FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 12, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 93-233
AMBROSIA COAL & CONSTRUCTION COMPANY	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 94-15
WAYNE R. STEEN, Employed by AMBROSIA COAL & CONSTRUCTION COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge William Fauver correctly determined that Ambrosia Coal & Construction Company

[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

("Ambrosia") violated 30 C.F.R. § 77.404(a)[2] when it operated a highlift with allegedly defective brakes, that the violation was significant and substantial ("S&S")[3] and caused by Ambrosia's unwarrantable failure,[4] and that a civil penalty should be assessed against Ambrosia's employee, Wayne Steen, under section 110(c) of the Mine Act [5] for his alleged knowing authorization of the violation. 16 FMSHRC 2293 (November 1994) (ALJ). For the reasons that follow, we affirm the judge's determinations on these issues, vacate the judge's penalty assessments against Ambrosia and Steen, and remand for reassessment.

I.

Factual and Procedural Background

Ambrosia operates the Ambrosia Tipple, a surface coal mine near Edinburg, Pennsylvania. On June 3, 1992, David Weakland, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and Charles Thomas, an inspector-trainee, inspected the mine. 16 FMSHRC at 2294. When they arrived, Inspector Weakland and Thomas went to the scale house, where they met Steen, and asked, "[W]ho is in charge here, who is the foreman?" *Id.*; I-

---

[2] Section 77.404(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe operating condition shall be removed from service immediately.

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

[4] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . ."

[5] Section 110(c) provides in part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any . . . agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

Tr. 27-28.[6] Steen replied that he was the foreman and accompanied the inspectors on their inspection. 16 FMSHRC at 2294.

After leaving the scale house, Thomas asked Inspector Weakland if he could inspect a highlift that he had observed having difficulty stopping as the inspectors drove into the mine. *Id.* Weakland agreed and directed Thomas to notify him if there were any problems. *Id.* Thomas approached the highlift, which was being operated by William Carr, an Ambrosia employee, and asked him about the condition of the brakes. *Id.* Carr replied that they were bad. *Id.*; I-Tr. 250. Thomas instructed Carr to position the highlift on a 30 to 40 degree incline and to engage the parking brake. 16 FMSHRC at 2294. The highlift rolled down the incline. *Id.* Thomas then asked Carr to reposition the highlift on the incline and to apply the service brake. *Id.* The highlift again rolled down the incline. *Id.* Thomas called Inspector Weakland, who, accompanied by Steen, joined them. *Id.* at 2294-95.

Inspector Weakland asked Carr if there were any brakes on the highlift. *Id.* Carr responded, "[N]o, there isn't, [and] there hasn't been." I-Tr. 31. Weakland instructed Carr to raise the bucket and test the service brake. 16 FMSHRC at 2294. The highlift drifted backwards on fairly level ground. *Id.* When Carr engaged the parking brake upon the inspector's instructions, the highlift continued to drift. *Id.*

Weakland testified that, after the brakes were tested, Carr informed him that the highlift had no brakes for several weeks, and that he had notified the foreman, Steen, and recorded the bad brakes in a maintenance log. *Id.* at 2295. Inspector Weakland testified that he then asked Steen why he did not get the brakes repaired, and that Steen had replied that he had contacted the maintenance shop but that it was "like pulling teeth to get things fixed around here." *Id.* The inspectors continued inspecting the highlift and discovered the presence of an accumulation of combustible fuel around a pivot point and the absence of a seatbelt and fire extinguisher. *Id.* Inspector Weakland informed Steen that the highlift was unsafe to operate. *Id.*

Inspector Weakland and Thomas returned to the scale house to look for the maintenance log, discuss the alleged violations, and prepare citations. *Id.* Thomas showed Inspector Weakland a log entitled, "Daily Work and Cost Record," which contained entries noting "bad brakes" for the highlift on May 1, 4, 5, 6, 7, 8, 22, 26, 27, and 28, 1992. *Id.* Some entries were initialed "B.C." for Carr, and some were initialed "W.S." for Steen, indicating that they had operated the highlift on those dates. *Id.*

Weakland issued an order pursuant to section 104(d)(1) of the Act, alleging an S&S and unwarrantable violation of 30 C.F.R. § 77.1605(b), which was later modified to allege a violation of section 77.404(a). I-Tr. 35-36. The face of the citation indicated that it was served to "Wayne Steen, Foreman." Gov't Ex. 4. Steen did not object to being identified as a foreman on the

---

[6] The hearing of this case is transcribed in two volumes. The first volume, covering June 28, 1994, shall be referred to as "I-Tr." and the second, covering June 29, as "II-Tr."

citation. 16 FMSHRC at 2300. Weakland and Thomas then conducted a close-out conference with Steen and Carmen Ambrosia, the owner of the mine. I-Tr. 41-42.

Mr. Ambrosia stated that he wanted to observe the brake demonstration. 16 FMSHRC at 2296. The highlift was placed on an incline and Carr was instructed to separately engage the parking brake and the service brake. *Id.* The highlift rolled down the incline without hesitation after each test. *Id.* Mr. Ambrosia told Steen that they could not stay in business operating equipment in such condition. *Id.*

The highlift was then removed from service. *Id.* Later that day, Timothy Yager, a mechanic for Ambrosia, adjusted the brakes. II-Tr. 156-57. The citation was terminated after the brakes held the highlift on an incline during a subsequent test. I-Tr. 44-45; II-Tr. 161.

After the inspectors left the mine, Carr admitted to Steen that he had made all of the entries in the highlift maintenance log. 16 FMSHRC at 2296-97. Steen stated, "I guess that's okay." *Id.* at 2297. Carr testified that, shortly after he told Steen, he also told Carmen Shick, Ambrosia's vice-president in charge of operations, that he had made the entries. *Id.* Shick commented that, "that wasn't a very good idea," but took no action to change the entries. *Id.* On approximately June 6, Steen falsified the official MSHA examination record by adding entries noting the highlift's "bad brakes" for May 30, June 2, and 3, 1992, and stating "repairing highlift" for June 4. *Id.*; II-Tr. 20.

On December 29, 1992, MSHA Special Investigator John Savine conducted an investigation to determine whether Steen should be held individually liable under section 110(c) of the Mine Act for knowingly authorizing Ambrosia's violation. 16 FMSHRC at 2297. Based on that investigation, the Secretary proposed that a penalty in the amount of $3,500 be assessed against Steen. *Id.* at 2303. The Secretary also proposed that a civil penalty in the amount of $7,000 be assessed against Ambrosia for its alleged violation of section 77.404(a). *Id.*

Ambrosia and Steen challenged the enforcement actions and the matters were consolidated and proceeded to hearing before Judge Fauver.[7]

The judge found that Ambrosia had violated section 77.404(a). *Id.* at 2298. He reasoned that the lack of operable brakes on the highlift amounted to an unsafe condition, and that the operator had failed to remove the equipment from service. *Id.* The judge also determined that the violation was S&S because the inoperable brakes posed a number of discrete safety hazards. *Id.* at 2299. He found the violation unwarrantable because the operator, through Steen, its foreman and mine examiner, knew that the brakes were bad and failed to repair them or remove

[7] The judge visited the mine between the first and second day of the hearing. II-Tr. 10. He advised the parties that any observations that he made could be included in his findings, and that the parties could propose findings based upon what they considered to be reasonable observations. *Id.* at 10-11.

the highlift from service. *Id.* The judge further concluded that, as a foreman, Steen was a corporate "agent" under section 110(c) of the Mine Act, and that he had knowingly authorized Ambrosia's violation because he had actual knowledge of the bad brakes for at least five days and had failed to repair them or remove the equipment. *Id.* at 2300, 2302. Finally, the judge assessed civil penalties of $11,000 and $4,000 against Ambrosia and Steen, respectively. *Id.* at 2306. He based the penalties, in part, upon his finding that Shick, who he found to be a corporate agent, participated in the falsification of the maintenance log, and that the deliberate cover-up by Steen and Shick increased the need for deterrence provided by higher penalties. *Id.* at 2305-06.

Ambrosia and Steen each filed petitions for discretionary review challenging the judge's determinations, which the Commission granted.

II.

Disposition

A. Violation of Section 77.404(a)

Ambrosia argues substantial evidence does not support the judge's finding that it violated section 77.404(a) because the highlift had sufficient brakes to perform its functions. A. Br. at 19-26. It emphasizes that Carr testified he was not concerned for his safety when operating the highlift because he was working on level ground and loading in first gear, and that he could load trucks without any brakes by "slip[ping] it in reverse and back[ing] up." *Id.* at 21-23; I-Tr. 333. In addition, Ambrosia relies on testimony of its mechanic that the brakes required only adjustment, rather than repair or replacement of parts, and that the adjustment was not extensive. A. Br. at 23-24; II-Tr. 164-65. The Secretary responds that substantial evidence supports the judge's determination because the highlift had no brakes and that such a condition would be recognized as unsafe by a reasonably prudent person. S. Br. at 12-19.

As the Commission has previously recognized, section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (October 1979). The "[d]erogation of either duty violates the regulation." *Id.* Substantial evidence supports the judge's determination that Ambrosia derogated both duties.[8]

[8] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest*

Equipment is in unsafe operating condition under section 77.404(a) when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action. *See Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (involving identical standard applicable to underground coal mines). Here, the evidence is undisputed that when the parking brake and service brake were tested on fairly level ground, the highlift drifted backwards. I-Tr. 34-35, 187. In addition, the highlift rolled without hesitation down an incline when either brake was engaged. I-Tr. 44, 171, 173; II-Tr. 28-29. Upon observing the brake demonstration on the incline, Ambrosia's owner, recognizing a hazard warranting corrective action, told Steen, "we can't stay in business like this," and "we can't operate equipment like this." I-Tr. 176.

The evidence relied upon by Ambrosia does not, in fact, establish that the highlift was in safe operating condition for the functions it performed. Carr stated that the highlift "had a little bit of brakes on it to get by with," and that the brakes were only "good enough to stop me a little bit on the level." I-Tr. 332, 355. He acknowledged that the brakes were not "good enough to stop me on a ramp" and that he sometimes operated on the ramp. I-Tr. 355. Carr stated that when he was on the ramp, in order to stop the highlift, he "went right around and parked it." I-Tr. 355. Thomas testified that when he observed Carr operating the highlift to load a truck, Carr was having difficulty stopping it. I-Tr. 162-64. Moreover, Carr admitted that he complained about the condition of the brakes to Steen days before the inspection, at least by May 27th or 28th. I-Tr. 329, 332, 336, 353-54. In addition, Carr's statement that he did not need brakes when loading does not establish that the need for brakes would not arise. Inspector Weakland testified that, without brakes, the highlift could collide with a truck driver or another pedestrian, such as a mechanic or supervisor walking across the yard, or with a truck if the highlift operator misjudged distances when loading it. I-Tr. 45-47. Moreover, regardless of the extent of the brake adjustment required, the brakes were inoperable on the incline and on a fairly level surface, where the highlift traveled during normal mining operations.

Therefore, substantial evidence supports the judge's determination that the highlift was not maintained in safe operating condition. Given the undisputed evidence that Ambrosia failed to remove the highlift from service (16 FMSHRC at 2298), we affirm the judge's finding that Ambrosia violated section 77.404(a).

B. Significant and Substantial

Ambrosia argues that the judge erred in finding its alleged violation of section 77.404(a) was S&S because the Secretary failed to establish that it was reasonably likely operating the

---

Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

highlift would result in injury. A. Br. at 26-30. It submits there was little likelihood of a collision between the highlift and a truck being loaded, or with a pedestrian or structure, because Carr never dropped the highlift's bucket, the highlift was operated at low speed, the highlift could reverse direction, and the brakes were sufficient to stop the highlift on level ground on the day of the inspection.[9] *Id.* at 27-28. Ambrosia also argues that it was unlikely the highlift would roll on to the adjacent highway because the highway was 40 to 50 yards away from the operation of the tipple. *Id.* at 28. The Secretary responds that the judge correctly determined the violation was S&S and that the evidence relied upon by Ambrosia established only that an accident had not yet occurred. S. Br. at 22-23.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (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.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

At issue is whether the judge correctly determined that the Secretary established the third *Mathies* factor.[10] In arguing that injury was not reasonably likely to occur, Ambrosia relies on

---

[9] Ambrosia also argues that collision was unlikely because the highlift was noisy, which would warn a pedestrian of its approach, the highlift could stop a distance of eight to ten feet moving forward or ten to twelve feet moving backward by dropping its bucket, and the highlift could be turned. A. Br. at 27-28. As support for these assertions, Ambrosia cites the visit that the judge made to the mine. Because the judge did not include his observations from that visit in his decision, and no evidence was introduced at the hearing establishing those allegations, they are not part of the official record. 30 U.S.C. § 823(d)(2)(C); *see* II-Tr. 10-11.

[10] Although Ambrosia also argues that the second *Mathies* element was not established, its discussion of that issue relates to the third *Mathies* element. *See* A. Br. 26-28.

evidence relating to conditions or practices existing at the time of the inspection. An evaluation of the reasonable likelihood of injury must be made assuming continued normal mining conditions. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

Taking into consideration continued normal mining conditions, substantial evidence supports the judge's determination that the third *Mathies* factor was established. Evidence was undisputed that the brakes were ineffective on the ramp and fairly level ground, where the highlift traveled during normal operations. I-Tr. 34-35, 43-44, 171, 176-77, 188, 355, 387. Inspector Weakland testified that, without brakes, the highlift could collide with a truck driver or other pedestrian in the yard and that, during the inspection, he had observed a truck driver get out of his truck. I-Tr. 46, 52. In addition, he stated that the highlift could collide with a truck it was loading if the highlift operator misjudged distances. I-Tr. 45. Thomas testified that, if the highlift collided with anything in the tipple area, such as coal trucks, telephone poles, or the fuel storage area, the highlift operator could be thrown through the windshield or against the steering wheel. I-Tr. 178.

Carr's statement that he never dropped the bucket to stop the highlift does not preclude the possibility that another operator might do so or that an opportunity would arise when he would find it necessary to do so.[11] Inspector Weakland testified that, if the highlift operator dropped the bucket to stop the highlift, the bucket could collide with the side of the truck, resulting in injuries or fatalities. I-Tr. 45-46. In any event, Thomas stated that shifting the highlift into reverse while it is moving forward, the method of braking used by Carr (I-Tr. 333), would result in a jerking motion and that the operator could be thrown through the windshield, out of the vehicle, or against the steering wheel. I-Tr. 179-80. The hazard to the highlift operator would be greater given that the seatbelt was missing from the highlift. I-Tr. 41.

Furthermore, although the highway was 40 to 50 yards away from coal piles at the tipple, Thomas stated that he believed that the highlift was used in all areas of the mine. I-Tr. 180. He estimated that the highlift weighed 15 to 20 tons, and that it would be heavier and more difficult to stop if it were carrying a load. I-Tr. 181. In addition, there were no berms or guardrails separating the tipple area from the highway, and the highway received a great deal of traffic. I-Tr. 180-81.

Thus, the evidence relied upon by Ambrosia does not establish that injury was not reasonably likely to occur. Rather, it establishes only that an accident had not yet occurred, which is not dispositive of a finding that the third *Mathies* factor had not been established. *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). Accordingly, we affirm the judge's S&S determination.

---

[11] Ambrosia conceded as much in arguing that there was little likelihood of injury in part because the highlift "could stop in a distance of eight to ten feet moving forwards or ten to twelve feet moving backwards by means of dropping the bucket." A. Br. at 28. *See* n.9.

C. Unwarrantable Failure

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. 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 Corp.*, 13 FMSHRC 189, 193-94 (February 1991) ("*R&P*"); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

1. Whether Steen's Conduct is Imputable to Ambrosia

The conduct of an "agent" of an operator may be imputed to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 194. Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine . . . ." 30 U.S.C. § 802(e).

Ambrosia argues that Steen was not an "agent" and that his conduct may not be imputed to it for unwarrantable failure purposes. A. Br. at 17-18. Steen argues that he was not an agent because he was not a foreman and that, rather, he admitted to only being the person in charge at the mine. St. Br. at 3, 5-10. He submits that he did not possess the actual authority customarily exercised by a foreman, including the ability to recommend hiring or firing, discipline employees, change work schedules, adjust pay or terms of employment, or make contracts or decisions regarding the sale of coal. *Id.* at 13-14, 20. The Secretary responds that, as a foreman, Steen was an agent whose conduct was imputable to Ambrosia. S. Br. at 25 n.14, 29-39.

Steen's assertion that his job title was not "foreman" and that there were some supervisory functions that he did not perform is not dispositive of whether he was an agent within the meaning of section 3(e). In considering whether an employee is an operator's agent, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995). Here, Steen accompanied the inspectors and attended the MSHA close-out conference as Ambrosia's representative. I-Tr. 27, 175. In the close-out conference, Weakland and Thomas informed Steen that if he had any disagreement with the citations, he had ten days to request a manager's conference. I-Tr. 175. MSHA Inspector Thomas Sellers, who had inspected the mine on July 2, 1991, and March 16, 1992, testified that Steen also acted as the company representative during those inspections. I-Tr. 280-81. Steen was paid a salary and did not receive additional pay for working more than 40 hours per week, while rank-and-file miners were paid hourly and received time-and-a-half for working overtime. 16 FMSHRC at 2301. Steen, as a certified mine examiner, made required daily examinations at the mine and was responsible for entering his findings in an MSHA examination book. I-Tr. 382; II-Tr. 18-19.

In addition, Steen gave work orders to abate citations. When Inspector Weakland informed Steen that he was going to issue citations for the lack of seatbelt or fire extinguisher and the accumulation of combustible materials, Steen instructed Carr to remove the combustible materials and to get a fire extinguisher. I-Tr. 172. Inspector Weakland observed Steen direct Carr to place a "no smoking" sign on a fuel tank and to place a guard on a tail roller to abate other violations cited during the inspection. I-Tr. 138. MSHA Inspector Sellers testified that during the inspections he conducted, Steen had also called the maintenance shop to explain necessary repairs. I-Tr. 284-85. Thus, as the person "in charge" at the mine, the functions performed by Steen were crucial to the mine's operation and demonstrated an exercise of responsibility normally delegated to management personnel.

Furthermore, the manner in which Steen was treated by those with whom he worked demonstrates an exercise of responsibility normally delegated to management personnel. Carr informed Inspector Weakland that he had reported the bad brakes to Steen, essentially acknowledging Steen's position of responsibility. 16 FMSHRC at 2301. When the inspector asked Steen why he did not get the brakes repaired, Steen did not reply that it was not his job to remove equipment from service and arrange for repairs but, rather, that it was difficult to get repairs made. *Id.* Mr. Ambrosia apparently believed that Steen held a position of responsibility for overseeing conditions at the mine, exclaiming to Steen, "we can't stay in business like this," and "we can't operate equipment like this," after observing the brake demonstration. *Id.*

Therefore, we conclude that substantial evidence supports the judge's determination that Steen was an agent whose conduct was imputable to Ambrosia.[12]

2. Whether Ambrosia Engaged in Aggravated Conduct

Substantial evidence supports the judge's determination that Ambrosia, through Steen, engaged in aggravated conduct that amounted to more than ordinary negligence when it failed to maintain the highlift in safe operating condition or remove the highlift from service. Carr admitted that he informed Steen of the condition of the brakes on May 27 or 28. I-Tr. 329, 334, 336, 358. Steen conceded that, if Carr stated that he told him about the brake condition, Carr did. I-Tr.

[12] We also find evidence that Steen held himself out as the employee in charge at the mine and signed official MSHA documents as the mine foreman relevant by analogy to common law agency principles. *See R&P*, 13 FMSHRC at 195 (finding analogous support in common law agency principles). At common law, a principal is liable for the acts of an agent that are apparently within the agent's authority and which the principal permits the agent to exercise. 3 Am Jur 2d *Agency* §§ 78, 79 (1986). A "principal may vest his agent with apparent authority to perform an act by omission as well as commission, and such authority is implied where the principal passively permits the agent to appear to a third person to have authority to act on his behalf." *Id.* at § 79. There is no record evidence that Ambrosia took any actions to demonstrate that Steen did not, in fact, possess authority as the person in charge at the mine.

375. Steen maintains that during the end of May, however, he believed the brakes needed adjustment, rather than that they were completely ineffective. I-Tr. 387; II-Tr. 32. The judge's discrediting of that evidence is supported by substantial evidence. On the morning of the inspection, Steen observed Carr loading with the highlift. II-Tr. 12-13. On that day, Carr was observed having difficulty stopping the highlift by Inspector Thomas. I-Tr. 162-63. When tested, the brakes failed to stop the highlift on the ramp and on fairly level ground. I-Tr. 37, 162, 164, 171. Steen himself admittedly falsified the inspection manual to state "bad brakes" on May 30, June 2 and 3.[13] II-Tr. 20. Moreover, on the day of the inspection, when Inspector Weakland asked Steen why he had not had the brakes repaired, Steen did not react with surprise that the brakes required repair. Rather, he stated that it was "like pulling teeth to get things fixed around here." I-Tr. 37; 16 FMSHRC at 2299. Therefore, substantial evidence supports the judge's determination that Steen knew the brakes were bad at least five or six working days before the inspection.

In addition, although he had been informed about the condition of the brakes, Steen failed to remove the highlift from service or insure that the brakes were repaired. Inspector Weakland testified that Steen informed him that he called the maintenance foreman when Carr told him about the brakes, but that the foreman did not send anybody to repair the brakes. I-Tr. 67-68. The judge's finding that Steen, in fact, had not contacted maintenance (16 FMSHRC at 2295), is supported by substantial evidence given the maintenance foreman's testimony that he had not been notified before the inspection that the brakes on the highlift required repair or adjustment. II-Tr. 167-68. In any event, even if Steen had contacted the maintenance shop, he failed to remove the equipment from service until repairs were made. Accordingly, we affirm the judge's determination that Ambrosia's violation of section 77.404(a) resulted from its unwarrantable failure through imputation of the conduct of its agent, Steen.

D. Steen's Liability Under Section 110(c)

Steen argues that the judge erred in concluding that he was a foreman and, therefore, an agent subject to liability under section 110(c) of the Act. St. Br. at 2-3. The Secretary relies upon the same evidence establishing Ambrosia's aggravated conduct to assert that Steen knowingly authorized Ambrosia's violation of section 77.404(a) in violation of section 110(c). S. Br. at 39-40.

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety standard, any agent of the corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to individual civil penalty. We conclude substantial evidence supports the judge's determination that Steen was liable under section 110(c).

First, Steen's position as the salaried person in charge at the mine who represented the

[13] Steen testified that he mistakenly failed to make an entry for June 1. II-Tr. 23.

operator during inspections, close-out conferences and in receiving citations, and who gave abatement instructions, was crucial to the mine's functioning and involved a level of responsibility normally delegated to management personnel. *See U.S. Coal*, 17 FMSHRC at 1688. Therefore, Steen was an "agent" within the meaning of section 3(e) of the Act.[14]

Furthermore, substantial evidence supports the judge's determination that Steen knowingly authorized Ambrosia's violation of section 77.404(a). Steen had actual knowledge of the brake condition for at least five or six working days before the inspection but failed to have the brakes repaired or the highlift removed from service. Steen's assertion that he believed the brakes only needed adjustment and not that they were completely ineffective is unpersuasive given the Commission's recognition that, in order to prove section 110(c) liability, the Secretary "must prove only that an individual knowingly acted, not that the individual knowingly violated the law." *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). Steen knew that Carr was operating the highlift after complaining about the condition of the brakes, and observed him loading on the day of the inspection when the brakes were ineffective on the ramp and fairly level ground. In addition, Steen defended his failure to repair the brakes, not with surprise that the brakes were ineffective, but by stating that getting repairs made was difficult. 16 FMSHRC at 2295. Accordingly, we affirm the judge's determination that Steen was liable under section 110(c) of the Act.

E. Civil penalties

Ambrosia argues that the judge erred in assessing its penalty by failing to find good faith in achieving rapid compliance and by increasing the penalty from that proposed by the Secretary based on his determination that Shick, who he found to be a corporate agent, participated in the falsification of the maintenance log. A. Br. at 15-17. It argues that the increase in penalty was unreasonable for the additional reason that the Secretary had proposed a penalty of $7,000 based on a contention that the falsified log entries had, in fact, been genuine and provided notice of the

[14] The judge found that Steen's status as a certified mine examiner was relevant to his status as an agent for unwarrantable failure purposes, but not for purposes of Steen's liability under section 110(c). 16 FMSHRC at 2299 n.1, 2300 n.2. The judge reasoned that the Secretary failed to allege in his penalty proposal or prehearing statements that he considered Steen an agent under section 110(c) because he was a certified mine examiner and that, accordingly, Steen had been deprived of timely notice of the theory. *Id.* at 2300 n.2. In arguing on review that Steen was an agent subject to liability under section 110(c), the Secretary relies upon evidence that Steen was a certified mine examiner. S. Br. at 34. Even excluding Steen's function as a certified mine examiner, we conclude that substantial evidence supports the judge's determination that Steen was an agent for section 110(c) purposes.

brake problem. *Id*. at 16. Steen argues that the penalty assessed against him was excessive. St. Br. at 24-26. The Secretary agrees that the judge erred in assessing both penalties. S. Br. at 41-46.

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). The Commission has cautioned, however, that the exercise of such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act.[15] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings are supported by substantial evidence. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make findings of fact on the criteria that "not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93.

Contrary to Ambrosia's assertions, the judge did not err in analyzing the penalty criterion of good faith in achieving rapid compliance. As the judge found, the violation of section 77.404(a) was abated as soon as the inspector removed the highlift from service. 16 FMSHRC at 2305. Because the operator had no opportunity to show its good faith in rapidly achieving compliance, the judge properly neither increased nor decreased the penalty based upon his consideration of the factor.

In addition, we reject Ambrosia's argument that the assessment is erroneous because the penalty proposal was based upon the mistaken conclusion that the maintenance log entries were

---

[15] Section 110(i) sets forth six criteria for assessment of penalties under the Act.

> The Commission shall have authority to assess all civil penalties provided in [the Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

genuine and provided notice to the operator. There is no indication that the judge erroneously concluded he was bound by the Secretary's proposed penalty or that he relied upon the mistaken conclusion that the log entries provided notice. *See* 29 C.F.R. § 2700.30(b) (Judges and the Commission are not bound by the penalty proposal in assessing penalty). In fact, the judge expressly found that the entries were false and provided no notice. 16 FMSHRC at 2304.

The judge abused his discretion, however, in increasing Ambrosia's penalty for deterrence purposes based on his finding that Shick was a corporate agent who participated in the record falsification. The Secretary had not made any allegations of wrongdoing or initiated enforcement proceedings against Shick. The judge, who is not an authorized representative of the Secretary, cannot make findings that create new liability. *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991).[16] Moreover, although deterring future violations is an important purpose of civil penalties,[17] deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria. *See Dolese Bros.Co.*, 16 FMSHRC 689, 695 (April 1994) (a judge's consideration is limited to the statutory penalty criteria). Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.

In addition, the judge erred in assessing Steen's penalty. The judge failed to set forth findings applying the statutory criteria to Steen as an individual. Without such findings, Steen does not have sufficient notice of the basis of his penalty, and the Commission does not have the necessary foundation to determine whether the penalty was appropriate. *Sellersburg*, 5 FMSHRC at 292-93.

Accordingly, we vacate the penalties assessed against Ambrosia and Steen and remand for reassessment consistent with this decision.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Ambrosia violated section 77.404(a), that the violation was S&S and resulted from Ambrosia's unwarrantable failure, and that Steen is liable under section 110(c) of the Mine Act for knowingly authorizing the

---

[16] We hereby vacate any references in the judge's decision to alleged wrongdoing by Shick.

[17] As recognized in the legislative history of the Mine Act, the purpose of civil penalties is to "convinc[e] operators to comply with the Act's requirements." S. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). *See also Consolidation Coal Co.*, 14 FMSHRC 956, 965 (June 1992) (recognizing importance of civil penalties as deterrence).

violation. We vacate the penalties assessed against Ambrosia and Steen and remand for reassessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner