

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

October 26, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

PREMIER ELKHORN COAL COMPANY,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2011-827
A.C. No. 15-17360-248539

Mine: PE Southern Pike Co.

DECISION APPROVING SETTLEMENT ON REMAND
AND
ORDER TO PAY

Before: Judge Feldman

This civil penalty proceeding involves two citations issued to Premier Elkhorn Coal Company (“Premier”) in connection with a fatal coal truck accident. Citation No. 8230316 alleges a violation of 30 C.F.R. § 77.1607(b), which requires that “[m]obile equipment operators shall have full control of the equipment while it is in motion.” Specifically, Citation No. 8230316 provides:

A fatal accident occurred on December 12, 2009, when the driver of the 2006 red International Paystar coal haulage truck, owned by Trivette Trucking (Q080), VIN 1HTXHAPTX63J233337, failed to maintain control of the loaded truck as it was descending the mine haul road. Overloading of the truck was a factor in the driver losing control. The estimated weight of the truck was 37,600 pounds over the GVWR recommended by the manufacturer. Premier Elkhorn was aware that the trucks were routinely overloaded and did nothing to stop this practice. This truck operates on mine roads as well as public highways. This condition is an unwarrantable failure to comply with a mandatory safety standard.

Relatedly, Citation No. 8230317 alleges a violation of 30 C.F.R. § 77.1605(b), which requires that “[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.” Specifically, Citation No. 8230317 provides:

The red International Paystar model 5600I haul truck, Vehicle ID 1HTXHAPTX63J233337, was not equipped with adequate brakes. This truck was involved in a fatal accident on December 12, 2009. The operator of this mine did not assure that the above listed truck being operated by a contractor was equipped with adequate brakes. A mechanical evaluation conducted during the fatal accident investigation revealed the following conditions were present: 1. Both the left and right side brake drums on the steering axel had deposits of dried grease on the drum lining friction surface. These conditions compromise the braking activity. 2. The right side brake on the rear tandem axel did not function when tested. 3. Wear on the brake drums in excess of maximum allowable diameter was found on the right front tandem and both the left and right side on the rear tandems. 4. Bluing was found on the right side drum on the front tandem and the left side drum on the rear axle. Bluing indicates excessive heat. These conditions compromise the braking capacity. This truck operates on mine roads as well as public highways.

I. Procedural History

After a hearing on the merits, Administrative Law Judge Jeffrey Tureck vacated both citations, finding that the Secretary failed to demonstrate that the subject haul truck was hauling an unsafe amount of coal, and that the accident was more likely attributable to a steering problem that caused the brakes and steering to simultaneously fail. 35 FMSHRC 150, 164 (Jan. 2013) (ALJ). The Secretary filed a petition for discretionary review, which was granted by the Commission.¹

On review, regarding Citation No. 8230317, the Commission concluded that Judge Tureck's finding that the condition of the haul truck's brakes did not cause the fatal accident was supported by substantial evidence. As such, the Commission affirmed the vacation of Citation No. 8230317. 38 FMSHRC 1587, 1595 (July 2016).

However, the Commission reversed Judge Tureck's vacation of Citation No. 8230316 based on his finding that Premier was not responsible for loss of control of the truck because the Secretary failed to establish that the truck was loaded in excess of the manufacturer's gross vehicle weight rating. *Id.* at 1593. In so doing, the Commission relied on *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365, 370 (Feb. 2013), which held that the Secretary is not required to prove "a causal or contributing factor for the loss of control" to establish a violation of section 77.1607(b), but rather only must demonstrate that the truck driver lost control of his vehicle. 38 FMSHRC at 1591. Here, the Commission determined that the truck driver lost control of his vehicle and that this violation, given its fatal consequences, was properly designated as significant and substantial (S&S). *Id.* at 1591-92.

¹ As Judge Tureck is no longer with the Commission, this matter was assigned to the undersigned on remand on July 12, 2016.

The Commission's *Clintwood Elkhorn* decision narrowly held that the Secretary did not have to demonstrate that a truck was overloaded to establish the fact of a violation of section 77.1607(b). However, whether such a truck is overloaded is relevant, if not determinative, in resolving whether the accident is attributable to an unwarrantable failure. Here, as the subject truck overturned, the Mine Safety and Health Administration ("MSHA") could not determine how much coal the truck was carrying prior to the accident. *Id.* at 1597 (Commissioner Cohen, dissenting). However, the inability to determine the load of an overturned truck, as a consequence of a truck operator's loss of control, should not inure to the benefit of the mine operator.

The Commission's majority opinion concluded that the evidence that the truck was overloaded is "at best, circumstantial." *Id.* at 1592. The Secretary may satisfy his burden of proof, with respect to the issue of unwarrantable failure, by relying on reasonable inferences drawn from indirect (circumstantial) evidence, provided that such inferences are inherently reasonable and bear a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). I agree with the dissenting opinion of Commissioner Cohen that the record, consisting of weight tickets showing a pattern of overloading trucks in close temporal proximity to the accident, and a relevant manufacturer's truck manual providing relevant gross vehicle weight ratings, demonstrates that ample circumstantial evidence warrants the inference that the truck was overloaded.² *See* 38 FMSHRC at 1590-91. Premier does not deny that overloading a truck in excess of the gross vehicle weight rating could cause "component failure, result[ing] in property damage, personal injury, or death." *Id.* at 1589.

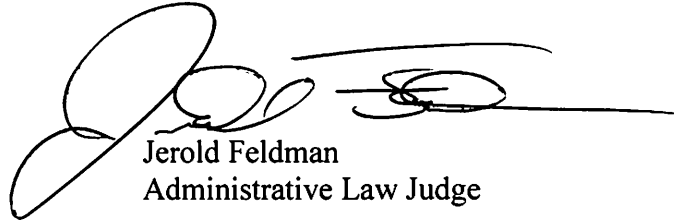
Nevertheless, the Commission's majority decision held that Citation No. 8230316 was not a result of an unwarrantable failure. *Id.* at 1592. Consequently, the Commission now has remanded Citation No. 8230316 for a determination of the appropriate civil penalty. *Id.* at 1595.

II. Settlement Agreement

On remand, the parties have now filed a motion to approve settlement and dismiss this matter. The parties have agreed on a reduction of the proposed civil penalty for Citation No. 8230316 from \$70,000.00 to \$7,500.00, based on the Commission's deletion of the unwarrantable failure designation. As noted above, although I believe that there is significant evidence reflecting that the violation may have been attributable to an unwarrantable failure, I am constrained to approve the parties' settlement motion given the Commission's majority decision to the contrary.

² Although Judge Tureck denied admission of this documentary evidence, the Commission noted that the judge permitted the Secretary's witnesses to testify with respect to the information therein. 38 FMSHRC at 1591 n.10.

Consistent with the above discussion, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Premier Elkhorn Coal Company **IS ORDERED** to pay the \$7,500.00 civil penalty within 30 days of this Order in satisfaction of the single citation remaining at issue on remand.³ Upon receipt of timely payment, the captioned matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.