FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

January 25, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 92-953
	:	
STEELE BRANCH MINING	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners[1]

DECISION

BY: Jordan, Chairman and Marks, Commissioner[2]

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Steele Branch

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[1] Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

[2] Chairman Jordan and Commissioner Marks vote to affirm the judge's decision. Commissioner Doyle and Commissioner Holen would remand this matter to the judge. In *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the Commission determined that the effect of an evenly split vote, in which at least two Commissioners would affirm a judge's decision, is to leave the decision standing as if affirmed. Accordingly, the vote of Chairman Jordan and Commissioner Marks to affirm the judge's decision is the Commission's disposition.

Mining ("Steele Branch") alleging a violation of 30 C.F.R. § 77.404(a).[3] Following an evidentiary hearing, Administrative Law Judge George A. Koutras determined that Steele Branch violated the cited standard and that the violation was significant and substantial ("S&S"),[4] and assessed a civil penalty of $4,500. 15 FMSHRC 1667 (August 1993) (ALJ). Steele Branch timely filed a petition for discretionary review challenging the judge's finding of violation, his conclusion that the violation was S&S, and the penalty assessed. For the reasons set forth below, we affirm.

I.

Factual and Procedural Background

Steele Branch, owned by the Geupel Construction Company ("Geupel"), operated the No. 927 surface coal mine, in Logan County, West Virginia. On April 23, 1991, while Rayburn Browning operated the No. 9 road grader (Caterpillar Model 16) used to maintain the haulage road, the grader's engine stalled on a hill and the grader rolled backwards. Apparently unable to control the vehicle, Browning jumped off and the grader ran over him. Browning sustained fatal injuries.

On April 24, MSHA Inspector Donald Mills directed the inspection and testing of the grader. The grader was equipped with a hydraulic service braking system and a mechanically applied parking brake which was also intended to function as an emergency brake. Tr. 184. The service braking system is the primary system for stopping and holding the machine. 15 FMSHRC 1695.

The inspector caused the brakes to be tested on approximately a 9.5% grade with the participation of mechanics employed by the C. I. Walker Machinery Co. ("Walker"), a Caterpillar dealer. Tr. 215. With the grader engine running, the service brakes and the parking brake functioned properly. Because the investigation revealed that the engine had stalled, the grader's service brakes were also tested on level ground with the engine turned off. Tr. 31, 212, 215. The

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[3] Section 77.404(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. § 77. 404(a).

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

tests revealed that, with the engine turned off, only the first brake application produced sufficient pressure to stop the grader. Tr. 217. All successive brake applications produced zero pressure. Tr. 32, 75, 217-19, G. Ex. 5, R. Ex.5. The inspector concluded that a component of the braking system, the "accumulator," was not functioning properly and caused the defective condition.[5] Tr. 32-33, 41-42.

In addition, the tests showed that the parking brake was able to hold the grader in place on a grade once the grader had been brought to a stop. 15 FMSHRC at 1695. However, the tests did not establish that the parking brake was capable of bringing the grader to a stop if the grader were rolling free on a grade. *Id.* The inspector also determined that the brake pressure gauge was defective. Tr. 55. On April 29, Inspector Mills issued Steele Branch a citation alleging an S&S violation of 30 C.F.R. § 77.404(a)[6] involving a moderate degree of negligence.

The judge found that the grader engine quit for an unknown reason while Browning was operating it. 15 FMSHRC at 1689. He determined that the accumulator was defective and, applying the Commission's "reasonably prudent person" test, concluded that the grader was unsafe to operate within the meaning of section 77.404(a). *Id.* at 1696. The judge also concluded that the violation was S&S and that moderate negligence was involved, and assessed a civil penalty of $4,500. *Id.* at 1701.

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[5] The accumulator is described in the service manual as:

> the pressure source for brake actuation. Its accumulation of oil, under nitrogen pressure, is released to apply the brakes whenever the brake pedal is depressed . . . . Fully charged, the accumulator provides for approximately five brake applications after the diesel engine has been shut off.

G. Ex. 3, R. Ex. 9.

[6] The citation stated:

> The investigation of a fatal surface machinery (grader) accident at this mine revealed that the Caterpillar Grader involved, Model No. 16, serial No. 49G915, was not maintained in a safe operating condition, in that based on the specifications of the manufactor (sic) the fully charged accumulator provides for approximately five brake applications after the diesel engine has been shut off. The investigation revealed through testing that only one brake application was provided after the diesel engine was shut off. Also, the brake pressure gauge, located on the instrument panel in the cab of the grader (Company No. 03009) was found to be inoperative. . . .

G. Ex. 2.

II.

Disposition

A. The Violation

Steele Branch contends that the grader's braking system as a whole was functioning in compliance with industry standards and that, even if the accumulator was not functioning in accordance with the manufacturer's specifications, that fact alone did not render the grader unsafe within the meaning of the cited standard, because under the circumstances of this case "a reasonably prudent person" would not have recognized "a hazard warranting corrective action." S. B. Br. at 10.

The Secretary responds that substantial evidence supports the judge's determination of violation. Sec. Br. at 4-9. The Secretary maintains that the judge correctly applied the "reasonably prudent person" test in concluding that the grader was unsafe. *Id.*

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "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 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

1. The condition of the grader

The Caterpillar service manual called for the accumulator to provide approximately five brake applications after engine shutoff. A Walker mechanic's report indicated that "the number of brake applications that is normally supplied by the accumulator with the engine off is five applications." R. Ex. 5, attachment dated April 25, 1991. Steele Branch's brake expert appeared to concede that the accumulator should have been repaired if it provided for only one braking application. 15 FMSHRC 1692. Inspector Mills indicated that an accumulator that provides for only three braking applications should be repaired. *Id.* at 1696.[7] Steele Branch does not dispute

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[7] Respondent argued that MSHA's post-accident investigation did not reveal the condition of the grader at the time of the fatality since the braking system might have been damaged in the accident. 15 FMSHRC at 1693. The judge considered but rejected this argument, concluding that "[t]he credible and unrebutted testimony of Inspector Mills reflects that there was no collision damage to the loader braking system as a result of the accident . . . ." *Id.* The judge pointed out

the results of MSHA's test of the grader's brakes showing that only one application of brakes was possible with the engine off. We therefore conclude that substantial evidence supports the judge's finding that the grader's braking system only provided one service brake application after engine stoppage because the brake accumulator, a "critical and integral component" of the braking system, was defective. 15 FMSHRC at 1693, 1696.

2. Application of the "reasonably prudent person" test

In *Alabama By-Products*, 4 FMSHRC 2128 (December 1982), the Commission held:

> [I]n deciding whether equipment or machinery is in safe or unsafe operating condition, . . . the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action.

4 FMSHRC at 2129.[8] In *Ideal Cement Co.*, 12 FMSHRC 2409 (November 1990), the Commission elaborated on the test described in *Alabama By-Products*:

> [I]n interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibitions or requirement of the standard.

Id. at 2416. *See also Dolese Brothers Co.*, 16 FMSHRC 689, 694 (April 1994).

In concluding that Steele Branch violated the standard, the judge expressly relied on the decisions which set forth the reasonably prudent person test. *Alabama By-Products, supra; Ideal Cement Co., supra*; *Southern Ohio Coal Co.*, 13 FMSHRC 912 (June 1991). 15 FMSHRC at 1687-88. To support his conclusion that the grader was unsafe within the meaning of section 75.404(a), the judge relied on the evidence indicating that a fully charged accumulator should

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that "respondent's accident report reflected that the only damage to the grader was a cracked rear cab glass and two broken engine mounts." *Id.* Substantial evidence supports the judge's finding that the accident itself did not render the accumulator faulty.

[8] The underground coal standard addressed in *Alabama By-Products*, 30 C.F.R. § 75.1725(a), contains the same text found in section 77.404(a), the surface coal standard involved here.

have provided the grader with approximately five braking applications after the engine was shut off, and that the accumulator in this case, which provided for only a single braking application after engine shutoff, needed repair. 15 FMSHRC at 1696. The judge, determining that the record did not support respondent's claim that the parking brake could also perform as an emergency brake, rejected Steele Branch's claim that the parking brake rendered the grader safe. *Id.* at 1695.

Invoking *Alabama By-Products*, Steele Branch argues on review that it should be relieved of liability because a reasonably prudent person would not have recognized that the grader was hazardous. S. B. Br. at 10-21. Steele Branch bases this contention on the presence of an operable parking brake. *Id.* at 14-19. Steele Branch maintains that the parking brake in this case was also designed to serve as the emergency brake, and that therefore the grader was in conformance with industry requirements and may not be considered unsafe. *Id.* The Secretary agrees that the *Alabama By-Products* test applies, and contends that the judge's decision is faithful to it. Sec. Br. at 4-9.

Contrary to the view of the dissent, the question on review is not whether Steele Branch should have recognized that a grader's service brakes must provide for five braking applications after engine shutoff (slip op. at 13-14). Rather, we examine whether substantial evidence supports the judge's determination that a reasonably prudent person would have recognized that a grader that provided only one braking application after engine shutoff was unsafe within the prohibition of the standard. *See Alabama By-Products, supra*; *Ideal Cement Co.*, *supra*.[9]

Substantial evidence supports the judge's conclusion that the parking brake did not render the grader safe to operate notwithstanding the condition of the accumulator. As the judge pointed out, while the grader service manual refers to the parking brake and the wheel brakes, "it does not use the term 'emergency' brake." 15 FMSHRC at 1690. Similarly, the grader operation maintenance guide "contains detailed information concerning the parking brake but does not use the term 'emergency' brake." *Id.* The Society of Automotive Engineers' ground vehicle standards for braking performance for graders describe the parking brake system as "the system to hold stopped machinery stationary." 15 FMSHRC at 1695 (emphasis omitted). Although respondent's expert witness offered the opinion that the grader's parking brake was capable of stopping the grader in an emergency, the judge found "no evidence that the testing included allowing the grader to roll

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[9] Our colleagues also suggest that, in applying the reasonably prudent person test, the judge should have examined whether the reasonably prudent person would have recognized the existence of a hazard "despite having a grader accumulator that was properly charged in accordance with the service manual." Slip op. at 13-14. Although the operator's purported reliance on the service manual is a factor that may be considered in determining the level of negligence for purposes of assessing the penalty, *see* section C.2. *infra*, it has no bearing on whether the operator violated the standard. As we have frequently had occasion to observe, the Mine Act imposes liability without regard to fault. *E.g.*, *Fort Scott Fertilizer - Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995).

free on a grade and then bringing it to a stop while it was rolling by activating the park brake." *Id.*

We agree with the judge that the reasonably prudent person would recognize the grader to be unsafe because "one can reasonably conclude that in the event of unexpected engine failure, the first instinct of the operator would be to attempt to stop the grader by depressing the foot service brakes, the primary braking system designed to stop the loader under operating conditions." 15 FMSHRC at 1696. In the event of an engine failure, the ability of the equipment operator to stop the grader safely is significantly impaired if only a single brake application is possible. This conclusion is supported by respondent's own expert witness, who confirmed that applying the foot service brakes would also be his first reaction if a grader were rolling downhill with the engine off. 15 FMSHRC at 1679.

We conclude that substantial evidence supports the judge's conclusion that the grader was in an unsafe condition and, therefore, in violation of the standard. Accordingly, we affirm the judge's determination of violation.

B. Significant and Substantial

Steele Branch challenges the judge's affirmance of the S&S finding, arguing in part that a serious injury was not a reasonably foreseeable outcome of the violation here. S. B. Br. at 21-23. The Secretary responds that substantial evidence supports the judge's conclusion that, under the specific conditions at the mine, a reasonably serious injury was reasonably likely to result from the violation. Sec. Br. at 9-11.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). In *Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g,* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

Steele Branch's challenge relates to the third element of the *Mathies* test, "a reasonable likelihood that the hazard contributed to will result in an injury." *Id.* at 3-4. In relevant part, the judge determined that:

> the discrete hazard created by the failure of the accumulator to provide for more than one braking application with the engine off, particularly where the grader is operated over an inclined roadway with many curves, presented a reasonable likelihood that the hazard created would result in an injury . . . of a reasonable [sic] serious nature.

15 FMSHRC at 1698.

We base our resolution of this issue "on the particular facts surrounding the violation . . . . " *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). We agree with the judge that, given the condition of the grader, it was reasonably likely that a reasonably serious injury would occur. The record establishes that the grader service brakes provided only one brake application after engine shutoff although the manufacturer's specifications call for approximately five brake applications after shutoff. The grader was operated on a hilly, curved road, thereby increasing the hazards associated with brake failure. In fact, the equipment operator unsuccessfully attempted to stop the grader after the engine stopped and sustained fatal injuries. Thus, substantial evidence supports the judge's conclusion that the violation was S&S, and we accordingly affirm.[10]

C. Civil Penalty

In challenging the civil penalty of $4,500, Steele Branch asserts that the Secretary's delay in proposing the penalty was unreasonable and prejudicial, that the judge's conclusion of moderate negligence was erroneous, and that, since it is now out of business, no penalty should be assessed.

1. Delayed proposal

Under section 105(a) of the Mine Act, the Secretary must notify the operator of a proposed civil penalty "within a reasonable time after the termination of such inspection or investigation" giving rise to the citation or order. 30 U.S.C. § 815(a). Here, the citation was issued on April 29, 1991 and terminated on June 19, 1991, but notification of the proposed assessment was not forthcoming until May 19, 1992. The operator alleges that this delay was prejudicial because it was unable to call as a witness MSHA Inspector James Davis, who had been

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[10] We reject Steele Branch's argument that its violation was not S&S because it ceased mining operations subsequent to the violation at issue here.

indicted and tried for a criminal offense subsequent to the investigation of the fatality. S. B. Br. at 24.[11]

Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See Rhone-Poulenc of Wyoming Co.,* 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd,* 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 181, 95th Cong., 1st Sess. 34 (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 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

The investigation report[12] is undated and there is no indication whether the preparation of that report accounted for some of the 11 months that elapsed between termination of citation and issuance of the proposed assessment. The Secretary has not offered any explanation for his delay but does challenge the operator's claim of prejudice. Sec. Br. at 13-15.

Concerning the reason for delay, we take official notice, as we did in *Rhone-Poulenc*, of the Secretary's unusually high case load in 1992, and the resultant delay it caused in the penalty proposal process. *See* 15 FMSHRC at 2094. The civil penalty involved here was prepared in 1992, and we view that consideration as constituting adequate reason for the delay. However, we caution the Secretary that our disposition of this challenge is not an endorsement of unbridled Secretarial delay in notifying operators of proposed penalties.

We further conclude, in agreement with the judge,[13] that Steele Branch has failed to demonstrate that it was prejudiced by the delay in notification. At no time has Steele Branch identified how or why Inspector Davis's testimony would affect its case beyond claiming that his unrelated criminal conviction "goes to his credibility." Tr. 104. Inspector Davis was not a witness at the hearing, and nothing prevented Steele Branch from calling witnesses to testify. We accordingly affirm the judge's rejection of the operator's arguments concerning delay.

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[11] Steele Branch mistakenly refers to section 105(d) of the Mine Act, 30 U.S.C. § 815(d).

[12] G. Ex. 5.

[13] 15 FMSHRC at 1701.

2. Negligence

Steele Branch challenges the judge's finding of moderate negligence. The operator argues that the accumulator was adequately charged at the time of the accident and points out the manual's statement that an accumulator which is fully charged will provide approximately five braking applications. S. B. Br. at 24-25. According to Steele Branch, the accumulator's failure was therefore not due to any fault of the operator. *Id.* The operator further contends that the accumulator may not have been defective, since its replacement did not solve the problem, which required changing all four brake assemblies. *Id.*

The operator's asserted reliance on the manual might have some persuasive force if the record had disclosed that the persons responsible for maintaining and repairing the grader were even aware of the provision in question. In fact, the record discloses just the opposite. In finding moderate negligence, the judge relied on the admission of respondent's master mechanic that "he was unaware of the service manual recommendation that the accumulator should provide approximately five brake applications with the grader engine off[.]" 15 FMSHRC at 1700. Although William Roberts, the equipment manager for Geupel pointed out that none of the manuals directed the user to test the brake accumulator system for five applications after the engine has been shut off, he described how such a test should be conducted and admitted he had performed such tests in the past. 15 FMSHRC at 1674-75, 1693. The operator's failure to make sure its mechanics understood both the manufacturer's specifications for the grader's brakes, as well as the need to conduct the kind of test that would verify whether the grader was performing according to these standards, indicates a lack of reasonable care consistent with the judge's finding of moderate negligence.

The judge's negligence determination was also based on the admission of equipment manager Roberts "that he was unaware of any accumulator pressure checks ever being made for the grader, and had no knowledge that the grader accumulator had ever been tested." 15 FMSHRC at 1700. Roberts's testimony provides support for the judge's conclusion that the operator "had no method of prevention maintenance which could have detected the condition prior to the accident." *Id.*

Accordingly, we conclude that substantial evidence supports the judge's finding of moderate negligence and affirm that determination.

3. Effect of going out of business

We reject as unsupported Steele Branch's assertion that it should be relieved of its civil penalty liability because it is no longer in business. S. B. Br. 25-26. Beyond this bald statement, it has provided neither the judge nor the Commission with any evidence on this claim. *See Spurlock Mining Co., Inc.,* 16 FMSHRC 697 (April 1994). Accordingly, we affirm the judge's rejection of this argument.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

Commissioners Doyle and Holen, concurring in part and dissenting in part:

We agree that substantial evidence supports the judge's determination that the parking brake alone did not render the grader safe to operate. 15 FMSHRC 1667, 1695 (August 1993)(ALJ); slip op. at 6. We dissent, however, from the affirming Commissioners' opinion that the administrative law judge appropriately applied the reasonably prudent person test in determining whether Steele Branch had violated 30 C.F.R. § 77.404(a)[14] and would remand for further analysis of that issue.

The citation issued to Steele Branch alleged as follows:

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[14] 30 C.F.R. § 77.404(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

> The investigation of a fatal surface machinery (grader) accident at this mine revealed that the Caterpillar Grader . . . was not maintained in a safe operating condition, in that *based on the specifications of the [manufacturer's manual,] the fully charged accumulator provides for approximately five brake applications after the diesel engine has been shut off*. The investigation revealed through testing that only one brake application was provided after the diesel engine was shut off.

G. Ex. 2 (emphasis added). The inspector testified that he had relied on the manual provision in reaching his conclusion that the grader was unsafe. 15 FMSHRC at 1691.

The judge, also relying on the service manual to the effect that "a fully charged accumulator should provide approximately five brake applications after the engine is shut off," concluded that the grader's brake accumulator was defective, thereby rendering the grader unsafe to operate. 15 FMSHRC at 1696. Accordingly, he found a violation of 30 C.F.R. 77.404(a). *Id.*

On review, the operator challenges the judge's finding of violation, asserting that, under the circumstances surrounding the violation, the reasonably prudent person would not have recognized a hazard warranting corrective action. PDR at 6.

The facts are largely undisputed. MSHA learned in its investigation that Mr. Browning was an experienced and safe grader operator, who conducted daily checks of his equipment and reported all problems to the company mechanics. 15 FMSHRC at 1673; Tr. 98. On the day of the accident, Mr. Browning had shut down the grader he usually operated because of a problem and was operating the No. 9 grader in its place. 15 FMSHRC at 1673, Tr. 99-100. Apparently, during operation, the engine stalled, the brakes failed, and Mr. Browning jumped from the vehicle and was run over by the grader. R.Ex. 4 at 2-3; R.Ex. 5 at 1. The grader came to a stop in an upright position, against the highwall. 15 FMSHRC at 1668.

There are three manuals for the No. 9 Grader (Caterpillar Grader Model No. 16, serial No. 49G915). The first is an operation and maintenance manual (R.Ex. 6), which directs that the accumulator precharge pressure be checked every 500 service meter hours. *Id.* at 92. The second is a lubrication and maintenance guide (R.Ex. 8), which directs that the accumulator's nitrogen precharge pressure be checked "when required." *Id.* at 9. The third is a service manual (R.Ex. 9), which is used by mechanics who are making major repairs on the machine (Tr.147) and which indicates that, at 70 degrees Fahrenheit, the accumulator is fully charged at 600 pounds per square inch ("psi") and that "[f]ully charged, the accumulator provides for approximately five brake applications after the diesel engine has been shut off." R.Ex. 9 at Group 70, p. 1 (issued 3-65). The service manual also contains detailed instructions for checking the pressure in the accumulator by using a shutoff valve, gauge, hose and chuck. *Id.* at Group 100, p.1. It contains no indication that the pressure in the accumulator is to be tested by repeated brake application after engine shutoff or that brake applications are part of the test procedure of the braking system. *See* R.Ex. 9. Nor do the other manuals contain such information. *See* R.Ex. 6, 8.

On the basis of the service manual provision stating the expected performance of the brakes after engine shutoff, MSHA charged that Steele Branch violated section 77.404(a), despite the fact that the accumulator, when tested after the accident, was fully charged with a nitrogen precharge reading of 600 psi, as required by the service manual. 15 FMSHRC at 1672, 1675; Tr. 75-76, 151; R.Ex. 5 at 5, 8; R. Ex. 9 at Group 40, p. 1 (issued 4-65).[15]

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Alabama By-Products Corp.,* 4 FMSHRC 2128, 2129 (December 1982) (citation omitted). The Commission has determined that adequate notice of the requirements of a standard is provided if a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.,* 12 FMSHRC 2409, 2416 (November 1990); *Energy West Mining Co.*, 17 FMSHRC 1313, 1318 (August 1995).

The affirming Commissioners assert that the judge determined that a reasonably prudent person would have recognized that the grader had been rendered unsafe. Slip op. at 6. We disagree. In his decision, the judge referred to the Commission's reasonably prudent person test. 15 FMSHRC at 1687. In our opinion, however, he failed to apply that test to ascertain whether Steele Branch, despite having a grader accumulator that was properly charged in accordance with the service manual, nevertheless should have recognized a "hazard warranting corrective action," *Alabama By-Products*, 4 FMSHRC at 2129, and should have recognized that it was also required to assure that it had approximately five brake applications after engine shutoff.

We note that the affirming Commissioners, in stating that the service manual may be considered only in determining the level of negligence but not in determining the violation, slip op. at 6 n.9, have overlooked the fact that the citation in this case was expressly based on the service manual's representation of five brake applications. G.Ex. 2. Moreover, the scheme of liability without fault set forth in the Mine Act does not override the due process protections of the Constitution. "Laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Energy West,* 17 FMSHRC at 1318, *quoting Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). The case relied on by the affirming Commissioners, *Fort Scott Fertilizer - Cullor, Inc.,* 17 FMSHRC 1112, 1115 (July 1995), involved a challenge by the Secretary of Labor to a judge's determination that employee misconduct was a defense to a violation. No notice issues were raised.

For the foregoing reasons, we would remand the proceeding for application of the Commission's reasonably prudent person test.

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[15] In fact, even after a new, fully charged accumulator was installed on the grader, the service brakes still provided only one application. 15 FMSHRC at 1675; Tr. 151-53.

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner