

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 Skyline, Suite 1000  
5203 Leesburg Pike  
Falls Church, Virginia 22041

April 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-55
Petitioner	:	A. C. No. 46-06751-03611
and	:	
	:	Ruffner Mine
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
ARCH OF WEST VIRGINIA,	:	
Respondent	:	

**DECISION**

Appearances:	James F. Bowman, Conference and Litigation Representative, Mine
Safety	and Health Administration, U.S. Department of Labor, Mt. Hope,
	West Virginia, for Petitioner;
	Robert Horton, United Mine Workers of America, Miner's
Representative,	Whitman, West Virginia, for Intervenor;
	Anne Wathen O'Donnell, Esq., Arch Coal, Inc., St. Louis, Missouri, for
	Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Arch of West Virginia, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$585.00. A hearing was held in Charleston, West Virginia. For the reasons set forth below, I affirm one citation, vacate the other two and assess a penalty of \$55.00.

**Settled Citation**

At the beginning of the hearing, the parties advised that they had reached a settlement agreement with regard to Citation No. 4624967. The Secretary's representative stated that although the citation had been modified to non-S&S on December 20, 1999, that fact had not been considered by the assessment office when assessing a penalty of \$475.00. (Tr. 13-14.) The parties agreed to settle the citation for \$55.00. (Tr. 14.) The motion to approve the settlement was granted, (*Id.*), and the penalty will be ordered at the conclusion of this decision. The two remaining citations were contested at the hearing.

### **Background**

The Ruffner Mine consists of a surface coal mine, underground coal mine and a preparation plant operated by Arch of West Virginia in Logan County, West Virginia. Sometime in the second half of 1998, John Metzger, the maintenance manager at the mine, concluded that damage to the company's fuel and lube trucks was being caused by their traveling at excessive speeds. Some of this damage resulted in citations being issued for violations involving the trucks during MSHA inspections. He decided to slow down the trucks in attempt to alleviate these problems.

Fuel truck No. 61462 (truck No.62) was purchased from Robinson Services. It was a rebuilt Mack truck with a Road Ranger transmission. The transmission has five low range gears and five high range gears. The gear shift lever has a button on it which is used to select the low or high range gears. Metzger requested that the air supply to the air valve enabling the high range gears be disconnected so that the high range gears could not be engaged. A short time later, fuel truck No. 61461 (truck No. 61) was sent to Robinson Services so that its Mack transmission could be replaced with a new Road Ranger transmission. Access to the high range gears was blocked in the same manner as truck No. 62. Operating with only the low range gears, the two trucks could travel at a top speed of between 13 and 20 miles per hour.

The fuel trucks are used to carry fuel to all areas of the three mile long surface mine. This requires them to travel over twenty-five to thirty miles of haulage roads, which they share with other mining vehicles.

Almost immediately, the fuel truck drivers began complaining about the slow speed of the trucks and noting in their pre-shift examination reports that the high range gears were disabled. Roger Horton, a fuel truck driver and miners' representative, discussed the matter with both an MSHA inspector and a West Virginia mine inspector. When he did not receive any satisfaction from them, he filed a grievance with the company. After the company declined to act on the grievance, Horton and two United Mine Workers of America (UMWA) international representatives obtained a meeting with the supervisor of the MSHA District Office in Logan and Inspector Sherman Slaughter to complain about the situation.

Shortly after the meeting, Inspector Slaughter went to the mine to investigate the complaint. He met with mine management and discussed the situation with the truck drivers.

He then spent about three hours riding in truck No. 62. After his investigation, Inspector Slaughter offered the company an opportunity to "fix" the trucks by restoring the high range gears. When they declined to do so, he issued Citation Nos. 7185723 and 7185724 alleging violations of section 77.1606(c), 30 C.F.R. § 77.1606(c), because:

The high range gears of the transmission of the Mack fuel truck . . . being used at the mine was [sic] disabled so as to limit the maximum speed the truck could travel at the governed engine Rpm [sic] to approximately 13 mph. This was a defect affecting safety in that the slow speed of the truck impeded other traffic using the same roadways at the mine causing unsafe passing situations to develop, prevented the driver from moving out of the way of larger trucks on some steep grades where the ability of the larger truck to slow to the speed of the slower fuel truck was compromised, and would not permit the driver to maintain full control on slippery road surfaces when the truck reached maximum Rpm [sic] and began to break into a slide. Workers at the mine indicated the truck was manufactured to travel at speeds up to 45 mph.<sup>1</sup>

(Jt. Exs. 1 and 2.) Section 77.1606(c) provides that: "Equipment defects affecting safety shall be corrected before the equipment is used."

### **Findings of Fact and Conclusions of Law**

To prevail in this matter, the Secretary must prove three things: (1) that disconnecting the air supply to the air valve which enabled the high range gears constituted an "equipment defect;" (2) that this defect was one "affecting safety;" and (3) that the operator failed to correct the defect before the equipment was used. *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857 (August 1984).<sup>2</sup> I find that the Secretary has not proved either that lack of access to the high range gears was a defect or that the lack of access affected safety.

#### *Was there a defect in the transmission?*

The Commission has held that:

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<sup>1</sup> The two citations are identical except that one is for truck No. 61 and the other is for truck No. 62. The violations were alleged to be non-S&S.

<sup>2</sup> In the *Allied Chemical* case, the Commission was construing 30 C.F.R. § 57.9-2 which was worded identically to section 77.1606(c).

In both ordinary and mining industry usage, a "defect" is a fault, a deficiency, or a condition impairing the usefulness of an object or part. *Webster's Third New International Dictionary (Unabridged)* 591 (1971); U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 307 (1968).

*Id.* In this case, the inability to access the high range gears did not result from a fault or a deficiency in the equipment and it did not impair the usefulness of the transmission or the fuel trucks.

Both parties agree that the high range gears were not damaged or removed from the transmission; they just could not be engaged because the air valve was disconnected. However, the Secretary argues that the fact that the high range gears did not function was a defect in the equipment. In fact, the high range gears could function if the air valve were connected, so it was not that they did not function, rather that they could not be used. Since there was nothing "wrong" with the high range gears, there was not a fault in the gears. Since the gears were present, there was no deficiency in the them. Finally, since the low range gears allowed the trucks to move and to travel any where they needed to go on the mine property, the lack of high range gears did not impair the transmissions' usefulness.

Clearly, blocking the high range gears, by itself, does not create a defect in the transmission or the vehicle to which it is attached. In this connection, the company introduced into evidence several petitions for modification which were granted by MSHA. (Resp. Ex. 1.) All of them had to do with the operation of graders in underground coal mines and sought modifications of section 75.1909(b)(6), 30 C.F.R. § 75.1909(b)(6), of the rules, which have to do with the service brakes on the graders. In permitting the modification requested, most of the decisions stated that: "The maximum speed on the . . . grader must be limited to ten miles per hour or less by *physically blocking higher gear ratios.*" (*Id.*) (emphasis added.)

While it can be argued that there is an obvious difference between fuel trucks operating at a surface mine and graders operating underground, the fact remains that if MSHA thought that blocking the high range gear ratios created a defect in the equipment, it would not have required it to be done as a condition of granting the petitions for modification. That MSHA does not, in

fact, consider the blocking of high range gears to be a defect is further substantiated by the testimony of Inspector Slaughter, who candidly admitted that he is one of the few people in MSHA who believed that there were violations in this case. (Tr. 370.)<sup>3</sup>

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<sup>3</sup> The transcript of the hearing contains numerous errors, many of which were noted in a Motion to Correct Transcript filed by the Respondent. One error which was not included in the motion, was Inspector Slaughter's statement that he was one of the few people in MSHA who

Consequently, I conclude that the inability to use the high range gears was not a defect.

Did the slow speed of the trucks affect safety?

The Secretary argues that: "The defective transmissions affected the safety of all haulage equipment operators using the haul roads." (Sec. Br. at 10.) The Secretary asserts that the slow speed of the fuel trucks impedes traffic, causes unsafe passing situations, limits the maneuverability of the trucks, compromises the safety of larger rock trucks and makes the drivers unable to control the fuel trucks on slippery roads. However, as the Respondent has correctly pointed out, none of these hazards is the result of the alleged defect in the transmission.

First, it should be noted that the fuel trucks are not the only vehicles traveling on the mines' roads which are slow. Front-end loaders, bull dozers and drills all travel as slowly as, or slower than, the fuel trucks.<sup>4</sup> In addition, Mr. Metzger testified that the Dresser 685 and 830 haulage trucks have a maximum speed of 16 miles per hour, when loaded. Thus, if slow speed is a safety hazard, then one would expect citations for these other vehicles. The fact that there are no citations, and that no reasonable person, including the Secretary, argues that there should be, reveals the weakness in the Secretary's case.

The Petitioner avers that the fuel trucks impeded traffic because they did not have the ability to travel at a prudent speed, consistent with the other traffic using the road. This proposition is based on rule 77.1607(c), 30 C.F.R. § 77.1607(c), which states that: "Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used." The Secretary's interpretation turns the rule on its head, however. The rule does not mean that if the speed limit is 35 MPH, as it is at the mine, that all vehicles have to travel 35 MPH. Instead, it means that even if the speed limit is 35 MPH, vehicle operators have to take the above factors, which includes slower vehicles, into consideration and may have to drive at a speed lower than 35 MPH.

Additional alleged hazards are that the fuel trucks create unsafe passing situations and contribute to "tailgating." Again, this argument focuses on the wrong party. Rule 77.1607(a), 30 C.F.R. § 77.1607(a), and common sense, require that: "Vehicles shall follow at a safe

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believed the blocking of the high range gears was a violation. The transcript actually states: "Im [*sic*] one of the few people to believe MSHA by the way." However, it is clear from the follow-up question, and from my recollection, that what he really said was: "I'm one of the few people in MSHA who believe it is a violation, by the way." Most, if not all, of the mistakes noted by the Respondent are well taken, however, a correction will be made, as here, only if the statement is used in this decision.

<sup>4</sup> The drills actually travel so slowly, less than 2 MPH, that special precautions are taken when they are moved.

distance; passing shall be limited to areas of adequate clearance and visibility." Obviously, it is the overtaking vehicle which has to insure that it is safe to pass, not the fuel truck. Unsafe passing situations are created by a driver not complying with rules 77.1607(a) and (c), not the fact that the fuel trucks can only use the low range gears. Similarly, "tailgating" is the fault of the driver of the vehicle not following at a safe distance, not the driver of the vehicle being followed.

The compromised safety of the haulage trucks is another claimed hazard. This is based on the premise that a rock truck driver selects a speed when he begins descending a grade and if he comes around a "blind curve" and sees a fuel truck in front of him he will not be able to stop in time. (Sec. Br. at 15-16.) Once again, this assertion blames the wrong participant. All the haulage truck driver need do is select a speed which permits him to stop if he is surprised rounding a blind curve. This would seem particularly prudent in view of the fact that what he may be confronted with on a blind curve, in addition to a slower truck preceding him, is a faster vehicle coming toward him.

Finally, the Secretary maintains that the fuel truck drivers will not be able to pull out of a skid when going down steep grades. The theory behind this contention is that the fuel trucks descend the grade at their top speed and if they start skidding, they cannot speed up to get out of the skid. While there was evidence from the Secretary's witnesses that speeding up is a method for correcting a skid, there was also evidence from the Respondent that the way to correct a skid is to take one's foot off of the brake and to steer in the direction of the skid. None of the witnesses were experts in controlling a skidding vehicle. However, I find the Respondent's witnesses more persuasive.<sup>5</sup> Moreover, even if speeding up is an appropriate way to correct a skid, all the fuel truck drivers have to do is not go down the hill at top speed.

In sum, all of the hazards alluded to by the Secretary are either within the control of someone other than the fuel truck driver, or, in connection with skidding, are within the control of the fuel truck driver. All of the hazards, including the last one, can be avoided by compliance with rules 77.1607(a) and (c).

In conclusion, the inability to use the high range gears does not make the transmission or the truck defective. Slow speed is not a defect. And neither the transmissions nor the slow speeds adversely affect safety. Accordingly, I conclude that the Respondent did not violate section 77.1606(c) by blocking access to the top five gears on the fuel trucks and will vacate the citations.

### **Civil Penalty Assessment**

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<sup>5</sup> Perhaps this is because the method Messrs. Metzger and Dale Lucha, Manager of Safety and Labor Relations at the mine, detailed for recovering from a skid is the same method that is taught in driver training.

The only penalty to be assessed is for Citation No. 4624967, which the parties settled. In connection with that citation, I have considered the representations and documentation submitted and conclude that the settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i).

**Order**

Accordingly, it is **ORDERED** that Citation Nos. 7185723 and 7185724 are **VACATED**, and that Citation No. 4624967 is **AFFIRMED**. It is **FURTHER ORDERED** that Arch of West Virginia **PAY** a civil penalty of **\$55.00** within 30 days of the date of this decision.

T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

James F. Bowman, Conference and Litigation Representative, U.S. Department of Labor,  
MSHA, 100 Bluestone Road, Mt. Hope, WV 25880

Roger Horton, UMWA Miner's Representative, P.O. Box 158, Whitman, WV 25652

Anne Wathen O'Donnell, Esq., Arch Coal, Inc., CityPlace One, Suite 300, St. Louis, MO 63141

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