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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 3, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. CENT 8-65-M

v.

MISSOURI ROCK, INC.

BEFORE: Ford. Chairman; Backley. Doyle. Lastowka and Nelson, Commissioners

DECISION

BY: Backley, Lastowka and Nelson, Commissioners

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977. 30 U.S.C. $ 801 et seq. (1982). involves three citations issued to Missouri Rock, Inc. ("Missouri Rock") alleging "significant and "substantial" violations of 30 C.F.R. $ 56.9003 for using Caterpillar 631C tractor-scrapers ("scrapers") without adequate brakes at Missouri Rock's Plant Co. 2. 1/ Commission Administrative Law Judge James A. Broderick determined that Missouri Rock violated section 56.9003 by failing to provide adequate brakes on the three cited scrapers and assessed civil penalties totaling S2.000.00. 10 FMSHRC 583 (April 1988)(ALJ). We subsequently granted Missouri Rock's petition for discretionary review. For the following reasons, we affirm the judge's decision.

Missouri Rock's plant No. 2 is a limestone quarry located in Clay County, Missouri. Missouri Rock uses three scrapers to remove the overburden (soil and unconsolidated rock) that overlies the limestone deposit. Each scraper is equipped with a large bowl, often called the pan, that scrapes the ground and scoops up the

overburden into the bowl as the scraper moves forward. An empty scraper weighs approximately 35 tons, while a scraper with a bowl fully

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1/ Section 56.9003. a mandatory safety standard for surface metal and non-metal mines, provides:

> Mobile equipment brakes.
>
> Powered mobile equipment shall be provided with adequate brakes.

loaded with overburden weighs over 70 tons. The scraper operator can raise and lower the hydraulically operated bowl and can exert positive pressure against the ground with the bowl by means of a lever in the operator's compartment. Each scraper is equipped with wheel brakes, often called service brakes, that are activated with a pedal in the operator's compartment.

On February 3, 1987, Eldon Ramage, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of Missouri Rock's Plant No. 2. During this inspection, Inspector Ramage requested that the operator of a scraper, identified by Missouri Rock as Unit No. 643, pull the machine forward and upon signal activate the brakes. The scraper operator dropped the bowl to the ground using the quick release lever and the scraper stopped. The inspector then directed the operator to stop the vehicle by using the wheel brakes. The scraper operator was unable to stop the scraper with the wheel brakes. This operator told the inspector that there was no air pressure to operate the wheel brakes. The inspector issued Citation No. 2846910 under section 104(a) of the Act. 30 U.S.C. $ 814(a), charging a violation of 30 C.F.R. $ 56.9003 for failure to provide adequate brakes on powered mobile equipment. The citation required that the service brakes be repaired by February 4, 1987. On February 20, 1987, the inspector modified the citation by changing the likelihood of an injury designation from "Unlikely" to "reasonably likely" and designating the violation as being of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

On February 25, 1987, Inspector Ramage returned to the mine. He asked that scraper No. 643 be tested and again found that the wheel brakes did not stop the scraper. He issued a section 104(b) order of withdrawal for failure to abate the previously cited violation. 2/ He also requested that the wheel brakes on the other two scrapers be tested. He found the wheel brakes to be inadequate on each and issued Citation Nos. 2846916 and 2846917 under section 104(a) of the Act charging significant and substantial violations of the same safety standard.

2/ Section 104(b) of the Act , 30 U.S.C. $ 814(b), states:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of

time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Before the administrative law judge, Missouri Rock admitted that the wheel brakes were not in working order on the three scrapers. It produced evidence to show that the bowl on each scraper serves as the primary brake and that such "brake" is fully adequate to stop the scraper in all operating situations. The inspector testified that the bowl will not adequately stop a scraper in all instances and that the safety standard requires that wheel brakes be adequate whenever the equipment is in operation.

In finding a violation of section 56.9003. Judge Broderick concluded that the term "brakes" in the standard refers to wheel brakes. 10 FMSHRC at 586-87. He held that the wheel brakes are required to be adequate (i.e., able to stop the equipment in a reasonable distance) and the fact that there are other effective means of stopping a scraper does not satisfy the safety standard. 10 FMSHRC at 587. He also determined that dropping the bowl is not a safe or effective means of stopping a scraper in all situations. Id.

On review, Missouri Rock contends that the bowl of a scraper is designed, manufactured and customarily used as the primary braking system on the scrapers at issue and is an adequate brake under the standard. It further contends that if a violation is found, the civil penalties ordered by the judge are excessive and should be reduced. The Secretary argues that the Commission should defer to its interpretation of the safety standard as expressed by the inspector and adopted by the judge. She states that the legislative history of the Act establishes that it was Congress' intention "that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor. Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 638 (1978). For the reasons set forth below, we conclude that substantial evidence supports the judge's finding that the scrapers were not provided with adequate hrakes and that the civil penalties assessed by the judge are also supported by substantial evidence.

The testimony of Inspector Ramage affords substantial evidentiary support for the judge's determination that the term "brakes" in the standard refers to wheel brakes. Although the term "brakes" is not defined in the Act or the Secretary's regulations, it is clear that the Secretary's interpretation of that term was as expressed by the inspector. When he asked the scraper operators to test the brakes during his inspection, he demanded that the service brakes be tested

not the pan of the scraper. Tr. 30-35 & 37. He did not consider the pan to have any bearing on the safety standard at issue. Tr. 83. When asked on cross-examination whether he had required that the pan be tested, he replied:

> [W]hen we check a piece of equipment for brakes, we're checking for brakes. It [does not] say check the pan. The standard that I -- in the normal procedure that we do, it does not say check the pan.

Tr. 97. In addition, the Operator's Guide, 631 Tractor Scraper, published by Caterpillar Tractor Company and introduced at the hearing, instructs

scraper operators to test the brakes when checking the controls of the scraper. Exhibit P-4 at p. 4. It is obvious from the context that this guide is referring to the service brakes and not to the pan. Finally, Inspector Ramage testified that in his inspections of 50 to 60 quarries twice a year during the five proceeding years, he had issued only one citation for inadequate brakes on scrapers and in his experience quarry operators usually keep such brakes in working condition. Tr. 44-47. 3/

The Secretary's interpretation of the term "brakes" in the standard to mean service brakes is a reasonable construction of section 56.9003. Because brakes are required to be "adequate" under the standard, it is an appropriate reading of the standard to direct this requirement to the service brakes as opposed to other parts of a scraper such as the pan. Under the interpretation proposed by Missouri Rock, the safety standard would not require that the service brakes designed and installed by the manufacturer function as an adequate brake if the vehicle could be stopped by other means. The standard does not require that powered mobile equipment be provided with an adequate stopping or braking method; it requires adequate brakes. It is also helpful to note that tractor-scrapers are a conventional type of powered mobile equipment manufactured and sold at the time this standard was promulgated. There is no evidence that the standard provides any exceptions for scrapers. We find the Secretary's interpretation of the standard to require adequate service brakes to be rational and reasonable notwithstanding the fact that, in some situations, other effective means may exist for stopping the equipment. 4/

On review, Missouri Rock has presented no compelling reasons why the Commission should not give weight to the Secretary's interpretation. It simply argues that because the pan will effectively stop the scraper, the pan is a brake under the standard. The administrative law judge rejected this argument. We believe it is appropriate to give weight to the Secretary's interpretation of the standard in this case because it is supported by the record and is a reasonable interpretation. See U.S. Steel Mining Company, 10 FMSHRC 1138 (1988).

Missouri Rock also challenges the judge's finding that dropping the pan is not a safe and effective means of stopping the scraper in all instances. The judge found that dropping the pan would not be a safe or

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3/ Our dissenting colleague Chairman Ford states that Inspector Ramage personally had not operated a model 631 Caterpillar scraper.

We note that personal experience in operating every model of every type of regulated equipment realistically cannot be expected and is not required of MSHA inspectors. We note also that in addition to his experience gained through formal training and 10 years of inspection activity, Inspector Ramage has, in fact, personally operated scrapers. Tr. 75.

4/ The Secretary does not take the position that the pan should never be used to stop a scraper or that using only the service brakes is always advisable. She argues, however, that the standard requires that the service brakes be available for use should the need arise. She maintains, for example, that situations will arise in which service brakes will be necessary for the supplemental braking effect they may provide when used in conjunction with the pan. Sec. Br. 9 & 11.

effective method of stopping the scraper (1) on hard packed surfaces, (2) if the scraper engine fails while ascending a hill or (3) if buried rock is present. Missouri Rock contends that substantial evidence does not support the judge's finding and points to the extensive evidence it presented that the pan will adequately stop the scraper in each of the above-described situations.

We find that substantial evidence was presented by the Secretary to support the judge's findings. Although there also is evidence in this record to the effect that the pan will stop the scraper in these situations. The judge credited the testimony of Inspector Ramage that the pan alone may not effectively stop the scraper in all instances including the situations relied upon by the judge. 10 FMSHRC at 587; Tr. 38, 49-50. 134-35. I find nothing in the record that would warrant overturning the judge's finding in this regard. The inspector's ten years of experience as a surface mine inspector provides a substantial level of experience to support his testimony as to the potential hazards of operating a scraper without service brakes.

Substantial evidence has been defined to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. V. NLRB, 305 U.S. 197, 229 (1938). Taking into account the evidence in the record which detracts from the judge's findings, we conclude that the record supports the judge's conclusion that the pan will not effectively stop the scraper on all instances. The Commission may not substitute a competing view of the facts for an administrative law judge's reasonable factual determination. Universal Camera v. NLRB, 340 U.S. 474, 488 (1951); Donovan ex rel. Chacon v. Phelps Dodge Corp., 709 F.2d 86, 94 (D.C. Cir. 1983).

Finally, Missouri Rock argues that the judge's decision should be reversed because the proposed penalties were improperly assessed under the Secretary's "special assessment" provision of 30 C.F.R. $ 100.5 and are in any event excessive. In his decision, the judge held that the fact that the Secretary used her special assessment provisions to be irrelevant since the Commission possesses de novo authority in assessing civil penalties. 10 FMSHRC at 588.

The Commission has previously determined that the Secretary's penalty regulations are not binding on the Commission. Sellersburg Stone Co., 5 FMSHRC 287 (1985), aff'd, 736 F.2d 1147 (7th Cir. 1984). The Commission has held that a mine operator may prior to hearing raise and, if appropriate, be given the opportunity to establish,

that in proposing penalties the Secretary failed to comply with her Part 100 penalty regulations. Youghiogheny & Ohio Coal Company, 9 FMSHRC 673, 679-80 (1987). Given the Commission's independent penalty assessment authority, the scope of the inquiry would be whether the Secretary had arbitrarily proceeded under a particular provision of her penalty regulations.

In the instant proceeding, Missouri Rock did not seek resolution of this issue prior to hearing. In its post-hearing brief, Missouri Rock simply asked that the proposed penalties be "reduced to nominal penalties under the regular assessment provision (without assessing respondent, as petitioner apparently proposed to do, with excessive or unwarranted points in the areas of negligence, good faith, likelihood of occurrence and gravity of injury)." Missouri Rock Br. to ALJ at 16. Since the judge independently assessed

civil penalties taking into consideration the criteria set forth at section 110(i) of the Act (30 U.S.C. $ 820(i)), the controlling issue is whether the judge did so properly rather than whether the Secretary failed to comply with her penalty regulations.

When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. Pyro Mining Co., 6 FMSHRC 2089. 2091 (September 1984). The judge considered the evidence relating to the violations and found that the violations were moderately serious, that the violations found on February 25. 1987 (Citation Nos. 2846916 & 2846918) were the result of Missouri Rock's gross negligence and the violation found on February 3 (Citation No. 2846910) to be a result of Missouri Rock's ordinary negligence. He also found that Missouri Rock showed good faith abatement with respect to the violations of February 25 but that it did not demonstrate good faith in attempting to achieve rapid compliance of the first violation until a section 104(b) order was issued. We find that the civil penalties totalling S2,000 imposed by the judge for the violations of section 56.9003 are supported by substantial evidence, are consistent with the statutory penalty criteria and do not constitute an abuse of discretion by the judge.

For the foregoing reasons, the decision of the administrative law judge is affirmed.

Chairman Ford, dissenting:

If the standard at issue required that "powered mobile equipment shall be provided with adequate service brakes", I would join the majority in affirming the judge's decision. Likewise, had this case arisen under the current brake standard which supersedes and clarifies the one cited by the inspector, a finding of violation would have been appropriate. 1/ Given, however, the vagueness of the brake standard, as manifested in the widely divergent interpretations advanced by the parties, and the unique design of the scraper-tractors cited, I do not believe the Secretary has met her burden of proving a violation. Therefore, I respectfully dissent.

The premise underlying the judge's decision is that 30 C.F.R. 56.9003, requiring that "powered mobile equipment shall be provided with adequate brakes", applies only to the service or wheel brakes of the scraper-tractors cited. While the judge found that the bowl or pan on a scraper-tractor could be used to effectively stop the equipment in many circumstances, he nevertheless found that the bowl by itself could not be considered a means of compliance with the standard. I would reverse the judge on the ground that his basic legal conclusion regarding the application of the standard is erroneous.

Section 56.9003 does not refer to "service brakes" nor is the term "brakes" defined in 30 C.F.R. Part 56. The Secretary offered no official interpretation of the standard, nor could she point to any Commission or court precedent that might shed light on the meaning and scope of section 56.9003. The Secretary does, however, urge upon the Commission the opinion of her inspector as to what the standard means and argues that the Commission should give deferential weight to his interpretation of the standard. Unfortunately

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1/ 30 C.F.R. 56.14101, promulgated August 25, 1988 (53 FR 32496, 32522) provides in part:

"(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels...

(3) All braking systems installed on the equipment shall be maintained in functional condition.

(b) Testing. (1) Service brake tests shall be conducted when

an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair."

for the Secretary, however, the inspector readily admitted: that he was "not a brake expert" (Tr. 125); that he had never operated a 631 scraper-tractor (Tr. 75-76); 2/ and that his training with respect to braking systems consisted of reviewing a demonstration board at MSHA's Training Academy which differentiated air brakes from hydraulic brakes (Tr. 24). I strongly disagree with the majority's view that the inspector's ten years' experience of inspecting 50-60 quarries qualifies him as an expert on "brakes" or as an expert on interpreting section 56.9003. 3/

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2/ I believe the majority misperceives the basis for my reliance on this admission by the inspector. Obviously, a mine inspector need not be a qualified operator of every piece of mobile equipment he might have occasion to inspect. The issue, here, however, is the level of expertise the inspector brings to bear on interpreting the brake standard, generally, and on applying it to the components of the particular model of equipment he cited as not being in compliance with the standard. As to his "hands on" familiarity with the operation of the tractor-scrapers cited the complete testimony is as follows:

> Q. And I listened closely and I didn't hear you tell us that you had any training in 631 C-scraper operations, is that true?
>
> A. I am not a qualified operator, no.
>
> Q. Okay. Have you ever gotten on one of those 631 C-scrapers, and operated the wheel brakes?
>
> A. Not a 631. I have operated scrapers, but not 631's.
>
> Q. Okay. I'm not talking about any other scrapers, or any other equipment. I'm talking about 631 C-scrapers?
>
> A. We're not allowed to operate anyone's equipment.
>
> Q. Have you ever gotten on them even, and used the bowl, or the pan, or used that lever that operates the bowl, or the pan?
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> A. We do not interfere -- or bother people's equipment. Tr. 75-76.

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3/ The inspector's experience might qualify him to speak with

some authority to whether a particular braking system is adequate, i.e., capable of stopping equipment within a reasonable and safe distance, but, as will be shown, infra, his opinions as to the adequacy of the bowls on the scraper-tractors was highly speculative and lacking any empirical basis.

Poised in opposition to the inspector's testimony is that of: (1) representative of a large distributor of the equipment cited who had 12-14 years experience with scraper-tractors and extensive training in their operation and capabilities; (2) a quarry supervisor with ten years experience operating scraper-tractors; (3) a safety director with four years experience operating scraper-tractors; and (4) a mechanic with six to seven years experience both operating and repairing scraper-tractors. All testified that the pan or bowl constituted the primary braking system on the equipment. 4/ Mr. Messerli, territorial manager for the Caterpillar distributor that supplied the scraper-tractors, testified that the distributor's training and demonstration personnel taught customers to rely on the pan or bowl as the primary braking system on the equipment. Tr. 189-190. Furthermore, Respondent's Exhibit 1 clearly indicates that the local Operating Engineer's Union apprentice training program stresses use of the pan or bowl as the primary braking system on scraper-tractors. See also Tr. 251-252. One can assume that union members so trained are employed by mining and construction operations other than Missouri Rock's quarry.

This Commission has on numerous occasions applied what has come to be known as the "reasonably prudent person" test in determining whether vague or broadly drawn standards afford reasonable notice of what is required or proscribed. Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983).

In U.S. Steel, supra, the issue was whether or not berms along a mine roadway were "adequate" for purposes of the standard, 30 C.F.R. 77.1605(k). In essence, the Commission held that the adequacy of a berm must be determined "by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute." Id. 5. In setting an "objective standard" the Commission held it appropriate to consider "accepted industry standards...considerations unique to the mining industry, and the circumstances at the operator's mine." Id.

Applying the reasonably prudent person test here, one could not avoid concluding that at Missouri Rock's facility and at facilities utilizing the type of scraper-tractor cited and employing trainees of the Operating Engineers program, the common practice was to utilize the pan or bowl as the primary braking system on the units. Furthermore, both the judge and the Secretary acknowledged that in certain instances the pan or bowl would be necessary to meet the objective of the standard -- safely stopping the equipment within a

reasonable distance. Tr. 118, 128-129; Sec. Br. 9, fn. 8; 11, fn 12; 10 FMSHRC 587 I would therefore find as a matter of law that pans or bowls on the

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4/ The record establishes that the bowl or pan can be applied as a braking mechanism in two ways. It can be gradually lowered against the ground with up to 82,000 pounds positive pressure to slow the scraper-tractor, or it can be "quick-dropped" to provide immediate stopping capability in the event of an emergency. The bowl is controlled by a lever readily at hand in the operator's compartment. Tr 177, 172-3, 201, 203. We are dealing here with a fairly sophisticated braking system not dependent upon the "ingenuity of the employee" or the "whimsical imagination of the operator" to stop the equipment. Secretary of Labor v. Brown Brothers Sand Co., 9 FMSHRC 636, 656-57 (March 1987).

scraper-tractors can appropriately be considered "brakes" for purposes of section 56.9003. With that established, the issue becomes whether or not those "brakes" are adequate for purposes of the standard. In that regard the Secretary has failed to show that the bowls were inadequate.

Once again the Secretary's case rests entirely on the testimony of the inspector which can be summarized as follows:

> If you're maneuvering in an area where there -- you've got hard surface, or real dry hard packed surface, the dropping of the pan may not provide the immediate braking action that would be required, or may be necessary to stop -- keep from striking someone, or running into another piece of equipment."
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> [A]scending a steep grade or a grade, and the engine fails, dies, or anything, he has got no brake whatsoever if he don't have a service brake."
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> If the scraper was moving at any speed -- I'm saying five to ten miles per hour or maybe faster, then if they were in an area where there could be some rock buried below the surface, and you dropped the pan, that pan -- that scraper is going to come to a real abrupt halt, and if the operator don't have his seat belt on, he could suffer substantial injuries. Even with his seat belt on, he is going to be pitched forward with considerable force. Tr. 48-50.

Generally speaking the testimony is speculative in nature -- interspersed with "may" or "could". Furthermore, at no time did the inspector verify his conjectures by asking the equipment operators to demonstrate the use of the bowls in such circumstances. More particularly, Missouri Rock clearly rebutted the inspector's testimony in each of the three cases.

First, Messrs Case, Gordon and McClanahan all testified that a test of the braking capacity of the bowl on a hard packed surface was undertaken at the mine site. Test results indicated that the bowl stopped the equipment at full speed in five to six feet while fully functioning wheel brakes required 12 feet. Tr. 316-17; 370-71. Masserli testified that if the engine died while the equipment was ascending a steep grade the wheel brakes would soon overheat so that only the bowl would be available as a

brake. The hydraulic system for the bowl, however, continues to operate whether or not the engine is running. Tr. 172, 178. Third, Masserli and Ellis both testified that equipment operators are required to use seat belts at all times. Tr. 186, 254. Indeed, Masserli testified that since operators are subjected to a great deal of bounce while operating the equipment, they have to be belted into the seat in order to maintain control of the units. Tr. 187. Given the overwhelming rebuttal evidence presented by Missouri Rock, I conclude that substantial evidence does not support the judge's holding that operation of the bowl is not "safe or effective" in those circumstances speculated upon by the inspector. 10 FMSHRC 587.

One other aspect of the "adequacy" issue strikes me as contradictory. If one assumes that the standard applies only to the service or wheel brakes and not the bowl, then it appears that Missouri Rock would have been found in violation of the standard even if the wheel brakes had been well-maintained. All parties and the judge agree that the wheel brakes are limited by their design capability inasmuch as they will not safely and effectively stop a fully loaded unit going downhill on a steep grade; the bowl or pan is best utilized in such circumstances (Tr. 118-20, 177-78, 258, 372-3; Sec. Br. 9, fn. 8; 11, fn. 12; 10 FMSHRC 587). Thus, even fully operational wheel brakes could not be considered adequate for all purposes under section 56.9003. On the other hand, extensive and uncontroverted evidence establishes that the pan or bowl would be adequate in all off-road applications that might arise in the Missouri Rock quarry. 5/

In summary, I would reverse the judge with respect to his legal assumption that the standard applies only to the wheel or service brakes and not the pans or bowls of the scraper-tractors. I would also reverse his holding with respect to the adequacy issue since substantial evidence does not support his holding that the pans are not safe and effective.

Since the majority affirms the judge on both matters, I must respectfully dissent.

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5/ Missouri Rock acknowledges that the wheel brakes would be necessary for transporting a scraper-tractor between jobs on public roads and would have to be fully operational in those circumstances. Pet. for Discr. Rev. at 3; Tr. 166-171.

Commissioner Doyle, dissenting:

In his decision, the administrative law judge examined the term "brake" as defined by two sources. He noted that the American Heritage Dictionary of the English Language defined brakes as "[a] device for slowing or stopping motion, as of a vehicle or machine, especially by contact friction" and that A Dictionary of Mining, Mineral and Related Terms defined the term in part as "[a] device (as a block or band applied to the rim of a wheel) to arrest the motion of a vehicle, a machine or other mechanism and usually employing some sort friction." He then found that the testimony in this case established that dropping the pan is the usual method of stopping the scrapers in issue and that in many cases that is the quickest and safest way to stop them. Based solely on the inspector's testimony, however, he found several instances in which the pan would not be effective in stopping the scrapers and then concluded that the term "brakes" in the standard refers only to wheel or service brakes. The majority finds that substantial evidence was presented by the Secretary to support the judge's findings of fact. I disagree.

The only evidence of record to support the judge's finding that there were instances in which dropping the pan is not effective is the opinion testimony of a non-expert witness (Inspector Ramage). The inspector testified that his training with respect to brakes consisted of learning at MSHA's Training Academy to differentiate air and hydraulic brake systems (Tr. 24, 125) and he readily admitted that he was "not a brake expert." (Tr. 125). Yet the judge permitted him to testify, and credited his testimony, as to what he thought would happen if attempts were made to stop the scraper when operating on pavement or other hard surfaces, when the engine failed while ascending a hill, when traveling backwards downhill or in the case of buried rock or a limestone knoll. This testimony was not based on tests that the inspector had conducted, nor on tests he had observed. It was not based on his own experience in operating a scraper nor on his study of the subject. In fact, the record gives no indication that it had any basis at all. For that reason, the inspector's testimony should have been accorded no weight by the judge. Instead, the judge credited it and based his findings of fact and his subsequent conclusion that the standard refers to the wheel or service brakes on this testimony. I believe that he erred in relying on the opinion testimony of a nonexpert witness and that, without that testimony, his finding that there were instances when the pan would not be effective in stopping the scraper is without record support.

The majority accepts the Secretary's argument that her

interpretation of the standard as meaning only service brakes is a reasonable one that should be accorded deference. I disagree.

This case is unlike Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) cited by the Secretary in support of her position. In that case the agency issued a regulation interpreting a statute and it was the agency's official interpretation of the statute as set forth in the regulation that was at issue. This case is also unlike U.S. Steel Mining Company, 10 FMSHRC 1138 (1988) cited by the majority. In that case the operator had longstanding notice of the Secretary's consistent enforcement of the standard. Here the Secretary introduced no evidence of consistent (or previous) enforcement of the standard to apply only to service brakes nor did she even advance this interpretation in her brief to the administrative law judge. The Secretary did not submit any official MSHA interpretations of the regulation, such as interpretive bulletins or policy manual positions on the subject. Rather than any official interpretation, the record before us presents only a personal interpretation of one MSHA inspector.

The majority states that "it is clear that the Secretary's interpretation of the term was as expressed by the inspector" and they then recount the inspector's actions and his testimony as to his state of mind ("[h]e did not consider the pan to have any bearing on the safety standard at issue") as evidence of the Secretary's interpretation. It is perhaps more accurate to say that the Secretary has subsequently fashioned her interpretation of the term to coincide with the inspector's actions and the judge's conclusions rather than the Secretary having arrived at her interpretation, the inspector having then acted on the basis of that interpretation and the judge having then properly given deference to it. Under the circumstances of this case, I do not believe that the Secretary's after the fact (and after the hearing) interpretation is a reasonable action to which deference is owed. To find otherwise permits the Secretary to adopt ex post facto any number of diverse interpretations and enforcement actions by her inspectors with no forewarning to operators of what those interpretations or enforcement actions might be. Safety is better served if operators know in advance what the law requires of them.

Accordingly, I would reverse the judge's finding of violation.

Joyce A. Doyle, Commissioner

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