FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 28, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. YORK 95-57-M
	:	YORK 96-13-M
AUSTIN POWDER COMPANY and BRUCE EATON	:	

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

DECISION

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

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Austin Powder Company ("Austin Powder") and its foreman Bruce Eaton (collectively "Petitioners") seek review of Chief Administrative Law Judge Paul Merlin's decisions holding that Austin Powder violated 30 C.F.R. § 56.15005,[1] that the violation was significant and substantial ("S&S"), that Eaton is liable for the violation under Mine Act section 110(c), 30 U.S.C. § 820(c), and that a penalty assessment of $6,000 against Austin Powder is warranted. 18 FMSHRC 1878 (Oct. 1996) (ALJ); 18 FMSHRC 2197 (Dec. 1996) (ALJ). For the following reasons, we affirm the judge's decisions.

I.

Factual and Procedural Background

On the morning of July 13, 1994, Austin Powder was conducting drilling and blasting operations at the Lynn Sand and Stone Quarry, a large stone quarry in Lynn, Massachusetts,

[1] Section 56.15005 provides in pertinent part that "[s]afety belts and lines shall be worn when persons work where there is danger of falling . . . ."

pursuant to a contract with Bardon Trimount, the quarry operator. 18 FMSHRC at 1882; Tr. 14. Guy Constant, a mine inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), accompanied by Robert Dow, then an inspector trainee, arrived at the quarry to conduct a follow-up inspection. 18 FMSHRC at 1882; Tr. 13, 101. The two inspectors sought out Bardon Trimount miners' representative Douglas Gallant, in order to afford him the opportunity to accompany them. 18 FMSHRC at 1882-83; Tr. 14-15. At the time, Gallant was involved as lead laborer in pumping ground water from bore holes in a level of the quarry, or "bench," prior to blasting.[2] 18 FMSHRC at 1882; Tr. 15-16.

Both Constant and Dow testified that, upon arriving at the blast site and while still in their car, they observed Gallant, along with Austin Powder foreman Eaton, the certified blaster in charge, and Jeffrey Allard, an Austin Powder laborer, all standing approximately 1-1/2 feet from the edge of the quarry highwall. 18 FMSHRC at 1882-83. At that point the inspectors were approximately 50 feet from the highwall. Tr. 23. Although the highwall edge was approximately 55 feet above the quarry floor, the three miners were not wearing safety belts or lines. 18 FMSHRC at 1881; Tr. 17.[3] The inspectors cited Austin Powder for an S&S and unwarrantable violation of section 56.15005. 18 FMSHRC at 1880. The inspectors also issued Austin Powder an imminent danger order, which was not contested, and cited Bardon Trimount for Gallant's participation in the violation. Tr. 48, 54, 97.

At the hearing, Dow testified that Gallant, who he believed was positioning a hose to be used in dewatering the mine, was located between the highwall and a forklift that had been used to transport the pump, straddling a bore hole, with the rear of his body protruding over the highwall edge. 18 FMSHRC at 1882; Tr. 171.[4] Constant agreed, stating that Gallant was bent over with his back to the highwall, facing the forklift and the dewatering unit. 18 FMSHRC at 1883. Dow testified that Eaton was standing to the right of Gallant, holding the discharge hose with his back to the edge of the highwall. *Id*. at 1882. Constant corroborated Dow's testimony as to Eaton's location. *Id*. at 1883. Dow stated that Allard was a couple of feet from Eaton and further away from Gallant, facing the equipment. *Id*. at 1882-83. Constant testified that Allard was 2 feet away from Eaton. *Id*. at 1883.

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[2] At the Lynn quarry, when there was over 5 feet of water in a blast hole, the water was removed by means of a submersible dewatering pump and a discharge hose. Tr. 21, 172-73, 246.

[3] The only safety belt and line at the blast site was in Eaton's vehicle. 18 FMSHRC at 1881. Eaton testified that earlier that morning he wore that belt, with the line tied to a "deadman," while checking the depth of water in the row of holes closest to the highwall edge. Tr. 250-51. A "deadman" is an anchor buried in the ground. American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 146 (2d ed. 1997).

[4] The bore holes, which were 6 inches in diameter, were in two rows in that area: the first between 1-1/2 and 5 feet from the highwall edge, and the other 11 to 15 feet further back. Tr. 26, 193-94, 251, 271-72, 274.

Both inspectors also testified that, while Constant was parking the car near the back of the bench, Dow, following Constant's instructions, got out of the car, yelled to the miners, and motioned for them to come back from the edge. *Id*. at 1884; Tr. 107-08. According to the inspectors, the miners retreated 25 feet from the edge to talk with the inspectors. 18 FMSHRC at 1884.

Gallant, Eaton, and Allard all disagreed with the inspectors' accounts. According to Gallant, when the inspectors arrived the dewatering process had not yet begun, as he and Eaton had not yet discussed what holes needed dewatering. Tr. 223. However, Eaton stated that by that time they had discussed the matter, that Gallant had decided which hole to dewater first, and that Austin Powder laborer Ron Wilcox was checking the depth of the water in that hole. Tr. 245-47, 263. Allard testified that his back was turned at this time, but that he believed Gallant and Eaton were preparing to submerge the head of the pump in the first hole, and Gallant, who was on the side of the forklift where the controls were, was asking Eaton, who was on the other side, if he was ready. Tr. 171-74, 202.

Gallant testified that he was 10 to 15 feet from the edge, facing the highwall, when the inspectors arrived. 18 FMSHRC at 1883. Eaton estimated his distance from the edge at that time as between 8 and 10 feet, and denied that part of Gallant's body was over the edge. *Id*. Allard testified that, when their work was interrupted by the inspectors, he was facing the edge, holding the dewatering hose that he had unwound from the reel attached to the pump and thrown over the edge of the highwall to discharge the water. *Id*. at 1884; Tr. 196-200. On direct examination Allard estimated he was 12 to 15 feet from the edge (Tr. 180, 182-83), but on cross-examination extended that estimate to 18 feet. Tr. 199-201. He also stated that he, Gallant, and Eaton were the same distance from the edge. Tr. 182.

The miners also differed with the inspectors over what exactly occurred when the inspectors arrived on the scene. While Allard was not in a position to testify regarding the inspectors' actions, Gallant and Eaton stated that it was inspector Constant who first headed toward them, motioning to them, and that he was followed by Dow. 18 FMSHRC at 1884-85. Gallant and Eaton also testified that they were not told by the inspectors that they were too close to the highwall edge. *Id*.

The judge, after finding the two inspectors' testimony to be consistent, and comparing it to the testimony of the three miners, who he found to have "often changed their testimony and contradicted each other," credited the inspectors' account of events. *Id*. at 1883-85. The judge went on to hold that, "[i]n view of the proximity of Gallant and Eaton to the edge, the positions of their bodies with backs to the edge, Gallant's stance astride the hole, and the activities both men were performing, . . . a reasonably prudent person would have recognized the danger of falling," and thus a violation of section 56.15005 was established. *Id*. at 1886.

The judge also found the violation S&S, given the miners' proximity to the edge of the highwall, the nature of the activities in which they were engaged, the danger of falling, and the

likely severity of injuries resulting from such a fall. *Id*. at 1887. Focusing on Eaton's knowledge of the presence of the highwall and of the safety belt requirement, the judge further concluded that negligence and aggravated conduct on Eaton's part had been established and that Eaton's behavior had put the other miners at risk. *Id*. at 1887-88. The judge consequently found an unwarrantable failure under section 104(d)(1) of the Mine Act, and assessed a penalty of $6,000 against Austin Powder. *Id*. at 1888.

With regard to Eaton's liability under section 110(c), the judge concluded that there could "be no doubt that Mr. Eaton acted in a knowing and intentional manner, because he knew that he and the others were standing dangerously close to the edge and that under such conditions safety belts should have been worn. Clearly, his conduct was aggravated and exceeded ordinary negligence." *Id*. at 1888-89. A penalty of $400 was assessed against Eaton. *Id*. at 1889.

Austin Powder and Eaton petitioned the Commission for review of the judge's decision. The Commission granted that petition in part, limiting review to "the issue of whether the judge erred by affirming the citation as one issued under section 104(d)(1)." Unpublished Direction for Review, dated December 10, 1996. In a subsequent decision, the Commission noted that, while the citation was originally issued under section 104(d)(1), it had later been modified to delete the unwarrantability allegation and reflect a charge under section 104(a). 18 FMSHRC 2105, 2105 (Dec. 1996). Because the judge did not mention these modifications in his initial decision, the Commission vacated his decision and remanded for a determination of "the appropriate designation for the citation and whether any penalty reassessment is warranted." *Id*. at 2106.

On remand, the judge vacated his finding of unwarrantable failure and affirmed his penalty assessments on the ground that his previous finding of very high negligence remained unchanged. 18 FMSHRC at 2197-98. The Commission subsequently granted Austin Powder and Eaton's PDR challenging both the judge's original decision and his decision on remand.

II.

Disposition

Petitioners contend that the determination of a section 56.15005 violation is flawed by the judge's erroneous credibility finding in favor of the Secretary's witnesses, maintaining that there is only slight or dubious evidence to support that finding. Pet'r Br. at 11-20. They also argue that, if the judge's credibility finding is overturned, so should his S&S determination. *Id*. at 20-21. Petitioners claim that, because the judge was originally mistaken that there was an unwarrantable failure charge, and based Austin Powder's penalty in part on aggravated conduct, he erred in not reducing the penalty on remand. *Id*. at 28-29. Petitioners also maintain that one of the findings on which the judge based the penalty — high negligence — is not supported by substantial evidence. *Id*. at 29. Petitioners further contend that the section 110(c) charge against Eaton cannot stand because there was no corresponding unwarrantable failure charge against the

operator, and that, in any case, the judge's section 110(c) determination is also not supported by substantial evidence. *Id*. at 24-28.

The Secretary responds that the changing nature of the miners' testimony and the contradictions among their versions of events support the judge's decision to credit the inspectors' testimony. S. Br. at 12-24. The Secretary argues that, because Petitioners' challenge to the S&S finding depends on the outcome of their attack on the credibility determination, it too must fail. *Id*. at 24. The Secretary contends that, by not raising the argument before the judge, Petitioners have waived Eaton's assertion that the section 110(c) charge cannot stand in the absence of a corresponding unwarrantable failure charge against the operator. *Id*. at 27. Alternatively, she asserts that an unwarrantable failure finding against an operator is not a prerequisite to holding an individual liable under section 110(c), and that the judge properly determined that Eaton was liable under section 110(c). *Id*. at 27-33. The Secretary also contends that, even without a finding of unwarrantable failure, the penalty the judge assessed against Austin Powder is supported by his finding of high negligence on Eaton's part. *Id*. at 33-35.

A. Violation of Section 56.15005

The question of violation hinges on whether the judge properly credited the inspectors over the miners regarding where the miners were positioned in relation to the highwall when the inspectors arrived at the blast site. On review, the judge's decision to credit the testimony of the inspectors is entitled to great weight and may not be overturned lightly. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). While the Commission will not affirm credibility determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them, it will not reject a judge's credibility choices merely because it would have made different ones if the matter was before it de novo. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878, 1881 n.80 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) ("*Dust Cases*"); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989). As an appellate body, the Commission "must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 579 (2d ed. 1995).

We reject Petitioners' request to overturn the judge's decision to credit the inspectors over the miners, as they have failed to offer "compelling reasons to take the 'extraordinary step' of reversing the judge's credibility determination." *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986)). The parties disagree over whether the judge erred in finding inconsistencies in Allard's and Eaton's testimony regarding how close to the high wall edge each was, as well as among the three miners' descriptions of how far along in the dewatering process they were when the inspectors arrived. *See* Pet'r Br. at 12-18; Pet'r Reply Br. at 2-9; S. Br. at 12-19. Those, however, are not the only inconsistencies the judge cited as grounds for discrediting the miners;

he found other inconsistencies in "fundamental[]" elements of their account of events. *See* 18 FMSHRC at 1885. For example, the judge found that the miners could not agree on whether Allard was involved in the dewatering process when the inspectors arrived. *Id*. at 1884. Allard testified that he was, and that he was holding the discharge hose in advance of pumping. *Id*. Gallant, however, testified that Allard was not near the hole they were preparing to dewater, as he had told Allard to stay by the Austin Powder blast truck, which was approximately 60 feet away from the dewatering operation. *Id*.; Tr. 25, 228-29.

Similarly, the judge based his decision to discredit the miners' accounts in part on their disagreement regarding whether Wilcox was involved in the alleged violation. 18 FMSHRC at 1884. The parties stipulated that Wilcox was on the site, but not involved in the violation, as inspector Dow placed him at the Austin Powder blast truck as well. *Id*. at 1881; Tr. 25. Gallant did not mention Wilcox in his testimony, and Allard could not place him at the hole they were preparing to pump out. 18 FMSHRC at 1884. Yet Eaton testified that Wilcox was at the hole, running a tape down to find its depth. *Id*.

Petitioners do not dispute the judge's reading of the record on these subjects, but instead characterizes the miners' disagreements regarding the location of Allard and Wilcox as a "minor fact." Pet'r Br. at 18. However, because of the judge's "superior position to appraise and weigh the testimony" (*Federal Practice and Procedure* § 2586, at 579-82), we do not agree that he abused his discretion by discrediting the miners based on their inability to agree on which miners were present when the inspectors arrived. The concept of "[c]redibility . . . comprehends an *overall* evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Id*. at 578-79 (emphasis added); *see also Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). Consequently, while a judge may credit a witness despite minor inconsistencies in his testimony,[5] a judge does not abuse his discretion in making an adverse credibility finding based on inconsistencies the judge considers central to the issue before him.

Here, the miners' inability to agree on whether two, three, or four miners were present when the inspectors arrived — a basic element of their account of events — is more than sufficient to support the judge's decision to discredit their accounts of what was occurring at that time. *See Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (refusing to overturn judge's credibility determination based upon lack of consistency in testimony), *aff'd*, 766 F.2d 469 (11th Cir. 1985). Accordingly, there is no need to address other inconsistencies found by the judge in the miners' testimony that Petitioners assert are based upon the judge's misinterpretation of that testimony.[6]

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[5] *See United States v. Harty*, 930 F.2d 1257, 1266 (7th Cir. 1991) (refusing to reverse credibility determination despite minor inconsistencies in testimony because "[minor] inconsistencies in testimony . . . are inadequate to make it incredible").

[6] Petitioners also argue that the inspectors' account of events was not as consistent as the judge found, contending that the judge failed to consider that the two inspectors' testimony

In addition, the judge did not credit the inspectors over the miners simply because he found the inspectors' testimony more consistent. He also took the witnesses' demeanor into account in determining credibility. *See* 18 FMSHRC at 1885 (crediting inspectors over miners "[a]fter observing and listening to the witnesses and upon a review of the entire record"). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *Dust Cases*, 17 FMSHRC at 1878 (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Consequently, we reject Petitioners' request to reverse the judge's decision to credit the inspectors over the miners, and affirm the finding of violation.

B. Significant and Substantial

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Petitioners contend that if the judge's credibility determination is overturned with respect to the question of the miners' proximity to the highwall, so should his S&S determination,

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differed on what each could see at various times when they arrived at the site, and citing differences between statements the two inspectors originally gave regarding the actions they took in removing the miners and their subsequent testimony on the subject. Pet'r Br. at 18-19. We agree with the Secretary that the different vantage points of each inspector adequately explains the differences between their testimony, and that the inspectors' brief prior statements are only inconsistent to the extent that the statements were not as specific as the inspectors' later oral testimony. *See* S. Br. at 19-22.

because there no longer will be support for the judge's finding that there was a danger of falling. Pet'r Br. at 21. The sole S&S issue on review is thus inextricably tied to the finding of violation. Having affirmed the judge's finding of violation, we also affirm the judge's S&S determination.[7]

C. Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c).

1. Lack of an Accompanying Unwarrantable Failure Charge

Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); *accord* 29 C.F.R. 2700.70(d). *See generally Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1312-14 (Aug. 1992); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). Despite failing to raise the issue before the judge, Petitioners request that we decide whether Eaton can be found individually liable for violating section 56.15005 even though Austin Powder's violation of the standard was not formally adjudicated unwarrantable. Pet'r Br. at 24-26.

In attempting to show the required "good cause," Petitioners make two somewhat contradictory arguments. First, they maintain that we should reach the issue because it is a legal one that can be decided on the record as it presently exists. Pet'r Reply Br. at 11. Even if that were true, however, that does not necessarily establish "good cause." The Commission has consistently held "that parties in Mine Act cases must first present their evidence *and advance their legal theories* before the judge, and not for the first time on appeal." *Shamrock Coal Co.*,

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[7] Commissioner Marks agrees that this violation is S&S. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he believes that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, should be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission's narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretative Bulletin with little explanation. *Id.* at 20,217. For the past six months, Commissioner Marks has been calling on the Secretary to advise him as to whether she is ever going to pursue her initial attempt to challenge the *Mathies* test and, thus far, the Secretary has refused to comment on the issue. Commissioner Marks again requests that the Secretary advise him on the S&S issue.

14 FMSHRC at 1304 (emphasis added); *Shamrock Coal Co.*, 14 FMSHRC at 1314 (emphasis added); *Beech Fork*, 14 FMSHRC at 1321 (emphasis added).

Petitioners also argue that we should decide the issue because it is "so closely related to and intertwined with [their] constant position throughout this case that" the evidence to support section 110(c) liability is insufficient. Pet'r Reply Br. at 11-12. We disagree. The question whether substantial evidence[8] supports the judge's section 110(c) finding is an entirely separate issue from whether Eaton can be held liable under section 110(c) without an accompanying unwarrantable failure charge against Austin Powder. In sum, because it was not raised before the judge, we will not consider Petitioners' claim that an absence of an unwarrantable failure determination against the operator precludes a finding of section 110(c) liability against an individual.

2. Substantial Evidence

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 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982); *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 knew or had reason to know of the violative conditions, 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)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16.

We are not persuaded by Petitioners' contention that, even if the three miners were momentarily too close to the edge of the highwall, no more than ordinary negligence on supervisor Eaton's part was established. Pet'r Br. at 27.[9] The judge found, and Petitioners do

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[8] 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). "Substantial evidence" means "'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)).

[9] Petitioners also contend that Eaton cannot be found liable under section 110(c) because of his testimony disputing the inspectors' account that the three miners were working close to the edge. *See* Pet'r Br. at 27-28. The judge, however, discredited that testimony, and we have already held that we will not overturn that determination.

not dispute, that Eaton knew that safety belts are required by regulation when miners are working as close to the highwall edge as the judge found the three miners were in this instance. 18 FMSHRC at 1887, 1888.[10] The judge also found that all three miners were dangerously close to the edge when spotted by the inspectors. *Id*. at 1885, 1888. The judge consequently concluded that Eaton knew how close to the edge he and the other miners were working, and that under such conditions safety belts should have been worn. *Id*. at 1887, 1888. Because the judge found Eaton's conduct "aggravated," we reject Petitioners' request to reverse the section 110(c) determination based on the judge's purported reliance on the impermissible criterion of "high negligence" in determining section 110(c) liability. *See* Pet'r Br. at 26 (citing *Freeman*, 108 F.3d at 360, 364 (rejecting finding of "high negligence" as sufficient by itself to support section 110(c) liability)). "[A]ggravated conduct" is the accepted test for section 110(c) liability. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992) (cited approvingly in *Freeman*, 108 F.3d at 364). Accordingly, the judge's rationale contains the necessary elements, allowing us to affirm his determination that Eaton's failure to protect miner safety, despite his knowledge of the existence of a serious hazard, constituted aggravated conduct. *See* 18 FMSHRC at 1887.

D. Penalty Assessment

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the six penalty criteria set forth in section 110(i),[11] as well as the deterrent purpose of the Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

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[10] Indeed, as noted above, Eaton admitted that he had worn a safety belt and line earlier that morning while checking the depth of water in the row of holes closest to the highwall edge. Tr. 250-51.

[11] Those six criteria are:

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

30 U.S.C. § 820(i).

Here, the sole penalty criterion in dispute is Austin Powder's negligence. The operator contends that, because the judge based his penalty assessment, in part, on the finding of aggravated conduct that he made in support of his prior determination that the violation of section 56.15005 was unwarrantable, on remand he should have reduced the penalty to reflect that the violation was no longer considered unwarrantable. Pet'r Br. at 28-29. However, we vacated the unwarrantable determination only because the Secretary had modified the citation to delete the unwarrantable failure charge. 18 FMSHRC at 2105-06. The judge's original findings regarding the conduct leading to the violation remained undisturbed on remand, despite the fact that there was no longer an unwarrantable failure allegation at issue. Consequently, in vacating the unwarrantable failure charge, we did not require the judge to find a lower level of negligence or reduce his earlier penalty assessment.

Petitioners also contend that, because substantial evidence does not support the judge's negligence finding, Austin Powder's penalty should be reduced. Pet'r Br. at 29. Again, Petitioners rely only upon the testimony of the miners that they were farther from the highwall than the inspectors claimed. Because we have found no basis to overturn the judge's decision to discredit that testimony, we affirm the judge's negligence finding and his assessment of a $6,000 penalty against Austin Powder.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that Austin Powder violated section 56.15005, that the violation was S&S, and that Eaton is liable under Mine Act section 110(c) for the violation, and sustain the $6,000 penalty assessed against Austin Powder.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, concurring:

I agree with all of my colleagues' decision except Part II.C.1. I would reach the issue of whether Eaton can be found liable under section 110(c) in the absence of a finding that his employer's conduct amounted to an unwarrantable failure to comply with section 56.15005. I also write separately to offer my views on the proper bases for a finding of liability under section 110(c), an area of Commission law I find in need of further clarification.

1. Is a Finding of Unwarrantable Failure a Prerequisite to Section 110(c) Liability?

For the first time in these proceedings, Eaton contends in his appeal to the Commission that the section 110(c) charge against him is not valid because there was no corresponding unwarrantable failure charge against the operator. Pet'r Br. at 24-28. Generally, the Commission may not consider any "assignment of error by any party . . . on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). This general rule is qualified, however, by a "good cause shown" exception. *Id*. The issue is thus whether good cause exists to consider the issue, which I view as the simple question of whether a charge of unwarrantable failure is a condition precedent to a charge being brought against an individual under section 110(c).

I believe good cause exists to consider this question. The parties have fully briefed the issue and should be given an answer to the simple legal question presented — which is, in fact, narrow, easily addressed, and capable of being resolved on the present record. I also believe it is unfortunate that, in failing to answer this question, the cloud of a "technicality" that could be easily resolved now hangs over my colleagues' decision finding Eaton personally liable. Finally, I note that this case has a rather odd procedural history that has resulted in a substantive anomaly. In his original decision, the judge essentially based his finding of section 110(c) liability on his finding of unwarrantable failure. *See* 18 FMSHRC at 1887-88 ("Eaton's . . . unwarrantable failure . . . is attributable to the operator"). But the Commission reversed his finding of unwarrantable failure because the Secretary withdrew this charge early on in the proceedings. 18 FMSHRC at 2105. On remand, the Commission should have directed the judge to revisit his section 110(c) finding — but neglected to do so. Nor did the judge address Eaton's liability in his remand decision. Thus, we are left with a finding of section 110(c) liability that is deficient insofar as it is based on an unwarrantable failure finding that was overturned.[1] Given this procedural and substantive confusion, I believe we should afford the parties every opportunity to raise issues concerning Eaton's liability in the instant appeal. I would thus reach Eaton's contention.

[1] Under different facts, such a deficiency could very well necessitate a remand. But here, I believe the record compels a finding of individual liability, making remand unnecessary. *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).

As to whether section 110(c) liability must be predicated upon a finding of unwarrantable failure, I begin with the plain terms of section 110(c). The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. *See id.* at 842-43. Here, section 110(c) provides that "any director, officer, or agent of [a] corporation who knowingly authorized, ordered, or carried out [a Mine Act] violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a [corporation]." 30 U.S.C. § 820(c). Since there is no requirement in the Act that the violation upon which individual liability is based be unwarrantable, Eaton's contention is inconsistent with the Act's plain language. I would thus reject his argument.

2. The Bases of Section 110(c) Liability

It is well established that section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. Slip op. at 10 (citing *BethEnergy Mines*, 14 FMSHRC at 1245). Similarly, the Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). But the Commission has never distinguished between these two holdings and explained what the term "aggravated conduct" means in the context of section 110(c) — a gap in Commission jurisprudence that I believe needs to be addressed.

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as 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). Obviously, these factors need to be viewed in the context of the factual circumstances of a particular case — some factors may be irrelevant to a particular factual scenario. But all of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated — or whether the level of the actor's negligence should be mitigated.

The judge's original decision collapses the analysis of Eaton's liability under section 110(c) and Austin Powder's purported unwarrantable failure. Had the Secretary not withdrawn her unwarrantable failure allegation, I do not believe that the judge's approach would necessarily have been inappropriate because I believe that the two inquiries are very similar. It is up to the Secretary to decide how to prosecute "aggravated conduct" in a particular case — either that of an individual alone, or of an operator, or both. But a similar analytic approach should be used to

determine whether an individual or operator has engaged in "aggravated conduct" — in addition to determining whether the individual knew or had reason to know of the violative condition. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997).

I believe that the record in this case compels a finding of aggravated conduct. First, I rely on the judge's finding that Eaton knew that he and others were working dangerously close to the edge of the highwall under conditions that necessitated the use of safety belts. 18 FMSHRC at 1887, 1888. I agree with my colleagues that this finding is supported by substantial evidence. Slip op. at 9-10. In addition, I find that substantial evidence supports the judge's findings that the violation was serious and posed a high degree of danger, 18 FMSHRC at 1887 (finding a reasonable likelihood of serious injury); that the nature of ground conditions "enhanced [the] risk of falling," *id*. at 1886, 1887; and that "Eaton's behavior put others at risk," *id*. at 1888. Moreover, I note that the parties stipulated that only one safety belt and line was available to Eaton and his coworkers. *Id*. at 1881. Taken together, all these facts and circumstances compel me to find that Eaton's conduct was aggravated and that the judge properly found him liable under section 110(c).

Finally, although I believe that the judge provided little by way of an analysis of Eaton's liability, *see The Anaconda Co.*, 3 FMSHRC 299, 302 (Feb. 1981), given the paucity of Commission guidance on what "aggravated conduct" means under section 110(c), I find it understandable that the judge went no further than he did. This case presents the opportunity to tell our judges not only that we need a bit more, but what that "more" needs to be.[2]

Theodore F. Verheggen, Commissioner

[2] I note that in assessing a penalty, the judge made no explicit finding under section 110(i) on the gravity of the violation. He did, however, find the violation S&S, which is essentially a finding of high gravity. I believe that the Commission, in affirming the judge's penalty assessment (slip op. at 11), should enter such a finding based on the judge's uncontested S&S finding. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984) ("the Commission's entering of undisputed record information as findings [is] proper under the [Mine] Act").

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