FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 30, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. LAKE 95-114-RM
	:	LAKE 95-239-M
LAFARGE CONSTRUCTION	:	LAKE 96-28-M
MATERIALS, and	:	
THEODORE DRESS	:	

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

DECISION

BY: Jordan, Chairman; Marks, and Beatty, Commissioners

These consolidated 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@), involve a citation issued to Lafarge Construction Materials (ALafarge@) alleging an unwarrantable and significant and substantial (AS&S@) violation of 30 C.F.R. ' 56.16002(a)(1)[1] for failure to remove loose materials before allowing a miner to enter a surge bin, and a related allegation that Theodore Dress, a foreman for Lafarge, is personally liable under section 110(c) of the Mine Act, 30 U.S.C. ' 820(c), for knowingly authorizing the violation. Administrative Law Judge David F. Barbour concluded that Lafarge violated section 56.16002(a)(1) and that the violation was S&S and the result of unwarrantable failure. 18 FMSHRC 2199, 2208-10 (Dec. 1996) (ALJ). He also concluded that Dress knowingly authorized the violation by not taking additional steps to clear

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[1] Section 56.16002 provides, in part:

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

the surge bin. *Id.* at 2210-12. For the reasons that follow, we affirm the judge=s findings of violation, unwarrantable failure, and section 110(c) liability.

I.

Factual and Procedural Background

On July 15, 1994, Theodore Dress, a foreman at Lafarge=s Marblehead quarry in Ottawa County, Ohio, noticed sand leaking through a hole in the discharge chute at the bottom of the quarry surge bin. 18 FMSHRC at 2200-03. The surge bin is a metal structure measuring approximately 22 by 22 feet square and 13 feet high. *Id.* at 2201-02; Tr. 92. Crushed limestone, up to 10 inches in size, is deposited into the top of the surge bin. 18 FMSHRC at 2201. The surge bin has mechanical vibrators that shake the bin and cause the limestone to fall through openings in the bottom of the bin into a discharge chute and onto a conveyor belt below, where it is transported for further processing. *Id.* at 2201-02. In addition, a hand bar is available that can be used to manually scale the limestone inside the surge bin. *Id.* at 2203; Tr. 43, 105-06, 119-20.

In order to repair the hole, Dress determined that a metal patch needed to be welded over the hole from the inside of the discharge chute. 18 FMSHRC at 2203. In preparation for the repair, Dress ordered that the vibrators be kept running until electronic sensors indicated the surge bin was empty, and that the vibrators be run for an additional 20 to 30 minutes to dislodge any remaining loose materials. *Id.*; Tr. 40, 97, 113. Following the vibrating procedure and after the surge bin was deenergized and locked out, Dress and Daniel Harder, the miner assigned to do the repair, visually inspected the inside of the surge bin from the discharge chute. 18 FMSHRC at 2203. Both men observed an inverted cone-shaped wall of hard-packed fines,[2] known as the Adead bed,@ that had compacted around the openings in the bottom of the bin. *Id.* at 2202-03; Tr. 96, 107-08. At the top of the dead bed, which was about 6 to 8 feet high, was a ridge that caused loose rock deposited inside it to slide down through the openings into the discharge chute and loose rock deposited outside it to accumulate along the sides of the surge bin. 18 FMSHRC at 2202; Tr. 96. Both men observed loose rocks at the top of the dead bed, which they believed lay outside the ridge and would not fall. 18 FMSHRC at 2203. They did not use the scaling bar to knock down this loose material, concluding that it would be safe to enter the surge bin to perform the repair. *Id.*

Harder climbed inside the surge bin and welded the metal patch for approximately 45 minutes when he heard rocks begin to fall around him. *Id.* at 2204. He crouched down and

[2] AFines@ is defined, in part, as A[f]inely crushed or powdered material, e.g., . . . crushed rock, . . . as contrasted with the coarser fragments . . . .@ American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 208 (2d ed. 1997).

attempted to exit the surge bin, but succeeded in getting only his head out of the bottom opening because rocks had fallen around his back and shoulders preventing him from getting all the way out. *Id.* Dress, who had remained outside the surge bin, helped Harder remove some of the rocks and, after about 5 minutes, Harder was freed. *Id.* Harder suffered minor cuts and bruises. *Id.*; Tr. 36-37.

While conducting a regular inspection at the Marblehead quarry in October 1994, James Strickler, an inspector with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), learned of the accident and issued to Lafarge Citation No. 4413670, pursuant to section 104(a) of the Mine Act, 30 U.S.C. ' 814(a), alleging an S&S violation of section 56.16002(a)(1) for failure to remove loose materials before entering the bin. 18 FMSHRC at 2204-05; Gov=t Ex. 3. Strickler later modified the citation to allege, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. ' 814(d)(1), an unwarrantable failure to comply with the standard. 18 FMSHRC at 2205; Gov=t Ex. 3. Subsequently, the Secretary proposed a civil penalty assessment of $3,800 against Lafarge. 18 FMSHRC at 2210. In addition, following a special investigation, the Secretary proposed a civil penalty assessment of $3,000 against Dress, pursuant to section 110(c) of the Mine Act, alleging that, by not taking additional steps to clear the surge bin of loose materials, he knowingly authorized the violation. *Id.* at 2210-12. Lafarge and Dress challenged the proposed assessments.

Following an evidentiary hearing, the judge concluded that Lafarge violated section 56.16002(a)(1), that the violation was S&S, and that it resulted from Lafarge=s unwarrantable failure to comply with the standard. *Id.* at 2208-10. Finding the language of the standard clear, the judge determined that, although the surge bin was equipped with mechanical devices and other effective means to remove loose materials, Lafarge failed to Aoperate the vibrators to eliminate all of the loose rock, and . . . to ensure that the remaining loose rock was barred down prior to Harder entering the bin . . . .@ *Id.* at 2206-07. He further determined that the activity of patching the hole constituted Anormal operations@ within the meaning of the standard. *Id.* at 2207-08. The judge determined that the violation was the result of unwarrantable failure because Ano one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate@ and A[t]he company should have required more,@ e.g., it should have visually inspected the surge bin from above and used the scaling bar to remove any loose material, regardless of how long the vibrators had run. *Id.* at 2209-10. In addition, the judge concluded that Dress knowingly authorized the violation because he observed the loose materials yet failed to take additional steps to clear the surge bin. *Id.* at 2210-12. Accordingly, the judge assessed civil penalties of $2,500 against Lafarge and $500 against Dress. *Id.* at 2210, 2212. The Commission granted the petition for discretionary review subsequently filed by Lafarge and Dress challenging the judge=s conclusions.

II.

Disposition

Lafarge and Dress (the AContestants@) argue that the judge erred in concluding that the standard was violated. L&D Br. at 5-13; L&D Reply Br. at 3-4. The Contestants assert that the surge bin was Aequipped@ with mechanical devices for handling materials, and that the plain language of the standard does not regulate how such devices are to be utilized nor specify that the vibrators be run longer than 25 to 30 minutes or that the bin be inspected from the top. L&D Br. at 5-7, 9-12; L&D Reply Br. at 3-4, 6. They also assert that patching the hole in the surge bin does not constitute Anormal operations,@ and thus the standard is inapplicable. L&D Br. at 7, 12-13. In addition, the Contestants argue that, by following the quarry=s longstanding procedures of clearing and inspecting the surge bin, which were consistent with industry practice, Lafarge=s actions did not amount to unwarrantable failure. *Id.* at 6-7, 14-19; L&D Reply Br. at 1-5. They further argue that Dress= actions did not reflect a disregard for safety or legal requirements, and so did not constitute a knowing violation under section 110(c). L&D Br. at 7, 20-24; L&D Reply Br. at 4-6.

The Secretary responds that the judge properly concluded that Lafarge violated the standard. S. Br. at 1, 7-14. She asserts that her interpretation of the standard is entitled to deference because it is consistent with the language and purpose of the standard. *Id.* at 8-9. She also asserts that the standard provided notice that devices with which surge bins are Aequipped@ must be used in an effective manner to be considered an Aeffective means of handling materials,@ and that repairing the surge bin was part of Anormal operations.@ *Id.* at 10-13. In addition, the Secretary argues that substantial evidence supports the judge=s conclusions that the violation was the result of unwarrantable failure and that Dress knowingly authorized, ordered, or carried out the violation. *Id.* at 1-2, 14-19.

A. Violation

The parties disagree over the meaning of section 56.16002(a)(1). The Alanguage of a regulation . . . is the starting point for its interpretation.@ *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm=n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary=s interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (reviewing body must Alook to the administrative construction of the regulation if the meaning of the words is in doubt@) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (ADeference . . . is not in order if the rule=s meaning is clear on its face.@) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502,

1509 (D.C. Cir. 1984)). Here, we conclude that the language of section 56.16002(a)(1), which requires surge bins to have Amechanical devices or other effective means of handling materials,@ clearly requires that the devices be used effectively. As we explain below, we also conclude that the plain language of the regulation supports the Secretary=s view that repairing the surge bin constitutes Anormal operations.@

We find unpersuasive the Contestants= argument that the standard was not violated because the surge bin was Aequipped@ with mechanical devices for handling materials. Although the bin was furnished with vibrators and a scaling bar to remove loose rock, the record indicates that Lafarge failed to utilize these devices effectively. After Lafarge operated the vibrators for 25 to 30 minutes, Dress and Harder looked inside the bin and, despite their observation of loose materials, they did not continue to run the vibrators or use the scaling bar to clear the loose materials before Harder entered the bin.[3] 18 FMSHRC at 2203; Tr. 16-18, 24, 27-28, 41, 43, 116-20. We agree with the judge that, Aunder the standard, both the means for achieving the end and effective use of the means were required.@ 18 FMSHRC at 2207. By employing the words Aso that,@ the standard is clearly designed to achieve a result, and that result cannot be achieved unless the equipment is actually utilized properly. In this case, we conclude that the standard requires effective use of the vibrators and scaling bar, and that Lafarge failed to effectively use them to clear the loose materials before allowing Harder to enter the bin.

In addition, we reject the Contestants= argument that the standard is inapplicable because the activity of patching the hole in the surge bin does not constitute Anormal operations.@ The judge found that patching the hole constituted maintenance of the surge bin and that maintenance is considered part of normal operations. *Id.* at 2205. The Contestants also characterized the work as a maintenance task. *See* L&D Br. at 4 (referring to the Awelding maintenance task@). In fact, Dress characterized his duties as overseeing maintenance and testified that maintenance is part of normal operations at the quarry. Tr. 56, 111-12; *see also* Tr. 53 (referring to maintenance of the discharge chute under the surge bin). Thus, we conclude that patching the hole is clearly covered by the phrase Anormal operations@ and that the standard adequately expresses the Secretary=s intention to reach that activity. From our conclusion that the meaning of the standard

[3] We agree with the Contestants that the standard does not specify procedures for clearing or inspecting the surge bin, e.g., that the vibrators be run longer than 25 to 30 minutes, the scaling bar be used to clear loose materials, or the bin be inspected from above. By his statements that Lafarge should have required that the bin be inspected from above and that the bar be used to remove any loose material (18 FMSHRC at 2209, 2212), the judge merely articulated the means that were available to Lafarge for further action.

is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (holding that adequate notice provided by unambiguous regulation).

Based on the foregoing, we conclude that substantial evidence[4] supports the judge=s determination that Lafarge violated section 56.16002(a)(1) by Aexpos[ing Harder] to entrapment by the caving or sliding of materials@ inside the surge bin. We therefore affirm the judge=s finding of a violation.

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 (Dec. 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 disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission=s unwarrantable failure test). In addition, the Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams Apresented a danger@ to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon Acommon knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment@); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were Ahighly dangerous@). As we explain below, we conclude that substantial evidence supports the judge=s determination that Lafarge=s failure to effectively use the vibrators and scaling bar to protect Harder from falling materials constituted a serious lack of reasonable care sufficient to find an unwarrantable failure.

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[4] When reviewing an administrative law judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means A>such relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.=@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

We agree with the judge that the hazard posed by loose materials falling from atop the surge bin was serious and thus warranted heightened precautions by the operator. 18 FMSHRC at 2209. As Lafarge=s foreman, Dress was held to a high standard of care in this matter. *E.g.*, *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997). The record indicates that Dress observed Aloose and general[] large rock@ on top of the dead bed in the surge bin. Gov=t Ex. 2 at 5. In fact, it is undisputed that both Dress and Harder observed loose rock in the bin. The basis of this unwarrantable failure charge, therefore, is their unfounded conclusion that the rock was located where it would not cause harm.[5] Dress= observation of Aloose and general large rock@ on top of the cone-shaped interior of the surge bin should have served as a forceful warning that a dangerous situation existed. He simply assumed, based on his belief that the rock was laying outside the ridge, that it would not cause a perilous situation. Instead, the mere presence of the rock should have prompted Dress to take reasonable measures to ascertain whether it was actually positioned so that it would do no harm and, if not, to make efforts to remove the rock.

Given the fact that the observation of the loose rock should have generated extra precautions, and an inquiry as to whether the rock presented a danger, our dissenting colleague=s insistence that the danger was not obvious (slip op. at 18) misses the point: the fact that the danger might not have been immediately obvious did not absolve Dress of his duty to investigate the situation. If he had not hastily jumped to a conclusion, but instead conducted the more thorough examination that the presence of loose rock warranted, the danger would have become quite apparent. As the judge pointed out, Lafarge could have taken further steps to ensure safety in this dangerous situation, i.e., it could have required that the bin be viewed from above and that a scaling bar be used to remove the loose materials, but Lafarge failed to take those steps. 18 FMSHRC at 2209. The judge correctly concluded that Dress= failure to recognize the danger and to take further steps to clear the bin reflected a Aserious lack of reasonable care.@[6] *Id.* at 2209-10.

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[5] We believe that our dissenting colleague places undue weight on the judge=s general statement that rock *outside the ridge* of the dead bed Aslid[e]s away from the openings and does not pose a hazard to anyone working below.@ Slip op. at 16 (quoting 18 FMSHRC at 2202). As the dissent acknowledges, however, the judge also found that rock *inside the ridge* of the dead bed Aslid[e]s down through the opening.@ *Id.* Rock falling inside the ridge was the rock that covered Harder, which is the focus of this inquiry. The falling of rock inside the ridge supports the judge=s conclusion that Apatching the hole from inside the bin potentially was a very dangerous job.@ 18 FMSHRC at 2209. The judge explained his finding of high danger as follows: AAny miner assigned to do the job was subject to being injured or killed unless loose rock above the miner was removed. This potential threat required heightened precautions on the part of Lafarge and those acting for it.@ *Id.* The fallen material constitutes substantial evidence in support of the judge=s finding of danger.

[6] The judge=s discussion made clear that, contrary to the dissent=s claim (slip op. at 16), his analysis went far beyond the mere occurrence of the accident to support his unwarrantable failure finding. *See* 18 FMSHRC at 2209-10.

In sum, we agree with the judge that Lafarge=s procedures were inadequate, and that Lafarge should have required more. *Id.*

We find unavailing the Contestants= argument that, by following the quarry=s longstanding procedures of clearing and inspecting the surge bin, which were consistent with industry practice, Lafarge=s actions did not amount to unwarrantable failure. Regardless of the accuracy of this statement, we are not inclined to permit Lafarge to disregard the clear requirements of the standard, and substitute in its place a questionable industry practice that does not satisfactorily prevent the entrapment of miners.

Commissioner Verheggen contends that we are not utilizing the Commission=s traditional unwarrantable failure test. Slip op. at 17-18. He faults us for focusing on the high degree of danger posed by the violation and failing to question whether the danger was obvious and whether the operator was on notice that greater compliance efforts were required. *Id.* at 17-19. Contrary to our colleague=s assertion, we are not departing from the Commission=s precedent setting forth the criteria for an unwarrantable failure determination. Rather, consistent with prior Commission cases on unwarrantable failure, we are applying only those factors that are relevant to the facts of this case.[7] Furthermore, the judge=s analysis fully addressed these factors when he found that, given the high degree of danger, the operator should have been aware of the hazardous condition but instead failed to take appropriate measures to remove the loose rock poised above the miner. 18 FMSHRC at 2209; *see Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813-15 (Aug. 1998) (operator=s awareness of significant and obvious danger supports unwarrantable failure). In addition, the judge=s decision clearly reflects his view that the danger was obvious. 18 FMSHRC at 2209 (AHarder was required to work in the immediate presence of loose rock@).

When violations have exposed miners to extremely dangerous conditions, the Commission has not always relied on most of the remaining factors. A case in point is *Midwest Material*, in which the Commission found unwarrantable an operator=s extension of a crane boom. 19 FMSHRC at 34-37. As in the present case, the Commission relied on the high degree of danger and the heightened standard of care required of a foreman. *Id.* at 34-35. We specifically rejected the judge=s reliance on the short duration of the violation and contrasted the high degree of danger presented in that case with the cases involving coal accumulations, stating:

> The judge=s reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature. Given the extreme hazard created by [the foreman=s] negligent conduct, that misconduct is readily distinguishable from other types of violations **C** such as those involving the accumulation of coal dust **C** where the degree of danger and the operator=s responsibility for learning

[7] We note that Commissioner Verheggen also concludes that three of the factors are irrelevant in this case. Slip op. at 19 n.4.

of and addressing the hazard may increase gradually over time.

Id. at 36.[8] These principles apply with equal force to the present violation.

We also disagree with our dissenting colleague=s emphasis on the need to prove causation **C** in this case, how the rock fell. Slip op. at 17 (speculating that rock fall may have been caused by Harder=s actions). He cites to no Commission decisions, and we know of none, where the Secretary was required to prove causation of harm in a case involving unwarrantable failure. The aggravated conduct required for a finding of unwarrantable failure is the kind of conduct that, like simple negligence, results in a breach of duty. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* ' 30, at 164 (5th ed. 1984). On the other hand, causation is required in Aa cause of action founded upon negligence, from which liability for damages to another=s interests will follow.@ *Id.* at 164-65. Causation is not at issue in an unwarrantable failure case in which the relevant inquiry is simply whether aggravated conduct occurred, not whether one entity harmed another.

Based on the foregoing, we conclude that substantial evidence supports the judge=s determination that Lafarge demonstrated a serious lack of reasonable care by failing to clear the loose materials atop the surge bin to adequately protect Harder. Therefore, we affirm the judge=s unwarrantable failure holding.

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 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 (Jan. 1981), *aff=d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 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

[8] *See also, e.g.*, *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (holding unwarrantable, without discussion of obviousness, extent, duration, or abatement efforts, a foreman=s decision to permit use of shuttle car with serious brake problem) (citing *Quinland Coals*, 10 FMSHRC at 708-09).

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*, 14 FMSHRC at 1245. Here, we

conclude that substantial evidence supports the judge=s determination that Dress is liable under section 110(c) of the Mine Act for knowingly authorizing, ordering, or carrying out the violation.

We agree with the judge=s conclusion that Dress should have taken additional steps to clear the surge bin. 18 FMSHRC at 2210-12. In *Kenny Richardson*, the Commission stated that a person has reason to know under section 110(c) Awhen he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.@ 3 FMSHRC at 16 (quoting *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 780 (W.D.S.C. 1950)). The record establishes, and the Contestants do not dispute, that Dress had actual knowledge of the loose materials atop the surge bin yet failed to take measures that were available to remove the loose materials before allowing Harder to enter the bin. Instead, Dress relied on his opinion that the materials would not fall. This opinion was based on Dress= visual inspection of the bin from the discharge chute. The judge concluded that such inspection did not give a sufficiently full perspective of what remained in the bin and that A[i]nspection from above also was necessary.@ 18 FMSHRC at 2209. Under the circumstances, we conclude that Dress had reason to know of the serious danger of falling rock and that his belief that Harder could safely enter the surge bin was unreasonable. *Cf. New Warwick Mining Co.*, 18 FMSHRC 1365, 1370-71 (Aug. 1996) (finding aggravated conduct under unwarrantable failure analysis because operator=s efforts to achieve compliance with standard were unreasonable). As Lafarge=s agent,[9] Dress was responsible for recognizing the serious hazard posed by the loose materials and Ait became incumbent upon him to meet a standard of care proportionate with the danger.@ 18 FMSHRC at 2211-12. Instead, Dress relied on procedures that the judge found Awere wholly inadequate.@ *Id.* at 2212.[10]

[9] There is no dispute regarding Lafarge=s corporate status and Dress= status as its agent. 18 FMSHRC at 2210.

[10] We note that section 110(c) does not require that an agent intend that someone will be hurt. *See Kenny Richardson*, 3 FMSHRC at 15 (rejecting argument that willfulness must be shown to establish personal liability under Coal Act).

With respect to the concerns of our dissenting colleagues, we note that both Commissioners Riley and Verheggen refer to the Ajudgment call@ involved in assessing the safety of the surge bin. Slip op. at 13-14 & 20. In this regard, Commissioner Verheggen asserts that no Ainformation@ was available to provide Dress with either actual knowledge or reason to know of the violative condition. *Id.* at 19.[11] As we have stated, Dress actually observed the loose rock from the vantage point of the discharge chute and, subsequently, failed to view the bin from above. Such a view would have provided Dress with further information to enable a better-informed Ajudgment call@ regarding the condition inside the surge bin. Based on these facts, we conclude that substantial evidence supports the judge=s determination that Dress demonstrated a Alapse of judgment@ in this case. 18 FMSHRC at 2212.

In addition, Commissioner Verheggen asserts that the judge=s finding that Dress acted in good faith and with a degree of care appropriate to the condition inside the surge bin militates against finding section 110(c) liability. Slip op. at 19. Although Dress may have had a good faith belief that the surge bin was safe, as we explained above, his belief was unreasonable. An unreasonable belief that a practice is safe, even if held in good faith, is not a defense to liability under section 110(c). *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (Aug. 1994) (*reasonable*, good faith belief of mine manager served as a defense to section 110(c) liability); *cf. Cyprus Plateau*, 16 FMSHRC at 1615-16 (unreasonable albeit good faith belief of foreman was no defense to unwarrantable failure). Moreover, contrary to our colleague=s assertion, the judge specifically found that Dress failed to attain a proper standard of care. *See* 18 FMSHRC at 2211-12 (ARather than [meet a standard of care proportionate to the danger], Dress relied on the usual procedures . . . [that] were wholly inadequate.@).

Based on the foregoing, we conclude that substantial evidence supports the judge=s determination that Dress demonstrated aggravated conduct by failing to clear the loose materials

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[11] Commissioner Verheggen=s reliance on Inspector Strickler=s one time use of the isolated phrase Ajudgment call,@ in an attempt to overturn the judge (slip op. at 20), is inconsistent with the precepts of substantial evidence review. Under section 113(d)(2)(A)(ii) of the Mine Act, 30 U.S.C. ' 823(d)(2)(A)(ii), the Commission is charged with reviewing a judge=s findings to determine whether substantial evidence supports them. *See Eastern Associated Coal Corp.*, 13 FMSHRC 178, 185 (Feb. 1991) (A[t]he Commission=s task is not a de novo reweighing of somewhat conflicting evidence but a determination of whether there is substantial evidence in the record to support the judge=s conclusions@).

In any event, Inspector Strickler claimed only A[t]hat=s a judgment call whether it=s loose or not@ and was not using that phrase to refer to an overall assessment of the bin=s safety. Tr. 78. And, as we have noted, in this case it is uncontroverted that the material was loose, and the critical question was where the material was located. Moreover, the inspector emphasized that Dress Ashould have made sure that there wasn=t any loose material in that bin. That=s taking a little bit more time and more precaution. . . . [Dress should have] take[n] another pair of eyes up at the top of the feeder and look down on it and see if anything could be loose.@ Tr. 82.

atop the surge bin to adequately protect Harder. Therefore, we affirm the judge=s section 110(c) holding.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s findings of violation, unwarrantable failure, and section 110(c) liability.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr. Commissioner

Commissioner Riley, concurring in part and dissenting in part:

I concur with the opinion insofar as it affirms the judge=s determinations that Lafarge violated 30 C.F.R. ' 56.16002(a)(1) and that the violation was the result of Lafarge=s unwarrantable failure to comply with the standard. Slip op. at 4-9. I respectfully dissent, however, from the majority=s decision to affirm the judge=s determination that Theodore Dress is personally liable under section 110(c) of the Mine Act, 30 U.S.C. ' 820(c). Slip op. at 9-11. I conclude that substantial evidence does not support the judge=s determination that Dress is liable under section 110(c). 18 FMSHRC 2199, 2210-12 (Dec. 1996) (ALJ).

With respect to the underlying violation, the judge found, and the Commission majority agrees, that Lafarge=s actions constitute more than ordinary negligence and indicate Aa serious lack of reasonable care,@ arguably the lowest threshold of aggravated conduct necessary to support characterization of the violation as unwarrantable. Slip op. at 7, 9; 18 FMSHRC at 2210; *see Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995). Regarding individual liability, the judge emphatically stated: AIt is certain that Dress did not intentionally violate the standard.@ 18 FMSHRC at 2211. However, the judge further stated: A[I]t also is clear that intent is not the issue.@ *Id.* Therefore, the question before the Commission is whether Dress knew or should have known of the violative condition (*Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff=d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997)) in order to have Aknowingly acted@ when he violated the standard (*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))).

The record substantiates that Dress followed Lafarge=s supposedly industry standard procedures for inspecting the surge bin prior to the repair work. The judge found, and the Commission majority agrees, that, industry standard or not, Lafarge=s procedures were insufficient in light of the potential for entrapment, which actually occurred. Slip op. at 7-8; 18 FMSHRC at 2209, 2212. The judge also conceded Athe company=s relative unfamiliarity with emptying the bin.@ 18 FMSHRC at 2210, 2212. In fact, the judge went so far as to find: AThe evidence leads inescapably to the conclusion that no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate. . . . The company should have required more.@ *Id.* at 2209. It is in this factual context that the Commission must evaluate Dress= conduct. Surely the Commission majority does not intend to hold corporate agents automatically liable as individuals for the unwarrantable violations of operators. Are corporate agents expected to possess greater experience and expertise than their employers, as the judge and Commission majority would require in the instant case? AKnowing@ conduct arises not from a presumption of omniscience, but is supposed to be viewed from the perspective of a person exercising reasonable care under the circumstances. *Kenny Richardson*, 3 FMSHRC at 16 (quoting *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 780 (W.D.S.C. 1950)). Applying that principle here to what

the judge describes as a "judgment call" (18 FMSHRC at 2209) leads to the inescapable conclusion that Dress could not have been expected to have knowingly acted in violation of the standard.

Accordingly, I would reverse the judge's section 110(c) holding, which I believe lacks the requisite support in the record.

James C. Riley, Commissioner

Commissioner Verheggen, concurring in part and dissenting in part:

I agree with my colleagues that the judge=s finding of a violation of section 56.16002(a)(1) is supported by substantial evidence, and I concur in result with Part II.A of their opinion as further explained below. I disagree, however, with their conclusion that the judge properly found that the violation was unwarrantable and that Theodore Dress was personally liable for it. I therefore dissent from Parts II.B and II.C of the majority=s opinion.

1. Violation

I agree with my colleagues that Lafarge=s repair activities constituted Anormal operations@ as that phrase is used in section 56.16002(a)(1), and were thus clearly covered by the standard. I disagree, however, with the basis for the majority=s finding of a violation. They state that Athe bin was furnished with vibrators and a scaling bar to remove loose rock,@ and Aconclude that the standard requires effective use of@ these devices. Slip op. at 5. They find a violation because ALafarge failed to effectively use [these devices] to clear the loose materials before allowing Harder to enter the bin.@ *Id*.

I find that Lafarge violated the standard on much narrower grounds. As my colleagues note, section 56.16002 Ais clearly designed to achieve a result.@ *Id.* Although they fail to mention what that result is, I find the standard is clearly intended to prevent miners from being Aexposed to entrapment by the caving or sliding of materials@ in surge bins such as that used by Lafarge, and in which Aloose unconsolidated materials are stored, handled or transferred.@ 30 C.F.R. ' 56.16002(a)(1). Here, there is no dispute that Harder was entrapped by a rock fall in the surge bin. 18 FMSHRC 2199, 2204 (Dec. 1996) (ALJ). In light of this fact *alone*, I find that Lafarge violated the standard, it being well established that operators are liable without regard to fault for violations of the Mine Act. *See, e.g., Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989).

2. Unwarrantable Failure

In essence, the judge found that Lafarge had a heightened duty of care because Apatching the hole from inside the bin potentially was a very dangerous job.@ 18 FMSHRC at 2209. In support of his finding that Lafarge failed to meet its duty of care, the judge observed that although the company Arelied on procedures normally used at the quarry to make sure the bin was safe . . . [,] no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate.@ *Id*. He concluded that Lafarge=s violation was unwarrantable insofar as Athe company was guilty of a serious lack of reasonable care@ because it Ashould have required more,@ such as requiring workers to inspect the bin for loose material Afrom both below and above,@ and to scale from above for loose material Ano matter how long the vibrators had run.@ *Id*.

I find the judge=s analysis problematic for several reasons. First, it is unclear from his decision what objective criteria he used to conclude that Lafarge=s conduct amounted to Aa serious lack of reasonable care.@ *Id.* In fact, the only criteria he cites are Nelson=s uncertainty regarding Ahow long it took to clear the bin@ and Inspector Strickler=s opinion that A[i]nspection [of the bin] from above also was necessary.@ *Id*. I find these two factors alone an insufficient basis on which to hold Lafarge responsible for an unwarrantable failure to comply with section 56.16002(a)(1), particularly when viewed in the context of other findings made by the judge and the testimony of Lafarge employees.

Most of the facts of this case are undisputed. The damage to Lafarge=s surge bin required that a repair be made inside the bin. Tr. 21. Before making the repair, Lafarge followed its standard practice of running the bin empty to clear it of any loose material. 18 FMSHRC at 2203; Tr. 97-98. Harder and Dress then visually examined the bin to determine if any loose material remained. 18 FMSHRC at 2203; Tr. 23, 40-41; *see also* Tr. 98-99 (describing operator=s standard procedure Ato check the bin for loose material@). The judge noted that both men Aconcluded that it was safe for Harder to patch the hole.@ 18 FMSHRC at 2203. The judge also found that although Harder and Dress saw some loose material, they determined that Athe rock was lying on the side of the dead bed away from the opening,@ and that they both believed it would not fall. *Id*.

Notably, there is no indication in the judge=s opinion that he discredited this testimony. In fact, commenting generally on the function of the dead bed, the judge agreed with Harder and Dress that rock in the location where they observed the loose material posed no hazard. Specifically, the judge found that A[r]ock on the sides of the ridges opposite the openings slid[e]s away from the openings *and does not pose a hazard to anyone working below*.@ *Id*. at 2202 (emphasis added). He further found that A[r]ock on the other sides of the ridges slid[e]s down through the openings@ **C** and, presumably, could pose a significant hazard to workers in the bin. *Id*. In view of these findings, I believe that the critical question in this case is the location from which the material fell on Harder.

Unfortunately, the judge left this critical question unanswered insofar as he failed to comment on Dress= testimony that the loose material he observed Awas on the outside edge of the dead bed.@ Tr. 41. Instead, the judge simply concluded that Lafarge=s violation was unwarrantable by virtue of the fact that Harder was trapped by falling rock. A more careful review of the record reveals that the Secretary failed to adduce any evidence addressing the question of the location from which the rocks fell. This holds true for her rebuttal case as well **C** she offered no evidence to rebut Dress= testimony that the loose rock was situated on what the judge found to be the safe side of the dead bed. *See* 18 FMSHRC at 2202.

The record thus contains only evidence that any loose material present was in a location from which the judge found it would not pose a hazard. I find that this evidence, and the absence of any contrary evidence from the Secretary, contradicts the judge=s conclusion that the violation was unwarrantable. Indeed, I could affirm the judge=s conclusion only if I were to presume that

the rock that fell on Harder was on the hazardous side of the dead bed, a presumption for which I can find no record support.[1]

Nor is there any evidence in the record concerning *how* the rock fall occurred **C** only that it occurred in the first instance. The closest the record comes to revealing the cause of the accident is testimony by Dress that Harder apparently climbed Aoff of the vibrator@ up to a ledge, and that this may have caused the material to fall. Tr. 125-26. Although the judge did not comment on this testimony in his decision, it raises the possibility that Harder may have jarred some rock loose when climbing up to the ledge. If true, this scenario would cast considerable doubt on the judge=s finding of unwarrantable failure, which rests primarily on his conclusion that, in light of the high degree of danger associated with working in the surge bin, Lafarge did not do enough to ensure that there was no loose rock in the bin before Harder entered it (18 FMSHRC at 2209-10). If Harder=s actions caused the fall, however, there is little Lafarge could have done to prevent the accident. I believe that the judge erred in failing to consider, and make findings of fact concerning, Dress= testimony regarding whether Harder=s actions might possibly have caused the rock fall.

Indeed, I find the judge=s decision legally insufficient because he failed to examine the various factors the Commission has traditionally used in determining whether an operator=s conduct is unwarrantable. These factors include the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator=s efforts in abating the violative condition, and the operator=s knowledge of the existence of the violation. *See Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (Aug. 1998); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984).

[1] The majority nevertheless concludes that A[r]ock falling inside the ridge was the rock that covered Harder.@ Slip op. at 7 n.5. No citation to the record is offered in support of this contention. In fact, no such record evidence exists.

Obviously, these factors need to be viewed in the context of the factual circumstances of a particular case **C** some factors may be irrelevant to a particular factual scenario. But here, the judge did not go beyond examining the degree of danger posed by Lafarge=s violation **C** and erred as a result. The majority also fails to apply the Commission=s traditional unwarrantable failure test. Instead, like the judge, they collapse the test into a single dispositive factor: whether a Ahigh degree of danger [is] posed by a violation.@ Slip op. at 6. I find this approach at odds with the Commission precedent, under which it is clear we must look at a variety of factors when determining whether a violation is unwarrantable.[2] Moreover, I believe that the Atest@ used by the

[2] The cases on which the majority bases its test all involved more than just danger as factors contributing to findings of unwarrantable failure. *See Midwest Material*, 19 FMSHRC at 35 (finding Athe obvious nature of the hazard@ to be Aa further indication@ of unwarrantable failure in addition to the Aextreme danger@ of the violation); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (unwarrantable finding based on fact the operator was Aaware of the shuttle car=s serious brake problem and failed to follow up appropriately by remedying it@); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (operator Adeliberate[ly]@ removed signs that warned of dangerous roof conditions in violation of their own procedures for overriding decisions to Adanger off@ areas); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129-30 (July 1992) (considering variety of aggravating factors, including fact that operator knew and was specifically warned that work was taking place too near power lines, and operator=s inadequate measures taken to guard against known hazards associated with power lines); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure based primarily on Athe

judge and the majority hopelessly blurs the distinction between gravity and the aggravated negligence which the term Aunwarrantable failure@ describes.

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extensive and obvious nature of the conditions, the history of similar roof conditions, and [the operator=s] admitted knowledge of the conditions@). *See also Rock of Ages Corp.*, 20 FMSHRC 106, 115-16 (Feb. 1998) (considering various factors in finding unwarrantable failure in addition to extreme danger associated with violation, i.e., undetonated pyrodex explosives, including fact that a foreman=s Adiscovery of the four unexploded bags of pyrodex should have alerted [him] to the possibility of additional misfires,@ Athe experimental nature of the pyrodex blasting@ at the operator=s quarry, and operator=s inability to explain Aits negligence and the lack of safety precautions@).

Examining factors other than the danger of the violation, I find further reason to reverse the judge=s unwarrantable failure determination. From the testimony of Dress and Harder that they saw no danger when they inspected the bin, for example, it follows that the danger here was anything but obvious.[3] Indeed, the judge acknowledged that had Dress believed there was any danger, Dress would Anever@ have assigned Harder to repair the bin. 18 FMSHRC at 2211. And even the Secretary=s key witness, Inspector Strickler, conceded that any assessment of the condition of the bin would have to have been based on Aa judgment call.@ Tr. 78. It is clear from the record that no one at Lafarge actually knew a violation existed. Nor had the company been placed on notice that greater efforts were necessary for compliance. In fact, the need to make repairs to surge bins arose very infrequently (Tr. 34, 94-95), so the judge was correct in noting Ano one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate@ (18 FMSHRC at 2209) **C** or, as the record amply reveals, that the procedures were *inadequate*. Based on the unrebutted testimony of Harder and Dress that they believed the bin was safe, testimony the judge recited in his decision without disapproving it, Lafarge had no reason to believe its procedures were inadequate.[4] Accordingly, I would reverse the judge=s finding of unwarrantable failure.

3. Section 110(c)

I find the judge=s conclusion that Dress was liable under section 110(c) similarly lacking in record support or legal foundation. As the majority correctly states, section 110(c) liability arises when an individual Ain a position to protect employee safety and health . . . fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition,@ and that such liability is predicated on aggravated conduct constituting more than ordinary negligence. Slip op. at 9. Here, however, there was no Ainformation@ that would have given Dress either actual knowledge or reason to know of the existence of a violative condition in the surge bin. Moreover, the record contains no evidence that Dress engaged in any aggravated conduct **C** that he, for example, recklessly disregarded an obvious hazard, or intentionally ordered Harder to repair the bin knowing full well that a rock fall was imminent, or was indifferent to Harder=s safety. Nor do I find any evidence indicating he showed a serious lack of reasonable

[3] The majority claims that Athe judge=s decision clearly reflects his view that the danger was obvious.@ Slip op. at 8 (citing 18 FMSHRC at 2209). In fact, he made no findings that could support such an inference about his views. The majority also cites a *Cyprus Emerald* case for the proposition that an Aoperator=s awareness of . . . obvious danger supports@ a finding of unwarrantable failure. *Id.* (citing 20 FMSHRC at 813-15). Unlike the hazard in this case, though, at issue in *Cyprus Emerald* was a Avery large refuse pile **C** estimated by MSHA to be as much as 1 million tons,@ which the operator had permitted Ato develop over 18 years without attention to commonly accepted engineering principles.@ 20 FMSHRC at 814.

[4] Other factors traditionally considered by the Commission that do not appear to apply to this case include the extent of the violative condition, how long it existed, or Lafarge=s efforts to abate it.

care.

To the contrary, the evidence **C** and more importantly, the judge=s findings **C** indicate that Dress acted in good faith and with a degree of care appropriate to the conditions apparently existing before the accident. Indeed, the conditions observed by both Harder and Dress posed no *apparent* hazard. They testified that some loose material was present, but that it Awas lying on the side of the dead bed away from the opening@ (18 FMSHRC at 2203), a position from which the judge found rock Aslid[e]s away from the openings *and does not pose a hazard to anyone working below*@ (*id*. at 2202, emphasis added). Moreover, the judge included in his factual findings Dress= testimony that he did not believe work in the bin posed any danger. *Id.* at 2203. The judge also credited Harder=s testimony Athat Dress never would assign [Harder] to do a job that Dress believed was dangerous.@ *Id*. at 2211. In a similar vein, Harder testified as follows after being examined and cross examined:

> Could I just say one thing? . . . I=d just like to say on Ted=s behalf that . . . I do not believe that . . . if he thought it was dangerous in there, I don=t believe he would have ever sent me in there to do that job.

Tr. 37.

But the most significant record evidence that contradicts the Secretary=s allegation that Dress= conduct was aggravated is Inspector Strickler=s remarkable statement that to assess the safety of the bin would necessarily have involved Aa judgment call.@ Tr. 78. The term Ajudgment call@ means Aany subjective or debatable determination[,] personal opinion or interpretation.@ *Random House Dictionary of the English Language* 1036 (2d ed. 1987). In other words, a Ajudgment call@ is a determination on which reasonable minds might differ. In support of its affirming the judge=s finding of section 110(c) liability, the majority argues that Dress= Abelief that Harder could safely enter the surge bin was unreasonable.@ Slip op. at 10. Yet Dress= belief was based on what the Secretary, through her witness at trial, concedes was Aa judgment call.@ I fail to see how Dress= conduct can be found unreasonable when it is a matter on which even the Secretary concedes reasonable minds could differ. Nor do I believe that the majority=s rationale is supported by Commission precedent, under which more than mere unreasonableness is required to support a finding of section 110(c) liability.

Dress= reasonable, good faith belief that no hazard existed in the surge bin is amply supported by the record, and leads me to find the judge erred in finding section 110(c) liability. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (Aug. 1994). Accordingly, I would reverse the judge=s finding.

Theodore F. Verheggen, Commissioner

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