

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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June 3, 2004

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2003-274 |
| Petitioner | : | A.C. No. 15-18015-03527 A |
| | : | |
| v. | : | |
| | : | |
| CHARLES CLEVINGER, Employed by | : | |
| LODESTAR ENERGY, INC., | : | Bent Mountain |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2003-275 |
| Petitioner | : | A.C. No. 15-18015-03528 A |
| | : | |
| v. | : | |
| | : | |
| DAVID R. COLEMAN, Employed by | : | |
| LODESTAR ENERGY, INC., | : | Bent Mountain |
| Respondent | : | |
| | : | |

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC,
Charleston, West Virginia, for the Respondents.

Before: Judge Feldman

These consolidated proceedings are brought by the Secretary under section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(c), following a fatal truck accident that occurred on October 3, 2001, at Lodestar Energy Inc.'s (Lodestar's) Bent Mountain Mine. Section 110(c) of the Act provides that a corporate agent "who knowingly authorized, ordered or carried out . . . [a] violation" committed by a corporate operator may be subject to individual liability. As a general proposition, a "knowing" violation under section 110(c) involves aggravated conduct rather than ordinary negligence. *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

These matters concern petitions for assessment of civil penalties filed by the Secretary against the respondents Charles Clevinger and David R. Coleman who were supervisory personnel at Lodestar's Bent Mountain facility. The Secretary alleges that Clevinger and Coleman "knowingly" violated the provisions of section 77.1605(b) of the Secretary's mandatory safety standards that require all loading and haulage mobile equipment to be equipped with adequate brakes. 30 C.F.R. § 77.1605(b).

A hearing was conducted on February 11 and February 12, 2004, in Pikeville, Kentucky. At the hearing, the Secretary moved to dismiss the case against Clevinger because the facts did not support that he "knowingly" violated the cited safety standard, and because of Clevinger's untimely death in November 2003. The Secretary's motion to dismiss was granted on the record. (Tr. I, 8-12).¹ Accordingly, the civil penalty proceeding against Charles Clevinger in Docket No. KENT 2003-274 was dismissed on the record. (Tr. I, 8-11).

With respect to the case against Coleman, the record was left open for the parties to submit transcripts of the MSHA accident investigation interviews of David Coleman and Elchaney Cline. Coleman filed his transcript interviews on February 23, 2004. The Secretary provided the transcripts of Cline's interviews on March 5, 2004. (Tr. II, 342, 353; Resp. Ex. 6, Joint Ex. 1).

I. Statement of the Case

On October 3, 2001, Gary Blackburn was driving a Mack DM600 fuel truck down an inclined haulage road in order to refuel mining equipment located in a coal producing pit. At some point along the road, Blackburn lost control and jumped from the vehicle sustaining injuries that resulted in his death the following day. Drivers normally relied on downshifting in low gear to control their trucks while descending steep grades. After the accident, examination of the service brakes revealed significant defects.

The accident investigation team initially believed that defective brakes were the primary cause of the accident based on the erroneous belief that an employee, Elchaney Cline, had complained to Coleman about the truck's brakes the night before the accident.² Although poor brakes undoubtedly were a significant contributing factor, the evidence reflects the proximate cause of the accident was a defective clutch that was adjusted only two hours before the fatal accident. The clutch failure caused the truck to "freewheel" out of control. In this regard, at

¹ The transcripts for February 11 and February 12 are cited as "Tr. I" and "Tr. II," respectively.

² In fact, Cline testified he communicated brake complaints to Coleman approximately one month before the accident. (Tr. II, 227-30). There is very little evidence of brake complaints in the intervening weeks leading up to the accident.

trial, MSHA conceded that it was implausible that Blackburn jumped while the truck was in low gear and limited to a speed of ten miles per hour. (Tr. I, 250-61).

To prevail in a 110(c) personal liability case, the Secretary must show that Coleman, as a foreman in a position to protect employee safety, failed to act on the basis of information that gave him knowledge or reason to know of the existence of a hazardous violation. *Sec'y of Labor v. Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982). In addition, the Secretary must demonstrate that Coleman's failure to act in response to the information known to him constitutes aggravated conduct. *Bethenergy*, 14 FMSHRC at 1245.

In evaluating the evidence, the focus is on the nature and extent of Coleman's knowledge of the brake conditions in the weeks preceding the October 3, 2001, accident. In this regard, Coleman cannot be charged with knowledge of the significant brake defects that were revealed by a detailed examination of the wreckage after the accident. As discussed herein, the Secretary has failed to demonstrate that Coleman's failure to recognize the defective brake conditions constituted aggravated conduct.³ Consequently, the personal liability case brought by the Secretary against Coleman must be dismissed.

II. Preliminary Findings of Fact

Lodestar's Bent Mountain Mine began production in December 1998. Lodestar is in bankruptcy and is not currently operating the mine. At the time of the accident in October 2001, the mine facility consisted of three pits where highwall drills, a hydraulic shovel, front-end loaders and rock trucks were used to produce approximately 45 tons of coal each day.⁴ The mine operated two ten-hour production shifts, seven days a week. Personnel were divided into two crews designated as "A" and "B". The crews worked day shifts from 6:00 a.m. until 4:00 p.m. and night shifts from 6:00 p.m. until 4:00 a.m. Each crew worked four consecutive days, and then was off for five days. It was a common practice for employees to work on days that their crew was scheduled to be off. Roger Bartley was the "B" crew day foreman. David Coleman was the "B" crew night foreman. Don Holiday was the "A" crew day foreman and Doug Trimble was the "A" crew night foreman. (Tr. II, 316-17). Bartley, Coleman, Holiday and Trimble reported to Charles Clevinger who was the Mine Superintendent.

³ I note, parenthetically, Coleman has not been charged with failing to remove the truck from service because it was defective in violation of section 77.404(a). Section 77.1605(b), the standard Coleman is charged with violating, requires that mobile equipment must have adequate brakes. Thus, the issue is whether Coleman's failure to recognize the inadequacy of the truck's brakes constitutes a knowing violation of Section 77.1605(b).

⁴ Although not specifically cited, background information and investigation findings have been taken from MSHA's accident investigation report released on December 12, 2001, and admitted as Gov. Ex. 2.

Johnny Huffman was the maintenance supervisor in charge of vehicle maintenance. He supervised eight mechanics. (Tr. II, 290, 317-18). Huffman prepared the work schedule for the vehicles, managed maintenance work and assigned work to the mechanics. (Tr. II, 318). Huffman decided when brakes were to be serviced or replaced. (Tr. II, 269). If equipment operators experienced mechanical problems, Lodestar's procedure required the operator to immediately notify either one of the mechanics directly, the mechanic's supervisor, or the shift foreman, who would contact maintenance about the problem. (Tr. I, 82, 149, 156; Tr. II, 244, 267). Adjustments were sometimes made on equipment without the foreman's knowledge. (Tr. II, 305).

Employees who experienced equipment problems were also required to indicate the defective conditions on their time sheets. (Tr. I, 84; Tr. II, 270, 306-07). The time sheets have a specific location where brake problems are to be noted. (Tr. I, 84; Gov. Exs. 45-48, 53). The shift supervisor was responsible for ensuring that any problem noted on the time sheets was brought to the attention of the maintenance department. (Tr. II, 157). If a vehicle had a mechanical problem during Coleman's shift, Coleman's practice was to record the problem and communicate the problem directly to Huffman. (Tr. II, 352). Coleman had no direct involvement with the repairs. (Tr. II, 352).

Two fuel trucks were used at the Bent Mountain facility, a red truck and a black truck. (Tr. I, 52). The black truck, designated by Lodestar as FT916, was a newer, larger Mack fuel truck. The black truck was the primary vehicle used to fuel mine equipment. It was equipped with a Jacob's Brake, also called a "jake" brake. A Jacob's Brake uses compression from the engine to slow the vehicle lessening the operator's reliance on the service brakes. (Tr. I, 54).

The red fuel truck, designated by Lodestar as FT154, was a spare truck that was used when the black truck was being serviced or repaired. The red truck was a 1975 Mack Model DM 600, ten wheel vehicle with a 3,000 gallon capacity fuel tank. The red truck was not equipped with a Jacob's Brake. The brakes on the red truck were last replaced in April 2001, approximately six months before the accident. (Tr. II, 324, 351). The red truck had five high gears and five low gears that were engaged by using two shift levers. (Tr. I, 58). The main shift lever changed the gears from one to five and the auxiliary shift lever set the gear in high, low or neutral. Operators typically drove the red truck down steep hills in second gear (low), which limited the vehicle to approximately five to ten miles per hour. (Tr. I, 96). When in second gear, drivers normally did not have to use the service brakes to control the truck. (Tr. I, 111-12, 114, 118-19, 127).

a. The Events of October 3, 2003

The victim, Gary Blackburn, was an experienced truck driver. (Tr. I, 115, 255). On the day of the accident on October 3, 2001, Blackburn began work at 6:00 a.m. Blackburn normally worked as a rock truck driver on the "A" crew and he was not scheduled to work on this day. However, he decided to work an off shift and he was assigned to operate the red fuel truck.

FT154 was being used because the black fuel truck was being repaired. Blackburn filled the truck with approximately 3000 gallons of diesel fuel and proceeded to a parking area for mining equipment and private vehicles known as the #3 Knob.

Blackburn drove to the parking area to meet Mark Hamilton, a day shift mechanic. Hamilton had been directed by Johnny Huffman, the maintenance supervisor, to adjust the FT154 clutch after Elchaney Cline, who had operated the truck the previous shift, reported the clutch was slipping. (Tr. II, 262-64). After the adjustment was made, Hamilton asked Blackburn to apply the park brake and put the truck in gear to determine if the clutch would hold. (Tr. II, 263, 266). At that time, the brakes were sufficient to hold the truck until the engine almost stalled. (Tr. II, 265). Hamilton testified that Blackburn did not report any brake problem to him. (Tr. II, 265, 268).

Consistent with Hamilton's testimony, Bartley testified that Hamilton and Blackburn tested the clutch on the morning of October 3, 2001, by revving the engine while engaging the brakes. Bartley stated that, after the adjustment was made, Blackburn drove the truck around the parking lot to test the truck. Blackburn gave Bartley the thumbs-up sign indicating the truck was operating properly. Bartley testified Blackburn did not report any problems with the truck's brakes. (Tr. II, 288-89).

At approximately 10:40 a.m., Blackburn began descending the haulage road leading to the Winifrede Coal Seam to fuel and service the mining equipment in the pit. The road was composed of dry, compacted soil and rock. It was approximately 27 feet wide and 1,800 feet long, with a grade varying from 8 percent to 16 percent. This haulage road is commonly known as the "hell hole." (Tr. I, 54-58; Tr. II, 224). A public highway with a 6 percent grade is considered to be a steep grade requiring trucks to use low gear. (Tr. II, 213). On the day of the accident, the sky was clear and it had not rained for several days. At some point along the road, Blackburn apparently lost control of the fuel truck and jumped from the vehicle, landing on the left side of the road near the berm. The unoccupied truck continued traveling for an additional 180 feet and struck a larger Caterpillar rock truck parked in a flat area off of the left side of the haulage road. The impact caused extensive damage to the fuel truck. (Gov. Ex. 19). The fuel truck wreckage was found with the main shift lever in fourth gear and the auxiliary shift lever in neutral. The effect was a neutralized transmission that could result in a runaway or "freewheeling" truck. (Tr. II, 182-83, 206-08, 222-23).

At 10:50 a.m., a contract coal truck driver observed Blackburn lying on the left side of the road, approximately 1600 feet from the top of the slope. Bartley was notified and he immediately requested an ambulance. Blackburn was transported up the haulage road by ambulance to an area suitable for helicopter landings. Blackburn ultimately was air-lifted to a hospital where he died the following day of head injuries. There were no eyewitnesses to the accident.

b. The Accident Investigation

The Secretary's principal witness in this proceeding is Elchaney Cline. Cline was a utility man who operated a variety of mine equipment. Cline, whose testimony will be discussed in detail below, worked on the "B" crew supervised by Coleman. Cline drove the red FT154 fuel truck during the shift immediately preceding Blackburn's shift for 7½ hours during the evening of October 2, 2001, and into the early morning hours of October 3, 2001. Although Coleman overheard Cline complain on the CB radio about the clutch slipping during the shift that ended on the morning of October 3, 2001, Cline did not complain about the service brakes.

Cline provided equivocal information to MSHA investigators shortly after the accident about the nature and timing of relevant brake complaints he communicated to Coleman prior to the accident.⁵ Cline was interviewed by MSHA on October 4, 2001, at which time he described the condition of the brakes stating:

And I know when you get it out of gear, you couldn't stop the truck going down with a load of fuel on it. The brakes, I mean it had good brakes on level ground but with a load of fuel pushing you down in there, ain't know way you could stop it you had good brakes but you just couldn't hold them. You just had to pump them every now and then and you couldn't get it out of gear, you know I suspect that what it was doing , you know, cause I had a whole load of fuel of it. And I didn't want to get them hot, you know, I just pump, push them, go on, let off

(Joint Ex. 1, pp 25, 27).

Cline has provided varying accounts concerning his FT154 brake complaints. On October 4, 2001, Cline told MSHA he complained to Coleman about the brakes "just about every time I [got] in the truck" during the month preceding the accident. (Joint Ex. 1, p. 11). On October 18, 2001, Cline again was interviewed by MSHA investigators. This time Cline, explaining that the red truck was used infrequently, stated that he last complained about the brakes to maintenance supervisor Huffman and Coleman "a month or two before the accident." At trial, Cline testified the only time he complained to Coleman about the red fuel truck's brakes was "three weeks to a month before the accident." (Tr. I , 67-68).

MSHA examined the brakes on the wreckage on October 5, 2001. The brakes were determined to be approximately 30 percent effective as a significant portion of the brake lining surfaces were not contacting the brake drums. (Tr. II, 19-20). On October 6, 2001, MSHA examined the differential, power divider and rear axles for excessive wear or broken gears. The clutch friction plate pads were worn down to the rivets. Several of the rivets were also worn. The

⁵ The Secretary concedes Cline's investigation statements and testimony "often appeared inconsistent and, sometimes, contradictory." (Sec'y Br. at 35).

friction pads and the clutch plate were bluish in color, indicating overheating from clutch slippage. The accident investigation noted that the clutch had been readjusted shortly before the accident based on an operator's complaint that the clutch was slipping.

On October 22, 2001, MSHA issued 104(d)(1) Citation No. 7378492 to Lodestar citing a violation of section 77.1605(b) for inadequate brakes attributable to Lodestar's unwarrantable failure.⁶ The cited violation in Citation No. 7378492 is the subject of this proceeding against Coleman. (Gov. Ex. 1). On October 22, 2001, Lodestar also was issued 104(a) Citation No. 7378493, not a subject of this proceeding, for its failure to maintain the red fuel truck in safe operating condition. The worn friction plate pads bluish in color and bald right drive axle tires were cited as hazardous conditions. The negligence attributed to Lodestar was moderate. (Gov. Ex. 6).

MSHA's accident investigation concluded:

The factor that can conclusively be associated with the accident is the condition of the truck's braking system. Even if the drive train became disengaged, or an effective loss of steering occurred, the braking system on the truck should have been able to stop the vehicle. The investigation revealed that all six brakes on the truck had maintenance defects that resulted in severely reduced braking capability.

(Gov. Ex. 2, p. 11).

In evaluating culpability, the investigation report's closing statement noted that "[i]nformation obtained during the investigation indicates that mine management was aware that the brakes would not effectively stop the loaded vehicle on the grade where it was required to travel." (Gov. Ex. 2, p. 12).

c. 104(d)(1) Citation No. 7378492

Coleman has been charged with "knowingly" violating the mandatory safety standard in section 77.1605(b) that requires mobile equipment to be equipped with adequate brakes. The section 77.1605(b) violation was the subject of 104(d)(1) Citation No. 7378492 issued to Lodestar on October 22, 2001. Citation No. 7378492 states:

Adequate brakes were not provided for the Mack DM600 fuel truck (Company No. FT154) used to supply fuel to mobile mining equipment at the mine. This condition contributed to a fatal haulage accident which occurred on the Winifrede

⁶ A mine operator's conduct is unwarrantable when it engages in aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001(December 1987).

Coal Seam access road on 10/03/2001. During the accident investigation, the following deficiencies in the truck's braking system were found:

- 1) Right Front Steering Axle Brake - The pushrod stroke was excessive. Both brake lining wear surfaces were coated with grease across the width of the lining. The drum was coated with a film of grease. The return spring was missing.
- 2) Left Front Steering Axle Brake - Both brake linings and the drum were coated with grease in three separate bands approximately 1.5 inches wide each.
- 3) Right Forward Drive Axle Brake - The pushrod stroke was excessive. The service brake chamber leaked at a rate of 15 psi per minute.
- 4) Right Rear Drive Axle Brake - The pushrod stroke was excessive. The S-cam roller on the forward brake shoe was missing. The rear brake lining was worn to the point that the rivets holding the lining were also worn. The upper half of the rear lining was loose. The lower portion of the forward lining was coated with grease across the width of the wear surface.
- 5) Left Forward Drive Axle Brake - The pushrod stroke was excessive. Approximately one half of the brake lining surface was coated with mud, indicating that only half of the lining was making contact with the drum. The spring applied parking brake was not functional.
- 6) Left Rear Drive Axle Brake - The pushrod stroke was excessive. Approximately one half of the brake lining and drum were coated with grease. The lock ring that holds the slack adjuster onto the S-Cam shaft was missing.

The accident investigation revealed that all six of the fuel truck's brakes had maintenance defects that significantly reduced the overall braking capability of the truck. Information obtained during the investigation indicates that mine management was aware that the brakes would not effectively stop the loaded vehicle on the grade where it was required to travel.

(Gov. Ex. 1).

The Secretary subsequently charged Clevinger and Coleman, as agents of Lodestar, with "knowingly authorizing, ordering or carrying out" the violation of section 77.1605(b) cited in Citation No 7378492.

Lodestar has filed for bankruptcy protection. Given Lodestar's bankruptcy filing, on

May 22, 2003, Judge Melick entered an Order in Docket No. KENT 2002-292 directing Lodestar to pay the proposed civil penalty for Citation No. 7378492 after Lodestar withdrew its contest and request for a hearing.

As further discussed below, at trial I declined to adopt the Secretary's assertion that collateral estoppel prevented Coleman from challenging 104(d)(1) Citation No. 7378492. However, during the hearing, Coleman, through counsel, stipulated to the fact of the section 77.1605(b) violation and its significant and substantial (S&S) designation. Coleman declined to stipulate to the unwarrantable failure. (Tr. II, 70-71).

d. Events Preceding the October 3, 2001, Accident

_____ i. Elchaney Cline

_____ As noted, Elchaney Cline was a utility man who operated a variety of mine equipment. Cline was a night shift "B" crew member who reported to David Coleman. He characterized Coleman as a foreman who was interested in safety. (Tr. I, 93). Cline testified that he occasionally drove the red fuel truck when the black fuel truck was out of service. In the weeks preceding the accident, Cline testified that he drove the red fuel truck on September 13, September 14, September 15 and September 21, 2001, and on October 2, 2001. Lodestar's policy required equipment operators to note equipment defects on their daily time sheets. Cline's daily time sheets reflect he operated FT154 for 8½ hours on September 13, 2001, 4½ hours on September 14, 2001, 2 hours on September 15, 2001, 3 hours on September 21, 2001, and 7½ hours on October 2, 2001. Cline operated FT154 for a total of 25½ hours on these days. However, he did not enter any brake defects on his time sheets. (Gov. Exs. 45, 46, 47, 53, 56).

Cline described the brakes as spongy. Cline described FT154 as "junk." (Tr. I, 76). With respect to the brakes, Cline testified:

The foot brakes, you'd push it and you'd have good brakes at first, and when you tried to slow down more you wouldn't have none. They was (sic) gone, just like a sponge.

(Tr. I, 63).

Cline initially testified, "I told Dave Coleman and Johnny Huffman that the brakes wasn't (sic) working right . . . three weeks to a month before the accident." (Tr. I, 67). Cline subsequently testified he told Coleman and Huffman twice about a month before the accident. (Tr. I, 69-70).

On cross-examination, Cline further clarified the only brake complaint he communicated to Coleman prior to the accident:

Q. Now let's go back to the month before. [What] I understood from what you told me in yesterday's deposition is the first person you told was Mr. Huffman?

A. Yes.

Q. That the brakes needed worked on, they were weak, or how did you refer to it, they needed looked at?

A. Yes.

Q. And [Huffman] was head of maintenance for this Lodestar job?

A. Yes.

Q. And that after you reported it to Mr. Huffman, I think you told me, what, about ten minutes or so [you] saw Mr. Coleman?

A. Yes, I got in the truck to go around the hill and met Dave coming and I told him.

Q. And what you told Mr. Coleman was, "The brakes need to be looked at. I've just told Mr. Huffman about it," correct?

A. I never told him I talked to Johnny. I said, "The brakes need to be fixed, they ain't right."

Q. (Examining deposition transcript) Do you remember yesterday that when you had your conversation with Mr. Coleman - -

A. Yes.

Q. - - He asked you what Johnny Huffman had told you?

A. Yes.

Q. So you did have a discussion with Mr. Coleman on the fact that you just talked to Mr. Huffman about brakes?

A. Yes.

Q. Right? You remember that now, right?

A. Yes.

Q. Okay. There was a discussion about a switch on [the] pedal and some other things, wasn't there?

A. Yes.

Q. So what happens here is you talk to Mr. Huffman first, the chief of maintenance, right?

A. Yes.

Q. Then you say around the corner or around the hill when you run into Mr. Coleman?

A. Yes.

Q. You tell him that you want the brakes looked at and you have been talking to Mr. Huffman, the guy that's in charge of maintenance?

A. Yes.

Q. Now, the procedure up at this job is that if you needed something fixed you just went right to a mechanic, didn't you?

A. Yes.

Q. You didn't wait for a foreman to authorize it or anything else, you could call a mechanic over to get anything that you wanted done, basically?

A. We'd have to get a hold of Dave, yes.

Q. But you also at times went right to the mechanic, didn't you?

A. Yes.

Q. Now, you also told me yesterday that you had your conversation with Mr. Huffman first and then with Mr. Coleman, but Mr. Coleman very well could have believed that this was being handled because you had addressed it with the head of maintenance of the mine?

A. Yes.

Q. And you told me yesterday you had no further conversations with Mr. Coleman about any brake issues other than that incident about a month before?

A. Yes.

(Tr. I, 80-83).

Cline testified that the FT154 would “barely crawl” down the steep decline at no more than five miles per hour if the vehicle was downshifted in first gear. (Tr I, 95). Downshifting in second gear limited the vehicle to five to ten miles per hour. (Tr. I, 96). Operators relied on downshifting rather than the service brakes when descending the haulage road. (Tr I, 95-96). Cline never expressed concern that the red fuel truck could not safely traverse the steep grade on the haulage road. Cline drove down the “hell hole” hill in second and low with a full load of fuel on October 2, 2001, and did not report any brake complaints. (Tr. I, 73).

Cline testified that the clutch on the red fuel truck was slipping on the evening of October 2, 2001. He informed Coleman of the clutch problem over the CB radio. Coleman advised Cline that he would take care of it. Cline ultimately learned that the clutch was adjusted the following morning shortly before Blackburn’s accident. (Tr. I, 80).

Finally, Cline characterized Coleman as a foreman who was interested in safety and one who would not hesitate to remove a defective vehicle from service. (Tr. I, 93). While not dispositive, it is noteworthy that Cline does not believe that MSHA should have filed a case against Coleman because Coleman was not the supervisory mechanic responsible for repairs. (Tr. I, 93, 97).

_____ ii. Craig Anderson

_____ Craig Anderson was employed at Bent Mountain as a grease truck operator. Occasionally he would work overtime operating a rock truck or a fuel truck. Anderson was driving the red fuel truck on September 15, 2001. Anderson testified that his truck rolled backwards when he attempted to stop on a hill. (Tr. I, 140). Anderson reported the incident to the mechanic, Michael Hayden (also known as “Rodriguez”) and to Coleman. (Tr. I, 141-42). Anderson drove the red truck without incident on the following day. The truck stopped on level ground. Anderson could not tell whether the brakes had been adjusted. (Tr. I, 143). Anderson testified that mechanics routinely repaired equipment upon notification by mine personnel of an equipment problem. (Tr. I, 149). Anderson stated he subsequently drove the red truck on or about September 27, 2001, without further incident. (Tr. I, 145). Anderson did not communicate any other red truck brake complaints after September 15, 2001.

_____ iii. Roy Collins

Roy Collins was a dozer operator who operated fuel trucks between shifts to fuel mine equipment. Collins operated the red fuel truck the day before Blackburn’s accident. (Tr. I, 106, 111). Collins testified he did not experience any problems driving the red truck down the haulage

road because he kept the truck in second low gear. (Tr. I, 111-12, 114, 118-19, 127). Collins testified that it was standard operating procedure to drive fuel trucks down steep grades in low gear. Collins primarily was concerned with the clutch on the red truck. (Tr. I, 113). If the clutch failed Collins opined that he could lose control because the brakes were weak. (Tr. I, 128-29). Although Collins characterized the brakes as weak, Collins had no difficulty stopping the FT154 on level ground. (Tr. I, 118-19, 128-29). Collins did not report any brake or clutch problems on his time sheets because he believed it was a waste of time because “[t]hey wouldn’t fix nothing.” (Tr. I, 116). Collins did not tell Coleman or a mechanic that the brakes or the clutch on the red truck needed repair. (Vol I, 117, 129). While Collins’ testimony supports the credibility of Cline and Anderson, his opinions concerning the operational condition of FT154 are not material as he admittedly did not communicate his concerns to Coleman.

iv. Henry Hatcher

Henry Hatcher was employed as a utility man at Lodestar’s mine. Hatcher testified that he operated the red fuel truck from September 26 through September 30, 2001. During that period he drove the fuel truck down the subject haulage road on several occasions. He downshifted in first gear when the fuel truck was fully loaded. If it was not full, he used second gear. During this period he did not experience any difficulty with the brakes. (Tr. II, 273-83).

v. David Carl Wright

David Carl Wright was employed by Lodestar as a grader, fueler and mechanic. On the day before the accident, Wright drove the red truck for approximately 4 hours during which time he drove down the haulage road where the accident occurred. (Tr. II, 149, 154). He was able to stop the truck without any brake problems. (Tr. II, 152).

On the morning of October 3, 2001, Wright was working as a mechanic in the parking lot area. He observed Blackburn drive the red fuel truck into the parking area where he met Mark Hamilton. Wright overheard Blackburn tell Hamilton that the clutch was slipping. Wright observed Hamilton adjust the clutch. After the adjustment, Hamilton instructed Blackburn to rev the engine while engaging the brake to determine if the clutch held. He did not hear Blackburn communicate any brake related complaints. (Tr. II, 158-60).

vi. Mark Hamilton

On October 3, 2001, Mark Hamilton was working as a mechanic at Lodestar’s Bent Mountain mine. At approximately 8:00 a.m., Hamilton was working in the parking area loading crib blocks in preparation for working on a truck. Blackburn drove up and said Johnny Huffman wanted Hamilton to adjust the clutch on FT154 because it was slipping. Hamilton tightened the pressure on the clutch plate to improve its contact with the disc. After Hamilton adjusted the clutch, he asked Blackburn to put the truck in gear while applying the parking brake to see if the

clutch would over-pull the brakes. The cab shook and the engine almost stalled but the clutch did not slip. (Tr. II, 243). Blackburn expressed his satisfaction with the clutch and drove away. Hamilton saw Blackburn a short time later at which time Blackburn had no complaints. Hamilton testified Blackburn did not complain about the brakes on October 3, 2001. (Tr. II, 263-68).

vii. Roger Bartley

On October 3, 2001, Roger Bartley was the day shift foreman for the “B” crew that began after Coleman’s evening shift. (Tr. II, 284). At approximately 5:30 a.m. on October 3, 2001, Bartley heard Cline on the CB radio complaining about clutch problems on the red fuel truck. Cline’s complaint was also overheard by Coleman. Bartley testified that Cline’s complaint was limited to the clutch and that it did not concern brake problems. (Tr. II, 286-87, 289, 303). As a result of Cline’s complaint, Hamilton adjusted the clutch. Bartley was present when the clutch was adjusted. Consistent with Hamilton’s testimony, Bartley described how Hamilton tested the clutch by ensuring that it would not override the brake on acceleration. (Tr. II, 288-89).

Bartley testified that he was not aware of any brake complaints by Cline in the month preceding the accident. Nor did Bartley know of any other operator complaints about the red fuel truck’s brakes. (Tr. II, 304).

Bartley testified that Coleman routinely gave Bartley lists of repairs that were required at the conclusion of Coleman’s shift. (Tr. II, 289, 324-25). If service was required, Bartley would give the information to Huffman who would schedule the work to be done. (Tr. II, 289). Bartley also reviewed the time sheets to determine what repairs were necessary. (Tr. 368).

viii. David Coleman

David Coleman has been employed in the mining industry since 1974. He began working at the Bent Mountain Mine in January 2000. (Tr. II, 310, 313). He was foreman of the “B” crew night shift and supervised approximately 20 employees. (Tr. II, 313). Coleman usually worked from approximately 4:00 p.m. until 5:00 a.m. (Tr. II, 319). Coleman testified that he was safety conscious and that he had daily safety meetings with his crew. If equipment needed repair it was immediately removed from service. (Tr. II, 314). The red truck’s brakes had been replaced in April 2001. (Tr. II, 351).

Sometime during the October 2, 2001, night shift, Coleman recalled Cline complaining about the red fuel truck’s clutch slipping on the CB radio. Upon Bartley’s arrival at the mine at approximately 5:00 a.m. on October 3, 2001, Coleman told Bartley that the clutch required service. (Tr. II, 322). Bartley testified he also heard Cline complain about the clutch on the CB radio. (Tr. II, 286). The clutch was adjusted by Hamilton at approximately 8:00 a.m., after Coleman had left the mine site.

During September 2001 the back-up red fuel truck was used instead of the black fuel truck which was undergoing repairs. Coleman denied that Cline had told him about brake problems during this period. (Tr. II, 325, 328, 346-47, 350). Coleman claims he initially learned of Cline's brake complaint assertion during MSHA's accident investigation. (Tr. II, 326). Coleman also could not recall Anderson complaining about the red fuel truck's brakes during September 2001. (Tr. II, 345). There is no evidence of any relevant brake problems noted on time sheets during this period by Cline, Anderson or any other red fuel truck operator.

III. Further Findings and Conclusions

a. Collateral Estoppel

The Secretary contends that collateral estoppel applies to Judge Melick's May 22, 2003, Decision and Order Directing Payment for 104(d)(1) Citation No. 7378492 in the civil penalty case involving Lodestar in Docket No. KENT 2002-292. The question of collateral estoppel is moot with respect to the fact of the violation of section 77.1605(b) and the significant and substantial designation as Coleman has stipulated to these elements of the citation.

With respect to the issue of unwarrantable failure, it is clear that collateral estoppel does not apply. Identity of issue is a fundamental element that must be satisfied before collateral estoppel may be applied. Thus, "a judgement on the merits in a prior suit may preclude relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit. . . ." *Bethenergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) (citations omitted).

As an initial matter, Judge Melick's Order Directing Payment is not a judgement on the merits. Moreover, identity of issue is not present as the question of a mine operator's unwarrantable failure is markedly different from the question of whether an agent committed a "knowing" violation. An unwarrantable failure finding is based on aggravated conduct attributable to the mine operator. A knowing violation requires a showing of aggravated conduct on the part of an individual corporate agent. Surely, an unwarrantable failure finding against a company is not a determination that all agents of the mine operator are subject to personal liability.

Although Lodestar's unwarrantability has not been a subject of this litigation, the Secretary need not demonstrate unwarrantability to prevail in a 110(c) proceeding. She need only demonstrate that an underlying violation of a safety standard was committed by a mine operator, and that an agent of the operator "knowingly authorized, ordered or carried out" the violation. The cited standard requires mobile equipment to be equipped with adequate brakes. Faced with the self-evident nature of the red fuel truck's brake defects, Coleman has stipulated to the fact of the occurrence of the violation. The focus shifts to whether the violation was "knowingly" committed by Coleman.

b. Application of Statutory Provisions and Pertinent Case Law

Section 110(c) of the Mine Act provides:

Whenever a corporate operator violates a mandatory health or safety standard . . . any . . . agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties [as the corporate operator]

Simply put, a “knowing” violation under section 110(c) involves aggravated conduct, not ordinary negligence. *Bethenergy*, 14 FMSHRC at 1245. Unfortunately, the indicia necessary to support a finding that a corporate agent acted “knowingly” is difficult to articulate. What is clear is that individuals charged with 110(c) liability should be judged based on their individual knowledge and actions not on the collective actions or inferred knowledge of the company.

The operative term “knowingly” has been extensively discussed by the Commission and the courts. The Commission discussed the criteria for determining if there is personal liability under section 110(c) of the Mine Act in *Lefarge Construction Materials*, 20 FMSHRC 1140 (October 1998). The Commission stated:

The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971)). An individual acts knowingly where he is “in a position to protect employee safety and health [and] fails to act **on the basis of information** that gives him knowledge or reason to know of the existence of a violative condition.” *Kenny Richardson*, 3 FMSHRC at 16.

20 FMSHRC at 1148 (emphasis added).

Similarly, in *Roy Glen*, 6 FMSHRC 1583 (July 1984), the Commission stated:

We hold that a corporate agent in a position to protect employee safety and health has acted “knowingly” in violation of section 110(c) when, **based upon facts available to him**, he either knew or had reason to know that a violative condition or conduct would occur, but failed to take appropriate preventative steps.

6 FMSHRC at 1586 (emphasis added).

In *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d. (D.C. Cir. 1997), the Court addressed the issue of individual knowledge:

. . . the meaning of “knowledge” depends upon context and that a continuum of meaning stretches from “constructive knowledge” to “actual knowledge” with various gradations between . . . under the Commodity Exchange Act, [an] individual “knowingly” induced a violation if he had “**actual or constructive knowledge of the core activities that constitute the violation** at issue and allowed them to continue.”

108 F.3d at 363 (emphasis added) *citing JCC v. CFTC*, 63 F.3d 1557, 1567-68 (11th Cir. 1995).

c. The Nature and Extent of Coleman’s Knowledge

As a threshold matter, given Blackburn’s fatality, and MSHA’s responsibility in determining the cause of the accident, it is not surprising that Coleman, a focus of the investigation, asserts that he cannot recall the reported brake complaints by Cline and Anderson. Without question, examination of the wreckage revealed significant defects in the condition of the service brakes that rendered them ineffective. Thus, the reported brake complaints by Cline and Anderson are corroborated by the post-accident analysis of the brake condition. Consequently, the testimony of Cline and Anderson is credible.

Resolving whether Coleman’s failure to recognize the hazardous condition of the service brakes constitutes aggravated conduct requires viewing Coleman’s conduct in context. In other words, Coleman must be judged based on whether he knew or should have known of the **core elements** (the nature and extent) of the violation **based on the facts available to him**.

Obviously, no one had actual knowledge of the specific brake defects that were disclosed by examination of the wreckage. However, a lack of actual knowledge is not a defense to 110(c) liability. *Kenny Richardson*, 3 FMSHRC at 16. As the Commission has stated, “[t]o knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety . . .” *Roy Glenn*, 6 FMSHRC at 1586. Thus, the analysis shifts to whether Coleman had reason to know of the serious brake defects and whether he ignored the need for service to be performed.

Turning to the nature of Coleman’s knowledge, approximately one month prior to Blackburn’s accident, Cline told Coleman the brakes were “spongy.” Cline admits that when he complained to Coleman, he told Coleman that he had already informed Johnny Huffman, who was the vehicle maintenance supervisor, that the brakes needed service. (Tr. I, 80-83). Company policy permitted equipment operators to communicate directly with the mechanics if equipment needed service. Under such circumstances service would be performed.

Cline's testimony reflects he communicated no further brake complaints during the intervening three to four weeks prior to the accident. In fact, although he complained about the clutch the night before the accident, Cline did not express any brake concerns. Although Cline continued to operate the red fuel truck after his only brake complaint to Coleman, Cline did not report any subsequent brake complaints on his time sheets. In the absence of subsequent verbal or recorded complaints by Cline, it was not unreasonable for Coleman to conclude that the brakes had been adjusted by Huffman and that Cline's concerns had been alleviated.

Given the grades on which the vehicle traveled, Coleman's failure to confirm that the brakes had been serviced in response to Cline's complaint may constitute ordinary negligence. When viewed in context, however, Coleman's conduct was not so egregious, unjustifiable or inexcusable to warrant the conclusion that he ignored the potential hazard by adopting a see-no-evil approach. Consequently, Coleman's failure to take further action following Cline's complaint does not constitute aggravated conduct.

On or about September 15, 2001, Anderson attempted to stop on a hill and rolled backwards. Like Cline, consistent with company policy, Anderson reported the incident directly to mechanic Michael Hayden as well as to Coleman. Anderson drove the red truck without incident on the following day. Anderson did not know whether the brakes had been adjusted. Anderson subsequently drove the red truck on or about September 27, 2001, without further incident. Whether, the brakes were adjusted after Anderson's complaint is unclear. What is known is that Anderson did not communicate any additional relevant brake complaints after September 15, 2001. Moreover, time sheets reflect the red FT154 fuel truck was operated by Anderson for ten hours and Cline for two hours on September 15, 2001. Neither Anderson nor Cline noted any brake complaints on their time sheet. (Gov. Ex. 47). In the absence of subsequent complaints by Anderson or Cline evidencing continuing brake concerns, Coleman's failure to contact Hayden following Anderson's complaint to determine if the brakes were serviced does not constitute a reckless disregard of the potential hazard and does not otherwise evidence aggravated conduct.

Thus, without Coleman having the benefit of hindsight, the Secretary has failed to demonstrate that Coleman's failure to act was based on "self-induced ignorance" or a "blind acquiescence" in the face of apparent unsafe working conditions. *Roy Glenn*, 6 FMSHRC at 1587. Consequently, on balance, the Secretary has not shown that Coleman "knowingly authorized, ordered or carried out" a violation of section 77.1605(b) because the red fuel truck was not equipped with adequate brakes. Thus, the 110(c) case against David Coleman shall be dismissed.

As a final matter, as previously noted, 110(c) liability should be judged based on an individual's knowledge and actions not on the collective actions of the mine operator. While the issue of unwarrantable failure goes beyond the scope of this proceeding, the Secretary fails to recognize the distinction between a mine operator's unwarrantable failure and the aggravated conduct necessary to impose personal liability. Surely, an unwarrantable failure determination is

not a finding that all agents of the mine operator are subject to 110(c) personal liability. Coleman was a foreman not a supervisory mechanic. Yet the Secretary submits that both “Lodestar and Coleman had a duty to perform periodic and regular inspections on the red fuel truck . . .” (Sec’y Br. at 35). The evidence fails to support the Secretary’s claim that Coleman was responsible for implementing or carrying out Lodestar’s service maintenance program. Nor has Coleman been charged with a failure to maintain mobile equipment. Rather, the case against Coleman concerns a lack of adequate brakes. As noted, Coleman’s failure to recognize the inadequacy of the brakes does not constitute a “knowing” violation of section 77.1605(b).

ORDER

The Secretary’s motion to dismiss the case brought pursuant to section 110(c) of the Mine Act against Charles Clevinger **IS GRANTED**. Accordingly, **IT IS ORDERED** that Docket No. KENT 2003-274 **IS DISMISSED**.

Consistent with the above discussion, the Secretary has failed to demonstrate that David Coleman knowingly authorized, ordered or carried out a violation of section 77.1605(b). Consequently, **IT IS FURTHER ORDERED** that Docket No. KENT 2003-275 **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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