

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 14, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-77
Petitioner	:	A. C. No. 48-01200-03540
v	:	
	:	Buckskin Mine
TRITON COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ned Zamarripa, Esq., Conference and Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, Denver, Colorado, for the Secretary;
Michael O. McKown, Esq., LaTourette, Schlueter & Byrne, P.C., St. Louis, Missouri, for Respondent

Before: Judge Barbour

This civil penalty case arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. ' 815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Triton Coal Company (Triton or the company) for an alleged violation of 30 C.F.R. ' 77.1606(c), a mandatory safety standard for surface coal mines requiring defects affecting the safety of loading and haulage equipment to be corrected before the equipment is used. The Secretary alleges the violation occurred at the company's Buckskin Mine, a surface coal mine located in Campbell County, Wyoming, and that the violation was a significant and substantial (S&S) contribution to a mine safety hazard. The Secretary proposes a penalty of \$362 for the alleged violation. Triton denies it violated the standard, and contests the Secretary's S&S allegation. The case was heard in Gillette, Wyoming.

STIPULATIONS

At the commencement of the hearing, the parties stipulated as follows:

1. The Buckskin Mine is engaged in mining and selling coal in the United States, and its . . . operations affect interstate commerce.

2. Triton . . . is the owner and operator of the . . . [m]ine. The . . . [m]ine is subject to [the] jurisdiction of the . . . Act.

3. The . . . [j]udge has jurisdiction.

4. The . . . [c]itation was properly served by . . . [an inspector] upon an agent of . . . [Triton] on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevance of any statements asserted therein.

5. The exhibits offered by . . . [Triton] and the Secretary . . . [are] authentic, but no stipulation is made as to their relevance or [the] truth of matters asserted therein.

6. The proposed penalty will not affect . . . [Triton=s] ability to continue in business.

7. [Triton] demonstrated good faith in abating the violation.

8. Triton . . . is the coal mine operator, with 34,139,068 tons [of coal produced] and 11,616,418 hours of production in 1996.

9. The certified copy of the MSHA Assessed Violation History accurately reflects the history of the mine for the two years prior to the date of the [c]itation (Tr. 9-10; Joint Exh. 1).

The parties further agreed that the company should be characterized as a large operator (Tr. 11).

THE NATURE OF THE DISPUTE

The parties disagree whether a tire on a 190 ton haulage truck affected safety. The company=s tire contractor altered the tire by cutting funnel shaped holes into it (a process known as Askiving®). The company moved the tire from the front to the rear of the truck and used the truck to haul refuse. The Secretary maintains the tire was defective, adversely affected safety, and should not have been used (Tr. 12). The company maintains the tire did not adversely affect safety and was properly used without violating section 77.1606(c) (Tr. 89-90).

THE CITATION

<u>Citation</u>	<u>Date</u>	<u>77 C.F.R. '</u>	<u>Proposed Penalty</u>
4366121	8/8/96	1606(c)	\$362

The citation states in part:

The right rear outside tire on the 190 ton . . . dump haul truck . . . is in an unacceptable condition. The outer rubber layer (tread) of the tire is separated from the tire core around the outer circumference for a distance of about 42 [feet]. Three holes about 4 [inches] in diameter and 32 [inches] in depth have been cut through the tread layer to relieve pressure and prevent heat buildup. The holes leave the tire core and outer steel belts visible. The two outer protective steel belt layers are worn and frayed away in the 42 [feet] area. One of the cords is broken in the third steel belt layer and the third layer is showing wear. The tire should have been removed from service before deteriorating to this condition (Gov. Exh. P-2).

THE TESTIMONY

Herbert J. Skeens is the MSHA inspector who issued the citation. He has been an inspector for 42 years. Prior to that he has had 18 years of experience in the coal mining industry, first in the eastern coal fields and later in the west (Tr. 14-15). He has operated heavy equipment associated with surface coal mining (bulldozers, backhoes, drills, etc.) including coal haulage trucks similar to the truck at issue (Tr. 15). Skeens has had some experience in the maintenance of tires, and he believes he has more knowledge of tires than the average MSHA inspector (Tr. 43). As part of his MSHA training, Skeens received instruction in tire safety in a one day course. Prior to the course he estimated he received one other day of training in tire maintenance and repair (Tr. 45).

Skeen testified that in the late 1980s, steel belted radial tires for heavy equipment came into common use (Tr. 44). In a steel belted radial tire the air is contained within the tire's casing. The casing is the foundation of the tire. Layers of steel belts cover the casing and help give the tire its strength (Tr. 57, 59-60). The tread layer is the outer surface of the tire (Tr. 57). The tread layer protects the steel belts and gives the tire traction (Tr. 61).

On the morning of August 8, 1996, Skeens went to Triton's Buckskin Mine to conduct an inspection. (Throughout the inspection Skeens was accompanied by Triton mining technician, Paul Norfolk (Tr. 18).) After inspecting the pit, high-walls, and roadways, Skeens selected three or four pieces of equipment to inspect, including the subject haulage truck (Tr. 20).

The truck was loaded to capacity hauling refuse (overburden) (Tr. 22). As Skeens and Norfolk approached the truck, Skeens requested the driver stop so he and Norfolk could look at

the tires. There were two front tires and four rear tires, two rear tires on each side (Tr. 20, see also Tr. 122). As the truck came to a halt, Skeens could see part of the tread layer on the outside right rear tire jiggle like Jell-O (Tr. 23). This indicated to Skeens something wasn't right (Tr. 83).

When Skeens inspected the tire, he found:

[T]he outer rubber-layer tread of the tire . . . [was] separated from the tire core around the outer circumference for a distance of four and a half feet . . . holes about four inches in diameter and three and a-half inches in depth . . . [were] cut through the tread layer to relieve pressure and prevent heat buildup.

The holes [left] the [tire] core and outer steel belts visible. The two outer protective steel-belt areas . . . were worn and frayed away in a four-and-a-half-foot area. One of the cords . . . [was] broken in the third steel belt layer, and the third layer . . . [was] showing wear (Tr. 20-21).¹

Skeens described the holes as skived out.² The purpose of skiving was to relieve pressure and heat inside the tire (Tr. 47, 50). The holes allowed air that was heated and expanded when the tire rotated, to escape the tire, which, in turn, relieved heightened air pressure inside the tire (Tr. 62). Skeens did not have the capacity to measure the tire's pressure and heat so he did not know what the air pressure was when he cited the alleged violation, nor did he know what the pressure was supposed to be, or what pressure should cause concern about the tire's condition (Tr. 62, 69). However, after Skeens insisted the tire be taken out of service, the pit mechanic read the temperature and pressure with a gauge. The temperature inside the holes measured between 127 to 132 degrees Fahrenheit (Tr. 128-131). The pressure was 122 pounds per square inch (Tr. 130).

¹ / Although Skeens initially testified there were three holes in the tire and although the citation mentions three holes, he later testified there were five holes (Tr. 83). All other witnesses who referenced the number of holes, agreed there were five (Tr. 97, 126, 161-162), and I find there were five holes in the tire.

² / Skiving is defined as the [r]emoval of a material in thin layers or chips with a high degree of shear or clippage, or both, of the cutting tool (U.S. Department of the Interior *A Dictionary of Mining, Mineral, and Related Terms* (1968) at 1022).

Skeens believed the holes should have been filled with rubber to protect the exposed steel belts (Tr. 47-48). The rubber would have acted as a guard to keep a rock from going through the . . . hole[s] and puncturing the steel belts (Tr. 30). Also, it would have prevented debris from getting between the tread layer and the steel belts (Tr. 30, 48).

In addition to noticing the loose tread and skived holes, Skeens saw the word *Runout* painted on the sidewall of the tire. To Skeens, the word meant the company had decided to run . . . [the tire] until it destroyed itself (Tr. 39, see also Tr. 67-68, 84).

Given the condition of the tire, Skeens feared a rock could penetrate to the tire's core and cause a blowout. Or, heat produced by the tire's operation could cause a blowout (Tr. 25). In either event, the driver could lose control of the truck, veer into the path of another vehicle, or plunge through a berm and over the edge of the roadway. Injuries resulting from the blowout could be fatal (Tr. 25-26).

The company's witnesses challenged Skeens' opinion the tire posed a hazard. After the citation was issued, Richard K. Burns, the safety coordinator, went to the mine and examined the tire (Tr. 97). He saw that some of the tread had separated from the tire's steel belt layers (Tr. 115). Also, he saw the holes (Tr. 97). When he looked into the holes, he saw some insignificant wire breakage (Tr. 97). He could not see the tire's casing (Tr. 100).

Burns testified that tires for 190 ton haulage trucks are very expensive and that skiving is a way to mitigate damage to a tire and to keep damage from worsening (Tr. 99). (The cited tire cost between \$16,500 and \$17,000 (Tr. 145-146)). Burns also explained the company used a contractor, Cobre Tire, for tire maintenance and repair. Representatives of Cobre visited the mine each week. They inspected all of the tires in use (Tr. 100). Employees of Triton also inspected the tires during each of the mine's two shifts (Tr. 101-102).

Burns did not believe the company violated section 77.1606(c) because the defect in the tire had been mitigated . . . or corrected. Not reversed, but stopped so that it did not become a defect that affected safety (Tr. 102). Burns explained:

[I]f a tire . . . has a rock cut and is left uncorrected . . . it can build up heat and it can separate the tread from the steel. But if . . . skiving is done correctly . . . it prevents or . . . stops that heat from building up When a cut is made, the rocks get in it and the . . . dirt gets in it and it keeps making that separation larger [I]f you can skive those cuts . . . then the dirt isn't allowed to stay in there. It falls out. It also cools it so it prevents . . . [the tire] from overheating . . . and skiving mitigates that . . . or prevents that from happening. And . . . the separation is stopped at that point (Tr. 103).

Equally important to Burns was the fact the tire's casing was free from damage. He described the casing as the load-bearing part of the tire (Tr. 104). Since the casing was not compromised, neither was safety. Burns explained that although tire cuts can lead to the tread layer separating from the tire, if the casing is unimpaired the tire still supports the load (Tr. 112-116).

Burns believed Skeens misunderstood what was meant by **Arunout**.[@] As used by the company and the contractor, the word signaled a tire had been moved from the front of the equipment to the rear. He stated:

We normally put . . . new tires on the front, and then if . . . there's a cut . . . we move those front tires to the rear to be run out. And we put new ones on the front. It does not mean that we're running it until it blows It . . . means we've changed the location from the front of the truck to the back of the truck (Tr. 116).

Norfolk, who also noticed the holes, three damaged belts, and loose tread, agreed with Burns that part of the purpose of skiving is **to extend the life of the tire by preventing further tread separation from the steel cords underlying the tread**[@] (Tr. 132). The skived holes **blow out debris that may get in between the tire tread and the . . . belt below** [@](Id.). According to Norfolk, skiving is common at the mine and in the industry (Tr. 131). Indeed, with **Arocks and everything**,[@] Norfolk felt it would be **Ahighly unusual**[@] for a tire not to be skived (Tr. 134).

He believed the tire was safe because if one of the four rear tires failed, **Athe extra tire . . . [would] carry that load until you can get [the truck] safely stopped**[@] (Tr. 136). (This is not true in the front of the truck, where there is only one tire on each side.) He also believed the tire was safe because there was no indication of heat build up or dangerously high air pressure.

Wesley, the Cobre store manager, stated that when a tire is cut the area around the cut is removed to reach the top of the steel belts. If the resulting hole is small, it is filled with rubber. If the hole is filled, the tire may continue to be used on the front of the truck (Tr. 156-157). If the cut out area is large and has not reached the casing, the hole is left unfilled. Leaving the hole unfilled allows air to ventilate and cool the tire when the truck is operating. The unfilled hole also allows dirt to fall out of the tire and prevents the tread from separating. If the tread has started to separate, skiving helps to keep the separation from growing (Tr. 147-148, 158).

Wesley went to the mine to look at the tire. He believed the holes were skived for these purposes (Tr. 161-162). He noted the tire's casing was unaffected (Tr. 153), and the tire showed no evidence of heat and air pressure buildup (Tr. 155). In Wesley's view, air pressure above 138 pounds per square inch was something about which to be concerned because it indicated heat was being generated in the tire (Tr. 146). Conversely, pressure below 138 pounds per square inch was acceptable (Tr. 147).

To Wesley the word **Arunout**[@] indicated the tire should be put on **Athe rear and watch[ed] . . . until it becomes unsafe to run**[@] (Tr. 151, see Tr. 151-152).

The company's final witness was Glen Whitear, an engineer who works for Cobre. He has spent approximately 45 years in the tire industry (Tr. 167-168). He described steel belted radial tires in detail. A single band of steel runs radially round the inner circumference of the tire and

forms the casing of the tire (Tr. 175-176). The casing is the strength of the tire (Tr. 176). Whitear agreed with all of the other witnesses that inside the casing is a cushion of air that carries the weight of the truck and its load. Steel belts over the casing protect it and stabilize the tread so it doesn't squirm (Tr. 177). The tread provides traction (*Id.*). Here, where three of the steel stabilizing belts were damaged, but the casing remained in tact, Whitear believed the tire was capable of safely supporting its load (Tr. 177-178, 182-183).

Whitear agreed with the other company witnesses that skiving was a method of significantly prolonging the life of a tire while still providing safety (Tr. 179-180). Skiving is recommended by all rubber companies (Tr. 182, 186). It does not weaken the tire in any way. Rather, it stops the tire's deterioration (Tr. 188).

If a front tire is skived and moved to the rear, continued safe operation of the truck is unaffected (Tr. 180). If one of the two front tires fails, the truck can swerve and go off the road. If one of the four rear tires fails, the other three bear the load (Tr. 187), and unlike the front tires, those on the rear do not turn from side to side (Tr. 190).

Finally, Whitear agreed with Burns and Wesley that the term runout means a tire has to be removed to the rear and it remains there while it is safe (Tr. 189).

THE VIOLATION

Section 77.1606 is headed *Loading and haulage equipment; inspection and maintenance*. Section 77.1606(c) states *[e]quipment defects affecting safety shall be corrected before the equipment is used*. The standard's requirement is clear, if loading and haulage equipment has a defect that makes the equipment unsafe, the equipment cannot be used until the defect is corrected. The standard is simple and brief in order to be broadly adaptable to myriad circumstances (*Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981)). Compliance is evaluated by an objective test of those actions taken by a reasonable prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the standard (*see, e.g. Austin Power, Inc.*, 9 FMSHRC 2015, 2018 (December 1987); *Alabama By-Products, Corp.*, 4 FMSHRC 2128, 2129 (December 1992)).

The evidence establishes: the haulage truck was in operation when the alleged violation was observed; the right rear outside tire on the truck had a 42 to 5 feet area where the tread layer was loose and separated; five holes were skived in the tire; the holes exposed three of the tire's six steel belts; the two belts closest to the tread were cut; the third exposed belt was worn and frayed; and the casing of the tire was unaffected.³

³/I recognize Skeens stated in the citation the core was visible (Gov. Exh. P-2). (Skeens used the terms *core* and *casing* interchangeably.) However, because the holes affected the outer three and not the inner three belts, I believe he confused the casing with the inner belts, and

I credit the testimony of the company's witnesses the casing was fully functional.

The first question is whether these conditions constituted equipment defects? A defect is defined in part as, "Wanting or absence of something necessary for completeness, perfection, or adequacy in form or function" (*Webster's Third New International Dictionary* (1986) at 591). Clearly, the loose tread, the skived holes, and the damaged steel belts detracted from the tire's form and diminished its completeness. In other words, they were equipment defects.

The next question is whether the defects adversely affected safety? Or, to put the question in the context of the Commission's test, whether a reasonably prudent person familiar with the mining industry and the Buckskin Mine would have believed the tire was unsafe and have corrected the condition before using the truck? I conclude the answer is no, that whether the loose tread, the holes, and the damaged belts are viewed separately or in combination, the record does not support finding they made the tire unsafe.

Skeens testified the purpose of the tread layer was to give the tire traction (Tr. 57). He also testified the tread layer protected the steel belts (*Id.*). Wesley agreed with Skeens that the purpose of the tread layer was to provide traction, and he described the relationship of the tread and the belts as one in which the belts stabilized the tread (Tr. 177). This testimony bespeaks the obvious. What is not obvious is how the loose tread adversely affected safety. There is no testimony linking the partially separated tread layer to a specific hazard, and even if I assumed the loose layer caused the loss of some traction, there is no evidence that the loss of traction on one of the four rear tires posed a hazard.

One of the reasons the holes were skived in the tire, as Norfolk, Wesley, and Whitear testified, was to prevent the tread layer from separating further (Tr. 132, 145, 147-148, 158, 161, 163, 188). While I might infer from this that tread separation needed to be stopped for safety reasons, I might as easily find it needed to be stopped for fiscal reasons. (The tire cost \$16,500 to \$17,000 (Tr. 145-146).) The point is, the Secretary did not establish a nexus between a hazard and the loose tread.

The parties also agreed, as Skeens, Burns, and Wesley testified, that in addition to preventing further tread separation, the reason the holes were skived in the tire was to relieve heat and pressure build up (Tr. 47, 50, 62, 103, 147-148, 158). These palliative purposes enhance, rather than diminish safety, and the testimony establishes the holes were meeting these objectives.

Although Skeens did not know what the tire's temperature and pressure were, or what the pressure was supposed to be (Tr. 62, 69), the pit mechanic measured both and Norfolk testified without dispute the pressure was acceptable and the tire showed no signs of overheating (Tr. 130-131). In addition, Wesley testified air pressure below 138 pounds per square inch was safe (Tr. 147). (Clearly, the 122 pounds of pressure found by the pit mechanic was well below this amount.) The Secretary did not challenge any of this testimony. I therefore conclude the Secretary failed to prove the heat, air pressure, or the holes themselves affected the safe operation of the tire.

The Secretary also failed to prove the damaged steel belts affected safety. Below the three damaged belts were three undamaged steel belts that protected the tire's casing. The company

presented compelling testimony that because the casing was functional, it was safe to use the tire.

Burns explained the casing was the load-bearing part of the tire (Tr. 103), and as long as the casing remained in tact, safety was unaffected (Tr. 112-116). His testimony was corroborated by Wesley (Tr. 148, 153), and was further bolstered by Whitear, an engineer with nearly an half century of experience in the tire industry (Tr. 177-178 , 182-183). I recognize Skeens believed the strength of the tire had been compromised, and I do not doubt his sincerity (Tr. 64). However, the company's witnesses offered detailed accounts of the structural makeup of the tire and their testimony, based on their thorough understanding of the tire's structure and capacity, is more persuasive.

In addition, the Secretary did not overcome the company's contention that even if the tire somehow suffered a blowout, the driver would not lose control. The tire was one of four rear tires. Norfolk's testimony that in the event of a blowout, the three remaining tires were sufficient to carry the weight of the truck until it could be safely stopped was not rebutted (Tr. 136). Also, Whitear persuasively pointed out that because the tire was on the truck's rear axle, the tire could not be turned to the right or left like a front tire. Therefore, if the rear tire failed, the truck would not be pulled suddenly to one side or the other (Tr. 187, see also Tr. 190).

Finally, I conclude Skeens' citation of the company was triggered by his incomplete understanding of the purpose of skiving and tire usage at the mine. Skeens believed rubber should have been poured into the holes (Tr. 47-48). However, Norfolk and Wesley explained the holes were purposefully left unfilled so dirt and debris fell out of the holes rather than worked between the tread and belt layers, causing further tread separation and belt damage (Tr. 132, 147-148, 158). In addition, Skeens clearly misunderstood the meaning of the word **Arunout**. He thought it meant the tire could not be repaired and the company would **Arun** it until it destroyed itself (Tr. 39, see also Tr. 67-68, 84). He acted to prevent this from happening.

However, the testimony of Burns, Wesley, and Whitear leads to the conclusion the word was put on the tire to further safety not to detract from it. They agreed **Arunout** was painted on the tire to keep the tire from being mistakenly placed on the front of the truck (Tr. 116, 151-152, 189). The word alerted company employees to watch the tire to make sure it was safely used **C** that is, to make sure it was used as a rear tire and that it remained in safe condition (Tr. 151-152). Had Skeens understood the holes were preventing not contributing to further deterioration of the tire, and had he understood company employees were on notice not to use the tire on the front of the truck and to keep watch over its condition, I doubt he would have issued the citation.

Commission Administrative Law Judge T. Todd Hodgdon, recently vacated a citation issued under similar circumstances (although alleging a violation of a different standard) because the Secretary had not proven a violation. He found, ~~A~~the company's witnesses were more knowledgeable concerning the tire in question than was the inspector, who . . . was not aware of all the facts pertaining to the tire@(*Amax Coal West, Inc.*, 19 FMSHRC 1311, 1312 (July 18, 1997)). Judge Hodgdon's observation is equally applicable here. Like Judge Hodgdon, I believe that a reasonably prudent person familiar with the Buckskin Mine and the condition of the tire would have concluded the tire was not in an unsafe condition. I find the company did not violate section 77.1606(c).

ORDER

Citation No. 4366121 is **VACATED** and this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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