FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 30, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. CENT 95-29-M
	:	CENT 95-30-M
v.	:	CENT 95-239-M
	:	CENT 95-240-M
REB ENTERPRISES, INC., and	:	
HAROLD MILLER and RICHARD BERRY	:	

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is whether a violation of 30 C.F.R. ' 57.14131(a), involving the failure of a haul truck driver to wear a seat belt while driving a truck on the mine roadway, was the result of unwarrantable failure by REB Enterprises, Inc. (AREB@); whether REB=s violations of 30 C.F.R. ' 56.14130(g), involving the failure of bulldozer drivers to wear seat belts while operating that equipment, were the result of unwarrantable failure; whether civil penalties should be assessed against Quarry Supervisor Harold Miller and REB President Richard Berry for alleged knowing violations of section 56.14130(g); whether REB violated 30 C.F.R. ' 56.14130(a)(3) by failing to equip with a seat belt a piece of Case mechanized equipment identified as a backhoe that was also equipped as a loader and used primarily for that purpose; whether an order alleging that a loader operator was not wearing a seat belt was properly dismissed on the ground that it alleged a violation of the wrong standard; and whether REB=s violation of 30 C.F.R. ' 56.14107(a), involving the lack of a guard on the tail pulley of a radial stacker conveyor belt, was the result of unwarrantable failure. Administrative Law Judge Avram Weisberger concluded that the Secretary of Labor had failed to establish that

[1] Commissioner Beatty assumed office after this case had been considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

the violations of sections 57.14131(a), 56.14130(g), and 56.14107(a) were the result of REB=s unwarrantable failure; that the Secretary had not proved the alleged violation of section 56.14130(a)(3); and that the citation alleging that a loader operator was not wearing a seat belt should be dismissed on the ground that it alleged a violation of the wrong standard. 18 FMSHRC 1603, 1607-11, 1612-16, 1620-21, 1624-25 (September 1996) (ALJ). The judge also concluded that Secretary had failed to establish that Miller and Berry violated section 110(c) of the Mine Act, and accordingly dismissed the actions brought against them. *Id.* at 1618-19, 1622, 1626-27. The Commission granted a petition for discretionary review filed by the Secretary (APDR@) challenging these determinations. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand.

I.

Citation No. 4327776

1. Facts and Procedural Background

On August 16, 1994, while conducting an inspection at REB=s limestone quarry, Inspector James Enochs from the Department of Labor=s Mine Safety and Health Administration (AMSHA@), accompanied by REB foreman Ray King, walked over to an R-20 Euclid haul truck to introduce himself to the driver. 18 FMSHRC at 1607. When he climbed up on the running board of the truck, Enochs noticed that the driver, Ron Alexander, did not have on his seat belt. *Id.* Enochs issued a citation alleging a significant and substantial (AS&S@)[2] and unwarrantable violation of section 57.14131(a).[3] *Id.*; Gov=t. Ex. 4.

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), which distinguishes as more serious any violation that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@

[3] Section 57.14131(a) provides: ASeat belts shall be provided and worn in haulage trucks.@ 30 C.F.R. ' 57.14131(a).

At trial, Inspector Enochs testified that he considered this violation to be unwarrantable based in part on a conversation he had with Alexander. Enochs testified that when he asked Alexander why he was not wearing a seat belt, Alexander said that Anobody made a big deal about [wearing seat belts].@ 18 FMSHRC at 1610. In addition, Enochs testified that after he issued the citation, King did not say anything or instruct the driver to wear his seat belt. *Id.* Enochs opined that King seemed Asomewhat indifferent to the whole situation.@ *Id*. Enochs also testified that he considered this violation to involve unwarrantable failure because of the seriousness and danger involved in operating equipment without a seat belt. Tr. 37, 42. Finally, Enochs testified that in making his unwarrantable failure finding, he considered second-hand information he received from an MSHA Inspector Hermstein (who did not testify at the hearing) regarding an industrial assistance session MSHA had with REB management at which the importance of seat belt use was purportedly discussed. 18 FMSHRC at 1610; Tr. 15, 18, 33.[4]

The judge concluded that REB violated section 57.14131(a), relying on the uncontradicted testimony of Inspector Enochs that Alexander was not wearing his seat belt while operating the haul truck. 18 FMSHRC at 1607. The judge also concluded that the Secretary had failed to establish that this violation was the result of REB=s unwarrantable failure, stating that the only evidence offered by the Secretary to establish the violation as unwarrantable was the uncorroborated hearsay testimony of Enochs. *Id.* at 1611. The judge noted that neither King nor Hermstein were called as witnesses for the Secretary. 18 FMSHRC at 1611. He concluded that Enochs= hearsay testimony concerning statements allegedly made by Alexander was Ainherently unreliable@ and not entitled to any probative value, noting that the Secretary also failed to call Alexander as a witness. *Id.* The judge also concluded that Enochs= testimony concerning King=s reaction to the issuance of the citation was too subjective to be accorded any probative weight. *Id*. In addition, he credited the testimony of REB=s witnesses that the company posted information on its premises advising employees of the need to wear seat belts. *Id.* at 1610-11.[5]

2. Disposition

The Secretary asserts that the judge erred by refusing to accord any probative weight to the evidence submitted to establish that this violation was unwarrantable, and rejecting it as inherently unreliable, solely because of its hearsay nature. S. Br. at 16-20. The Secretary argues that the judge in effect applied a per se rule that hearsay evidence may not be considered, in

[4] Commissioners Riley and Verheggen note that the Secretary failed to introduce any corroborating evidence concerning the details of the industrial assistance session, such as its date, location, attendees, or even specific content. *Cf. AMAX Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (finding fact that AMSHA had repeatedly met with mine management to discuss section 75.400 compliance problems@ based on testimony that was voluminous in comparison to that adduced here).

[5] The judge also concluded that this violation was not S&S. *Id.* at 1610. The Secretary does not challenge this finding. *See* PDR at 3-5.

contravention of Commission precedent which permits consideration of material and relevant hearsay evidence based upon its reliability and probative value. *Id.* The Secretary contends that the hearsay evidence relied upon to establish that this violation was unwarrantable was reliable and entitled to consideration, particularly since REB could have cross-examined Inspector Enochs concerning his hearsay testimony or called mine officials to rebut that testimony. *Id.* at 18-19. The Secretary also contends, in the alternative, that the statements attributed to Alexander and other miners by Enochs do not constitute hearsay because they fall within an exception for admissions by a party-opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence. *Id.* at 19 n.7.

REB contends that the judge did not err in finding Enochs= hearsay testimony to be inherently unreliable, and refusing to give that testimony any probative weight, in determining that the section 57.14131(a) violation was not the result of unwarrantable failure. R. Br. at 5-8. REB argues that the weight to be afforded to hearsay testimony is within the sound discretion of the trial judge, and that the judge properly exercised his discretion in refusing to give any probative weight to this hearsay testimony because it was not verified and the declarants to whom the statements were attributed were not called as witnesses. *Id.* at 6-8. REB also argues that there was substantial evidence, including the credited testimony of REB witnesses, to support the judge=s determination that this violation was not unwarrantable. *Id.* at 7-8.

Hearsay evidence is admissible in Commission proceedings so long as it is material and relevant. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984); *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 n.1 (September 1991). The Commission=s procedural rules expressly provide for the admissibility of A[r]elevant evidence, including hearsay evidence.@ 29 C.F.R. ' 2700.63(a). Here, the judge stated that much of Enoch=s testimony was Ainherently unreliable due to its [hear]say nature, and cannot be relied upon.@ 18 FMSHRC at 1611. In effect, he applied a per se rule precluding any consideration of this hearsay evidence, contrary to established Commission precedent. Instead, he should have evaluated the evidence to determine whether it was reliable and entitled to any probative weight. *See Mid-Continent*, 6 FMSHRC at 1139 (A[i]t is, of course, the judge=s duty to draw conclusions from the record@); *see also Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJs have Asole power to make credibility determinations and resolve inconsistencies in the evidence@). We thus vacate the judge=s determination that this violation was not the result of unwarrantable failure, and remand this matter for him to evaluate the Secretary=s hearsay evidence in accordance with Commission precedent. We specifically do not reach the issue of whether any of the Secretary=s hearsay evidence was reliable or probative because this task is reserved to the judge=s discretion in the first instance.

II.

Order Nos. 4327622 and 4327625

1. Facts and Procedural Background

1. Order No. 4327622

During the inspection conducted on August 16, Inspector Enochs, in the presence of foreman King, observed a Case bulldozer operating near the top of the highwall. 18 FMSHRC at 1612. Enochs was about 30 to 40 feet away from the bulldozer, which was approaching him at an angle of about 45 degrees, when he noticed that the operator, Bill Jacobs, was not wearing a seat belt. *Id.* Enochs issued Order No. 4327622, which alleged an S&S and unwarrantable violation of section 56.14130(g).[6] 18 FMSHRC at 1612.

At trial, Enochs testified that he considered this violation to be the result of unwarrantable failure based, in part, on statements made to him by Jacobs that he sometimes wore a seat belt, and other times did not. *Id.* at 1614.[7] Enochs also testified that Jacobs= supervisor, Harold Miller, was nearby observing and monitoring the work but took no action to ensure that the bulldozer operator wore a seat belt. Tr. 131-32. According to Enochs, he was told by Inspector Hermstein that he (Hermstein) had warned REB supervisory personnel, including foreman King, in an industrial assistance session of the importance of seat belt use. Tr. 131-32.[8] Dale St. Laurent, who previously served as a special investigator for MSHA, testified that Jacobs told him in an interview that REB did not have a seat belt policy and that no one ever made him wear a seat belt. 18 FMSHRC at 1614. St. Laurent also testified that he was told by REB serviceman Yates that, in the year prior to the inspection, he never saw either of the two bulldozer operators wear a seat belt, and that no one at REB ever told them to wear seat belts. *Id.* at 1614, 1621. In addition, St. Laurent testified that Yates told him that there was no company policy regarding seat belts, that he did not recall anyone at REB telling anyone else to wear a seat belt, and that Jacobs told Yates that neither Miller nor REB President Berry ever told Jacobs to wear a seat belt. *Id.*

The judge found that the Secretary had established a violation of section 56.14130(g), but concluded that the Secretary had failed to establish that this violation was the result of REB=s unwarrantable failure because the only evidence offered by the Secretary on that issue was hearsay testimony that was unreliable and not entitled to any probative weight. *Id.* at 1612-13, 1616. The judge found that there was no evidence that either foreman King or Miller, then a lead man in charge of the stripping operation, was aware that Jacobs was not wearing a seat belt. *Id.* at 1615-16. The judge refused to assign any probative weight to the testimony of Inspector Enochs that King had been previously warned by MSHA regarding the need to ensure compliance

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[6] Section 56.14130(g) provides, in relevant part, that A[s]eat belts shall be worn by the . . . operator@ of equipment covered by that section, which includes bulldozers. 30 C.F.R. ' 56.14130(g). *See* discussion *infra* at 13 n.15.

[7] Enochs= contemporaneous notes of this conversation indicated that Jacobs also stated that at REB Ano one makes a big deal about@ wearing seat belts. *Id.*

[8] *See supra* note 4.

with the seat belt standard because of Athe inherently unreliable nature@ of that hearsay testimony. *Id.* at 1616. For the same reason, the judge declined to give any weight to the testimony of Enochs and St. Laurent concerning the statements allegedly made by Jacobs and Yates regarding the lack of any company policy requiring the wearing of seat belts and the failure of REB management to remind employees to wear seat belts. *Id.* The judge also relied on evidence that REB had posted information in its office regarding the need to wear seat belts while on the job. *Id.*

2. Order No. 4327625

Also on August 16, Inspector Enochs observed another REB employee, Jim Farrish, operating a John Deere bulldozer without wearing a seat belt. *Id.* at 1620. Enochs issued Order No. 4327625, which alleged an S&S and unwarrantable violation of section 56.14130(g). *Id.* at 1619-20.

At trial, Enochs testified that he determined this violation involved high negligence and unwarrantable failure because the violation was obvious, it was the fourth citation or order he had issued that day involving the failure to wear seat belts, and REB management had not taken any corrective action. *Id.* at 1621. In addition, former Special Investigator St. Laurent testified that when he asked Mr. Cunningham, an employee who operated equipment for REB, about the use of seat belts by employees, Cunningham told him that Athe normal posture was . . . that if a guy wanted to wear them, fine, and if he didn=t then that was okay, too.@ *Id.* St. Laurent also testified that, when asked why the bulldozer operators were not wearing their seat belts, foreman Harold Miller told him that he had only recently been promoted to supervisor and therefore felt uncomfortable telling employees what to do and so just let them do what they wanted to do. Tr. 167. According to St. Laurent, Miller also stated that he usually did not wear a seat belt when he operated equipment. Tr. 167.

The judge found that REB had committed a second violation of section 56.14130(g), but concluded that the Secretary had failed to establish that this violation was the result of unwarrantable failure. 18 FMSHRC at 1620, 1621.[9] The judge also found that the Secretary had failed to adduce evidence that King had any opportunity to check whether other employees were wearing their seat belts following issuance of the prior citation and orders alleging seat belt violations, or regarding King=s activities following issuance of the first seat belt citation. 18 FMSHRC at 1621. The judge also refused to assign any weight to the testimony of St. Laurent concerning statements made to him by Yates and Cunningham, noting that neither Yates nor Cunningham was called by the Secretary to verify the statements attributed to them, and characterizing this hearsay testimony as Ainherently unreliable.@ *Id.*

2. Disposition

[9] The judge also concluded that both of the section 56.14130(g) violations were not S&S. *Id.* at 1613-14, 1620. The Secretary does not challenge these findings. *See* PDR at 5-9.

The parties make essentially the same arguments with respect to the judge=s findings that these violations were not the result of unwarrantable failure that they make in connection with the alleged unwarrantable violation of section 57.14131(a), discussed in Part I.B, above.

We vacate the judge=s determination that these violations were not the result of unwarrantable failure, and remand this matter to the judge, for the reasons discussed in Part I.B. As indicated above, we believe that the judge=s blanket failure to evaluate the reliability and probative value of this hearsay testimony is inconsistent with Commission precedent.

III.

Liability of Harold Miller and Richard Berry Under Section 110(c)

1. Factual and Procedural Background

The Secretary charged Quarry Supervisor Harold Miller and Richard Berry **C** the owner, principal stockholder and president of REB**C** with knowingly authorizing, ordering, or carrying out the violations of section 56.14130(g) alleged in Order Nos. 4327622 and 4327625. 18 FMSHRC 1604, 1616-19, 1622. The Secretary proposed penalties totaling $1200 against Miller and $1600 against Berry. S. Pets. for Assessment of Penalty, Docket Nos. CENT-239-M and CENT-240-M (Sept. 1, 1995).

The judge concluded that the Secretary had not established that either Miller or Berry had violated section 110(c) of the Act, and accordingly dismissed the actions brought against them. 18 FMSHRC at 1618-19, 1622. The judge concluded the Secretary failed to establish that Miller was an agent of REB at the time these violations occurred because she Afailed to adduce sufficient evidence to establish that Miller had any significant responsibility for the operation of the highwall, or that he supervised the other miners working at that site.@ *Id.* at 1618. The judge noted that the Secretary failed to provide any evidence regarding whether Miller was paid as an hourly employee or as part of management, or his official duties and responsibilities. *Id.* He found that the Secretary failed to establish that Miller had direct responsibility for controlling the acts of miners on the highwall or for their performance or duties, the authority to assign them work or discipline them, or responsibility for the safety of miners and for insuring compliance with mandatory safety standards. *Id.* The judge credited Miller=s testimony that he was only a Alead man@ at the time of the August 1994 inspection and was not promoted to foreman until September 1995. *Id.* In addition, the judge found that the Secretary failed to rebut Miller=s testimony that in August 1994 he did not have the authority to hire or fire employees, was not given instructions regarding the discipline of employees, and did not assign equipment to employees. *Id.*

While finding that Berry was an officer of REB, and therefore within the purview of section 110(c), the judge found that the Secretary did not establish that Berry had any information that gave him knowledge or reason to know that the bulldozer operators were not wearing seat

belts when cited, or adduce any other evidence to show that Berry engaged in aggravated conduct. *Id.* at 1618-19, 1622. With respect to the violation alleged in Order No. 4327622, the judge found that there was no evidence that Berry had information that gave him knowledge or reason to know that Jacobs was not wearing a seat belt. *Id.* at 1619. The judge found that, as the president of REB, Berry=s policy regarding the wearing of seat belts was demonstrated by the posting of materials informing employees of the responsibility to wear seat belts. *Id.*[10] The judge also credited Berry=s testimony that although he personally feels an individual has the right not to wear a seat belt, he did not condone the failure of employees to wear seat belts and that, on five or six occasions, he told employees he observed not wearing seat belts to put them on and warned them that they would be sent home the next time they were found not wearing a seat belt. *Id.* at 1619. With respect to the other section 56.14130(g) violation, the judge found that hearsay testimony of former Special Investigator St. Laurent regarding statements made by employees Yates and Cunningham was insufficient to establish Berry=s liability under section 110(c). *Id.* at 1622.

2. Disposition

The Secretary contends that the judge erred in dismissing the section 110(c) allegations because he failed to accord any probative weight to the testimony of Inspector Enochs and former Special Investigator St. Laurent concerning statements made by employees indicating that REB management had an indifferent attitude regarding the wearing of seat belts, and that Miller and Berry had ample notice of the failure of bulldozer operators to wear seat belts on these occasions. S. Br. at 19. The Secretary argues that the judge failed to evaluate factors bearing on the reliability or probative weight of these statements, and instead improperly applied a per se rule that this evidence could not be considered because it was hearsay. *Id.*

REB argues that the judge properly exercised his discretion in refusing to give any probative weight to the hearsay testimony relied upon to establish the section 110(c) liability of Miller and Berry. R. Br. at 6-8. REB also argues that there was substantial evidence, including the credited testimony of REB witnesses, to support the judge=s determination that Miller and Berry were not liable under section 110(c). *Id.* at 7-8.

1. Applicable Principles

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

[10] The judge credited Berry=s uncontradicted testimony that REB has new employees sign its safety policy, which requires that seat belts Abe worn at all times of vehicle operation.@ *Id.* at 1619 n.3.

authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. ' 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff=d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is Ain a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.@ *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

2. Harold Miller

We affirm the judge=s determination that the Secretary failed to establish that Miller was liable for the section 56.14130(g) violations under section 110(c) of the Mine Act. In our view, the judge correctly concluded that the Secretary failed to meet her burden of establishing that Miller was an Aagent@ of REB within the meaning of section 3(e) of the Act, 30 U.S.C. ' 802(e),[11] at the time these violations occurred.[12]

[11] Section 3(e) of the Mine Act defines an Aagent@ as Aany person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine[.]@ 30 U.S.C. ' 802(e).

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

While Miller testified that he was a Alead man@ at the time of the August 1994 inspection, and was not promoted to quarry supervisor until September 1995 (Tr. 174-75), this testimony by itself is not dispositive of whether he was an agent of REB at the time these violations occurred. AIn considering whether an employee is an operator=s agent, the Commission has >relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine=s operation and involved a level of responsibility normally delegated to management personnel.=@ *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (September 1996) (quoting *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995) (alteration in original). As the judge noted, Miller testified without contradiction that at this time he did not have the authority to hire and fire employees, did not assign equipment to employees, and was not given any instructions regarding the discipline of employees. 18 FMSHRC at 1618. Miller testified that he never attempted to take any formal disciplinary actions against miners working on the highwall. *Id.*; Tr. 178. In addition, while Miller testified that he transmitted to other employees directions received from his supervisor (King) regarding tasks to be performed at the site (Tr. 178), there was no evidence that he then had the authority to directly initiate the assignment of work to employees. Moreover, as the judge noted, the Secretary failed to adduce evidence that Miller was directly responsible for controlling the acts of miners on the highwall, that he was responsible for their performance and duties, or that he was responsible for the safety of miners and for ensuring their compliance with mandatory safety standards. 18 FMSHRC at 1618. Given the lack of record evidence indicating that Miller exercised supervisory responsibilities in August 1994, when these violations occurred, substantial evidence supports the judge=s conclusion that the Secretary failed to establish that Miller was then an agent of REB within the meaning of section 3(e). Accordingly, we affirm the judge=s finding that Miller is not liable for these section 56.14130(g) violations under section 110(c).

3. Richard Berry

We also affirm the judge=s conclusion that the Secretary failed to establish a basis for holding REB President Richard Berry liable for the section 56.14130(g) violations under section 110(c). The judge correctly concluded that there was not sufficient evidence to show that Berry knew or reasonably should have known that Jacobs was not wearing a seat belt when cited, or that Berry engaged in any type of aggravated conduct. As the judge explained, there was no evidence adduced that Berry had any specific information that would give him knowledge or reason to know that Jacobs was not wearing a seat belt. 18 FMSHRC at 1619. In addition, the judge credited Berry=s testimony that he did not condone the conduct of REB employees in not wearing seat belts, and that he issued verbal warnings to employees on five or six occasions when he observed them not wearing seat belts. *Id.* While these verbal warnings by Berry were not entirely consistent with REB=s official policy, which is to send employees home for the rest of the day without pay for a first-time seat belt violation (*see id.* at 1619 n.4), we agree with the judge that, without something more, these statements do not provide a basis for section 110(c) liability. On review, the Secretary does not point us to any specific evidence which would serve as a basis

for holding Berry personally liable under section 110(c) for this violation. Therefore, we affirm the judge on substantial evidence grounds.

We also agree with the judge=s conclusion that the Secretary did not establish a basis for holding Berry liable for the other section 56.14130(g) violation under section 110(c). *Id*. at 1622. The only evidence offered to establish the section 110(c) liability of Berry for this violation was the hearsay testimony of Inspector Enochs and St. Laurent concerning statements attributed to employees Yates and Cunningham concerning the alleged failure of REB management to require employees to wear seat belts. *Id*. at 1621-22. While we disagree with the judge=s blanket failure to accord any probative weight to this evidence, for reasons discussed in Part I.B above, in our view, this evidence, even if accorded full probative value, is not sufficiently particularized as to what Berry knew or had reason to know concerning the failure of Farrish to wear a seat belt to provide a basis for the assessment of section 110(c) liability. Accordingly, we affirm the judge=s conclusion that Berry is not liable under section 110(c).

IV.

Order No. 4327626

A. Facts and Procedural Background

During the August 16, 1994 inspection, Inspector Enochs observed a Case backhoe with a loader bucket in front being operated as a loader. 18 FMSHRC at 1622-23. Enochs noticed that the vehicle was not equipped with a seat belt, and therefore issued Order No. 4327626 alleging a violation of section 56.14130(a)(3).[13] *Id.* at 1623.

The judge concluded that the Secretary failed to meet her burden of establishing that the vehicle at issue was a Awheel loader@ or Awheel tractor@ within the meaning of section 56.14130(a)(3), and accordingly dismissed the order. *Id*. He declined to accord significant weight to Enochs= opinion that the vehicle was a combination loader/backhoe because, in his view, Enochs did not provide a detailed explanation of the basis for his opinion. *Id.* The judge also relied on the Secretary=s failure to offer any evidence how the terms Awheel loader@ and Awheel tractor@ are commonly understood in the mining industry. *Id*.

2. Disposition

The Secretary argues that the judge erred in dismissing this order because he misconstrued the evidence and failed to properly interpret the applicable standard. S. Br. at 20-22. The Secretary contends that section 56.14130(a)(3) must be broadly construed to include this type of mobile equipment, and that this vehicle came within the meaning of the terms Awheel loader@ or Awheel tractor@ as used in that standard because it was mounted on wheels, was self-propelled, and had a bucket on the front that was being used to load materials. *Id.* at 21-22.

REB contends that the judge properly concluded that the Secretary failed to establish that this vehicle fell within the coverage of section 56.14130(a)(3), and that therefore there was insufficient evidence to support a finding of a violation. R. Br. at 9-10.

[13] Section 56.14130(a) requires that seat belts be installed on various types of mobile equipment, including A[w]heel loaders and wheel tractors.@ 30 C.F.R. ' 56.14130(a)(3).

Our review of the judge=s conclusion that the Secretary failed to establish a violation of section 56.14130(a)(3) involves interpretation of the terms A[w]heel loaders@ and Awheel tractors@ used in that standard.[14] In the absence of a statutory or regulatory definition of a term, or a technical usage, we look for the ordinary meaning of the terms used in a regulation. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff=d*, 111 F.3d 963 (D.C. Cir. 1997) (mem.). A Aloader@ is defined as A[a] mechanical shovel or other machine for loading coal, ore, mineral, or rock.@ American Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 316 (2d ed. 1997) (A*DMMRT*@). A Atractor@ is defined as Aa self-propelled vehicle **C** which may be mounted on crawler tracks, on wheels with large pneumatic tires, or on a mixture of both **C** intended for moving itself and other vehicles.@ *Id*. at 582. A Abackhoe@ is defined as A[t]he most versatile rig used for trenching. The basic action involves extending its bucket forward with its teeth-armed lip pointing downward and then pulling it back toward the source of power.@ *Id.* at 34. A comparison of these definitions indicates that a backhoe is distinguished from a loader or tractor primarily on the basis of the different function it is used to perform **C** dragging its downward-pointed bucket in a backward direction to perform trenching work. Thus, the plain meaning of the language of section 56.14130(a)(3) indicates that it applies to vehicles equipped and utilized as a loader.

The root of confusion with respect to this citation stems at least in part from the inspector=s unfortunate characterization of the equipment in the first place. One might say it is like the apocryphal story of a group of blind persons who encounter an elephant, each one pronouncing very different descriptions of the creature depending on what part of the beast they are nearest to and able to touch. The equipment in question, a J.I. Case construction tractor mounted on pneumatic tires or wheels, is equipped with a loader attachment on the front and a backhoe attachment on the rear. We can only surmise that the inspector too, identified this mechanized equipment by the part nearest to him. Faced with three choices **C** (wheel) tractor,

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[14] This standard, which was issued in 1988, was Aderived from@ a preexisting standard, 30 C.F.R. ' 56.9088 (1988). 53 Fed. Reg. 32,496, 32,511 (1988). While the regulatory history indicates that section 56.14130 was intended to retain the scope of the prior standard, it contains no specific discussion of the meaning of the terms Awheel loaders@ and Awheel tractors.@ *Id.* at 32,511-12. A comparison table listing equipment covered by the new and old standards indicates that the term A[w]heel loaders and wheel tractors@ in the new regulation was intended to have the same meaning as the term A[f]ront-end loaders and tractors@ in the prior regulation. *Id.* at 32,511.

loader, or backhoe **C** two of which are specifically included in the regulation, the inspector selected the third choice which opened the door to the legal defense the operator is now asserting.

Nevertheless, the testimony of Inspector Enochs establishes that the Case mechanized equipment at issue here was equipped as a loader and used to perform functions more typically performed by a loader, rather than the trenching function associated with a backhoe. Enochs testified that what he identified as a backhoe had a loader bucket on the front and that he was told by foreman King that it was used primarily to clean up spilled material in the plant area. 18 FMSHRC at 1623; Tr. 256, 258. Enochs also testified that he considered this vehicle to be a Acombination loader backhoe@ because it had Aa loader bucket on the front, and a backhoe bucket on the back.@ 18 FMSHRC at 1623; Tr. 261. In our view, Enochs= testimony concerning the function performed by this Case equipment, and the manner in which it was equipped, supports no determination other than that it was within the coverage of section 56.14130(a)(3). *See Ford Constr. Co.*, 14 FMSHRC 1975, 1978-79 (December 1992).[15]

Accordingly, we find that substantial evidence does not support the judge=s conclusion that the Secretary failed to meet her burden of showing that the Case machine identified by the inspector as a backhoe fell within the coverage of that standard, and therefore reverse the judge=s decision to vacate this order. Moreover, because it is undisputed that this equipment did not have a seat belt, we find that the record compels a conclusion that REB violated section 56.14130(a)(3), and remand the matter for a determination whether the violation was unwarrantable and assessment of an appropriate civil penalty.

V.

Order No. 4327628

1. Factual and Procedural Background

During the August 16 inspection, from a walkway located about 10 feet above, Inspector Enochs observed REB employee Ron Alexander using a loader to load material from a stockpile. 18 FMSHRC at 1623. Enochs then observed Alexander turn off and climb out of the loader, without unbuckling his seat belt. *Id.* Enochs issued Order No. 4327628, alleging an unwarrantable violation of section 56.14130(a)(3). *Id.*; Gov=t Ex. 10.

[15] In *Ford*, we reversed a judge=s determinations that a scraper and a bulldozer were not within the coverage of this standard, relying, in part, upon the testimony of an MSHA inspector concerning the size and function of that equipment. *Id.* at 1977-79. We concluded that a bulldozer fell within the coverage of section 56.14130(a), even though Athe language of the standard itself does not include the specific term >dozer= or >bulldozer= in the six categories of equipment requiring the installation of seat belts,@ based upon our determination that bulldozers come within the meaning of the term Acrawler tractors@ in subparagraph (1) of that standard. *Id.* at 1979.

On February 23, 1995, the Secretary moved to amend this order to allege a violation of section 56.14130(g), to conform with the description of the violation contained in the order.[16] *See* Mot. to Amend Citations (Feb. 23, 1995). The judge granted this motion on March 14, 1995, well in advance of the June 11, 1996 hearing. Stay Order and Order Granting Mot. (Mar. 14, 1995).

The judge credited Enochs= uncontradicted testimony that Alexander was not wearing a seat belt when cited. 18 FMSHRC at 1624. He further found, however, that the Secretary had failed to establish a violation of section 56.14130(a)(3), the standard referred to in the order, which requires that seat belts be *installed* on wheel loaders, because there was no evidence in the record that a seat belt had not been installed on this vehicle. *Id.* Accordingly, the judge dismissed Order No. 4327628. *Id.*

2. Disposition

The Secretary argues that the judge erred in dismissing this order on the ground that it cited the wrong standard, because the record indicates that in March 1995 he granted the Secretary=s motion to amend the order to cite section 56.14130(g), the standard applicable to the violation alleged in Order No. 4327628. S. Br. at 22.

REB contends that the judge did not err in vacating Order No. 4327628 because that order cited the wrong standard, and no evidence was offered by the Secretary to establish a violation of section 56.14130(a)(3), the cited standard. R. Br. at 10-11. In response to the argument that the citation was later amended to cite section 56.14130(g), REB argues that the Secretary has failed to offer any exhibit or evidence to establish that the order had been so amended. *Id.* at 11.

We conclude that the judge erred in dismissing Order No. 4327628 on the ground that it cited an inapplicable standard. The record indicates that the judge granted the Secretary=s motion to amend this order to allege a violation of the correct standard, section 56.14130(g), well in advance of the June 11, 1996 hearing. This was clearly sufficient to put REB on notice of the correct standard allegedly violated, and the record demonstrates that REB knowingly litigated the alleged violation on that basis. *See* Tr. 262-74.

[16] Order No. 4327628 alleged that on August 16, 1994, A[t]he operator of the 1989 Michigan L 140 loader . . . was observed operating the end loader without his seat belt fastened.@ Gov=t Ex. 10 at 1.

Based on the foregoing, we vacate the judge=s dismissal of Order No. 4327628. Moreover, because the judge expressly found that the loader operator was not wearing a seat belt when cited by Inspector Enochs (18 FMSHRC at 1624), and there is no dispute that the loader in question was covered by this standard, we also conclude that the record compels a conclusion that REB violated section 56.14130(g). *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (September 1993) (where evidence supports only one conclusion, remand on that issue unnecessary). We remand the matter for a determination whether this violation was the result of unwarrantable failure on the part of REB and assessment of an appropriate civil penalty.

VI.

Order No. 4327631

1. Factual and Procedural Background

During the August 16 inspection, Inspector Enochs observed that there was no guard on the tail pulley of the radial stacker conveyor belt at REB=s facility. 18 FMSHRC at 1624. The belt was in operation at the time, and there was nothing to restrict access to the unguarded tail pulley, which was approximately 2 feet off the ground. *Id.* Enochs issued an order alleging an S&S and unwarrantable violation of section 56.14107(a).[17] *Id.*; Gov=t Ex. 11.

Enochs testified that he considered this violation to be unwarrantable and indicative of high negligence because, in his view, King knew that he was creating a violative condition when he removed the guard from the tail pulley; because of the seriousness of the danger of exposure to a wing tail pulley; and because there was a lot of traffic in the area. Tr. 278-79. Enochs testified that he also based his unwarrantable failure finding on second-hand information he received from Inspector Hermstein regarding an industrial assistance session MSHA had with REB management at which King was purportedly given an MSHA handbook on guarding. 18 FMSHRC at 1625; Tr. 278-79.[18]

The judge found that REB violated section 56.14107(a), but concluded that the Secretary had failed to establish that this violation was the result of REB=s unwarrantable failure. 18 FMSHRC at 1624-25. In reaching this conclusion, he declined to assign any probative weight to

[17] Section 56.14107(a) provides that A[m]oving machine parts shall be guarded to protect persons from contacting gears, . . . chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury.@ 30 C.F.R. ' 56.14107(a).

[18] Commissioners Riley and Verheggen note that the Secretary did not introduce a copy of the handbook into evidence, nor any details concerning the industrial assistance session at which she alleged the handbook was given to REB management (*see supra* note 4).

the hearsay testimony of Enochs concerning the guarding handbook given to King by MSHA. *Id.* at 1625.[19]

2. Disposition

The parties make essentially the same arguments with respect to the judge=s finding that this violation was not the result of unwarrantable failure that they make in connection with the alleged unwarrantable violations of sections 57.14131(a) and 56.14130(g), discussed in Parts I and II, above.

We vacate the judge=s determination that this violation was not the result of unwarrantable failure, and remand this matter to the judge, for the reasons discussed in Part I.B. Since the judge failed to properly evaluate the Secretary=s hearsay evidence in accordance with Commission precedent, we vacate the judge=s determination that this violation was not the result of unwarrantable failure, and remand this matter for further analysis of the unwarrantability issue in accordance with the principles discussed above.

VII.

Conclusion

For the foregoing reasons, we vacate the judge=s determination that the section 57.14131(a) violation described in Citation No. 4327776, the section 56.14130(g) violations described in Order Nos. 4327622 and 4327625, and the section 56.14107(a) violation described in Order No. 4327631 were not the result of unwarrantable failure on the part of REB. We remand these issues for further consideration consistent with this opinion. We affirm the judge=s conclusion that the Secretary failed to establish that Harold Miller or Richard Berry were liable under section 110(c) for the violations of section 56.14130(g) described in Order Nos. 4327622 and 4327625. Finally, we reverse the judge=s conclusion that the Secretary failed to establish that the Case equipment described in Order No. 4327626 fell within the coverage of section 56.14130(a)(3), and vacate his dismissal of Order No. 4327628 because it alleged a violation of the wrong standard. We conclude that REB violated sections 56.14130(a)(3) and 56.14130(g) as

[19] The judge also concluded that this violation was not S&S. *Id.* at 1625. The Secretary does not challenge this finding. *See* PDR at 12.

alleged in those orders, and remand for a determination whether these violations were the result of unwarrantable failure on the part of REB and assessment of appropriate civil penalties.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in my colleagues= opinion that the Secretary failed to adduce sufficient evidence that would warrant imposition of personal liability under Mine Act section 110(c) against Harold Miller and Richard Berry. I also agree with my colleagues that the judge was incorrect in appreciating the significance of the hearsay testimony when evaluating the unwarrantable determinations before him. However, I part company from my colleagues because, after considering this testimony in conjunction with the entire record, I believe that the record supports only one conclusion **C** that the violations were unwarrantable. Therefore, I dissent and would reverse the judge=s determinations that Citation No. 4327776 and Order Nos. 4327622, 4327625, and 4327631 were not a result of REB=s unwarrantable failure.[1]

Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991) (A*R&P*@). The Commission has examined various factors to determine whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator=s efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708-09 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Consideration of these factors with respect to the four violations listed above leads to the conclusion that they were unwarrantable. I first discuss the three seat belt violations **C** Citation No. 4327776 and Order Nos. 4327622 and 4327625 **C** and then turn to the guarding violation, Order No. 4327631.

I.

[1] I concur in the majority disposition with respect to the two seat belt violations contained in Order Nos. 4327626 and 4327628. Because the judge did not address the issue of whether these violations were a result of REB=s unwarrantable failure, a remand for evaluation of that question is appropriate. Nonetheless, many of the factors that compel a conclusion that the above three seat belt violations are unwarrantable **C** such as extensiveness of the violations, prior warning and danger **C** apply to these two violations on remand and should be considered by the judge.

Seat Belt Violations

On August 16, 1994, MSHA Inspector James Enochs discovered that REB employee Ron Alexander, the operator of the R-20 Euclid haul truck, did not have a seat belt on. 18 FMSHRC 1603, 1607 (September 1996) (ALJ). During the same inspection, Enochs observed another REB employee, Bill Jacobs, not wearing a seat belt while operating a bulldozer. *Id*. at 1612. Approximately an hour later, the inspector observed yet another employee, Jim Farrish, not wearing a seat belt while operating a bulldozer. *Id*. at 1620. On that same day, Inspector Enochs later observed REB employee Alexander operating a loader, again without wearing a seat belt. *Id*. at 1623-24. Enochs also observed that a backhoe loader at the quarry was not equipped with a seat belt. *Id*. at 1622-23. In total, the inspector cited REB for five seat belt violations in the course of one day and, according to REB President Berry, only seven vehicles were operating that day. Tr. 252. Inspector Enochs testified that he checked all personnel in the quarry that day and found that not one individual was wearing a seat belt. Tr. 119-20. The sheer number of violations indicates that the operator=s policy towards seat belt use was one of serious indifference to compliance with MSHA=s regulations. Thus, the extent of the violations, which is one of the factors in the unwarrantable analysis, leads to only one conclusion **C** that these seat belt violations were a result of unwarrantable failure. *See Jim Walter Resources, Inc*., 19 FMSHRC 480, 486 (March 1997) (extent of violations supported reversal of judge=s negative unwarrantable failure determination).

REB=s indifference to seat belt use was also reflected in the statements that REB employees gave to MSHA inspectors. As the majority recognizes, the judge improperly discounted these statements as hearsay without evaluating their probative nature. The judge failed to consider that these statements were consistent in their view that REB took a lackadaisical attitude toward seat belt use. Two of REB=s equipment operators, haul truck driver Ron Alexander and bulldozer driver Bill Jacobs, *both* told Inspector Enochs that Anobody made a big deal about [wearing seat belts].@ 18 FMSHRC at 1610, 1614; Tr. 34; R. Ex. 32. In addition, Inspector Enochs= contemporaneous notes corroborated the statement of Jacobs that Ano one makes a big deal about [seat belts].@ R. Ex. 32. The notes also reported that Jacobs stated that he Asometimes wears [a seat belt and] sometimes doesn=t.@ R. Ex. 32. Jacobs also told former MSHA Special Investigator Dale St. Laurent that Anobody ever told him to wear seat belts.@ Tr. 164. St. Laurent also testified that he was told by REB serviceman Yates that, in the year prior to the inspection, he never saw either of the two bulldozer operators wear a seat belt, and that no one at REB ever told them or him to wear seat belts. Tr. 245. St. Laurent also interviewed plant operator Cunningham, who reported that the Anormal posture was . . . that if a guy wanted to wear them fine, and if he didn=t want to wear them, then that was okay too.@ Tr. 245-46. In addition, St. Laurent testified that, when asked why the bulldozer operators were not wearing their seat belts, foreman Miller told him that he had only recently been promoted to supervisor and therefore felt uncomfortable telling employees what to do and so just let them do what they wanted to do. Tr. 167. According to St. Laurent, Miller also stated that he usually did not wear a seat belt when he operated equipment. Tr. 167. These statements are consistent in the view

that REB made little or no effort to adhere to MSHA=s seat belt regulation. Under *Mid-Continent Resources Inc.*, 6 FMSHRC 1132, 1135-39 (May 1984), these statements have high probative value because they rested upon personal knowledge of the MSHA inspectors; there was consistency between the statements; Inspector Enoch=s contemporaneous notes corroborated the statements; and REB did not introduce any evidence to establish that the statements of these REB employees to the inspectors did not in fact occur.[2]

Other factors of the unwarrantable analysis are present that compel the conclusion that these violations were a result of aggravated behavior. The record shows that REB had been placed on notice that greater efforts were necessary for compliance with MSHA=s seat belt regulations. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (January 1997) (inspector=s discussions with management regarding need for greater compliance efforts were relevant to unwarrantable failure determination).[3] Inspector Enochs testified that, prior to inspecting the REB quarry, in accordance with customary agency procedure, he discussed the REB mine with

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[2] In *Mid-Continent*, 6 FMSHRC at 1136-37, the Commission discussed various factors that may be used to determine the probative value of hearsay evidence, such as whether the out-of-court statement rests upon personal knowledge gained from first-hand experience; the consistency among statements, if there is more than one statement; whether the making of the statement was denied or its contents were declared untrue; and any contradictory or corroborating evidence.

[3] Two Commissioners only, Commissioners Riley and Verheggen, seem to be critical of the quantity of evidence of prior warning introduced by the Secretary on this record. Slip op. at 3 n.4, 5 n.8, 15 n.18. The Commission however has not quantified the type of evidence sufficient to establish prior warning. Instead, the Commission has stated: A[T]o the extent that the inspectors= discussions with management placed [the operator] on notice of its need for greater compliance efforts . . . , those discussions were relevant to the unwarrantable failure evaluation and should have been considered by the judge.@ *Enlow*, 19 FMSHRC at 12.

the previous MSHA inspector, Mr. Hermstein, who reported that, at the last inspection, he had conducted an industrial assistance session with management employees of REB, foreman Ray King and shift supervisor Goody, where the importance of seat belt use was discussed. Tr. 14-18. The judge improperly discounted this testimony, without considering that this information had a high indicia of trustworthiness and reliability as it was reported from one MSHA inspector to another as part of standard agency operating procedure. The Supreme Court in *Richardson v. Perales*, 402 U.S. 389 (1971), identified several factors, in addition to those outlined in *Mid-Continent*, to be considered in evaluating the reliability and probative value of hearsay evidence, including the *identity of the declarant*, the credibility of the declarant or the witness testifying to the hearsay, and *the nature and structure of the administrative system in which the statements were generated*. *Id.* at 402-06. *See also* n.2, *supra*.

With respect to Citation No. 4327776, Inspector Enochs testified that REB foreman King=s attitude was Asomewhat indifferent to the whole situation@ and that he did not correct the condition or tell the driver that he had to wear the seat belt. 18 FMSHRC at 1610; Tr. 34. The judge erroneously failed to consider that King did not correct the condition, tell the driver that he had to wear a seat belt, or say anything else. The inspector=s observation of foreman King=s attitude of indifference is also probative. *See Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046-47 (October 1994) (inspector=s observations have probative value). In addition, the fact that King was a foreman greatly supports the unwarrantability of the violation. In *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (November 1997), the Commission held that because a foreman, who is held to a higher standard of care than rank and file miners, witnessed a violation and did not act to immediately stop it, the foreman=s conduct was Aa factor tending to establish an unwarrantable failure.@ In addition, the judge failed to recognize that truck driver Ron Alexander, cited in Citation No. 4327776, was later cited on the same day for failing to wear a seat belt (Order No. 4327628), even after having earlier received a citation for failure to do so that morning. *See* 18 FMSHRC at 1607, 1623-24. This evidence indicates that REB failed to take efforts to come into compliance with MSHA=s seat belt regulations, even after it received its first citation. An operator=s efforts in abating the violative condition is a factor in the unwarrantable failure analysis. *Enlow*, 19 FMSHRC at 11-12.

Finally, Enochs testified, without contradiction, that he considered these violations to involve an unwarrantable failure because of the seriousness and danger involved in operating equipment without a seat belt. Tr. 37, 42. The judge erroneously failed to address the degree of danger involved in failing to operate heavy equipment without wearing seat belts. MSHA=s Program Policy Letter No. P90-IV-3 (APPL@), that was sent to all metal and nonmetal mine operators, states that the failure to wear seat belt is a serious safety hazard, which may be considered highly negligent and serve as the basis for a section 104(d) citation/order. Gov=t Ex. 5 at 1; Tr. 34-36.[4] It is beyond dispute that failure to wear seat belts is a highly dangerous violation

[4] The PPL illustrates what MSHA considers highly negligent behavior with respect to seat belt use:

and that this degree of danger also supports the unwarrantable failure determination.[5] *See BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (August 1992) (finding unwarrantable failure where unsaddled beams Apresented a danger@ to miners entering area).

In determining that the Secretary failed to establish that these seat belt violations were not a result of REB=s unwarrantable failure, the judge relied solely on REB=s evidence that two signs are posted at the quarry advising employees of the need to wear seat belts. 18 FMSHRC at 1610-11, 1616. However, the evidence relied upon by the judge is insignificant compared to the body of record evidence, and does not establish that the three seat belt violations were not a result of unwarrantable failure. On the contrary, the overwhelming weight of the evidence **C** on the cumulative extensiveness of the violations, on prior notice, on REB=s efforts to come into compliance with the seat belt regulations, even when a foreman observed the violation, and the danger of the violations **C** detracts from the judge=s finding of no unwarrantability. Therefore, I would reverse the judge on the grounds that his findings were not supported by substantial

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> Negligence for failure to wear seat belts should be determined by the extent of the mine operator=s efforts to enforce the seat belt requirement. Examples of such efforts may include:
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> 1. evidence that the equipment operators are instructed on the mandatory use of seat belts;
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> 2. regular observation by supervisors to determine whether seat belts are being worn;
>
> 3. corrective action taken by supervisors when seat belts are not being worn; and
>
> 4. the development and implementation of a job safety analysis program to reinforce task training for equipment operators.
>
> If the mine operator does not make any effort to ensure that seat belts are worn, the negligence would be high and a 104(d) citation/order would be appropriate.

Gov=t Ex. 5 at 1-2. Although not determinative of my decision, this criterion is instructive because, after applying this criterion to the case at bar, it is very obvious that REB showed no diligence in ensuring that seat belts were to be worn by all operators at all times and that the unwarrantable failure allegations were appropriate.

[5] With respect to the high danger of these violations, it is significant that in 1997, fatalities in the metal and nonmetal mining industry increased at an alarming rate to 60 deaths, the highest total since 1987. In 1996, there were 47 deaths in metal and nonmetal mining. Of the 60 metal and nonmetal fatalities, 24 resulted from powered haulage accidents. MSHA News Release USDL 97-470 (Dec. 31, 1997).

evidence and conclude that this record can support no other conclusion than that the seat belt violations contained in Citation No. 4327776 and Order Nos. 4327622 and 4327625 were a result of REB=s unwarrantable failure. *See Buffalo Crushed Stone*, 16 FMSHRC at 2045-47 (where overwhelming weight of evidence detracts from judge=s finding, reversal is appropriate). Accordingly, I would reinstate the subject section 104(d)(1) citation and orders and remand for reassessment of civil penalties!

II.

Guarding Violation

With respect to the violation of 30 C.F.R. ' 56.14107(a), which requires that A[m]oving machine parts shall be guarded to protect persons from contacting gears, . . . chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury,@ the overwhelming weight of the evidence detracts from the judge=s decision that this violation was not a result of REB=s unwarrantable failure. In particular, the record discloses that foreman King authorized the removal of this guard and knew that it was off. Tr. 278-79. Inspector Enochs testified that no barricades or warning signs had been placed around the tail pulley at issue to alert miners to the danger. Tr. 277. This evidence was not contradicted by REB. In *R&P*, 13 FMSHRC at 194, the Commission held that A[i]ntentional misconduct, whether by commission or omission,@ qualifies as aggravated conduct and constitutes an unwarrantable failure under the Mine Act. There is no dispute that King engaged in intentional misconduct when he authorized the removal of the guard and never replaced it. Further, as discussed above, the fact that this violation was committed by a foreman, who is held to a higher standard of care, also supports an unwarrantable failure determination. *Lion Mining*, 19 FMSHRC at 1778.

In addition, REB, and foreman King in particular, had been put on notice of the need to guard the tail pulley. This prior notice buttresses my conclusion that the violation was a result of REB=s unwarrantable failure. *See Enlow Fork*, 19 FMSHRC at 11-12. During his preparation for the August 16, 1994 inspection of the REB quarry, Inspector Enochs learned that King had attended an industrial assistance session with the previous MSHA inspector where a handbook on the importance of guarding had been given to him. Tr. 14-18, 278-79. On this record, as discussed above, I can only conclude that this testimony has a high level of reliability and trustworthiness because it related to the discussion of two MSHA inspectors, as part of their customary agency procedure. *See Richardson*, 402 U.S. at 402-04; *Mid-Continent*, 6 FMSHRC at 1136. In addition, the danger of exposure to a wing-type tail pulley, which was approximately 2 feet off the ground, also supports a finding of unwarrantable failure and was completely overlooked by the judge. *See* 18 FMSHRC at 1624; Tr. 278-79; *see also BethEnergy*, 14 FMSHRC at 1243-44.

In conclusion, a review of the evidence on the record compels the conclusion that this guarding violation was a result of REB=s unwarrantable failure. Accordingly, I would reverse the

judge and reinstate Order No. 4327631 as a section 104(d)(1) order and remand for reassessment of a civil penalty.

_____
Marc Lincoln Marks, Commissioner

Distribution

James B. Crawford, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

James E. Crouch, Esq.
Cypert, Crouch, Clark & Harwell
P.O. Box 1400
Springdale, AR 72765

Administrative Law Judge Avram Weisberger
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041