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MSHA V. MICHEAL W. BRUNSON
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FMSHRC-WDC
May 10, 1988

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

v. Docket No. SE 86-40-M

MICHAEL W. BRUNSON

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act" or "Act"). The issue presented is whether Michael Brunson, within the meaning of section 110(c) of the Mine Act, knowingly authorized a violation of 30 C.F.R. § 56.9003. 1/
Commission Administrative Law

1/ Section 110(c) of the Mine Act states:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section [105(c)] of this [Act], any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject

to the same civil penalties, fines, and imprisonment
that may be imposed upon a person

Judge James A. Broderick determined that Michael Brunson, as an agent of a corporate mine operator, knowingly authorized a violation of that mandatory safety standard. The judge assessed a civil penalty of \$300 against him. 9 FMSHRC 257 (February 1987)(ALJ). We conclude that substantial evidence does not support the judge's decision. Accordingly, we reverse.

In January 1985, the Brunson Construction Company, Inc. ("Brunson Construction"), an Alabama corporation, operated two sand and gravel pits in Clarke County, Alabama, including Pit No. 4, the site involved in this case. Two unsupervised employees, Charles Gwin, the operator of a front-end loader, and Dwight Garrick, a laborer, worked at Pit No. 4. W.D. Brunson was president of the corporation and, according to Gwin, routinely visited Pit No. 4 "to see [if] everything [was] fine and then he [would go] out." Tr. 42. W.D. Brunson's son, Michael Brunson, was Vice President of Brunson Construction, and was listed on the Department of Labor's Mine Safety and Health Administration ("MSHA") legal identity report as the company official with overall responsibility for health and safety matters. Michael Brunson had never been to Pit No. 4 and had visited the company's other pit only a few times. Most of his time was spent in the company office at Saraland, Alabama. Tr. 63; Exh. G-1. T.J. Johnson, listed on the MSHA report as superintendent in charge of safety and health at Pit No. 4, had left the company some months prior to January 1985.

On January 23, 1985, during a regular inspection at Pit No. 4, MSHA Inspector Charles A. Bates observed Gwin seated in the front-end loader with the motor running. The inspector joined Gwin in the cab and proceeded to test the loader's brakes on level ground and inclines. Having determined that the brakes were not holding due to leaks in the air line and in the left front wheel brake booster, the inspector issued a combined section 104(a) citation/section 107(a) imminent danger withdrawal order, 30 U.S.C. §§ 814(a) & 817(a), alleging a violation of 30 C.F.R. § 56.9003. (Although the citation/order stated that it had been issued to Michael Brunson, it was actually issued to Gwin. Tr. 22-23; Exh. G.2.) Repairs to the brakes were made, and the citation/order was terminated on February 11, 1985.

Brunson Construction subsequently paid a civil penalty of \$500 proposed by the Secretary of Labor for the violation of 30 C.F.R. § 56.9003. On February 25, 1986, the Secretary, pursuant to section 110(c) of the Mine Act, filed a petition for assessment of an individual civil penalty against Michael Brunson, alleging that, as

an agent of the

under subsections (a) and (d) of this section.
30 U.S.C. § 820(c).

30 C.F.R. § 56.9003 provides:

Mobile equipment brakes:

Powered mobile equipment shall be provided with
adequate brakes.

corporate mine operator, he had knowingly authorized, ordered, or carried out the violation of section 56.9003.

At the hearing in this matter, Michael Brunson represented himself. 2/ The Secretary's principal witness at the hearing was Gwin, upon whose testimony the judge based his findings of fact. Gwin initially testified that he had not reported any brake problem to "Mike Brunson" but had told "Mr. Brunson" of "a slight leak in the brakes" either a long time before or at least four or five days prior to issuance of the citation/order. Tr. 35. Judge Broderick asked Gwin to which of the Brunsons he referred. In answer, Gwin repeated several times that he meant W.D. Brunson. Tr. 35-36.

Counsel for the Secretary then asked for "a moment" and the hearing went off the record. When the record reopened -- without explanation as to what had transpired while off the record -- Gwin testified that after the citation and imminent danger order had been issued, he telephoned Michael Brunson at the company office to inform him of MSHA's actions. Tr. 36.

The following exchange among counsel for the Secretary, Judge Broderick and Gwin then occurred:

Q. Do you remember telling [MSHA Special Investigator] Bob Everett that approximately one week before [MSHA Inspector] Charlie Bates got there that you reported to the boss man, Mr. Mike Brunson, that the brakes were bad?

A. I can't recall that right now. It was a week, you said, before then?

Q. Approximately a week before Charlie Bates got there that you reported the brakes going bad to Mr. Michael Brunson, your "boss man" as you called him?

A. I believe I told him, I do remember that now. I told him, I did report it to Mr. Brunson, Mr. Mike, yes, I did.

Q. Mr. Mike, you mean this man right here?

A. Yes, sir. Yes, sir. That was a week, I think, before then.

JUDGE BRODERICK: Before the order was issued?

2/ Michael Brunson did not contest the violation of section 56.9003. The only question before us is whether Michael Brunson knowingly

authorized the violation.

THE WITNESS: Yes. Was going bad, I didn't say they was bad.

Tr. 37.

On cross-examination by Michael Brunson, Gwin testified that he had told W.D. Brunson that, despite the leak, the brakes were holding. Tr. 40. He also stated that the loader's brakes were working when he started work on the day that the violation was cited, but that they were not holding when Inspector Bates examined them later that day. Tr. 40.

When Gwin was asked again by the judge whether he had informed W.D. or Michael Brunson of the brake problem, he again responded that he had told "Mr. Brunson" of the brake leak. Tr. 43. Gwin also stated he had informed "Mr. Brunson" that there was no danger at that time, and had been told that "if there was any danger to shut the machine down and as soon as he can [Mr. Brunson was] going to get the mechanic up there to check it out...." Tr. 43. Asked again by the judge whether he had talked with Michael Brunson, Gwin answered: "I had talked to Mr. -- I believe I had talked -- I can't recall but I believe I had talked to Mr. Mike along about the same time." Tr. 43. In answer to a further question, Gwin indicated that he had called Michael Brunson after talking with W.D. Brunson; the date of this later telephone conversation was not established. Tr. 43-44. Gwin also testified that he could "not recall" just what he had said to Michael Brunson but had told him that the brakes were leaking yet holding, and had been instructed as follows:

"If the brakes is bad, Charlie, make sure you shut the machine down." Tr. 44. Lastly, Gwin testified that company instructions to him had always been to shut down equipment if there was any danger. Tr. 48.

Michael Brunson, under questioning by the judge, unequivocally stated that he had not been informed by Gwin of any brake problem prior to the issuance of the citation/order on January 23, 1985, and that his father had not reported any such problem to him. Tr. 60-61, 62, 66.

The administrative law judge found that Gwin's testimony established that Gwin knew of the leak in the brakes and that he had reported that condition to the company mechanic and to W.D. Brunson. 9 FMSHRC at 258. The judge summarized Gwin's testimony concerning Michael Brunson as follows:

[Gwin's] testimony concerning when he reported the

brake problem to Respondent Michael Brunson was contradictory, but he finally stated that he told Michael Brunson about one week before the order was issued that the brakes were going bad. Respondent told him if the brakes were bad to shut down the machine. Gwin replied that the brakes had a leak but were holding.

Id. The judge "accepted as factual the testimony of Charles Gwin" that he had told Michael Brunson about a week before the citation/order was issued that the brakes on the loader "were going bad," i.e., were not adequate. 9 FMSHRC at 259. Also, it is undisputed and the judge found

that Michael Brunson "took no action to have the brakes repaired until after the order was issued." 9 FMSHRC at 258. Citing *Secretary v. Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), the judge concluded that "[Michael Brunson] knew or had reason to know that the brakes were not adequate" and "knowingly permitted the violation of 30 C.F.R. § 56.9003." 9 FMSHRC at 259. The judge assessed a civil penalty of \$300 against Michael Brunson. *Id.*

We granted Michael Brunson's petition for discretionary review, which was prepared without assistance of counsel. On review, he challenges the judge's factual findings. He contends that Gwin did not inform him of the condition of the loader's brakes until January 23, 1985, after issuance of the citation/order, and that he had left standing instructions with the company's equipment operators to shut down immediately any equipment with insufficient brakes. After carefully examining the entire record, we conclude that Gwin's testimony does not constitute substantial evidence in support of the judge's key finding that Michael Brunson was informed of a problem with the loader's brakes prior to issuance of the citation/ order. Even if we were to affirm this finding, we conclude that Gwin's account of the substance of these communications is insufficient to establish that Michael Brunson knowingly authorized a violation of the cited standard within the meaning of section 110(c) of the Act.

The Commission has held previously that the proper legal inquiry for purposes of determining corporate agent liability under section 110(c) of the Act is whether the corporate agent "knew or had reason to know" of a violative condition. *Secretary v. Roy Glenn*, 6 FMSHRC 1583, 1586 (July 1984), citing *Kenny Richardson*, *supra*, 3 FMSHRC at 16. In *Kenny Richardson*, the Commission stated:

If a person in a position to protect 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 at 16. The Commission has applied a similar test in situations in which a violation of a mandatory standard may not exist at the time of the corporate agent's failure to act but does occur subsequent to such failure. In that context, the Commission has held that the agent acts "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 would occur, but he failed to take appropriate preventive steps." Roy Glenn, *supra*, 6 FMSHRC at 1586.

Within the foregoing framework, we must determine whether substantial evidence supports the administrative law judge's findings. 30 U.S.C. § 823(d)(2)(A)(ii). As we have consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1137 (May 1982) quoting

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986)), neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See. e.g., Krispy Kreeme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that in reviewing the whole record an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Here, the judge's material finding is that Gwin informed Michael Brunson approximately one week prior to the issuance of the citation/order on January 23, 1985, that there was a problem with the loader's brakes. This is the only basis upon which it has been claimed throughout this proceeding that Michael Brunson "knew or had reason to know" of a violative condition. Our review of the record convinces us that Gwin's testimony concerning this alleged conversation with Michael Brunson is too slender a reed. As the judge himself acknowledged (9 FMSHRC at 259), Gwin's testimony is contradictory. We go further: the testimony in question is also confusing, unclear, and ambiguous and it does not constitute substantial evidence.

As noted, on direct examination by the Secretary's counsel, Gwin initially stated that he had not reported the brake problem to Michael Brunson, but rather had spoken with "Mr. Brunson." Tr. 35. If anything emerges with some clarity from Gwin's account, it is that he used the name "Mr. Brunson" to refer to W.D. Brunson, Michael Brunson's father. After the judge intervened to ask Gwin to which Brunson he referred, Gwin confirmed several times that he meant W.D. Brunson. Tr. 31-36. Counsel then asked "for a moment," and the hearing went off the record. The transcript contains no explanation as to why government counsel interrupted his direct examination or what transpired while the hearing was off the record. When the hearing resumed, Gwin testified that he had called "my boss man here, Mike Brunson," after Inspector Bates had issued the order. Tr. 36. He next replied to counsel that he could not recall telling an MSHA special investigator, Robert Everett, that he had reported the brake problem to Michael Brunson about a week prior to January 23, 1985. Tr. 37. At this juncture, counsel reiterated the same leading question as to whether Gwin had spoken with Michael Brunson prior to January 23 and Gwin replied, "I believe I told him, I do remember that

now," and repeated "Yes, sir. Yes, sir. That was a week, I think, before then." Tr. 37. However, when the judge next sought to elicit clarification as to the Brunson with whom Gwin had spoken, Gwin yet again referred to "Mr. Brunson" -- not "Mr. Mike" or "Michael Brunson." Tr. 43. The final attempted clarification resulted in Gwin's answer that he "can't recall" but "believe[d]" that he had talked with Michael Brunson "along about the same time," or perhaps after, he had spoken to W.D. Brunson. Tr. 43-44. The exact date or proper chronological sequence of this conversation in relation to MSHA's enforcement actions on January 23 was not established.

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Considered as a whole, we conclude that this testimony does not supply adequate or reasonable support for the judge's finding that Gwin informed Michael Brunson of a brake problem before January 23, 1985. Nor do we find Gwin's testimony to be corroborated by that of Inspector Bates, who issued the citation/order, or by Special Investigator Everett, whose investigation led to the institution of the section 110(c) proceeding against Michael Brunson. In relevant part, Bates testified that Michael Brunson was apparently Gwin's only boss -- an inaccurate statement, given the uncontroverted evidence of W.D. Brunson's role at Pit No. 4. Special Investigator Everett testified that when he interviewed Gwin, Gwin told him that he had informed both Brunsons of the brake problem prior to the issuance of the citation/order. Tr. 51-52. However, Gwin stated on direct examination that he could not recall this conversation. Tr. 37. Indeed, Everett's special investigation appears to have been based in large part on his assumption that because Michael Brunson was the company safety and health official, he must have known of the brake problem and the continuing operation of the loader by Gwin at Pit No. 4. Tr. 52, 68.

Under these circumstances, we hold that substantial evidence does not support the judge's finding that Gwin informed Michael Brunson prior to January 23 of a brake problem and that there is no basis in the record for concluding that Michael Brunson "knew or had reason to know" of a violative condition involving the loader's brakes. This conclusion is sufficient to dispose of this case. We further hold, however, that even if the judge's finding that Gwin had spoken to Michael Brunson about the brakes prior to January 23 were affirmed, the substance of the communications as testified to by Gwin is insufficient as a matter of law to show that he knowingly authorized a violation of section 56.9003 within the meaning of section 110(c).

Under the principles of Kenny Richardson and Roy Glenn, *supra*, in order to establish Michael Brunson's liability under section 110(c), the Secretary was obligated to prove that Michael Brunson knew of the violation or possible future violation of section 56.9003 but failed to take appropriate corrective or preventive steps. Section 56.9003 states that mobile equipment shall be provided with "adequate" brakes. Gwin testified that in his conversations with management about the brakes he gave assurances that the brakes were holding and that there was no danger. Tr. 34-35, 37, 40, 43, 44. In fact, Gwin testified that on January 23, the brakes were holding prior to the inspection but had "softened" because he was operating the loader in water, and that prior to the inspection he was unaware of

any leak in the line between the tank and the air compressor. Tr. 44. These communications to management failed to provide clear notification that the brakes were not adequate.

More importantly, Gwin testified repeatedly that when he informed management about the brakes, he was told to "shut the machine down" if the brakes were bad. Tr. 43-44. On cross-examination, Gwin stated that company instructions to him had always been, "If there's any danger, shut it down." Tr. 48. These instructions manifest managerial directions to Gwin that the loader was not to be used if the brakes were inadequate. Considered in conjunction with Gwin's ambiguous communications, the instructions that he received do not provide the basis

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necessary to support a finding that Michael Brunson knowingly authorized a violation of 30 C.F.R. § 56.9003.

Accordingly, we reverse the judge's decision, vacate the civil penalty, and dismiss the Secretary's petition for civil penalty.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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