

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 30, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 95-214-M
	:	
HAROLD MOODY, employed by	:	
GRAND RIVER QUARRY, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (Mine Act or Act). At issue is whether substantial evidence supports former Commission Administrative Law Judge Arthur Amchan's determination that the Secretary of Labor did not satisfy his burden of establishing that Harold Moody was individually liable under section 110(c) of the Mine Act,¹ 30 U.S.C. ' 820(c), for Grand River

¹ Section 110(c) provides:

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

Quarry, Inc.'s violation of 30 C.F.R. ' 56.9300(b).² 18 FMSHRC 67 (January 1996) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging this determination. For the reasons that follow, we reverse and remand for assessment of a civil penalty.

I.

Factual and Procedural Background

Grand River Quarry, Inc. (Grand River), a corporation, owns the Gallatin Quarry in Davies County, Missouri. 18 FMSHRC at 68; Tr. 18. Grand River normally used a truck to transport finished product from its plant to a stockpile. 18 FMSHRC at 68; Tr. 33, 38. For about a year prior to the issuance of the citation, however, the truck broke down once or twice a month; on those occasions, Grand River used a Caterpillar 631 scraper that had been modified for use as a haul truck. 18 FMSHRC at 68; Tr. 109-10. The front tires of the 631 are 84 inches high. 18 FMSHRC at 68. Travel from the plant to the stockpile was on an elevated roadway that is approximately 150 feet long at a 35% downgrade. *Id.*; Tr. 30; Gov't Ex. C.³

² Section 56.9300 states in pertinent part:

(a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

³ The 631 was normally used to transport shot rock to a crusher from the blasting area by way of a different roadway than the one at issue here. 18 FMSHRC at 68.

On the morning of July 21, 1994, the truck carrying finished product to the stockpile broke down and Grand River substituted the 631 to perform this work on the elevated roadway. 18 FMSHRC at 68. Later that day, MSHA Inspector Michael Marler, who was in the midst of a multi-day inspection of the Gallatin Quarry, was informed that the 631 had gone off the elevated roadway and fallen into a drainage ditch. *Id.*; Tr. 27. Marler measured the berm at the point where the 631 left the roadway and found that it was only 24 inches high. 18 FMSHRC at 68; Tr. 31. Based on the height of the wheels on the 631 and the requirement of section 56.3900(b) that the berm be at least mid-axle height of the largest self-propelled mobile equipment usually using the roadway, Marler determined that the berm should have been at least 42 inches tall. Tr. 31-32. Accordingly, he issued Citation No. 4322450 to Grand River, alleging a significant and substantial and unwarrantable violation of section 56.3900(b). 18 FMSHRC at 68-69; Tr. 26-27; Gov't Ex. A.

Following issuance of the citation, MSHA Special Investigator Dale St. Laurent conducted a special investigation of the accident involving the 631. 18 FMSHRC at 69. As part of his special investigation, St. Laurent interviewed Robert Flint, the foreman in charge of the daily operations at the quarry, and Harold Moody, the general manager of Grand River. Tr. 66. In his capacity as general manager, Moody had overall responsibility for the Gallatin Quarry. Tr. 19, 73-75. Moody was at the Gallatin Quarry on a daily basis for periods of between one and four hours, gave directions to Flint concerning the work to be performed, and called to check up on things. Tr. 71-72, 73-75, 97.

At the hearing, Flint testified that the berms were kept low because the landowner wanted to keep free of debris a ditch that runs along the side of the roadway and drains 800-900 acres of land upstream from the quarry. Tr. 103-04. Flint also testified that the berms had been higher before issuance of the citation, but had been reduced in height by hard rain and floods. 18 FMSHRC at 70; Tr. 104. During the special investigation, Flint told St. Laurent that the berm had been as high as 22 feet (30 inches). Tr. 68-69. According to St. Laurent's uncontradicted testimony, Flint stated during the investigation that the berm had been partially removed while the operator was working on the road, and that it had not been replaced because the operator planned to reroute the road and work on the ditch. Tr. 67. Flint agreed that the berm as of the date of July 21 was insufficient to restrain the 631. Tr. 104-05.

The loader operator, Mr. Miller, confirmed to St. Laurent that the berm had previously been higher but had not been maintained or replaced. Tr. 71, 76. The driver of the 631, Lynn Dunnington, told St. Laurent that during his 4 or 5 months at the quarry the berm had never been of any size. Tr. 76.

According to St. Laurent's testimony, Moody told him during the special investigation that the berm had previously been 3 feet (36 inches) high, but spring rains had washed down the berm and it was an oversight, due to complacency, that the operator failed to return the berm to its full

height. Tr. 73.⁴ St. Laurent also testified that Moody stated he traveled the elevated roadway almost every day he came to the mine. Tr. 74-75.

Evidence of previous history of violations introduced at the trial shows that MSHA cited Grand River for violating section 56.9300(a) on October 6, 1992, and that a citation was issued for no berms on a different elevated roadway on July 19, 1994, two days before the instant citation was issued. Gov't Exs. F, G; Tr. 47-48.

The judge concluded that Flint knowingly violated section 56.9300(b) and assessed a civil penalty of \$300. 18 FMSHRC at 71-72. However, he determined that the Secretary had not established that Moody knew or should have known that a violative condition existed on July 21, 1994. *Id.* at 70. He found that Moody had no reason to know that the 631 would be driven on the elevated roadway at times when the berm was less than 42 inches high. *Id.* Finding that Moody was not on-site on July 21, the judge held that the evidence does not establish that Moody knew, or had reason to know, that [the 631] would be used on July 21. *Id.* Although he concluded that Moody had reason to know that the 631 would be used on [the elevated] roadway periodically, the judge found that the Secretary failed to prove that Moody knew the height of the berm on July 21, and opined that on July 19 the road was not used due to bad weather, and it is quite possible that the berm was substantially smaller on July 21 than it had been the last time Moody had observed it. *Id.* (citing Tr. 52).

II.

Disposition

⁴ St. Laurent also testified that Moody admitted he was aware that the 631 had gone through the same area of the berm on an earlier occasion. Tr. 73. At the hearing, however, Moody denied knowledge of this earlier incident. Tr. 96-97. The judge made no finding on this point.

The Secretary argues that nothing in the record supports the judge's finding that Moody was not present at the quarry on July 21. S. Br. at 6-7.⁵ In the alternative, the Secretary contends that in light of Moody's overall responsibility for the quarry, his daily visits and his direction of work activities, Moody's presence was not required on July 21 in order to establish that he knew or should have known of the violative condition of the berm. *Id.* at 7-8. The Secretary points out that Moody knew that the 631 was regularly substituted for the truck to haul finished product on the elevated roadway. *Id.* at 8-9. The Secretary asserts that Moody's admission during the special investigation that the berm was not kept high due to oversight and complacency establishes his knowledge of the violative condition. *Id.* at 9. The Secretary further argues that, because Moody traveled the roadway almost every day, he had reason to know that the berm was inadequate. *Id.* at 10. The Secretary asserts that Moody was in a position to protect employee safety and health and, because he failed to take action to place the berm at its proper height, was liable under section 110(c). *Id.* at 10-11.⁶

Section 110(c) of the Mine Act subjects to liability individual corporate agents who knowingly authorize[], order[], or carr[y] out a violation of a mandatory health or safety standard. The Commission has held that actual knowledge is not required to establish liability under section 110(c); rather, it is sufficient if the Secretary shows that the individual knows or has reason to know of the violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). In *Kenny Richardson*, the Commission held that an individual acts knowingly where he is in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition@ 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

⁵ Pursuant to Commission Procedural Rule 75(a)(1), 29 C.F.R. ' 2700.75(a)(1), the Secretary designated his petition for discretionary review as his brief.

⁶ Moody appeared pro se before the judge and did not file a brief on appeal.

We note at the outset that there is no dispute that Moody, as Grand River's general manager, is an agent of the corporate operator within the meaning of section 110(c). Further, we read the judge's decision as finding an underlying violation of section 59.6300(b), and we affirm that finding as supported by substantial evidence.⁷ Section 59.6300(b) requires berms to be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.⁸ The record establishes that the berms were never as high as 42 inches, the mid-axle height of the 631. Grand River's regular use of the 631 as the backup to the haul truck for a year prior to the accident brings that vehicle within the scope of section 56.9300(b) as a vehicle which usually travels the roadway.⁹

⁷ The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.¹⁰ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that fairly detracts from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

However, substantial evidence fails to support the judge's determination that Moody did not have *reason to know* of the violative condition. The judge concluded that Moody had reason to know that the 631 would be used on the roadway. Based on that finding, and in view of the unchallenged testimony that Moody visited the quarry and traveled the elevated roadway daily, we think that the record establishes only one conclusion: that Moody had reason to know the berm was inadequate. Contrary to the judge's statement that "there is no basis on which I could conclude that [Moody] knew [the 631] would be used at times when the berm was not mid-axle height," as noted above, there is no record evidence that the berm was ever higher than 30 to 36 inches. Thus, Moody had reason to know that it was well below the 42 inches necessary to reach mid-axle position on the 631,⁸ and the record evidence does not permit any conclusion other than that Moody had reason to know that the berm would be inadequate whenever the 631 was driven on the elevated roadway. Under this set of facts, Moody's knowledge of the precise height of the berm on July 21 is not dispositive of his liability under section 110(c). See *Prabhu Deshetty*, 16 FMSHRC 1046, 1051 (May 1994) (finding 110(c) liability as to employee who "was aware of ongoing spillage problem . . . that ultimately resulted in the citation, but [who] failed to take measures to remedy the problem").⁹

In sum, substantial evidence establishes that Moody was in a position to protect employee safety but failed to act. Whether the condition of the berms resulted from a deliberate decision to keep the berms low, as Flint testified, or from oversight and complacency, as Moody told Special

⁸ The judge did not base his decision on a conclusion that Moody did not know or have reason to know of the height of the wheels on the 631.

⁹ The Secretary is also correct that Moody's presence at the mine on July 21 is not a precondition for finding him liable under section 110(c). See *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992). Accordingly, we need not reach the question whether substantial evidence supports the judge's finding that Moody was not present at the quarry on July 21.

Investigator St. Laurent, Moody's failure to direct that the berm be built up, in spite of his hands-on control of quarry operations and his reason to know of the inadequacy of the berm, is aggravated conduct constituting more than ordinary negligence and subjects him to liability under section 110(c). Because the judge's conclusion to the contrary is not supported by substantial evidence, we reverse that determination and remand to the Chief Administrative Law Judge for reassignment¹⁰ and assessment of a civil penalty.¹¹

¹⁰ Judge Amchan has transferred to another agency.

¹¹ Given our disposition based on our conclusion that Moody had reason to know of the existence of the violative condition, we need not address the Secretary's argument that Moody had actual knowledge of that condition.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Moody is not liable under section 110(c) of the Act for knowingly authorizing Grand River's violation of section 56.9300(b). Accordingly, we remand this matter to the Chief Administrative Law Judge for reassignment and assessment of a civil penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner