

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 23, 2023

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

CLAY TRUCKING, INC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2023-0123
A.C. No. 46-09514-567090

Mine: Muddy Bridge

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Respondent has agreed to the proposed changes. The originally assessed total amount was \$26,260.00, and the proposed settlement amount is \$16,079.00.

The proposed settlement terms are reflected in this table:

Citation/Order No.	MSHA'S Proposed Penalty	Settlement Amount	Modifications
9568922	\$12,754.00	\$2,573.00	Modify gravity from "Reasonably Likely & S&S" to "Unlikely & Non-S&S" 80% reduction in penalty
9568923	\$234.00	\$234.00	Affirmed as issued and assessed
9568924	\$518.00	\$518.00	Affirmed as issued and assessed
9568925	\$12,754.00	\$12,754.00	Affirmed as issued and assessed
TOTALS	\$26,260.00	\$16,079.00	39% overall reduction in penalty

Citation No. 9568922, for which the Secretary seeks an 80% reduction in the penalty.

On September 19, 2022, **per Citation No. 9568922**, MSHA Inspector Emory Pack issued a section 104(a) citation alleging a violation of 30 C.F.R. §77.1606(c). That standard titled “Loading and haulage equipment; inspection and maintenance,” provides at subsection (c): **“Equipment defects affecting safety shall be corrected *before* the equipment is used.”**

Inspector Pack stated in the condition section of his citation the following:

The following equipment defects affecting safety were not corrected *before* the company No. 041 Peterbilt 18 wheeler coal truck was placed into operation:

The Brake canisters located on the front axle of the tractor was leaking air and could be heard over the truck and surrounding noise levels. The air leaks caused the air tank to empty when tested. Defects effecting safety shall be corrected before the equipment is used. **This truck was being operated on steep grades throughout the mine property.**

Petition for Civil Penalty at 11 (emphasis added)

The violation was terminated after the defective brake canisters were replaced with new ones. Following that replacement, the canisters were no longer leaking air. *Id.*

Citation No. 9568923

On the *same* day, **per Citation No. 9568923**, the *same* coal truck was cited for a violation of 30 C.F.R. § 77.1605(d). That provision, under the same title, “Loading and haulage” states: “Mobile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required.” The inspector stated that the truck was not provided with a working reverse light on the trailer finding that the light provided was not operative when checked. The violation was terminated upon the reverse light being replaced with a new one.

Petition for Civil Penalty at 12

Citation No. 9568924

Yet again on the same day, **per Citation No. 9568924**, the inspector cited another violation of 30 C.F.R. § 77.1605(d), this time recording “The company No. 024 18-wheeler coal truck (Trailer No.48) was not provided with a working signal lights on the right rear and the front right. Also, the head lights would not work on high beam when checked. The lights provided is not operative when checked.”

Petition for Civil Penalty at 13

That violation was terminated on September 26, 2022, with the inspector noting: “The company No. 024 18-wheeler coal truck has been provided with a working signal lights on the right rear and the front right. Also, the head lights dimmer switch was replaced with a new one and will now work on high beam when checked.”

Id. at 14.

Citation No. 9568925

Last, again on the same day as the other citations described above, September 19, 2022, Inspector Pack issued the fourth citation in this docket, Citation No. 9568925. Involving the same standard identified in Citation No. 9568922, 30 C.F.R. §77.1606(c), this one involved the same truck cited in Citation No. **9568924**. This time in the condition section of the citation, the Inspector listed the following:

The following equipment defects affecting safety were not corrected before the company No.024 (Trailer No.48) Peterbilt 18-wheeler coal truck was placed into operation:

- (1) The turtle valve fitting for the tractor has a broke fitting and is leaking air bad and can be heard over the truck and surrounding noise levels.
 - (2) **The right rear brake canister was also leaking air when tested.**
 - (3) The crossover bar for the 5th wheel was broke into on the front side.
- Defects effecting safety shall be corrected before the equipment is used. This truck was being operated on steep grades and sharp curves throughout the mine property. The truck was removed from service immediately.

Petition for civil penalty at 15.

On September 26, 2022, the violation was terminated with the inspector recording:

The following equipment defects affecting safety have been corrected on the company No.024 Peterbilt 18-wheeler coal:

- (1) The turtle valve fitting for the tractor has been replaced with a new fitting and is no longer leaking air.
- (2) **The right rear brake canister was replaced with a new canister.**
- (3) The 5th wheel bracket has been replaced.

Id. at 16.

Thus, this docket involves four, now-conceded, violations, all dealing with truck safety defects, two each on two coal haul trucks and the two cited trucks had leaking brake canisters. Three of the four citations were paid as per the regular assessment process.

After noting in the motion the condition of leaking air from the front axle brake canisters, as found by the MSHA Inspector Pack, as described above, the claimed justification for designating the injury from the admitted defect as ‘unlikely’ stated:

The Respondent does not dispute that the canisters/brake chambers on the front axle of the tractor may have been leaking air to some extent but not at a rate which compromised the capability of the braking system. The MSHA-inspector determined the fitness of the braking system was adversely affected based on noise level of the air leak coming from brake chambers and the leakage allegedly causing the actuator tank to empty. Therefore, the braking capacity was evaluated as being diminished to a point as to create a safety hazard that would result in a serious injury.¹ The Respondent would argue at hearing that with the truck’s engine running at idle when tested, the truck’s air compressor for the braking system would be supplying air continuously to the actuator tank. It is highly unlikely the actuator tank would ever be void of compressed air, empty. Unless, there was a malfunction with the compressor, however, there was no evidence of this at the time of issuance. The Respondent further argue [sic] that *the inspector failed to show any defects*, based on criteria in MSHA’s Inspection Procedure for Coal Haulage Trucks, page #4, Steering Axle Brakes: 1) an absence of braking action on either of the two brake chambers; 2) that there existed a mismatch across the two power units (air chamber size or in the slack adjuster length) and; 3) that the brake linings or pads on the steering axle of the power units were compromised (pads are not firmly attached to the brake shoe, oil seepage into or out of the brake lining/drum, or brake pads less than 3/16 inch in thickness). Moreover, with condition as alleged, MSHA’s protocol is to request the company representative to “Perform Brake Tests” on an area of the haul road of moderate to steep slope with the truck fully loaded to determine the actual braking capability of the vehicle. This request, possibly to resolve the alleged braking issue, was not even considered by the inspector. The Respondent asserts there is no practical data/evidence provided to support the alleged condition based on the quasi-brake test performed by the inspector. The previous pre-op inspection conducted on the coal haul truck reflected the braking capacity was adequate to control the truck at all times and there is no evidence contrary to this contention. The Respondent further asserts the inspector’s rationale in evaluating the alleged condition is speculative.

The Secretary agrees that the facts support a modification of the likelihood from reasonably likely to unlikely.
Motion at 3-4.

¹ Depending on one’s meaning of a ‘serious injury,’ Inspector Pack evaluated that the an injury would be reasonably likely to result in lost workday or restricted duty. Petition for Civil Penalty at 11.

Analysis for Citation No. 9568922

For this now-admitted violation, regarding Citation No. **9568922**, the Secretary's representative seeks to have the penalty reduced by **80% (eighty percent)**, on the basis that the likelihood of the injury occurring should be classified as "unlikely." Motion at 2, 3. For the reasons which follow, the Court believes that there is not legitimate support for an 'unlikely' designation and that the mine operator's support for that designation improperly shifts the burden of proof on the MSHA mine inspector and that the admitted condition, air leaking from canisters/brake chambers, was serious and warranted correction without delay.

To begin, air brake chambers are round metal containers, located at each wheel, where compressed air is converted into mechanical force to apply the brakes and stop the vehicle. Air is supplied to the brake chambers on each wheel through brake valves. It is controlled by the driver, who can determine how intense the braking should be.²

The Federal Motor Carrier Safety Administration, Department of Transportation speaks to the subject of this admitted violation, noting at APPENDIX A TO PART 396—MINIMUM PERIODIC INSPECTION STANDARDS, "**A vehicle does not pass an inspection** if it has one of the following defects or deficiencies: "... (4) **Audible air leak at brake chamber** (Example-ruptured diaphragm, loose chamber clamp, etc.)." (emphasis added).

As noted above, the mine operator's justification attempts to shift the burden of proof on the MSHA mine inspector beyond his findings that the brake canisters/brake chamber, on the front axle were leaking air to the extent that the air leakage could be heard over the noise levels created by the truck itself and the surrounding noise. The inspector's hearing alerted him to the leaking air and though that was sufficient, as "[a] brake chamber should never leak air out of the service or parking brake system,"³ he then found that "the air leaks caused the air tank to empty when tested." Petition for Civil Penalty at 11. The air tank is important as "an air braking system

²https://www.google.com/search?q=brake+chambers+explained&rlz=1C1GCEB_enUS954US954&ei=IFiPZLSzAduw5NoPuf,-NiA4&oq=brake+chamber+and+%22vital+part%22&gs_lcp=Cgxnd3Mtd2l6LXNlcnAQARgAMgsIABCKBRCGAxCwAzILCAAQigUQhgMQsANKBAhBGAfQAFgAYIcZaAFwAHgAgAEAiAEAkEAmAEAwAEByAEC&sclient=gws-wiz-serp;https://www.theengineerspost.com/air-brake-system/

³ <https://www.thetruckersreport.com/truckingindustryforum/threads/brake-chamber-leaking-from-rear-when-brakes-applied.510651/> Further, to the question whether one can drive with a leaking brake chamber, it is advised it is "[n]ot a good idea to drive with a leaking brake line. The possibility will exist that when you apply your brakes the leaking part could rupture and the brake line will give way completely and you will lose braking power all together. <https://www.quora.com/Can-you-drive-with-a-leaking-brake-line#:~:text=Not%20a%20good%20idea%20to,lose%20braking%20power%20all%20together.> More will be said about leaking brake air canisters in the body of this decision.

includes an air tank that holds sufficient energy to stop a heavy vehicle if the compressor fails. So, an air brake system is designed with enough fail-safe capacity to stop a truck safely, even when leaking.” <https://www.repairsmith.com/blog/air-brake-system/> Here, Inspector Pack found that “[t]he air leaks caused the air tank *to empty* when tested.” *Id.* at 11 (emphasis added).

Turning to the Respondent’s assertions in support of its claim that an accident was not likely to occur, the Respondent’s argument that truck’s air compressor for the braking system would be supplying air continuously to the actuator tank sidesteps the inspector’s finding that the air leaks caused the air tank to empty when he tested it. Although the Respondent contends that it would be “highly unlikely the actuator tank would ever be void of compressed air,” as long as there was no malfunction with the compressor, it does not challenge the inspector’s finding that the leaks caused the air tank to empty.

More importantly, the Respondent’s argument distracts from the underlying issue – the brake canisters on the truck’s front axle were leaking air and to an extent that the noise from the air leaks could be heard over the truck’s noise and the surrounding noise as well. Anyone who has ever been at a gas station and heard an 18-wheeler idling can attest that it is noisy. The point is that an air leak noise of the order found by the inspector is significant.

A serious flaw in the parties’ assertion is that it ignores that the test for likelihood is measured under continued normal mining operations, without any assumptions as to abatement therefore it is not limited to the moment at hand. *See, for e.g., Consol Pennsylvania Coal*, 44 FMSHRC 691,697 (Dec. 2022), citing *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (Aug. 1985). The leaking brake canisters were an accident waiting to happen, especially so because, as Inspector Pack noted without contradiction, the truck was being operated on steep grades throughout the mine property.

The balance of the Respondent’s claim that an injury was unlikely to occur is all about its protest that *the inspector, but not the operator itself*, should have performed additional testing. Further, additional testing would not change the fact that the canisters *were leaking air* and loudly at that. Perhaps the best evidence that the inspector’s ears and the test he performed told the story, is that the operator replaced the canisters with new ones and voila, the air leaking stopped.⁴ In short, had the inspector taken on the burden that really belonged to the operator, not MSHA, all that the best-case scenario would have established is that, *at that moment*, the brakes might function, even as they were leaking air. Again, that is *not the test*.

⁴ Hearing an audible air leak is not to be discounted in establishing that a brake system was not functioning properly. *Oil-Dri Production*, 40 FMSHRC 876 (June 2018) (ALJ Zane Gill). That case involved a metal/nonmetal provision, which is tantamount to the same requirement that – “All braking systems installed on the equipment shall be maintained in functional condition.”

Mining fatality investigations have also implicated service brake chambers where brake actuators had an air leak. <https://www.msha.gov/data-reports/fatality-reports/2022/january-28-2022-fatality/finalreport#:~:text=On%20January%2028%2C%202022%2C%20at,they%20were%20in%20lost%20control%2C>

It is noteworthy that Clay Trucking's recent problems with brake chambers were not limited to this instance. In this very docket Citation No. 9568925, issued the same day as Citation No. 9568922, another 18-wheeler truck was also found by Inspector Pack to have a rear brake canister leaking air when tested. Petition for Civil Penalty at 15. The leaking air canister was but one of three defects identified by the inspector in issuing his citation for the now-admitted violation of 30 C.F.R. §77.1606(c). As with Citation No. 9568922, the remedy was to replace the right rear canister with a new one. *Id.*

In a separate earlier instance, per Docket No. WEVA 2023-0124, Clay was cited with yet another violation of the same standard, 30 C.F.R. §77.1606(c). Brake canisters were part of the defects in that matter. Issued earlier in the same year as this matter, in March 2022, a different MSHA Inspector, Andrew D. Bell, found a host of defects affecting safety with Clay's No. 026 coal truck. As pertinent here, Inspector Bell found that "[b]oth canisters (brake chambers) [on the No. 026 coal truck] on the middle tandem of the trailer are not providing adequate braking capacity. The air lines on the passenger side middle tandem canister were hooked up backwards; the passenger side middle tandem canister is out of adjustment; the driver side rear tandem canister on the tractor is out of adjustment; the driver side front brake canister is out of adjustment." For that violation, the Secretary believed that a 50% reduction in the penalty was justified.⁵

Based on the evidence of record and recognizing that the Commission does not allow its judges to make reasonable inquiry when presented with settlement motions, the Court concludes that the unlikely designation is unjustified. This is particularly troublesome because Citation No. 9568922 was regularly assessed. Given the concerns expressed above, there is a question whether the 80% penalty reduction is consonant with Congress' goal of imposing penalties that make non-compliance more expensive than compliance. If afforded the authority to make reasonable inquiry, a judge's concerns may be allayed and a settlement then approved in good conscience. To the Court, respectfully, settlements reviewed under the present structure, such as this, lay bare the conundrum faced by its judges. Unable to make reasonable inquiry, the Court is faced with either blindly accepting the parties' remarks, in which case it is reduced to a titular role or pointing out the apparent deficiencies in a given settlement, as it has done here.

While rejecting the former approach, that is not the end of the settlement review, because even when faced with problematic settlements as here, the Court is to consider the Secretary's Motion on the basis of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions

⁵ Although it was this Court which approved the settlement in Docket No. WEVA 2023-0124, it did so "solely on the basis of the Commission's decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act." Decision Approving Settlement at 3.

under the Commission’s interpretation of section 110(k) of the Mine Act. Per the Commission’s decisions on the scope of a judge’s review authority of settlements, the “information” presented in this settlement motion is sufficient for approval. Accordingly, the settlement must be approved, but again, as with this Court’s recent approval in the other Clay Trucking case described above, the approval here is also based *solely* on those Commission decisions addressing settlements.

Given the present limited review parameters, the motion to approve settlement must be, and is, **GRANTED** and the Citations in this docket are modified, as reflected in the table above. As such, it is **ORDERED** that for Citation No. 9568922 the gravity is **MODIFIED** from “Reasonably Likely” to “Unlikely,” and as a consequence of that, S&S finding is replaced as “Non-S&S.”

It is **ORDERED** that the Respondent is to pay a civil penalty of **\$16,079.00**.

Further, per the terms of the settlement motion, the civil penalty for this docket is to be paid in five (5) consecutive monthly payments of **\$2,680.00** and one (1) final payment of **\$2,679.00** for the violation(s) in Docket No. **WEVA 2023-0123**. The first payment shall be made on or before the first day of the month following the issuance of an Order approving this settlement.⁶

William B. Moran

William B. Moran
Administrative Law Judge

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⁶ Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. It is vital to include Docket and A.C. Numbers when remitting payments.