FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. SE 2010-1236
v.	:	SE 2011-782
OAK GROVE RESOURCES, LLC and DONNY BIENIA, employed by OAK GROVE RESOURCES, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Cohen, Nakamura and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). These matters involve an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Oak Grove Resources alleging a failure to comply with a safeguard notice, and a related individual penalty issued to Oak Grove foreman Donny Bienia pursuant to section 110(c) of the Act.[1]

The safeguard notice in question requires that only approved equipment such as track motors be used to move supply cars on a track. The order alleges that Bienia was using a winch and cable on a scoop to move supply cars, in violation of the safeguard, when the cars broke

[1] Safeguard notices effectively function as mine-specific mandatory standards. *Wolf Run Mining Co.*, 659 F.3d 1197, 1201-02 (D.C. Cir. 2011), *aff'g*, 32 FMSHRC 1228 (Oct. 2010). They are issued pursuant to section 314(b) of the Act, which states that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b).

Section 110(c) of the Act states in relevant part that "[w]henever a corporate operator violates a mandatory health or safety standard . . . 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 [the operator]." 30 U.S.C. § 820(c).

loose and rolled approximately 3,900 feet.[2] The cited condition was designated as "significant and substantial" ("S&S") and the result of an unwarrantable failure.[3] The Judge found the safeguard to be valid, affirmed the order in its entirety, found Bienia personally liable, assessed the $50,700 penalty proposed by the Secretary against Oak Grove, and assessed a reduced penalty of $500 against Bienia. 35 FMSHRC 842 (Apr. 2013) (ALJ).

Oak Grove and Bienia challenge the validity and applicability of the safeguard notice, and the Judge's unwarrantable failure and personal liability determinations. For the reasons below, the Judge's decision is affirmed.

I.

Factual and Procedural Background

A. Factual Background

The relevant events occurred on May 12, 2010, at an Oak Grove underground coal mine in Jefferson County, Alabama. A miner, Andrew Teel, asked foreman Bienia for assistance moving some supply cars a short distance down the track to the crosscut for unloading. Oak Grove refers to this as "spotting." The six cars were coupled together on a track which sloped outby the mine.[4] The fourth car was resting against a car stop, and another car stop was located approximately 30 feet down the slope. Bienia and Teel decided to use the winch, cable and hook on a nearby scoop that Bienia had been operating. They planned to winch the cars a few feet uphill to take the weight off the car stop, remove the stop, then lower the cars down the track to the crosscut. Bienia testified that this method was used at a mine where he was previously employed. *Id.* at 844, 851.

Teel attached the winch hook to a side rail, which was normally used to tie down and secure loads, on the third car. Bienia began winching the cars uphill, and Teel removed the car stop which the fourth car had been resting against. At that point the weld attaching the third

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[2] A scoop is a piece of "[d]iesel- or battery-powered equipment with a scoop attachment for cleaning up loose material, for loading mine cars or trucks, and hauling supplies." Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 484 (2d ed. 1997). The winch, which was "like the winch on a pickup truck," was mounted behind the bucket of the scoop. Tr. 50. Counsel for the operator noted that not all scoops have winches. Tr. 17.

[3] The "significant and substantial" and "unwarrantable failure" terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that "could significant and substantially contribute to the cause and effect of a . . . mine safety and health hazard," and establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." Oak Grove does not contest the Judge's finding of a significant and substantial violation.

[4] "Outby" refers to areas "away from the face . . . toward the mine entrance." *Dictionary of Mining*, 383.

car's side rail to the car broke, the hook and cable came loose, and all the cars started to roll. Bienia attempted to halt their movement by turning the bucket of the scoop into the fourth car, but doing so caused the third and fourth cars to become uncoupled. The scoop held the last three cars, while the first three kept moving. Bienia left the scoop and ran alongside the cars, hoping to find some way to derail them, but was not able to keep up as the cars gained speed. The cars ran over the outby car stop without halting or derailing, and ultimately travelled approximately 3,900 feet before coming to a stop. No miners were injured, although one miner had to run to take refuge in a spur track to avoid being hit as the cars went by. Oak Grove investigated the incident during the following two days. *Id.* at 845, 852-53.

On May 24, 2010, an MSHA inspector received an anonymous handwritten complaint regarding the incident and conducted an investigation. The inspector concluded that the method used to move the supply cars violated previously issued Safeguard No. 3013658, which states:

> The two longwall utility men were observed moving 3 flat cars of supplys [*sic*] on the longwall section track with a diesel powered scoop. (Note) They were pulling the cars with a 5/8" dia. wire rope.
>
> This notice to provide safe guard [sic] requires only equipment such as track motors or other approved equipment be used in moving supply cars on the track in the mine.

Gov. Ex. 4. Accordingly, the inspector issued the following order pursuant to section 104(d)(2) of the Act:

> On 5-12-2010 at approximately 11:30pm an incident occurred at this mine that endangered the lives of miners working underground. A Section Foreman was using the winch of a scoop to move 3 supply cars; with 1 of the cars being loaded with 20 foot sections of 2 inch metal water pipe. The supply cars were located at the end of the Main North 3 track. The 3rd car inby was attached to the winch cable. The hook on the end of the cable became disconnected from the supply car causing the 3 most outby supply cars (coupled together) to roll outby. There was a positive stop located approximately 30 feet from the cars, that when contacted by the cars, fell over allowing the supply cars to continue to gain momentum and travel outby with no one in control of the cars. The cars came to rest at crosscut 20 on 11 West track. The distance traveled by the supply cars was 3,900 feet.

Gov. Ex. 2. In explaining why he determined Bienia had not been using "approved equipment," the inspector testified that supply cars are typically moved along a track using rail-mounted equipment (locomotives or mantrips) equipped with couplers, and that such a method (rather than a winch and scoop) is widely considered to be the only safe way to move supply cars on a track. Tr. 73-74. The inspector stated that he designated the alleged violation as an unwarrantable failure because a miner in a management position (Bienia) was directly involved. Tr. 119.

Bienia testified that at the time of the incident he believed his method of "spotting" supply cars to be a safe procedure, and was unaware of the concept of safeguards or of any "rule" prohibiting the use of a rope and winch to move supply cars. Tr. 145, 154-55, 163. Oak Grove's safety manager at the time, John Henry Hedrick III, testified that he believed the safeguard did not prohibit using a winch to spot supply cars (where the winch is powering the move), but rather prohibited using a scoop and rope to pull cars move cars (where the scoop is powering the move). Tr. 172-75, 190-91.

B. The Judge's Decision

In finding Safeguard No. 3013658 to be valid, the Judge relied on *American Coal*, 34 FMSHRC 1963 (Aug. 2012). In that case, the Commission held that a safeguard notice is valid if it describes a hazardous condition and specifies a remedy; it need not articulate a specific risk or harm to miners. *Id.* at 1969-70. The Judge determined that the safeguard at issue here "implicitly specifies the hazardous condition and explicitly provides the remedy for it." 35 FMSHRC at 861. The Judge then found that the safeguard notice applied to the cited condition. He noted that both involve the use of a scoop and wire rope to move supply cars, and found no meaningful distinction between pushing or pulling the cars, or between powering the move with a winch or the scoop itself. *Id.* at 861, 861 n.39.

The Judge concluded that the violation was the result of an unwarrantable failure, based on the direct involvement of supervisory personnel and the gravity of the cited condition. *Id.* at 863. He rejected Oak Grove's claim of an objectively reasonable and good faith belief that the cited conduct was not violative. In rejecting the claim, he stated that Bienia's lack of awareness of the safeguard's requirements was "inexcusable," and emphasized the inspector's testimony that the method employed by Bienia was well-understood to be unsafe. *Id.* The Judge was also unpersuaded by allegedly mitigating factors such as Bienia's experience moving cars with a winch and rope at another mine, the presence of the outby car stop, and Oak Grove's subsequent investigation. He found these factors to be irrelevant or non-determinative. *Id.* at 851, 854 n.27, 862 n.41, n.43.

Finally, the Judge found Bienia personally liable under section 110(c) of the Act. He noted that Bienia had a duty to know of the mine's safeguard notices, and thus had reason to know that his actions ran contrary to the requirements of the safeguard and were unsafe. However, the Judge assessed a penalty of $500 rather than the proposed penalty of $6,500. *Id.* at 865. In finding personal liability, the Judge rejected Oak Grove's argument that section 110(c) does not apply to agents of LLCs. *Id.* at 867.

III.

Disposition

A. Validity of the Safeguard

We conclude that the Judge properly held Safeguard No. 3013658 to be valid. The safeguard notice describes flatcars being pulled by a scoop and wire cable (the hazardous condition) and directs that only approved equipment such as track motors be used to move

supply cars on a track (the remedy). As discussed further below, we reject Oak Grove's claim that the safeguard is invalid because it fails to identify a hazard.

Oak Grove argues that the Commission's holding in *American Coal* is in error, but fails to offer any new reasons that would justify reconsidering the principle adopted therein.[5] We reaffirm our holding in *American Coal* that a notice of safeguard identifies a hazard for purposes of section 314(b) by identifying a hazardous condition, and need not specify a particular harm or risk to miners. 34 FMSHRC at 1969-70.

Oak Grove additionally contends that the safeguard notice fails to identify a hazardous condition because the nature of the hazard is not evident from the condition described (moving supply cars with a scoop and rope). The Commission, however, has looked to both common sense and industry standards to determine whether a condition described in a safeguard notice is hazardous. *See, e.g., American Coal*, 34 FMSHRC at 1976 ("it requires only common sense to know that it is unsafe to travel in a hoist with an open gate"); *Oak Grove Resources, LLC*, 35 FMSHRC 2009, 2012-13 (July 2013) ("it has long been commonly recognized that pushing cars on the main haulage roads of an underground mine is a hazardous practice").

Here, the inspector testified that using track-mounted equipment and couplers provides a "sure way of holding the cars," and that conversely, Bienia's method is considered unsafe and is "not a common practice . . . because of exactly what happened," i.e., runaway cars. Tr. 73-74. As the inspector reasonably explained, a scoop and rope does not provide the same level of control as track-mounted equipment which is "in line with . . . [and] rigidly coupled to the cars." Tr. 84. Even Oak Grove safety manager Hedrick conceded that "cars could run over you" when using a scoop and rope to move cars. Tr. 174-75. Common sense and industry practice demonstrate that the condition described in the safeguard raises concerns regarding stability and control. Accordingly, we find that the condition described in the safeguard – use of a scoop to pull cars – is hazardous.

Oak Grove claims that it is unclear whether the safeguard notice is directed toward preventing runaway cars, a car riding into the scoop, or some other danger. However, as we noted in *American Coal*, "many potential risks" can flow from a single condition, and "it would be unreasonable to require the inspector to identify each and every one." 34 FMSHRC at 1970; *see also Oak Grove*, 35 FMSHRC at 2014 (a valid safeguard notice "need not foreshadow the events that may occur if the safeguard is not implemented"). A safeguard notice is not invalid because it describes a hazardous condition that could result in multiple specific harms; indeed, a

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[5] Oak Grove relies on earlier Commission caselaw and the use of the term "hazard" in MSHA's Program Policy Manual ("PPM"). These were already considered by the Commission in *American Coal*. The caselaw was found to be consistent with our holding, and the discussion of hazards in the PPM was found not to be persuasive. 34 FMSHRC at 1967-71. Oak Grove also claims that the Commission in *American Coal* did not consider testimony from a former MSHA district manager that inspectors were told to include hazards when issuing safeguards. Resp. Ex. 4 at Tr. 127-28. However, the testimony indicates that MSHA was simply attempting to comply with Commission caselaw, and the Commission has since held that safeguard notices need not identify a specific harm.

multiplicity of potential specific harms arising from the identified hazardous condition emphasizes that the safeguard notice does identify a hazardous condition.[6] Here, Safeguard No. 3013658 describes a hazardous condition and specifies a remedy. Within the framework of *American Coal*, the safeguard is valid.

B. Applicability of the Safeguard

The Judge found that the cited condition "clearly falls within [the safeguard notice's] purview." 35 FMSHRC at 861. We agree. The purpose of the safeguard notice is to ensure that only approved equipment is used to move supply cars on a track. Oak Grove moved supply cars on a track using a scoop and wire rope rather than approved equipment, and was cited for doing so.

Oak Grove claims that the safeguard notice is not applicable to the cited condition.[7] Oak Grove would distinguish pulling cars using a scoop and rope, as described in the safeguard notice, from using a winch to spot cars a short distance, as described in the order. We have recognized that a citation should be vacated if the conditions "differ fundamentally in nature, cause and remedy" from those in the underlying safeguard, such that the operator lacked notice that the cited conduct was prohibited. *Bethenergy Mines, Inc.*, 15 FMSHRC 981, 986 (June 1993); *see also Southern Ohio Coal Co.*, 7 FMSHRC 509, 512-13 (Apr. 1985) ("SOCCO I"). However, we see no such fundamental dissimilarity here.

The only potentially relevant difference here is the use of the winch.[8] We do not find this to be a meaningful distinction. While the use of a winch may change the mechanics of the process to some degree, it does not alter the nature of the hazardous condition. As the inspector testified, approved equipment (track-mounted equipment with couplers) provides control because it is in-line with and rigidly attached to the supply cars. Tr. 84. Using non-approved equipment that is not track-mounted – whether a rope attached to a scoop, or a winch and rope attached to a scoop – creates a danger of loss of control and runaway cars, which is avoided by using only approved equipment. The safeguard put Oak Grove on notice that using non-approved equipment to move supply cars on a track is prohibited. Limiting prohibited conduct to the exact scenario in the safeguard notice, i.e., the use of a scoop and rope but no winch, would unduly narrow the scope of the hazardous condition identified in the safeguard notice, and allow the use of equipment which is clearly non-approved.

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[6] Conceivably, an operator could be cited for conduct which is hazardous in a way truly not contemplated by the underlying safeguard notice. However, that would affect the validity of the citation rather than the validity of the safeguard notice, and regardless, is not the situation here.

[7] Oak Grove also contends that the violation cannot be sustained because the safeguard notice does not clearly identify the condition to which it is directed. This involves the validity, rather than the applicability of the safeguard notice, and has already been addressed.

[8] Oak Grove also suggests a substantive distinction between pulling cars and spotting them a short distance. Tr. 173, 190-91. However, the safeguard notice addresses *moving* cars generally.

C. Unwarrantable failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Because supervisors are held to a higher standard of care, the involvement of supervisory personnel in violative conduct may support an unwarrantability determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). Conversely, if an operator has acted on an objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law, such conduct will not be considered to be the result of an unwarrantable failure when it is later determined that the operator's belief was in error. *IO Coal Co.*, 31 FMSHRC 1346, 1357-58 (Dec. 2009) (citing *Kelly's Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997).

The Judge found that the violation was the result of an unwarrantable failure, based primarily on the direct involvement of Bienia, a supervisor. The Judge rejected Oak Grove's claim of an objectively reasonable and good faith belief that the cited conduct was not violative. He acknowledged Bienia's apparent good faith belief that his method of moving cars was not prohibited, but considered such ignorance of the mine's safeguard notices inexcusable, stating that "[a]s supervisors are held to a heightened standard of care regarding safety matters, and as there was an intentional, though inexcusably unwitting, violation of the safeguard involved here, the conclusion that the violation was unwarrantable is inescapable." 35 FMSHRC at 863. Oak Grove claims the Judge erred in finding that Bienia's belief in compliance was not objectively reasonable, and in rejecting certain other mitigating factors.[9] For the reasons below, we find that the Judge properly rejected such arguments.

In claiming an objectively reasonable and good faith belief in compliance, Oak Grove relies on Bienia's testimony that the same method of moving cars was used at the mine where he was previously employed. While this may support Bienia's good faith belief that the method was compliant, it does not make the belief objectively reasonable. The inspector testified that the method used by Bienia is commonly understood to be unsafe. Tr. 73-74. Furthermore, safeguard notices are mine-specific. A belief that a method of moving supply cars is compliant is not objectively reasonable simply because a miner used it in an undescribed instance(s) at some unidentified time(s) and, most importantly, without testimony that MSHA was aware of

[9] In determining whether aggravated conduct has occurred, a Judge must consider all relevant factors, including the extent of the violative condition, the length of time the condition has existed, whether the violation posed a high risk of danger, whether the violation was obvious, the operator's knowledge of the existence of the violation, the operator's efforts in abating the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal*, 31 FMSHRC at 1350-57. Although the Judge did not address all the relevant factors here, Oak Grove does not challenge the unwarrantable failure determination on those grounds.

such purported use.[10] The record does not detail the extent of this experience. It may have been a single instance as far back as 1975 and there was no evidence that MSHA ever knew of Bienia's use of this method. Tr. 135-36.

Oak Grove has a duty to ensure that its supervisors are aware of the proper way to move supply cars at Oak Grove Mine. Here, it apparently failed to do so; Bienia could not recall any training as to this particular safeguard notice. Tr. 154, 162-64. However, the "general principle that ignorance of the law is no defense" applies in the negligence context. *Douglas R. Rushford Trucking*, 23 FMSHRC 790, 793 (Aug. 2001) (citing *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 509 (1st Cir. 1996)). Neither Bienia's experience at another mine, nor his unfamiliarity with the requirements of the safeguard notice, is a valid ground for finding his belief objectively reasonable.

Oak Grove also argues more generally that the text of the safeguard notice can reasonably be interpreted as applying only to pulling cars along the track with a scoop and rope, rather than spotting them with a winch.[11] As discussed above, such an interpretation focuses on a distinction without a difference, and is not objectively reasonable.

As for other allegedly mitigating factors, we do not find the presence of the outby (downslope) car stop to be relevant. Bienia stated that he only became aware of the car stop after he began winching the cars. Tr. 140. Therefore, the car stop is irrelevant to his state of mind when deciding to engage in the cited conduct. Moreover, car stops are intended to prevent cars from beginning to move, rather than safely stopping cars that are already moving. Tr. 44, 76-77. Awareness of a car stop 30 feet away that would not be expected to (and in fact did not) stop the runaway cars, does not affect the relevant standard of care.

We are also unpersuaded by Oak Grove's contention that its investigation and remedial actions taken after the incident are mitigating factors. The record does not indicate that any *relevant* remedial actions were taken, as nothing in the investigation summary or the safety manager's testimony indicates that Oak Grove implemented any changes to ensure the use of

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[10] The Commission has recognized that prior inconsistent enforcement by MSHA can be relevant with regard to negligence and reasonableness of belief. *See IO Coal*, 31 FMSHRC at 1358; *see also King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981). However, safeguard notices are mine-specific, and there is no indication that MSHA has inconsistently enforced *this* safeguard notice at this mine.

[11] Oak Grove notes the safety manager's testimony that this is what he believed. Aside from the fact that a mere statement of belief does not make that belief reasonable, he was not the agent acting on the operator's behalf in this instance, so his beliefs are not relevant to the determination of reasonable and good faith belief. *See Excel Mining, LLC*, 37 FMSHRC 459, 468 (Mar. 2015) (the negligence of an agent is imputed to the operator for the purpose of making an unwarrantable failure determination).

approved equipment such as track motors when moving supply cars.[12] *See* Resp. Ex. 8; Tr. 178-80. In sum, we are not persuaded by the mitigating factors offered by Oak Grove. The Judge's unwarrantable failure finding is affirmed.

D. Personal Liability of Donny Bienia

Section 110(c) provides that whenever a corporate operator violates a mandatory standard or any order under the Act, "any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). Liability under section 110(c) only requires that an agent knowingly acted, not that the individual knowingly violated the law. *See, e.g., McCoy Elkhorn Coal Corp. and Robinson,* 36 FMSHRC 1987, 1996 (Aug. 2014), *citing Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992). A knowing violation thus occurs when an individual "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." 3 FMSHRC at 16.

As an initial matter, we reaffirm our holding in *Simola* that section 110(c) applies to agents of LLCs. *Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 548-49 (Mar. 2012), *followed in Sumpter, employed by Oak Grove Resources LLC,* 763 F.3d 1292, 1298-99 (11th Cir. Aug. 2014). Oak Grove contends that the plain language of section 110(c) explicitly and exclusively refers to agents of corporate operators, and therefore cannot be applied to Bienia, an agent of an LLC. However, as we explained in *Simola*, LLCs did not exist when section 110(c) was drafted. 34 FMSHRC at 542. Because the intent of the provision is to pierce corporate liability, and the limited liability shield is a key characteristic of LLCs, section 110(c) applies to agents of LLCs. Oak Grove fails to offer any new theories that would justify reconsidering this principle.[13]

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[12] The parties disagree as to whether remedial actions taken after the cited event, but prior to the issuance of a citation, can be considered mitigating factors with respect to an unwarrantable failure determination. As we find no such relevant actions occurred, we need not address this issue. We note that Oak Grove had 13 days from the incident until MSHA issued the order within which to investigate the incident and make meaningful changes in its practices. It had this much time because MSHA did not learn of the incident until the inspector received an anonymous handwritten note from a miner in his lunch box, which the inspector properly regarded as a complaint under section 103(g) of the Mine Act. 35 FMSHRC at 843.

[13] Oak Grove relies on caselaw stating that section 110(c) does not apply to partnerships and distinguishing LLCs from corporations for jurisdictional purposes, and notes the relatively recent creation and hybrid nature of LLCs. The Commission in *Simola* considered the caselaw, and found it distinguishable. 34 FMSHRC at 544-45, 548 n.13. Noting that LLCs have the corporate characteristic of limited liability and that Congress had a clear intent to pierce the

Turning to Bienia's liability, he not only knew that supply cars were being moved using a scoop, winch, and cable, but actually directed such activity. Furthermore, as foreman, he had a duty to be aware of the requirements of the mine's safeguard notices.[14] For the reasons discussed above, slip op. at 7-8 *supra*, we find that Bienia did not have an objectively reasonable belief that his conduct was in compliance. Bienia had direct knowledge of the condition (moving supply cars with unapproved equipment). As an agent of Oak Grove, he authorized and carried out conduct which he knew or should have known created a violative condition. Accordingly, we affirm the finding of liability under section 110(c) of the Act.

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corporate veil, the Commission concluded that "Congress, if given the opportunity, would have explicitly included LLCs, within the scope of section 110(c)." *Id.* at 549, 550-51.

[14] If the record established that Bienia had not received any training regarding the safeguard requiring the use of approved equipment, it could be argued that he did not have reason to know that his conduct was violative. While a foreman has a duty to know what is required by the mine's safeguard notices, an operator has as great a duty to ensure that knowledge by proper training. However, the record only reflects that Bienia was unfamiliar with the term "safeguard" and did not recall whether he was trained as to this particular requirement. He did admit knowledge of other requirements and "rules" addressed in safeguard notices in place at the mine. Tr. 154, 162-64.

Commissioner Cohen adds that Bienia's defense was conducted jointly with Oak Grove's defense. The defense for the section 110(c) citation against Bienia personally was identical to Oak Grove's defense against the allegation of unwarrantable failure – that Bienia had a good faith belief that what he did was proper. No evidence was offered by the defense as to the training Bienia received from Oak Grove regarding the safeguards applicable at the mine. If, in fact, Bienia had not been trained regarding Safeguard No. 3013658, his defense would have been stronger. However, such evidence would also have weakened Oak Grove's defense against the unwarrantable failure designation. Thus, Bienia may have been ill-served by linking his defense with Oak Grove's defense.

III.

Conclusion

For the foregoing reasons, the Judge's Decision is affirmed.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Young, concurring:

I continue to believe that the Commission's expansive view of *American Coal Company*, 34 FMSHRC 1963 (Aug. 2012), in some previous decisions is contrary to our precedents and the safety purposes of the Act. However, I join the majority's opinion in this case in its entirety, writing separately only to ensure my position on safeguards generally is not misinterpreted.

I joined the opinion in *American Coal* because common sense supported the conclusion that there is no need to state the obvious in authoring a safeguard notice to specify the harm that would foreseeably result from a prohibited, patently hazardous practice. The case before us clearly falls within the parameters of our decision in *American Coal.*

Powered haulage is a significant cause of miner deaths and injuries.[1] It is thus an area where improvisational misjudgments are especially likely to have fatal consequences. Simple matters of physics and engineering should make obvious the need to avoid using equipment other than track motors or other approved means to move equipment.

This case presents a perfect example. Not only was the motivating force applied through an untested wire rope and side rail that was never designed to bear it, the force moved in more than one direction by pulling the load laterally, and not straight down the tracks as a properly-coupled connection would have allowed. There was no track motor in place to provide controlled power through an approved connection, and the result was a foreseeable loss of control over the cars.

This, then, is unlike the circumstances in *Oak Grove Resources, LLC*, 37 FMSHRC 2687 (Dec. 2015) and *Black Beauty Coal Company*, 38 FMSHRC 1 (Jan. 2016). In the former case, there was no description of the hazard, and despite there being a fatal accident at issue, the Secretary was unable even to make a case that the violation was S&S. *Oak Grove*, 37 FMSHRC at 2692-94. In the latter case, a safeguard modification requiring travelways to be "free of mud and water" failed to specify a hazard or the degree or type of accumulations so that the hazard would be clearly discerned, and failed to relate the modification to the conditions which prompted the original safeguard. *Black Beauty*, 38 FMSHRC at 10-15 (Young and Althen, dissenting). Again, the cited breach was found not to be S&S.

I have some misgivings about finding Mr. Bienia liable under section 110(c) of the Act. That discomfort arises from the fact that neither MSHA nor this operator has taken steps to incorporate safeguards into the mine's hazard training. While I suspect this is a general problem, and should be considered along with other compelling reasons why safeguards should not be used to address hazards common to all mines, in our opinion today, Commissioner Cohen

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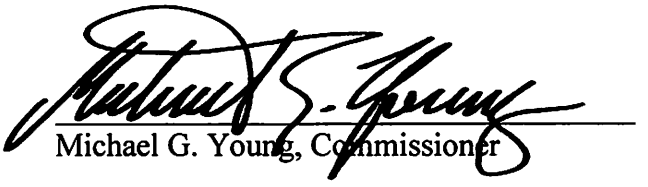
[1] *See* MSHA – Coal End of Year 2015 Fatality Report and Metal/Nonmetal End of Year 2015 Fatality Report, http://arlweb.msha.gov/stats/charts/chartshome.htm (from the years 2011-2015, 21 of 87 total fatalities in coal mines, and 29 of 100 total fatalities in metal/nonmetal mines, involved powered haulage); MSHA Summary Fatal Accidents with Preventative Recommendations, http://arlweb.msha.gov/fatals/summaries/previoussummaries.asp ("The leading cause of fatalities in the U.S. mining industry during 2012 was powered haulage . . . .").

correctly notes that Bienia provided no argument or evidence concerning a lack of training. Slip op. at 10, n.14.

The patchwork nature of regulation-by-safeguard may explain why Mr. Bienia believed it might be permissible to move cars with a scoop, as was done in this case. Nevertheless, he was in a supervisory position with the mine and had a duty to know all governing standards, including the applicable safeguards. It would not be logical to hold both that the practice was patently dangerous – as I believe it to be – and that a foreman, removed from the operational pressures inherent in the situation that confronted Mr. Bienia in this case, would not have known this.



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