FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 28, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 93-63, etc.
SUNNY RIDGE MINING COMPANY, INC.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 94-453 KENT 94-454
MITCH POTTER and TRACY DAMRON, employed by SUNNY RIDGE MINING COMPANY, INC.	:	

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

DECISION

BY: Jordan, Chairman; and Marks, Commissioner

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

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@), raise the issues of whether Sunny Ridge Mining Company, Inc. (ASunny Ridge@) violated 30 C.F.R. ' 77.405(b)[2] when miners allegedly worked under the unsecured, raised bed of a coal truck, and 30 C.F.R. ' 77.1001[3] on three separate occasions when loose and unconsolidated material on spoil banks and highwalls allegedly had not been stripped for a safe distance or otherwise stabilized; whether civil penalties should be assessed against Sunny Ridge mine foreman Tracy Damron for his alleged knowing authorization of all four violations; and whether civil penalties should be assessed against Sunny Ridge president Mitch Potter for his alleged knowing authorization of two of the violations of section 77.1001. Commission Administrative Law Judge William Fauver found that Sunny Ridge violated the standards, that the violations were significant and substantial (AS&S@),[4] and that civil penalties

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[2] Section 77.405(b) provides:

> No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

[3] Section 77.1001 provides:

> Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

[4] The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), and refers to more serious violations.

should be assessed against Damron and Potter for knowing authorization of the violations. 17 FMSHRC 648, 653-59 (April 1995) (ALJ). We granted a joint petition for discretionary review filed by Sunny Ridge, Damron, and Potter challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand.

I.

Citation No. 4020202

A. Factual and Procedural Background

Sunny Ridge operates the No. 9 Mine, a surface coal mine in eastern Kentucky. Tr. 192. On August 5, 1992, while inspecting the mine, Beverly AButch@ Cure, an inspector with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), noticed a fully-loaded coal truck parked outside the mine truck shop. 17 FMSHRC at 652; Tr. 14. Cure could see a group of men standing near the truck with their foreman, Tracy Damron. 17 FMSHRC at 652. Sometime later, from a distance, Inspector Cure saw that the bed of the truck, which held approximately 30 tons of coal, was raised. *Id*. at 652-53. Upon closer inspection, he discovered that the rear edge of the raised bed was resting on a stack of cribs, which had the effect of raising the left rear wheel slightly off the ground. *Id*. at 650. No chocks or blocks were present other than the cribs on which the raised bed rested. *Id*. Miners had been working on the tire, and Cure saw someone handling the lug nuts of the raised wheel.[5] *Id*. at 653. Soon after Cure approached the truck, the miners lowered the bed and Damron unsuccessfully attempted to use a 20-ton jack to raise the wheel. *Id*.

Based on his observations, Inspector Cure issued a section 104(d)(1) citation alleging an S&S and unwarrantable violation of section 77.405(b) for working under unsecured, raised equipment. *Id*. at 651; Gov=t Ex. 3. The Secretary proposed a civil penalty of $3,000 for the alleged violation. Sunny Ridge challenged the proposed assessment.

Following an evidentiary hearing, the judge concluded that Sunny Ridge violated section 77.405(b). 17 FMSHRC at 652-53. The judge reasoned that miners working on the tire were A>under . . . machinery or equipment= within the meaning of the regulation because the wheel . . . was under the elevated truck bed and truck frame.@ *Id*. at 653. The judge also determined that the violation was S&S because he found it Areasonably likely@ that a serious injury would occur if the work Acontinued in normal mining operations.@ *Id*. at 653-54. The judge found that if the

[5] The terms Atire@ and Awheel@ are used interchangeably by the parties and judge to refer to the tire/wheel assembly on which miners were working, one of four wheels in a tandem set attached to a hub by means of lug nuts and wedges. Tr. 64-65. The wheel that is the subject of these proceedings was located on the outside of the rear pair of tandem wheels on the driver=s side of the truck; it weighed approximately 250 to 300 pounds, and was 48 inches tall and 10 inches wide. Tr. 36.

raised bed had fallen, a miner could have been injured by the wheel if it was jarred loose, or by the truck frame. *Id*. at 653. The judge concluded that the violation was unwarrantable because the truck bed was not designed to lift a wheel and Sunny Ridge deliberately failed to use what the judge considered the safer method of raising the truck with jacks. *Id*. at 654. The judge assessed a civil penalty of $5,000.[6] *Id*. at 655. In its petition for discretionary review, Sunny Ridge challenges the judge=s determination that it violated section 77.405(b) and that the violation was S&S. Sunny Ridge does not dispute the judge=s finding that the violation was unwarrantable or his penalty assessment.

B. Disposition

Sunny Ridge argues that substantial evidence does not support the judge=s finding of a violation, contending that the Secretary failed to prove that any miners actually worked under the raised truck. S.R. Br. at 5-6. Sunny Ridge also argues that, because there was no reasonable likelihood that the alleged violation would result in an injury, substantial evidence does not support the judge=s S&S determination. *Id*. at 6-8.

The Secretary argues that, as to the violation, the sole issue to be decided is whether any miners were working under raised equipment. S. Br. at 12-14. He argues that it would be Aimpossible to change a tire by hand without getting under the vehicle to which it is attached.@ *Id*. at 16-17 & n.9. He also argues that the judge correctly construed section 77.405(b) to include a broad prohibition against working within a Asphere of danger@ created by a piece of raised, unsecured equipment. *Id*. at 15 (quoting Tr. 71-72). The Secretary contends that Athe judge properly deferred to the Secretary=s reasonable and safety-promoting interpretation of [section 77.405(b)]@ as including such a sphere of danger. *Id*. at 15-16. Finally, arguing that it was reasonably likely that, given the weight of the coal in the raised bed, the bed could fall and seriously injure a miner, the Secretary asserts that the violation was S&S. *Id*. at 18-19.

1. Violation

Commission Procedural Rule 69(a) requires that a Commission judge=s decision Ashall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record. . . .@ 29 C.F.R. ' 2700.69(a). As the D.C. Circuit has emphasized, A[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review.@ *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (February 1981). We thus have held that a judge must

[6] In his posthearing brief to the judge, the Secretary argued that his proposed penalty of $3,000 should be doubled. S. Posthearing Br. at 31-32.

analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). We find that the judge=s decision here has Across[ed] the line from the tolerably terse to the intolerably mute.@ *Anaconda*, 3 FMSHRC at 302 (citations omitted).

At issue on review is whether the judge correctly concluded that work was performed under the raised truck. The judge failed to make specific findings or credibility determinations on this issue. Instead, he simply concluded, with no elaboration or citations to the record, that work was performed under unblocked, raised equipment Abecause the wheel [the miner] was working on was under the elevated truck bed and truck frame.@ 17 FMSHRC at 653. The judge=s failure to explain his conclusion in greater detail makes it impossible for us to determine whether it is either legally correct or supported by substantial evidence.[7]

We are unable in the first instance to determine how the judge interpreted the prohibition in section 77.405(b) against working Aunder@ unblocked, raised machinery or equipment. During the hearing, the judge opined that section 77.405(b) prohibits work within a Asphere of danger@ near unblocked, raised equipment. Tr. 71-72; *see also* S. Br. at 15 (adopting the judge=s

[7] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge=s factual determinations. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means Asuch relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge=s factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g.*, *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

interpretation). But nowhere in his decision does the judge state whether this was the interpretation of the standard on which he based his finding of a violation.

To the extent the judge did read a Asphere of danger@ into the requirements of section 77.405(b), he erred. This interpretation is at odds with the plain meaning of the standard. We have long held that A[w]here the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written. . . .@ *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989). The plain meaning of the term Aunder@ as used in section 77.405(b) is Abelow or beneath something.@ *Webster=s Third New International Dictionary* 2487 (1986). Nothing in the standard expressly or implicitly suggests that the Secretary intended the term to mean anything other than work below or beneath raised, unblocked equipment. Nor does anything in the regulation suggest that it reaches areas near or beside raised, unblocked equipment.[8] Since the meaning of Aunder@ in section 77.405(b) is clear and unambiguous, we need not reach the Secretary=s contention that his interpretation of the standard is entitled to deference. *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered A*only* when the plain meaning of the rule itself is doubtful or ambiguous@) (emphasis in original).

Even if the judge based his decision on a finding that work was performed *under* unblocked, raised equipment (rather than within a Asphere of danger@), we are unable to determine the basis for the judge=s conclusion that such a violation occurred. Nowhere in his decision does he point to any evidence of a miner working *under* the raised truck. Nor does our review of the record reveal any clear evidence of such conduct. Indeed, we cannot even determine whether the relevant tire was actually under the elevated truck bed or truck frame.

Our review has been hampered because the record is incomplete. After the hearing, the record exhibits were lost in the mail. 17 FMSHRC at 649. The parties were requested to furnish the judge with replacement copies. *Id*. But the folder in which replacements were assembled does not contain copies of any of Sunny Ridge=s exhibits. The transcript reveals that when Sunny Ridge=s counsel introduced the company=s exhibits at trial, he had only one copy of each. Tr. 74, 176, 258. We are concerned that the judge did not order Sunny Ridge=s counsel to provide the

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[8] *Cf*. 30 C.F.R. ' 77.413(c) (boiler blowoff valves must be Aso located or protected that persons passing by, near, or under them will not be scalded@); 30 C.F.R. ' 77.807-3 (high-voltage powerlines must be deenergized when any equipment passes Aunder or by@ them); 30 C.F.R. ' 77.1006(a) (persons must not work Anear or under dangerous highwalls or banks@). These provisions demonstrate that, had the Secretary intended to give a broader reach to section 77.405(b), he could have easily employed the language to do so.

court, witnesses, and opposing counsel with copies of the exhibits. Our concern is heightened by the fact that among Sunny Ridge=s exhibits were four pictures which depicted a truck similar to the one cited. *See* Tr. 30, 61-62, 64, 67 (descriptions of Resp. Exs. 1, 2, 3, and 4). These pictures were the only evidence from which we could have determined the physical appearance of the truck, there being no other detailed description of it in the record. Compounding this problem is the fact that the judge failed to indicate whether he relied on these lost exhibits. We are thus at a loss to determine the evidentiary basis of the judge=s opinion.

Nor does the judge indicate whether he based his decision on a credibility determination. On cross examination, Inspector Cure repeatedly offered his opinion that a miner would have had to get under the truck to work on the tire. Tr. 28-33. But he never actually observed anyone *under* the truck. Tr. 29, 32. Moreover, a Sunny Ridge witness testified that A[t]here would be no need, no reason for anyone to get under raised equipment to change a tire.@ Tr. 60. The judge made no effort to resolve this conflicting testimony. In the absence of such findings, we cannot effectively review the judge=s decision.

Accordingly, we vacate the judge=s finding of a violation and remand the matter to him so he can Aanalyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision.@ *Mid-Continent*, 16 FMSHRC at 1222. If the judge relied on the lost exhibits in finding a violation, we direct him to reopen the proceedings for the limited purpose of obtaining replacement exhibits.

2. S&S

In light of our determination to vacate the judge=s finding of violation, we also vacate the judge=s accompanying conclusion that the violation was S&S. Because the judge will have to revisit the S&S question in the event he determines on remand that Sunny Ridge violated section 77.405(b), we offer the following observations on his S&S determination.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat=l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), we further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

Here, the judge summarily concluded that the violation was S&S because Ait was reasonabl[y] likely to result in serious injury if [such a] practice of shortcutting safety devices continued in normal mining operations.@ 17 FMSHRC at 653-54. The judge predicated his finding of a potential hazard on the truck bed falling. *Id*. at 653. But evidence was presented at the hearing that cast some doubt on the Areasonable likelihood@ of the truck bed falling, *Mathies*, 6 FMSHRC at 3-4, evidence the judge failed to analyze and weigh. Potter testified that the truck was equipped with a check valve that would have prevented the truck bed from falling suddenly, even in the event of an Aunusual@ accident. Tr. 69-70, 84-85. The judge also found that A[i]f the truck bed fell the wheel may have been jarred loose and fallen on [a miner].@ 17 FMSHRC at 653. But Potter testified that the tire could not have been dislodged by a fall of the bed because the inside tire would have caught the weight of the fall and because such tires can be intentionally dislodged only with some difficulty. Tr. 64-65, 70. The judge considered the use of jacks a safer and preferable method of changing a coal truck tire. 17 FMSHRC at 654. But this ignored Potter=s testimony that cribs are safer to use than jacks because cribs are Amore capable of taking the weight than a jack.@ Tr. 64.

We find unacceptably terse the judge=s conclusion that the violation was S&S. The judge failed to consider and weigh all of the relevant evidence on the S&S issue. If the judge considers the S&S question on remand, he must provide a full explanation of his decision. *Mid-Continent*, 16 FMSHRC at 1222.

II.

Order No. 4020210

A. Factual and Procedural Background

On August 18, 1992, during the course of a regular inspection of Sunny Ridge=s No. 9 Mine, Inspector Cure observed loose and unconsolidated spoil material on the spoil side of the No. 3**2** Pit. 17 FMSHRC at 655; Tr. 120. The spoil material, consisting of blasted rocks of various sizes, formed a vertical highwall approximately 25 feet high and 200 feet long. 17 FMSHRC at 655; Tr. 122, 138. Inspector Cure observed four pieces of equipment operating below the spoil bank. 17 FMSHRC at 655. Based on his observations, Inspector Cure issued a section 104(d)(1) order alleging an S&S and unwarrantable violation of 30 C.F.R. ' 77.1001. *Id.* at 651, 655; Gov=t Ex. 5. The Secretary proposed a civil assessment of $4,600, which Sunny Ridge challenged.

Following the hearing, the judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. He noted that the inspector observed loose and unconsolidated material

consisting of rocks and boulders on the spoil side of the highwall in the No. 32 pit. *Id*. at 655. The spoil bank was approximately 25 feet high and 200 feet long. *Id*. Noting that the loose material Apresented a hazard to the drivers of four pieces of equipment operating below the spoil bank,@ the judge found the cited conditions S&S because Athere was a reasonable likelihood that the loose material on the spoil bank would slough or roll off striking equipment or miners and causing serious injuries.@ *Id*. at 655-56. He also found that, because foreman Damron=s Adisregard of the hazards . . . was serious and shows aggravated conduct beyond ordinary negligence,@ the violation was unwarrantable. *Id*. at 656. The judge assessed a civil penalty of $8,000.[9] *Id*. We subsequently granted Sunny Ridge=s petition for discretionary review challenging the judge=s determination that it violated section 77.1001 and that the violation was S&S, as well as his penalty assessment. Sunny Ridge does not challenge the judge=s finding of unwarrantable failure.

B. Disposition

Relying on the testimony of its witnesses, Sunny Ridge argues that no hazardous materials were present on the spoil bank and that, therefore, the judge=s finding of a violation is not supported by substantial evidence. S.R. Br. at 9. Sunny Ridge also argues that any violation that might have occurred was not S&S because there was very little likelihood of any serious injuries. *Id*. at 9-11. In addition, Sunny Ridge asserts that the judge=s penalty assessment is inappropriate. *Id*. at 11. The Secretary does not address whether Sunny Ridge violated section 77.1001, arguing only that the judge=s finding of S&S is supported by substantial evidence. S. Br. at 23-25. In support of his argument, the Secretary cites Inspector Cure=s observation of miners working in close proximity to a vertical highwall consisting entirely of loose and unconsolidated spoil material, ongoing blasting at the mine that could have led to failure of the highwall, and the inspector=s knowledge of other highwall failures. *Id*. The Secretary does not address the propriety of the penalty assessed by the judge.

1. Violation

Section 77.1001 requires operators to strip loose, hazardous material for a safe distance from the top of pits or highwalls. There is no dispute that loose material was present on the top and face of the highwall. 17 FMSHRC at 655. Cure testified that Athe whole spoil pile itself was loose material@ and that the highwall it formed was vertical. Tr. 137-38. Although Sunny Ridge=s witnesses testified that the spoil material posed no hazard (Tr. 156, 193, 196), the judge implicitly credited Cure=s testimony that the material was hazardous and threatened miners working underneath it, in part because both blasting and rain could have compromised its stability (Tr. 146, 150-51). 17 FMSHRC at 655.

[9] In his posthearing brief to the judge, the Secretary argued that his proposed penalty of $4,600 should be doubled. S. Posthearing Br. at 31-32.

On review, Sunny Ridge seeks to have its witnesses credited over the Secretary=s witnesses. S.R. Br. at 9. Only under exceptional circumstances do we overturn findings based on credibility resolutions. *In re: Contents of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878-81& n.80 (November 1995) (A*Dust Cases*@). We find no such circumstances in this case. We conclude that substantial evidence supports the judge=s finding that Sunny Ridge violated section 77.1001, and we therefore affirm his determination.

2. S&S

We find unpersuasive Sunny Ridge=s argument that the Secretary failed to prove the third *Mathies* element because there was very little likelihood of an injury. S.R. Br. at 9-11. As noted above, Cure testified that both blasting and rain could have compromised the stability of the spoil material. Tr. 146, 150-51; *see also* Tr. 169-70 (testimony of Hobart Potter that rain could adversely affect spoil bank=s stability). Sunny Ridge=s expert, Edward Brown, also testified that Athe higher you stack the spoil, the less the angle [of the material] can be simply because it will slide.@ Tr. 174. There is no dispute that the spoil material was vertical and that miners worked near the spoil bank. Tr. 123, 138, 157. We thus find that substantial evidence supports the judge=s S&S finding and, accordingly, we affirm the judge=s determination.

3. Penalty

In support of his assessment of a penalty of $8,000 against Sunny Ridge for this violation, the judge stated that he had considered all of the criteria for civil penalties under section 110(i) of the Mine Act, 30 U.S.C. ' 820(i).[10] 17 FMSHRC at 656. He did not make separate findings of fact that he tied directly to any of the criteria. However, the judge made findings on several of the criteria elsewhere in his decision. Regarding the operator=s history of violations, the judge found that Sunny Ridge Ahad been cited for a violation of the same standard on the same highwall less than two weeks before [the instant] violation.@ *Id*. Regarding the operator=s negligence, the judge found that the conduct of Tracy Damron, Sunny Ridge=s foreman, was Aaggravated . . . beyond ordinary negligence.@[11] *Id*. Regarding the gravity of the violation, the judge in effect

[10] Section 110(i) provides in pertinent part:

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

[11] As Sunny Ridge=s agent, Damron=s conduct may be imputed to the operator. *Rochester*

found it to be serious insofar as he found that it could have caused Aserious injuries.@ *Id*. We can enter findings on the remaining criteria based on record evidence. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984) (Athe Commission=s entering of undisputed record information as findings [is] proper under the [Mine] Act@). Regarding the appropriateness of the penalty to the operator=s size and the effect of the penalty on the operator=s business, the parties stipulated, and we find that Sunny Ridge Ais a medium-sized operator@ and that its ability to continue in business would not be affected by a reasonable penalty. Joint Ex. 1 at && 4-5. Finally, regarding whether Sunny Ridge Ademonstrated good faith . . . in attempting to achieve rapid compliance after notification of [the] violation,@ 30 U.S.C. ' 820(i), the record merely indicates that the violation was abated approximately 4 hours after the order was issued when Sunny Ridge Aremoved the height of the spoil material.@ Tr. 132; Gov=t Ex. 5. Accordingly, we find that Sunny Ridge demonstrated neither good faith nor bad faith in abating the violation.

& Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991) (A*R&P*@).

The question remains whether, in light of the above findings, the penalty assessed by the judge is excessive. The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, discretion bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act=s penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984).[12] Although the penalty assessed by the judge exceeds that originally proposed by the Secretary before the hearing, based on the facts developed in the adjudicative record, we cannot say that the penalty is inconsistent with the statutory criteria or the Act=s deterrent purposes.[13] We thus find that the judge=s penalty assessment did not constitute an abuse of discretion.

III.

Order No. 4020075

[12] Commissioner Marks further notes that his dissenting colleague also cites *Sellersburg* in support of his determination to remand this and the following two violations cited under section 77.1001. *See* Slip op. at 23-25. However, in *Sellersburg*, the court concluded that A[t]he Commission must remand a case to the ALJ only if it >determines that further evidence is necessary on an issue of fact.= [30 U.S.C. ' 823(d)(2)(C).] Given the Commission=s conclusion that uncontroverted evidence did not warrant further factual findings, such a remand was not required. . . .@ 736 F.2d at 1153. For the same reason, Commissioner Marks believes that remand in the instant case is unnecessary.

[13] Litigants in many types of actions often risk increased liability when they opt to litigate rather than settle a claim, because they are faced with an independent assessment of their liability by the judge. Contrary to our colleague, we find no basis for concluding that the increase in this case was levied in retaliation against the operator for exercising its rights under the Act.

Even if, as our colleague suspects, the judge=s assessment was influenced by the Secretary=s posthearing argument to double the penalties originally proposed, that does not make the penalty defective. In support of his argument, the Secretary indicated that the A[t]estimony at trial [of] Tracy Damron and Mitch Potter . . . demonstrates an indifference on the part of mine management to the health and safety of its employees.@ S. Posthearing Br. at 31-32. The Secretary also claimed that respondents= lack of good faith was demonstrated at the hearing when photographs of the site, offered by respondent as proof of a lack of violation, were Aobviously taken after corrective measures to the cited violations had already been instituted.@ *Id*. at 32. Surprisingly, the Secretary=s request to double the penalties is described by our dissenting colleague as Apunitive,@ Aquestionable,@ and Aretaliatory.@ Slip. op. at 23, 25. We do not agree. The Secretary has the obligation to vigorously prosecute violations and the duty to function as an advocate by marshaling relevant, legitimate arguments in support of penalties he deems appropriate. Consequently, it is certainly reasonable for the Secretary to adjust a proposed penalty based on information developed at the hearing.

A. Factual and Procedural Background

On January 27, 1993, as MSHA Inspector Billy Damron was conducting a regular inspection of Sunny Ridge=s No. 9 Mine, he observed loose, hazardous, and unconsolidated material that had not been stripped from the highwall and spoil side of the No. 2 Pit. 17 FMSHRC at 656; Tr. 218. The highwall was approximately 65 feet high. 17 FMSHRC at 656-57. Inspector Damron observed one piece of equipment operating beneath the highwall. *Id*. at 657. Based on his observations, Inspector Damron issued Order No. 4020075 under section 104(d)(2) of the Mine Act, alleging an S&S and unwarrantable violation of section 77.1001. *Id*. at 656; Gov=t Ex. 8. The Secretary subsequently proposed a penalty of $7,500 against Sunny Ridge. Sunny Ridge challenged the Secretary=s proposed assessment.

After the hearing, the judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. He noted that the inspector Aobserved loose and unconsolidated material in the form of blasted rock, dirt and trees on the highwall and spoil bank,@ and that the highwall was about 65 feet high. *Id*. at 656-57. The judge stated that Sunny Ridge had recently been charged with several violations of section 77.1001, that Tracy Damron had been foreman in charge at the time these prior violations had been issued and when the instant order was issued, that Tracy Damron=s disregard of the cited hazards constituted aggravated conduct beyond ordinary negligence, and that the violation was therefore unwarrantable. *Id*. at 657. The judge also stated: AThe violation was reasonably likely to result in serious injury, and therefore was significant and substantial.@ *Id*. The judge assessed a $10,000 civil penalty against Sunny Ridge.[14] *Id*. We subsequently granted Sunny Ridge=s petition for discretionary review challenging the judge=s determination that it violated section 77.1001 and his penalty assessment. Sunny Ridge does not challenge the judge=s findings of S&S and unwarrantable failure.

B. Disposition

Sunny Ridge argues that the judge=s determination that the company violated section 77.1001 is not supported by substantial evidence because Inspector Damron did not thoroughly inspect the material he cited. S.R. Br. at 12-13. Sunny Ridge also argues that the judge should have credited the testimony of its dozer operator, Charles Clevenger, that he tested the stability of the cited highwall before the order was issued and found no problems. *Id*. Sunny Ridge also maintains that the judge=s penalty assessment is not appropriate. *Id*. at 13. The Secretary argues that the record contains extensive evidence of hazardous material present on the cited highwalls, and that the judge=s finding of violation is thus supported by substantial evidence. S. Br. at 28-30. The Secretary does not address the propriety of the penalty assessed by the judge.

We find that substantial evidence supports the judge=s determination that Sunny Ridge

[14] In his posthearing brief, the Secretary argued that his original proposed penalty of $7,500 should be doubled. S. Posthearing Br. at 31-32.

violated section 77.1001 by failing to strip loose, hazardous material from the top of a highwall and spoil bank in Pit No. 2. There is no dispute that loose material was present on the highwall and spoil bank. 17 FMSHRC at 656-67. The judge implicitly rejected the testimony of Sunny Ridge=s witnesses that the cited area was safe (*see* Tr. 251-54, 261), and credited Inspector Damron=s testimony that the material was hazardous because it Ahad just been pushed over and was laying on [the] high wall,@ including a large fallen tree, and that the material was highly susceptible to failure because of continual blasting in the area and frequent freezes and thaws that could have further loosened it (Tr. 223-26). We find no circumstances that would warrant following Sunny Ridge=s implicit suggestion that we overturn the judge=s credibility determinations. *Dust Cases*, 17 FMSHRC at 1878-81& n.80. Accordingly, we affirm the judge=s determination that Sunny Ridge violated section 77.1001.

As with the previous order, although the judge did not make any separate findings of fact that he tied directly to any of the statutory penalty criteria in support of his penalty assessment, findings on each of the criteria either were made by the judge elsewhere in his decision or can be entered by the Commission based on record evidence. *See Sellersburg*, 736 F.2d at 1153. The judge found that Sunny Ridge Ahad been issued 17 charges of violations of the same standard within about six months, and had been issued two charges for violating the same standard during the last inspection.@ 17 FMSHRC at 657. The judge also found that AForeman Damron=s disregard of hazardous, loose materials on the highwall and spoil bank shows aggravated conduct beyond ordinary negligence,@ *id*., conduct that may be imputed to Sunny Ridge. *R&P*, 13 FMSHRC at 194. Regarding the gravity of the violation, the judge found that it could have caused serious injuries. 17 FMSHRC at 657. Pursuant to the parties= stipulation, we find that Sunny Ridge Ais a medium-sized operator@ and that its ability to continue in business would not be affected by a reasonable penalty. Joint Ex. 1 at && 4-5. Regarding abatement, the record merely indicates that Sunny Ridge abated the violation when it bermed off the cited area. Tr. 229. Accordingly, we find that Sunny Ridge demonstrated neither good faith nor bad faith in abating the violation.

Based on our review of the adjudicative record, we cannot say that the penalty is inconsistent with the statutory criteria or the Mine Act=s deterrent purposes. We thus find that the judge=s penalty assessment did not constitute an abuse of discretion.

IV.

Order No. 4020076

A. Factual and Procedural Background

On January 27, 1993, after issuing Order No. 4020075, Inspector Damron observed loose, hazardous material on the face and top of a highwall and on the spoil side in the No. 1 Pit. 17 FMSHRC at 657. The highwall was approximately 90 to 100 feet high. *Id*. at 657-58. Several pieces of equipment were operating under the highwall, and footprints indicated individuals had

worked or traveled under the spoil bank. *Id*. Although Inspector Damron allowed work to continue in the center of the pit to allow Sunny Ridge to remove a quantity of coal that had already been mined (Tr. 289-90), he issued Order No. 4020076 under section 104(d)(2), alleging an S&S and unwarrantable violation of section 77.1001 based on his observations of conditions elsewhere in the pit. 17 FMSHRC at 657; Gov=t Ex. 11. The Secretary subsequently proposed a civil penalty of $9,200 against Sunny Ridge, which the company challenged.

After the hearing, the judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. He noted that Inspector Billy Damron Aobserved loose, hazardous material in the form of rocks and boulders on the face and top of [the] highwall,@ which was 90 to 100 feet high. *Id*. at 657. The judge also noted the hazardous conditions Inspector Damron observed on the spoil bank, which was approximately 60 feet high. *Id*. at 658. Finally, the judge took note of Inspector Damron=s observations of work being performed under the highwall and spoil bank. *Id*.

The judge stated that Sunny Ridge had recently been charged with violating section 77.1001, that Tracy Damron had been foreman in charge at the time these prior violations had been issued and when the instant order was issued, that Tracy Damron=s disregard of the cited hazards constituted aggravated conduct beyond ordinary negligence, and that the violation was therefore unwarrantable. *Id*. at 658. The judge also stated: AThe violation was reasonably likely to result in serious injury, and therefore was significant and substantial.@ *Id*. The judge assessed a $10,000 civil penalty against Sunny Ridge.[15] *Id*. We subsequently granted Sunny Ridge=s petition for discretionary review challenging the judge=s determination that it violated section 77.1001 and that the violation was S&S, as well as his penalty assessment. Sunny Ridge does not challenge the judge=s finding of unwarrantable failure.

B. Disposition

Sunny Ridge argues that the judge=s determination that it violated section 77.1001 is not supported by substantial evidence. S.R. Br. at 14-15. The company maintains that the judge=s finding of S&S is inconsistent with Inspector Damron allowing mining to continue in the pit. *Id*. at 15-16. Sunny Ridge also argues that the judge=s assessment of penalty is not supported by substantial evidence. *Id*. at 16. The Secretary argues that the record contains extensive evidence of hazardous material present on the cited highwalls, and that the judge=s finding of a violation is thus supported by substantial evidence. S. Br. at 31-32. The Secretary contends that substantial evidence also supports the judge=s finding that the violation was S&S, and that Inspector Damron=s permitting some mining to continue in the pit is irrelevant because the area where mining continued was outside the area covered by the order. *Id*. at 33-34. The Secretary does not address the propriety of the penalty assessed by the judge.

1. Violation

[15] In his posthearing brief, the Secretary argued that his original proposed penalty of $9,200 should be doubled. S. Posthearing Br. at 31-33.

We find that substantial evidence supports the judge=s finding that Sunny Ridge violated section 77.1001 by failing to strip loose, hazardous material from the top of a highwall and spoil bank in Pit No. 1. The judge credited Inspector Damron=s testimony that both the highwall and spoil bank contained loose, hazardous material. 17 FMSHRC at 657-58. Inspector Damron testified that Aloose rock and boulders were present in the face [and] top of the high wall,@ and that the near-vertical spoil bank also Acontained loose rock and dirt.@ Tr. 274, 284. The judge implicitly rejected the testimony of Sunny Ridge=s witnesses that no loose, hazardous material was present. *See* Tr. 331, 336-37. No circumstances warrant overturning the judge=s credibility determinations. *Dust Cases*, 17 FMSHRC at 1878-81& n.80. Accordingly, we affirm the judge=s finding of a violation.

2. S&S

In what is essentially an estoppel argument, Sunny Ridge contends that the Secretary failed to prove the third *Mathies* element because, had there been any likelihood of a serious injury, Inspector Damron Awould not have permitted continued mining for the remainder of the day underneath the highwall or spoil bank. . . .@ S.R. Br. at 16. Equitable estoppel, however, generally does not operate against the Secretary. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981).[16]

In any event, Inspector Damron testified that both blasting and the freeze/thaw cycle had compromised the stability of the loose material, and that, since material could have been dislodged, a serious injury was Avery highly likely.@ Tr. 286-87. Based on this testimony, we find that the judge=s determination that the violation was S&S is supported by substantial evidence. Accordingly, we affirm the judge=s S&S determination.

3. Penalty

As with the previous two orders, although the judge did not make any separate findings of fact that he tied directly to any of the statutory penalty criteria in support of his penalty assessment, findings on each of the criteria either were made by the judge elsewhere in his decision or can be entered by the Commission based on record evidence. *See Sellersburg*, 736 F.2d at 1153. The judge found that Sunny Ridge Ahad been issued two charges of violating the same standard in the previous inspection,@ and that AForeman Damron=s disregard of the hazards discovered by the inspector shows aggravated conduct beyond ordinary negligence.@ 17 FMSHRC at 658; *see R&P*, 13 FMSHRC at 194 (Damron=s conduct may be imputed to Sunny Ridge). The judge also found that the violative condition could have caused serious injuries. 17

[16] Moreover, Sunny Ridge=s argument rests on the mistaken assumption that Inspector Damron allowed mining to proceed *underneath* the highwall and spoil bank. In fact, Inspector Damron only allowed Sunny Ridge to remove some coal from the pit that had already been mined and that was stockpiled in an area not affected by his order. Tr. 289-90, 365, 369.

FMSHRC at 658. Pursuant to the parties= stipulation, we find that Sunny Ridge Ais a medium-sized operator@ and that its ability to continue in business would not be affected by a reasonable penalty. Joint Ex. 1 at && 4-5. Regarding abatement, Sunny Ridge=s witnesses testified that mining continued in the pit, including under the highwall, after Inspector Damron pointed out the violation to company personnel. Tr. 336-37, 348; *see also* Tr. 369 (Inspector Damron=s testimony that it was not his intention to allow mining to continue under the highwall). We thus find that, although the violation was abated when Sunny Ridge bermed off the cited area (Tr. 292), the company demonstrated bad faith by continuing to mine in areas of the pit where Inspector Damron had pointed out hazardous, violative conditions.

Based on our review of the adjudicative record, we cannot say that the judge=s penalty assessment is inconsistent with the statutory criteria or the Mine Act=s deterrent purposes. We thus find that the judge did not abuse his discretion in assessing the penalty.

V.

Tracy Damron=s Liability Under Section 110(c)

A. Factual and Procedural Background

The Secretary charged Tracy Damron with knowingly authorizing, ordering, or carrying out the alleged violations described in Citation No. 4020202 and Order Nos. 4020210, 4020075, and 4020076. The Secretary subsequently proposed penalties totaling $15,000 against Damron, which Damron challenged.

After the hearing, the judge found that Damron was liable under section 110(c) for the four violations. With respect to Citation No. 4020202 (working under unblocked equipment), the judge found that Damron attempted Ato cover up his method of changing a tire@ based on testimony that when Cure Aapproached the truck, some men scattered and [Damron] quickly had the truck bed and wheel lowered. He then got a 20-ton jack and attempted unsuccessfully to raise the rear wheel.@ 17 FMSHRC at 655. The judge regarded this as Astrong evidence of [Damron=s] knowledge of a violation.@ *Id*. The judge assessed a civil penalty of $2,500 against Damron. *Id*.

With respect to Order Nos. 4020210, 4020075, and 4020076 (highwall violations), the judge found that Damron was aware of hazardous highwall conditions because, in each case, he conducted daily examinations of the affected areas. *Id*. at 656, 657, 658. The judge concluded that Damron=s disregard of the hazards on each occasion amounted to Aaggravated conduct beyond ordinary negligence.@ *Id*. The judge also noted that Sunny Ridge had repeatedly been cited for similar violations, and that Damron was the company=s representative upon whom the previous citations had been served. *Id*. The judge assessed civil penalties against Damron of $3,000 for Order No. 4020210, $4,000 for Order No. 4020075, and $4,000 for Order No. 4020076. *Id*. We subsequently granted Damron=s petition for discretionary review challenging the judge=s findings of liability and penalty assessments.

B. Disposition

Relying on the arguments advanced elsewhere in petitioners= joint brief, Damron argues that the judge=s findings of liability under section 110(c) are not supported by substantial evidence. S.R. Br. at 17, 19. Citing his subjective beliefs that using cribbing to change a coal tire was safe and that all of the cited highwalls were sound, Damron argues that his conduct was not Aknowing.@ *Id*. at 17-19. Damron also argues that none of the penalties assessed against him by the judge are appropriate or supported by substantial evidence. *Id*. at 11, 13, 16-19.

The Secretary responds that with respect to each of the section 110(c) charges brought against Damron, substantial evidence supports the judge=s conclusions that Damron is liable. S. Br. at 20-23, 26-28, 30-31, 34-35. The Secretary argues that section 110(c), rather than imposing a subjective standard, requires agents of operators to act in an objectively reasonable

manner. *Id*. at 22. The Secretary contends that, with respect to each of the four charges brought against him, Damron failed to meet this standard of care. Regarding Citation No. 4020202, the Secretary asserts that Damron Awas actively involved in the violative tire-changing operation, which openly and obviously involved a failure to block securely the raised equipment.@ *Id*. at 22-23. Regarding the three highwall violations, the Secretary argues that Damron was fully aware of the cited conditions, having inspected the cited areas on the morning of each day an order was issued. *Id*. at 26-28, 30, 34-35. With respect to Order Nos. 4020075 and 4020076, the Secretary maintains that Damron admitted that conditions were hazardous. *Id*. at 30, 35. The Secretary does not address the propriety of the penalties assessed by the judge.

1. Violation of Section 77.405(b)

Because we are vacating and remanding to the judge the issue of whether Sunny Ridge violated section 77.405(b), we vacate the judge=s determination that Damron is liable under section 110(c) for this citation, and remand for further proceedings consistent with our remand of the underlying citation.

2. Violations of Section 77.1001

Section 110(c) provides that, whenever a corporate operator violates a safety or health standard, an agent of the corporate operator who Aknowingly authorized, ordered, or carried out such violation@ shall be subject to an individual civil penalty under the Mine Act. 30 U.S.C. ' 820(c).[17] The proper legal inquiry for purposes of determining liability under section 110(c) is

[17] Section 110(c) states:

> 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

whether the corporate agent Aknew 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). To establish a knowing violation, the Secretary Amust prove only that an individual knowingly acted, not that the individual knowingly violated the law.@ *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).

We have already found that substantial evidence supports the judge=s conclusion that Sunny Ridge violated section 77.1001 on the three occasions in question. There is no dispute that Damron was Sunny Ridge=s agent when each of the violations occurred. Damron was fully aware of each of the violative conditions since he inspected the cited areas each day the orders were issued. Tr. 124, 228, 290. With respect to Order Nos. 4020075 and 4020076, Damron admitted that the cited areas needed some corrective measures. Tr. 229, 291. In light of these facts, we find that substantial evidence supports the judge=s conclusion that Damron is liable under section 110(c) for each of the highwall violations.

In assessing penalties against Damron, however, the judge failed to make all of the requisite findings under section 110(i) of the Mine Act. The judge made findings on Damron=s negligence and the gravity of the alleged violations. 17 FMSHRC at 656, 657, 658. Regarding whether the violations were abated in good faith, evidence appears in the record from which the Commission could enter findings. Tr. 132, 229, 292; Gov=t Exs. 5, 8, 11. But with respect to the three criteria of history of previous violations, appropriateness of the penalty based on Asize,@ and effect of the penalty on ability to Acontinue in business,@ no evidence appears in the record, as to Damron as an individual, on which any findings could be entered either by the judge or by the Commission on review. The only record evidence on these factors relates to Sunny Ridge as an operator.

Section 110(i) of the Mine Act states that Athe Commission shall consider *the operator=s* history of previous violations, the appropriateness of such penalty to the size of the business of *the operator charged*, whether *the operator* was negligent, the effect on *the operator=s* ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.@ 30 U.S.C. ' 820(i) (emphasis added). Although section 110(c) subjects individuals to Athe same civil

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> 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.

penalties, fines, and imprisonment that may be imposed upon@ a mine operator, no separate penalty factors applying only to individuals appear in the Act. Yet, from the plain language of section 110(i), it would appear that Congress did not have *individuals* in mind when it fashioned the penalty criteria set forth in that provision.

The penalty criteria, as well as section 110(c), were carried over with no significant changes from section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976) (amended 1977) (ACoal Act@). The legislative history of these sections provides little guidance of Congressional intent regarding how the penalty criteria be applied to individuals. The drafters of the Coal Act did, however, indicate a recognition that the criteria for penalties assessed against agents be independent of the operator criteria:

> It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him. . . . The committee does not, however, intend that the agent should bear the brunt of corporate violations.

H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1041-42 (1975). We view this as evidence that Congress did not intend the penalty criteria to be applied to individuals in the same fashion they are applied to operators. Such an approach would be unfair because it would tie the individual=s liability to the operator=s conduct and financial resources, and would not allow Athe agent [to] stand on his own.@ *Id*. It could also result in inordinately high penalties being assessed against individuals, which would clearly be contrary to Congress=s intention that agents not Abear the brunt of corporate violations.@ *Id*.

The Supreme Court has held that, in interpreting a single enactment, courts should give the statute Athe most harmonious, comprehensive meaning possible.@ *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Interpreting sections 110(c) and 110(i) harmoniously, we hold that, in keeping with our prior holding that Afindings of fact on the statutory penalty criteria *must* be made,@ *Sellersburg*, 5 FMSHRC at 292 (emphasis added), Commission judges must make findings on each of the criteria as they apply to *individuals*. The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus consider such facts as an individual=s income and family support obligations, the appropriateness of a penalty in light of the individual=s job responsibilities, and an individual=s ability to pay. Similarly, judges should make findings on an individual=s history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing an operator=s penalty for the violation underlying the section 110(c) liability.

Because the judge did not make any findings on Damron=s history of previous violations, or on the appropriateness and effect of the penalties assessed against him, and given the lack of record evidence on which we could enter any findings on these criteria, we remand this matter to the judge so that he can make separate findings on each of the statutory penalty criteria. We direct the judge to institute further proceedings as necessary to obtain evidence that will enable him to make findings pertinent to Damron=s individual liability.

VI.

Mitch Potter=s Liability Under Section 110(c)

A. Factual and Procedural Background

The Secretary charged Sunny Ridge president Mitch Potter with knowingly authorizing, ordering, or carrying out (along with Tracy Damron) the alleged highwall violations described in Order Nos. 4020075 and 4020076. The Secretary proposed penalties totaling $12,000 against Potter, which Potter challenged.

The judge found that Potter was liable under section 110(c) for the violations alleged in Order Nos. 4020075 and 4020076. 17 FMSHRC at 659. The judge stated:

> Mr. Potter supervised the day-to-day operations of the corporation. He was present at Mine No. 9 on January 27, 1993, and was aware of the conditions of the highwalls involved in the two orders before the inspection. Also, Mr. Potter was aware of previous citations issued by Inspector Cure for similar violations of the same standard. I find that Mr. Potter was in a position to prevent the violations found on January 27, 1993, but failed to take action to do so.

Id. at 658-59. The judge assessed civil penalties against Potter of $6,000 for each order. *Id*. at 659. We subsequently granted Potter=s petition for discretionary review challenging the judge=s findings of liability and penalty assessments.

B. Disposition

Relying on the arguments advanced elsewhere in petitioners= joint brief, Potter argues that the judge=s findings of violations are not supported by substantial evidence. S.R. Br. at 19. Potter also argues that his conduct was not Aknowing.@ Citing his subjective belief that the cited highwalls were sound, Potter asserts that the Secretary failed to prove that he knew of any conditions that may have violated section 77.1001. *Id*. The Secretary responds that substantial evidence supports the judge=s conclusion that Potter is liable under section 110(c) for the two alleged violations of section 77.1001. S. Br. at 30-31, 34-35. The Secretary argues that section 110(c), rather than imposing a subjective standard, requires an operator=s agent to act in an objectively reasonable manner. *Id*. at 22. The Secretary contends that, with respect to each of

the two charges brought against him, Potter failed to meet this standard of care. The Secretary points out that Potter testified he was at the mine on the day the orders were issued and was familiar with the cited highwall conditions. *Id*. at 31 (citing Tr. 326). The Secretary does not address the propriety of the penalties assessed by the judge.

With respect to Order No. 4020075, there is no evidence in the record that Potter actually knew of conditions in the No. 2 Pit on the day the order was issued. Nor was any evidence presented at the hearing that Potter had been informed of the conditions, or had any reason to know of the conditions. The only mention of Potter in all of the testimony on this order is Inspector Damron=s statement that Potter attended a closeout conference *after* the order was issued. Tr. 243. Nevertheless, the judge found that Potter Awas aware of the conditions of the highwall@ cited in Order No. 4020075. 17 FMSHRC at 659.

The judge=s finding, however, is not supported by substantial evidence. Although Potter was at the mine on the day in question (Tr. 325-26), this fact alone does not support the judge=s finding. Because substantial evidence does not support a finding that Potter knew or should have known about the hazardous conditions in the No. 2 Pit, we reverse the judge=s conclusion that Potter is liable for the violation charged in Order No. 4020075 and vacate the $6,000 penalty assessed by the judge.

In contrast, there is no dispute that Potter was aware of the conditions in the No. 1 Pit cited in Order No. 4020076. Tr. 326. He also discussed the condition of the spoil bank in the pit with Tracy Damron and Sunny Ridge=s safety director, the three of whom agreed that conditions were bad. Tr. 288, 291-92. We have held that A[i]f a person in 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, he has acted knowingly and in a manner contrary to the remedial nature of the statute.@ *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981). Potter knew about the highwall and spoil bank problems in the No. 1 Pit, yet failed to take any measures to correct those problems. We thus find that the judge properly concluded that he knowingly violated section 77.1001 with respect to Order No. 4020076.

Regarding the $6,000 penalty the judge assessed against Potter for this violation, as with the penalties he assessed against Damron, the judge failed to make any separate findings of fact on the section 110(i) penalty criteria. *See* 17 FMSHRC at 659. Findings appear elsewhere in the judge=s decision on the gravity of the alleged violations (*id*. at 657-58), and evidence appears in the record on whether the violations were abated in good faith (Tr. 229, 292; Gov=t Exs. 8, 11). But with respect to the four criteria concerning Potter=s negligence and history of previous violations, and the appropriateness and effect of the penalty assessed against him, no evidence appears in the record on which any findings could be entered, as to Potter individually, by either the judge or the Commission. For the reasons for which we remanded the judge=s assessment of penalties against Damron, we also vacate this penalty and remand for reassessment. The judge must make separate findings on each of the statutory penalty criteria, and must institute further proceedings as necessary to obtain evidence that will enable him to make such findings.

VII.

Conclusion

For the foregoing reasons, we (1) vacate and remand the judge=s determination that Sunny Ridge violated section 77.405(b) and that the violation was S&S, and direct him to fully analyze and weigh the relevant testimony of record, make appropriate findings, and fully articulate the reasons and bases for his decision; (2) affirm the judge=s findings with respect to each of the three alleged violations of section 77.1001 set forth in Order Nos. 4020210, 4020075, and 4020076, Tracy Damron=s liability for all three violations, and Potter=s liability for the violation charged in Order No. 4020076; (3) reverse the judge=s determination that Potter is liable for the violation charged in Order No. 4020075; (4) vacate the judge=s determination that Damron is liable for the violation charged in Citation No. 4020202, and remand for further proceedings consistent with our remand of the underlying citation; and (5) vacate and remand the penalties assessed by the judge against Damron and Potter for each of the violations for which they are liable, and direct the judge to make the necessary findings as to their individual penalty assessments and to institute further proceedings to obtain evidence that will enable him to make such findings.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioner Riley, dissenting in part:

While I am in general agreement with the majority, I am concerned about the majority=s decision to affirm civil penalties ordered by the administrative law judge for three highwall violations and therefore dissent on that issue alone. I am certainly aware of and appreciate the Commission=s authority to independently set appropriate penalties for violations of the Mine Act. It is simply not clear to me that is what occurred in this case.

I am troubled by the indecipherable criteria used to calculate the appropriate sanction. The judge=s penalty assessment is not based on any discernable mathematical formula nor supported by any comprehensible legal rationale and is therefore unreviewable.

It is also likely, although not clear, that the judge was influenced by the Secretary=s questionable posthearing argument to double the original penalties assessed against Sunny Ridge for the highwall violations. This extraordinarily punitive proposal has the appearance of retaliation for exercising and vigorously pursuing due process rights. Consequently, it must be challenged. Since the judge=s decision does not allow us to determine to what extent he was influenced by that argument, his penalty assessment must be vacated and remanded for a more complete explanation.

Order No. 4020210 (August 18, 1992 Highwall Order). The inspector observed material on the side of the Number 3 **2** Pit consisting of blasted rocks of various sizes that formed a vertical highwall approximately 25 feet high and 200 feet long. 17 FMSHRC 648, 655 (April 1995) (ALJ); Tr. 120, 122, 138. Inspector Cure observed four pieces of equipment operating below the spoil bank. 17 FMSHRC at 655. The Secretary=s MSHA staff proposed a penalty of $4,600.

In his posthearing brief, the Secretary argued that this proposed penalty should be doubled Ato reflect the lack of good faith and high level of negligence attributable to [Sunny Ridge].@ S. Posthearing Br. at 31-32. The judge, noting that he had considered Aall of the criteria for civil penalties@ under section 110(i) of the Mine Act, but without making any separate findings of fact on the criteria, assessed a penalty of $8,000 against Sunny Ridge for violating section 77.1001. 17 FMSHRC at 656. Without commenting on the Secretary=s argument for vastly increasing the penalty, or offering any other explanation, the judge assessed a penalty almost double that originally proposed by MSHA. In keeping with *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7th Cir. 1984), the judge should be directed on remand to fully explain his penalty assessment.

Order No. 4020075 (January 27, 1993 Highwall Order, Pit No. 2). When MSHA Inspector Billy Damron came to the Number 2 Pit, he observed loose, hazardous, and unconsolidated material that had not been stripped from the approximately 65-foot high highwall and spoil side of the pit. 17 FMSHRC at 656-57. It is worthwhile to note that the highwall in Pit No. 2 was 2 **2** times as high as the August 1992 violation in Pit No. 3 **2** and, therefore, arguably

more dangerous. Inspector Damron observed one piece of equipment operating beneath the highwall. *Id*. Recognizing the increased risk, MSHA proposed a penalty of $7,500.

In his posthearing brief, the Secretary argued that the proposed penalty should be doubled Ato reflect the lack of good faith and high level of negligence attributable to [Sunny Ridge].@ S. Posthearing Br. at 31-32. The judge concluded that Sunny Ridge violated section 77.1001. 17 FMSHRC at 659. Noting that he had considered Aall of the criteria for civil penalties@ under section 110(i) of the Mine Act, but without making any separate findings of fact on the criteria, the judge assessed a $10,000 penalty against Sunny Ridge. *Id*. at 657.

As with Order No. 4020210, however, the judge assessed a penalty significantly higher than that originally proposed by MSHA without commenting on the Secretary=s argument for a vastly increased penalty, or offering any other explanation. (The $10,000 penalty assessed by the judge is 33 **a** percent higher than the $7,500 penalty originally proposed by MSHA.) The judge should be directed on remand to provide a full explanation of his penalty assessment.

Order No. 4020076 (January 27, 1993 Highwall Order, Pit No. 1). Inspector Damron observed loose, hazardous material on the face and top of a highwall and on the spoil side in the Number 1 Pit. 17 FMSHRC at 657. The highwall was approximately 90 to 100 feet high, *id*. at 657-58, four times higher than the August 1992 violation and approximately 40 percent higher than the highwall violation in Pit No. 2 earlier on the same day. Several pieces of equipment were operating under the highwall, and footprints indicated individuals had worked or traveled under the spoil bank. *Id*.

Considering the greater threat presented by the highwall, MSHA assessed a proposed penalty of $9,200 against Sunny Ridge. In his posthearing brief, the Secretary argued that this proposed penalty should be doubled Ato reflect the lack of good faith and high level of negligence attributable to [Sunny Ridge].@ S. Posthearing Br. at 31-33. Noting that he had considered Aall of the criteria for civil penalties@ under section 110(i) of the Mine Act, but without making any separate findings of fact on the criteria, the judge assessed a $10,000 penalty against Sunny Ridge. 17 FMSHRC at 658. Again, without commenting on the Secretary=s argument for greatly increasing the proposed penalty, or offering any other explanation, the judge assessed an amount higher than the civil penalty originally proposed by MSHA. This time, however, without regard to the seriousness of the violation, the judge=s adjustment of the penalty was quite modest.

It is clear that as the height of each violative highwall increased, so too were MSHA=s initial penalty assessments adjusted upward commensurate with the increased danger. While the height of the highwall violations increased over threefold, the penalties assessed increased twofold. Apparently not content with the results of MSHA=s initial calculations which according to the Program Policy Manual and Enforcement Guidelines would have included all relevant factors including negligence, the Secretary, citing extreme bad faith, proposed in his posthearing brief to double the civil penalties yet again. The judge, however, made no specific findings on nor even mentioned the extreme bad faith issue in his decision.

This silence, however, did not stop the judge from more or less endorsing the Secretary=s retaliatory posthearing brief suggestion for one violation. Without a shred of explanation, the judge increased the proposed penalty by approximately 75 percent for what was probably the least serious highwall violation. What were his reasons when, for an arguably more serious violation of the same standard, the judge, again without explanation, substantially modified the Secretary=s questionable suggestion, increasing the proposed penalty by 33 a percent? What was the judge thinking when, for the most serious violation, he almost ignored the Secretary=s punitive exhortation, increasing the proposed penalty by only 8 : percent? His actions leave me with more questions than answers about his rationale for assessing the penalties. The judge must explain more precisely exactly what he did and why he did it.

The high level of negligence also offered in posthearing brief as the other justification for multiplying penalties was noted on the face of the citations and presumably considered by area compliance staff and at the time they determined appropriate penalty assessments for the cited offenses. I question why the Secretary=s counsel did not raise this argument at the hearing. I am concerned that Arubber stamping@ this maneuver to increase the exposure of operators who refuse settlement will compromise statutory due process rights afforded to all persons under our jurisdiction, including uncooperative and argumentative ones.

James C. Riley, Commissioner