

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

April 15, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-144-M
Petitioner	:	A.C. No. 13-00691-05518
v.	:	
_____	:	
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	IA Portable #1

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The petition alleges that Higman Sand & Gravel, Inc. ("Higman") is liable for three violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in Sioux City, Iowa, The parties submitted briefs following receipt of the transcript. The Secretary proposes civil penalties totaling \$1,800.00 for the alleged violations. For the reasons set forth below, I find that Higman committed one of the alleged violations and impose a civil penalty of \$350.00.

Findings of Fact - Conclusions of Law

On August 14, 2001, MSHA inspector Christopher Willet conducted an inspection of Higman’s facility in Plymouth County, Iowa. Higman mines and processes sand and gravel at the site, which includes a crusher, sand plant, shop, and truck scales. Willet had been an inspector for two and one-half years and had eight years of prior experience in the mining field.

The first step in the mining process, “stripping,” entails removal of the overburden. An excavator and two Euclid “belly” dump trucks are used to remove the topsoil and other materials covering the sand and gravel deposit. The Euclid trucks have a tractor/trailer configuration and carry a load of approximately 25 tons. The load is “dumped” from the bottom of the trailer through a clamshell-like mechanism. They are powered by 12 - cylinder Detroit diesel engines,

and have six-gear automatic transmissions, which shift when the driver moves the gear selector into each gear. They have “off-road,” knobby tires that are over six feet in diameter. The service brake systems operate on air pressure. A compressor pumps air into a surge tank or accumulator. When the brake pedal is depressed, the compressed air flows to an actuator mechanism which forces brake shoes into contact with brake drums mounted on the rear axle.

The parking brake system is entirely separate from the service brake. It is activated when the driver pulls up on a lever, which is connected by a cable to a mechanism that activates brake shoes mounted in a drum on the rear of the transmission. The brake is adjusted by turning a knob on the lever, which varies the tension on the cable. The trucks are also equipped with an air-activated mechanism that can lock the rear drive wheels on either side of the tractor. It is typically used when tire traction is lost on one side. By pushing a floor-mounted pedal to the right or left, the driver can lock the wheels that are slipping and, presumably, move the truck forward with the wheels that have traction. The trucks are also equipped with a “retarder” device, which is used to slow the truck as it descends lengthy slopes. It operates through the re-routing of transmission fluid within the transmission.

On the day of the inspection, stripping was being done on the east end of the property. After being loaded by the excavator, the trucks traveled a looped path to the dumping area on the west side of the property. They exited the field being stripped, entered the facility’s entrance roadway, and traveled past the scalehouse/office, shop, stockpile, crusher and sand plant. A concrete plant, owned by another entity, was also located across the entrance road from the shop. Secretary’s exhibit S-3 is a rough sketch of the facility layout, showing the path that the trucks traveled. The surface of the path traveled by the trucks varied considerably. On the east and west end of the property it was soft, essentially unimproved farmland. The roadway near the shop and other buildings was at least part gravel and was well-compacted. As noted on the sketch, Willet estimated that there was a five - ten percent grade for a short distance near the excavator and a five percent grade in the area of the crusher.¹

In the course of the inspection, Willet, who was accompanied by Harry R. Haneklaus, Higman’s mechanic, determined to inspect one of the Euclid trucks, Co. # NW 23, that was emerging from the stripping area and approaching the roadway leading from the highway to the scalehouse/office area. Haneklaus waived to the driver of the truck, who brought it to a stop. Willet determined that the service brakes and the parking brake on the truck were defective and issued the three citations at issue in this case. He also issued an oral imminent danger order, pursuant to section 107(a) of the Act, prohibiting further use of the truck until the service brakes were repaired. The citations/order are discussed below in the order that they were presented at the hearing.

¹ Willet had difficulty explaining what he meant by percentage slope. Tr. 135-36. Considering the pictures and other evidence on this issue, he was most likely referring the slope’s angle from horizontal, rather than the ratio of rise or fall to horizontal distance.

Citation/Order No. 7845474

Citation/Order No. 7845474 was issued by Willet on August 14, 2001, and alleged a violation of 30 C.F.R. § 56.14101(a)(1) which requires that: “Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.” The conditions he observed were noted on the citation as:

An employee was observed operating a Euclid haul truck, Co. # NW 23, stripping dirt. When the service brakes were tested the brakes did not work at all. This truck was operating around several customer trucks, company owned equipment and people on foot around the shop area. This exposes all persons in the area where the truck is operating to being over-traveled by a truck unable to stop which could result in fatal injuries. The emergency/parking brake was not maintained in functional condition, see Citation # 7845477. Paperwork to follow. An oral 107(a), imminent danger order was issued to Ray Haneklaus, service man, at 1000 hours on this date. (Typographical and other errors corrected).

He concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that ten persons were affected and that the operator’s negligence was moderate. The citation was subsequently modified to reflect that two persons were affected. The imminent danger order directed that the haul truck not be used until the service brakes were operational.

The Violation

Willet testified that when he advised the driver that he intended to inspect the service brake system, the driver stated that the brakes didn’t work. Tr. 34. He then held the brake pedal down, put the truck into first gear, throttled it and it “took off.” Willet noted that the service brake actuator mechanism was not moving and that there was no air pressure in the system. The service brakes were totally ineffective. He determined that the condition of the truck violated the regulation and that, because the driver was aware of the condition, the brakes “had not been working for some time.” Tr. 86. He determined that the “operator,” i.e., Higman, was not aware of the condition and rated its negligence as “moderate.”

His conclusions that the violation was significant and substantial and posed a high likelihood of a fatal injury, were based upon a number of factors.² For a portion of the looped path, the truck traveled briefly on the entrance road and past the cement plant, scalehouse, stockpile and sand plant, where there was other vehicular traffic, i.e., customers’ trucks and, possibly, employees’ private vehicles. In addition, he testified that he observed foot traffic in the

² He first evaluated the probability of injury as “reasonably likely.” However, after determining that the parking brake was also defective, he raised the probability of injury to “highly likely.” Tr. 150-51.

area of the scalehouse and saw pedestrians crossing the road from the shop area to the cement plant. Most employees parked their personal vehicles across the roadway from the shop area and crossed the road to reach those buildings and/or Higman vehicles that were parked near the shop. He estimated that there was a “small” five-ten percent grade for 30 - 40 feet of the truck’s path near where the excavator was located and an approximate five percent downhill/uphill grade for about 200 yards near the crusher. Although the truck traveled at a relatively low speed of 10 - 20 mph, it made 30 - 40 trips per day. He also considered that the driver might lose control of the vehicle in the event of a tire blowout or failure of the steering mechanism.

Haneklaus, who accompanied Willet, was very familiar with the Euclid truck, having driven and serviced it. He testified that the truck was inspected and serviced that morning and that no one was aware of any problem with the brakes. Tr. 240-41, 247, 275. He was standing next to Willet when the inspection was performed and did not recall the driver saying that the brakes didn’t work. Tr. 243-44. He confirmed that the service brakes were not functioning after the truck had come to a stop, and noted that the air pressure gauge on the dashboard of the truck showed that there was no air pressure in the system. The service brakes were repaired by replacing the compressor, which was found to have a non-functional valve.

Haneklaus disagreed with Willet’s gravity assessment for a number of reasons. The truck, particularly when loaded, is very heavy and mostly travels on soft ground. The large knobbed tires sink into any but the most compacted of surfaces. As a consequence, it takes a good deal of power to move the truck and it stops fairly quickly when power is not applied. Tr. 250. He has driven the truck for extensive periods of time and never had occasion to use the service brakes at all, because the normal operations of de-throttling and down-shifting provided all of the stopping force needed. Tr. 271. If additional stopping power were needed, the wheel locking mechanism and/or the retarder could be engaged. If the truck was loaded, dumping the load so that the rear tires and axle had to be pulled through it, would bring the truck to a prompt halt. Tr. 262, 307-08. He testified that he would have been “comfortable” operating the truck in the condition that it was in at the time of the inspection. Tr. 309.

Haneklaus also disagreed with Willet’s estimate of the slopes in the roadway and the frequency with which the truck might encounter other vehicular and pedestrian traffic. He and Harold Higman, vice president for operations, measured the slopes with a transit used for surveying and layout in Higman’s construction business. The slope of the roadway near the shop was two inches in 100 feet, and the slope near the crusher was four inches in 100 feet. Tr. 304, 349-53. Haneklaus and Higman also testified that there was virtually no pedestrian traffic anywhere that the haul truck traveled, and that other vehicles would be encountered infrequently and only in the area of the scalehouse and stockpile. Tr. 252-53, 291, 299-302, 341-46, 368-69. Higman described company policy as requiring that trucks be inspected during the first hour of the day, 7:00 - 8:00 a.m., that they operate in no higher than third gear, and that the movement of traffic at the facility is designed to provide “a smooth, continuous flow at low speed.” Tr. 329, 333, 337. Drivers are paid for all hours of the day and eat lunch in their trucks. Neither they nor other employees cross the truck’s path on foot. Higman also testified that the truck could be driven all day without using the service brake, that he couldn’t imagine any possibility of an injury occurring because the service brake was non-functional, and that there has never been a

loss of control experienced by Higman drivers due to a tire blow out or a steering failure.
Tr. 332, 346, 356.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd.*, *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

There is no dispute that the service brakes on the truck were not functional when the truck was inspected. The availability of other mechanisms and procedures to bring the truck to a stop cannot negate the fact that the standard was violated. *See Missouri Rock, Inc.*, 11 FMSHRC 136 (Feb. 1989).

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *See also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*,

6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

Virtually all of the factors that entered into Willet's imminent danger and significant and substantial determinations are in dispute. Respondent contends that operation of the truck with non-functional service brakes posed no possibility of an injury, because of the extremely low incidence of the truck encountering other traffic and the driver's ability to stop it without using the brakes. If the truck's operation had been confined to the soft fields where the stripping and dumping were done, Respondent's position might have merit. However, the truck regularly crossed the facility's entrance road and traveled past the shop, stockpile and crusher areas, where there was pedestrian and vehicular traffic. Customers' trucks used the entrance road, weighed in and out at the scalehouse and traveled to the stockpile/crusher/plant area to load products. Tr. 298, 344. Employees occasionally crossed the path used by the truck to reach the shop area or company vehicles. Tr. 301, 368-69. Haneklaus and Higman also acknowledged that service brakes would be needed in an emergency situation. Tr. 277, 332, 379. The roadway where the truck was most likely to encounter other traffic was also highly compacted, which would significantly reduce the rolling friction that tends to slow the truck in the absence of power.³

A mandatory safety standard was violated, creating a discreet safety hazard – a large heavy vehicle with inoperable service brakes traveling at speeds of 10 - 20 mph in close proximity to occasional vehicular traffic and somewhat rare pedestrian traffic. Any injury inflicted by the haul truck would most likely be serious. The issue is whether there was a reasonable likelihood that the hazard would result in an injury. Haneklaus and Higman believed that there was no possibility of an injury. However, both conceded that the truck encountered some vehicular and pedestrian traffic on part of its route. While drivers of other vehicles and

³ I accept Respondent's evidence that there was virtually no slope in the roadway. Willet did not measure the "slopes" recorded on the sketch, though he had an instrument with him that he could have used for that purpose. Higman was experienced in use of the transit and made precise measurements of the slopes. The various pictures introduced as Secretary's exhibit S-4 are of marginal value. They were taken in October 2002, and do not purport to show the actual areas traveled by the truck, except on the flat ground near the shop area. The Secretary also called another MSHA inspector, Kevin Legrand, as a witness. Legrand had last inspected the facility in December of 1999, and was able to state only that the sketch and pictures looked familiar and that he recalled a "gradual slope" near the crusher.

pedestrians would most likely yield to the large haul truck, driver error and misjudgments are certainly possible. In evaluating the risk of injury in other situations, the Commission has emphasized that the vagaries of human conduct cannot be ignored. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). While I disagree with Willet's assessment that the probability of injury was "highly likely," I find that there was a reasonable possibility that the hazard contributed to by the violation would result in a serious injury. The Secretary has carried her burden on this issue. I find that the violation was significant and substantial. I also affirm the imminent danger order.⁴

I also disagree with Willet's assessment of the operator's negligence as being moderate. He determined that the driver was aware of the violation, based upon his alleged admission, but that the operator, i.e., Respondent, was not. Haneklaus did not believe that the driver had made the statement, and directly contradicted Willet with respect to a nearly identical alleged statement regarding the parking brake. A direct statement by the driver that he knew that the braking system was defective would most likely be regarded as a very important admission by an inspector, and would have prompted inquiries as to how long the driver had been aware of the problem and whether he had told anyone about it. Yet, Willet, admittedly, did not note the alleged statements in the body of the citations or in his field notes. Tr. 121. I find that the driver did not tell Willet that the service brakes were not functional prior to testing them. There is no evidence as to how long the condition existed. Willet apparently made no inquiries regarding the duration of the violation and there was no evidence that it had been noted during preshift inspections or in any other manner. Haneklaus, to whom such problems should have been reported if they were discovered during the preshift examination of the truck, denied knowledge of the condition. In short, there is no evidence indicating that Respondent was, or should have been, aware of the problem. I find that Respondent's negligence was no more than "low."

Citation No. 7845477

Citation No. 7845477 alleged a violation of 30 C.F.R. § 56.14101(a)(2) which requires that: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." The conditions he observed were noted on the citation as:

The emergency/parking brake was not maintained in a functional condition. This exposes all persons in the area to being over-traveled by a truck that is unable to stop which could result in fatal injuries. Service brakes were not in functional condition, see Citation/Order # 7845474.

⁴ An imminent danger order need not be based upon a violation of a mandatory standard or a condition that poses an immediate danger. It is sufficient that the condition could reasonably be expected to cause serious physical harm if normal mining operations were permitted to proceed before the dangerous condition is eliminated. *Cyprus Empire Corp.*, 12 FMSHRC 911, 918-19 (May 1990).

He concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that ten persons were affected and that the operator's negligence was moderate. The citation was subsequently modified to reflect that a fatal injury was reasonably likely and that two persons were affected.

The Violation

Willet tested the parking brake in the same manner as the service brake. He instructed the driver to apply the brake and put the truck in gear. Willet testified that the driver told him that the parking brake did not work, and that the truck moved forward when it was placed in gear. He was of the opinion that if the parking brake worked effectively, the truck should not have moved. He, therefore, determined that the parking brake was defective and issued the citation. The citation was abated by simply turning the knob on the activating lever in the cab of the truck, thereby adjusting the brake. Haneklaus testified that the driver did not state that the parking brake did not work, and that he "throttled" the truck when he put it in gear, causing the truck's powerful engine to override the parking brake, which it would have done regardless of how the brake was adjusted. For the reasons discussed with respect to the previous alleged violation, I find that the driver did not state that the parking brake was not working.

I find that the Secretary has failed to carry her burden of proof with respect to this citation. The violation alleged is that the truck's parking brake would not "hold the [truck] with its typical load on the maximum grade it travels." I have found that the maximum grade traveled by the truck was a four inch elevation change in 100 feet. Even on well-compacted roadway, the truck had significant rolling friction. While the parking brake adjustment may not have been set at high tension, there is no evidence that it was not capable of holding the truck on the virtually flat ground over which it traveled. In fact, it is highly likely that the sheer weight of the truck, with its compression of the tires and road surface, would hold it in the absence of any braking mechanism.

I find that Respondent did not commit the violation alleged. The citation will be vacated.

Citation No. 7845478

Citation No. 7845478 alleged a violation of 30 C.F.R. § 56.14100(a) which requires that: "Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." The conditions he observed were noted on the citation as:

A proper pre-shift operational check was not done by the operator of the Euclid haul truck, Co. # NW 23. It was operated with no service brakes or emergency/parking brake, see Citation/Order # 7845474 and Citation # 7845477. This exposes all persons in the area of the truck to being over-traveled by a truck that is unable to stop which can result in fatal injuries.

He concluded that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial, that ten persons were affected and that the operator's negligence was high. The citation was subsequently modified to reflect that two persons were affected.

The Secretary's Motion to Amend the Citation/Petition

On January 6, 2003, three days prior to the scheduled hearing, the Secretary moved to amend the petition to allege, in the alternative, that Respondent violated 30 C.F.R. § 56.14100(b), which requires that equipment defects affecting safety be timely corrected. Respondent filed a written opposition to the motion. The motion was denied, without prejudice, at the commencement of the hearing on grounds of timeliness, possible duplication of charges and the uncertainty of its effect on the special assessment of the originally alleged violation. The Secretary has renewed the motion in her brief.

Guided by Fed. R. Civ. P. 15(a), motions to amend pleadings in Commission proceedings are to be freely granted unless the moving party has been guilty of bad faith, acted for purposes of delay, or a hearing on the merits would be unduly delayed. Prejudice to the opposing party may also bar an otherwise permissible amendment. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (Aug. 1992); *Cyprus Empire Corp., supra*, 12 FMSHRC at 916. Respondent's opposition to the motion was based on timeliness, potential prejudice of having to deal with newly disclosed facts and duplication of charges. While the timeliness of the motion is a concern, there is no suggestion that it was the product of bad faith.

Respondent's claims of prejudice in having to defend against newly disclosed facts and potential duplication in alleged violations have more merit. In the course of the argument on the motion, after the commencement of the hearing, Respondent's counsel learned that the Secretary anticipated testimony from the inspector that the truck's driver told him that the service and parking brakes did not work before they were tested. As noted above, those were significant facts that were not recorded in either the citations or the inspector's notes, which had been provided to Respondent in discovery. The only indication of notice in the citation and notes was that the "operator" was not aware of the problems. As to duplication, the Secretary has presented viable allegations that the truck was being operated with non-functional service and parking brake systems. It is not clear that a violation alleging a failure to correct either of those defects would not be duplicative of the violation alleging that the defect existed.

For all these reasons, the Secretary's renewed motion to amend the citation/petition to allege violation of an alternative standard is denied. In any event, I have found that the Secretary has failed to carry her burden of proof as to the alleged non-functional parking brake and that the truck's driver did not make the statement attributed to him by Willet. The Secretary has, therefore, also failed to establish the factual predicate for her proposed amendment.

The Violation

Willet testified that he did not recall whether the driver of the truck stated that he had conducted a preshift inspection of the vehicle. Tr. 101. His belief that a proper preshift inspection had not been done was premised upon the alleged admissions by the driver that he knew the service and parking brakes were not functional and the limited likelihood that both systems would have failed in the two hours that had elapsed since the truck should have been inspected.

Haneklaus and Higman described Respondent's policy that during the first hour of the work day, 7:00 - 8:00 a.m., operators are to conduct inspections of the equipment they will operate on the shift. All operational elements of haul trucks are checked, from engine oil and transmission fluid to tire air pressure. Tr. 240, 266-69, 329-30, 337. The trucks are parked near the shop and the inspections are performed there, under the watch of Haneklaus, who testified that the truck in question was examined by the driver that morning and that oil was added, air was put into the tires and the brakes were working. Tr. 241, 275.

The foundation for Willet's conclusion that a preshift inspection was not performed by the driver of the truck has been substantially undermined. The Secretary has established only that the service brakes were non-functional. I have found, as noted above, that the truck's driver did not make the admissions attributed to him by Willet. Consequently, there is no evidence that he, or any other Higman employee knew of the problem prior to its being checked by Willet. Tr. 86, 96, 125. Although Willet concluded that the driver knew of the problem, he conceded that the driver might have learned of it when he stopped for the inspection. Tr. 125. The defect in the service brake system was a failed valve in the compressor, which could have been caused by any number of things, including fatigue or a foreign body. Tr. 242, 260, 338-40. It is the type of failure that could have occurred immediately prior to Willet's inspection. Moreover, the compressor might have been functioning marginally for some time without the driver's knowledge. The service brakes were seldom used and, as long as there was adequate time between braking for the compressor to restore pressure in the system, the service brakes would have functioned effectively.

The only direct evidence regarding the preshift inspection is Haneklaus' testimony that it was performed. The Secretary's case rests entirely on an inference that the defect existed, and should have been discovered, at the time of the preshift examination. However, there is virtually no credible evidence that the defect existed, or that the driver or anyone else was aware of it, before Willet performed his inspection.

I find that the Secretary has failed to carry her burden of proof with respect to this alleged violation. The citation will be vacated.

The Appropriate Civil Penalty

There is no evidence as to the size of Higman's mining operation or its controlling entity. It appears to be a relatively small operation. The parties have stipulated, and I so find, that

Respondent demonstrated good faith in abatement of the violation and that payment of the proposed civil penalties would not threaten its ability to continue in business. I also find that the civil penalty imposed below is appropriate to the size of Higman's business. Higman has a relatively good history of violations, with three paid assessed violations having been issued in the course of eight inspection days in the 24 months preceding August 14, 2001.

The civil penalty proposed for Citation/Order No. 7845474 was \$700.00. The violation is sustained as significant and substantial. However, the probability of a reasonably serious injury resulting was "reasonably likely," rather than "highly likely," and the operator's negligence was "low," rather than "moderate." Taking into consideration all of the factors required to be addressed under section 110(I) of the Act, I impose a civil penalty of \$350.00 for that violation.

ORDER

Citation No's. 7845477 and 7845478 are hereby **VACATED** and the related Petition for Assessment of Civil Penalties is **DISMISSED** as to those citations.

Citation/Order No. 7845474 is **AFFIRMED**, as modified, and Respondent is directed to pay a civil penalty of \$350.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

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