill requirements not contemplated by the standard can not prevail. First, and most important, there was a violation of the cited standard. The truck was not operated at a speed consistent with the conditions, grade and type of equipment used. Second, if Bluestone objected to the requirements for abatement of the citation, the Act provided a specific means to challenge those requirements. Bluestone could have refused to comply and could have sought review of any resulting section 104(b) withdrawal

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order, 30 U.S.C. 814(b), by bringing a contest proceeding under section 105(d) of the Act, 30 U.S.C. 815(d). Bluestone could have argued the withdrawal order was invalid because it was unreasonable to require measures beyond the requirements of the cited regulation. As Judge Melick observed, "The Secretary is without authority under [s]ection 104(b) to compel performance of additional mining activities or to create new regulations beyond what is necessary to abate the precise violation charged." Drummond Company, Inc., 14 FMSHRC 2039,2042 n. 3 (December 1992). However, Bluestone did not chose to avail itself of this option and it is much too late for it to "end run" the statutory enforcement scheme.

BLUESTONE'S LIABILITY

Finally, I also reject Bluestone's view that the imposition of liability for the violation is contrary to existing decisional law (Bluestone Br. 8-9). The relationship of Bluestone, Blackstone, Mullins Trucking, and Payne is clear. Bluestone was the operator in overall charge of the mine. Bluestone contracted the mining of the No. 39 Mine to Blackstone. Blackstone subcontracted with Mullins Trucking to haul the coal. Payne was employed by Mullins Trucking.

In the past, MSHA has issued citations to independent contractors when the independent contractors have actual control over the violative conditions. The theory behind citing the contractor in such situations is that responsibility should lie with the party in the best position to alleviate the hazard. The theory recognizes that although under the Act a mine operator may be held liable for the violative conduct of another on the basis of the Act's imposition of liability without fault, the Secretary has wide discretion in citing the contractor or the mine operator or both and that he does not abuse his discretion when he chooses to cite the party in the best position to prevent the violation in the first instance. See Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359-1361 (and cases cited therein.)

The Secretary has made clear that there are four instances in which he will exercise his discretion to cite mine operators for the violations of independent contractors: the mine operator contributed to the violation; the mine operator contributed to continued existence of the violation; the mine operator's employees were subjected to the hazard created by the violation; or the mine operator had control over the condition requiring abatement (III Program Policy Manual Part 45 at 6). However, the Secretary's discretion is not limited to these four instances, Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-539, and, indeed, one commentator recently (and rather gratuitously) has suggested the law is such that the Commission will "rubber

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stamp" any and all MSHA decisions to cite mine operators for independent contractor violations. C. Gregory Ruffennach, Independent Contractors: How Things Have changed, Mine Safety and Health News, November 18, 1994, at 585-589.

While I suspect that no one would be more surprised than the Secretary if this were indeed true, I believe in this case there are traditional and compelling reasons to find that the Secretary's citation of Bluestone was well within his authority. First, the hazard created by the violation was not limited to Payne. Operation of the truck at a speed that was inconsistent with the grade and curve of the road and the condition of the truck created a hazard that not only resulted in Payne's death but that also potentially endangered the public, truckers employed by contractors and employees of Bluestone -- all of whom, the record establishes, used the road on occasion.

Second, Bluestone recognized a bottom line responsibility to make sure the speed of coal haulage trucks was consistent with the condition of the road. Bluestone's haulage rules and regulations specifically limited trucks to 20 miles per hour and cautioned the speed limit was to be "strictly adhered to" (Bluestone Exh. 1 at 2). Bluestone added that it would not accept coal from truckers who did not comply with its rules (Id. at 3). The citation of Bluestone was an incentive for Bluestone to find a more effective means to better ensure truckers traveled at safe speeds on the mine's roads.

For these reasons I cannot find the Secretary abused his discretion in citing Bluestone. Moreover, the fact that the Secretary might have cited Mullins Trucking, as Castanon recognized, and that this also might have had a deterrent effect, equal or even greater, to citing Bluestone, does not invalidate the Secretary's choice (Tr. II 126-127).

S&S

The four-part test enunciated by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) for determining whether a violation is S&S is well known and need not be repeated here. I have concluded a violation of section 77.1607(c) existed. Moreover, I find the evidence easily establishes a discrete safety hazard in that failure to operate the coal haulage truck at a speed consistent with the grade and curve of the road and the condition of the truck endangered not only the truck driver but others who traveled the road. Unfortunately, the worst occurred and the hazard came to a fatal fruition. There is no doubt that the speed at which the truck was operating was a significant and substantial contribution to that fatality. The violation was S&S.

GRAVITY

The concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. The potential hazard was of an accident caused by excessive speed and resulting in the death or injury of the truck driver, other miners, and/or the public. It is difficult to imagine anything more hazardous than a truck with inadequate brakes speeding out of control down a frequently used, steep, and multi-curved road.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Given the volume of traffic over the road and the lack of any previous reportable accidents or citations, the lack of any conclusive evidence as to what caused Payne to lose control of the truck or where he lost control, as well as the lack of any citation with regard to the washboard area, there is no basis to find that Bluestone's design and/or maintenance of the road contributed to the violation. Nor is there any basis to find that Bluestone was in some way responsible for training Payne and that its failure to properly train him lead to Payne speeding out of control. Although at trial the Secretary's counsel seemed especially enamored of this theory, speculation is not equivalent to proof.

However, Bluestone required trucks on its property to be maintained in safe operating condition (Sec. Br. 17; Bluestone Exh. 1). It seems certain the virtually useless condition of the brakes played a role in causing the violation. While initial responsibility for the condition of the brakes lay with Mullins Trucking and Blackstone, the presence of the unsafe truck on Bluestone's property evidenced Bluestone's negligent failure to effectively enforce its rules. I conclude therefore, the Secretary has established that Bluestone failed to exhibit the care that was necessary and that Bluestone's negligence contributed to the violation.

OTHER CIVIL PENALTY CRITERIA

The parties stipulated that Bluestone is a small operator with an excellent history of compliance (Stipulation 5). They further stipulated that the proposed penalties would not affect Bluestone's ability to continue in business (Stipulation 4).

CIVIL PENALTY

The Secretary has proposed a civil penalty of \$6,000 for the violation of section 77.1607(c). The violation was instrumental in Payne's death and I have recognized its very serious nature.

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In addition, I have found Bluestone negligent. However, I conclude that the company's small size and excellent compliance record, as well as the primary parts played by Payne, Mullins Trucking and Blackstone in the violation, warrant a significantly lower penalty than that proposed by the Secretary. I will assess a civil penalty of \$500.

ORDER

The Secretary has vacated Order No. 2723399. Therefore, Docket No. WEVA 93-165-R is DISMISSED.

In Docket No. WEVA 94-117, the Secretary's vacation of Citation No. 2723275 is AFFIRMED. Citation No. 2723400 is VACATED. Citation No. 2723974 is AFFIRMED and a civil penalty of \$500 is assessed for the violation of section 77.1607(c). Bluestone is ORDERED to pay the civil penalty within 30 days of the date of this decision. Upon payment of the civil penalty Docket No. WEVA 94-117 is DISMISSED.

David F. Barbour
Administrative Law Judge

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