FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 21, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 92-334-M
FORT SCOTT FERTILIZER- CULLOR, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 93-117-M
JAMES CULLOR, employed by FORT SCOTT FERTILIZER- CULLOR, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"), involve a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Fort Scott Fertilizer-Cullor, Inc. ("Fort Scott"), alleging violations of 30 C.F.R. ' 56.14101.[1] The

[1] Section 56.14101 provides, in part:

> (a) *Minimum requirements.* (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. . . .
>
> (b) *Testing.* (1) Service brake tests shall be conducted

Secretary of Labor filed petitions for civil penalties against Fort Scott and also against its agent, James Cullor, pursuant to section 110(c) of the Mine Act, for knowingly authorizing, ordering, or carrying out the violations.[2] Administrative Law Judge Jerold Feldman vacated the citation and order on the basis that the violative conditions were the result of employee misconduct and

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> when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair; . . .

[2] Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) 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).

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

dismissed the penalty proceedings against Fort Scott and Cullor. 15 FMSHRC 2354 (November 1993) (ALJ).

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's recognition of employee misconduct as a defense to Mine Act violations and his reliance on certain factors in determining that misconduct had occurred. The Secretary also challenged the judge's finding that the violative conditions were the result of tampering, on the grounds that it is not supported by substantial evidence. For the reasons that follow, we reverse the judge's dismissal of the citation and order, which was based on his determination that employee misconduct is a defense to liability. We also vacate his determination that misconduct occurred and remand for further proceedings.

I.

Procedural and Factual Background

On May 22, 1992, two truck drivers at Fort Scott's limestone quarry in El Dorado, Missouri, telephoned the MSHA District Office and, asserting that the brakes on a 30-ton haulage truck (the "big Euclid") and a 15-ton haulage truck (the "small Euclid") were defective, requested an inspection. 15 FMSHRC at 2358; Tr. 96, 165. On May 27, they informed James Cullor, a supervisor, that the brakes on their trucks were inoperable. 15 FMSHRC at 2358. He instructed them to park the trucks, which were then in use, so that they could be checked. *Id.* at 2358-59. MSHA Inspector Michael Marler arrived shortly thereafter. *Id.* at 2359.

The brakes were tested and found to be defective. 15 FMSHRC at 2359. Inspector Marler issued a citation for the big Euclid, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. ' 814(d)(1), and a section 104(d)(1) withdrawal order for the small Euclid, alleging violations of section 56.14101. The inspector designated the alleged violations as significant and substantial ("S&S") and the result of Fort Scott's unwarrantable failure to comply with the cited standard. After repairs were made to the trucks, the withdrawal order and citation were terminated on June 10 and July 9, 1992, respectively. Subsequently, the Secretary filed a civil penalty petition against Cullor, charging him with knowingly authorizing, ordering, or carrying out the violations.[3]

Following an evidentiary hearing in the civil penalty proceedings, during which the operator stipulated to the fact that the brakes on both trucks were defective, the judge found, in essence, that the drivers were disgruntled employees who had caused the violative conditions by tampering with the slack adjusters on the trucks' brakes. 15 FMSHRC at 2355-58, 2360-62. The judge concluded that deliberate employee misconduct is a defense to liability under the Mine Act and, on that basis, dismissed the penalty proceedings against both Fort Scott and Cullor. *Id.* at 2362-63.

[3] In June 1992, the two miners were terminated by Fort Scott. 15 FMSHRC at 2355. Failure to wear steel-toed boots was given as the reason. *Id.* Both filed discrimination complaints with MSHA against Fort Scott pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. ' 815(c)(2). *Id.* MSHA subsequently determined that Fort Scott had not discriminated against the complainants in violation of the Act. *Id.*

II.

Disposition

A. Employee Misconduct

1. As a defense to violations

On review, the Secretary contends that the judge erred in creating an exception to the liability scheme of the Mine Act, under which liability for violations is established without regard to fault. S. Br. at 8-14. The Secretary argues that deliberate employee misconduct is not a defense to a violation of the Act or its standards. *Id.* at 12-13. The Secretary states that an operator's lack of fault is to be considered only in assessing a civil penalty. *Id.* at 10-11. Fort Scott responds that employees should not be allowed to create Mine Act violations to retaliate against management in labor disputes. F. S. Letter at 2.

It is well established that operators are liable without regard to fault for violations of the Mine Act. *E.g.*, *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The Commission and the courts have also consistently held that a miner's misconduct in causing a violation is not a defense to liability. For example, in *Allied Products*, the court held that the operator is liable for violations even where "significant employee misconduct" caused the violations. 666 F.2d at 893-94. The court concluded: "If the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation . . . ; the operator is liable." *Id.* at 894. Similarly, in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351 (September 1991), the Commission observed that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." *See also Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754, 757-58 (May 1992).

Accordingly, we conclude that the judge erred in treating employee misconduct as a defense to liability under the Mine Act and we reverse his finding to that effect. Based on the operator's stipulation that the brakes were defective, we conclude that the judge also erred in vacating the citation and order.

2. Effect on other matters

Although employee misconduct is not a defense to liability for a violation, it is relevant in determining other issues, i.e., the operator's negligence for penalty purposes, unwarrantable failure,[4] and liability under section 110(c) of the Mine Act. The operator's fault or lack thereof is

[4] Unwarrantable failure is aggravated conduct constituting more than ordinary negligence.

also a factor to be considered in assessing a civil penalty. *Asarco, Inc.*, 8 FMSHRC at 1636. The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Rather, the operator's supervision, training, and disciplining of those miners is relevant. *Id.*; *Western Fuels-Utah, Inc.*, 10 FMSHRC at 261. In determining unwarrantable failure, the Commission has found that, where a miner was acting as the employer=s agent at the time, intentional misconduct is imputable to the operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-98 (February 1991). In *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226 (June 1994), the Commission found no section 110(c) liability on the part of a supervisor where the violation arose from a rank-and-file employee's failure to follow instructions. *Id.* at 1233-34.

3. Impermissible considerations

To support his conclusion that the miners tampered with the brakes, the judge relied, in part, on their complaint to MSHA regarding the brakes, the Secretary's failure to prosecute their discrimination complaints, and the Secretary's refusal to produce the investigatory report on those complaints. 15 FMSHRC at 2361-62. For the following reasons, we conclude that the judge erred in considering these matters, and we therefore vacate and remand for further analysis his determination of employee tampering.

a. Miners' report to MSHA

The Mine Act, in section 103(g)(1), expressly confers on miners and their representatives the right to notify the Secretary of violations and imminent dangers. 30 U.S.C. ' 813(g)(1). Upon receiving such notification, the Secretary is required to conduct "an immediate inspection." *Id.* Section 105(c) protects miners from discrimination arising from exercise of that right. 30 U.S.C. ' 815(c).

Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Id.* at 2002-04 & n.5; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

In support of his finding, the judge stated that the miners were "anticipating Marler's inspection." 15 FMSHRC at 2361. The record reflects only that the miners contacted MSHA and were aware that an inspection would result, not that they knew when the inspector would arrive. Consequently, this factor affords no support for the judge's finding. We conclude that the judge erred in considering the miners' complaint to MSHA in determining whether employee misconduct occurred.[5]

b. Secretary's determination regarding discrimination

The judge found that the Secretary's decision not to prosecute the miners' subsequent discrimination complaints supported a conclusion that the complaints about the brakes were not legitimate. 15 FMSHRC at 2361-62 & n.4. The Secretary argues that, because his determination of no discrimination cannot support a negative inference in a section 105(c)(3) discrimination case, neither can it support a negative inference in a civil penalty case involving a different incident and issue. S. Br. at 16-17.

We agree. The Secretary's administrative determination of no discrimination in an unrelated subsequent incident does not justify the inference that the brake complaints were not legitimate. Congress designed section 105(c)(3) of the Act, 30 U.S.C. ' 815(c)(3), as an "independent avenue of adjudication" of section 105(c) claims. *Roland v. Secretary of Labor,* 7 FMSHRC 630, 635-36 (May 1985). The Commission may find discrimination where the Secretary has not. *See, e.g., Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 974 (June 1993); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 608-09 (April 1993). The Secretary's determination not to prosecute the discrimination cases is not probative of whether Fort Scott discriminated against the miners or of whether the miners engaged in previous misconduct. We therefore conclude that the judge erred in relying on the Secretary's decision not to prosecute the discrimination complaints.

[5] The Commissioners agree in result that the judge erred. Chairman Jordan and Commissioner Marks agree with the Secretary that reliance on an employee's exercise of his Mine Act rights as an indication of employee misconduct would undermine the rights and protections accorded in the Mine Act. *See* S. Br. at 19. They believe such reliance could exert a chilling effect on the exercise of miners' rights under section 103(g)(1). Commissioners Doyle and Holen are of the opinion that the complaint to MSHA has no probative value as to whether the miners engaged in misconduct.

c. Secretary's refusal to produce files

At the hearing, the judge ordered the Secretary to produce MSHA's investigatory report in the discrimination cases. 15 FMSHRC at 2361. Based on the Secretary's refusal to produce the report, the judge inferred that this material would have been adverse to the Secretary's case in the present matter. *Id.* at 2361-62 & n.5.

MSHA's refusal to produce the investigatory report in the discrimination cases, like its decision not to prosecute those cases, is not probative of whether employee misconduct occurred. Moreover, the Commission has generally recognized that the Secretary's investigative files are protected by a qualified official information privilege. *Secretary of Labor on behalf of Gregory v. Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2237-38 (November 1993). *See also In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1007-09 (June 1992). Accordingly, we conclude that the judge's negative inference based on the Secretary's failure to produce the investigation files was error.[6]

B. Remand

The question of violation need not be reexamined. On remand, the judge shall address the issues of whether the violations were S&S and caused by the operator's unwarrantable failure. In his decision, the judge stated: "The respondents have stipulated . . . to the fact that there was a reasonable likelihood that the hazards contributed to by these conditions *could* result in injuries of a reasonably serious nature." 15 FMSHRC at 2355 (emphasis added). The third prong of the test for S&S is whether there exists a reasonable likelihood that the hazard contributed to *will* (not *could*) result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984).

Concerning the issue of tampering, we note that the judge did not address evidence referenced by the Secretary on review, S. Br. 27-28, that the miners had made previous complaints about brake problems and that their complaints had been ignored; the judge shall evaluate this evidence on remand. The judge shall also assess appropriate penalties against Fort Scott based on the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i). Finally, he shall enter findings and conclusions regarding Cullor's liability, if any, under section 110(c) of the Act.

[6] We do not reach the Secretary's argument that substantial evidence does not support the judge's determination of employee misconduct. S. Br. 20-29.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision that deliberate employee misconduct is a defense to operator liability for Mine Act violations. We also vacate his finding that such misconduct occurred and remand for an analysis of that issue, consistent with this opinion, insofar as it is relevant to determination of the remaining issues.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner