

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

March 30, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-193
Petitioner	:	A. C. No. 15-16958-03510 HD2
v.	:	
	:	
DOTSON TRUCKING COMPANY	:	
INCORPORATED,	:	
Respondent	:	Long Fork Preparation Plant
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-201
Petitioner	:	A. C. No. 15-16958-03517
v	:	
	:	
MCCOY ELKHORN COAL CORP.,	:	
Respondent	:	Long Fork Preparation Plant

**DECISION**

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Lexington, Kentucky, on behalf of Dotson Trucking Incorporated;  
Melanie J. Kilpatrick, Esq., and Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of McCoy Elkhorn Coal Corporation.

Before: Judge Melick

These consolidated cases are before me upon petitions for Civil Penalty filed by the Secretary of Labor against Dotson Trucking Company, Inc., (Dotson) and McCoy Elkhorn Coal Corporation (McCoy) pursuant to Section 105(d) of the Federal Mine and Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” alleging violations of mandatory standards and seeking civil penalties of \$60,000.00 and \$25,000.00, respectively, for those violations. The general issue before me is whether the violations were committed as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Background

On Tuesday, September 1, 1998, at approximately 2:45 p.m., truck driver Charlie Hall was injured when he failed to negotiate a curve while descending the refuse haul road at the subject mine. Hall died of his injuries on September 13, 1998. McCoy operates the cited coal preparation plant and Dotson provides trucking services hauling refuse from the plant by road up a hill to the refuse dumping area. At the top of the hill an employee of Sky Hawk Construction operated a bulldozer to spread the refuse material. After Dotson's haulage trucks dumped their refuse they traveled unloaded down the hill to the preparation plant to be reloaded.

On September 1, 1998, Dotson was using four trucks to haul refuse. One of these trucks, the Cline Number 77, was being driven by Charlie Hall. Hall was traveling unloaded down the refuse haul road on a 15% grade, apparently lost control of his truck, failed to make the turn at the Number 1 curve and passed through the berm into the side of a hill. When Hall's truck struck the hillside, he was projected through the windshield and landed in a ditch.

On September 1, 1998, Buster Stewart, an experienced coal mine inspector and accident investigator for the Mine Safety and Health Administration (MSHA) and Robert H. Bellamy, an MSHA mining engineer, proceeded to the mine to investigate. The investigation continued on September 2, 1998, and on September 3, 1998, when Dennis Ferlich and Terry Marshall from MSHA's Approval and Certification Center arrived. Ferlich is a mechanical engineer who focused his investigation on the braking system and related components of the cited truck.

### The Alleged Violations

Citation Number 3816166, issued to Dotson, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1605(b) and charges as follows:

The Cline refuse truck #77 was not provided with adequate brakes. The truck was examined by MSHA Technical Support personnel and defects to the braking system were documented which include that the front brakes were not operational.

The cited standard 30 C.F.R. § 77.1605(b) provides as relevant hereto that "[m]obile equipment shall be equipped with adequate brakes."

Citation Number 7350320 was issued to McCoy and also alleges a "significant and substantial" violation of the standard at 77.1605(b). It charges as follows:

The 50-Ton Cline Refuse Truck, Co., No. 77, was not provided with adequate service brakes that would stop the truck in an emergency situation on the roadway it was traveling. On September 1, 1998, the truck was returning empty to the refuse bin when it failed to negotiate the No. 1 curve. The truck traveled through the berm and impacted the hillside. The evaluation of the testing performed by MSHA Technical Support during the fatal accident investigation concluded the

brakes were inadequate at the time of the accident. The truck has been out of service since the accident.

Citation Number 7351484, issued to Dotson and as subsequently modified, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 77.1607(c) and charges as follows:

Equipment operating speeds are not consistent with the conditions of the roadway, grade, and type of equipment being used. On September 1, 1998, a powered haulage accident occurred resulting in fatal injuries to Charlie R. Hall, truck driver. The accident occurred when the #77 Cline refuse truck failed to negotiate the #1 curve. The truck traveled through the berm and over the out slope of the road and in to the hillside. The gravel on the road was firmly embedded and worn slick. The grade of the road in the area was approximately 15%. Extra water had been added to the refuse and allowed to leak from the truck beds for dust control purposes which added to the condition. The road is maintained by Dotson Trucking, Inc.

The cited standard, 30 C.F.R. § 77.1607(c), provides as follows:

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

Citation Number 7351483, issued to McCoy and as subsequently modified, also alleges a “significant and substantial” violation of 30 C.F.R. § 77.1607(c) and charges as follows:

Equipment operating speeds are not consistent with the conditions of the roadway, grade, and type of equipment being used. On September 1, 1998, a powered haulage accident occurred resulting in fatal injuries to Charlie R. Hall, truck driver. The accident occurred when the #77 Cline refuse truck failed to negotiate the #1 curve. The truck traveled through the berm and over the out slope of the road and in to the hillside. The gravel on the road was firmly embedded and worn slick. The grade of the road in the area was approximately 15%. Extra water had been added to the refuse and allowed to leak from the truck beds for dust control purposes which added to the condition. The on-shift examinations are conducted by McCoy Elkhorn personnel.

### Evaluation of the Evidence

Both MSHA investigators, Stewart and Bellamy, opined that truck driver Charlie Hall had been traveling at excessive speed in the presence of adverse road conditions. They concluded that the haul road where the accident occurred was slick from the deposition of water and from gravel worn to a smooth surface. They also considered the skid marks at the Number 1 curve; the fact

that the same truck had been driving this haul road for four hours before the accident on September 1, 1998, without incident; and reports from interviews that the victim, Charlie Hall, was known to drive fast down the haul road.

Mechanical engineer Dennis Ferlich's opinions are not disputed. Ferlich found that three of the six brakes on the cited truck were completely inoperative and that the remaining three brakes had a reduced functional capacity. He opined that the cited Cline Number 77 truck had only about 50% of its normal braking capacity and therefore the brakes were not adequate. Ferlich further opined that it was much more likely that the accident would not have happened if the truck had had full braking capacity. Ferlich also opined that, based upon his own examination of the brakes and the testimony of William New, Dotson's chief mechanic, Dotson did not in fact have a preventive maintenance program. In this regard he noted the failure of Dotson to have replaced the worn brake drums.

William New was the chief mechanic at Dotson and had worked for Dotson his entire mining career of 16 years. New was also supervisor for Dotson's two other mechanics and its truck drivers. According to New, Hall had worked for Dotson for three to four years before the accident on September 1, 1998. New was aware even before the accident that Hall had a reputation among the truck drivers for driving "too fast" down the haul road. He defined "too fast" as "coming off the hill" in fourth gear. New had himself seen Hall driving too fast on two occasions, one of which was only two to three weeks before the accident. He asked Hall to slow down "because it was too dangerous to come off that fast."

New also testified that there were no established disciplinary procedures at Dotson for violating company rules. When asked if he had ever disciplined Hall for driving too fast, he responded only that "I had spoke [*sic*] to him about driving too fast." New agreed with the Secretary's experts that "by all of the signs at the accident scene" Hall had been "definitely going fast."

Tommy Bevins, vice-president, secretary of Dotson and one of Dotson's owners, testified about Dotson's lack of disciplinary procedures in the following colloquy:

Q. The 15 or 22 employees that you had in 1998, what were your disciplinary procedures or operation there, for example for driving too fast?

A. Well, if it was a constant thing I would probably have fired them. But as far as I'm just a small operator, I don't have a lot of extra people, and I couldn't afford to furnish . . . So I couldn't have six or eight drivers to fill in if I disciplined one or laid him off. So what I tried to do was really stay on them, caution them about safety factors of it.

(Tr. 12/14/99 at 61, 76-77).

Bevins also testified that Dotson did not examine the drums or brake shoes on its equipment unless there was a problem. He later testified, regarding Dotson's method of inspecting the brakes on its equipment, as follows:

We do it the same way MSHA does, you know, if they stop then we assume they are all right. You know, like I say, if we see a problem we fix it, but if they stop we assume they are all right.

(Tr. 11/16/99 at 281-282). (Tr. 12/14/99 at 109).

Todd Lowe was employed on September 1, 1998, as a bulldozer operator for Sky Hawk Construction, a company also owned by Tommy Bevins. In order to get to and from his work site on the top of the hill he would ride with one of the truck drivers. He had been a passenger with Charlie Hall on two or three of these occasions and would not ride with him again. He was afraid to ride with Hall because "he came off the hill too fast."

Based on the undisputed evidence alone it is clear that all of the violations have been proven as charged. Citation No. 7351484 against Dotson and Citation No. 7351483 against McCoy both allege violations of the standard at 30 C.F.R. § 77.1607(c) and charge that the haulage truck driven by Charlie Hall was not operated at a speed prudent and consistent with conditions of the roadway, grades and related conditions and with the type of equipment being used. There is no dispute that the haulage road at the No. 1 curve was slick from water and with gravel which had been worn smooth. The area descended steeply at a grade of 15%. Skid marks also indicated that the truck was proceeding at a high rate of speed when it entered the No. 1 curve. There is, in addition, undisputed evidence that this truck driver had a practice of driving with excessive speed down the haul road.

The violations were clearly also of high gravity and "significant and substantial." A violation is properly designated as "significant and substantial" if, based on 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary 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.

*See also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to

abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

There is no dispute that haul truck driver Charlie Hall died as a result of the injuries he sustained when his truck proceeded through the berm, struck a hillside and he was thrown through the window of his truck. There likewise can be no dispute that the accident was caused by imprudent driving considering the road conditions including the grade and slickness of the road. Under these circumstances the violations were clearly “significant and substantial.”

McCoy nevertheless claims that it is not liable for the violation charged in Citation No. 7351483, because neither its employees, its equipment nor its activities caused or contributed to the violation. The Commission and various courts have long recognized, however, that, under the Act’s scheme of strict liability, an operator, although without fault itself may be held liable for the acts of its independent contractor. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Company v. FMSHRC*, 664 F.2d 1116, 1119 (9<sup>th</sup> Cir. 1981). In instances of multiple operators, the Secretary has “wide enforcement discretion” and may proceed against the operator, independent contractor, or both. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (February 1997), *Aff’d per curiam*, No. 97-1392 (4<sup>th</sup> Cir. January 8, 1998); *Consolidation Coal Company*, 11 FMSHRC 1439, 1443 (August 1989). The Commission has determined that “its review of the Secretary’s action in citing an operator is appropriate to guard against abuse of discretion.” *W-P Coal Company*, 16 FMSHRC 1407, 1411 (July 1994). A litigant seeking to establish an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary’s decision or that the decision is based on an improper understanding of the law. *Mingo Logan*, 19 FMSHRC at 249-50 n.5.

The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary’s discretion, including the operator’s day-to-day involvement in the mine’s operations, whether the operator is in the best position to effect safety and whether the enforcement action is consistent with the purpose and policies of the Act. *Secretary v. Extra Energy Inc.*, 20 FMSHRC 1 (January 1998).

In this case I find that McCoy had substantial involvement in the day-to-day operations at the mine in that it operated the preparation plant at which the waste material hauled by Dotson’s trucks originated, it directed Dotson’s trucks to the place to dump the waste material and it retained overall directorial authority over the haul trucks. In addition, McCoy took no measures to ensure that the Dotson’s haul truck drivers were driving at a reasonable and prudent speed considering the conditions of the haul road.

As the Secretary observes in her brief it is clear that McCoy’s employees were also exposed to the hazards presented by the reckless driving of Charlie Hall. Indeed, Gary Thacker, who was at the time of the accident McCoy’s plant superintendent, testified that he and other employees of McCoy’s traveled the haulage road in order to carry out the required on-shift examination for McCoy as well as for other purposes. Thacker also testified that on occasion William Spears, McCoy’s safety director traveled this road to perform his own inspections.

Thacker testified that while traveling on the haul road he remained in contact with the Dotson truck drivers by radio since they were traveling the same road at the same time. Clearly Dotson's trucks therefore posed a hazard to McCoy's employees. It is consistent with the purposes of the Act that McCoy should therefore have an active role in assuming that its employees are protected by ensuring that its contractor had competent and safe drivers on its mine property.

Based on the credible and unchallenged testimony of the Secretary's expert mechanical engineer Dennis Ferlich, it is also clear that the violations charged in Citation No. 7350320 against McCoy and Citation No. 3816166 against Dotson have also been proven as charged. 30 C.F.R. § 77.1605(b) requires that mobile equipment be equipped with adequate brakes. Ferlich's credible and undisputed testimony that the subject Cline No. 77 truck had only three operative brakes out of six and that its braking capacity had been reduced by 50% is clearly sufficient to sustain the violations. The violations were also of high gravity and "significant and substantial." In this regard Ferlich opined that if the subject 50-ton haul truck had been equipped with a fully functioning brake system then the deceased could have stopped the truck before he struck the hillside. It may reasonably be inferred in this case therefore that the inadequate brakes were a causative factor in the death of Charlie Hall.

McCoy nevertheless argues again that it should not be held liable because the Secretary abused her discretion in issuing the citation. McCoy maintains that its employees did not work with or alongside Dotson Trucking employees and the alleged violations were abated by the employees by Dotson. Applying the principles of law previously stated it is noted that Dotson's trucks represented a hazard to McCoy's employees who were required to travel the same haul road on which Dotson's haul trucks were operating. As previously noted McCoy was also responsible for the overall day-to-day mining activities at this operation and provided overall direction to Dotson's employees including the location to dump and designated the haul roads to be utilized. In addition, McCoy took no measures to ensure that the brakes on the haulage trucks were safe either by inspecting them itself or by requiring Dotson to do so. As a result, the obvious defects in the braking system were not discovered. Through its failure to inspect or ensure that the haul trucks were inspected, McCoy contributed to the braking violation and to the continued existence of the violation. See *Extra Energy*, 20 FMSHRC at 6. Under the circumstances I cannot find that the Secretary abused her discretion in citing McCoy for the violation herein.

#### Negligence Regarding Violations of 30 C.F.R. § 1607(c)

##### (a) Dotson's Negligence.

It is established that haul truck driver Charlie Hall was traveling at excessive speed for the conditions present at the time of his accident and that it may reasonably be inferred therefrom that Hall was highly negligent. The issue is whether the negligence of a rank and file truck driver may be imputed to Dotson for purposes of assessing a civil penalty. In *Southern Ohio Coal Co*, 4 FMSHRC 1459 (August 1982) the Commission stated that, in the context of evaluating operator conduct for the purposes of penalty assessment "where a rank-and-file employee has

violated the Act, the operator's supervision, training and disciplining must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miners' violative conduct." The Commission also stated in that case that the fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being negligent. "In this type of case, we look to such considerations as the foreseeability of the miners' conduct, the risks involved, and the operator's supervising, training and disciplining of its employees to prevent violations of the standard in issue." *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (January 1983).

In the instant case it is undisputed that haul truck driver Charlie Hall was traveling at excessive speed for the conditions present on the date of his accident. It is also undisputed that Hall's supervisor, William New, had knowledge of Hall's propensity for driving at excessive speed down the haul road. New was aware not only of Hall's reputation for excessive speed but also had personally observed this behavior only two or three weeks before the accident at issue. Hall was "talked to" but no disciplinary action was taken. Tommy Bevins, one of the co-owners of Dotson confirmed that he could not, or would not, institute any disciplinary procedures because of a labor shortage. Under the circumstances, it may reasonably be inferred that because of Hall's continued unpunished behavior in driving down the haulage road at excessive speed that the accident on September 1, 1998, was a foreseeable result of a lack of discipline and/or training. Dotson is accordingly responsible for Hall's negligence in driving at an excessive speed down the haul road on September 1, 1998.

(b) McCoy's Negligence.

While the Secretary has alleged in the citation at bar that McCoy was chargeable with "moderate" negligence she fails to cite in her post-hearing brief any evidence to support such a finding. Indeed, McCoy notes in its post-hearing brief that Dotson performed all maintenance on the road, that McCoy did not directly supervise Dotson's truckers, that McCoy had no information that Hall had a reputation for driving at excessive speed or that he in fact had been observed driving the road at excessive speed. These facts are indeed undisputed and, under the circumstances, I cannot find McCoy chargeable with negligence for this violation.

Negligence Regarding Violations of 30 C.F.R. 77.1605(b)

(a) Dotson's Negligence

The Secretary's expert, mechanical engineer Dennis Ferlich, credibly testified without contradiction that the brakes on the cited truck were seriously defective. The truck had only three of its six brakes operative and its braking capacity was reduced by 50%. Dotson mechanic-in-charge William New testified that they perform their own service and maintenance such as adjusting brakes and installing brake drums and brake shoes on the trucks. According to Tommy Bevins, one of Dotson's owners, the brakes are not routinely inspected and if the trucks "stop" they are assumed to be all right. Dotson therefore by its own admission failed to comply with the



standard at 30 C.F.R. § 77.1606.<sup>1</sup> By its failure to have conducted legally mandated inspections on its haulage truck brakes, Dotson was clearly negligent. *See Jim Walter Resources Inc.*, 19 FMSHRC 1646, 1649 (October 1997).

(b) McCoy's Negligence

The Secretary argues in this regard that McCoy had a duty to inspect the maintenance records of Dotson to ensure that the subject Cline #77 Truck as well as other Dotson equipment being used on its mine property was being maintained in a safe operating condition. *See Secretary v. Extra Energy Inc.*, 20 FMSHRC 1 (January 1998). There is no evidence that McCoy inspected or ensured that the Dotson trucks were inspected and, accordingly, within the framework of the *Extra Energy* decision, McCoy was negligent in this regard.

Civil Penalty

In assessing civil penalties in these cases I have also considered that Dotson is a small operator with a modest history of violations and that McCoy is a large operator with a significant history of violations. The instant violations were abated appropriately and there is no evidence that the assessed penalties would affect the ability of either to continue in business. The negligence and gravity criteria have already been discussed with respect to each violation.

**ORDER**

Citations No. 3816166 and 7351484 are affirmed as “significant and substantial” citations and Dotson Trucking Company, Inc., is directed to pay civil penalties of \$35,000.00 and \$25,000.00 respectively for the violations charged therein within 40 days of the date of this decision. Citations No. 7361483 and 7350320 are affirmed as “significant and substantial” citations and McCoy Elkhorn Coal Corporation is directed to pay civil penalties of \$200.00 and \$2,000.00 respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick  
Administrative Law Judge

---

<sup>1</sup> The standard at 30 C.F.R. § 77.1606 provides that “mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation.”

Distribution: (Certified Mail)

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., 841 Corporate Drive, Suite 101, Lexington, KY 40503

Marco M. Rajkovich, Jr., Esq., & Melanie J. Kilpatrick, Esq., Wyatt, Tarrant & Combs, Lexington Financial Center, Suite 1700, 250 West Main Street, Lexington, KY 40507

/mca