FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 19 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1821
v.	:	
LEWIS-GOETZ AND COMPANY, INC.	:	

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

In this simplified penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Administrative Law Judge vacated a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Lewis-Goetz and Company, Inc. ("Lewis-Goetz"), and dismissed the pending penalty proceeding. 35 FMSHRC 2192 (July 2013) (ALJ).[1] At issue is the regulatory interpretation of 30 C.F.R. § 77.1710(g), which requires employees to use safety belts and lines when there is a danger of falling. For the reasons that follow, we reverse the Judge's decision, grant summary decision for the Secretary on the fact of violation, and remand for further proceedings.

I.

Facts and Proceedings Below

A. Factual Background

Lewis-Goetz is an independent contractor that offers conveyor belt fabrication and repair services to mines. On December 18, 2011, an MSHA Inspector was inspecting a prep plant in West Virginia. The inspector observed Lewis-Goetz hourly employee Jesse Brown performing belt splicing and vulcanizing services on the elevated No. 2 raw coal belt. The belt was approximately 30 inches wide, wet from the falling snow, and located approximately 10 to 12

[1] We are deciding this case in conjunction with our consideration of *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), which also involves the interpretation of 30 C.F.R. § 77.1710, and are issuing the decisions in both cases on this date.

feet above the ground. Brown was walking and squatting down on the wet, narrow, and elevated coal belt. He was not wearing a safety belt or tag line.

The inspector determined that Brown was in imminent danger of falling and issued an imminent danger order (which is not at issue in this case). He also issued a citation alleging that Brown had violated 30 C.F.R. § 77.1710(g),[2] which addresses miners' use of safety belts and lines where there is danger of falling. The citation also alleged that it was highly likely that a fatal injury would occur as a result of a fall; that the violation was "significant and substantial" ("S&S");[3] and that one miner was affected. The citation was initially issued with a designation of "high" negligence, but MSHA later modified the operator's negligence to moderate.

After the inspector ordered Brown to descend from the coal belt, Brown stated that he was aware he was supposed to wear a safety belt and tag line, but due to the severe cold weather, he was in a hurry to get the work done and decided not to wear the belt. After being removed from the elevated beltline, Brown retrieved a safety belt and tag line from a tool bag located in the maintenance truck. Brown told the inspector that the devices were available to him and that he had been trained in their use.

MSHA proposed a civil penalty of $971, and Lewis-Goetz filed a notice of contest challenging the citation.

B. The Judge's Decision

The Judge issued a Decision and Order on Cross Motions for Summary Decision. She denied the Secretary's motion for summary decision on the violation of section 77.1710, granted the operator's motion for summary decision, and vacated the citation. 35 FMSHRC at 2197. The decision did not revisit a previous determination by the Judge to reject the Secretary's filing

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[2] Section 77.1710 provides:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> . . . .
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

30 C.F.R. § 77.1710.

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

of an opposition to Lewis-Goetz's motion and did not refer to any of the arguments the Secretary had made in that filing.[4]

The Judge first concluded that the Secretary properly asserted MSHA jurisdiction over Lewis-Goetz. *Id.* at 2194-95. In effect, though not explicitly, the Judge therefore granted partial summary decision in the Secretary's favor on the jurisdictional issue.

The Judge then considered whether Lewis-Goetz violated 30 C.F.R. § 77.1710(g) when Brown worked without a safety belt or line. She concluded that the contractor had not violated the standard. *Id.* at 2195-97. The Judge noted the Secretary's position that a violation had occurred because section 77.1710(g) imposes strict liability on operators. *Id.* at 2196. The Judge also noted Lewis-Goetz's position that the standard only requires an operator to impose a requirement for employees to use fall protection and to take reasonable measures to ensure that the requirement is enforced. *Id.* at 2195-96. The Judge concluded, based on the Commission's decisions in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), and *Southwestern Illinois Coal Corp.*, 7 FMSHRC 610 (May 1985) ("*Southwestern II*"), that the duty the standard imposes on the operator is to "have a safety system in place requiring employees to use safety gear and that [the operator] diligently seek[s] to enforce that requirement through such avenues as training, supervision, and disciplinary measures for failure to comply." 35 FMSHRC at 2196.

The Judge summarized the evidence in the record, stating that the Secretary stipulated to the following facts: (l) Lewis-Goetz has a written policy that all miners must wear fall protection; (2) Lewis- Goetz offers at least yearly refresher training on the policy; (3) by company policy, a violation of the requirement to wear fall protection is subject to graduated disciplinary measures, including termination; and (4) Brown admitted to the inspector that he was "well aware of the requirement to wear the equipment but he intentionally ignored the policy" and that "[t]he gear was readily available to him in his tool bag." *Id.*

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[4] Before the Judge, the Secretary submitted a document which was titled "Secretary's Reply Brief in Further Support of His Motion for Summary Decision and Determination of Penalty." The content of the filing was in essence an opposition to Lewis-Goetz's motion for summary decision, addressing the case law cited by Lewis-Goetz but not addressed by the Secretary's July 5, 2013 motion. The Judge rejected the Secretary's filing, informing the Secretary that she would not accept and consider any reply briefs.

On appeal, the Secretary argues that the Judge erred by excluding his responsive filing. The Commission's rule on summary decision contemplates that a party opposing the motion may have an opportunity to file an opposition. 29 C.F.R. § 2700.67(d). However, because the case was designated for simplified proceedings (29 C.F.R. § 2700, Subpart J), permitting the Judge an opportunity for greater involvement at an early stage of the proceeding, the Judge directed the parties to file cross motions for summary decision. Any error by the Judge in excluding the Secretary's opposition is non-material and harmless at this stage of the proceeding, especially in light of our holding on the merits of this case. Moreover, the arguments raised in the Secretary's opposition have been raised on appeal and are now being addressed. Thus, we find no prejudice to the Secretary as a result.

The Judge noted that if the parties disputed whether Lewis-Goetz's efforts to enforce its policy were adequate, then a material fact would be in dispute. *Id.* at 2196 n.3. The Judge concluded, however, that summary decision was appropriate because the parties "had stipulated to the contrary," after having noted the undisputed facts about the operator's policy and enforcement efforts. *Id.* Ultimately, the Judge concluded: "Based upon the facts mutually agreed upon, I find that Lewis-Goetz did have an adequate policy in place requiring employees to wear fall protection and [that it] took adequate measures to enforce that policy." *Id.* at 2196. After granting Lewis-Goetz's motion for summary decision and denying the Secretary's motion for summary decision, the Judge vacated the citation and dismissed the matter. *Id.* at 2197. The Commission granted the Secretary's petition for discretionary review.

II.

Disposition

A. Occurrence of a Violation

The Secretary argues that in denying his motion for summary decision and granting Lewis-Goetz's motion, the Judge misinterpreted section 77.1710 and committed several procedural errors. Specifically, the Secretary contends that the Judge misinterpreted the applicable regulatory standard by applying Commission precedent holding that an operator may escape liability for its rank-and-file miner's failure to comply with the standard. The Secretary argues that strict liability under the Mine Act mandates an alternative interpretation of the applicable standard.

Below, the Judge determined that the operator was entitled to summary decision as a matter of law. She based this decision on a plain interpretation of section 77.1710, controlled by Commission precedent set forth in *Southwestern I.* The Commission reviews the Judge's summary decision de novo. *See Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). As we concluded in *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), which was also issued on this date and addresses the interpretation of the same language in section 77.1710, section 77.1710(i) requires the use of seat belts. Similarly, section 77.1710(g) requires the use of fall protection where there is a danger of falling. Thus, the Judge erred in granting summary decision for Lewis-Goetz. Rather, the Secretary is entitled to summary decision that a violation occurred as a matter of law.

Consistent with *Nally*, the only sensible reading of the regulation is that it requires that miners use fall protection. As in *Nally*, we do not read section 77.1710 as imposing only an obligation upon the operator to train and discipline miners. The section compels the wearing of the prescribed protective clothing and devices.[5] Section 77.1710(g) achieves its purpose if and

[5] *Nally* involved wearing seat belts, and *Southwestern I* involved the use of fall protection. However, those cases, as does this case, turn upon the interpretation of the language of the opening paragraph of section 77.1710 that miners "shall be required" to wear the protective clothing and devices identified in the subsequent subsections.

only if miners wear fall protection, and not if they merely receive training on its use and suffer discipline for failing to use it. It is not necessary to repeat our analysis of the proper interpretation of section 77.1710 again here. As fully explained in *Nally*, we conclude that the language of the standard, other standards related to the use of protective gear, Commission precedent, and the purpose of the Mine Act underscore our interpretation of section 77.1710.[6]

Therefore, for the reasons set forth in *Nally*, we overrule *Southwestern I* and *II*. We find that the failure of a miner to use fall protection as defined in section 77.1710(g) is a violation. The operator, in turn, is strictly liable for such violation without regard to the diligence with which it has trained and required miners to use fall protection. Therefore, we vacate and reverse the decision below and find the operator committed a violation of section 77.1710(g).

B. Negligence, S&S, and Penalty

In granting summary decision for the operator, the Judge found that the Secretary had stipulated to facts demonstrating that the operator had adequate policies and enforcement measures in place to warrant summary judgment under the then-prevailing *Southwestern I* standard. On review, the Secretary asserts that it did not concede that the operator's enforcement actions were adequate and further asserts that the stipulations do not concede the adequacy of enforcement.

The Judge acknowledged that if the Secretary contested the operator's enforcement of its policy, a disputed issue of fact would exist. In light of our decision today finding a violation, these questions of enforcement actions become relevant to the Judge's negligence determination, which must be considered on remand. In addition, the Judge must make determinations regarding whether the violation was S&S and the penalty amount.

We conclude that Lewis-Goetz violated section 77.1710(g) because of the miner's failure to use fall protection where there was a danger of falling. Because the Judge granted summary decision for the operator and dismissed the proceeding, the Judge did not make findings on the operator's level of negligence and whether the violation was S&S, and did not assess a penalty. Accordingly, we remand the case to the Judge for further proceedings in light of our decision.

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[6] Also as in *Nally*, even if we harbored doubts about the proper interpretation of section 77.1710, we necessarily would find section 77.1710(i) to be ambiguous, and would defer to the Secretary's interpretation as a reasonable and persuasive construction of the regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997).

III.

Conclusion

For the foregoing reasons, we reverse the Judge's decision, affirm Citation No. 8036268, and remand for further proceedings on S&S and negligence and for assessment of a penalty.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Young, concurring:

I join my colleagues in reversing the Judge's decision and granting summary decision to the Secretary on the finding of a violation of 30 C.F.R. § 77.1710(g). I also agree with remanding the case back to the Judge to address negligence, the Secretary's S&S designation, and for assessment of a penalty. However, because I disagree with their decision to overturn the Commission's decisions in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), and *Southwestern Illinois Coal Corp.*, 7 FMSHRC 610 (May 1985) ("*Southwestern II*"), I write separately.

As I stated in my dissent in *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), also issued on this same date, I believe that the Commission should respect and follow its precedent. A decision to overturn precedent should not be made lightly and should be substantiated by ample reason based in law. In this circumstance, I believe that *Southwestern I* was rightly decided based on the plain language of section 77.1710 and the well-established principles of regulatory construction. However, applying *Southwestern I* to the facts of this case, substantial evidence supports that Lewis-Goetz failed to comply with the requirements of *Southwestern.* More specifically, the evidence does not demonstrate that Lewis-Goetz engaged in "sufficiently specific and diligent enforcement" of its policy regarding fall protection. *Southwestern I*, 5 FMSHRC at 1676. The record is devoid of evidence of any such program and enforcement by Lewis-Goetz. Thus, even applying *Southwestern I*, the Judge erred in granting summary decision for the operator.

The Commission reviews a Judge's summary decision de novo. *See Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). A Judge can enter summary decision only if there are no material facts in dispute and a party's position is entitled to judgment as a matter of law. *See* 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.24 (3d ed. 2015) (considering a motion for summary decision, Judge's role is limited to a determination of whether a case can be decided without the need to resolve any factual disputes).

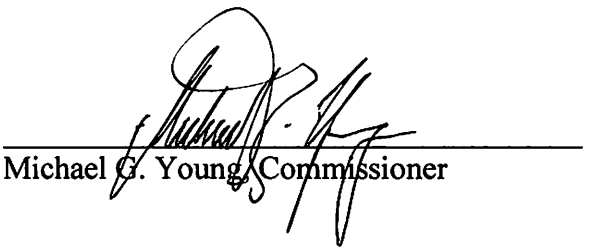
The parties presented undisputed evidence that Lewis-Goetz had a policy concerning the use of fall protection and provided guidance (training) and enforcement (progressive disciplinary program); contrary to the Judge's statement, the parties did *not* stipulate as to the adequacy of Lewis-Goetz's enforcement efforts under the standard articulated in *Southwestern I.* 35 FMSHRC 2192, 2196 & n.3 (July 2013) (ALJ). Nor is there sufficient evidence in the record to support the Judge's conclusion that Lewis-Goetz adequately enforced its policy on fall protection.

The parties stipulated that Lewis-Goetz has a written policy that all miners must wear fall protection, that they offer at least yearly refresher training on it, and that by company policy a violation of the requirement to wear fall protection is subject to graduated disciplinary measures including termination. 35 FMSHRC at 2196; Jt. Stips. 13, 14, 22. The parties submitted copies of Brown's training records, indicating that he had been trained annually on the use of fall protection. Jt. Ex. C (attached to Jt. Stips.). Also submitted was a copy of Lewis-Goetz's Disciplinary Program. Jt. Ex. D (attached to Jt. Stips.). However, both Lewis-Goetz's safety policy and summary decision motion simply emphasize that its policy provided that it is each

employee's personal responsibility to "work in a safe and efficient manner." Jt. Ex. D; Resp't's Br. Supp. Contest 3.

Lewis-Goetz did not present any evidence detailing the training provided to its miners or evidence of enforcement and discipline for non-compliance with its safety program. Thus, given the evidence of the operator's sparse program and enforcement, I conclude that the record compels the conclusion that Lewis-Goetz did not undertake "sufficiently specific and diligent enforcement" of its policy about when miners must wear fall protection in satisfaction of *Southwestern I. See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (stating that remand is not necessary when the record supports no other conclusion).

Because I conclude that *Southwestern I* is controlling, I agree that the Judge erred in granting summary decision for the operator and conclude that the Secretary is entitled to summary decision based on the conclusion that the operator did not comply with *Southwestern I.* Accordingly, I agree with the majority that the case should be remanded to the Judge to address the operator's negligence and S&S and for assessment of a penalty.



Michael G. Young, Commissioner

Commissioner Cohen, dissenting:

I respectfully dissent in this case for two reasons.

First, I disagree with the majority that 30 C.F.R. § 77.1710(g) should be interpreted in a manner that overrules the Commission decisions in *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), and *Southwestern Illinois Coal Corp.*, 7 FMSHRC 610 (May 1985) ("*Southwestern II*"). In a decision we are issuing simultaneously with this one, *Nally & Hamilton Enterprises*, 38 FMSHRC __, No. KENT 2011-434 (July __, 2016), a majority of the Commissioners have overruled *Southwestern I* and its progeny. I along with my colleague Commissioner Young authored opinions dissenting from the majority in that case, stating that the majority decision failed to provide a compelling justification to depart from established Commission precedent. I adopt that opinion here. As Commissioner Young states in his concurring opinion in this case, "*Southwestern I* was rightly decided based on the plain language of section 77.1710 and the well-established principles of statutory construction." Slip op. at 7 (Young, Comm'r, concurring).

Hence, I disagree with the majority's conclusion that the fact that Lewis-Goetz employee Jesse Brown was not wearing a safety belt or other fall protection while working on the elevated No. 2 raw coal belt by itself compels the conclusion that section 77.1710(g) was violated. The proper issues, as framed in *Southwestern I*, are whether Lewis-Goetz (1) "establish[ed] a safety system designed to assure that employees wear [the clothing or equipment] on appropriate occasions" and (2) "enforce[d] such system with due diligence." 5 FMSHRC at 1673 (quoting *N. Am. Coal Corp.*, 3 IBMA 93, 107 (1974)); *see also Southwestern II*, 7 FMSHRC at 612-13.

It is tempting to join with Commissioner Young in the finding that Lewis-Goetz was guilty of a violation because the record compels the conclusion that it failed to adequately enforce its policy on fall protection. Nevertheless, I must instead conclude that this is not an appropriate case for summary decision—my second reason for dissenting.

According to Commission Procedural Rule 67(b), 29 C.F.R. § 2700.67(b), a judge may only grant a motion for summary decision "if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." The Commission has noted that summary decision is an "extraordinary procedure" that should only be employed when the rule's exacting standards are satisfied by the moving party. *See Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (1994).

The Judge here granted summary decision for Lewis-Goetz, concluding that the Secretary's stipulations were sufficient to justify the findings that (1) Lewis-Goetz had "an adequate policy in place requiring employees to wear fall protection" and that (2) it "took adequate measures to enforce that policy." 35 FMSHRC at 2196. However, the Secretary did not stipulate either to the adequacy of Respondent's policy or to the adequacy of its efforts to enforce the policy. The Secretary's stipulations were limited to the facts that (1) the two employees of Lewis-Goetz who were working at the Dobbin Ridge Preparation Plant mine at the time of the MSHA inspection and issuance of the citation in question were both trained on fall protection devices, (2) Mr. Brown had received such training as recently as 13 days before the

incident, (3) Lewis-Goetz had a disciplinary policy, a copy of which was attached to the Joint Stipulations, (4) Mr. Brown had a safety belt and tagline available to him, and (5) Mr. Brown acknowledged to the MSHA inspector that he had been trained and that he should have been wearing the fall protection equipment available to him. Joint Stips. 11, 13-14, 21-24. These stipulations by the Secretary did not concede the adequacy of the safety program or Lewis-Goetz's diligence in enforcing it.

The Judge thus erred in finding that the Secretary had made stipulations which were sufficient to support her conclusions regarding the adequacy of the policy or Lewis-Goetz's enforcement of it. In considering a motion for summary decision, the judge must view the record in the light most favorable to the party opposing the motion, and all inferences must be drawn in favor of the non-moving party. *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Here, the Judge drew inferences regarding the adequacy of Lewis-Goetz's program against the non-moving party based on the Secretary's very limited stipulations.

The Judge further erred in excluding the Secretary's response to Lewis-Goetz's motion for summary decision.[1] After receipt of the Secretary's response, the Judge's Attorney-Advisor sent the parties an email, stating, "[The] Judge . . . did not authorize reply briefs and will not be accepting them." App. C to Br. for Sec'y 2. The Secretary's counsel then requested reconsideration of the ruling, pointing out that a responsive filing was contemplated by Commission Rules and did not require the Judge's authorization. *Id.* at 1. However, the Judge again indicated that she would not consider any reply briefs. *Id.*

In this exchange, the Secretary was correct. Commission Procedural Rule 67(d) plainly contemplates that parties may file an opposition to a motion for summary decision. 29 C.F.R. § 2700.67(d). Moreover, Commission Procedural Rule 10(d) states that "[a] statement in opposition to a written motion may be filed by any party within 8 days after service upon the party." 29 C.F.R. § 2700.10(d). Commission Procedural Rule 8(a) provides that when the "time prescribed for action is less than 11 days, Saturdays, Sundays and federal holidays shall be excluded in determining the due date." 29 C.F.R. § 2700.8(a). Hence, under the Commission Procedural Rules, the Secretary timely filed a response to Lewis-Goetz's motion for summary decision, which should have been considered by the Judge.

[1] This case was designated for simplified proceedings pursuant to Commission Procedural Rule 102, 29 C.F.R. § 2700.102. Following the parties' submission of joint exhibits, joint stipulations, and competing proposed findings of fact, the Judge requested the filing of motions for summary decision. App. A to Br. for Sec'y 1. The parties complied with the Judge's request. Eight business days after the filing of Lewis-Goetz's motion, the Secretary filed a response to the Lewis-Goetz motion. The Secretary's response analogized to the facts of *Southwestern I* and *Southwestern II*, and argued that Lewis-Goetz failed to provide site-specific guidelines or any supervision in fall protection.

The Judge's refusal to consider the Secretary's response had a significant effect.[2] The Judge stated in a footnote that "[i]f it were the Secretary's position that Lewis-Goetz does not make a diligent effort to enforce its policy regarding fall protection, a material issue of fact would be in contest making summary decision inappropriate in this case." 35 FMSHRC at 2196 n.3. The Secretary's response to Respondent's summary decision motion makes clear that the Secretary certainly did contest Lewis-Goetz's diligence in enforcing its fall protection policy. Thus, the Judge's refusal to consider the Secretary's response prevented the Judge from understanding that the grant of summary decision was inappropriate under her own formulation of the issues.

Accordingly, I conclude that the Judge erred in granting summary decision. Because there was a material fact at issue—whether the operator diligently enforced its safety program—the Judge should have denied the motions for summary decision and conducted an evidentiary hearing.[3]

Robert F. Cohen, Jr., Commissioner

[2] My colleagues in the majority say that "[a]ny error by the Judge in excluding the Secretary's opposition is non-material and harmless at this stage of the proceeding, especially in light of our holding on the merits of this case." Slip op. at 3 n.4. Of course, if the case were being considered under the now-overruled principles of the *Southwestern* decisions, the error could not be considered harmless. In any event, my colleagues recognize that the Secretary does not concede that Lewis-Goetz's enforcement of its policy was adequate and, on remand, direct the Judge to consider the adequacy of the enforcement actions on the issue of negligence.

[3] In *Nally & Hamilton*, issued simultaneously with this decision, the Judge conducted a full evidentiary hearing. Based on the record of that hearing, I concluded that the evidence demonstrated that the operator violated section 77.1710(i) under *Southwestern I* because it lacked an appropriate monitoring tool to ensure compliance with its safety policy. It may be true, as Commissioner Young has determined, that Lewis-Goetz likewise violated section 77.1710(g) because of a failure of diligent enforcement of its safety policy. However, I cannot reach such a conclusion based on the sparse factual record before us.

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