FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 23, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-113
Petitioner	:	A. C. No. 46-03317-03655
v.	:	
	:	Mine: Lady Dunn Preparation Plant
CANNELTON INDUSTRIES,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., U. S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Secretary;
David J. Hardy, Esq., Heenan, Althen & Roles, Charleston, West Virginia, for the Respondent.

Before: Judge Barbour

This civil penalty proceeding is brought by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 815, 820). The Secretary is seeking the assessment of civil penalties against Cannelton Industries, Incorporated (Cannelton) for three alleged violations of mandatory training and safety standards. The case arises out of MSHA's investigation of a fatal accident that occurred at Cannelton's Lady Dunn Mine, a facility that includes the Dunn Coal and Dock Strip Mine, the Dunn Hollow Haulroad and the Lady Dunn Preparation Plant, on June 28, 1999. The accident took the life of Roy Whitt, an employee of Cannelton's contractor, Wiggles Trucking Company (Wiggles).

Cannelton denied the violations occurred, and the parties engaged in extensive pretrial discovery. The case was tried in two sessions in Charleston, West Virginia. During the first session, the testimony of nonexpert witnesses was heard. During the second session, the expert witnesses testified.

STIPULATIONS

At the commencement of the first session the parties agreed to the following 16 stipulations:

1. Cannelton . . . is the operator of the [Lady Dunn Mine;]

2. Operations of the [mine] are subject to the jurisdiction of the [Mine Act;]

3. [The] case is under the jurisdiction of the . . . Commission and its designated Administrative Law Judge pursuant to . . . the Mine Act [;]

4. William Uhl was acting in his official capacity as an authorized representative of the Secretary . . . [i.e., as a federal mine inspector] when [the] citation[s] . . . were issued[;]

5. True copies of [the] citation[s] . . . were served on . . . [Cannelton] or its agent as required by the Mine Act[;]

6. The total proposed penalty . . . will not affect . . . [Cannelton's] ability to continue in business[;]

7. [Gov. Exh. 1] is an authentic copy of [C]itation No. 7157394 . . . and may be admitted into evidence for the purpose of establishing its issuance[;]

8. [Gov. Exh. 2] is an authentic copy of [C]itation No. 7157395 . . . and may be admitted into evidence for the purpose of establishing its issuance[;]

9. [Gov. Exh. 3] is an authentic copy of [C]itation [N]o. 7187482 . . . and may be admitted into evidence for the purpose of establishing its issuance[;]

10. Assuming that the violations . . . are affirmed . . . [they] were abated in good faith[;]

11. The Proposed Assessment . . . [Gov. Exhibit 5], accurately sets forth[:]

a. [T]he size of Cannelton . . . in production tons or hours worked per year[;]

b. [T]he size, in production tons or hours worked per year, of . . . [the mine] in which the citations . . . were . . . issued[;]

c. [T]he total number of assessed violations for the period of July 1998 through May 2000, and[;]

d. [T]he total number of inspection days for that same period[;]

12. [Gov. Exh.6], the . . . printout of prior violations, may be admitted into evidence and may be used for determining the assessment of a penalty if the citations at issue are affirmed[;]

13. Coal was hauled from the Dunn Coal [and] Dock Strip [M]ine to the preparation plant via the Dunn Hollow haulroad on June 28, 1999[;]

14. On June 28, 1999, the Dunn Coal [and] Dock Strip [M]ine, the Dunn Hollow [H]aulroad and the Lady Dunn [P]reparation [P]lant were all on property leased or owned by Cannelton . . .[;]

15. On June 28, 1999, at approximately 6:00 p.m., while driving a loaded haulage truck on the Dunn Hollow [H]aulroad, going from the Dunn Coal [and] Dock Strip [M]ine to the Lady Dunn [P]reparation [P]lant, Roy E. Whitt was involved in a haulage accident and received fatal injuries [;]

16. The decline grade of the Dunn Hollow [H]aulroad in the vicinity of the accident ranged from 10.6 to 17.4 percent[;] [Gov. Exh. 8] . . . is an accurate depiction of the grade of the haulroad in the vicinity of where the accident occurred and may be admitted into evidence.

(Tr. 14; see also Joint Exh. 1).

THE FACTS

The mine is a surface complex where bituminous coal is extracted, hauled and processed. As the stipulations indicate, the mine includes the Dunn Coal and Dock Strip Mine (the pit), where the coal is mined and stockpiled, and the Lady Dunn Preparation Plant, a coal preparation and tipple facility. The pit and the processing area are connected by the Dunn Hollow [H]aulroad (the road). The pit's elevation is considerably higher than that of the processing area. As a result the connection road has several areas of steep decline.

If the company's speed limits are observed, it takes approximately 15 minutes to drive from the pit to the processing area. Due to the elevation difference the route is somewhat circuitous. The road leaves the pit and, after its initial descent, reconnects with a public road before resuming its course on mine property and descending to the processing area. Primarily, the road is used by coal haulage trucks. However, the road also is used by other mine vehicles, and the short public part of the road is open to general traffic (Tr. 119, 688).

Jack Hatfield, the safety manager of Cannelton since 1977, explained that the mine began operating in late 1992 or early 1993 (Tr. 569). After it opened, the road was used intermittently. As 1999 began, the road which had been out of service was upgraded and reopened (Tr. 573). Cannelton then contracted with Bridgeport Trucking Company (Bridgeport) to haul coal from the pit to the processing area (Tr. 575-576). However, on June 13, 1999, Bridgeport informed Cannelton it no longer would haul (Tr. 578, 676). Because Cannelton could not get its coal to

the processing area without trucks, Cannelton immediately sought to replace Bridgeport with another firm (Tr. 676).

On June 18, Cannelton selected Big G Trucking Company as its new contractor. After the company decided on Big G, Hatfield told George Arthur, Big G's president, that all of Big G's drivers, mechanics, and bosses should come to the mine for training. A training class was scheduled to be held on Saturday, June 19. Hatfield maintained that he assembled the men and began a hazard training session in which he reviewed hazards associated with the road and the processing area (Tr. 584). Hatfield discussed escape ramps with the drivers (Tr. 586) and explained that they should rely on their citizens' band (CB) radios to report trouble and request assistance (Tr. 588-589). Also, Hatfield emphasized the drivers should wear seat belts and should not pass on the road (Id.).

In the meantime, George Arthur's relative, William Arthur, heard about the job at the mine. William Arthur owned Wiggles Trucking Company, a coal haulage firm that owned 11 trucks and employed approximately 30 persons.[1] William Arthur wanted the work for his company. After discussing the matter, Wiggles subcontracted the work from Big G (Tr. 30-32). Thus, it was Wiggles' drivers who actually hauled for Cannelton.

After Hatfield's training session ended, William Arthur, who was at the mine, introduced himself to Hatfield. As the owner of Wiggles, William Arthur was in charge of all work done by his employees. As he put it, he was responsible for "run[ning] the jobs" (Tr. 29). After the two men met, Hatfield got in William Arthur's pickup truck and guided Arthur up the road to the pit. Along the way, Hatfield spoke to Arthur about various aspects of the road, including the escape ramps and the berms. Hatfield noted that there was a flat area near the top of the hill where the drivers could pull over. He told Arthur to instruct the drivers that when they left the pit and began to descend toward the tipple, they could stop in that area, gear down and then proceed down the hill (Tr. 682).

When the tour of the road was finished, Hatfield felt that Arthur "could lead the trucks . . . and . . . talk to [the] drivers" (Tr. 590-591). Hatfield believed Arthur would tell the drivers which gears to use when they came down the hill (Tr. 591). Arthur agreed that Hatfield gave a good overview of the road. "He showed me the whole road . . . all the escape ramps and everything" (Tr. 191).

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[1]/ Subsequent to the accident, Wiggles filed for bankruptcy. It no longer engages in trucking (Tr. 27-28).

Hatfield testified he told Arthur that if Arthur was going to bring in drivers other than those Hatfield already had met, Arthur should "make sure they have all their training, they have been hazard trained, [and] . . . they're legal" (Tr. 598). Hatfield felt certain Arthur understood Cannelton did not want untrained persons on its property and that Cannelton was concerned about safety (Tr. 656). For his part, Arthur was not clear what Cannelton officials asked about Wiggles' safety program. At first, he seemed to agree that representatives of Cannelton asked whether his company had a safety training program (Tr. 216), but a short time later he stated he did not recall whether or not anyone asked (Tr. 218). Arthur was sure, however, that the representatives of Cannelton made it clear that Wiggles' drivers had to be trained as MSHA required (Tr. 218).

Hatfield also testified he told Arthur that Cannelton needed copies of Form 5000-23 for the drivers to show they had been trained.[2] According to Hatfield, Arthur responded that a person named Greg Holestin conducted training for Wiggles, that Arthur would contact Holestin, and that Holestin would provided the documents. Hatfield felt comfortable that Wiggles' drivers had the required training (Tr. 593).

After Hatfield's and Arthur's conversation ended, Wiggles' drivers went up the hill to the pit. Hatfield believed Arthur would lead the drivers down the road to the processing area and the tipple. Hatfield did not accompany the drivers because he "felt confident [Arthur] had seen the road, and escape ramps, and . . . [would] convoy . . . [the drivers] . . . and show them these things" (Tr. 681).

The next day, June 20, the mine did not operate. The drivers returned to the mine for work on Monday, June 21, and they worked the rest of the work week. Hatfield stated that during this week he was not aware of any safety issues at the mine involving the drivers (Tr. 596). Arthur agreed that things went well. However, because of a large amount of coal in the pit, Hattfield kept asking Arthur for more
drivers, and Arthur testified he felt pressure to provide them (Tr. 34, 194-195).[3]

A short time later Wiggles hired two laid-off former employees, one was Whitt and the other was David Fields (Tr. 34-35). Arthur had known Whitt for 20 years (Tr. 36). Whitt was then working in the Cleveland, Ohio area (Id.). Holestin called Whitt on June 24 or June 25, and left a message for Whitt to return to West Virginia, if he wanted to work at the mine (Tr. 196). Whitt agreed to report for work on Monday, June 28 (Tr. 83-84, 197). Fields also agreed to

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[2]/ Upon completion of a miner's training, an operator is required to record and to certify that the miner has received the training specified. The operator does so on MSHA Form 5000-23, a copy of which is given to the miner and a copy of which is retained by the operator (30 U.S.C. § 48.9).

[3]/ Arthur maintained that Hatfield told him if Wiggles could not provide more drivers, Cannelton would let someone else do the job (Tr. 41).

come to work that Monday.

Holestin testified that he let Cannelton officials know Whitt and Fields would be reporting for work by writing their names on a piece of paper and leaving the paper on a desk at Cannelton's mine office (Tr. 75). Holestin stated he did not sign the paper (Tr. 87).[4]

Whitt and Fields reported for work around 5:00 p.m. on June 28 (Tr. 198). The men stopped where Wiggles' trucks were parked. Arthur estimated that he spent approximately 45 minutes to 1 hour "training" both men (Tr. 38, 163).[5] He explained that the training was the same he had "done for 15, 16 years or 20 years" (Tr. 164-165). It involved him and the men preshift examining the trucks by checking their brakes, lights, horns, and other components (Tr. 165). Arthur had great confidence in the men's driving abilities, and he noted that neither asked any questions regarding the trucks (Tr. 165-166, Tr. 170). After he was finished with the "training," Arthur filled out Whitt's and Fields' task training papers.

Arthur completed the forms even though he was not certified by MSHA to provide training (Tr. 38-39, 158). He stated he did not know he was required to be certified, that he had provided training "for 23 years," and that prior to the accident "[e]very inspector in West Virginia ha[d] looked at it and it was fine" (Tr. 38).[6]

After the papers were signed, Whitt and Fields got in their trucks and headed for the pit. Arthur told them when they reached the pit, they should not try to take their trucks down the road on their own. Rather, the first time they descended the road, they should follow another driver, Ronald Hunt (Tr. 41). Arthur viewed Hunt as an "excellent truck driver" (Tr. 38), "one of the best . . . on the job" (Tr. 167). Hunt was "head strong when it [came] to safety" (Id.).

Whitt and Fields did as they were told. When they reached the pit, their trucks were loaded, and they formed a "convoy" with other trucks. Hunt lead the way down the hill followed by Fields, Whitt, a driver named John Harless, and another Wiggles driver (Tr. 126-127). Fields understood that Hunt would explain the "lay of the land" to him and Whitt (Tr. 127). As the

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4/ The paper was not addressed to anyone, and Holestin had no knowledge of what happened to it (Tr. 74-75). Cannelton's witnesses testified that they never saw it.

5/ Arthur later seemed to hedge his testimony regarding the time he spent with the men. He agreed that when he met with Inspector Uhl and a representative of the State of West Virginia after the accident, he might have said he spent 10 to 15 minutes with Whitt and Fields (Tr. 52, 163).

6/ Fields described how his training papers were completed. Fields placed his social security number and the date on the forms, and Arthur filled out the rest (Tr. 110, 125). As Fields recalled, it took about 5 minutes (Tr. 108, see also Tr. 125). He believed that the same procedure was followed with regard to Whitt (Tr. 110).

trucks proceeded down the hill, Hunt spoke to the drivers over their CBs (Tr. 108, 127-128). Fields remembered Hunt telling them to stay in first gear. According to Fields, Hunt talked to the men all of the way down the hill (Tr. 130). Once the trip was completed, Fields believed he was introduced to the haulage road and that he understood what was required to drive it (Tr. 112).

In the meantime, another driver, Randy Halstead, had stayed from the previous shift to work during the evening shift. Halstead was assigned to use Wiggles' Truck No. 425. Halstead checked the truck's brakes and tires, and found nothing wrong (Tr. 375). He was not surprised the brakes exhibited no problems because approximately 2 1/2 months previously new brake shoes had been installed on the truck (Tr. 365-366). Halstead proceeded to the pit in Truck No. 425 where the truck was loaded. Truck No. 425 was equipped with a "Jake brake," a devise for slowing the engine and hence the truck. It also was equipped with a retarder.[7] Prior to starting down the hill, Ron Hunt told Halstead that he only should use the Jake brake and that he should stay in first gear (Tr. 377, 378).

As he began his descent, Halstead put the truck into first gear and applied the Jake brake. He had no trouble getting down the hill. In addition, when he applied the truck's service brakes at the bottom of the hill, they worked as they should (Tr. 379-380).

After Halstead reached the bottom and dumped his coal at the tipple, he heard someone on the CB tell Whitt that something was hanging underneath Whitt's truck. Halstead pulled up beside Whitt, got out of Truck No. 425, and looked under Whitt's truck. A brace for a fuel line had come loose and was hanging below the truck. Halstead told Whitt to use Truck No. 425, that he, Halstead, would take Whitt's truck and have it repaired (Tr. 356-357).

Whitt agreed to switch trucks with Halstead. Halstead explained to Whitt that Truck No. 425 had a larger engine than the truck Whitt had been driving. Whitt responded that he could "handle it" (Tr. 357). As the men drove up the hill and before Halstead went to the repair area, Halstead remained in touch with Whitt over the CB. Whitt reported no problems with Truck No. 425 (Tr. 381).

Near the top of the hill, Halstead turned off to go to the repair area, and Whitt continued

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[7]/ A "retarder" is generally defined as a device for restraining movement (<u>See</u> <u>e.g</u>. U. S. Department of the Interior *A Dictionary of Mine, Mineral & Related Terms* (1968 at 918). William Arthur, descried the function of a retarder as being to "hold you back on the hill where you don't have to use your brakes and get them hot" (Tr. 49). Fields explained that a retarder "slows the drive shaft down and [thus] help[s] to slow the truck down" (Tr. 114). Fields cautioned – and almost all of the other witnesses who addressed the point agreed – that if a driver tried to down-shift and to take the truck out of gear while the retarder was engaged, the driver could not get the truck back into gear and the retarder would have no effect on controlling the truck's speed (Tr. 114-115).

to the pit. A short time later, Whitt asked over the CB how to work the retarder. Halstead was not surprised. He believed a driver would not necessarily know how to use a retarder, especially if he or she never had driven a truck equipped with one (Tr. 371).

Halstead thought it was dangerous for such a driver to use the retarder. If the driver tried to shift and go out of gear, he or she could stall the engine. The result would be "just like putting . . . [the] truck in neutral" (Tr. 363). Once the engine stalled, the driver instinctively would apply the service brakes, but the truck would be traveling at such a speed it would require repeated application of the brakes to even begin to slow it, which in turn would make the brake drums hot and the brakes quickly would loose their effectiveness (Tr. 367). Therefore, Halstead told Whitt "you don't need the retarder . . . use your Jake brake . . . and first gear . . . until you get to the bottom of the mountain" (Id.). Whitt again replied he could "handle" the truck, and Halstead had the impression that Whitt was comfortable driving it (Tr. 372).[8]

When Whitt reached the pit, Cannelton miner Tommy Campbell was loading trucks with a front-end loader (Tr. 401- 402). Whitt pulled his truck into the wrong place, and Campbell called him on the CB and asked him to move the truck closer to the front-end loader, which Whitt did (Tr. 404-405). Campbell testified that Cannelton officials had told him and other loader operators that new drivers would be coming and had asked them to "make sure . . . [the new drivers] were . . . task trained before . . . [the operators] loaded them" (Tr. 406). As a result, Campbell believed when a new driver arrived in the pit, the front-end loader operators always asked if the driver was task trained (Id.).[9]

Because Whitt was a new driver, Campbell maintained that he loaded Whitt's truck "lighter" than he loaded the other trucks (Tr. 407). Campbell was certain he had been told to "to do that" by the mine superintendent (Tr. 407). Because the coal was not piled above the truck's side rails, Campbell estimated Whitt's load was about 75 percent that of an experienced driver (Tr. 408).

After Field's truck was loaded, the men were ready to make their second trip down the hill to the tipple. Fields proceeded Whitt. Because he was ahead of Whitt, Fields did not see what happened next (Tr. 107). However, John Harless did.

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[8]/ Fields overheard the discussion. Fields version of what was said essentially tracked Halstead's. He stated that Whitt "asked [Halstead] something about the . . . retarder and [Halstead] told him not to fool with it, just [to] put the truck . . . in first gear and do down the hill" (Tr. 113). Fields did not know whether Whitt had prior experience driving a truck equipped with a retarder (Tr. 189).

[9]/ Campbell never specifically stated he asked the question of Whitt (See Tr. 405-407). Rather, he testified that he was "sure he . . . would have [asked Whitt] or I wouldn't have loaded him" (Tr. 412). Compbell also stated he had no first hand knowledge Whitt actually received such training (Id.).

Harless had been working at the mine for about a week. On June 28, he too was hauling coal from the pit to the tipple on the evening shift. When Whitt and Fields left the pit, Harless also started for the tipple. Harless reach a spot where he had a good view of the road. Harless described what happened:

> [I] slowed down and looked . . . I saw a truck break away, and I saw it flip over . . . coal dust went up . . . 30, 40 feet in the air.[[10]] I started . . . hollering at Roy [over the CB]. [There was] no response. And I thought Roy was still in the truck because Roy always wore a seat belt . . . I hollered back up to the strip. I said you need to get 911 up here there's been an accident (Tr. 233; see also Tr. 240)).

Harless drove to a level spot and parked. He got out and began running down the road toward Whitt's truck. He rounded a curve and saw Whitt laying in the middle of the road. The truck had traveled on for a considerable distance before running off the road and overturning. Harless took off his shirt and covered Whitt. He told Whitt that everything was going to be all right. Whitt did not respond. Another miner arrived and checked Whitt's pulse. The other miner told Harless to return to his truck and there was nothing Harless could do. Whitt was dead (Tr. 234-235).

MSHA was notified of the accident, and later that evening, Inspector Uhl arrived at the mine. He made sure that an order was issued under section 103(k) of the Act (30 U.S.C. § 813(k)) to "freeze" the accident site until MSHA's investigation was completed. He traveled the haulroad to familiarize himself with the road, and he requested that representatives of MSHA's technical support unit come to the mine and inspect the overturned truck. Uhl also arranged for MSHA to interview those who had information about the accident, and he requested the truck's maintenance records and the road's shift examination reports (Tr. 423). Finally, he asked to see the training records of Wiggles' and Cannelton's employees (Tr. 424).

In addition to Uhl, MSHA sent to the mine supervisory investigator Dennis Ferlich, who holds a BS degree in mechanical engineering from Penn State University (Tr. 834-835). Ferlich arrived on June 30, and spent the next 3 days inspecting the truck (Tr. 748).[11] He took photographs and kept notes of his findings (Tr. 749).

Although, Ferlich found the steering, the transmission, the gears, the electronic system,

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[10]/ Harless described the truck as traveling faster than if it had been in first or second gear. In fact, it was going so fast, he believed it could have been totally out of gear (Tr. 241, 261).

[11]/ On June 30, the truck was still located where it had come to rest after it careened off the road. The only change in the truck's physical condition since the accident was that it had been returned to an upright position (Tr. 862).

the pneumatic system, and the structure of the truck to be sound, he believed there were defects in the trucks' service braking system (Tr. 778-779, 843, 867-868). He explained there were six service brakes on the truck. Two wheels on the truck's front steering axle each had brakes, and four wheels on the truck's back axles each had brakes. The brakes were applied through hydraulic air pressure which was activated when the driver pushed the brake pedal. The brakes worked as follows: When the driver stepped on the brake pedal, the air pushed forward the pushrods, which contacted the slack adjusters, which pushed the S-cams, which pushed against the rollers, which pushed the brake shoes outward and into the inside of the brake drums. Since this happened virtually simultaneously on the six wheels, the contact between the brake shoes and the brake drums caused the wheels to slow and, if need be, to stop (Tr. 755, 766-767, 768; see Gov. Exh. 20-7).

In Ferlich's view, the nature of the contact between the pushrods and the slack adjusters was critical to the effective functioning of the brakes. The distance the pushrods moved (the pushrod stroke) determined whether the slack adjusters adequately caused the S-cams to move sufficiently to cause the rollers to propel the brake shoes out against the brake drums. Ferlich stated that the goal was to keep the pushrod strokes to a minimum so that a S-cams "didn't have to turn too far to push the [brake] shoes . . . against the drum[s]" (Tr. 770). The strokes should extend no more than 2 inches (Id.). Ideally, each stroke should be "in the neighborhood of an inch and a half" (Tr. 771).

Ferlich found the pushrod stroke on the right middle brake to be 2 1/4 inches, which, in Ferlich's view "reduced the braking force on that brake" (Tr. 781). In addition, two of the three other rear brakes were at or near their limit. The left-rear brake had a stroke of 2 inches and the right rear brake had a stroke of 1 15/16 inches. (The stroke on left middle brake was 1 9/16 inches (Tr. 781; see also Tr. 843-844).)

Ferlich also testified there were limits to allowable wear on the brake drums. He measured the wear and found that "all of the brake drums were over the maximum allowable wear limits" (Tr. 783). The drums were "severely worn . . . beyond what the manufacture[r] allow[ed]" (Id.). In his view, the wear was so great the drums should have been "throw[n] . . . out" (Tr. 799). Each drum had a "ridge build up on the edges" and the ridge showed that excessive use had worn the drums down (Tr. 783).

In addition, each drum was discolored by scorching, which indicated to Ferlich that the drums had been subjected to temperatures "anywhere above 6 to 8 hundred degrees Fahrenheit" (Tr. 783). Finally, a piece measuring approximately 2 1/4 inches had broken off the edge the right middle brake drum (Tr. 782; see Gov. Exh. 20-10).

Upon the completion of his on-site inspection of the truck, Ferlich returned to his office where he prepared a report summarizing his findings (Id.). Then, after consulting with Ferlich, Uhl issued the subject citations to Cannelton.

THE ALLEGED VIOLATIONS

Citation No.	Date	30 C.F.R. §
7157394	9/21/99	48.26

Citation 7157394, which alleges a significant and substantial violation of section 48.26, states:

> Based upon testimony and records obtained during this accident investigation, adequate experienced miner training was not provided to Roy Whitt, driver and victim of the . . . haulage accident which occurred June 28, 1999. The training he received did not provide adequate information and instruction about the recognition and avoidance of hazards he would encounter at the mine, more specifically on the haul road where he was assigned to drive. This inadequate training was determined to be a factor contributing to the accident which resulted in fatal injuries to the driver (Gov. Exh. 1).

At the time the alleged violation occurred (June 28, 1999), section 48.26(a) required newly employed experienced miners to complete a training course as "prescribed in the section" before beginning work duties. Section 48.26(b) specified the topics for the course, which included: (1) an introduction to the work environment (section 48.26 (b)(1)); (2) mandatory health and safety standards pertinent to the task(s) the miner [would] be assigned (section 48.26(b)(2)); (3) review of the line of authority of supervisors and miners' representatives, and an introduction to the operator's rules and procedures for reporting hazards at the mine (section 48.26(b)(3)); (4) instruction on the procedures for riding on and in mine conveyances, the controls for the transportation of miners and materials, and the use of communication systems, warning signals and directional signs at the mine (section 48.26(b)(4)); (5) escape and emergency evacuation plans and fire warning and firefighting procedures at the mine (section 48.26(b)(5)); (6) instruction in work procedures around highwalls and pits (section 48.26(b)(6)); (7) the recognition of hazards in the mine and their avoidance (section 48.26(b)(7)); (8) and such other courses of instruction as may be required by MSHA's District Manager based on the circumstances and conditions of the mine (section 48.26(b)(8)).[12]

The citation charges that "adequate experienced miner training was not provided to Roy Whitt" (Gov. Exh. 1). The parties accept the fact that Whitt was an "experienced miner" (as defined in section 48.22 (30 C.F.R. § 48.22)), who was newly employed. As such, section 48.26 required that he be trained according to its mandates. There is no dispute that Cannelton did not

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[12]/ Effective July 1, 1999, section 48.26 was revised. Among other things additional requirements for a "minimum course of instruction" were add to the regulation (30 C.F.R. § 48.26 (July 1, 1999)).

provide Whitt with training. Thus, whatever training Whitt received was provided by Wiggles.

I credit Arthur's testimony that on the afternoon of June 28, the trucks that Whitt and Fields were going to drive were preshift examined in Whitt and Fields presence (Tr. 106, 159, 165). I also find that after the trucks were examined, Whitt and Fields drove them to the pit where they were loaded, that the men then followed Hunt down the hill (Tr. 41), and that on the way down, Hunt pointed out the escape ramps and other safety-related features of the road (Tr. 167).

I conclude, however, that none of this "training" complied with the existing requirements of the standard. There is nothing in the standard indicating that miners observation of and/or participated in preshift examination of trucks they would be driving in and of itself met any of the prescribed training requirements. Further, even if Whitt's "convoyed" introduction to the road qualified as instruction in "the recognition and avoidance of hazards present in the mine" (section 48.26 (b)(7)), a dubious assumption given the rather imprecise description of the content of Hunt's instruction given in the testimony (See Tr. 126-130), section 48.26(a) required the training to be given before Whitt was "assigned to work." Here, the journey down the road did not occur before Whitt was assigned to work, that is to carry a load of coal to the tipple. Rather, it followed his visit to the pit and it coincided with his first trip down the road in a loaded truck (Sec. Br. 10).

Moreover, the training requirements for newly employed experienced miners were premised on the requirement that most of the training would be provided by MSHA approved instructors (See section 48.23(g)). Arthur acknowledged that he was not certified by MSHA to provide training. Nor was Arthur authorized to sign a certificate of training (Tr. 38, 41, 542-543). Hunt, too, was not authorized by MSHA to provide training. For these reasons, I find the Secretary proved that Whitt was not provided with experienced miner training as required and that section 48.26 was violated.

Having found a violation, the question arises whether Cannelton can be held responsible for it, and I conclude it can. The law is clear. In a case whose facts resembled those at hand, the Commission stated:

> Operators are liable without regard to fault for violations of the Mine Act and its standards. *E.g. Fort Scott Fertilizer-Cullor, Inc.* 17 FMSHRC 1112, 1115 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988) aff'd on other grounds, 870 F.2d 711, 716 (D.C. Cir. 1989); *Asarco, Inc. - Northwestern Mining Dept.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195, 1198 (10th Cir. 1989). . . .[T]he mine operator . . . is strictly liable for all violations of the Act that occur at its mine, including those committed by its contractors' employees. See *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991) ("the Act's scheme of liability provides that an

> operator, although faultless in itself, may be held liable for the violative acts of its employees, agents and contractors"); see also *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (mine operators are strictly liable for the actions of independent contractor violations") (*Bluestone Coal Corporation*, 19 FMSHRC 1025, 1032) (June 1997)).

Thus, a production-operator may be liable without regard to fault for violations committed by its contractor's employees, and it is within the Secretary's discretion to cite the production-operator, the contractor, or both. The Commission and its judges may review the decision of the Secretary in order to guard against an abuse of discretion. (*Bluestone*, 19 FMSHRC at 1032 (citing to *W-P Coal Co.*, 16 FMSHRC at 1404, 1411 (July 1994)).

The facts support the Secretary's decision to cite Cannelton. As the Commission has pointed out, a factor indicative of a proper exercise of the Secretary's discretion is whether the violation affects the safety of the production-operator's employees (*Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 (Feb. 1997); aff'd 133 F3d 916 (4th Cir. 1998)). Whitt did work alone or only with Wiggles' drivers. His operated his truck in areas where Cannelton's employees and the public occasionally were present. Employees of Cannelton worked in the pit and the processing area (Tr. 243), and at times equipment other than haulage trucks was driven by Cannelton's employees on the haulage road. Finally, the public had access to the small part of the road that belonged to the state (Tr. 589). An untrained driver, such a Whitt, was a danger to Cannelton's employees as well as to the public when he had to travel in the pit, the processing area, and on Cannelton's and the state's parts of the road (Tr. 244). Cannelton had a duty to protect those employees and citizens by ensuring that its contractor's employees were properly trained.

Moreover, as the Court noted in *Mingo Logan*, "holding production-operators liable for the training violations of their independent contractors encourages production-operators to employ only those independent contractors with exemplary health and safety records, thereby promoting the protective purposes of the Mine Act" (*Mingo Logan*, No. 97-1392, slip op 8 (4th Cir. Jan. 8, 1998)). In addition, holding production-operators liable for the training violations of their independent contractors promotes production-operator oversight and, thus, encourages contractor compliance. Training prescribed by the regulations is vital to ensuring a safe work place and the ultimate responsibility for ensuring a safe workplace lies with the production-operator.

SIGNIFICANT AND SUBSTANTIAL (S&S) AND GRAVITY

Inspector Uhl found that the violation was S&S. He based his finding on the fact that the lack of training meant hazards associated with descending the road and ways to avoid such hazards were not properly pointed out to Whitt. Uhl believed the violation directly contributed to Whitt's death. (Tr. 480-481).

Although the evidence does not establish an unequivocal causal link between the accident and Whitt's lack of experienced miner training, I agree with Uhl's conclusion as to the S & S nature of the violation. A condition or practice is S&S if: (1) it is a violation of a mandatory safety standard; (2) if it contributes to a discrete safety hazard; (3) if there is a reasonable likelihood that the hazard contributed to will result in an injury; and (4) if there is a reasonable likelihood that the injury will be of a reasonably serious nature (*Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)). When evaluating the "reasonable likelihood" element, "likelihood" is viewed in terms of continued normal mining operations without any assumption as to abatement (*U.S. Steel Mining Co., Inc*. 6 FMSHRC 1573, 1574 (July 1984); *Halfway, Inc*., 8 FMSHRC 1, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991)).

I have found a violation of section 48.26. The failure to provide Whitt with required experienced miner training made him a danger to himself and to others, specifically to those at the mine who worked in the pit and tipple areas, who drove on the road, and to those members of the public who used the state's part of the road. This was especially true given the fact that Whitt had not driven a loaded coal haulage truck for a number of months and the fact that he was totally unfamiliar with the steeply graded road. The situation created by Whitt's lack of training was an accident waiting to happen. Finally, given the weight of the truck, the speed at which the truck could move, the steepness of the road, as well as the other vehicles the truck could encounter as mining continued, it was reasonably likely that any injuries resulting from Whitt's lack of training would be serious or worse.

In addition to being S&S, the violation was very serious. As I have noted, training is critical to maintaining a safe work place. Whitt was not given the training required. He had not driven a coal haulage truck for months, and he was unfamiliar with the conditions at the mine, the most potentially hazardous of which was the steep descent of the haulage road. He was expected to work in the vicinity of other miners and, to a limited extent, in the vicinity of the public. Allowing him to work under such conditions without first providing him the required prescribed training placed him and others in a very dangerous situation.

NEGLIGENCE

Negligence is the failure to exercise the care required by all of the circumstances. I conclude that although Cannelton tried to exercise some oversight of contractor training, it did not implement sufficient procedures to make the oversight effective and, therefore, did not exhibit the care required. In finding Cannelton negligent, I note, again, that it is the production-operator who bears the ultimate responsibility to ensure training is given as required.

Essentially, Cannelton relied on Wiggles to be responsible for the training of new drivers. Cannelton's reliance was exemplified by the fact that Hatfield showed William Arthur the haulage road so that Arthur could instruct the new drivers in its hazards (Tr. 590-591), and by Hatfield telling Arthur to make sure the Wiggles' drivers were trained properly (Tr. 598, see also

Tr. 28). For his part, I am persuaded that Arthur lead Hatfield to think all of Wiggles' drivers were trained as required (Tr. 616). I am also persuaded that Arthur was asked by a Cannelton representative whether Wiggles had a training program. Arthur testified this "probably" happened, and it is something a production-operator, relying on its contractor to provide training, would have done (Tr. 216-217). Moreover, I credit Arthur's testimony that Cannelton officials had made it clear to him Wiggles' drivers had to be current in their training (Tr. 218). This also would have been consistent with Cannelton's reliance.

There was nothing wrong with Cannelton relying on Wiggles. Required training can be provided by the contractor, the production-operator, or by both. The problem was that Cannelton's efforts to monitor Wiggles' compliance were woefully inadequate. In fact, there is no indication that Cannelton instituted any systematic checks to ensure that before a contract miner was assigned work, he or she was properly trained by a certified trainer. For example, Cannelton did not insist that prior to beginning work a newly employed contract employee review his or her training status with someone from the company and from Wiggles.[13] True, Hatfield requested copies of Wiggles' employees training certificates (Tr. 610), but this was not enough because it left Cannelton in the position of relying on what the certificates stated without attempting to confirm their accuracy.

Further, even if rank-and-file front-end loader operator, Tommy Campbell, and other loader operators were told by Cannelton officials to make sure new drivers were trained before they loaded the drivers' trucks (Tr. 406), by the time the loader operators would have asked, untrained newly employed experienced drivers would have been assigned to work and would have embarked upon their duties. In other words, the loader operators' questions would have come too late to further full compliance with section 48.26(a). ("A newly employed experienced miner shall receive and complete training . . . before such miner is assigned to work duties" (30 C.F.R. § 48.26(a)).[14]

Citation No.	**Date**	**30 C.F.R. §**

[13]/ This is not to say that the mechanics of a production-operator's oversight must include such a check. Oversight methods are up to the operator. However, whatever methods it chooses to employ, they must be effective, and Cannelton's were not.

[14]/ While I conclude Cannelton was negligent because it failed to exercise effective oversight of Wiggles' compliance, I recognize Wiggles also did not exercise the care rquired. Indeed, Wiggles' lack of care was greater than Cannelton's. Arthur was primarily responsible for failing to see that Whitt was trained properly before he was assigned work. Wiggles' greater negligence, however, does not excuse Cannelton's failure.

7157395	9/21/99	48.27

The citation, which alleges a S & S violation of section 48.27, states:

> Based on the testimony obtained and the failure to provide records of task training for operating the Mack RD-854-SX coal haulage truck, it is determined that task training was not proved for Roy Whitt, driver and victim of the fatal powered haulage accident which occurred on June 28, 1999. This was the victim[']s first day of employment at this mine site and his first trip on the haulage road with this particular type vehicle. He was operating it in the production process and was not under direct supervision. This failure to provide training was determined to be a factor contributing to the accident which resulted in fatal injuries to the driver (Gov. Exh. 2).

With regard to Whitt, section 48.27 then required he be: (1) instructed in an on-the-job environment in the health and safety aspects of safe operating procedures relating to the operating of the coal haulage trucks at the mine and relating to the hauling of coal (30 C.F.R. § 27(a)(1)); and, (2) because he was to begin work immediately, be instructed in the supervised operation of the coal haulage truck during production (30 C.F.R. § 48.27(a)(2)(ii)). Whitt was required to abstain from driving a truck until the training "ha[d] been completed" (30 C.F.R § 48.27(a)).

It is clear that Uhl based the citation on the fact that after Whitt's first trip down the haulage road, he changed to Truck No. 425, a truck that was equipped with a retarder. In Uhl's opinion, the presence of the retarder required new task training because the regulation required training whenever a miner used a new or modified piece of equipment that he or she had not used before.[15] In Uhl's view, the retarder qualified as such a modification because if a miner was unfamiliar with its purpose and use the miner's ignorance could create a serious safety hazard for himself or herself and others (Tr. 487, 526). Uhl believed Whitt did not understand the function of the retarder because Whitt asked Halstead over the truck's CB about the retarder's purpose (Id., see also Tr. 360).

I agree with Uhl that Whitt needed new task training (Tr. 487, 523). The regulation encompasses the exact situation in which Whitt found himself when it requires operators of equipment to be "instructed in safe operating procedures applicable to . . . modified . . . equipment[,] . . . which requires . . . new or different operating procedures" (section 47.27(a)(3)). The retarder's purpose, as stated by Wiggles' driver, John Harless, was to slow the truck (Tr. 239). However, while the testimony establishes that a retarder can be helpful in keeping a truck under control as it descends an incline, the record also reveals the retarder can be dangerous

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[15]/ Uhl also testified that the truck's larger engine size also required new task training (Tr. 526), but he did not explain why, and the entirety of his testimony abundantly indicates he based the citation almost solely upon the presence of the retarder.

if its purpose and function are not understood. As Halstead and others explained, a driver must realize if the retarder is engaged and he or she tries to shift, the transmission can go out of gear and the engine can stall. If this happens, and the truck is loaded and starts to run away, the truck's brakes will not hold it on steep grades such as those of the haulage road (See e.g. Tr. 363).

I accept as a fact that Whitt asked Halstead over the CB radio how to work the retarder since there is no testimony discrediting Halstead's assertion that this is what happened and since Halstead's description of the conversation was essentially confirmed by Fields (See e.g. infra (Tr. 360)). Whitt's question reveals that the retarder was new to him and that training was required – training he did not receive. Other than being told by Halstead not to "fool around" with the retarder, there is no indication Whitt was advised about the device's purpose, function and safe use (or, nonuse, as the case may be (Tr. 360)). Thus, Whitt was placed in a situation where misuse of the retarder easily could cause the truck to run away. Therefore, I find that a violation of section 47.27 occurred as charged.

S&S and GRAVITY

The violation was S&S. The lack of training contributed to the hazard that Whitt would try to use the retarder and would endanger himself and/or others. Given the particular circumstances under which the violation occurred – the grades of the road, the necessity to maintain complete control of the truck when on the road, Whitt's general lack of familiarity with the road, the fact that shifting gears with the retarder "on" could cause the truck to go into neutral and stall, and the fact that Whitt was likely to downshift to try to control the speed of the truck – it was reasonably likely that lack of training in the purpose and function of the retarder could lead to a runaway situation which, in turn, could result in an accident causing injury to Whitt or to anyone the uncontrolled vehicle hit. Finally, such an accident was reasonably likely to at least cause serious injury to Whitt and perhaps to others as well.

In addition, to being S & S, the violation very serious. While I am not holding that the accident was caused by misuse of the retarder – no one knows for certain its cause – it is clear to me that lack of training in the purpose and function of the retarder created the conditions under which the accident or one like it easily could have happened. This alone is sufficient to make the violation very serious.

NEGLIGENCE

I also find that the violation was due in part to Cannelton's negligence. Cannelton's management representatives did not know that Whitt had started work, changed trucks, and was unfamiliar with a retarder. However, Cannelton knew that new employees of Wiggles were likely to be arriving and especially that they might be present on June 28. (I credit Arthur's testimony that Cannelton was anxious to have more drivers on the job (Tr. 195-196) and that Arthur told Hatfield more drivers would be coming to work that Monday (Tr. 195)).

As I have already noted, Cannelton made some general efforts to check on the training of

its contractor's employees, but what the testimony does not reveal and what I conclude did not exist was systematic, effective and ongoing oversight by Cannelton to make sure all of the employees of its contractor were trained as required. There were things that a production-operator exercising reasonable care might have done, and which Cannelton did not do, to exercise effective oversight. Had Cannelton systematically overseen training compliance by its contractor, Arthur would have been more likely to make certain that Whitt be properly trained before he drove a truck like Truck No. 425. Although Arthur, acting for Wiggles, assumed the primary duty of making sure all required training was provided, Cannelton also had a duty that it fully failed to meet. Its negligence was less than Wiggles', but Cannelton's lack of a systematic and (most importantly) effective effort to make sure the training requirements were enforced, means that the violation of section 48.27 also was due to its negligence.

Citation No.	**Date**	**30 C.F.R. §**
7187482	9/21/99	77.404(a)

The citation, which alleges a S & S violation of section 77.404(a), states:

> [The truck] that was being driven by Roy Whitt to haul coal at the mine on June 28, 1999, was not maintained in a safe operating condition in that: 1. One brake on the axles was beyond the maximum allowable adjustment range[;] 2. The other three brakes on the drive axles were at or near the maximum allowable adjustment range[;] 3. The brake drums of all four drive axle brake units and the two front steering axle brake units were worn beyond the maximum allowable wear limit stamped on the drums by the manufacturer. These conditions decreased the braking capacity of the truck. This reduced braking capacity, in combination with the fact that the truck was operating on a steep grade that ranged from 10.6 to 17.4 percent over a distance of approximately 1000 feet in the area of the accident site and the fact that the truck was routinely carrying significantly more than its rated capacity, contributed to the accident that resulted in fatal injuries to the driver (Gov. Exh. 3).

Section 77.404(a) requires in pertinent part that "[m]obile . . . equipment . . . be maintained in safe operating condition and . . . equipment in unsafe condition . . . be removed from service immediately." The Commission has held that section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately (*Peabody Coal Company*, 1 FMSHRC 1494, 1495 (Oct. 1979)) and that "[d]erogation of either duty violates the regulation" (1 FMSHRC at 1495; see also *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1556 (Sept. 1996)). Truck No. 425 was mobile equipment. Obviously, it was not removed from service before the accident. Therefore, if the conditions cited by Uhl existed, and if they singly or in combination rendered it unsafe to operate

the truck, a violation occurred.[16] The issue of whether the truck was unsafe must be determined by deciding whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous conditions, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action" (See *Alabama By-Products Corporation*, 4 FMSHRC 2128, 2129 (Dec. 1982) (involving identical standard applicable to underground coal mines)). The burden of proof is on the Secretary.

Ferlich was the only witness who conducted a detailed, post-accident investigation of the state of the subject truck's braking system, and I find that the conditions he found, particularly the pushrod stroke lengths, the brake drum wear and discoloration, and the missing piece of the right rear middle brake drum, existed as he described them.

Would a reasonably prudent person consider these conditions to have rendered Truck No. 425 unsafe? The question must be answered based on the testimony of Ferlich and Steven Chewning, President of Traffic Safety Consultants of Richmond, Virginia. (Chewing conducted a study of the accident for Cannelton (Tr. 906-907)). Having considered the testimony of both, I conclude that the Secretary established the violation. My conclusion is based upon a combination of conditions as they affected the brakes and upon the circumstances under which the truck was used. In my view, together they created a situation in which a reasonably prudent person would have recognized a hazard and would have withdawn the truck from service.

Ferlich believed the braking capacity of the truck was diminished by what he found. He stated that the pushrod for the brake on the right rear axle being 1/4 inch above the limit reduced its braking capacity. Ferlich persuasively and logically explained why a stroke exceeding the 2 inch limit meant the S-cam could not propel the right rear brake shoe far enough so it had adequate contact with the brake drum (Tr. 770-771, 781). Ferlich was a credible witness, and I accept his testimony that the braking capacity of the right rear brake was lessened.

I am also persuaded that, due to wear, all of the brake drums were thinner than they should have been (Tr. 783, 786-788, 799). I credit Ferlich's testimony that because they were thin, the drums had less structural integrity and a tendency to heat faster than brake drums with lesser wear. Further, I credit his explanation that as the temperature rose, the drums then expanded and, when the brakes were applied to the expanded drums, the brake shoes could not maintain effective contact with the drums because the drums had pulled away from the shoes (Tr. 786-787, 789-790). (This is the phenomenon Ferlich referred to as "brake fade" (Tr. 788)). The credibility of Ferlich's testimony regarding the condition of the drums and the consequences to the braking system is supported by the fundamental and unchanging rule of physics that friction produces heat and that heat causes metal to expand.

Ferlich was less convincing when he testified regarding the hazard posed by the three pushrods that were "at or near the limits" (Tr. 781). The stroke of the three pushrods measured 2

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[16]/ Equipment may be defective and not be in violation of the standard if the defect does not affect safe operation of the equipment during its normal intended use (See *Hobet Mining, Inc.*, 19 FMSHRC 411, 414 (Feb. 1997) (ALJ Maurer)).

inches, 1 15/16 inches, and 1 9/16 inches (Id.). Although he believed the length of these strokes minimized a driver's ability to stop, he did not satisfactorily explain why (Tr. 786), and the fact remains that the strokes' distances were within an allowable range. I cannot conclude that a perfectly permissible condition would have signaled a hazard to a reasonable miner.

Also, while I accept as a fact that a piece measuring approximately 2 1/4 inches in length was missing from the right middle drum, I am not convinced the missing "chunk" posed a hazard (See Tr. 791). In his testimony Ferlich did not connect the missing piece to any particular hazard. His general view seemed to be that somehow the missing chunk compromised the integrity of the braking system, but he did not fully explain why. Without an adequate explanation I cannot find that the missing piece posed or contributed to a hazard, especially when, as here, the missing chunk was not mentioned in the citation as a cause of the violation.[17]

Thus, during the course of a work day, Truck No. 425 – a truck, with diminished braking capacity on one wheel and with six worn brake drums – would have been required to descend a haulage road carrying a load of coal. The question is whether a reasonable miner would have concluded that travel down the road in such a loaded truck posed a hazard warranting correction.

I conclude the answer is "yes" because the pushrod stroke being above the limit on one of the rear brakes reduced the capacity of that brake to function as it should, and, therefore, the full force of the truck's braking system could not be applied when needed. In addition, the record fully supports finding that the thin brake drums meant they were more likely to crack or to loose a piece because their integrity was less than when they were manufactured and that they would heat up and expand faster and lead to brake fade (Tr. 786-789). Not only does Ferlich's credible testimony support this conclusion, so do elementary physical principles.

Ferlich's description of the brakes as "the "last line of defense in an emergency" was accurate (Tr. 809). As he explained, if the Jake brake and the retarder did not slow the truck sufficiently, the service brakes had to be used (Tr. 808). For example, if the drive shaft broke, the truck would have nothing to slow it but its service brakes (Tr. 809). Also, Ferlich persuasively testified that brakes in pristine condition are designed to stop the truck on a 20 percent grade (Tr. 879). Here, the grade was approximately 17 percent at its steepest, close to the maximum grade on which the truck could be safety operated. The fact that the brakes were in far from pristine condition meant that Truck No. 425 had diminished braking capacity where it might be needed most. While the diminished capacity might not have been a problem if the truck had been operated on generally level roads, on a road with grades

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[17]/ In addition, there was much discussion by Ferlich and by Chewning about the significance of the brake drums' blue color. Their testimony revolved around the issue of whether "bluing" was indicative of bake fade (Tr. 820) and thus, indicative of the immediate cause of the accident. Very little, if any, of the testimony concerned whether a reasonable miner would have noted the bluing as indicating a hazard prior to the accident. In fact, Ferlich agreed he could not say for certain if the "bluing" was present prior to the accident and thus would have been seen by such a miner (Tr. 856, 885). Therefore, I will not consider it as a condition that would have signaled a hazard.

as steep as those at the mine, diminished capacity presented a definite hazard. Therefore, I conclude Truck No. 425 was in an unsafe condition, and a reasonably prudent person familiar with the truck and the conditions under which it was operating would have fixed or adjusted the pushrod stroke and installed new brake drums or would have removed the truck from service.

S&S and GRAVITY

The violation was S&S. The violation of section 77.404(a) contributed to the hazard that the truck would be unable to stop. Given the particular circumstances under which the violation occurred – the grade of the road, the necessity to maintain control of the truck, the need to make frequent trips down the road with the truck, the driver's unfamiliarity with the road and with the truck – I conclude that as mining continued it was reasonably likely that the lack of full braking capacity could contribute to a situation which was reasonably likely to result in an accident causing serious injury to Whitt and/or to anyone the uncontrolled vehicle hit. Obviously, the violation also was serious.

NEGLIGENCE

William Arthur testified that, prior to the accident, no one from Cannelton inquired about Wiggles' truck maintenance program (Tr. 42-43). There is no testimony to refute this assertion, nor any testimony that Cannelton made any independent checks of Wiggles' trucks. While primary responsibility for the violation lay with Wiggles, Cannelton also exhibited negligence. Cannelton could have – and should have – instituted some sort of systematic check (perhaps a periodic spot check) to ensure its contractor's equipment was in compliance with applicable safety standards. In particular, Cannelton had a duty to ensure its contractor used equipment that either was maintained in safe condition or, if it could not be so maintained, was removed from service. In the case of Truck No. 425, Cannelton did not meet this duty.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated that the total of the proposed penalties would not affect Cannelton's ability to continue in business (Stip. 6).

SIZE

The parties stipulated that the proposed assessments were based, in part, on accurate figures regarding Cannelton's size (Stip. 11(a),(b); Gov. Exh. 5). The figures reveal that Cannelton has an annual tonnage of 43,607,666 (See Gov. Exh. 5; Petition For Assessment of Civil Penalty, Exh. A). Cannelton is a large operator.

GOOD FAITH ABATEMENT

The parties stipulated that if the violations are affirmed, they were abated in good faith

(Stip. 10 infra).

HISTORY OF PREVIOUS VIOLATIONS

The parties stipulated that the printout of the mine's prior violations for June 27, 1997 through June 27, 1999, "may be used determining the assessment of a penalty" (Stip. 12). The printout indicates that there were 34 applicable violations during this period, a number which represents a moderate history of pervious violations.

CIVIL PENALTY ASSESSMENTS

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7157394	9/21/99	48.26	$25,000

I have found the violation was very serious and was in part the result of Cannelton's negligent failure to effectively oversee Wiggles' training of its employees. The violation was abated in good faith, and any penalty assessed will not affect the ability of Cannelton, which is a large company with a moderate history of previous violations, to continue in business. Given the factors and especially in view of Cannelton's shared negligence and moderate history of prior violations, I conclude an assessment of $5,000.00 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7157395	9/21/99	48.27	$20,000

I have found the violation was very serious. I also have found that it was in part the result of Cannelton's failure to effectively oversee Wiggles' training of its employees. The violation was abated in good faith, and any penalty addressed will not affect the ability of Cannelton, which is a large company with a moderate history of previous violations, to continue in business. Given these factors and especially in view of Cannelton's shared negligence and a moderate history of previous violations, I conclude an assessment of $4,000 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment
7187482	9/21/99	77.404(a)	$20,000

I have found the violation was serious. I also have found it was, in part, the result of Cannelton's failure to meet its duty to ensure the equipment operated by its contractor was either safe or removed from service. The violation was abated in good faith, and any penalty assessed will not affect the ability of Cannelton, which is a large company with a moderate history of previous violations, to continue in business. Given these factors and especially in view of Cannelton's shared negligence and moderate history of previous violations, I conclude an

assessment of $1,500.00 is appropriate.

ORDER

Within 30 days of the date of this decision, Cannelton **SHALL** pay to the Secretary a total of $10,500.00 for the violations found above, and upon payment of the penalties this proceeding is **DISMISSED**.[18]

Payment may be sent to: Mine Safety and Health Administration, U. S. Department of Labor, Payment Office, P. O. Box 360250M, Pittsburgh, Pennsylvania 15251.

David Barbour
Chief Administrative Law Judge

Distribution:

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dcp

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[18]/ In issuing this order, I note that the Secretary chose to propose very substantial penalties for these violations. In so doing the Secretary presumably was attempting to "send a message" to Cannelton and to other production-operators that they must increase oversight of their contractors' compliance efforts and proactively encouraging compliance. While I do not disagree with the Secretary regarding production-operators overall responsibility for compliance and their need to effectuate that responsibility, I question whether the assessment of substantial penalties without a prior "warning" is equitable. It is clear from the testimony of Bowman and Hatfield that before the accident they discussed Cannelton's responsibility for contractors' violations including the operator's need for oversight (Tr. 272-273, 282-283, 296-297; 648-649). What is not clear from this record is whether there has been a prior consistent effort on MSHA's part to enforce oversight by Cannelton and/or other production-operators. For example, MSHA might have insisted that operators include in their training plans provisions for effective oversight . . . something MSHA apparently did not do when it came to Cannelton (Tr. 659), or MSHA might have sent cautionary letters to production-operators, something about which the record is silent.