FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 15, 1997

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

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, 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. (1994) (AMine Act@ or AAct@), are before the Commission for a second time. They involve Administrative Law Judge Jerold Feldman=s decision on remand that significant and substantial (AS&S@) violations of 30 C.F.R. ' 56.14101[1] for defects in the brakes on two haulage trucks were not the result of unwarrantable failure by Fort Scott Fertilizer - Cullor, Inc. (AFort Scott@) and that an agent of Fort Scott was not personally liable under section

[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.

110(c) of the Mine Act, 30 U.S.C. ' 820(c), because the defective brakes were caused by employee misconduct. 17 FMSHRC 1330 (August 1995) (ALJ). The Commission granted the Secretary of Labor=s petition for discretionary review challenging these determinations and the judge=s assessment of civil penalties. For the reasons that follow, we affirm in part, vacate in part, and remand.

I.

Factual and Procedural Background

On May 22, 1992, William Burris and Timothy Ragland, two truck drivers at Fort Scott=s limestone quarry in El Dorado, Missouri, telephoned a District Office of the Department of Labor=s Mine Safety and Health Administration (AMSHA@) and, asserting that the brakes on a 30-ton haulage truck (the Abig Euclid@) and a 15-ton haulage truck (the Asmall Euclid@) were defective, requested an inspection. 17 FMSHRC at 1331, 1333; Tr. 96, 165. On May 27, they informed James Cullor, a Fort Scott supervisor, that the brakes on their trucks were inoperable. 17 FMSHRC at 1333. He instructed them to park the trucks, which were then in use, so that the brakes could be checked. *Id.* MSHA Inspector Michael Marler arrived shortly thereafter. *Id.*

The brakes were tested and found to be defective. 17 FMSHRC at 1333-34. 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. *Id.*; Exs. P-2 & P-4. The inspector designated the alleged violations as S&S and the result of Fort Scott=s unwarrantable failure to comply with the cited standard. Exs. P-2 & P-4. After repairs were made to the trucks, the citation and withdrawal order were terminated. *Id.* Subsequently, the Secretary filed a civil penalty petition against Cullor, charging him with knowingly authorizing, ordering, or carrying out the violations. 17 FMSHRC at 1330-31.[2]

In his initial decision, the judge found, in essence, that the drivers were disgruntled employees who had caused the violative conditions by tampering with, i.e., loosening, the slack adjusters on the trucks= brakes. 15 FMSHRC 2354 (November 1993) (ALJ). The judge

[2] In June 1992, Burris and Ragland were terminated by Fort Scott. 17 FMSHRC at 1334. 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.*

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.

The Commission reversed the judge=s conclusion that deliberate employee misconduct is a defense to operator liability for Mine Act violations. 17 FMSHRC 1112, 1115 (July 1995) (A*Fort Scott I*@). Because he relied, in part, on impermissible considerations, i.e., the drivers= complaint to MSHA regarding the truck brakes, the Secretary=s failure to prosecute their discrimination complaints, and the Secretary=s refusal to produce the investigatory report related to those complaints, the Commission also vacated his finding that such misconduct had occurred. *Id.* at 1116-18. The case was remanded for further analysis of the employee misconduct issue insofar as it was relevant to the determination of unwarrantable failure, negligence, and Cullor=s liability, if any, under section 110(c). *Id.* at 1115-19. The Commission also instructed the judge to evaluate evidence that the drivers had made previous complaints about brake problems and that their complaints had been ignored. *Id.* at 1118. The Commission directed the judge to determine whether the violations were S&S and caused by Fort Scott=s unwarrantable failure, to assess penalties against Fort Scott based on the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), and to determine whether Cullor was personally liable. *Id.*

In his decision on remand, the judge reaffirmed his conclusion that the drivers had caused the defective condition of the brakes by tampering with the slack adjusters. 17 FMSHRC at 1335, 1337-38. With regard to the Commission=s instruction that he evaluate evidence that the drivers had made previous complaints about brake problems and that their complaints had been ignored, the judge found the drivers= allegations Aself-serving and refuted by [Fort Scott=s mechanic] who denied ever receiving pertinent complaints.@ *Id.* at 1338. He further found the legitimacy of such complaints undermined by Burris= testimony that the big Euclid=s brakes held on May 25, which was 3 days after Ragland had complained to MSHA about the brakes. *Id.* The judge determined that the violations were S&S because the inoperable truck brakes posed a substantial likelihood that serious or fatal injuries would occur. *Id.* at 1336. Based on his finding of employee misconduct, the judge determined that the violations were not caused by Fort Scott=s unwarrantable failure and that Cullor was not personally liable. *Id.* at 1339. Noting that the employee misconduct mitigated the degree of Fort Scott=s negligence, he assessed civil penalties of $10 for each of the two violations. *Id.* at 1340.

II.

Disposition

The Secretary argues that substantial evidence does not support the judge=s finding that loose slack adjusters were the primary cause of the inoperable truck brakes and that the loose slack adjusters resulted from employee misconduct. PDR at 15-28.[3] In this regard, the Secretary

[3] Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. ' 2700.75(a), the Secretary

asserts that the judge again erred in relying on the fact that one of the drivers contacted MSHA regarding the truck brakes and in drawing a negative inference from the Secretary=s decision not to present testimony from the MSHA inspector who investigated the two drivers= discrimination complaints. *Id.* at 8-15. Finally, the Secretary argues that the judge erred in failing to consider all six statutory criteria for penalty assessment and in according dispositive weight to the negligence criterion. *Id.* at 28-30. She requests that the judge=s decision be reversed. *Id.* at 28, 31.

Fort Scott, a *pro se* operator, responded to the Secretary=s petition in the form of a letter, stating that Aalthough [it] did not agree with everything in [the judge=s initial] ruling, [it] felt he was trying to be fair and had a pretty good understanding . . . of what really happened.@ F. S. Letter dated December 15, 1995, at 2. Fort Scott asserts that it has paid the civil penalties with a check marked AFinal,@ the check was accepted for payment, and it feels that its obligation has been fulfilled. *Id.*

A. Scope of Review

In her petition for discretionary review, the Secretary focuses on the judge=s finding of employee misconduct, without relating how that finding affects the judge=s ultimate conclusions regarding unwarrantable failure, negligence, and section 110(c) liability. *See* PDR at 8-30. Nevertheless, she requests that the Commission Areverse the judge=s decision.@ *Id.* at 31. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. ' 823(d)(2)(A)(iii), and Commission Procedural Rule 70(f), 29 C.F.R. ' 2700.70(f), provide that Commission review is limited to the questions raised in a granted petition for discretionary review. *E.g.*, *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1429 (D.C. Cir. 1989). We construe the Secretary=s petition to implicitly request reversal of the judge=s unwarrantable failure, negligence, and section 110(c) conclusions.[4]

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to more serious conduct by an operator in connection with a violation. 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 Areckless

---

designated her petition for discretionary review as her brief.

[4] We urge the Secretary to make her pleadings explicit, particularly when a *pro se* litigant and section 110(c) liability are involved.

disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission=s unwarrantable failure test). In cases involving brake failure, the Commission has looked to the operator=s abatement efforts in determining whether the violation was the result of unwarrantable failure. *E.g.*, *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1562 (September 1996) (affirming unwarrantable failure finding where, although employee-agent had been informed about bad condition of highlift=s brakes, he failed to remove it from service or ensure that brakes were repaired); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (August 1994) (affirming unwarrantable failure finding where two foremen were aware of shuttle car=s serious brake problem and failed to follow up appropriately by remedying it).

The judge=s finding of employee misconduct is not dispositive of the unwarrantable failure issue because, irrespective of the cause of the defective brakes, Fort Scott was responsible for abating the dangerous condition upon becoming aware of it. *See Cyprus Plateau,* 16 FMSHRC at 1608. Inspector Marler designated the violations as unwarrantable failure based on his belief that Fort Scott had been informed of the brake problems early on the morning of May 27 but that it failed to remove the trucks from service before hauling more loads that day. Tr. 203-04; Exs. P-2 & P-4. Therefore, we focus on Fort Scott=s actions after it became aware of the defective condition of the brakes on May 27.

The judge found that the drivers= May 27 brake complaints had not been Acommunicated@ to Cullor. 17 FMSHRC at 1338. In our view, this finding refers to the drivers= alleged complaints to Cullor early on the morning of May 27, before the quarry=s highloader broke down. In addition, the judge found that Inspector Marler=s assertion that Cullor ignored the May 27 complaints was Ainconsistent with the evidence that the trucks were parked by the work shed and not in service (although not tagged out) when [he] arrived.@ *Id.; see also id.* at 1333, 15 FMSHRC at 2358-59.

The record contains conflicting testimony regarding the events of May 27. Burris testified that he had told Cullor early that morning that the big Euclid did not have any brakes and that Cullor Aseemed unbothered by it.@ Tr. 78-79; *see also* Tr. 80-81, 96-97. He stated that he continued driving the truck until the highloader broke down, at which time he parked it. Tr. 79-80, 97. However, Burris also testified that, immediately before he parked the truck, he had complained to Cullor that Ait wouldn=t stop on level ground@ and that Cullor told him to Apark it.@ Tr. 103. Burris acknowledged that Cullor did not have a chance to examine the truck before the inspector arrived. Tr. 103. Ragland also testified that he had told Cullor early that morning that the small Euclid had bad brakes due to a leaking foot valve and that Cullor told him to A[r]un it.@ Tr. 143-45. He stated that he continued driving the truck until just before the inspector arrived, at which time it was parked at the shed. Tr. 145-46, 151. He asserted, however, that the truck had not been parked for repairs. Tr. 151. In addition, Inspector Marler testified that, when he arrived at the quarry, the trucks were parked by the shed but they had not been not tagged out and no repair work was being performed. Tr. 182-83. He asserted that Cullor had told him that

the trucks were parked due to repair work on the highloader and that the trucks were ready to be placed into service as soon as the highloader was repaired. Tr. 183, 191, 275. According to Marler, Burris had told Cullor early that morning about the bad brakes on the big Euclid and Cullor told him Ato keep driving it and not to complain so much about the equipment.@ Tr. 186. Marler testified that Cullor admitted that he had been told about the bad brakes but that Athe driver was a liar and complained too much and was very unreliable. So he didn=t put much faith in what he told him.@ Tr. 190-91; *see also* Tr. 203, 220.

On the other hand, Cullor testified that Ragland told him early that morning that the small Euclid might have a leaking foot valve but that it would not cause brake failure. Tr. 286-87. According to Cullor, however, after the highloader broke down, Ragland told him that the brakes were not working and Cullor told Ragland to park the truck so the brakes could be examined. Tr. 286-87, 292. Cullor testified that he did not know about the brake problems until after the highloader broke down, when Burris said that the big Euclid would not stop on level ground and Ragland said that the foot valve was leaking on the small Euclid. Tr. 289-92, 297, 329-30, 331. He stated that he had told both drivers to park the trucks so the brakes could be examined. Tr. 291-92, 312, 329-30, 330-31. Cullor denied telling Burris and Ragland to continue driving the trucks following their complaints. Tr. 311-12, 327, 331, 346. Cullor testified that he told Inspector Marler that the trucks were parked for repairs and that they had not been tagged out because they had not been parked for very long. Tr. 293-94, 315.

We conclude that the judge implicitly credited Cullor=s testimony that he did not know about the brake problems until after the highloader broke down and that he responded by directing both drivers to park the trucks so the brakes could be examined. *See* 17 FMSHRC at 1333, 1338. A judge=s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Here, we conclude that the Secretary has failed to offer compelling reasons to take the Aextraordinary step@ of reversing the judge=s credibility determination. *See Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (November 1986).

In light of the conflicting testimony presented by the witnesses, we conclude that the judge was within his discretion in crediting Cullor. Based on the judge=s credibility determination, we conclude that substantial evidence supports his conclusion that Fort Scott effectively abated the dangerous condition upon becoming aware of it.[5] Accordingly, we affirm his determination that the violations were not the result of Fort Scott=s unwarrantable failure.[6]

[5] 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 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[6] Given our conclusions regarding the events of May 27, we do not need to reach the Secretary=s argument that substantial evidence does not support the judge=s determination that the violations were caused by employee misconduct. Regardless of the cause of the defective brakes, Fort Scott=s actions on May 27, as found by the judge, do not rise to the level of aggravated conduct constituting unwarrantable failure.

C. Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. ' 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 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, 1131 (July 1992) (citing *United States v. Int=l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). 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. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Based on the judge=s credibility determination, discussed *supra*, that Cullor did not know about the brake problems until after the highloader broke down and that he responded to the drivers= complaints, we conclude that substantial evidence supports his determination that Cullor did not knowingly authorize, order, or carry out the violations. Accordingly, we affirm the judge=s determination that Cullor is not liable under section 110(c).

D. Penalty Assessment

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). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act.[7] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94

[7] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator=s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator=s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

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

(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 with regard to the penalty criteria are supported by substantial evidence. Assessments Alacking 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 A[f]indings of fact on each of 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.

In *Fort Scott I*, the Commission explicitly directed the judge to Aassess 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).@ 17 FMSHRC at 1118. On remand, however, the judge addressed only the criterion of negligence. 17 FMSHRC at 1339-40. We agree with the Secretary that, by limiting his penalty assessment discussion to the negligence criterion, the judge failed to adequately consider the other penalty criteria. Accordingly, we vacate the judge=s penalty determination and remand for findings of fact and reassessment of all of the penalty criteria.[8]

[8] With regard to Fort Scott=s argument that it has paid the civil penalties with a check marked AFinal,@ we note that payment of civil penalties does not affect the Secretary=s right to petition for review of a judge=s decision within 30 days. *See* 30 U.S.C. ' 823(d)(2); 29 C.F.R. ' 2700.70(a).

III.

Conclusion

For the foregoing reasons, we affirm the judge=s determinations that the violations were not the result of Fort Scott=s unwarrantable failure and that Cullor is not liable under section 110(c), and vacate the judge=s penalty assessment and remand for analysis consistent with this opinion.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner