

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 31, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-178-M
Petitioner	:	A.C. No. 48-00152-46498
	:	
v.	:	Docket No. WEST 2005-217-M
	:	A.C. No. 48-00152-48519
FMC CORPORATION,	:	
Respondent	:	FMC @ Westvaco Mine

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
 David L. Thomas, Safety Team Leader, FMC Corporation, Green River, Wyoming, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against FMC Corporation (“FMC”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). At the hearing, FMC contested three citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of \$6,110.00 for these alleged violations. An evidentiary hearing was held in Green River, Wyoming. The parties introduced testimony and documentary evidence and presented oral argument.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

FMC operates the Westvaco Mine, an underground trona mine in Sweetwater County, Wyoming.¹ Mark Horn was employed at the mine as a belt electrician on September 27, 2004. He had been working at the mine for about 26 years. His job was to ensure that the underground conveyor belts were operating properly. These belts transport mined rock from the working sections to the mine shafts at the other end of the mine. The mined rock travels underground

¹ “Trona” is a soft, nonmetallic mineral that is a major source of sodium compounds. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 589 (2d ed. 1997).

about five miles on these belts. (Tr. 19). He also maintained pumps and other electrical equipment. There are about eight pumping stations around the perimeter of the mine. The mine is a single level mine.

Horn was scheduled to work the graveyard shift on September 27, 2004, which runs from midnight to 8:00 am. The mine operates three shifts per day. The belt control division of the mine's maintenance department was assigned one Jeep for use underground. The top and windshield of the Jeep had been removed. The Jeep is equipped with automatic transmission and a parking brake. The parking brake is activated by a pedal. The brakes on the Jeep often get wet and muddy as the Jeep is driven through the mine. (Tr. 27). When the brakes are wet and muddy they are not very responsive. In addition, from time to time the Jeep is "used so hard that the brake lines are crushed and brake fluid has actually leaked out of it so that either the front or back [brakes are] not functional." *Id.*

Horn testified that the parking brake is rarely very reliable and "it never seems to work properly." (Tr. 28). Horn said that he usually cannot feel the parking brake ratchet down when he pushes the pedal and that the pedal is bent from being pushed down so hard. The Jeep was converted to operate on diesel fuel rather than gasoline. When this conversion was made, the dash board was not properly reconnected, with the result that none of the gauges work, including the speedometer and brake warning light. (Tr. 29; Ex. G-1).

On September 27 Horn was driving the Jeep underground to various pumping stations to adjust the water flow. He was traveling from crossover station in 2 West toward the No. 8 Shaft when he arrived at a set of air doors. These doors must be kept closed to maintain the ventilation in the mine. Horn parked his Jeep, opened the door, drove through the doorway, and parked his Jeep again. Horn testified that when he parked his Jeep this second time, he put the vehicle in park, stepped on the parking brake, and put chocks under one of the wheels. (Tr. 33-34; Ex. G-3). He did not turn off the engine. Horn walked back, closed the air door, and removed the chocks from the wheel. Horn thought he heard the air rushing around the air door. He wondered if he had forgotten to close the vent on the door. The vent must first be opened before the air door can be opened or closed to equalize the pressure on both sides of the door. (Tr. 37-39; Ex. G-2). When he turned to face the air door he noticed that the vent was closed but he went over to the door to see if it was fully closed. He picked up the chocks, which were on the ground. As he turned back to face his Jeep, he felt something hit him and he was knocked backward against the door. (Tr. 39). When he realized that the back of the Jeep was pushing him against the air door, he took the chocks and tried to wedge them between the back bumper and the air door before the Jeep "smashed [him] and the door." (Tr. 39-40). Horn estimates that he had parked the Jeep about 20 to 30 feet from the air door. The ground was level in that location. It was about 3 a.m. when this accident occurred. (Joint Stips. ¶ 10).

The Jeep hit Horn hard despite his efforts to wedge the chocks between the vehicle and the door. He believes that he may have passed out momentarily. He was in a sitting position and he was unable to move because his chest was wedged between the bumper and the door. He

could hardly breathe. (Tr. 42). He was able to wiggle a little and when he looked under the Jeep he discovered that his right foot was under the left wheel. The Jeep was still running as he tried to extricate himself from his position but his knee was also stuck in the undercarriage of the Jeep. He tried to grab his right leg to pull his foot out from under the wheel, but he was not successful. He reached into the back of the Jeep, opened the door, and started pulling things he could reach out of the Jeep. (Tr. 44). He did not find anything he could use to help him get his foot out.

The diesel exhaust was very strong and between not being able to breathe very well and the fumes, Horn believes that he passed out again. When he awoke, he tried again to pull his right foot out from under the wheel of the Jeep. Because he was in a remote location, he realized that it was unlikely that anyone would find him any time soon. After much work and maneuvering, Horn was able to extricate his foot from under the wheel. (Tr. 45-46). With a lot of effort, he was able to get himself up into the driver's seat of the Jeep. He drove the Jeep up to the second air door and slowly pushed it open with the Jeep. He then drove to belt control, got out of the Jeep, and called the hoist man. He was barely able to breathe at that point. Horn was taken out of the mine and then to the hospital in Rock Springs, Wyoming.

Horn testified that he inspected the Jeep before he drove it that night. (Tr. 52-53). He looked underneath the Jeep to see if brake fluid was leaking. He also applied the brakes as he backed out of the parking space to make sure that they were working. The Jeep was in its usual condition and he did not find anything that would keep him from using it. (Tr. 60). The power steering was leaking fluid and the brakes were not as "good as they could have been," but he assumed that the brakes were simply wet. *Id.* If he had determined that the Jeep was not safe to operate, he would not have been required to use it, but he would have had to borrow one from another department. He also has the authority to tag out a Jeep if it is not safe to operate. (Tr. 62). Horn admitted that in the early 1980s he took annual refresher safety tests given by FMC in which he was asked to explain the procedure for blocking mobile equipment in the mine. (Tr. 64-67; Ex. R-7). Horn responded that the equipment operator should "kill engine, set brakes, use wood blocks to block both sides of wheel." (Ex. R-7). Horn testified that he uses that procedure when he parks the Jeep at the end of his shift. He testified that he does not shut off the engine on a flat surface when he is only going to be off the Jeep for a moment because of his concern that he may have difficulty starting it again. (Tr. 68). Horn said that the starter motor sometimes gets wet while driving through water in the mine.

Horn suffered extensive injuries as a result of this accident. His internal organs were pushed up through his diaphragm into his left lung cavity. (Tr. 112-13). After the extent of his injuries were identified at the Rock Springs hospital, he was air lifted to the LDS Hospital in Salt Lake City, Utah, where he underwent surgery. Complications resulted from his surgery and he had to be hospitalized again. (Tr. 117-124). Horn is still employed by FMC, but he is unable to work at the present time.

On September 30, 2004, MSHA Inspector Duane Coats traveled to the mine to investigate this accident. On October 4, 2004, he traveled underground to examine the area

where the accident occurred. (Tr. 189). At the conclusion of his investigation, Inspector Coats issued three citations related to this accident. During his investigation, Inspector Coats interviewed Gene Hutchinson and other FMC employees. (Tr. 165). Based on these interviews, Inspector Coats concluded that mounting bolts on the transmission and engine had come loose, allowing the transmission to slide to the right side so that when the Jeep “was placed in park, it would not go all the way in park.” (Tr. 166). As a result, the Jeep could easily slip out of park into reverse. (Tr. 167). Inspector Coats also concluded that the parking brake on the Jeep was not working at the time of the accident and, if the parking brake had been working, “it would have held the vehicle in place on level ground if it had slipped from park to reverse as it did.” *Id.*

Gene Hutchinson testified at the hearing under a subpoena from the Secretary. He is a diesel mechanic at the mine. Although Gene Hutchinson was not involved in FMC’s investigation of the accident, he repaired the Jeep at the conclusion of the accident investigation. (Tr. 130). The work order that he was given said that the parking brake was not working and that the transmission may have slipped out of park. (Tr. 130, 133). In addition, he discovered that the neutral safety switch was not working. The neutral safety switch, which is a “whisker” switch, allows the Jeep to be started only when it is in park. In this instance, the Jeep could be started in any gear. (Tr. 136, 154). This switch was permanently bent over. (Tr. 154).

Upon examining the parking brakes, Gene Hutchinson determined that the parking brakes did not work on either rear wheel. (Tr. 137-40, 149-51). He had to replace the entire brake caliper system. The combination of trona and water tends to corrode the brakes. Because it was the calipers that were broken, rather than the parking brake cable, the rear disk brakes were also not engaging when the service brakes were depressed. (Tr. 141). The hydraulic lines used with the service brakes could not activate the disk brakes because the calipers were not working.

Gene Hutchinson also had to replace the transmission mount and the left front motor mount. (Tr. 141). The mount is a bolt that is used to attach a part to the vehicle. In examining the Jeep, he discovered that the transmission mount had broken away from the pan it was mounted on. (*See also* Joint Stips. ¶ 18). This was the only mounting device on the transmission. (Tr. 142). Gene Hutchinson believes that because the transmission mount was missing and one of the two motor mounts was missing, the transmission assembly could move around a little. (Tr. 142-43). He believes that this movement “may have put a stress on that shifting lever that hooked to the transmission from the shifting column.” (Tr. 143). This stress could have caused the transmission to pop out of park into reverse. (Tr. 143, 146). Gene Hutchinson believes that, if the parking brake had been working, and the transmission on the Jeep had popped out of park into reverse while the engine was idling, the parking brake would have been able to hold the Jeep in place on a level surface. (Tr. 143-44). The Jeep was repaired by replacing the transmission system so that the gear-shift lever is now mounted directly to the transmission on the floor rather than through a lever on the steering column.

Following his investigation, Inspector Coats issued Citation No. 6302200 under section 104(a) of the Mine Act alleging a violation of section 57.14101(a)(2) as follows:

A miner was seriously injured at this mine on September 27, 2004 when he was struck and pinned beneath the rear wheel of his Jeep. The miner had parked the Jeep and was closing the air door when the Jeep started rolling backward and struck him. The parking brakes on the Jeep (Company No. 25 UM) were inoperative and would not hold the parked vehicle on a grade.

(Ex. G-4). Inspector Coats determined that an injury occurred and that the injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was of a significant and substantial nature (“S&S”) and that FMC’s negligence was moderate. The safety standard provides, in part, that “[i]f 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 Secretary proposes a penalty of \$5,500.00 for this citation.

Although the Jeep was parked on level ground, the safety standard requires that the parking brake be capable of holding a vehicle on the maximum grade that it travels. (Tr. 169). He determined that the violation was S&S because an accident occurred that resulted in a serious injury. (Tr. 170). Inspector Coats was told by Gene Hutchinson that the rear brake calipers were not working. (Tr. 195-96). Hutchinson did not tell him whether the calipers were working on the date of the accident. *Id.* Coats was not able to determine when the parking brake ceased to operate. (Tr. 315).

Inspector Coats also issued Citation No. 6302201 under section 104(a) of the Mine Act alleging a violation of section 57.14101(a)(3) as follows:

All braking systems were not maintained in functional condition on the Jeep (Company No. 25 UM). The brake calipers for both rear service brakes were nonfunctional.

(Ex. G-5). Inspector Coats determined that an injury was reasonably likely and that the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that FMC’s negligence was moderate. The safety standard provides, in part, that “[a]ll braking systems installed on [self-propelled mobile] equipment shall be maintained in functional condition.” The Secretary proposes a penalty of \$305.00 for this citation.

The inspector concluded that the braking systems were not being maintained in a functional condition on the Jeep. (Tr. 171). The calipers for the rear service brakes were not working. He bases this conclusion on statements made by FMC employees. (Tr. 172). He concluded that the violation was S&S because the absence of working rear brake calipers could cause a fatal accident. These rear calipers must be functioning for the rear service brakes to engage and for the parking brake to engage. Only the front service brakes were working on the Jeep. If the operator of the Jeep were driving in a congested area, he might not be able to stop in time to avoid a pedestrian. (Tr. 174). In addition, if the front brakes were to cease functioning,

the Jeep would not have any brakes. (Tr. 175). Given the wet, muddy conditions in the mine, the inspector believed that it was reasonably likely that the effectiveness of the front brakes could easily become compromised. Nevertheless, the inspector testified that if the front brakes were working, the Jeep could be stopped. (Tr. 197). The Jeep is designed with two separate hydraulic chambers so that, if the rear brakes fail, the front brakes will still function. (Tr. 318-19) Coats does not know when the rear service brakes stopped working. (Tr. 316).

Inspector Coats also issued Citation No. 6302202 under section 104(a) of the Mine Act alleging a violation of section 57.14100(b) as follows:

The neutral safety switch was not maintained in functional condition on the Jeep (Company No. 25 UM). This safety defect enabled the Jeep engine to be started while the transmission was engaged in gear.

(Ex. G-6). Inspector Coats determined that an injury was reasonably likely and that the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that FMC's negligence was moderate. The safety standard provides, in part, that "[d]efects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of \$305.00 for this citation.

Inspector Coats testified that he issued the citation because the neutral safety switch on the Jeep was not working. (Tr. 177). As a result of this defect, the Jeep could be started in any gear. When the neutral safety switch is working, the Jeep can only be started in park or neutral. The inspector testified that the cited condition is a defect that affects safety because the Jeep could lunge forward or backward as the operator was starting it. (Tr. 179). He determined that the violation was S&S because it was reasonably likely that an employee would start the Jeep in an area congested with pedestrians and pin someone against a rib or another vehicle. (Tr. 180). Because the Jeep could pop out of park, the operator of the Jeep might not know that it was actually in reverse when he started the engine and it could jerk backward. (Tr. 180-81). He admitted that many people put their foot on the brake when they start a vehicle but, since the brakes were not working properly, the Jeep could have jerked backward anyway. (Tr. 192-94). If the idle on the Jeep were set low, the Jeep would not lunge but it could move a "little bit." (Tr. 194).

MSHA Inspector Tom Barrington interviewed Mr. Horn at the LDS Hospital in Salt Lake City. (Tr. 208-11). During the interview, Inspector Barrington took notes, but they are not verbatim. In response to the question, "Did you set the brake?," Inspector Barrington wrote:

It was in park when I got out. They told me they checked the brakes and the park brakes didn't work at all. They probably hadn't worked since I mashed them the first of the shift. I probably rode around with them on without knowing it.

(Ex. R-9, p. 3). Later in the interview, Horn was asked how he thought the Jeep rolled onto him. Horn responded by stating:

It slipped out of park into reverse. I was told that it happened on the second shift after me. The park brakes and transmission were always broke. A wheel even fell off once. The park brake virtually never worked. There was something always wrong with it.

Id. at 5. Neither party called Inspector Barrington to testify at the hearing. On October 12, 2004, Inspector Coats, company representatives, and a union representative held a conference call with Mr. Horn while he was in the hospital in Salt Lake City. David Hutchinson testified that Horn remembered performing a pre-shift examination but he could not remember whether he set the parking brake when he got out of the Jeep at the air door. (Tr. 262-63).

Ken Lacey, who is also a belt electrician, was called by FMC to testify. He testified that he worked the swing shift immediately prior to Mr. Horn's shift. He washed the Jeep, changed a headlight, and checked underneath the Jeep. (Tr. 82). He said that everything looked good. (Exs. R-2 & R-3). He testified that he checked the brakes during his pre-shift examination, but he did not look at the braking system when he crawled underneath the Jeep. (Tr. 85). The only way to see if the brakes are "plugged up" is to take off the wheels. *Id.* Lacey did not find any other problems with the Jeep and it operated well throughout his shift. (Tr. 90). If he had found safety defects on the Jeep, he would have used another Jeep. Lacey has had problems with the transmission popping out of gear from park to reverse on that Jeep. (Tr. 95-98, 102-06). Lacey testified that he always turns off the engine when he gets off the Jeep, even when he is just opening an air door. (Tr. 103, 106).

David Hutchinson is the mine's safety coordinator. (Tr. 246). He oversaw FMC's investigation of the accident. The Jeep was first examined where Horn had left it. (Tr. 251). When the parking brakes were tested, they would not hold the vehicle. *Id.* When the service brakes were tested, they stopped the vehicle. The neutral switch was observed out of position. The Jeep was taken to the shop for further examination. The other problems discussed above, including the missing motor and transmission mounts and the defective rear brake calipers were discovered in the shop.

FMC determined that there were several "immediate" causes of the accident: failure to follow procedures and defective equipment. (Tr. 264; Ex. R-6). FMC believes that Mr. Horn should have turned off the engine and kept the chocks around the wheel until he was ready to drive off. It also concluded that it was not certain whether Horn set the parking brake. (Tr. 262-23). In addition, the transmission mount and motor mounts were missing.

Michael Burd was on the safety committee of the union at the time of the accident. He was also on FMC's accident investigation team. His testimony is consistent with the testimony of David Hutchinson, set forth above. (Tr. 281-89). Garth Mitchell is the maintenance

coordinator at the mine. (Tr. 290). He was on the accident investigation team. As stated above, on the morning of September 27, it was determined that the parking brake was not working and the neutral safety switch was out of position. (Tr. 291). On September 28, the Jeep was examined in the shop to find everything that was wrong with it. (Tr. 293). The cable for the parking brake was working, but the rear brakes were caked with muck and the brake calipers were not working. (Tr. 295). In addition, a motor mount and transmission mount had broken loose and the crossover bracket that holds the transmission in place was broken. (Tr. 296). The Jeep was repaired and overhauled before it was put back into service. Mitchell testified that this Jeep is the most used vehicle in the mine. (Tr. 297). Mitchell testified that it is impossible to determine when the parking brake stopped working.

Daniel Haanpaa is a mechanic in the diesel shop at the mine. He is also on the union executive committee. He testified that whenever a vehicle had problems at the mine, its operator should bring it in for repairs. (Tr. 307). The 25-UM Jeep broke down “pretty often” because of its heavy use, but there were no safety complaints. (Tr. 308). He participated in the conference call with Mark Horn when Horn was in the hospital. Horn could not remember whether he set the parking brake. (Tr. 309, 311). If Horn had shut off the engine, the accident would not have occurred.

An underlying dispute in this case is whether FMC was required to immediately advise MSHA that there had been a life-threatening accident under the provisions of 30 C.F.R. Part 50. FMC believed that it was not required to immediately report the accident because Horn’s injuries were not life-threatening. (Tr. 248). The Secretary contends that the injuries caused by the accident were life threatening and that FMC was obligated to immediately advise MSHA of that fact. At about 7:00 a.m. on September 27, FMC notified MSHA’s office in Green River that an accident had occurred, but FMC did not indicate that the accident resulted in a life-threatening injury. (Tr. 248-49, 321-26). MSHA did not start its investigation of the accident until September 30, 2004. Because this issue is not before me, I have not attempted to resolve it in this decision.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

The Secretary contends that she established the violation set forth in each citation as written. FMC argues that the cited safety standards are performance-based standards. It contends that there is no dispute that the company has a very good safety program which requires equipment operators to perform thorough pre-shift examinations. The examination performed on the previous shift and the examination performed by Mr. Horn did not indicate that the brakes were not working or that there were any other problems with the Jeep. The parking brake could have failed between the beginning of the shift and the accident. The company has an excellent preventive maintenance record, but it cannot be expected to guarantee that nothing will break down during the shift after the equipment operator performs his pre-shift examination. Mr. Horn was interviewed twice, once by Inspector Barrington while he was in intensive care, and once

during a conference call with MSHA, company management, and union officials. Both times, Horn could not be sure that he engaged the parking brake. It is the responsibility of mobile equipment operators to report any safety problems on their equipment.

A. Citation No. 6302200

I find that the Secretary established a violation of 57.14101(a)(2). The parking brakes on the cited Jeep were not working at the time they were inspected by FMC following the accident. The Jeep was tagged out by FMC's investigation team after the accident and was not used until after it was refurbished by the maintenance department. Substantial evidence presented at the hearing establishes this violation and FMC stipulated that, "as a result of the September 28, 2004, examination, FMC mechanics determined that the park brake on the Jeep (No. 25UM) did not work or otherwise function." (Joint Stips. ¶15).

FMC maintains that the Secretary did not establish when the parking brakes became defective. It argues that Mr. Horn and Mr. Lacey performed pre-shift examinations and determined that the braking systems on the Jeep were functioning. I find that, given the sequence of events, the preponderance of the evidence established that the parking brakes did not work at the time of Horn's accident. The defective parking brake was immediately discovered by FMC mechanics. Gene Hutchinson, a diesel mechanic at the mine, testified that the caliper that activates the parking brake and the rear service brake was corroded. (Tr. 149). He stated that wet trona gets into the braking system and corrodes the moving parts of the brakes so that these parts can no longer move or function. (Tr. 150). I find that this corrosion cannot happen during a single shift and that it is more likely than not that the parking brake did not meet the requirements of the safety standard prior to the beginning of Horn's shift. The standard requires that the parking brake be "capable of holding the equipment with its typical load on the maximum grade it travels." The evidence establishes that the parking brake was not capable of holding the vehicle on any grade.

FMC also argues that Horn told MSHA investigators that he may not have set the parking brake when he stopped the Jeep and that he may have damaged the parking brakes earlier in the shift by driving with the parking brake engaged. Even if I credit this evidence, it does not contradict my finding that the parking brakes were defective at the time of the accident. In addition, I take notice of the fact that when someone has been severely injured in an accident, he experiences a wide range of emotions following the accident, including feelings of guilt and self-doubt. Horn was in the ICU when he was interviewed by MSHA Inspector Barrington and he was still in the hospital during the subsequent conference call. At the hearing, Horn testified that it was his normal practice to set the parking brake and that he had done so that night. It is unlikely that he would remember to put chocks under the wheels, but forget to set the parking brake.

I also find that the violation was serious and S&S. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the

hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established all four elements of the *Mathies* test. Mr. Horn was seriously injured as a result of this violation. Although the accident would not have occurred if the transmission system were working properly or if Mr. Horn had shut off the engine, the injuries sustained by Horn were directly related to this violation. The violation is clearly S&S.

FMC argues that it was not negligent with respect to this violation. It maintains that the company reasonably relies on its maintenance program and the equipment operators’ pre-shift examinations to keep mobile equipment operating safely. FMC argues that MSHA’s safety standards with respect to mobile equipment are performance-oriented regulations with the result that it should not be held negligent unless safety defects reported by equipment operators are not promptly repaired.

I find that the preponderance of the evidence establishes that FMC’s negligence with respect to this violation was “high.” The Jeep involved in the accident was in appalling condition, as described above. It is undisputed that this Jeep is used more than any other vehicle at the mine. The transmission was not fully secured to the Jeep with the result that the vehicle popped out of park into reverse. This condition had been reported in the past. Indeed, the crossover bracket that holds the transmission in place was broken. One of the engine mounts was missing. The Jeep could be started in any gear. The rear service brakes as well as the parking brake did not function. Horn testified that the Jeep was often in poor operating condition. He stated that often when he engaged the parking brake, he could not feel it ratchet down. Given the extensive wear and tear to which this Jeep was subjected, it was incumbent on FMC to closely monitor the condition of the Jeep and keep it in safe operating condition. As stated above, I find that the parking brakes did not suddenly become defective during Horn’s shift and that FMC failed to ensure that its maintenance program kept the parking brake in good operating condition. This violation was a contributing factor in Mr. Horn’s accident. A penalty of \$6,000.00 is appropriate for this violation.

B. Citation No. 6302201

I find that the Secretary established a violation of 57.14101(a)(3). The rear service brakes on the cited Jeep were not working at the time they were inspected by FMC following the accident. The Jeep was tagged out by FMC's investigation team. Substantial evidence presented at the hearing establishes this violation and FMC stipulated that, "as a result of the September 28, 2004, examination, FMC mechanics determined that the rear service brakes on the Jeep (No. 25UM) did not work or otherwise function." (Joint Stips. ¶16). The safety standard requires that all braking systems must be "maintained in a functional condition."

FMC maintains that the Secretary did not establish that the rear service brakes were not working at the start of Horn's shift. It also contends that this alleged violation is unrelated to the accident. The Secretary is not contending that this violation caused the accident or was related to Horn's injuries. I find that a preponderance of the evidence establishes that the rear service brakes were not working before the start of Horn's shift. The corroded calipers that caused the parking brakes to cease functioning also caused the rear service brakes to fail. The parking brake cable actuates the same brake pads as the rear service brakes. The calipers must be functioning for either braking system to work. As I stated with respect to the parking brake violation, the brake calipers did not become plugged up and corroded during a single shift.

I also find that the violation was serious and S&S. With only the front service brakes functioning, it is reasonably likely that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. If the operator of the Jeep were operating in a congested area, he might not be able to stop quickly enough to avoid a pedestrian. The Jeep was subjected to wet, muddy conditions that are likely to compromise the effectiveness of the front service brakes. As stated above, wet trona tends to corrode working parts of the Jeep. The fact that this Jeep was not well maintained makes it likely that, given continued mining operations, the front service brakes would have started to fail before the condition was corrected.

For the reasons set forth with respect to Citation No. 6302200, I find that the evidence establishes that FMC's negligence was high. The braking systems on this Jeep were in poor condition. As stated above, I find that the rear service brakes did not suddenly become defective during Horn's shift and that FMC failed to ensure that its maintenance program kept the brakes in good operating condition. This violation was not a contributing factor in Mr. Horn's accident. A penalty of \$350.00 is appropriate for this violation.

C. Citation No. 6302202

I find that the Secretary established a violation of 57.14100(b). The neutral safety switch on the cited Jeep was not working at the time the Jeep was inspected by FMC following the accident. The Jeep was tagged out by FMC's investigation team. Substantial evidence presented at the hearing establishes this violation and FMC stipulated that, "as a result of the September 28, 2004, incident investigation and examination by FMC's investigation team it was determined

that a mechanism that prevented the Jeep (No. 25UM) from starting when the automatic transmission was engaged in a forward or reverse gear did not work or otherwise function.” (Joint Stips. ¶ 17).

The safety standard provides that safety defects on equipment shall be corrected in a timely manner to prevent the creation of a hazard. FMC contends that because this defect had never been reported by any of the operators of the Jeep, FMC did not have the opportunity to correct the defect in a timely manner. David Hutchinson testified that the defective condition of the neutral safety switch was observed upon opening the hood at the location where Horn left the Jeep. (Tr. 251). Garth Mitchell observed the condition as well. (Tr. 291). The defect was neither difficult to find nor was it hidden or latent. The Commission has held that “[w]hether the operator failed to correct [a] defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence.” *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). It is not entirely clear when the defect occurred. Gene Hutchinson testified that the switch was in a “bent-over position.” (Tr. 154). I find that the preponderance of the evidence establishes that this condition had existed for more than one shift. It is highly unlikely that the switch suddenly became defective on Mr. Horn’s shift. Although it is clear that FMC did not know that the neutral safety switch was defective, I find that it should have known that it was defective. As stated above, the FMC investigation team easily discovered the defect during their initial examination of the Jeep.

I also find that the violation was serious and S&S. I credit the testimony of Inspector Coats that it was reasonably likely that a miner would start the Jeep in a congested area and strike a pedestrian. Because this Jeep could pop out of park, the operator of the Jeep might not know that it was actually in reverse when he started the engine. As a consequence, the Jeep could lurch backward and strike someone. The fact that only the front service brakes were working increased the danger. Because this Jeep was not well maintained, it was more likely that a serious accident would occur as a result of this violation, assuming continued mining operations.

I find that the evidence establishes that FMC’s negligence was moderate, as alleged by the Secretary. FMC should have detected this violation as part of its preventive maintenance program. This violation was not a contributing factor in Mr. Horn’s accident. A penalty of \$300.00 is appropriate.²

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the mine has a history 167 paid violations in the 24 months preceding the inspection and that all but 14 of these violations were non-S&S. In 2004, the mine worked about 1,562,568 total man-hours making it a relatively large mine. All of

² FMC also contested three other citations in WEST 2005-178-M. By order dated August 26, 2005, I approved the parties’ settlement of those citations.

the violations at issue in these cases were abated in good faith. The penalties assessed in this decision will not have an adverse effect on FMC's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2005-178-M		
6302201	57.14101(a)(3)	\$350.00
6302202	57.14100(b)	300.00
7914705	62.130(a)	Previously Settled & Paid
7914706	62.130(a)	Previously Settled & Paid
7914707	62.130(a)	Previously Settled & Paid
WEST 2005-217-M		
6302200	57.14101(a)(2)	6,000.00
	TOTAL PENALTY	\$6,650.00

For the reasons set forth above, the three citations are **AFFIRMED** as modified in this decision. FMC Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of \$6,650.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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