

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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FEB 02 2018

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2015-383
	:	
v.	:	
	:	
KENTUCKY FUEL CORPORATION	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY: Althen, Acting Chairman; Jordan and Cohen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The case involves an accident at Kentucky Fuel Corporation’s Beech Creek Surface Mine, in which a truck rolled backward and injured a mechanic who was working on the vehicle. The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Kentucky Fuel a citation alleging a failure to block machinery against motion while conducting repairs, in violation of 30 C.F.R. § 77.404(c).¹

MSHA designated the alleged violation as significant and substantial (“S&S”)² and the result of high negligence, and the Secretary of Labor (“Secretary”) proposed a specially assessed penalty of \$52,500. After a hearing on the merits, an Administrative Law Judge issued a decision affirming the citation as issued and assessing the proposed penalty. 38 FMSHRC 2905 (Dec. 2016) (ALJ).

¹ The standard states: “Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.” 30 C.F.R. § 77.404(c).

Docket No. KENT 2015-383 also contains a second citation related to these events, issued pursuant to section 103(k) of the Mine Act. 30 U.S.C. § 813(k). This second citation was affirmed by the Judge and is not contested on appeal.

² The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

The only issue before the Commission is the negligence determination.³ We affirm in result the Judge's finding of high negligence. The Judge reasonably found that Kentucky Fuel failed to provide materials necessary for the miner to comply with the mandatory safety standard.

I.

Factual and Procedural Background

A. Accident and Subsequent MSHA Investigation

On the evening of September 23, 2014, the driver of an autocar grease truck at Kentucky Fuel's Beech Creek Mine discovered that the vehicle would not start and called for a mechanic. When the mechanic arrived, he lay down under the truck behind the driver's side front wheel and asked the driver (who was still in the cab) to try starting the truck. Although crib blocks apparently were available, the miner did not place any between or on either side of the tires. The starter would not turn over, so the mechanic hit the starter with a hammer to move it into a better position. The truck immediately started, and rolled back approximately two feet; the front tire rolled into the mechanic, causing several broken ribs and a punctured lung. The mechanic was airlifted to a hospital. He eventually recovered fully and returned to work. Only the driver and the mechanic were present at the time of the accident. Tr. 19-24, 30.

Kentucky Fuel conceded that the truck was not blocked against motion when the accident occurred. Tr. 21. Shortly afterward, foreman Steve Ritz placed wooden crib blocks between the truck's rear tires. Kentucky Fuel's Vice President of Health and Safety, Pat Graham, visited the accident site later that evening to preserve the scene, leaving the crib blocks in place. MSHA Inspectors arrived on site the next day and replaced the crib blocks with wheel chocks. Tr. 19-24, 30.

After an investigation, MSHA Inspector Brian Robinson issued Citation No. 8299655. The citation alleges that the mechanic failed to block the truck against motion before conducting repairs, and designates the violation as highly negligent. The citation notes that suitable wheel chocks were not available at the mine and had to be provided by MSHA. Gov. Ex. 3. At the hearing, Robinson testified that the high negligence designation was due to Kentucky Fuel's failure to provide proper blocking materials, i.e., wheel chocks. He conceded that crib blocks may be sufficient for certain types of vehicles, but stated that wheel chocks were required to properly block this type of truck against motion. The truck at issue had large tires and a gross weight vehicle rating of 48,000 pounds. Robinson explained that curved wheel chocks better distribute weight and energy, while crib blocks (which have 90 degree angles) are "apt to scoot" when used to block a truck of this weight and tire diameter. Tr. 30-32, 45-46; *see* Gov. Exs. 6, 9 (photographs of crib blocks and wheel chocks).

³ Kentucky Fuel petitioned for review of the specially assessed penalty, as well as the Judge's negligence determination. The Commission accepted review of the negligence issue, but denied review of the penalty issue.

Robinson testified that wheel chocks are extremely common on surface mines, yet were not available at this mine. He did not see any wheel chocks on-site, and when interviewed, mine personnel did not know where wheel chocks were located. He concluded that, since the necessary tools to properly block the truck (wheel chocks) were not available, Kentucky Fuel should have foreseen the mechanic's failure to properly block the truck. Tr. 30-31, 41-42, 49, 59. He stated that the citation was intended to "get [miners] the supplies they need to do the jobs properly." Tr. 44-45.

Mark Huffman, Kentucky Fuel's Director of Health and Safety, did not confirm or deny the absence of wheel chocks; instead, he stated that wooden crib blocks were available at the mine and can effectively block trucks against motion when deployed properly. Tr. 149, 152, 161. He also testified that the foreman had no reason to expect the mechanic to fail to block the truck against motion, because the mechanic was properly trained. Tr. 147-48.

Meanwhile, MSHA Inspector Melvin Wolford examined the truck. He testified that the brakes set and released properly, but had several deficiencies that would have prevented the truck from stopping under accident conditions, as well as an inoperative backup alarm.⁴ Wolford conducted a "function" test of the truck and found that when the conditions of the accident were replicated, the brakes did not hold. Tr. 64-71. Conversely, Huffman testified that Kentucky Fuel's own inspection of the truck revealed only a broken spring on a brake canister, and that a "pull-through" test established that the brakes were working properly. Tr. 139-40, 151.

B. Judge's Decision and Arguments on Appeal

The Judge affirmed the citation in its entirety. He noted that Kentucky Fuel stipulated to the violation, and found that the violation was S&S because the failure to block against motion increased the likelihood of a fatal crushing injury. 38 FMSHRC at 2916, 2918. Kentucky Fuel does not contest the violation or S&S designation.

The Judge also concluded that the violation was attributable to high negligence. Crediting Inspector Robinson's testimony, the Judge found that wooden crib blocks were insufficient for this type of vehicle, and that proper blocking materials (wheel chocks) were not readily available. He also found that Ritz and Graham's reliance on crib blocks rather than wheel chocks was persuasive evidence that mine personnel were not trained in proper blocking techniques. Finding that the training and materials supplied by Kentucky Fuel were plainly inadequate to meet the requirements of the safety standard, the Judge concluded that Kentucky Fuel's conduct fell far short of its duty of care. *Id.* at 2919-22. The Judge also credited the inspectors' testimony regarding the condition of the truck's braking system and found that Kentucky Fuel failed to meet its duty of care by failing to remedy these defects. Taking the deficiencies of the truck together with the inadequate training and materials, the Judge concluded that the mechanic's conduct was reasonably foreseeable and that Kentucky Fuel had been highly

⁴ These deficiencies were documented in a citation (not contested here) which alleges a failure to maintain the truck in safe operating condition. Tr. 25-26. The deficiencies included malfunctioning brake canisters, grease contamination on two of the brake drums, and an air leak in a brake chamber. Tr. 64-65.

negligent. *Id.* at 2923-25. Based on aggravating factors including high negligence and high gravity, the Judge assessed a penalty of \$52,500, the amount proposed by the Secretary.

In its petition for discretionary review, Kentucky Fuel claims that the record shows no evidence of improper training, supervision, or discipline, and therefore the Judge's finding of high negligence is not supported by substantial evidence. PDR at 3-6. Kentucky Fuel also contests the Judge's factual finding regarding the insufficiency of crib blocks and states that the issue of blocking material is irrelevant to the negligence analysis. *Id.* at 6.

II.

Disposition

The issue in this matter is whether the Judge erred in concluding that the mechanic's failure to block the truck against motion while conducting repairs was attributable to high negligence on the part of Kentucky Fuel. The Commission applies the substantial evidence test when reviewing a Judge's conclusion regarding an operator's negligence. *See, e.g., Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1976 (Aug. 2014). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). As discussed further below, the record supports a finding that Kentucky Fuel's failure to provide effective blocking materials constituted a significant breach of its duty of care in this instance.⁵ Accordingly, we affirm the Judge's high negligence determination.

The Commission employs a traditional negligence analysis, under which an operator is negligent if it fails to meet the requisite standard of care accompanying the mandatory standard at issue. The Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulations." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2367 (Sept. 2016), *citing Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-65 (D.C. Cir. 2016). The "gravamen of high negligence is that it 'suggests an aggravated lack of care.'" *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (citation omitted).

Although the conduct of a rank-and-file miner is not imputable to the operator for negligence purposes, "[t]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15-16 (Jan. 1983). To determine whether the operator has met its duty of care in such circumstances, we look at whether the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. *Knight Hawk*, 38 FMSHRC at 2369. For example, "we

⁵ An inherent element of the standard at issue is that the machinery be *effectively* blocked against motion. To hold otherwise would run contrary to the plain meaning and purpose of the standard, which is to prevent motion while repairs are conducted. *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998-99 (June 1997) (holding that a statute that requires conveyor belts to be "equipped" with slippage and sequence switches plainly requires that the switches be functional).

look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard [at] issue." *A.H. Smith Stone*, 5 FMSHRC at 15-16.

Here, the Judge determined based on the record that the materials needed to properly block the vehicle against motion were not available at the mine site, mine personnel had not been adequately trained in blocking techniques, and the truck's brake system was not adequately maintained. Based on these findings, he concluded that the mechanic's violative conduct was foreseeable, and that Kentucky Fuel's conduct fell far short of its duty of care. 38 FMSHRC at 2919-25. Without addressing the issues of truck maintenance or training, we find that the record supports the Judge's findings regarding the unavailability of effective blocking materials and the foreseeability of the mechanic's conduct.⁶ On these narrow grounds, we conclude that substantial evidence supports a finding of high negligence.⁷

The record supports the Judge's factual finding that materials necessary for compliance were not available to the mechanic. Inspector Robinson testified that the truck was too large (in both weight and tire diameter) to be effectively blocked against motion by a crib block. He explained that, given the difference in shape and resulting difference in weight distribution, a crib block would be "apt to scoot" while a wheel chock would hold the vehicle. Tr. 31-32. The Judge found that a crib block could not effectively block a truck of this type. 38 FMSHRC at 2921. The Judge found Inspector Robinson's testimony in this regard to be "persuasive." *Id.* Conversely, Safety Director Huffman stated more generally that properly configured crib blocks can be very effective at blocking vehicles against motion. Tr. 149. A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). There is no basis here to overturn the Judge's decision to credit Inspector Robinson regarding the efficacy of various blocking materials.

⁶ While there may be some question as to whether the Judge properly considered the condition of the truck in his negligence analysis, we need not address that issue. On appeal, Kentucky Fuel has not challenged (or indeed mentioned) the Judge's finding regarding the truck's condition and its effect on the negligence determination. Regardless, the issue is not determinative.

⁷ Commissioner Cohen agrees with Commissioner Young's concurring opinion that in analyzing the foreseeability of the accident, the Judge considered the condition of the truck's braking system. Commissioner Cohen further agrees with Commissioner Young's conclusion that the very poor condition of the brakes made it more likely that the truck would move because the brakes were incapable of holding it. Hence, Commissioner Cohen agrees that the inadequate maintenance of the truck's brakes was relevant to the citation issued for failing to block the truck against motion, and to the degree of Kentucky Fuel's negligence in this matter. Nevertheless, Commissioner Cohen joins the majority opinion because Kentucky Fuel's failure to provide adequate materials to block the truck against motion in the form of wheel chocks is sufficient, by itself, to establish high negligence.

Substantial evidence supports the Judge's finding that wheel chocks (or something more than crib blocks) were necessary to effectively block this type of vehicle against motion.⁸

The Judge also found that wheel chocks were not available to the mechanic, and substantial evidence supports that finding. Inspector Robinson testified that wheel chocks were not present at the mine; he did not see any on-site, and mine personnel interviewed by the inspector did not know where wheel chocks were located. Tr. 30-31, 41-42, 49, 59. When Safety Director Huffman was asked whether there were wheel chocks on the property, he did not answer directly, stating only that crib blocks were available. Tr. 152-53. Considering the testimony of Inspector Robinson and Safety Director Huffman, the record reasonably supports a finding that wheel chocks were not available.

Taken together, these facts support a finding that Kentucky Fuel was highly negligent. As Inspector Robinson noted, operators are responsible for supplying miners with safety equipment. Tr. 49. We look to the actions of a reasonably prudent operator to determine duty of care. *Knight Hawk*, 38 FMSHRC at 2367. A reasonably prudent operator would provide materials necessary for compliance with safety standards; the record here shows that Kentucky Fuel failed to do so. Moreover, this was a particularly significant breach of the operator's duty of care. Failing to provide materials necessary for compliance means that a miner *cannot* comply with the safety standard. Kentucky Fuel's failure to ensure that proper blocking materials were available rendered the mechanic's violative conduct reasonably foreseeable. This reasonably supports a finding that Kentucky Fuel was highly negligent in failing to provide materials necessary for compliance with the standard.

We reject Kentucky Fuel's argument that the issue of blocking material is irrelevant to the negligence analysis. PDR at 6. The standard requires vehicles to be *effectively* blocked against motion while repairs are conducted. *See supra* note 5. The availability of proper materials to comply with the standard, i.e., materials adequate to effectively block the vehicle against motion, is clearly relevant to whether the operator met its duty of care. If an operator fails to supply the materials that a reasonably prudent operator would have supplied to ensure the truck is performing safely, it cannot avoid responsibility when a miner uses inadequate or no materials.⁹

⁸ The Judge explicitly *did not* find that crib blocks are always inadequate to block a truck against motion. 38 FMSHRC at 2921. Neither do we. As Inspector Robinson and the Judge acknowledged, properly configured crib blocks may be sufficient to satisfy the requirements of the standard in some situations. *Id.*; Tr. 46. We affirm the Judge's finding that wooden crib blocks were insufficient *in this instance*, given the type of truck at issue and the inspector's persuasive testimony.

⁹ Acting Chairman Althen observes that in this case the Judge was persuaded by the inspector's testimony that "wheel chocks are on nearly every mine site he visits," 38 FMSHRC at 2922 (quoting Tr. 49), and Kentucky Fuel did not argue in its PDR that a reasonable operator would not have known that wheel chocks were necessary to block the autocar grease truck against motion. Therefore, we do not deal with an argument that supplying chocks for blocking movement of this type of truck was not an action that would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant

With respect to Kentucky Fuel's argument that there is no specific evidence to support a finding of inadequate training, supervision, or discipline, the outcome in this case flows naturally from the absence of sufficient blocking materials and is not dependent upon adverse findings on these issues.¹⁰ Considering the totality of circumstances, Kentucky Fuel's failure to provide effective blocking materials is fully sufficient under the substantial evidence test to sustain a finding of high negligence. In light of the absence of materials the Judge reasonably found essential for safe performance of the work, the best trained and supervised mechanic could not have performed the job safely.¹¹

As a final matter, we acknowledge the seriousness of the mechanic's actions in failing to use any material to block the truck against motion while conducting repairs. However, that does not negate Kentucky Fuel's failure to meet its duty of care. The issue in this matter is whether Kentucky Fuel was highly negligent in failing to take reasonable steps to prevent the mechanic's violative conduct. The record supports a finding that due to Kentucky Fuel's actions, the mechanic *could not have* properly blocked the truck against motion, regardless of his intentions.

In sum, substantial evidence supports the Judge's factual findings that wheel chocks were necessary for compliance with the safety standard in this instance, yet Kentucky Fuel failed to ensure that they were available. This failure rendered the mechanic's violative conduct reasonably foreseeable. Given the importance of providing materials necessary for compliance, the record reasonably supports the Judge's finding that Kentucky Fuel fell far short of its duty of care, i.e., it displayed the "aggravated" lack of care required for high negligence. Based on the evidence regarding Kentucky Fuel's failure to provide proper blocking materials, we find that substantial evidence supports the Judge's conclusion regarding high negligence.

facts, and the protective purpose of the regulation. One may imagine a case in which an operator would argue that it reasonably did not and reasonably should not have known that certain material or equipment was necessary. Such circumstances would raise different negligence and/or fair notice issues. *Cf., e.g., Hecla Ltd.*, 38 FMSHRC 2117, 2126 (Aug. 2016) (holding that an operator's failure to perform a geomechanical analysis was not a violation where a reasonably prudent operator would not have known that such an analysis was required).

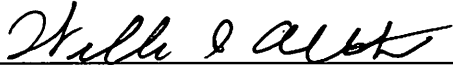
¹⁰ Kentucky Fuel suggests that direct evidence such as training records was required. However, the Commission has held that the substantial evidence standard "may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *see also Black Beauty Coal Co.*, 703 F.3d 553, 560-62 (D.C. Cir. 2012) (finding inadequate training based solely on indirect evidence). Inferences are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res.*, 6 FMSHRC at 1138.

¹¹ The evidence regarding supervision was essentially limited to an observation that the foreman was not present when the accident occurred, which the Judge found to be an inadequate defense. Regarding discipline, although Kentucky Fuel's Post-Hearing Brief claimed that the mechanic was admonished, there was no actual evidence of this in the record. 38 FMSHRC at 2923.

III.

Conclusion

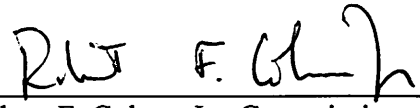
For the foregoing reasons, we affirm the Judge's determination that Citation No. 8299655 was attributable to high negligence.



William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Robert F. Cohen, Jr., Commissioner

Commissioner Young, concurring in the result:

I agree that the Judge's decision should be affirmed, but I disagree with the reasoning. We have noted that negligence is determined holistically. Having approved of that formulation, we cannot unbundle the Judge's decision from his reasoning, as the majority has done, because the Judge has given no specific weight to any of the conditions he found noteworthy in finding high negligence here.

The Judge properly noted that the Commission is not bound by MSHA's Part 100 negligence formula. 38 FMSHRC at 2919-20. However, the Judge's high negligence determination did not rest on the sole basis asserted by the majority, the failure to provide proper materials for blocking truck wheels during maintenance. Instead, the Judge relied upon a variety of factors to support his conclusion.

If the mere failure to provide wheel chocks was sufficient to persuade the Judge, one assumes he would have said so, rather than expounding for several pages on other conditions that he deemed relevant. In particular, the Judge dedicates nearly half of his negligence discussion to the condition of the truck and its impact on the "foreseeability" of the rank-and-file miner's violation of the standard requiring the equipment to be braked against movement.

The Judge's focus is on the foreseeability of the accident. But the negligence adheres to the violation itself—i.e., the failure to block the truck against movement. This does not mean that the condition of the truck is irrelevant to the violation. But the Judge—in a departure from an otherwise exemplary opinion—appears to have misunderstood the Secretary's rationale for including the truck's condition in its argument on this violation.

In fact, the Judge himself questioned the relevance of the Secretary's evidence about the condition of the truck, which was the subject of a distinct and uncontested citation for failure to properly maintain the truck. Tr. 26-27. In response, counsel for the Secretary explained that the condition of the truck made it more likely that the truck would move because the brakes were incapable of holding it. Tr. 27. Counsel for the Secretary said that "because the truck was in bad condition to begin with, that it wasn't just the—the failure to block it was maybe the last step in the chain which caused the injury." Tr. 27.

Thus, the Secretary made clear that the condition of the brakes was a factor in the accident. However, the failure of the brakes in the accident also materially contributed to the violation. We know that the standard was violated here—not merely because the operator conceded the violation, but because the truck was demonstrably not blocked from unsafe movement when it rolled onto the mechanic working beneath it.

Thus, the brakes and their condition were integral to the standard, and their poor maintenance and condition contributed to the violation. This is the point the Secretary was trying to make. The evidence of record supported the theory. The inspector testified that if the brakes had been properly maintained, they would have held the truck, and that testing of the same model under similar conditions confirmed this. The inspector also tested the brakes of the truck at issue and found that they would not hold the truck.

The very purpose of the truck's braking system is to prevent the truck from moving—to “block it against movement.” See U.S. Dep't of the Interior, *Dictionary of Mining, Mineral and Related Terms* 133 (1968) (“Brake” defined 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 form of friction. A device for slowing, stopping, and holding an object.”) (internal citations omitted). The failure of the brakes to do so here is evidence of a violation of the standard.

This is crucial because the failure to properly maintain or inspect the brakes reflected a broader and more troubling lack of regard for safety. The majority focuses exclusively on the behavior of the rank-and-file mechanic, but the condition of the brakes and the absence of proper training and supervision are failures attributable to mine management.

Just as important, the condition of the brakes greatly amplified the danger to anyone working beneath the truck, in combination with the failure to use wheel chocks, a secondary device that would become relevant only if the brakes failed to hold the vehicle. It is the convergence of these failures that created a foreseeable deadly hazard here, and while the Judge does not say that, the Secretary argued it distinctly. This convergence is essential to the finding of high negligence, because without all of the elements it might not be possible to discern the boundary between moderate and high negligence here. We are essentially finding *de novo* that the failure to provide necessary safety equipment is itself enough to constitute high negligence without any consideration of the other circumstances cited by the Judge.

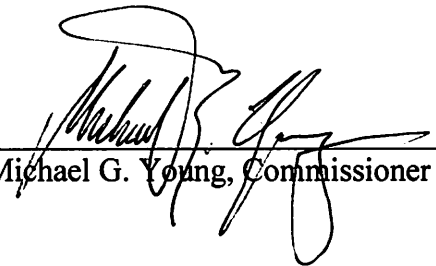
I therefore also disagree with the majority's exclusion of training and supervision as relevant factors in the negligence assessment. Again, the Judge found them relevant, and the record supports his decision to consider an apparent lack of supervision and training. The record fails to provide any evidence concerning the operator's training, supervision, or familiarity with wheel chocks—despite the fact that the inspector testified that chocks are used at nearly every mine he inspects.

While the operator argues that the Secretary introduced no evidence concerning its training or supervision in the use of wheel chocks, it is noteworthy that a member of mine management used a crib block and a large rock to block the truck's wheels after the accident, and the operator's own representatives doggedly insisted at hearing that crib blocks would have been sufficient. The operator cannot logically insist that the Secretary further prove something it has essentially admitted, by deed and by word, in the aftermath of the accident and on the record at the hearing.¹

¹ In this regard, I generally agree with Acting Chairman Althen's observations in footnote 9, *supra*, concerning the availability of wheel chocks and the operator's neglect in failing to provide them. I further note that Inspector Robinson testified that crib blocks might be adequate in some circumstances (Tr. 45-46), but would have been insufficient here due to the size and weight of the truck (Tr. 31-32). The suitability of available materials that may be used to block trucks against motion during maintenance should be evaluated on a case-by-case basis, and that was properly done here by the inspector and the Judge.

Taking all of the circumstances into account, then, the conclusion of high negligence is supported by both the relative indifference to the condition of the truck's brakes and the general carelessness regarding the proper use of materials to ensure the truck would be blocked against movement. The operator's imputable actions include not only the failure to provide rank-and-file miners with the tools needed to work safely, but a lack of focus on conditions such as the inspection and maintenance of the truck's brakes and the provision of training and supervision in proper maintenance techniques, which were generally within management's scope of control.

The distinction between moderate and high negligence is often legally significant. The fact that the operator not only failed to properly maintain the primary system designed to prevent the truck here from moving while miners worked beneath it, but also failed to provide or ensure the use of proper secondary devices, created a high degree of danger and evinces high negligence. While the Judge did not perfectly express the relationship between the distinct breaches in the operator's duty, he did account for all of them in holding the operator to be highly negligent. We should affirm him on that basis.



Michael G. Young, Commissioner

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