FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 5, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 95-29-M A.C. No. 03-01640-05511
v.	:	
REB ENTERPRISES INCORPORATED, Respondent	:	Docket No. CENT 95-30-M A.C. No. 03-01640-05512
	:	REB Enterprises Inc.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-239-M A.C. No. 03-01640-05517 A
v.	:	
HAROLD MILLER, Employed by REB ENTERPRISES INC., Respondent	:	REB Enterprises Inc.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-240-M A.C. No. 03-01640-05518 A
v.	:	
RICHARD E. BERRY, Employed by REB ENTERPRISES INC., Respondent	:	REB Enterprises Inc.

DECISION

Appearances: Daniel J. Haupt, Mine Safety and Health Administration, U.S. Department of Labor, Dallas, Texas, and Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
James E. Crouch, Esq., Cypert, Crouch, Clark & Harwell, Springdale, Arkansas, for the Respondent.

Before: Judge Weisberger

Statement of the Case

At issue in these consolidated cases are citations and orders issued by the Secretary ("Petitioner") to REB Enterprises Inc., ("REB"), alleging violations of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Also at issue are citations issued to Harold Miller, and Richard E. Berry, alleging violations of Section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Pursuant to notice, a hearing was held in Fayetteville, Arkansas in June 11, 1996. REB filed a post-trial brief on July 17, 1996. Petitioner's post-hearing brief was filed on August 5, 1996. On August 14, 1996, REB's response to petitioner's post-hearing brief was filed.

I. Jurisdiction

REB operates a limestone quarry. As a part of the mining operation, overburden is first removed exposing limestone rock which is then blasted. The rock is then further crushed, stockpiled, and subsequently sold to customers. There is no evidence that any REB product is sold or used outside the state of Arkansas.

It is the position of REB and the individual Respondents, Miller, and Berry, that REB's operation is not subject to the Act's jurisdiction.

Section 4 of the Act provides that each mine ". . . the operations or products of which affect commerce," shall be subject to the Act.

In Jerry Ike Harless Towing, Inc., and Harless, Inc., (16 FMSHRC 683 (April 11, 1984)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. Fry v. United States, 421 U.S. 542, 547 (1975); Wickard v. Filburn 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce

> to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. Marshall v. Kraynak, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980); United States v. Lake, 985 F.2d 265, 267-69 (6th Cir. 1993). In Lake, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." Id. Harless, supra at 686.

It is significant to note that a product mine at the quarry at issue, SP-2, which is used as a highway road base, was sold to a contractor who used the product in construction work performed on Arkansas state highway No. 412, which runs West from Arkansas, and crosses over and continues into the state of Oklahoma. Also, a Case bulldozer which was in operation at the mine on August 16, 1994, was manufactured in Racine, Wisconsin i.e., outside the state of Arkansas. Given these uncontested facts, and considering the broad principles enunciated by the Commission in Harless Towing, supra, and based on the authority of the sixth circuit in Lake, supra, I am constrained to find that REB's operation affected interstate commerce, and hence was subject to the Act's jurisdiction.

II. Citation No. 4327635.

At the hearing, Petitioner moved to withdraw this citation due to the lack of evidence to support it. Based upon Petitioner's representations, the motion was granted.

III. Citation No. 4327775.

James Clifton Enochs, an MSHA inspector, testified that on August 16, 1994, he reviewed REB's records. According to Enochs, the records indicated that the most recent test for continuity and resistance of the grounding system, was on April 8, 1993. According to Enochs there was no record of any test subsequent to that date and prior to his inspection on August 16, 1994. Enochs issued a Citation alleging a violation of 30 C.F.R. § 57.12028 which provides as follows: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on a request by the Secretary or his duly authorized representative." (Emphasis added.)

Based upon the uncontradicted testimony of Enochs, I find

that the most recent test of the continuity and resistance of the grounding system recorded by REB was April 8, 1993. I reject REB's argument that, in essence, there was no violation of Section 57.12028, supra, since it had until the end of the calendar year 1994 to perform and record the relevant testing.

Section 57.12028, supra, requires continuity testing "annually"' after installation. Websters Third New International Dictionary, (1986 Edition) ("Webster's") defines the word "annually" when used as an adjective as follows "***2: . . . done, or acted upon every year or once a year ... ." "Year" is defined in Webster's, as relevant, as follows: "c: a period of time equal to one year on the Gregorian calendar but beginning at a different time." In contrast, Webster's defines a "calendar year" as follows: "a period of a year beginning and ending with the dates which are conventionally accepted as marking the beginning and end of a numbered year." Hence, applying the common meaning of the adjective "annually", I find that Section 57.12028 supra, by its terms, is not satisfied by performing and recording the relevant test anytime within a calender year. I conclude that Section 57.12028, supra, is not complied with if the relevant test was not performed and recorded within a year subsequent to the last such test. Since the last recorded test had been recorded more than twelve months prior to the date of the inspection, August 16,1994, I find that Section 57.12028 supra, has been violated. I find that a penalty of $50 is appropriate.

IV. Citation No. 4327776.

A. Violation of 30 C.F.R. § 57.14131(a)

Enochs testified that on August 16, 1994, as part of his inspection, he went to the pit along with Ray King, who was the foreman at the time. Enochs walked over to a R-20 Euclid haul truck to introduce himself to the driver. He climbed up to the running board and noticed that the driver, Ron Alexander, did not have his seat belt on. Enochs issued a Citation alleging a violation of 30 C.F.R. § 57.14131(a) which provides as follows: "Seat belts shall be provided and worn in haulage trucks".

Respondent did not impeach or contradict the testimony of Enochs regarding his observations. Accordingly his testimony in this regard is accepted. Based on his testimony, I find that on August 16, 1994, the driver of the R-20 Euclid haul truck was not wearing his seat belt. I thus conclude that REB violated Section 57.14131(a), supra,

B. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon 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 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The truck at issue hauls material from the pit to the crusher over the roadway which Enochs described as being “somewhat rough” (Tr. 32). According to Enochs the roadway is mostly level but goes down an incline at the area of the crusher. Enochs indicated that there are other haul trucks and equipment operating in the area.

Enochs opined that should the truck overrun a berm, the operator would be thrown from the vehicle and severely injured because he was not wearing a seat belt. Also, Enochs opined that should the truck run into another piece of equipment, the operator would be thrown into the windshield, and could be injured thereby. According to Enochs, there is constant spillage on the road, and if the truck should run over a large boulder, "it could throw the steering wheel, it could throw the unit itself" (Tr. 57). He opined that, based upon his experience, the occurrence of an accident resulting in the truck being wrecked is quite possible. According to Enochs, thirty percent of fatalities in the mining industry involve haulage units. He opined that should the truck roll over, the driver would most likely suffer a fatality, as he did not have a seat belt on. Enochs indicated that he investigated five or six situations in which haul trucks had rolled over.

Richard E. Berry, the owner, principal stockholder, and President of REB, indicated that REB has been operating a limestone quarry at the location in issue since 1988. According to Berry the distance from the pit to the crusher is approximately a quarter of a mile. He testified that at the crusher the roadway goes down a grade for about 100 feet, where it flattens out for 700 to 800 feet, and then goes up a grade that rises about thirty feet, and then becomes flat again. The roadway is between sixty to seventy feet wide, but narrows down to twenty feet for approximately 100 feet where the road goes up a grade. Berry said that the trucks that are driven over the roadway are about eight to nine feet wide, and generally pass one another.

I find, that REB did violate a regulatory standard, i.e., Section 56.14131(a) supra. I also find that this violation contributed to the hazard of the operator of the haul truck being injured should the truck collide with another vehicle or object, or overtravel a berm. However, the record does not establish the speed at which the haul truck regularly operates. There is no evidence that there was any problem with the truck's brakes, or that the truck had any other mechanical malfunction. Further, based upon the uncontradicted testimony of Berry, the roadway was wide enough to safely accommodate two trucks traveling in different directions. Although Enochs testified that the roadway was "somewhat rough" and that spillages were common, he did not proffer any evidentiary facts based upon his observations to support these conclusions.

Based upon the above record, I find that it has not been established that an injury producing event, i.e., the haul truck in question colliding with another object with such force and

speed as to cause the driver to lose control of the truck, or to dislodge the driver, was reasonably likely to have occurred. I thus find that the third element in Mathies supra, has not been established. I find that it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

It is the Secretary's position that the violation herein constituted an "unwarrantable failure". As such, it is incumbent upon the Secretary to establish that REB's actions herein were more than ordinary negligence, and reached the level of aggravated conduct (Emery Mining Corp., 9 FMSHRC 1997 (1987)).

According to Enochs, a Mr. Hermstein, an MSHA inspector informed him that an industrial assistance program handouts concerning haulage were passed out to REB's supervisors, Ray King, and a Mr. Goody. Enochs stated, in essence, that Hermstein told him that he had spent three hours with King and Goody "... for the employees to make sure they preshift each unit, wear their seat belts brakes, steering, the major concerns" (sic) (Tr. 18). He also indicated that " . . . King had been warned by MSHA during the industrial assistance session on the seat belt usage and how important it was. There was--seemed to be no effort to enforce the seat belt law" (sic) (Tr. 33). According to Enochs, when he asked the cited driver of the haul truck why he had not been wearing a seat belt, he said that "nobody made a big deal about it" (Tr. 34). Enochs indicated that King did not say anything when the driver was cited, did not correct the condition or tell the driver that he had to wear the belt. Enochs said that King "... seemed somewhat indifferent to the whole situation" (Tr. 34). Enochs indicated that on the date of the inspection, he went inside REB's office and did not see any notices posted informing employees of the need and necessity to wear seat belts.

According to Berry, a sign is posted outside the building where employees check in, advising them of the need to wear seat belts. He also testified that a notice was posted in the office advising employees of the need to wear seat belts.[1] I observed

[1]This notice was admitted in evidence as Defendant's Exhibit 30, is dated April 1995. However, Harold Miller, a REB employee who testified, and was found to be a credible witness on this point, testified that he could not recall any differences between the notice that was posted in the office on August 16, 1994, and Defendent's Exhibit 30.

Berry's demeanor, and found that his testimony on these points was credible.

It is incumbent upon Petitioner to establish, by a preponderance of the evidence, that the violation at issue resulted from REB's aggravated conduct. Petitioner relies upon the heresay testimony of Enochs that King had been warned by MSHA personnel in an industrial assistance session regarding the use of seat belts at REB's facility. Neither King nor the MSHA personnel who allegedly imparted this information to King testified on behalf of Petitioner. I find the testimony of Enochs in this regard is inherently unreliable due to its heresay nature, and cannot be relied upon to establish that King received such a warning. Petitioner also relies upon an out of court statement by the driver of the cited truck to Enochs that "nobody made a big deal" out of the wearing of seat belts. This person was not called upon by Petitioner to testify to establish this point. I do not assign any probative value to Enochs' heresay testimony as such testimony is inherently unreliable. I find Enochs' testimony that, when cited, King did not provide much of a response and "seemed indifferent", to be too subjective, and thus not to be accorded any probative value. Further, I accept the testimony of REB's witnesses regarding the information that was posted on REB's premises concerning the use of seat belts. For these reasons, I find that it has not been established that the violation herein resulted from REB's unwarrantable failure.

D. Penalty

I find that Petitioner has not established that REB's negligence herein was more than moderate. I find that the driver of the truck, who was not wearing a seat belt, could have been seriously injured should the truck have been significantly jolted upon hitting another object, or should it have overturned. I thus find that the violation herein was more than a moderate level of gravity. Taking into account the balance of the factors set forth in Section 110(i) of the Act, I find that a penalty of $700 is appropriate for this violation.

V. Order No. 4327622, and Docket Nos. CENT 95-239-M and CENT 95-240-M.

A. Violation of 30 C.F.R. § 56.14131(g)

On August 16, 1994, Enochs, in the presence of King, observed a Case bulldozer in operation at the top of the highwall. According to Enochs, the bulldozer was approaching him at an angle of approximately 45 degrees. Enochs estimated that when he was about thirty or forty feet away from the bulldozer,

he noticed that the driver, Bill Jacobs, was not wearing a seat belt. He said that it was "obvious" that the operator did not have a seat belt on (Tr. 130). Enochs issued an Order alleging a violation of 30 C.F.R. § 56.14130(g) which, in essence, requires the wearing of seat belts.

Harold Miller, the lead man at the time, testified that he was in the area when Enochs told Jacobs to put his seatbelt on. Miller indicated that he could not tell if Jacobs was wearing a seat belt. On cross examination Enochs indicated that a photograph of the bulldozer in question taken subsequent to the date of his inspection, (Defendant's Ex. 8) depicts a bulldozer at the approximate angle that the bulldozer was at when cited by him. He was unable to tell by looking at this photograph if the driver was wearing a seat belt. Enochs was shown two other pictures of a driver sitting in the bulldozer at issue (Defendant's Exs. 7, and 28) and he was not able to tell if the driver was wearing a seat belt.

REB has not offered any eyewitness testimony to directly impeach or contradict Enochs' observation that Jacobs was not wearing a seat belt. Specifically, Miller's testimony that he could not tell if Jacobs was wearing a belt when Enochs told the latter to put his belt on, is insufficient to contradict Enochs' testimony. The record does not establish that Miller observed Jacobs from the same distance and direction as observed by Enochs. Also, although Enochs could not tell whether the driver depicted in REB's photographs was wearing a seat belt, there is no evidence that these photographs accurately depict the view that Enochs would have seen from the specific vantage point that he had on August 16, 1994, when he saw the bulldozer at issue and cited it. Accordingly, I accept Enochs' testimony, and find that Jacobs was not wearing a seat belt when cited. Hence, I find that REB did violate Section 56.14130(g), supra.

B. Significant and Substantial

According to Enochs, the violation should be characterized as significant and substantial. He pointed out that he observed tracks within five feet of the edge of the highwall. According to Enochs, the highwall was eighty feet above the next level. Enochs indicated that in normal operations, at times the blade of the bulldozer "will catch on a hard rock area, seam or something like that, and it shakes, shake the machine and the operator pretty bad, substantially, and it could throw him off the machine. You know, cause him to lose control" (sic) (Tr. 131). Enochs also opined that the bulldozer could accidentally run over the highwall, as the berm in the area varied between knee to waist level, and consisted only of overburden material.

On the other hand, on cross examination, it was elicited from Enochs that the bulldozer as seen by him was not operating "at a high rate of speed" (Tr. 146). Further, on cross examination Enochs was unable to state how often bulldozers have been driven off a highball each year.

Miller explained that in stripping the overburden ". . . we stay at least ten foot away from it [the highwall] with any dozer" (sic.) (Tr. 185). Berry explained that in normal operations the overburden is cleared in stages working from top down. He indicated that in normal operations, the closest the bulldozer would get at the edge of a highwall was thirty to forty feet (Defendant's Ex. 33). He opined that the tracks observed by Enochs might have been placed by the bulldozer during the clearing of the overburden, when those tracks would have been located thirty to forty feet from the edge of the highwall. Enochs did not explain how, in normal operations, the bulldozer would go within five feet of the edge of the top of an existing highwall.[2] I thus find that it has not been established that in normal operations the bulldozer would go within five feet of the edge of the top of an existing highwall.

Based upon all of the above, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event, and thus it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

1. Summary of the Testimony

Enochs testified that Jacobs had told him on the date the Citation was issued that he sometimes wears a seat belt, and sometimes does not. In contemporaneous notes taken by Enochs, he indicated that Jacobs stated that "no one makes a big deal about it". (Defendant's Ex. 32). I do not assign much probative weight to this testimony, as it is heresay and thus inherently unreliable. The declarant did not testify, and accordingly was not present in court to be cross examined.

Dale St. Laurent, an MSHA investigator, interviewed Jacobs who told him that REB did not have any seat belt policy, and that

[2]On rebuttal, Enochs indicated that when he arrived at the top of the highwall, bulldozers were backing out onto a thirty foot area that had been stripped. However, he did not testify specifically how close these vehicles were to the edge of the highwall.

no one have ever made him wear a seat belt. St. Laurent testified that he also interviewed a Mr. Yates, a serviceman, who told him that in the year prior to the inspection "he had never seen either of those two dozer operators wear a seat belt ... . He doesn't remember anyone ever yelling at Mr. Berry or Mr. Miller or anyone ever yelling at anybody to put seat belts on" (Tr. 245). St. Laurent indicated that Yates told him that there wasn't any policy regarding seat belts and that one told him to wear seat belts (Tr. 162). According to St. Laurent, Yates told him that Jacobs had told him (Yates) that Miller and Berry never told him to wear a seat belt.

According to Enochs, Miller who was the supervisor on the site, was present when the bulldozer was cited, but did not take any corrective action. Enochs indicated that the fact that Jacobs was not wearing a seat belt was obvious as the cab was open.

Miller indicated that he arrived at work on August 16, at 6:00 a.m. and left the site at 7:00 a.m. to get some parts, returning about 9:00 a.m. He testified that he had been on the site for about ten minutes when he saw Enochs talking to Jacobs. He indicated that when Enochs came up to Jacobs and told him to put a seat belt on, he (Miller) could not tell whether Jacobs was wearing a seat belt. I observed Miller's testimony and found him credible in these regards. Enochs indicated on cross examination, that he was thirty to forty feet away from Jacobs when he observed that Jacobs did not have a seat belt on, and that Miller was approximately ten yards further back. Within his context I find that there is no evidence that Miller knew that Jacobs had not been wearing a seat belt when cited.

Miller indicated that subsequent to September 1995, he has been the supervisor at the quarry but that in August of 1994, he was only the "lead man" (Tr. 175). He stated that in this capacity it was his responsibility to operate equipment, and get the dirt stripped. He said that in general, his supervisor, Ray King, told him what to do on the site, and he in turn passed this information on to the other equipment operators. He said that he did not have any authority to punish the men, and did not have any authority to hire or fire. He stated that he was never told what to do regarding the punishment to be given the men. He indicated that he did not tell the men what equipment to use.

2. Discussion

There is no evidence that King, the quarry supervisor, or Miller, had notice or acknowledge that Jacobs was not wearing a seat belt. There is no evidence that King, prior to Enochs'

issuance of the Order at issue, was in any position to have observed that Jacobs was not wearing a belt. Having observed Miller's demeanor, I find his testimony credible, that on August 16, he had only been at the site for approximately ten minutes prior to Enochs' issuance of the Order, and had not observed Jacobs being without a belt. When Enochs observed Jacobs being without a belt he was 10 yards closer to Jacobs than Miller. There is no evidence that, Miller was in any position to have observed that Jacobs was not wearing a seat belt. I note Enochs' testimony that King had received a special warning, and training from MSHA regarding the need to ensure the compliance at the site with the seat belt standard. However, this testimony was not based upon Enochs personal knowledge, but rather was based upon statements of another inspector made to him. Because of the inherently unreliable nature of heresay testimony I do not assign any probative weight to Enochs' heresay testimony, in evaluating the critical issue of REB's unwarrantable failure. For the same reason, I do not assign any probative weight to Enochs' and St. Laurent's testimony about out of court statements made by Jacobs and Yates concerning the attitude of their supervisors regarding the use of seat belts, and the policy of REB in this area. On the other hand, I find, as discussed above, (IV(c) infra), that the credible evidence establishes that REB had indeed posted in its office information regarding the requirement for its employees to wear seat belts while on the job. Miller indicated that prior to the date of the Order at issue, in his capacity as lead-man, he had not enforced seat belt rules as he did not want to be hard on the men. However, the record does not establish that Miller, on the date the Order at issue was issued, had any official duties or responsibilies toward enforcing compliance with the mandatory seat belt standard. Within this context, I find that it has not been established that the violation was the result of REB's unwarrantable failure.

D. Penalty

I find that REBs negligence was no more than moderate. I find that a penalty of $500 is appropriate.

E. Section 110(c) violations. Docket Nos. CENT 95-239-M, and CENT 95-240-M)

1. The Legal Standard to be Applied

Section 110(c) of the Act subjects certain individuals to civil penalties if the Secretary can sustain his burden of proving that: (1) a corporate operator committed a violation of a mandatory health or safety standard (or an order issued under the

Act); (2) the individual was an officer, director, or agent of the corporate operator; and (3) the individual "knowingly authorized, ordered, or carried out" the violation.

A violation by the corporate operator must be established and such violation must be proved in the proceeding against the individuals. Kenny Richardson, 3 FMSHRC 8, 10 (January, 1981), aff'd sub nom. Richardson v. Secretary of Labor, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). The Secretary also has the burden of proving that the person charged is an agent of the corporate operator. Under Section 3(e) of the Act "agent" is defined as "any person charged with responsibility for the operation of all or part of a coal or other mine, or the supervision of miners in a coal or other mine."

Finally, the Secretary must prove that the agent "knowingly authorized, ordered or carried out" the violation. The appropriate legal inquiry in this regard is whether the corporate agent "knew or had reason to know" of the violative condition. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984), citing Kenny Richardson, 3 FMSHRC 8, 16 (January 1981). In Kenny Richardson, the Commission stated:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC supra, at 16.

In order to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted, not that the individuals knowingly violated the law. Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August, 1992). In Roy Glenn, 6 FMSHRC 1583 (July, 1984), the Commission held, however, that something more than the possibility of an underlying violation must be shown to establish "reason to know". 6 FMSHRC at 1587-8. Moreover, a "knowing" violation requires proof of aggravated conduct and not merely ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August, 1994).

a. Miller

Miller testified that on the date in issue, he was only a "lead man" (Tr. 175), and did not become the quarry supervisor until September 1995. He was asked whether he was Jacob's supervisor and he answered as follows. "I guess you can call me that, yes, sir" (Tr. 176). Miller indicated that he did verbally discipline the men working on the top of the highwall. Also, he

indicated that it was his responsibility, in addition to operating the equipment on the top of the highwall, to transmit to the men the directions he had received from his supervisor, (King), regarding the tasks to be performed on the site. He indicated that he did not have the authority to hire and fire, was not told what to do regarding disciplining the men at the site, and did not assign equipment to the men. Petitioner has not rebutted or impeached this testimony.

I find that Petitioner has failed to adduce sufficient evidence to establish that Miller had any significant responsibility for the operation at the highwall, or that he supervised the other miners working at that site. There is no evidence whether he was paid as an hourly employee, or as part of management. There is no evidence regarding any description of his official duties and responsibilities. There is no evidence that he had any direct responsibility for controlling the acts of the miners on the highwall, that he had the authority to initiate the assignment to them of their tasks, that he was responsible for their performance and duties, that he had the responsibility to discipline them if they did not perform their duties properly, that he was responsible for the safety of the miners and their operation, or that he was responsible to ensure that the mandatory safety standards were complied with by the men at the highwall. Within this context, I conclude that the Secretary has not met his burden in establishing that Miller was an "agent". Accordingly, I find that Petitioner has not established that Miller violated Section 110(c) of the Act.

b. Berry

Berry was the owner, principal stockholder, and President of REB on the date in issue. He thus was an officer and came within the purview of Section 110(c), supra. It is incumbent upon the Secretary to establish that Berry knew or had reason to know of the violative condition (Roy Glenn, supra.) There is no evidence that he had any information that gave him any knowledge or reason to know that Jacob was not wearing a seat belt. (See, Kenny Richardson, supra at 16). For the reasons discussed above, (IV (C) infra,) I find that as President, Berry's policy toward the wearing of seat belts was manifested by the posting of material informing employees of their responsibility to wear seat belts.[3] I observed Berry's demeanor. I find his testimony

[3]Berry's testimony that REB has employees sign its safety policy (Defendant's Ex. 28) when they start to work for REB, was not impeached or contradicted. I therefore accept this testimony. I note that this policy requires that seat belts "be

credible that although he personally feels that a person has the right not to wear a seat belt, he does not condone not wearing a seat belt. I also accept his testimony that on five or six different occasions when he saw employees not wearing a seat belt, he told them to put on a seat belt and warned them that they would be sent home the next time they were found to be without a seat belt.[4]

Within the context of the above evidence I find that it has not been established that Berry knew or reasonably should have known that Jacob was not wearing a seatbelt when cited. Nor is there sufficient evidence of aggravated conduct on his part. For these reasons, the 110(c) action against him shall be dismissed.

VI. Order No. 4327625.

A. Violation of Section 56.14130(g), supra.

Approximately one hour after Enochs had cited the bulldozer operator for not wearing a seat belt, he observed Jim Farrish operating a John Deere bulldozer, but not wearing a seat belt. According to Enochs he was at a forty five degree angle facing the bulldozer. Enochs indicated that when he was sixty to seventy feet away from Farrish, and approximately six to eight feet above the ground that Farrish's bulldozer was being operated on, he saw that Farrish was not wearing a seat belt. Enochs issued an Order alleging a violation of Section 56.14130(g) supra, which requires the wearing of seat belts.

Miller indicated that he spoke with Farrish later on that afternoon, and Farrish informed him that he had the seat belt on, but that he undid it when he saw Enochs approach him. I find this heresay testimony inherently unreliable, and insufficient to rebut or contradict Enochs' testimony regarding his observations.

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worn at all times of vehicle operation" (Defendant's Ex. 28).

[4]REB's official policy provides that the first offence of a failure to comply with the policy to wear a seat belt, will result in "remainder of day of violation off without pay" (Defendant's Ex. 28). Berry's action in warning, but not discipline the employees he had caught not wearing a seat belt might lead to an inference that REB has been unduly lax in not discipline employees for not wearing a seat belt. However, since Berry did issue a warning, I cannot conclude that Berry's conduct is to be equated with aggravated conduct, nor can it be the basis of a Section 110(c) action.

There is no other evidence of record to contradict Enochs' testimony regarding his observations. I thus find that REB did violate Section 56.14130(g) supra, as alleged.

B. Significant and Substantial

According to Enochs, the bulldozer in question was being used to cut a ramp, and was being operated down an incline. He said that, when cited, Farrish was "very close to a steep incline" (Tr. 229). He described the area as consisting of "unconsolidated material, very steep drop off" (sic) (Tr. 230). Enochs opined that in the event the bulldozer would travel over the "hill" the operator would definitely be severely injured (Tr. 231).

Respondent did not offer any evidence to impeach Enochs' testimony with regard to his observation of the terrain, and his opinions regarding the likelihood of an injury producing event, and the seriousness of any resulting injury. I thus find, based on the testimony of Enochs, that an injury producing event was likely to have occurred, and that there was a reasonable likelihood that the driver would have been injured as he was not wearing a seat belt. There was also no contradiction or impeachment of Enochs' testimony that the resulting injury would reasonably likely have been permanently disabling. I thus find that it has been established that the violation was significant and substantial (See Mathies, supra).

C. Unwarrantable Failure

Enochs indicated that the instant Order was the fourth Citation/Order that he had issued that morning involving not wearing a seat belt. He indicated that the violative condition was obvious, and that no corrective action was being taken by management. Petitioner did not adduce any evidence that, subsequent the issuance of the other seat belt violations by Enochs, King had any opportunity to check whether other employees were wearing their seat belts. There is no evidence regarding King's actions subsequent to the first set of seat belt citations and orders issued. There is no evidence regarding his activities between the time the first Citations/Orders were issued, and the issuance of the instant order.

According to St. Laurent, Yates, had told him that in the year prior to the instant inspection he never saw the two bulldozer operators wearing their seat belts. St. Laurent testified that he asked Yates if efforts were made to make employees wear seat belts, and Yates told him that when he was hired, no one told him to wear a seat belt. St. Laurent

testified that Yates also told him that he did not recall anyone yelling at anyone else to put a seat belt on. St. Laurent testified that he asked a Mr. Cunningham, a plant operator who also operated equipment, about seat belts and the latter told him that "what the normal posture was there is that if a guy wanted to wear them, fine, and if he didn't then that was okay, too" (Tr. 246).

For the reasons stated above, (V(c) infra), I find the heresay testimony of St. Laurent regarding what Yates and Cunningham told him to be inherently unreliable. I thus do not assign it any probative value in evaluating the critical issue of REB's unwarrantable failure, if any. I note that neither Yates nor Cunningham was called by Petitioner to testify. Within the above context, I find that it has not been established that this violation was as the result of REB's unwarrantable failure. I find that a penalty of $500 is appropriate.

D. 110(c) violations

1. Miller

For essentially the reasons set forth above, (V(E)(a) infra), I find that it has not been established that Miller was liable under Section 110(c) of the Act, and hence that action against him shall be dismissed.

2. Berry

I find that the heresay testimony of St. Laurent with regard to out of court statements by Yates and Cunningham is insufficient to establish Berry's liability under Section 110(c) of the Act. Further, for the reasons set forth above, (V(E)(b) infra), I find that Petitioner has failed to establish any liability on Berry's part under Section 110(c) of the Act. Therefore that action against him shall be dismissed.

VII. Citation No. 4327624

On August 6, Enochs observed a track mounted trackhoe operating in the stripping area. He said that this equipment is used for excavating dirt, is track mounted, and rotates and revolves. He said that the front and side window on the right side was "cracked in several places" (Tr. 217), and that the driver's vision would be obscured. He described the breakage as being "pretty extensive throughout the whole panel" (Tr. 221).

Enochs issued a Citation alleging a violation of 30 C.F.R. § 56.14103(a) supra, which provides, as pertinent, that if

windows are provided on self-propelled mobile equipment, "[t]he windows shall be maintained to provide visibility for safe operation."

REB did not offer any evidence to contradict Enochs' testimony regarding his observations. I therefore accept Enochs' testimony, and find that REB did violate Section 56.14103(a) supra. I find that a penalty of $50 is appropriate.

VIII. Order No. 4327626.

On August 16, Enochs observed a Case backhoe being operated. According to Enochs it was being used as a loader, as it had a bucket on the front. He said that King had told him that it was being used to clean spilled material. Enochs said the backhoe was equipped with wheels, had a loader bucket in front, and a backhoe bucket in the back. He opined that it was a combination loader/backhoe. According to Enochs, the vehicle was not provided with a seat belt.

On cross examination Enochs indicated that a wheel loader is different than a backhoe, and that the vehicle in question was in use when he inspected it.

Enochs issued an Order alleging a violation of 30 C.F.R § 56.14130(a)(3) which provides, in essence, that seat belts shall be installed on "wheel loaders and wheel tractors".

It is incumbent upon Petitioner to establish that, as commonly understood in the mining industry, a reasonably prudent person familiar with the industry, the terms "wheel loaders" or "wheel tractors" encompass the vehicle in question. Enochs' opinion that the vehicle was a combination loader/backhoe is not accorded much weight, as he did not set forth in detail the basis for his opinion. Further, aside from this opinion Petitioner has not proffered any evidence as to how the terms "wheel loader" or wheel tractor" are commonly understood in the mining industry. For these reasons, I conclude that Petitioner has failed to meet his burden, and that this Order shall be dismissed.

IX. Order No. 4327628.

Enochs indicated that on August 16, at about 12:00 p.m., he was on a walkway which was approximately ten feet above where a loader was being operated. Enochs noted that his point of observation was approximately twenty feet removed from the loader. Enochs testified that he saw the driver, Ron Alexander, drive under him. Enochs said that he saw Alexander's hands on

the loader's controls. According to Enochs, Alexander then turned off the loader, did not unbuckle his seat belt, and climbed out of the loader. According to Enochs, the loader was being used to load material from a stock pile. Enochs issued an Order alleging a violation of Section 56.14130(a)(3) supra.

Based upon Enochs' testimony that I find credible, and that was not contradicted by any other eyewitness, I conclude that Alexander was not wearing a seat belt when cited by Enochs. However, there is no evidence in the record that a seat belt had not been installed on this vehicle. Accordingly, I find that it has not been established that REB was in violation of Section 56.14130(a)(3), which provides that seat belts shall be installed on loaders. Hence, Order No. 4327628 is to be dismissed.

X. Order No. 4327631.

A. Violation of 30 C.F.R. § 56.14107(a)

According to Enochs, on August 16, 1994, he observed that there was no guard at the tail pulley of the radial stacker conveyor belt. According to Enochs, the belt was in operation, and the pinch point of the tail pulley which was not guarded, was approximately two feet above the ground. Enochs issued an Order alleging a violation of 30 C.F.R. § 56.14107(a) which, as pertinent, provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, . . . chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury."

REB did not proffer the testimony of eyewitnesses to contradict or impeach the observations of Enochs. REB's defense appears to be based upon 30 C.F.R. § 56.14107(b) which provides that guards are not required where the exposed moving parts "are at least seven feet away from walking or working surfaces". In this connection, REB elicited from Enochs, on cross-examination, that the unguarded tail pulley was not located in the normal path of travel. Berry indicated that there was no reason to go to the cited area, except to perform maintenance on the belt. In that event, the belt would not be in operation.

I note Enochs' testimony that there was nothing to restrict access to the unguarded tail pulley which was located only two feet above the ground. The ground was the surface upon which men can walk or work. Accordingly, the terms of the exception set forth in Section 56.14107(b) supra, has not been met. I thus find that REB did violate Section 56.14107(a) supra.

B. Significant and Substantial

In essence, Enochs concluded that the violation was significant and substantial, inasmuch as the pinch point was exposed, and there were no barriers or signs warning persons of this condition. Enochs opined that a person could easily get caught up in the self-cleaning pulley which was not smooth. According to Enochs, the pulley was located behind an exit door, and was in a "natural traffic walkway area" (Tr. 277). However, he did not elaborate with sufficient specificity the basis for this opinion. Enochs opined that should an injury occur as a result of the violative condition, it would be at least permanently disabling.

On the other hand, Berry opined that there was no reason to walk in the cited area. Berry indicated that, in exiting the shop, the path taken to other parts of the plant would not place a person within twenty five, or thirty feet of the pulley. He also was not aware of any injuries at this site.

Within the context of this evidence, I conclude that it has not been established that an injury producing event was likely to have occurred. Accordingly, I find that it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

Enochs testified, in essence, that his conclusion that the violation was as a result of REB's unwarrantable failure, was based upon the fact that King was given a handbook by MSHA setting forth the need for guarding. For the reasons set forth above, (IV(c) infra), I do not assign any probative value to this heresay testimony. I thus conclude that it has not been established that the violation herein was as a result of REB's unwarrantable failure.

D. Penalty.

The tail pulley in question was self-cleaning, and was located only two feet above the ground. REB did not contradict Enochs' testimony that the unguarded self-cleaning pulley can grab a person's clothing, and wrap a person up in the tail pulley. I thus conclude that the gravity of the violation was relatively high. I find that a penalty of $500 is appropriate for this violation.

XI. Citation No. 4327632

On August 16, Enochs observed that there was an unguarded

V-belt drive on the simplicity belt vibratory screen. He indicated that the V-belt drive was approximately three feet above the walkway. The pulley itself was located about twenty feet off the ground. Enochs issued a Citation alleging a violation of Section 56.14107(a) supra.

REB did not offer the testimony of any witness to impeach or contradict Enochs' observations. Accordingly, I find that it has been established that the drive belt was not guarded, and that someone could be caught in the belt drive. I find that the unguarded pinch point was located three feet above the walkway. Although the pulley was twenty feet above the ground, I find that the exception set forth in Section 56.14107(b) supra, does not apply, as the unguarded pinch point was three feet above a surface where persons can walk. I thus find that it has been established that REB did violate Section 56.14107(a) supra. I find that a penalty of $50 is appropriate.

XII. Citation No. 4327633.

Enochs observed that the V-belt drive of a thirty horse power vibratory shaker drive belt, was not guarded. He indicated that the belt machine and pulley were located along the walkway, but probably fifteen feet off the ground. REB did not impeach or contradict his testimony. I find, consistent with the discussion above (XI infra,) regarding Citation No. 4327632, that REB did violate Section 56.14107(a) supra, and that the exception set forth in Section 56.14107(b) supra, does not apply. I find that a penalty of $50 is appropriate for this violation.

ORDER

It is ORDERED as follows: (1) Order Nos. 4327626, and 4327628, and Citation No. 4327635, and Docket Nos. CENT 95-239 and 95-240 shall be DISMISSED; (2) Citation No. 4327776 and Order Nos. 4327622 and 4327631 shall be amended to Section 104(a) citations, and Order No. 4327625 shall be amended to a Section 104(a) Citation that is significant and substantial; and (3) that Respondent shall, within 30 days of this decision pay a total civil penalty of $2,400.

Avram Weisberger
Administrative Law Judge

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