

CCASE:  
SOL (MSHA) V. OLD BEN COAL  
DDATE:  
19940726  
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-362
Petitioner	:	A. C. No. 46-02052-03689
v.	:	
	:	Docket No. WEVA 93-479
OLD BEN COAL COMPANY,	:	A. C. No. 46-02052-03694
Respondent	:	
	:	Docket No. WEVA 94-38
	:	A. C. No. 46-02052-03696
	:	
	:	Docket No. WEVA 94-72
	:	A. C. No. 46-02052-03698
	:	
	:	Mine No. 20

DECISION

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner; Thomas L. Clarke, Esq., Old Ben Coal Company, Fairview Heights, Illinois for Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Old Ben Coal Company pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820. The petitions allege six violations of the Secretary's mandatory health and safety standards. For the reasons set forth below, Citation No. 3570901 and Order No. 4190960 are affirmed, Citation Nos. 3999419, 3991939, 4187917, and 4190585 are vacated and Old Ben is assessed a civil penalty of \$6,498.00.

A hearing was held in these cases on May 3, 1994, in Williamson, West Virginia.(Footnote 1) Inspectors Vicki L. Mullins and Ernie Ross, Jr. and Richard A. Skrabak, of the Mine Safety and Health Administration (MSHA), testified for the Secretary.

1 A hearing was also held in Docket No. WEVA 93-442 which was consolidated with the captioned cases for hearing. Because proceedings on one of the citations in that docket are being stayed, the docket was severed from the consolidated cases and a partial decision was issued on July 14, 1994.

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James C. Downey, Jr., G. Franklin Foster, Gregory M. Chandler, Peter R. Eisenman and Tommy L. Dempsey testified on behalf of Old Ben. The parties have also filed briefs which I have considered in my disposition of these cases.

#### SETTLED VIOLATIONS

At the beginning of the hearing, the parties advised that they had reached a settlement agreement concerning four of the infractions in these cases. The agreement provides that Old Ben will pay the assessed penalties for Order No. 4190960 in Docket No. WEVA 94-38 and Citation No. 3570901 in Docket No. WEVA 93-479. (Tr. 8-11.) In addition, the Secretary agreed to vacate Citation No. 3999419 in Docket No. WEVA 93-362 and Citation No. 3991939 in Docket No. WEVA 94-72. (Tr. 9-10.)

Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. 820(i). Accordingly, approval of the settlement agreement is granted and its provisions will be carried out in the order at the conclusion of this decision.

#### CONTESTED VIOLATIONS

##### Summary of the Evidence

The two remaining citations, Citation No. 4187917 in Docket No. WEVA 94-72 and Citation No. 4190585 in Docket No. WEVA 93-479, involve assertions that the automatic emergency-parking brakes on two shuttle cars were not adequate, thus violating Section 75.523-3(b)(1) of the Regulations, 30 C.F.R. 75.523-3(b)(1). (Gt. Exs. 2 and 4.) The first alleged violation, Citation No. 4187917, occurred on July 1, 1993, in the West Mains Section of Mine No. 20. Inspectors Mullins and Ross both inspected the mine on that day, but split up and conducted separate inspections after arriving at the section.

Inspector Mullins testified that she inspected a shuttle car after the operator informed her that he was having some problems with his brakes. To test the automatic emergency-parking brake, she had the operator tram the unloaded shuttle car a distance and then hit the "panic bar" (emergency deenergization device). She related that "[w]hen he hit the panic bar, I listened for a noise to know that the system had been activated. And it rolled approximately twenty feet before I heard the noise, and then it rolled approximately twenty more feet before the machine actually come [sic] to a stop." (Tr. 21.)

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The inspector maintained that Frank Foster was the company representative accompanying her during this brake test. She stated that she was sure that she had discussed the brake problem with him at that time, but could not remember what either of them had said.

Contrarily, Mr. Downey, the General Mine Manager, testified that while Mr. Foster had originally accompanied Ms. Mullins to the section on July 1, after he (Downey) arrived at the section, he stayed with Inspector Mullins and Foster went with Inspector Ross. Downey contended that he arrived as Inspector Mullins was talking to the shuttle car operator. He agreed that the inspector had conducted a test of the automatic emergency-parking brake, but stated that Foster was not present when it occurred.

According to Mr. Downey, the test and its results ensued as follows:

We were located in a crosscut between number two and number three heading. We were approximately a hundred and fifty feet in by the feeder. The shuttle car was loaded and it was traveling toward the feeder. The shuttle car was operating at or near full speed.

When he got to the reference point which is the crosscut we were standing in, his instructions were to hit his panic bar so we could demonstrate whether the panic bar worked.

. . . .

We were standing at approximately the center of the intersection. The intersection was typically twenty feet in width. The shuttle car came to a stop before it reached the outby corner of the intersection which is a distance of approximately eight feet.

(Tr. 131-32.)

Foster, the Safety Manager, testified that he did not view the test. He said that after the conversation with the shuttle car operator, "Mr. Downey arrived on the section and we split up. I got with Mr. Ross. And Mr. Downey got with Ms. Mullins." (Tr. 235.)

The second citation was issued on July 6, 1993. Inspector Ross testified that he had the shuttle car operator "start the machine, tram a certain distance, and then hit the panic bar." (Tr. 50.) He said that when this was done, the shuttle car traveled six to eight feet before it came to a full stop.

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He further recounted that he then had the operator tram the shuttle car and then turn the machine off. He asserted that when that was done the vehicle also traveled six to eight feet before coming to a complete stop.

The inspector testified that after observing no difference between the two stops he went to the shuttle car where he could observe the pressure gauge for the automatic emergency-parking brake system. He narrated that:

I had the operator start the machine. While observing the gauge, I had him hit the panic bar. And I observed the drop on the pressure gauge which was just a gradual drop. There was no immediate dumping of the hydraulic fluid in the pressure system.

Then I had him restart the shuttle car, and then just normally turn it off with the switch. And it reacted exactly the same way. There was no differential in the pressure drop.

(Tr. 51.) Inspector Ross did not testify concerning over what period of time the gradual drop occurred.

Once again, it was Mr. Downey who accompanied the inspector during the inspection of the shuttle car. While he concurred with the inspector's testimony about the distance it took the shuttle car to stop, he had this to say about the pressure gauge:

Q. And what were your observations of what happened with that pressure gauge after the panic bar was struck?

A. As soon as the panic bar was hit, it de-energized [sic] the machine. It also triggered the dump valve for the braking system at the same time. And the system pressure immediately started to fall toward zero.

Q. Was that a rapid fall, a steady, slow fall? What kind of fall was it, as indicated by the gauge?

A. It just immediately dropped, within a second or less.

(Tr. 141.)

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Ironically, with all this contradictory testimony, the expert witnesses, Mr. Skrabak, an engineer with MSHA, and Mr. Chandler, an engineer with Joy Technologies, were in essential agreement. They agreed that there would be an observable difference between the dropping of the pressure gauge after the panic bar was hit and the dropping of the pressure gauge on deenergization (turning the machine off), with the former being less than a second and the latter being between two and a half and four and a half seconds. They agreed that in the laboratory the activation time for the Joy automatic emergency-parking brake system was between .55 seconds and .7 seconds. Finally, they agreed that a stopping distance of six to eight feet in mine conditions was reasonable.

In addition, Mr. Chandler gave the following testimony concerning the stopping distance of a shuttle car after hitting the panic bar:

A. I would expect a typical stopping distance, under factory test conditions, to be in the neighborhood of four to six feet with an empty car.

Q. Do you have any idea what you would expect under loaded conditions in a mine environment?

A. The stopping distance can vary considerable [sic] depending on conditions; the mine load on a car, the mine bottom, whether there is a grade involved or not. You know a load or a grade will definitely extend that stopping distance.

Q. Is there any range that you would consider to be acceptable, if the parking brake was functioning properly?

A. That is difficult to answer, depending on the conditions I've talked about.

Q. Is it safe to say it would be more than the four to six feet that you observed in the laboratory?

A. I would expect it to be, yes.

(Tr. 171-72.)

#### Discussion

Section 75.523-3(b)(1) provides that:

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(b) Automatic emergency-parking brakes shall--

(1) Be activated immediately by the emergency deenergization device required by 30 CFR 75.523-1 and 75.523-2;

The term "activated immediately" is not defined in the Regulations. Nor are there any Commission decisions defining it.

Webster's Third New International Dictionary (Unabridged) 21 (1986) defines "activate" as "to make active or more active." It contains two definitions for "immediately," but only the second "without interval of time : without delay" seems pertinent to this case. Id. at 1129. Based on the testimony of the two experts it is apparent that the brakes cannot be made active without interval of time, therefore, the plain meaning of the regulation is that the brakes be made active without delay.

How can the inspector in the mine determine whether or not the automatic emergency-parking brakes on a shuttle car are made active without delay? Mr. Skrabak suggested two methods. The first way, would be to observe how far the shuttle car travels after the panic bar has been actuated before coming to a stop. The second, would be to watch the pressure gauge and observe how fast the needle goes down when the panic bar is hit.

Applying these two tests to the cases at hand, I conclude that in neither instance does the evidence show that the automatic emergency-parking brake failed to function in accordance with the regulation. When the best stopping distance achieved for a shuttle car in the laboratory is four to six feet, I agree with the two experts that a stopping distance of six to eight feet is an acceptable demonstration that the automatic emergency-parking brakes have activated immediately.

Citation No. 4187917

Turning to the citation on July 1, 1993, it is obvious that if the shuttle car traveled twenty to forty feet before it stopped, the brakes had not activated immediately and the regulation was violated. On the other hand, if it stopped in eight feet, there was no violation. Clearly, determining whether a violation occurred depends on whether one accepts the testimony of Inspector Mullins or the testimony of Mr. Downey. Their testimony is irreconcilable.

There was nothing about the way each witness testified, either in their demeanor or manner of testifying, that indicated a lack of forthrightness. However, based on the entire record, I

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am constrained to credit the testimony of Mr. Downey over that of Inspector Mullins for the reasons in the following paragraphs.

Four witnesses to the incidents on July 1 were present in the courtroom: Mullins, Ross, Downey and Foster. Mullins testified that Foster was present during the test of the shuttle car, although she later indicated that he may not have been there the whole time. (Tr. 223.) Downey and Foster both agreed that Foster left before the test and that only Downey was present during the test.

Inspector Ross was present in the courtroom during this controversy. but was not recalled even though the Secretary's counsel talked to him in the courtroom before resting. Based on this failure to recall him, I conclude that his testimony would not have corroborated Inspector Mullins. This conclusion is somewhat supported by the inspectors' notes.

Inspector Mullins' notes state that she was accompanied by Jim Downey and Frank Foster as company representatives. (Gt. Ex. 1, p. 1.) They later state: "On section split up. I traveled with Frank Foster." (Gt. Ex. 1, p. 3.) However, when the inspection of the shuttle car is documented, there is no mention as to who was present or what was said. (Gt. Ex. 1, p. 5.) Inspector Ross' notes, which are generally much more detailed than Mullins', state that he was accompanied only by Frank Foster as company representative during his July 1 inspection. (Gt. Ex. 3, p. 1.)

Based on the testimony of Mr. Downey, I find that the shuttle car stopped in eight feet.(Footnote 2) Consequently, I conclude that the Respondent did not violate Section 75.523-3(b)(1) on July 1, 1994, as alleged.

Citation No. 4190585

Although the evidence concerning the July 6 violation involves some disparate testimony, it is not necessary to resolve the discrepancy to decide this citation. Every one agrees that the shuttle car stopped in six to eight feet. However, Inspector Ross stated that when he observed the pressure gauge, the needle dropped gradually. He asserted that the drop was the same whether the panic bar was hit or the machine was just turned off. On the other hand, Mr. Downey maintained that the needle dropped within a second when the panic bar was hit. He did not testify about its drop when the machine was turned off.

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2 The evidence indicates that this shuttle car also stopped in eight feet when re-inspected on July 8, 1994, and that nothing had been done to it in the interim. (Tr. 160-61, 203.)

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If Inspector Ross' testimony is correct, it results in the paradoxical situation of one test indicating that the brakes were activated immediately, the stopping distance, and one test indicating that they did not activate immediately, the pressure gauge. Nevertheless, since it is evident that the purpose of the regulation is to stop the shuttle car as quickly as possible in an emergency, I conclude that in a circumstance where the two tests are in apparent conflict, such as this, the stopping distance is a better indication that the system activated immediately than is the pressure gauge.

Accordingly, I find that the six to eight feet in which every one agrees that the shuttle car stopped indicates that the automatic emergency-parking brake did activate immediately. Therefore, I conclude that the Respondent did not violate Section 75.523-3(b)(1) on July 6, 1993, as alleged.

ORDER

Citation Nos. 3991939 and 4187917 in Docket No. WEVA 94-72 and Citation No. 3999419 in Docket No. WEVA 93-362 are VACATED and the civil penalty petitions are DISMISSED. Citation No. 4190585 in Docket No. WEVA 93-479 is VACATED. Citation No. 3570901 in Docket No. WEVA 93-479 and Order No. 4190960 in Docket No. WEVA 94-38 are AFFIRMED. Old Ben Coal Company is ORDERED to pay civil penalties in the amount of \$6,498.00 within 30 days of the date of this decision. On receipt of payment, these proceedings are DISMISSED.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

Pamela Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Thomas L. Clarke, Esq., Old Ben Coal Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

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