FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. EAJ 96-4
JAMES M. RAY, employed by LEO JOURNAGAN CONSTRUCTION CO., INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners:

This proceeding involves the recovery of attorney=s fees and expenses under the Equal Access to Justice Act, 5 U.S.C. ' 504 (1996) (AEAJA@). James AMike@ Ray (ARay@), who was employed by Leo Journagan Construction Co., Inc. (AJournagan@), prevailed over the Department of Labor=s Mine Safety and Health Administration (AMSHA@) in the underlying section 110(c) proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C ' 820(c) (1994) (AMine Act@ or AAct@). 18 FMSHRC 892 (June 1996) (ALJ). Thereafter, Ray filed an application for fees and expenses on the basis that the Secretary=s position on the two citations at issue was not substantially justified. Administrative Law Judge William Fauver denied the application. 18 FMSHRC 2033 (Nov. 1996) (ALJ). Ray filed a petition for review with the Commission challenging the judge=s determination that the Secretary=s position was substantially justified. For the reasons that follow, we reverse the judge=s determination of substantial justification on the first citation but affirm as to the second.

1.

Factual and Procedural Background

A. The Mine Act Proceeding

Journagan is engaged in the mining and sale of limestone in southwestern Missouri. 18 FMSHRC at 892; Tr. 9. On March 28, 1995, MSHA Inspector Michael Marler conducted an inspection of a portable rock crusher operated by Journagan. 18 FMSRHC at 892. While Marler was present, rocks became stuck in the crusher. *Id.* Ray, Journagan=s superintendent, drove Marler to the top of a hill above the crusher. *Id.* at 893. As Marler approached the crusher, he observed Journagan employee Steve Catron working to unjam the crusher. *Id.* Catron was trying to loosen with an iron bar rock that had become wedged in the crusher. *Id.*; Tr. 36-37. Initially, when Catron began working to dislodge the jammed rocks, he and crusher operator Keith Garoutte turned off the crusher controls and locked out the power at the generator trailer. 18 FMSHRC at 893. However, to determine whether the crusher was again operating, Garoutte restored the power. *Id.* After the power was restored, Catron and Garoutte attempted to Ajog@ the crusher by turning it on and off to dislodge the rock that was wedged in the crusher jaws. Tr. 36-38. Catron pried the rock that was in the crusher jaws with the bar and then moved away, and Garoutte started the crusher. 18 FMSHRC at 893-94.

When Marler saw Catron, he was straddling the gap between the crusher jaws with each of his feet on a metal plate two inches above the crusher jaws. *Id.* at 893. The jaws of the crusher are tapered from a width of approximately 30 to 36 inches at the top and narrowing to 5 inches at the bottom. Tr. 34-35. The crusher jaws are approximately six feet four inches in height, and the jammed rocks extended upward about two feet from the bottom of the crusher. 18 FSMHRC at 893. There were rocks in the feeder chute waiting to enter the crusher just above where Catron was standing. *Id.* at 902. The iron bar that Catron was using to dislodge the rocks was five to six feet in length. *Id* at 893. He was wearing a safety belt that was attached by a lifeline to a catwalk railing above where he was standing. *Id.* Garoutte watched Catron from the doorway of the shed housing the crusher controls that was uphill from the crusher. *Id.* Catron unhooked the lifeline to his safety belt from the catwalk railing and then moved up to the grizzly,[1] which is located on the opposite side of the crusher from the catwalk about 1 **2** feet above the metal plates on which he had been standing. *Id.* & n.2. After Catron moved up to stand on the grizzly, he attached the lifeline to a point above and behind the grizzly. *Id.* at 893-94. Catron then signaled Garoutte, and he went in the shed to start the crusher. *Id.* at 894.

[1] The grizzly is a flat metal plate with openings designed to separate smaller rock from larger rock before the rocks are fed into the crusher. 18 FMSHRC at 893 n.2; *see* Exs. R-5, R-6, and R-7.

It was an accepted practice at Journagan to dislodge rocks with the crusher energized. *Id.* Some 8 months earlier, Ray had seen Catron attempt to dislodge rocks from the crusher with the equipment energized in the presence of an MSHA inspector. *Id.*

Inspector Marler issued a citation charging Journagan with violating 30 C.F.R. ' 56.12016, which states:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

Id. The inspector determined that the violation was significant and substantial (AS&S@) under section 104(a) of the Mine Act, 30 U.S.C. ' 814(a).[2] As a result of the violation, MSHA proposed a penalty of $4,000 against Journagan and, pursuant to section 110(c) of the Act, 30 U.S.C. ' 820(c),[3] proposed a $1,500 penalty against Ray. *Id.*

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[2] 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 any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@

[3] Section 110(c) provides,

Inspector Marler also believed that the practice of Catron standing over the crusher while it was energized posed an imminent danger under section 107(a) of the Act, 30 U.S.C. ' 817(a). *Id.* Ray disagreed with Marler that Catron=s actions were in violation of the standard or that they posed a hazard to Catron. However, Ray immediately deenergized the crusher. *Id.*

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section [105(c)], any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

When Ray returned from deenergizing the crusher, he and inspector Marler climbed up onto the catwalk over the crusher. *Id.* When they reached the top, they observed Catron and Garoutte inside the crusher removing rocks from the jaws. *Id.* at 894-95. About a foot above the miners= heads was the crusher=s hopper with more than a truckload of rock, estimated to weigh between 25 and 30 tons. *Id.* & n.3. The rocks, which were loose and unconsolidated, ranged in size from dust particles to rocks that were two feet in diameter.[4] *Id.* at 895. The rock in the crusher hopper was resting on an incline that Ray estimated to be 35 degrees, while Marler estimated it to be on an incline of 45 degrees. *Id.*; Tr. 108. There was no physical barrier between the rocks and the crusher jaws where the men were working to prevent the rock from falling on them, crushing or suffocating them. 18 FMSHRC at 895, 902. Although Ray did not order Catron and Gourette into the crusher, he knew that they would climb into it. *Id.* at 896. It was a common practice at Journagan for employees to climb into the crusher to unjam it while the hopper just above them was filled with rock. *Id.*

Inspector Marler believed that the rocks posed an imminent danger to the miners because of the likelihood that the rocks could slide into the crusher on top of them. Accordingly, Marler issued a section 107(a) imminent danger order. *Id.* at 895. Ray argued that the rock in the hopper was stable, but he complied with the order by welding a piece of steel to the end of the grizzly to prevent the rock from sliding into the crusher. *Id.* Marler issued a citation charging a violation of 30 C.F.R. ' 56.16002(a), which provides in pertinent part,

> (a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall beC
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> (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials[] . . . .

Id. Marler determined that the violation was S&S and proposed a penalty of $4,500 against Journagan. 18 FMSHRC at 896. A penalty of $1,500 was proposed against Ray pursuant to section 110(c). *Id.*

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[4] While the judge found that the maximum size of the rock was 2 inches, the transcript pages to which his decision refers clearly state that the rocks were upwards to 2 feet in diameter. Tr. 55-56. In addition, the pictures in the exhibit file show that most of the rock in the hopper was much larger than 2 inches. *See* Exs. P-2 to P-6.

Journagan contested the citations and the matter went to hearing.[5] With regard to the citation charging it with failing to deenergize equipment, Journagan argued that its employees were not performing Amechanical work@ within the meaning of the regulation when they were attempting to unjam the rocks in the crusher. *Id.* It further argued that the standard only applied when miners were exposed to the hazard of electrical shock. *Id.* The judge rejected these defenses, construing the term Amechanical work@ broadly to reach the work of breaking loose the jammed rocks in the crusher.[6] *Id.* The judge held that it was not relevant to the violation that Catron was tied off with a safety belt, because the standard requires that electrically powered equipment be deenergized regardless of what other precautions are taken. *Id.* at 897. Thus, the judge concluded that Journagan violated the cited regulation. *Id.* The judge vacated the inspector=s S&S designation, noting that the safety line would prevent Catron from falling more than 1**2** to 2 feet and that his feet could only brush the jaws of the crusher at that level. *Id.* at 898. The judge further concluded that, in the brief time that the safety line was unhooked when Catron was switching positions, it was unlikely that the equipment would be activated due to misunderstandings. *Id.* The judge approved a penalty of $500 instead of the $4,000 penalty proposed by MSHA. *Id.* at 899-901.

In addressing superintendent Ray=s section 110(c) liability, the judge noted that the provision imposes civil penalties on a corporate agent when he Aknowingly authorized, ordered, or carried out [a] violation.@ *Id.* at 899. The judge fou nd that Ray clearly had reason to know that employees would be working on the crusher without it being deenergized. *Id.* The judge further found: AThe procedure employed by miners on the day of the inspection and implicitly condoned by superintendent Ray was Journagan=s normal procedure. It was not a practice initiated by Ray.@ *Id.* (citation omitted). However, the judge concluded that Ray=s conduct was not Aaggravated.@ *Id.* The judge further found that Ray had a reasonable good faith belief that the miners were adequately protected by wearing a safety belt for all but a brief period when they were working above the crusher. *Id.* Therefore, the judge vacated the penalty proposed under section 110(c). *Id.*

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[5] The imminent danger orders were not contested.

[6] The judge refused to follow the holding in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1192-93 (9th Cir. 1982), in which the court held, in a factual situation highly similar to the one in the instant proceeding, that the lockout requirement of section 56.12016 (then numbered 30 C.F.R. ' 55.12-16) was limited to situations involving the danger of electrical shock, rather than the unexpected activation of equipment. 18 FMSHRC at 897.

In addressing the second citation, the judge stated that the Secretary had to prove that Catron and Garoutte were exposed to entrapment by caving or sliding materials, and held that the fact that the miners were working downhill from a hopper filled with 25 to 30 tons of rock did not establish that the material might slide or cave in on top of them. *Id.* at 901. The judge reasoned that materials tend to move until they obtain a slope at which they will stop moving **C** referred to as Athe angle of repose.@[7] *Id.* The judge concluded that the Secretary Ahas not established that the rocks in the hopper had not reached the angle of repose.@[8] *Id.* The judge further noted that Inspector Marler did not measure the angle at which the rocks lay in the hopper, that he credited Ray who testified that the rocks were at an angle of 35 degrees, Aa relatively flat slope,@[9] and that the photographs of the hopper that were entered as exhibits which indicated the rocks were at Aa fairly steep angle@ were not considered because the Secretary did not establish that they accurately depicted the slope. *Id.* at 901-02 & n.5.

The judge noted that the rocks in the hopper were about a foot above the crusher and that Catron=s and Garoutte=s actions in removing rocks from the crusher and throwing them back into

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[7] U.S. Dep=t of Interior, *Dictionary of Mining, Mineral, and Related Terms* 19 (2d ed. 1997) defines Aangle of repose@ as follows: AThe maximum slope at which a heap of any loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope.@

[8] The judge also noted that he credited Ray that the vibration of the feeder pan had Aflattened the angle@ to one at which the rocks would not move further. 18 FMSHRC at 902.

[9] The judge also noted that a 35 degree slope was Aone degree steeper than the slope required by [the Occupational Safety and Health Administration] to protect workers in excavations dug in the least stable type of soil.@ *Id.*

the hopper did not establish that any alterations in the slope of the rocks created a hazard. *Id.* at 902. Finally, the judge noted that it was not Journagan=s practice to install a barrier between rocks in a hopper and miners working to unjam the crusher, and it was unclear what industry practice was in regard to barricading rocks. *Id.* The judge dismissed the citation and vacated the penalties against Journagan and Ray. *Id.* at 902-03.

B. The EAJA Proceeding[10]

[10] Judge Amchan presided over the Mine Act proceeding and issued the decision; however, the EAJA application was assigned to Judge Fauver due to Judge Amchan=s subsequent departure from the agency.

Ray=s counsel submitted an application for attorney=s fees of $12,657.50 and expenses of $1,726.59 under EAJA. R. Application at 1. In support of the application, Ray stated that his net worth was below that required for eligibility for an award under EAJA and that the Secretary=s position was not substantially justified. *Id.* The application requested that Ray=s counsel be reimbursed above the $125 hourly rate specified in EAJA.[11] *Id.* at 2. The Secretary responded that her position in the Mine Act litigation was substantially justified. S. Resp. to Application at 1. She noted in particular that her investigation disclosed that Ray was an agent of Journagan and that he had knowingly authorized violation of the Mine Act. *Id.* at 2. She further stated that the fees and expenses were unreasonable and that many did not relate to the section 110(c) proceeding. *Id.* at 1. Finally, the Secretary contended that fees could not exceed the statutory limit of $75 per hour. *Id.*

In her brief to the judge, the Secretary attached affidavits from Marler and special investigator Harold Yount, who had recommended that section 110(c) penalties be assessed against Ray, in which they detailed their investigation of the citations. S. Resp. in Opp=n and Mot. to Dismiss, Attachs. A & B. Ray responded with affidavits from Catron and Garoutte, who asserted that their signed statements given to Marler and Yount during the investigation were incomplete or inaccurate. R. Reply Mem., Exs. 1 & 2.

The judge denied in full Ray=s EAJA application. He reviewed Commission case law governing section 110(c) liability and concluded that A[t]he Secretary=s investigation of the alleged violation of [section] 56.12016 provided a reasonable basis in law and fact for charging Mike Ray with liability under [section] 110(c) of the Mine Act.@ 18 FMSHRC at 2040. The judge based his conclusion on record evidence indicating that Ray ignored the requirements of the standard because he thought the procedure followed by the miners was not hazardous. *Id.* Further, Ray had been cited previously for a lockout violation. *Id.* The judge noted that section 56.12016 is Aplain and unambiguous@ and requires deenergizing power on equipment when performing mechanical work and does not provide for a substitute means of compliance. *Id.* at 2040-41. The judge reasoned that Ray, as superintendent, was accountable for complying with mandatory safety standards, and, in light of his prior violation, his conduct could have been found to be aggravated. *Id.* at 2041. He noted that a judge other than the one who heard the underlying case might have viewed the evidence differently. *Id*.

The judge also concluded that MSHA=s investigation of the second alleged violation provided a reasonable basis in fact and law for charging Ray with section 110(c) liability. *Id.* The judge noted that miners were working in the crusher with rocks at chest level that ranged in size from small to very large and which were held in place only by other rocks. *Id.* Inspector Marler found an imminent danger because a small movement or a jolt by another rock could send the pile of rock down on the miners. *Id.* Ray was aware of the practice and had observed it at other times; Ray, however, disagreed with the inspector as to the hazard posed by the practice. *Id.* The

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[11] *See* EAJA Amendments of 1996, Pub. Law No. 104-121, ' 301, 110 Stat. 862 (1996) (adjusting statutory cap on fees from $75 per hour to $125 per hour).

judge reasoned that another trier of fact could have given greater weight to the inspector=s opinion of imminent danger and concluded that Ray=s conduct was aggravated. *Id.* AThe fact that the trial judge gave greater weight to Ray=s safety opinion does not mean that the Secretary=s case was not substantially justified by the inspector=s observations and safety opinion.@ *Id.*

II.

Disposition

Ray=s argument in chief is that substantial evidence does not support the judge=s decision that the Secretary=s position was substantially justified. R. Br. at 5-6. He contends that the government=s conduct that gave rise to the litigation as well as the government=s litigation position must be judged under the substantial justification test. *Id*. at 3. Ray further asserts that the legal standard for determining a section 110(c) violation is whether an operator=s agent knew that the actions placed employees at risk or that the actions were violative of MSHA standards. *Id*. at 5. Ray argues that his conduct did not constitute more than ordinary negligence and that MSHA=s determination that it did was based on several mistaken key facts and did not provide substantial justification for MSHA=s assessment of section 110(c) liability. R. Reply Br. at 8. Ray contends that MSHA=s notes of the investigation into Ray=s conduct establish that there was no reasonable basis in law or fact for a penalty under section 110(c). R. Br. at 8-13. Ray asserts that the judge in the merits proceeding determined that Ray=s belief in the safety of the activities cited was reasonable. R. Reply Br. at 1. Ray argues that the judge=s reliance on Ray=s prior violation for failing to lock out a conveyor was improper because the violation was dissimilar. R. Br. at 14. In evaluating the Secretary=s position, Ray contends that the judge failed to consider the entire record and applied an incorrect legal standard under EAJA, violating Ray=s procedural due process rights, when he stated that a different trier of fact might have viewed the evidence differently. *Id.* at 14-15.

The Secretary argues that her position was substantially justified with regard to the failure to deenergize the crusher because inspector Marler reasonably believed that, if the crusher were started, it posed several hazards to the miner straddling the crusher, including entangling his feet in the crusher jaws, impaling him with the iron bar, and causing the rock in the hopper to slide onto him. S. Br. at 10-11. Similarly, when the miners were standing in the crusher, the loose unconsolidated material was sloping down with no barrier to prevent the material from sliding on them. *Id.* at 11. The Secretary notes that section 110(c) requires only that an individual know or have reason to know of the existence of a violative condition, not that an individual knowingly violated the law. *Id.* at 13-14 & n.7. In response to Ray=s argument that he believed that the work practices cited were not dangerous, the Secretary argues that the determinative issue is whether such beliefs were reasonable. *Id.* at 16. The Secretary further argues that the evidence on which Ray relies does not indicate that the Secretary was not substantially justified in asserting that Ray=s belief was not reasonable. *Id.* Finally, the Secretary acknowledges that the judge in the merits proceeding credited Ray over Inspector Marler that the work practices in question were not dangerous and, therefore, dismissed the section 110(c) charges; however, the Secretary

concludes that adverse credibility resolutions do not establish that the Secretary=s position was not substantially justified. *Id.* at 17-18.

Under the EAJA, a prevailing party shall be awarded attorney=s fees unless the position of the United States is substantially justified. *Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994). The agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992). Substantially justified means that the Secretary=s position is such that it would have been Ajustified to a degree that could satisfy a reasonable person@ and has Aa reasonable basis both in law and fact.@ *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). AThis necessarily requires the court to examine . . . the Government=s litigation position and the conduct that led to litigation. After doing so, the court must then reach a judgment independent from that of the merits phase.@ *FEC v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986). When reviewing an administrative law judge=s EAJA decision, the Commission applies a substantial evidence test for factual issues,[12] and de novo review for legal issues. *Contractors Sand & Gravel, Inc.*, 20 FMSHRC __, slip op. at 7-8, No. EAJ 96-3 (Sept. 22, 1998).

A. Alleged Violation of 30 C.F.R. ' 56.12016

We first address the question of whether the Secretary has demonstrated that her decision to charge Ray under section 110(c) for a violation of 30 C.F.R. ' 56.12016 was substantially justified. For the reasons that follow, we conclude that the Secretary has not met this burden. We therefore find that her position was not substantially justified.

[12] When reviewing an administrative law judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means A>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 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

To establish section 110(c) liability in the case on the merits, the Secretary needed to prove that Ray Aknowingly authorized, ordered or carried out [a] violation.@ 30 U.S.C. ' 820(c).[13] In determining that the Secretary=s decision to charge Ray under 110(c) was substantially justified, the judge concluded in part that A[s]ection 56.12016 is plain and unambiguous. It requires deenergizing the power circuit on equipment when doing mechanical work. It does not provide or imply that a substitute method may be used . . . .@ 18 FMSHRC at 2040. The judge=s conclusion goes to the legal underpinnings of the Secretary=s position. We do not find, however, that the Secretary=s legal position was as clearly supported as the judge maintained. To the contrary, as explained below, we find that the Secretary=s case did not have a reasonable basis in law in light of other pertinent regulations and case law, and, thus, find that her position lacked substantial justification. Our conclusion that the Secretary was not substantially justified is based solely on our de novo review of the legal underpinnings of the Secretary=s position. As was made clear in *Pierce*, to be substantially justified, the Secretary=s position must be reasonable in law as well as fact. 487 U.S. at 565 (stating that an agency position is substantially justified if it has a Areasonable basis *both* in law and fact@) (emphasis added). In light of our disposition that the Secretary=s position lacked a reasonable basis in law, we do not reach any of the factual bases of the Secretary=s case against Ray.

In reaching his conclusion on the legal merits of the Secretary=s position, the judge focused solely on the language of section 56.12016. He made no reference to a second standard, 30 C.F.R. ' 56.14105, which pertains to A[p]rocedures during repairs or maintenance.@ Unlike section 56.12016, section 56.14105 does not contain a requirement that power switches be locked out. Instead, it requires that:

> Repairs or maintenance on machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

[13] Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. ' 820(c). A knowing violation occurs when an individual Ain 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.@ *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). Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

30 C.F.R. ' 56.14105. Prior to the events leading up to this case, the Secretary had charged another operator under section 56.14105 for failure to protect a miner from hazardous motion during testing of a rock crusher following its repair or maintenance. *Walker Stone Co.*, 19 FMSHRC 48, 49-50 (Jan. 1997). We agreed with the Secretary that the cited regulation applied to the breakup and removal of rocks clogging a crusher, and held that the Secretary had proven that the operator violated the standard. *Id.* at 51-53. In a recent decision, the Tenth Circuit agreed with the interpretation of the regulation put forth by the Secretary and the Commission, and affirmed the violation. *Walker Stone Co. v. Secretary of Labor and FMSHRC*, No. 97-9528, 1998 WL 646968 at *7, 9 (10th Cir. Sept. 22, 1998).

Although section 56.12016, standing alone, could be viewed as containing a plain and unambiguous lockout requirement, section 56.14105 and the case law interpreting that standard creates uncertainty regarding the *scope* of that lockout requirement. This is particularly true when, as occurred here, the machinery being repaired is activated for testing or adjustment, thereby subjecting employees to the danger of Ahazardous motion@ rather than electrocution. The legal basis of the Secretary=s case was thus not as well founded as the judge concluded. Indeed, section 56.14105 was clearly relevant to the situation at hand **C** the need to activate the crusher to determine whether it was still clogged. Given the need to Ajog@ the crusher as part of unclogging it, we fail to see how Ray could reasonably be expected to know that he was under an obligation to lock out the crusher power switch, rather than simply ensuring that the miners were protected from hazardous motion during the activation.

The Commission=s *Walker Stone* decision indicates that the Secretary herself has not always chosen to apply the lockout requirement in situations analogous to this one.[14] The Secretary=s decision to cite the operator in *Walker Stone* under section 56.14105 rather than under the lockout requirement in section 56.12016 occurred in June 1993, almost two years before the enforcement action at issue here. *See* 19 FMSHRC at 49-50. In light of this fact, we find that it was unreasonable for the Secretary to evaluate Ray=s culpability under section 110(c) based solely on the lockout requirement of section 56.12016, ignoring the fact that section 56.14105 does not contain a lockout requirement.[15]

We also find problematic that the Secretary=s decision to prosecute Ray under section 110(c) relied on a legal position in the underlying proceeding directly at odds with the decision of the Ninth Circuit in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). *Phelps*

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[14] *Walker Stone* involved an employee who was killed while attempting to remove rocks from inside the crusher after the equipment operator had not been alerted to the employee=s presence prior to restarting the crusher. 19 FMSHRC at 49.

[15] Because our purpose in this EAJA proceeding is limited to a determination of whether the Secretary was substantially justified in her position, we need not reach the question of whether the Secretary should have applied section 56.14105. Consequently, our dissenting colleague=s assertion (slip op. at 20 & n.4) that we have adopted this position is incorrect.

Dodge involved facts similar to those in the underlying case. The Secretary cited the operator for failing to deenergize and lock out a panfeeder on which employees were standing and attempting to dislodge rocks and stones that had clogged an adjacent drop chute. *Id.* at 1191. Pointing out that the lockout regulation, then numbered 30 C.F.R. ' 55.12-16 (1979), was Asandwiched between regulations whose purpose is manifestly to prevent the accidental electrocution of mine workers,@ the court held that principles of fair warning required the scope of the regulation be limited to situations involving electrical shock. *Id*. at 1192-93. In reaching its conclusion, the court relied on the existence of a separate regulation containing language identical to the current requirements of section 56.14105. *Id*. at 1192 (citing 30 C.F.R. ' 55.14-29 (1979), which contained language identical to the present section 56.14105). The court emphasized that, when the goal is to protect against the danger of machinery motion, the relevant regulation requires that the machinery be turned off and Ablocked against motion,@ not Adeenergized.@ *Id*. at 1193.

In the decision on the merits here, the judge rejected Journagan=s reliance on *Phelps Dodge* for the proposition that Asection 56.12016 cannot be cited in situations where the only hazard is danger of being injured by moving machinery.@ 18 FMSHRC at 896. Instead, the judge stated that he Adecline[d] to follow *Phelps Dodge*,@ thus implicitly acknowledging that the case was at least relevant. *Id*. at 897. He cited the dissenting opinion in *Phelps Dodge* as Afar more compelling,@ including the dissent=s view of the lockout requirement as Aclear and unambiguous.@ *Id*. (citing 681 F.2d at 1193). As discussed above, however, in the context of evaluating the reasonableness of the Secretary=s position, section 56.12016 cannot be read in isolation from section 56.14105, as the judge in the EAJA proceeding did here, following the lead of the *Phelps Dodge* dissent and the judge in the merits proceeding.

In this EAJA proceeding, we are not presented with the issue of whether the *Phelps Dodge* court correctly limited application of the lockout requirement to situations involving the potential for electrical shock. Nor do we express any view regarding the propriety of the judge=s finding that Journagan violated section 56.12016. Instead, we must determine whether the Secretary was substantially justified in charging Ray with a section 110(c) violation of that requirement. The reasonableness of the Secretary=s decision to charge Ray with a knowing violation must be viewed in the context of *Phelps Dodge*, a decision of a Court of Appeals directly on point and directly at odds with how the Secretary interprets the underlying regulation.[16]

We recognize that *Phelps Dodge* was not binding precedent in the Circuit in which the underlying proceeding arose, and we do not mean to suggest that the Secretary should refrain from attempting to persuade other Courts of Appeals that *Phelps Dodge* was wrongly decided. But at issue in the underlying proceeding was a charge of a section 110(c) violation of section

[16] Indeed, when viewed in the context of *Phelps Dodge*, the Secretary was incorrect when she argued that A[t]he failure to deenergize electrically powered equipment and to lock out power before any mechanical work is done on the equipment has been consistently held to constitute a violation of mandatory safety standard 56.12016.@ S. Posthearing Br. at 5.

56.12016. Whether correctly decided or not, the *Phelps Dodge* opinion is one the Secretary needed to contend with in deciding to charge Ray under section 110(c). There is no indication that this court decision was factored into the Secretary=s analysis; indeed, in her posthearing brief, the Secretary chose to ignore the case altogether. *See* S. Posthearing Br. at 5. We fail to see how it was reasonable to bring the 110(c) charge without appearing to even acknowledge the contrary authority of *Phelps Dodge*, in which no less than the Ninth Circuit ruled that circumstances like these are not covered by section 56.12016.[17]

The *Walker Stone* and *Phelps Dodge* cases illustrate why Ray could have reasonably concluded that a lockout requirement did not apply to the activity observed by the inspector, and that his obligation was simply to ensure that the crusher was turned off and the miners were Aeffectively protected from hazardous motion@ during testing. *See* 30 C.F.R. ' 56.14105. Indeed, according to the majority in *Phelps Dodge*, such a conclusion is the most reasonable one to be drawn from the regulations. Given all these considerations, we find that it was not reasonable to charge Ray under section 110(c). Accordingly, we conclude that the Secretary=s position was not substantially justified, and remand the case for a determination of the amount of fees and costs to be awarded.

We note that at the present time different proceedings have resulted in rulings that the work of unclogging the crusher falls under two separate regulations. *Compare Phelps Dodge*, 681 F.2d at 1192-93, *with, e.g., Ozark-Mahoning Co.*, 11 FMSHRC 859, 868 (May 1989) (ALJ), *aff=d* 12 FMSHRC 376 (Mar. 1990) (upholding a violation of section 56.12016 under circumstances similar to those here, but without any citation by the judge or Commission to *Phelps Dodge*). But only one regulation has a lockout requirement. There is an urgent need for the Secretary to clarify what precautions are necessary when employees unclog a crusher. In particular, she should clarify whether and to what extent the lockout procedure must remain in place when miners activate a crusher to determine if further work is necessary. The Secretary needs to address whether miners must go through the lockout procedure every time they jog a crusher and whether such a requirement is even feasible. Such a reevaluation is necessary to avoid confusion on this issue and to ensure miner safety in this critical area.

2. Alleged Violation of 30 C.F.R. ' 56.16002(a)

[17] Contrary to the claim of our dissenting colleague, we do not rely on the Ninth Circuit=s *Phelps Dodge* decision in an attempt to relitigate the underlying merits determination (slip op. at 20), but rather only to show that the Secretary=s effort to impose section 110(c) liability on Ray for a violation of section 56.12016 did not have a reasonable basis in law, and therefore was not substantially justified.

The judge in the merits proceeding ruled that the Secretary failed to prove a violation of the second regulation, section 56.16002(a).[18] 18 FMSHRC at 901. Inspector Marler had issued this citation after viewing the miners working inside the crusher jaws with no barrier between them and 25 tons of rock that rested on an incline in the hopper chute. *Id.* at 895, 901. The judge discredited Inspector Marler=s testimony that the rocks were at an incline of 45 degrees, and instead credited Ray=s testimony that the rock lay on an incline of 35 degrees, which he noted is Aa relatively flat slope.@ *Id.* at 901-02. The judge noted that Marler had not measured the angle of the incline; relied on the Secretary=s failure to show that the rock had not reached an Aangle of repose;@ refused to rely on photographs in evidence because the Secretary had not shown that they were accurate; noted that it had not been shown that the action of Catron and Garoutte in throwing additional material on the pile created a hazard; and noted that it was not Journagan=s practice to install a barrier between the pile and men in the crusher. *Id.* & n.5.

[18] Consequently, the corresponding section 110(c) charge against Ray was also vacated. 18 FMSHRC at 903.

The judge in the EAJA proceeding concluded that the Secretary=s investigation nonetheless provided a reasonable basis for charging Ray with section 110(c) liability. 18 FMSHRC at 2041. Substantial evidence supports this conclusion. First, the Secretary=s position on the underlying violation of the standard was reasonable. At trial, the record evidence presented a close case that turned, in large measure, on the judge discrediting Marler=s testimony on the angle of incline because he had not measured it. However, Ray also neglected to measure the angle of incline of the rock or the chute. Instead, he estimated the slope of the rock pile at the hearing by drawing it on paper and *then* measuring it.[19] Tr. 281. Thus, it would have been difficult for the Secretary to have anticipated that the judge would discredit Marler. Moreover, we believe that the photographs, which show loose rock resting on an inclined metal chute, support the reasonableness of the Secretary=s position, notwithstanding the judge=s finding that the Secretary failed to show that the pictures were an accurate depiction of the slope of the rocks. 18 FMSHRC at 902 n.5. *Compare* Tr. 108, *with* Tr. 228-31. Further, Catron and Garoutte were placing more rock on the pile which could have caused the rocks to begin sliding down into the crusher on top of them. Thus, even if the rock pile had reached an angle of repose before they entered the crusher, this was not determinative of the absence of a violation.[20] *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 371 (Mar. 1993) (AWhile the judge noted . . . that the west wall had reached an angle of repose, and was stable . . . , he credited testimony of the Secretary=s witnesses asserting that material on the west wall had a potential to move . . . .@). As the judge in the EAJA proceeding held, A[t]he fact that the trial judge gave greater weight to Ray=s safety opinion does not mean that the Secretary=s case was not substantially justified by the inspector=s observations and safety opinion.@ 18 FMSHRC at 2041. *See Europlast, Ltd. v. NLRB*, 33 F.3d 16, 17-18 (7th Cir. 1994) (noting that NLRB had no way of foreseeing that judge would make credibility resolutions in favor of respondent=s witnesses and against NLRB=s witnesses).

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[19] Even though at the hearing, a scale drawing of the crusher was presented into evidence, Ray made no effort to draw to scale the slope of the rock pile. Tr. 250; Exs. R-5, R-6. Ray also testified at the hearing that the rock, as it was dumped from the trucks, was never at an angle of more than 45 degrees. Tr. 273, 279. The basis for that statement is not evident from the record.

[20] Crusher operator Keith Garoutte testified that, in joining Catron in the crusher jaws, he came down from the crusher controls walking over the rock pile in the hopper, taking care to only step on the big rocks in order not to disturb the smaller rocks and loose material. Tr. 353-55.

Second, in terms of Ray=s section 110(c) liability, the Secretary=s investigation clearly indicated that Ray was aware of the presence of Catron and Garoutte in the crusher. Special Investigator Harold Yount stated in an affidavit that, based upon statements of Ray and other witnesses, he concluded that AJames Ray knew that two employees were working down in the crusher removing rocks by hand while there was approximately a truck load of rock in the feeder and chute overhead.@ S. Br., Ex. B & 10(b); *see id.* & 9(a). In his written statement, Catron stated that ARay was aware that we were down in the crusher with rock in the hopper and chute.@ R. Br., Ex. 3 at 3. This is corroborated by Ray=s testimony at the hearing that, from his position by the generator trailer, he saw Catron and Garoutte climb out of the crusher and walk up the pile of rocks to the control house, and then walk back down to the crusher and remove more rocks.[21] Tr. 270-271.

Accordingly, it was reasonable for the Secretary to conclude that Ray engaged in aggravated conduct by allowing miners to go into the crusher, subjecting them to an imminent

[21] As noted above, Ray relies on the prelitigation statements to support his position that he did not believe the actions cited by MSHA were violative or dangerous, neither of which is determinative of substantive justification in this proceeding. R. Br. in Support of Application, Ex. 2 at 3. *Cf. Inter-Neighborhood Hous. Corp. v. NLRB*, 124 F.3d 115, 121 (2d Cir. 1997) (holding that where there is evidence that raises a fundamental question as to the allegations in a charge, NLRB has the responsibility to conduct a reasonable investigation to resolve any credibility issues before bringing a complaint).

danger. *See* 18 FMSHRC at 2041.[22] In these circumstances, the Secretary=s position was substantially justified.

[22] We reject Ray=s contention that the judge in the EAJA proceeding did not apply the correct legal test in evaluating the Secretary=s position when he stated in his discussion of the first violation that another judge might have viewed the evidence differently. R. Br. at 14-15. The judge also noted in his discussion of the second violation that a trier of facts might have given weight to the inspector=s testimony and found Ray=s conduct aggravated. 18 FMSHRC at 2041. However, we do not believe that he applied the wrong legal standard. He cited *Pierce* and correctly articulated its legal standard for proving substantial justification. *Id.* at 2039. We interpret his comments acknowledging that A[d]ifferent triers of fact may view conflicting evidence differently@ and his finding that this was the case in the underlying proceeding here, as support for his ultimate conclusion that he Secretary=s position was reasonable in fact. *Id.* We note, however, that while the potential views of another trier of fact may be instructive in regards to a finding of reasonableness, they are not determinative in an EAJA case, where the *Pierce* standards of reasonableness must always be applied.

III.

Conclusion

For the foregoing reasons, we reverse the judge=s EAJA determination denying Ray=s application for fees and expenses on the first citation but affirm the judge=s determination as to the second. We remand this proceeding to the Chief Administrative Judge for assignment to a judge in order to allocate from the total amount of fees and expenses originally applied for those attributable to Ray=s defense of section 110(c) liability arising from the first citation.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting in part:

Although I join in my colleagues= affirmance of the judge=s EAJA determination denying Ray=s application for fees and expenses arising from the second section 110(c) citation based on a violation of 30 C.F.R. ' 56.16002, I would also affirm the judge=s denial of Ray=s EAJA application with respect to the first citation, that alleged a section 110(c) violation against Ray for the violation of 30 C.F.R. ' 56.12016. Therefore, I dissent as to the first citation.

After reviewing the Secretary=s pleadings and other record material with respect to the first citation, it is apparent to me that the Secretary=s position was substantially justified so that awarding fees under EAJA to Mr. Ray would not be appropriate. Substantial justification for an agency=s position exists when A>there is a reasonable basis in truth for the facts alleged in the pleadings; . . . there exists a reasonable basis in law for the theory it propounds; and . . . the facts alleged will reasonably support the legal theory advanced.=@ *Smith v. N.T.S.B.*, 992 F.2d 849, 852 (8th Cir. 1993) (citations omitted). In *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988), the Supreme Court explained the EAJA substantial justification test as follows: Aa position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.@ Under an EAJA analysis, A[t]he government=s failure to prevail does not raise a presumption that its position was not substantially justified.@ *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).

To establish section 110(c) liability, the Secretary needed to prove that Ray Aknowingly authorized, ordered, or carried out@ the violation of section 56.12016. 30 U.S.C.' 820(c). Although the Secretary did not ultimately prevail on this violation, it is beyond a doubt that the Secretary=s position had a reasonable basis in law and fact, particulary in light of the information revealed in her special investigation that culminated in the issuance of the section 110(c) penalties. As part of that investigation, Ray submitted an affidavit stating that AI had instructed the employees that they should follow the lockout procedures *anytime they were going to be working on something where they would be in danger if the equipment were to be started inadvertently*.@ (emphasis added). R. Br. in Support of Application, Ex. 2 at 3. This statement shows that Ray had clearly communicated instructions to the employees that he condoned actions that were in violation of the standard, which requires deenergization whenever mechanical work is performed.

Moreover, in his affidavit attached to the Secretary=s brief to the judge, Inspector Marler stated that Ray knew that miners were working in the crusher without locking it out (S. Resp. in Opp=n and Mot. to Dismiss, Attach. A at 3) and that several miners had informed him that ARay had observed them on several occasions working on the crusher, and down in the crusher, and said nothing to indicate that it was not appropriate.@ *Id.* During his testimony at trial, Marler stated that when he arrived at the crusher, Ray was at the rear of the truck observing the employees work (Tr. 96) and that the crusher was not locked out. Tr. 36.

The special investigator also submitted an affidavit, asserting that based upon the statements of Ray and other witnesses, he concluded that Ray knew that an employee was working near the opening to the crusher without it being locked out, and that Ray had instructed workers in lock out procedures. S. Resp. in Opp=n and Mot. to Dismiss, Attach. B at 2-4. These statements also indicated to the special investigator that Ray knew that an employee was in the crusher while a large amount of rock remained in the feeder and chute overhead. *Id*. at 3. The judge also noted that Ray had been cited earlier for a similar violation. 18 FMSHRC at 2040. In light of these facts, as did the judge in the EAJA proceeding, I have no difficulty concluding that the Secretary=s investigation provided a reasonable basis for charging Ray with liability under section 110(c).

Much of Ray=s argument that the Secretary=s investigation did not provide a basis for section 110(c) liability is premised on his incorrect interpretation of section 110(c). Ray argues that there is no basis for section 110(c) liability if Ray did not know if the cited action was a violation of the standard or was hazardous. R. Br. at 5. However, Commission case law does not support that interpretation of section 110(c). *E.g.*, *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1050-52 (May 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). The proper legal inquiry for determining liability under section 110(c) is whether a corporate 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). To establish 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, 1141 (July 1992) (citing *United States v. Int=l Minerals & Chem. Corp*., 402 U.S. 558, 563 (1971)); *Deshetty*, 16 FMSHRC at 1051. An individual acts knowingly where he is Ain a position to protect employee safety and health and fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.@ *Kenny Richardson*, 3 FMSHRC at 16. Thus, under established Commission precedent, the Secretary was entitled to bring an action against Mr. Ray because she had information that Ray knew or had reason to know that miners worked on the crusher without using proper lock out procedures. Although the judge ultimately Agave greater weight to Ray=s safety opinion,@ the fact that Secretary did not prevail did not mean that the Secretary=s case was not substantially justified, just as the judge properly concluded. 18 FMSHRC at 2041.

The majority finds that the Secretary=s decision to bring a section 110(c) action was unreasonable based, for the most part, on the fact that another regulation, which does not require lock out procedures, could also have applied. In doing so, the majority impermissibly revisits the underlying merits determination. *See Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994) (A[T]he inquiry into reasonableness for EAJA purposes may not be collapsed into [the] antecedent evaluation of the merits, for EAJA sets forth a >distinct legal standard.=@) (citation omitted). In the merits proceeding, the judge concluded that Journagan, Ray=s employer, violated section 56.12016, when Catron stood over the crusher with an iron bar trying to dislodge rock jammed in the jaws of the crusher while the equipment was energized.

18 FMSHRC at 896-97. The judge ruled that the section 56.12016 unambiguously applied to the instant case. *Id.* at 897. This holding was not appealed and has become the law of the case.

The majority, in overturning the judge=s determination that the Secretary was substantially justified in bringing a section 110(c) action against Ray based on the section 56.12016 violation, has impermissibly exceeded the scope of review that they assert they are following.[1] The majority has not merely addressed whether the Secretary was for the most part correct in her litigation position; the majority has gone so far as to *sub silentio* overrule the judge=s merits determination that the operator violated the cited standard. I find the majority=s conclusion that the Secretary was not substantially justified to be even the more remarkable because in *Ozark-Mahoning Co.*, 12 FMSHRC 376 (Mar. 1990), the Commission concluded that the cited regulation applied under similar facts. There, the Commission ruled that Aelectrically powered equipment be first deenergized before mechanical work is done on such equipment.@ 12 FMSHRC at 379. *Ozark-Mahoning* is binding Commission precedent. *Contractors*, 20 FMSHRC __, slip op. at 13 (unreviewed Commission decisions serve as legal precedent). Accordingly, the Secretary was justified in relying on it.[2]

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[1] When reviewing a judge=s factual determinations in an EAJA case, the Commission applies the substantial evidence standard of review. *Contractors Sand & Gravel, Inc.*, 20 FMSHRC ____, slip op. at 7-8 (Sept. 22, 1998). ASubstantial evidence@ means A>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 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the judge=s legal determination of substantial justification, the Commission applies the de novo standard of review. *Contractors*, 20 FMSHRC __, slip op. at 8.

[2] The majority rests its entire decision to reverse the judge on its de novo review authority over legal questions. In this case, de novo review goes only to the judge=s substantial justification

determination that the Secretary=s legal theory was reasonable. The majority may not substitute its judgment for the underlying merits. As the judge found that the regulation plainly applied to the facts in the merits proceeding, I do not see how the majority can now in the EAJA proceeding state that the Secretary was not at least reasonable in relying on that regulation to charge Mr. Ray under section 110(c).

In reaching its conclusion that the Secretary was not substantially justified, the majority also faults the Secretary for taking a position directly at odds with *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). However, the judge in the merits determination addressed *Phelps Dodge* and declined to follow it, noting that the Commission had never acceded to the decision. 18 FMSHRC at 897. The judge rejected the operator=s argument, which was based on *Phelps Dodge*, that section 56.12016 could not be cited in situations where the only hazard is danger of being injured by moving machinery. *Id.* The judge found more compelling the dissenting opinion of Circuit Judge Boochever in *Phelps Dodge*, which found that the plain language of the standard was clear and unambiguous. *Id.* (citing 681 F.2d at 1193). Like Judge Boochever, the judge in the merits proceeding saw no reason to qualify the standard=s application on account of the title of the subpart in which the regulation was placed. The judge also ruled that Athe Commission should defer to an agency interpretation of the standard which appears to better effectuate the purposes of the Act, than one limiting its reach to situations in which there is a danger of electrical shock.@ *Id*. Thus, not only did the judge determine that the Secretary=s position was substantially justified, the judge ruled particularly in the Secretary=s favor with respect to *Phelps Dodge.* The majority=s reliance on *Phelps Dodge* (slip op. at 11-12) is nothing more than an improper attempt to relitigate the merits determination.[3]

I find particularly troubling the majority=s attempts to revisit the judge=s merits determination on the ground that a standard *that provides less protection to miners and does not require lock out when mechanical work is being performed* could also have applied. By effectively overruling the judge=s determination that section 56.12016 applied on these facts, the majority=s holding today will inevitably lead to less protection for miners. In *Walker Stone Co.*, 19 FMSHRC 48 (Jan. 1997), on which the majority relies for the proposition that the Secretary should have cited this operator under 30 C.F.R. ' 56.14105, a miner was killed in a crusher.[4] Although the cited regulation was not at issue there, perhaps a fatality would have been avoided if the operator had taken the time to implement lock out procedures in that case.

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[3] The majority finds the Secretary=s legal position Aproblematic@ because of *Phelps Dodge*. Slip op. at 11. However, the proper legal test on review is not whether the Secretary=s case had some problems, but whether the Secretary was substantially justified under *Pierce*, 487 U.S. at 565.

[4] On appeal, the Tenth Circuit in *Walker Stone Co. v. Secretary of Labor and FMSHRC*, No. 97-9528, 1998 WL 646968, at *5 (10th Cir. Sept. 22, 1998), recently held that the removal of rocks from a crusher was *not* plainly and unambiguously covered by section 56.14105, although that was a permissible interpretation of the standard. (The court of appeals disagreed with the Commission that section 56.14105, on its face, applied to the removal of rocks from a crusher. *Id.*). This finding of ambiguity by the Tenth Circuit undercuts the majority=s assertion that the Secretary was not substantially justified because she should have applied section 56.14105 to the facts of this case.

The majority=s attempt to second guess the Secretary=s choice of the citing regulation is not only inappropriate because of the confines of the substantial justification test, but is contrary to Commission case law. As was recognized in *Fluor Daniel, Inc.*, 18 FMSHRC 1143 (July 1996), A[a] hazardous condition may violate more than one standard and the fact that MSHA determines not to issue citations under all applicable sections does not render invalid the citations it does issue.@ *Id*. at 1146 (citing *Cyprus Tonopah Mining Corp*., 15 FMSHRC 367, 378 (Mar. 1993)). Applying that reasoning here, the fact that the Secretary could have prosecuted under another regulation is simply no basis for discounting the Secretary=s choice to issue a citation under the regulation at issue, which the judge found plainly applied to the facts of this case.

Because I have concluded that the Secretary=s decision to pursue Ray under section 110(c) for knowingly authorizing, ordering, or carrying out the violation of section 56.12016 was substantially justified, I would affirm the judge with respect to the citation at issue.

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Marc Lincoln Marks, Commissioner

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