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MSHA V. BETHENERGY MINES
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August 4, 1992

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

v. Docket Nos. PENN 88-149-R, etc.

BETHENERGY MINES, INC., et al.

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY: Backley, Holen and Nelson, Commissioners

This consolidated proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), presents the issues of whether BethEnergy Mines, Inc. ("BethEnergy") violated 30 C.F.R. 75.303(a); whether that violation was of a significant and substantial nature ("S&S") and caused by BethEnergy's unwarrantable failure to comply with the standard; and whether civil penalties should be assessed, pursuant to section 110(c) of the Mine Act, against each of three BethEnergy supervisory personnel for being knowingly involved in the violative conduct.(Footnote 1)

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1 30 C.F.R. 75.303(a), which repeats 303(d)(1) of the Mine Act, 30 U.S.C. 863(d)(1), provides in pertinent part

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings.... If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may

enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and

Commission Administrative Law Judge Gary Melick concluded that BethEnergy violated section 75.303(a), that the violation was S&S and caused by BethEnergy's unwarrantable failure, and that civil penalties should be assessed pursuant to section 110(c) of the Act against the supervisory personnel. 12 FMSHRC 403 (March 1990) (ALJ). The Commission granted BethEnergy's petition for discretionary review, which challenges each of the judge's findings. For the reasons that follow, we affirm the judge's conclusions, with the exception of his determination that BethEnergy's violation was S&S, which we reverse.

I.

Factual Background and Procedural History

BethEnergy operates the Eighty-Four Complex, an underground coal mine located in Eighty-Four, Pennsylvania. During the 12:01 a.m. shift on Saturday, January 30, 1988, five supplemental support "I" beams were installed in the 4-butt empty track near the No. 80 stopping in the Livingston Portal area of the mine; the work had been ordered by James Nuccetelli, the chief construction foreman at the Eighty-Four Complex. Tr. 53, 228. The roof in that area sagged, bowed, and in the past had had three to four breakthroughs. Tr. 55, 129. The five beams were installed against the roof over a distance

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> shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted.

(Emphasis added.)

Section 110(c) of the Act provides:

> 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)], 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 under subsections (a) and (d) [of section 110].

30 U.S.C. 820(c).

of approximately 20 feet, and were spaced approximately 46 inches apart. The beams were scheduled to be "saddled" during the daylight shift on Sunday, January 31, 1988. Tr. 229. (Saddling, or "strapping," a beam is a method of securing the beam by strapping it with a metal cable bolted to the roof for the purpose of keeping the beam from falling if a post or "leg" supporting the beam is dislodged. Tr. 54, 57.) The roof in the area was supported by 6-foot bolts in addition to the beams, and was super-bolted with 12-foot resin bolts. Tr. 67-68, 129, 235.

During the daylight shift on January 30, 1988, Donald Rados, then acting as a fireboss for BethEnergy, examined the area in which the unsaddled beams were located. Mr. Rados called the dispatcher and told him not to bring empty cars into that area. Rados then placed two boards across the empty track, attached a danger sign to them, and placed a second danger sign on the trolley switch. In the mine examiner's book, he also entered the condition of the unsaddled beams as a danger. Tr. 135; G. Exh. 3.

On the 12:01 a.m. shift of January 31, 1988, Sam Kubovcik, then acting as a shift foreman for BethEnergy, contacted Mr. Nuccetelli at his home to inform him that independent contractors had arrived at the mine to splice a conveyor belt in the 4-butt area but could not do so because coal was on the belt. Nuccetelli, aware that the area had been dangered off because of the unsaddled beams, testified that he told Mr. Kubovcik to instruct John Ronto, who acted as a construction foreman on the 12:01 a.m. shift on January 31, 1988, to check the safety of the area in which the unsaddled beams were located. Tr. 230. Nuccetelli testified that he told Kubovcik that if the area was safe, Mr. Ronto was to bring empty cars into the area to unload the coal from the belt. Id.(Footnote 2) Kubovcik testified that Nuccetelli told him that the area was dangered off because the beams were unsaddled. Tr. 283.

Kubovcik gave Nuccetelli's instructions to Ronto. Tr. 284. Ronto testified that Kubovcik told him that the area was dangered off because the beams were unsaddled. Tr. 347-48. Kubovcik testified that he did not tell Ronto whether the danger signs should be rehung. Tr. 285. Ronto then assigned two miners, Messrs. Naddeo and Malie, to gather 20 empty cars and a motor. Ronto testified that he cautioned the motormen about the unstrapped beams. Tr. 316. While the cars were being gathered, Ronto went into the dangered off area and examined the roof and the unsaddled beams at the No. 80 stopping area. He hit the posts supporting the beams to make sure that they were solid, checked the clearance between the track and the legs, and observed that the track was dry. Tr. 320. Ronto testified that when the miners came back from gathering the empty cars, he cautioned them again about the condition of the unsaddled beams. Tr. 319.

Ronto later received a call from Naddeo and Malie when they reached the

area with the empty cars, confirming that the area was dangered-off and that a Fletcher drill, which was parked at the mouth of the empty track, was in the

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2 Ronto testified that he could not recall whether he had been told to examine the area but assumed that he had. Tr. 348.

way. Ronto told Naddeo and Malie that "everything was okay." Tr. 322. The miners then moved the Fletcher drill, removed the danger signs, and moved the empty cars into the area. Tr. 325-27, 343. The empty cars were left at the dump beside the belt to be filled with coal, and the motor was brought back under the unsaddled beams. Tr. 326-28. When Ronto rejoined the miners, they were in the process of putting the Fletcher drill back on the track. He told them to put everything back the way they had found it. Tr. 328. They rehung the danger signs. Tr. 329-30, 343.

At approximately 6:00 a.m. on January 31, 1988, while conducting a pre-shift examination, Rados noticed that the beams still were unsaddled and that empty cars had been brought into the area. He called the dispatcher, who told him that Ronto had directed Naddeo to bring the empty cars on to the track. Tr. 137. The beams were saddled later during that shift, as originally scheduled. Tr. 45-46, 164, 229. After the beams were saddled, the danger notation was removed from the books. Tr. 163-64.

Fred Imer, a member of the mine's safety committee, filed a written request with the Department of Labor's Mine Safety and Health Administration ("MSHA"), pursuant to section 103(g)(1) of the Mine Act, 30 U.S.C. 813(g)(1), asking for an investigation of the incident in which th dangered-off area had been entered for a reason other than to remedy the hazardous condition. Upon receipt of the request on February 4, 1988, MSHA Inspector Alvin Shade went to the Livingston Portal and interviewed several people regarding the incident.

Inspector Shade testified that Nuccetelli told him that he gave the order to remove the danger signs. Tr. 44.(Footnote 3) Shade also stated that Ronto told him that he had been told to take down the danger signs, push 20 cars up to the dump, bring the motor back, and rehang the danger signs. Tr. 48. Shade testified that Naddeo informed him that his job was to take the cars to the dump, unhook them, and bring the motor back out, but that he was not informed of the condition of the unstrapped beams. Tr. 51. (As noted above, Ronto testified that he had informed Naddeo and Malie of the hazardous condition on at least two occasions. Tr. 316-17, 319.) Naddeo told Shade that he was the person who took down the danger signs. Tr. 80. Shade concluded from his interview that Ronto had instructed Naddeo to rehang the danger signs. Tr. 81, 96.(Footnote 4)

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3 Nuccetelli testified at the hearing that he did not discuss with shift foreman Kubovcik what action to take with respect to the danger signs. Tr. 237.

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4 Shade also testified that Ronto told him that he had been directed from the surface to rehang the danger signs, and that Kubovcik relayed the order. Tr.

97-98. Kubovcik testified that he did not discuss with either Nuccetelli or Ronto whether the danger signs should be rehung. Tr. 285.

Based upon his investigative findings, Inspector Shade issued an order to BethEnergy, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. 814 (d)(2), alleging a violation of section 75.303

> Representative of the operator (foreman) had a miner remove a danger-board and go inby at No. 79 to 80 cross-cut 4 butt track-haulage, to bring 20 empty cars under "I" beams that were not strap[p]ed or saddled. Then proceed to come back through area second time with motor, and rehung the danger board.

G. Exh. 1.(Footnote 5)

Inspector Shade testified that the danger present in the area was the unstrapped beams and that the rehanging of the danger signs was an acknowledgment that a hazard still existed. Tr. 96, 109. Shade also found the alleged violation to be S&S and caused by BethEnergy's unwarrantable failure to comply. G. Exh. 1; Tr. 51, 61-62. He testified that the unabated condition could cause a serious accident before it could be corrected. Tr. 51. Shade described BethEnergy as being highly negligent because he believed that its management knew that the beams had to be secured. Tr. 58. He did not believe that such conduct rose to the level of "reckless disregard" because Ronto had made an examination of the area before he authorized a miner to enter it. Id.

After the order was issued, MSHA special investigator John Savine was assigned to conduct an investigation to determine if any individual liability for a knowing violation existed under section 110(c) of the Act. Savine interviewed Inspector Shade and other witnesses, including Nuccetelli, Kubovcik, and Ronto. Nuccetelli told Inspector Savine that he had told Kubovcik to direct Ronto to take 20 empty cars to the 4-butt dump so that the belt could be unloaded and then spliced. Tr. 177-78. Kubovcik generally confirmed Nuccetelli's account of the facts. Tr. 178. Ronto told Savine that Kubovcik had instructed him to get the 20 empty cars. Tr. 178. Savine testified that Ronto told him that he had not been instructed to make an examination of the area, but that he did so before the cars were brought through the area. Tr. 178-79. According to Savine, Ronto also told him that he had cautioned Naddeo and Malie about a hazard along the track and had instructed the men to go through the area because Kubovcik told him to do so. Tr. 178-79, 182-83. Finally, Naddeo told Savine that he and Malie rehung the danger signs. Tr. 182.

Following the conclusion of Savine's investigation, the Secretary proposed the assessment of individual civil penalties in the amounts of $500,

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5 At the hearing, the judge modified the section 104(d)(2) order to a citation issued pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), because he determined that the Secretary had failed to prove tha there had been no intervening clean inspection. 12 FMSHRC at 406 n.2; Tr. 199. The Secretary does not challenge this finding on review.

$450, and $400 against Nuccetelli, Kubovcik, and Ronto, respectively. The entire matter proceeded to an evidentiary hearing before Judge Melick.

In his decision, the judge determined that the fact of violation would turn on whether, at the time of the removal of the danger signs and entry into the previously dangered-off area, there still existed either a violation of a mandatory standard or a hazard, within the meaning of section 75.303(a). 12 FMSHRC at 410. He concluded that both conditions obtained at the time of entry. 12 FMSHRC at 410-11. The judge found that BethEnergy had violated a provision of its roof control plan and, thus, a mandatory safety standard, because the roof control plan unambiguously required strapping at the time that the beams were installed. Id. Crediting the testimony of mine examiner Rados, as corroborated by Inspector Shade, the judge also concluded that a significant hazard involving the unstrapped beams continued to exist at the time that the danger signs were removed. 12 FMSHRC at 411.

The judge concluded that BethEnergy's violation of section 75.303(a) was S&S, finding that a discrete hazard in the form of falling beams was contributed to by the violation, that it was reasonably likely that any hazard contributed to would have resulted in an injury, and that it was reasonably likely that any resulting injury would be reasonably serious or fatal. 12 FMSHRC at 411. The judge also found that the violation was caused by BethEnergy's unwarrantable failure, and assessed a civil penalty of $1,000 for the violation. 12 FMSHRC at 412-13. Finally, the judge determined that Nuccetelli, Kubovcik and Ronto each knowingly authorized, ordered, or carried out the violation of section 75.303(a) and, accordingly, were individually liable under section 110(c) of the Act. Id. The judge then assessed civil penalties in the amount of $400 each against Nuccetelli, Kubovcik and Ronto. 12 FMSHRC at 413. The Commission granted BethEnergy's petition for discretionary review and heard oral argument in this matter.

II.

Disposition of Issues

A. Violation of section 75.303(a)

We agree with the judge's conclusion that BethEnergy violated section 75.303(a). BethEnergy argues that the judge erred in finding that a violative and hazardous condition existed in the area at the time that its foremen authorized entry into the area. BethEnergy argues that a hazard within the meaning of section 75.303(a) did not exist in the area because the standard requires dangering off an area only when a hazard amounting to an imminent danger exists.(Footnote 6) Alternatively, BethEnergy argues that even if the standard

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6 Relying on the testimony of John Gallick, BethEnergy's safety director, BethEnergy argues that it is accepted practice within the industry that only hazards rising to the level of imminent dangers need be dangered-off. Regardless of the accuracy of this characterization of alleged industry practice, parties are not privileged to override or nullify the plain requirements of statutory language. See generally Secretary of Labor on behalf of David Pasula v.

requires dangering off an area for the presence of a hazard amounting to less than an imminent danger, the hazard must be reasonably likely to occur. BethEnergy contends that no violation occurred because it was not reasonably likely that a leg supporting a beam would be dislodged, causing a beam to fall on a miner. BE Br. at 20. We find no legal support for the interpretation of section 75.303(a) advanced by BethEnergy.

In relevant part, section 75.303(a) provides that a danger sign is to be posted in an area of active working if there exists a "condition which is hazardous to persons who may enter or be in such area...." Our analysis of this mandatory standard, which repeats the language of section 303(d)(1) of the Mine Act, 30 U.S.C. 863(d)(1), and its predecessor, section 303(d)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)("1969 Coal Act"), begins with the fundamental canon of statutory construction that "the primary dispositive source of information [about statutory meaning] is the wording of the statute itself." Association of Bituminous Contractors v. Andrus, 581 F.2d 853, 861 (D.C. Cir. 1978). See also Consolidated Coal Co., 11 FMSHRC 1609, 1613 (September 1989).

There is no indication in the statutory text or in the legislative history that Congress intended that the "hazardous condition" referred to in section 303(d)(1) must amount to an imminent danger, or must rise to some specific level of risk before dangering off is required.(Footnote 7) The House Report on the bill that became the 1969 Coal Act, explaining section 303(d)(1) of the Coal Act, stated:

> Paragraph (1) of subsection (d) contains detailed requirements for preshift examinations which must be made within 3 hours before a coal-producing shift. When hazards are encountered the examiner shall report the conditions found to a person on the surface and record the results of such examination in a manner prescribed in this section. A "Danger" sign is posted in all places where persons would observe the sign and such persons are not to enter the area except to correct the dangerous condition.

H. Rep. No. 563, 91st Cong., 1st Sess. 44 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Congress,

Consolidation Coal Co., 2 FMSHRC 2786, 2794 (October 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981) (contractual provision limiting the conditions in which a miner could refuse to work did not override the provisions of the Mine Act governing the scope of a miner's work refusal).

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The Secretary is empowered to issue withdrawal orders in the face of imminent dangers in mines, 30 U.S.C. 817, and the term is defined in the Mine Act as "the existence of any condition or practice in a ... mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated...." 30 U.S.C. 802(j).

1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1074 (1975)("1969 Legis. Hist.") (emphasis added). See also S. Rep. No. 411, 91st Cong., 1st Sess. 57, reprinted in 1969 Legis. Hist. at 183.

The general meaning of the statutory text and the parallel regulation is plain: If a "hazardous" condition is encountered in active workings by the preshift examiner, the affected area must be dangered off. The statute does not use the phraseology of "imminent danger." We discern no indication in the statute that Congress intended to convey anything other than the ordinary meaning of the phrase "condition which is hazardous." The Commission similarly adopted such ordinary meaning in National Gypsum Co., 3 FMSHRC 822, 827 & n.7 (April 1981). Such a construction based on plain meaning enhances miner safety in that it requires the dangering off of an area upon a finding that a hazard, although not necessarily an imminent danger, exists. Thereafter, miners must heed the warning of that danger sign unless they enter the area to remedy the hazardous condition. The sanctity of danger signs has long been recognized in the mining industry and constitutes a fundamental tool of protecting miner safety. We reject any construction of the standard that diminishes that protection as contrary to the primary purposes of the Mine Act.

If such a hazardous condition or place has been dangered off as a result of a preshift examination, section 75.303(a) makes clear that no person shall enter such place while the danger sign is posted except authorized persons "for the purpose of eliminating the hazardous conditions." Substantial evidence supports the judge's finding that BethEnergy violated section 75.303(a) because its foreman authorized miners to enter a dangered off area for a reason other than eliminating the hazardous condition while the condition continued to exist in that area.

Although the record contains some conflicting testimony regarding the nature of the hazard in question, the judge made a credibility finding in favor of the testimony of Rados and Shade to the effect that a hazard existed. We emphasize that, in general, credibility determinations are within the discretion of the presiding official who heard the witnesses' testimony and observed their demeanor. See, e.g., Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985); Brown v. U.S. Postal Service, 860 F.2d 884, 887 (9th Cir. 1988). If the judge's findings are supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," the Commission is bound to uphold them, rather than substitute its own view even if such a competing view finds some support in the record. Donovan v. Phelps Dodge Corp., 709 F.2d 86, 92 (D.C. Cir. 1983).

Was there a continuing hazard in the dangered-off area when the miners entered it on January 30? Mine examiner Rados testified that derailments occurred in the cited area involving dislodgements of the legs supporting the beams "twice a month, once a month, sometimes more often. It might be one or two months before one wreck, ... [and then] a couple [of wrecks would occur] in a week"; and that he himself had recorded such dislodged posts as a danger in fireboss books "a number of times." Tr. 130-31. Nuccetelli testified that

he was unaware of any history of derailments in the area, but that he was not the only person who reviewed the derailment sheets and that mine foremen also reviewed them. Tr. 242. Alfred Paterini, a mine examiner for BethEnergy at the 84 Complex (and a nonparty to the action), testified that he had been aware of derailments occurring in the cited area and had been sent into the area on a few occasions to reset the legs. Tr. 432. Paterini testified that if a leg were dislodged, an unsaddled beam could fall on the persons travelling below or could fall on the trolley wire, causing short-circuiting or a fire. Tr. 430.

Inspector Shade stated that if legs supporting unsaddled beams were dislodged, the beams could fall and strike any person below them, or a roof fall could result because the roof bowed and sagged. Tr. 54-55. Shade also testified that a motorman pushing twenty cars through the area would be unable to observe all of the cars and that pushing cars makes a derailment more likely. Tr. 97, 108. Derailment can occur when pushing cars regardless of whether there is adequate clearance. Tr. 108. Shade believed that when the danger signs were removed, a hazard continued to exist because the beams were not strapped. Tr. 109.

As noted by the judge, even supervisors involved in the section 110(c) aspect of this proceeding conceded, to one degree or another, that a caution to people was warranted by the condition. 12 FMSHRC at 411. Nuccetelli testified that he believed the unsaddled beams warranted a warning to people going through the cited area. Tr. 255. Ronto also conceded generally that, although he did not consider the unsaddled beams a large danger, the danger signs were rehung because of a concern for people going through the area with a motorized vehicle. Tr. 343-44. Such evidence demonstrates that BethEnergy realized that the unsaddled beams presented a hazardous condition.

BethEnergy also argues, in defense to special findings and allegations that its supervisors violated section 110(c), that its supervisors possessed the authority to override a preshift examiner's decision to danger-off an area. Although such a defense could have possible implications with respect to liability issues under section 75.303(a), we find the defense inapposite in this case because no actions were taken by BethEnergy supervisory personnel consistent with the operator's internal procedures for overriding a preshift examiner's action. See Oral Arg. Tr. 8-9. We, therefore, leave to another case analysis of the effect and implications under section 75.303(a) of an operator's decision to override the dangering off of an area by a mine examiner.

Accordingly, we affirm the judge's findings that a dangered-off hazard continued to exist in the affected area on January 31, 1988. There is no

dispute that BethEnergy miners entered that area on that date for purposes other than elimination of the hazard. Under the circumstances, BethEnergy violated section 75.303(a).

The judge determined that the standard was violated in addition because a violation of BethEnergy's roof control plan existed in the dangered-off area when the miners entered it for purposes other than elimination of the hazard. As a threshold objection, BethEnergy maintains that a proper reading of the

standard requires prohibition of access to a dangered-off area only when a hazard exists in the area. We disagree. Given the wording of the cited standard, analysis of whether a violative condition existed is relevant, even though a separate citation for a violation was not issued. The judge reasoned that the roof control plan clearly required that the beams be installed with appropriate support and that, in this case, failure to saddle the beams constituted a hazardous violation of the roof control plan. Since the alleged violation in this case involved a hazard, as discussed above, we need not reach any hypothetical issue of whether a dangered-off area containing only a "technical" or "non-hazardous" violation requires prohibition of access under the standard.

BethEnergy argues that its roof control plan did not require simultaneous installation of support when the beams were emplaced but, rather, allowed a reasonable time for such installation of support. If the language of a document is plain and unambiguous, the intent expressed and indicated in that language controls, rather than whatever may be claimed to be the actual intention of the parties. See, e.g., 17A Am Jur. 2d Contracts 352 (1991). The provision in the roof control plan requiring that "beams shall be installed with some means of support" unambiguously requires that a means of support must be provided at the same time that the beams are installed. We find this to be the most natural reading of the term "with" in this language. We discern nothing in the language at issue implying a "reasonable time" rule, as contended by the operator. Even assuming facial ambiguity in this language, substantial evidence supports the judge's findings that the operator's actual practices and understanding were consistent with contemporaneous installation of strapping support when the beams were put in place.

Therefore, we agree with the judge that BethEnergy's failure to saddle the beams when they were installed constituted a hazard as well as a violation of its roof control plan. Because a hazardous violation of a mandatory standard existed at the time that the area was entered for a reason other than eliminating the condition, section 75.303(a) was thereby violated.

B. Special finding issues

1. Significant and substantial

A violation is properly designated as S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria).

With respect to the first and second elements, we have concluded that the judge properly found that BethEnergy violated section 75.303(a) and that the unsaddled beams presented a discrete safety hazard -- the danger of an unstrapped beam being dislodged and falling. The fourth element is undisputed given BethEnergy's statement in its brief that "Respondents would concede that if a beam were dislodged and fell upon a miner a serious injury could occur." BE Br. at 20.

With respect to the third element, we conclude that substantial evidence does not support the judge's finding that there was a reasonable likelihood that the hazard contributed to would result in an injury. We note preliminarily that the judge did not provide specific findings or credibility determinations on this issue.

The key question here is the likelihood of a derailment causing dislodgement of a leg, the falling of an unstrapped beam, and a resultant injury. Although the record contains evidence that derailments had occurred in this area in the past, the record also contains unrebutted evidence of diminished likelihood of derailment under the existing circumstances. Derailment is less likely to occur in areas where there are no switches, at slower speeds, and on straight track. Tr. 77-79. There were no switches in the area in question, Naddeo pushed the cars slowly, and the track was straight. Tr. 77-79, 238, 327.

More importantly, the evidence also fails to establish that, in the event of a derailment, a chain of events would occur that would be reasonably likely to result in an injury. Exposure to the hazard of a falling beam would occur only when a miner is very close to, or in the immediate area of, the falling beam. Tr. 75-76. While cars in the front are more likely to derail, a motorman would be positioned in the back. Tr. 79, 405. Gallick testified that although his experience was mainly with his own mine, there were probably tens of thousands of unsaddled beams in use in Western Pennsylvania underground mines over the course of 20 years. Tr. 402-04. He knew of only one accident, however, in which an operator was trapped in a cab by a fallen unsaddled beam, and no injuries occurred as a result of that accident. Id. Ronald Bizick, a mine inspector for BethEnergy, also testified that, in his eight years of experience at BethEnergy, he was unaware of any incidents in which a miner was injured from a beam falling along a haulage track. Tr. 355.

This undisputed evidence describes a considerable base of experience with no injury-causing events. We find that the evidence fails to establish a reasonable likelihood that the hazard contributed to here would result in an injury.

The Secretary additionally argues that the strapping of beams is intended to provide its safety function of preventing a beam from falling

"only in the event that a support post has been dislodged." S. Br. at 20. The Secretary maintains that because the requirement of strapping presumes the occurrence of a beam being dislodged, the third Mathies element must be evaluated within the context of a presumption of a post having been dislodged. Id. The Secretary contends that, therefore, the likelihood of a beam being dislodged is not at issue. Id. The Secretary, however, did not raise this new theory before the judge. Under the Mine Act and the Commission's procedural rules, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge ha[s] not been afforded an opportunity to pass." Section 113(d)(A)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(iii); see also 29 C.F.R. 2700.70(d). The Secretary has not attempted to show good cause for not first presenting this issue to the judge. We, therefore, leave resolution of the Secretary's assumption approach to another case in which it is first properly raised before the judge.

2. Unwarrantable failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

The judge determined that BethEnergy's conduct amounted to aggravated conduct because the operator's agents authorized the removal of the danger signs and allowed employees to enter the area, while knowing facts that demonstrated that a hazard and a violation of the roof control plan existed in the area. 12 FMSHRC at 412.

We reject BethEnergy's initial argument that its alleged violation was not the result of its unwarrantable failure because such a special finding cannot be based upon an "after-the-fact investigation" such as occurred here. BE Br. at 30-31. The Commission has held that an unwarrantable failure charge may be based upon investigative findings made after the occurrence of the violation. Emerald Mines Co., 9 FMSHRC 1590 (September 1987), aff'd, Emerald Mines Co. v. FMSHRC, 863 F.2d 51, 59 (D.C. Cir. 1988). See also Nacco Mining Co., 9 FMSHRC 1541 (September 1987).

We agree with the judge that BethEnergy's conduct is properly characterized as aggravated because the evidence shows that BethEnergy's

supervisors knew that: (1) the area had been dangered off because the beams were unsaddled (Tr. 283, 347-48); (2) the decision to danger off the area had not been overridden in accordance with BethEnergy's own policies by permanently removing the danger sign and making an entry in the fireboss books that the decision to danger off had been overridden (Tr. 141-42, 292-93, 352); and, (3) the unsaddled beams presented a danger when a motorized vehicle was brought through the area (Tr. 268, 290-91, 343-44). BethEnergy's supervisors

authorized miners to enter the area, not for the purpose of saddling beams, but for the purpose of bringing a motorized vehicle through the area.

The fact that Ronto examined the area before the cars were brought through it does not reduce BethEnergy's conduct to "moderate negligence," as argued by the operator (BE Br. at 34-35). The examination did not eliminate the risk posed by the unsaddled beams but rather served to measure the risk presented.(Footnote 8) Such deliberate conduct is appropriately characterized as a knowing neglect of the actions required by section 75.303(a).

We find unpersuasive BethEnergy's argument that Ronto was authorized to override the danger sign and that he rehung the danger sign only to put the area "back the way it was." BE Br. at 33. Even if such a defense were valid, there is no indication in the record that Ronto took the steps necessary to override the danger designation. In instances in which a mine examiner believed that an area was unnecessarily dangered off, BethEnergy's policy allowed the examiner to remove the danger signs and make a notation in the fireboss books that he was overriding the decision to danger off the area. Tr. 164-65, 264, 352, 398. Ronto did not require that the danger signs be permanently removed; on the contrary, he authorized miners to rehang the signs. Tr. 328, 338-39. Ronto admitted that he authorized the rehanging of the signs because he believed that the area continued to warrant cautioning miners. Tr. 343-44. Furthermore, none of BethEnergy's supervisors, including Ronto, overrode the danger notation in the fireboss books. Tr. 292-93, 352.

The conduct described above was deliberate and aggravated and, accordingly, unwarrantable. BethEnergy has presented no viable defense to negate such characterization of its conduct. We therefore affirm the judge's finding that BethEnergy's violation of section 75.303(a) was caused by its unwarrantable failure to comply with the standard.

C. Section 110(c) issues

The judge found that the conduct of Nuccetelli, Kubovcik and Ronto in causing entry into the area while each knew of facts demonstrating that a hazardous and violative condition continued to exist in the area, not only established that BethEnergy's conduct was unwarrantable but also that it was "so aggravated that it constituted violations of section 110(c) of the Act." 12 FMSHRC at 412. The judge based this conclusion upon the findings that when the three individuals issued various orders resulting in entry to the area, they were aware of the requirements of BethEnergy's roof control plan, that the cited beams were without support, and that the area had been legally dangered off by a qualified mine examiner. 12 FMSHRC at 412-13.

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8 The evidence was disputed as to whether Ronto was instructed to examine the area before it could be entered. Inspectors Shade and Savine testified that Ronto told them that he had not been instructed to examine the area for safety. Tr. 50, 178. At the hearing, Ronto testified, "In my recollection, I don't recall Sam [Kubovcik] saying anything to me about examining the area, but with his experience, I would assume that he probably did tell me this." Tr. 348.

A corporate agent "who knowingly authorized, ordered, or carried out ... [a] violation" committed by a corporate operator may be subject to individual liability under section 110(c) of the Mine Act. The proper legal inquiry for purposes of determining 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, 3 FMSHRC 8, 16 (January 1981).(Footnote 9) 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 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. Cf., e.g., United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563 (1971).

The three individuals preliminarily argue that the foregoing standard of liability under section 110(c) should be replaced by a standard requiring, at the minimum, either actual knowledge, or a conscious disregard, of the requirements of a mandatory standard. They claim that the Commission's present section 110(c) standard requires the Secretary to establish the presence of only ordinary negligence. We reject these arguments. We reaffirm the Commission's previous holding that a "knowing" violation under section 110(c) involves aggravated conduct, not ordinary negligence. See Emery, 9 FMSHRC at 2003-04. In Kenny Richardson, the Commission expressly rejected the contention that section 110(c) liability is premised, at the minimum, on a showing of "willful" conduct (3 FMSHRC at 15), and we reaffirm that holding today. Further, we reject the three individuals' threshold argument that section 110(c) of the Mine Act violates constitutional equal protection because it applies only to agents of corporate operators. They have presented no new arguments persuading us to depart from established precedent to the contrary. See, Richardson v. Secretary of Labor, 689 F.2d 632 (6th Cir. 1982), aff'g Kenny Richardson, 3 FMSHRC 8, 18-21 (January 1981).(Footnote 10) With respect to the merits of the section 110(c) issues, we find substantial evidence demonstrates that the deliberate conduct of each individual amounted to knowingly authorizing or ordering actions that violated section 75.303. We now address the three individuals' liability separately.

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9 Commissioner Holen concludes that the three individuals acted "knowingly" within the meaning of section 110(c) of the Act. She reaches this result

without reliance upon Kenny Richardson. She believes that under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the plain meaning of the statute is not properly subject to reinterpretation.

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10 While it is clear to us that section 110(c) applies only to agents of corporate operators, we also believe that other subsections of section 110 may be applied to the agents of non-corporate operators as well.

1. Nuccetelli

Nuccetelli argues that he is not liable under section 110(c) because he was not aware that the dangered-off condition presented a hazard (or a violation of a mandatory standard) and that, in any event, he had the authority to override Rados' decision to danger off the area. BE Br. at 50-51. Consistent with BethEnergy's general position (supra) that an area should not be dangered off for only a violation of a mandatory standard but, rather, that a hazardous condition must also exist, Nuccetelli maintains that even if he believed that a violation of the roof plan existed, it cannot be inferred that he had constructive knowledge that such a violation involved a hazard requiring dangering off the area. BE Br. at 51-52.

Substantial evidence supports the judge's determination that Nuccetelli is liable under section 110(c). Nuccetelli knew that the area had been dangered off because the beams in the area were unsaddled and that the area would be entered for a reason other than for saddling the beams. Tr. 230, 237. He testified that he told Kubovcik to instruct Ronto to check the safety of the area and to bring the empty cars into the area, if it was safe. Tr. 237. More importantly, he also believed that the condition of the area warranted warning the miners of the unsaddled beams before they travelled through the area. Tr. 255, 268. He testified that he was "concerned [that miners] should go through [the area] with caution because the beams were not saddled." Tr. 253. Nuccetelli also testified that he told Kubovcik to tell Ronto to warn the motorman about the condition before he brought the vehicles through the area. Tr. 237, 257. In addition, Kubovcik testified that Nuccetelli told him that "there was a danger [in] the beams not being saddled." Tr. 291. This evidence is sufficient to show that Nuccetelli was aware that a hazard existed in the area.

We are unpersuaded by Nuccetelli's reliance on the Pennsylvania Bituminous Coal Mine Act, which allegedly gave him the authority to override the danger signs and thus determine that access to the area need not be prohibited. Even assuming that such a defense exists for Mine Act purposes, Nuccetelli did not take actions to indicate that he was overriding Rados' decision to danger off the area. Nuccetelli did not remove the danger entry from the fireboss books or instruct others to do so. Tr. 264. In addition, Nuccetelli testified that he did not tell Kubovcik what actions should be taken with respect to the danger signs. Tr. 237.

2. Kubovcik

Kubovcik argues that the judge's finding that he is liable under section 110(c) of the Act is not supported by substantial evidence because he had no

reason to believe that the unstrapped beams presented any particular hazard and, further, that he acted only as a conduit for Nuccetelli's instructions. BE Br. at 53.

Substantial evidence supports the judge's finding that Kubovcik knowingly ordered or authorized the violation of section 75.303(a). Kubovcik knew that the area had been dangered off because the beams were unsaddled, and that the area was to be entered for a reason other than to saddle the beams.

Tr. 281, 283, 291. Kubovcik testified that he passed along Nuccetelli's instructions to Ronto to examine the area, and to bring the cars into the area if it was safe. Tr. 284. Ronto testified that Kubovcik also told him that the area was dangered off because the beams were unsaddled. Tr. 347-48. The evidence also reveals that Kubovcik knew of such facts that indicated that a hazardous condition existed in the area. As noted above, Kubovcik testified that Nuccetelli told him that there was a danger presented by the unsaddled beams. Tr. 283, 291. Kubovcik, after agreeing that the purpose of saddling beams was to prevent a beam from falling in the event that a car derailed and hit a leg supporting a beam, also acknowledged that there are many causes of derailment other than those related to the condition of the track and the amount of clearance. Tr. 295-97. Ronto further testified that Kubovcik told him to caution the motorman about the unsaddled beams before he brought the vehicles through the area. Tr. 315.

In addition, Kubovcik, like Nuccetelli, did not override Rados' decision to danger off the area in accordance with BethEnergy's policies. After observing that the danger demarcation had not been removed from the fireboss books after the area had been entered, Kubovcik did not remove that danger demarcation nor did he ensure that the danger signs were not rehung. Tr. 308-09. Inspector Shade testified that Ronto told him that he had rehung the danger signs because he was told to do so from the surface, and that Kubovcik had relayed the order. Tr. 97-98. (Kubovcik testified that he did not discuss with Ronto what action should be taken with the danger signs. Tr. 285.)

3. Ronto

Substantial evidence supports the judge's finding that Ronto is liable under section 110(c) of the Act. Like Nuccetelli and Kubovcik, Ronto knew that the area had been dangered off because the beams were unsaddled and that the area was entered for a reason other than for saddling beams. Tr. 315, 347-48. Although Ronto had been informed by Kubovcik that the area had been dangered off because of the unsaddled beams, he authorized entry with a motorized vehicle. Tr. 322, 347-48. Ronto expressly indicated that he knew of facts that amounted to the existence of a hazardous condition, as defined herein, in the area.

> Q: When you replaced them [the danger signs] later, what hazard were you concerned with?
>
> A: Not really a large hazard. I was concerned that I wanted other people to be aware of the 80 stopping area.

Tr. 343. Although Ronto did not consider the danger posed by the unsaddled

beams to be large, he acknowledged that he rehung the danger signs as a caution because he was concerned about the possibility of vehicles coming through the area without the vehicle operators being warned that some beams in the area were unsaddled. Tr. 343-45. Inspector Savine testified that Ronto "did caution the two motormen ... about a hazard along the track. I think he said he directly said it involved the beams not being strapped." Tr. 179.

Ronto testified that he cautioned the motormen about the condition of the beams on two occasions. Tr. 316, 319.

Ronto also failed to take actions that would indicate that he was overriding the decision to danger off the area. He did not remove the danger demarcation from the books or permanently remove the dangers signs. Tr. 343, 352. Ronto authorized the danger signs to be rehung. Tr. 328. Although Ronto testified that he did so just because he was putting the area back the way it was, Inspector Shade testified that Ronto told him that he did so because he was ordered to do so by Kubovcik. Tr. 97-98. Inspector Shade testified that Ronto told him that "he was told to take the danger board down, push 20 cars up to the dump. Then he was supposed to bring the motor back and hang the danger board." Tr. 48.

Thus, substantial evidence supports the judge's findings that Nuccetelli, Kubovcik and Ronto are each liable under section 110(c) of the Mine Act for a knowing violation of section 75.303(a). Each knew that the area had been dangered off because the beams were unsaddled and that the area would be entered for a reason other than saddling the beams. Substantial evidence also demonstrates that each knew of facts showing that the unsaddled beams presented a hazard. Because the individuals in this case knowingly authorized or ordered the violation, we uphold the judge's findings of individual liability. Accordingly, we conclude that the judge properly found the three individuals liable under section 110(c).

III.

Conclusion

For the reasons set forth above, we affirm the judge's determinations that BethEnergy violated section 75.303(a); that the violation was caused by its unwarrantable failure; and that Nuccetelli, Kubovcik, and Ronto are each liable under section 110(c) of the Mine Act for being "knowingly" involved in the violative conduct. We reverse the judge's finding that BethEnergy's violation of section 75.303(a) was S&S.(Footnote 11)

Richard V. Backley, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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11 Chairman Ford did not participate in the consideration or disposition of this matter.

Commissioner Doyle, concurring in part and dissenting in part:

In this case, BethEnergy Mines, Inc, ("BethEnergy") was charged with a violation of 30 C. F. R. 75.303, which requires the posting of a danger board when a hazard or a violation is found and prohibits miners from passing beyond that danger board. The order reads as follows:

> Representative of the operator (foreman) had a miner remove a danger-board and go inby at No. 79 to 80 cross-cut 4 butt track-haulage, to bring in 20 empty cars under "I" Beams that were not strap[p]ed or saddled. Then proceed to come back through area second time with motor, and rehung the danger-board....

Gov.Exh.1.

After noting the Secretary's concession that a qualified mine examiner was authorized to remove the danger board if he found no violation or hazard, the administrative law judge upheld the violation, finding that the examiner's actions were unlawful based on the judge's determination that, at the time the "dangered off" area was entered, there existed both a violation of a mandatory standard, i.e., a provision of BethEnergy's roof control plan, and a hazard of a significant nature. 12 FMSHRC at 406, 411.

Based on his reading of the roof control plan as "clear and unambiguous" to the effect that the beams must be saddled contemporaneously with their installation, the judge found that it could reasonably be inferred that Messrs. Nuccetelli, Kubovcik and Ronto "knowingly authorized and ordered the violation." 12 FMSHRC at 413.

I agree with the majority that substantial evidence supports the judge's determination that BethEnergy violated section 75.303(a) and also with their determination that the violation was not significant and substantial. I respectfully dissent, however, from that part of the decision wherein the majority finds section 110(c) liability on the part of respondents Nuccetelli, Kubovcik, and Ronto. I do so because I am of the opinion that:

1. Section 110, as interpreted and enforced by the Secretary of Labor (the "Secretary") to assert individual liability only against corporate employees is unconstitutional;

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1 The inspector testified that he based his order on the existence of a hazard, primarily because of Mr. Roto's rehanging of the danger board,

rather than on the existence of a roof control plan violation. Tr. at 49-50, 96. He further testified, under extensive cross-examination by the judge, that MSHA did not require an operator to danger off an area where a violation existed, if the condition did not present a hazard. Tr. 90-95.

2 Saddling does not, by itself, provide roof support. Tr 57, 99, 233.

2. Assuming section 110 to be constitutional, the language of section 110(c) is clear on its face, and thus not subject to further interpretation by the Commission or by the Secretary;

3. The case should be remanded to the judge for reevaluation of the evidence against each of them individually as to whether each knowingly authorized or ordered a violation of section 75.303.

Because the judge based his finding of unwarrantable failure by BethEnergy on a flawed analysis of the behavior of Nuccetelli, Kubovcik, and Ronto, I would also remand that issue for further analysis.

1. Constitutionality

According to the Secretary, she is empowered to charge individuals under section 110 only if they are employees of corporate operators. Her enforcement actions have conformed to that interpretation. Tr. Oral Arg. at 53-54. This interpretation by the Secretary applies to section 110(d) as well as to section 110(c). Id.

I am of the opinion that, in enacting section 110(c), Congress intended to make clear that corporate employees could also be held individually liable for violations. I do not believe that the purpose of section 110(c) was to impose liability under sections 110(c) and (d) on corporate employees alone. The Secretary's interpretation and discriminatory enforcement of section 110 to assert individual liability only against corporate employees not only frustrates congressional intent but deprives corporate employees of their constitutional rights to equal protection.

Section 110(c) of the Mine Act provides:

> 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...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 under subsections (a) and (d). (emphasis added).

30 U.S.C. 820(c). Section 110(d) provides as follows:

> Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or

> refuses to comply with any order issued under sections 104 and 107, ... shall, upon conviction, be punished

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3 The judge could find unwarrantable failure on BethEnergy's part based on the collective behavior of Nuccetelli, Kubovcik, and Ronto, even if he found none of them liable individually under section 110(c).

> by a fine of not more that $25,000, or by imprisonment for not more than one year, or by both,.... (emphasis added).

30 U.S.C. 820(d). Section 110(d) contains no language restricting its applicability to corporate employees and the definition of operator (those subject to liability under 110(d)) set forth in section 3(d) includes any "other person who operates, controls, or supervises a coal or other mine...." 30 U.S.C. 802(d). The imprisonment penalty in section 110(d) can apply only to individuals, and makes clear that Congress did contemplate individuals being prosecuted under section 110(d). The Secretary's position, however, is that she cannot charge an individual, personally, under 110(d) unless he is a corporate employee. Tr. Oral Arg. at 53, 54.

Section 110(c) provides that a corporate employee can be subjected to the same penalties, fines, and imprisonment as a person charged under 110 (d). If the Secretary is correct that corporate employees alone are subject to prosecution under subsection 110(d) as well, it follows that section 110(c) means simply that a corporate employee can be penalized to the same extent under 110(c) for a "knowing" violation as he can be under section 110(d) for a "willful" violation.

The Secretary attempts to distinguish, for section 110 purposes, the terms "knowingly" and "willfully" from each other and from ordinary negligence. However, under the Secretary's interpretation that corporate employees alone are individually liable under sections 110(c) and (d), the difference between "knowingly" and "willfully" is moot and section 110(c) serves little purpose beyond making a corporate employee liable for the same penalties and imprisonment for a "knowing" violation under subsection 110(c) as he is for a "willful" violation under subsection (d).

The provisions of both sections 110(c) and 110(d) of the Mine Act were part of the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"). The section that is now section 110(d) was section 109(b) of the Coal Act while the section that is now section 110(c) followed it as section 109(c) of the Coal Act. Thus, under the Coal Act, the penalties for both ordinary and willful violations by an "operator" (defined then, as now, to include a person who supervises a mine) were set forth in sections (a) and (b) respectively, followed by the section providing that, whenever the violator was a corporate operator, its directors, officers and agents who knowingly authorized, ordered, or carried out such a violation were liable for the same penalties that could be imposed upon a "person" under the two previous

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4 The secretary interprets these terms to the effect that negligence means

"[m]aybe you should have know," "knowingly" means "[you] knew or should have known" or "you definitely should have known" and "willfully" means something more. Tr. Oral Arg. at 47, 48, 50.

5 Under the predecessor Federal Coal Mine Safety Act Amendments of 1952, individual liability was limited to agents causing miners to work in the face of withdrawal orders. Pub. L. No.82 - 552, ch. 877, 66 Stat. 692 (1952).

sections. Section (b) became section (d), without explanation, when the Mine Act was enacted.

It thus appears to me that, in enacting the provision on corporate agent liability under the Coal Act, Congress, rather than intending to limit individual liability to corporate employees, had in mind only to make clear that corporate employees were subject to the same penalties personally as were other managers and supervisors and were not to be shielded from liability because of the corporate veil. I believe that the Secretary's discriminatory enforcement activities not only fail to further this intent but violate corporate employees' guarantee of equal protection.

2. Statutory Language

Even if one assumes that section 110(c) is not enforced by the Secretary in an unconstitutional manner, the majority errs in defining the test for individual liability under section 110(c). The Secretary argues that actual or constructive knowledge that "[the corporate agent's] action was in violation of a mandatory standard" is the appropriate test. Sec. Br at 26-29. The majority, citing Kenny Richardson, 3 FMSHRC at 16, first emphasizes that, in order to establish individual liability, the Secretary must prove that the corporate agent "knew or had reason to know of a violative condition." Slip op. at 14. They then correct themselves and assert that the Secretary must prove "at the least only that the individuals knowingly acted not that [they] knowingly violated the law." Id. Finally, they analyze each individual's liability based on his awareness of a hazardous condition. Slip op. at 15-17.

The majority is correct in saying that the Secretary must prove only that the individual knowingly acted, i.e. in this case that he knowingly authorized or ordered entry inby a posted danger board, not that he knowingly violated the law. See United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). I disagree, however, with their analysis to the extent that they rely on Kenny Richardson to interpret "knowingly" to mean "knew or had reason to know of a violative condition" and to the extent that their

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6 The Court in Richardson v. Secretary of Labor, 689F. 2d 632 (6th Cir. 1982) aff'g Sedretary v. Kenny Richardson, 3 FMSHRC 8 (January 1981), while finding the section constitutional as written, appears to have recognized that sole proprietors and partners were personally liable as "operators." 689 F. 2d 632, 633. The court notes that congressional intent was to also hold corporate decision-makers liable (Id. at 633) and that this was a decision by Congress" to hold an additional group of decision-makers personally liable..." (emphasis added) 689 F. 2d at 634. Kenney Richardson did not deal with the issue of the Secretary's discriminatory application of section 110(c). See also H.R. Rep. No. 563, 91st Cong., 1st Sess., reprented in 1969 U.S. Code Cong. & Ad. News.

7 Under this test, the individual respondents would be liable for section 110(c) violations based on their knowledtge that a danger board had been passed ordered or carried out the violation.

reasoning avoids recognition of the clear statutory language "authorized, ordered, or carried out such a violation...." Because I am of the opinion that Kenny Richardson was effectively overruled by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, (1984). I would, in concurrence with Commissioner Holen, decide this case without reliance on Kenny Richardson.

The Secretary and the Commission "must give effect to the unambiguously expressed intent of Congress" and only when "the statute is silent or ambiguous with respect to the specific issue" is it subject to interpretation. Chevron, 467 U.S. at 843. Contrary to the Secretary's suggestion (Sec. Br. at 27, n. 8), the words "knowingly authorized, ordered or carried out such violation, failure or refusal..." are not ambiguous. Thus, under Chevron, which the Secretary agrees applies (Id.), these words must be given their plain meaning and are not subject to further interpretation by the Commission or the Secretary.

The court in United States v. Jones, 735 F.2d 785 (4th Cir. 1984), quoting E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, section 14.04 (3d ed. 1977), states that:

> A well-accepted definition of "knowingly" is "[a]n act...done voluntarily and intentionally, and not because of mistake or accident or other innocent reason."

735 F. 2d at 789. The dictionary similarly defines "knowingly" as "with awareness, deliberateness, or intention." Webster's Third New Int'l. Dictionary (Unabridged), 1252 (1986).

Because the word "knowingly" is unambiguous, I believe that, consistent with the Supreme Court's holding in Chevron, it must be given its plain meaning and cannot be interpreted by the Secretary or the Commission to mean "knew or had reason to know."

Based on the statute's clear language, it appears that Congress intended to penalize, through section 110(c), those corporate agents who voluntarily and intentionally authorized, ordered or carried out the activity giving rise to a violation, not someone who knew or had reason to know of a violative condition. Therefore, I believe that the majority errs in determining the liability of Nuccetelli, Kubovcik, and Ronto based on their knowledge of a violative condition.

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8 The Jones court quoting United State v. Illionis Cent. R.R., 303

U.S.239 (1938) described "willful conduct" as "that which is 'intentional, or knowing, or voluntary, as distingushed from accidental' and [characterizes] 'conduct marked by careless disregard'... "735 F. 2d at 789.

3. Section 110(c) Liability

The judge found Nuccetelli, Kubovcik, and Ronto guilty of section 110(c) violations based on his determination that "when they issued orders ... they were fully aware of the requirements of the Roof Control Plan including the requirement that `beams shall be installed with some means of support.'" 12 FMSHRC at 413. Because he found the language of the roof control plan to be clear and unambiguous, he "inferred that, they `knowingly authorized [and] ordered' the violation..." Id.

I believe that the judge erred in concluding that the individuals were liable for section 110(c) violations based on their collective acts and inferred knowledge of the requirements of the roof control plan, rather than by weighing individually the actions of Nuccetelli, Kubovcik and Ronto as to the violation actually charged by the Secretary, i.e., knowingly authorizing and ordering travel inby the danger board. I believe he also erred in failing to consider the testimony of the inspector that dangering off is required only for a hazard and not for non-hazardous violations and the Secretary's concession that a reexamination is permissible in lieu of corrective action. 12 FMSHRC at 406, Tr. Oral Arg. at 36, Tr. 49-50, 90-95. Further, he erred in permitting the inspector to testify as to the state of Ronto's mind while rehanging the danger board and also in holding Nuccetelli and Kubovcik responsible for that perceived state of mind. Accordingly, I would have remanded the section 110(c) cases to the judge for further individual analysis

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9 Even under Kenny Richardson, such a conclusion is not warranted. The respondents do not deny that they were aware the roof control plan required the beams to be strapped concurrently with their installation. In determining their to be strapped concurrently with their installation.l In determining their knowledge of the roof control plan, more would be required than the judge finding that to him, as a trained and experienced lawyer the judge, the language was unambiguous. That such is the case is clearly evidenced by the inspector's testimony as to the actual meaning of the standard in issue. Although 30 C.F.R. 75.303 states that whenever a "mine examiner finds a condition whic constitutes a violation of a mandatory health or safety standard or [a hazardous condition], he shall [post] a 'danger' sign..., "Inspector shade testified repeatedly, including under extensive questioning from the judge, that the operator was not required to post a danger board merely because a violation of a mandatory standard was found, but only when an actual hazard existed. Tr. 90-95. Obvioulsy, the apparent clarity of language does not determine each individual's actual knowledge or understanding of it. The judge would be required to look at each individual's knowledge and understanding of the plan in the context in which he viewed it, which may have included his own reading of the plan as well as information received from superiors as to the plan's requirements

and previous enforcement of the provision by MEHA and MSHA at both BethEnergy's mines and at other facilities.

of whether each individual knowingly authorized or ordered a violation, taking into consideration the evidence set forth below.

As to Mr. Nuccetelli, the record shows that he was aware of the unsaddled beams prior to the time that they were noted in the examination book by Mr. Rados but he did not believe that they constituted a danger. When called about the matter at home, Nuccetelli gave instructions that the area be reexamined to assure that it was still safe and, only if it continued to be safe, was it to be entered. There is no evidence that Nuccetelli was consulted further.

As to Kubovcik, it would appear that, even though he was the section foreman at the time, he had no decision making role at all in the incident. He called Nuccetelli for instructions, and was told to have Ronto reexamine the area. He delivered the message.

As to Ronto, he was asked only for his understanding of the requirements of the roof control plan as to immediate strapping and he answered that the strapping had to be done within a reasonable time. TR. 345. There is no evidence as to how Mr. Ronto, a construction foreman, had reached this understanding, or even of whether he had been given access to the roof control plan or had based his understanding of it on information received from his superiors.

Contrary to the majority's opinion, the Secretary concedes that the operator was within his rights in reexamining the area and removing the danger board if a hazard did not exist. 12 FMSHRC at 406, Tr. Oral Arg. at 36, Tr. 49-50, 90-95. However, the inspector does a little mind reading and is allowed to testify that Ronto must have believed that a hazard existed because he rehung the danger board. Perhaps Nuccetelli erred when he did not make his instructions specific on this point, i.e., if the area is safe, take down the danger board, remove the item from the examination book, and only then enter the area. Certainly this would have been a more precise and more orderly way to proceed, but I do not believe that Nuccetelli's failure to give such complete instructions raises his conduct to the level of aggravated conduct. Nor do I believe that the implications of Mr. Ronto's decision to rehang the danger board can be attributed to Mr. Nuccetelli or to Mr. Kubovcik.

According to the test set forth in United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971), which the majority cited but did not apply, the judge should have inquired whether Nuccetelli, Kubovcik, or Ronto, individually, voluntarily and intentionally authorized or ordered miners to pass a danger board under violative conditions. This he did not do. Therefore, I would remand the section 110(c) cases to the judge for

reevaluation under this test.

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10 The Secetary herself asserts that a 110(c) violation "does not occur upon the mere negligence of a corporate agent." Sec. Br at 28.

Unwarrantable Failure

Because the judge based his finding of unwarrantable failure on this flawed analysis and application of section 110(c), I would also remand the unwarrantable failure issue to the judge for reevaluation. I would not have considered as substantial evidence, as does the majority, BethEnergy's entrance into the area to conduct a reexamination rather than to eliminate the hazard or Ronto's failure to complete the steps to "formally" override the danger board by removing the condition from the fireboss book. Slip op. at. 16. In the first instance, the Secretary acknowledges BethEnergy's right to reinspect and override the danger board. 12 FMSHRC at 406, Tr.73-74, 90, See Tr. Oral Arg. at 36. The failure of Ronto to remove the condition from the fireboss book and his decision to "put things back the way they were" after actually examining the area and determining that the unsaddled beams did not present a hazard, does not rise to the level of aggravated conduct.

Conclusion

I join the majority in affirming the finding of violation and in its determination that it was not significant and substantial. For the foregoing reasons, however, I would remand to the judge for further analysis of both the unwarrantable failure and section 110(c) issues.

Joyce A. Doyle
Commissioner