Chapter 6

Critical Issues in the Law of Civil and Criminal Liability Under the Mine Act

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§ 6.01. Introduction.

The Sago and Aracoma mine accidents resulted in the passage of the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) and the start of a new Mine Safety and Health Administration (MSHA) regulatory era characterized by more stringent enforcement of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) and its regulations as well as substantially higher penalties. Increased funding from Congress has enabled MSHA to hire more inspectors and increase the number of inspections conducted. Since passage of the MINER Act, there has been a dramatic increase in the number of citations issued to operators, and an even greater increase in the size of the civil penalties, as well as an increase in findings of unwarrantable failure and high negligence, highlighted by vigorous use of MSHA’s new power to assess huge penalties for “flagrant violations.”

The recent tragedy at the Upper Big Branch Mine in Whitesville, West Virginia has prompted further Congressional hearings on the adequacy of existing mine safety laws and their enforcement. Extensive media attention and comments by the president himself have also highlighted safety issues in the mining industry. Again in the spotlight, operators should expect MSHA to continue or even further increase scrutiny of their compliance efforts and to employ some of its harsher enforcement tools, including individual civil penalties and criminal investigations and prosecutions.

This chapter analyzes issues in the interpretation and enforcement of federal laws that expose mine operators and supervisors to civil and criminal liability, focusing on sections 110(c) and 110(d) of the Mine Act. In addition to setting forth principles of liability developed through case law,
this chapter will focus on potentially critical issues not yet fully addressed by the Federal Mine Safety & Health Review Commission (Commission) or the courts, in the context of first civil, and then criminal, prosecutions. The chapter also touches briefly upon federal obstruction, false statement, and conspiracy provisions which may arise from investigations of alleged mine operator misconduct.

§ 6.02. Civil Enforcement of Mine Act Section 110(c).

Section 110(c) provides for individual civil and criminal liability for officers, directors and agents who knowingly authorize, order or carry out certain violations of the Mine Act.\(^5\) Section 110(c) enforcement actions are brought as the result of a “special investigation” usually triggered by a mine accident, the receipt of a miner complaint, or a review of certain citations and orders for possible knowing violations of the Mine Act.\(^6\) In a civil enforcement action, individuals found liable for a knowing violation under section 110(c) are subject to a maximum penalty of $70,000.\(^7\)

[1] — Elements of Section 110(c) Liability.

Section 110(c) of the Mine Act provides that:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation,

\(^5\) \textit{Id.} § 820(c).

\(^6\) \textit{See} I MSHA Program Policy Manual: Interpretation and Guidelines on Enforcement of the 1977 Act at 39-40 (Release I-14, Aug. 2007), \textit{available at} http://www.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%201.pdf. The following citations and orders are reviewed for possible knowing violations: 1) each 104(a) citation contributing to the issuance of an imminent danger order; 2) each 104(d) order that is marked “significant and substantial” and “high negligence” or “reckless disregard;” and 3) each citation issued for working in violation of a withdrawal order. \textit{Id.}

\(^7\) \textit{See} 30 C.F.R. § 100.3(a)(2010).
failure, or refusal shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.8

To prove liability of an individual under section 110(c) of the Mine Act, the government must show three elements: 1) that the employer was a corporate operator; 2) that the operator violated a mandatory health or safety standard or knowingly violated or failed or refused to comply with an order issued under the Mine Act; and 3) that a director, officer, or agent of such corporation knowingly authorized, ordered, or carried out such violation, failure or refusal.9

The Commission has held that liability under section 110(c) does not extend to partnerships, even those composed of two corporations, because section 110(c), “on its face” applies only to agents of corporations.10 Section 110(c) liability does, however, apply to agents of Limited Liability Companies (LLCs).11 In 2006, the Secretary of Labor issued an Interpretive Bulletin setting forth her position that LLCs fall within section 110(c)’s definition of corporate operator, because LLCs, like corporations, create “the same sort of shield against personal liability which led Congress to impose personal liability” of corporate agents under the Mine Act.12 Recently, an Administrative Law Judge (ALJ) upheld the Secretary’s interpretation of section 110(c) as applying to LLCs as reasonable, because it was consistent with legislation’s intent to reach individuals otherwise shielded from personal liability based on the mine’s business structure.13

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9 Id.
12 Id. at 26983-84 (explaining that while Congress could not have expressed any intent to subject LLCs to section 110(c) because such an entity did not exist at the time the provision was enacted, the provision nevertheless applies to new circumstances that implicate the concerns for which Congress did act).
Section 110(c) is also limited to violations of mandatory health or safety standards. A “mandatory health or safety standard” is defined as “the interim mandatory health or safety standards established by subchapters II and II . . . and the standards promulgated pursuant to subchapter I . . . .” Thus, if a standard was not issued as an interim mandatory health or safety standard or was not issued under the rulemaking procedures set forth in Mine Act Section 101, it cannot form the basis for Section 110(c) liability.

Finally, the provisions of section 110(c) apply only to directors, officers and agents of corporate operators. An “agent” is defined as “any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.” To determine whether a miner is an “agent” of the operator, the Commission relies on a multi-factor test that analyzes both the statutory definition of agent as well as common law principles of agency law. In its analysis, the

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14 See I MSHA Program Policy Manual: Interpretation and Guidelines on Enforcement of the 1977 Act at 40 (Release I-14, Aug. 2007), available at http://www.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%201.pdf (“Only a violation of a mandatory health or safety standard or order issued under the Mine Act shall be reviewed for possible further action [under sections 110(c) or (d)]. This includes violations of 30 C.F.R., Parts 46, 47, 48, 49, 56, 57, 58, 62, 70, 71,72, 75, 77, and 90.”).
16 For example, in Cyprus Emerald Resources Corp. v. Federal Mine Safety & Health Review Comm’n, 195 F.3d 42, 45 (D.C. Cir. 1999) the D.C. Circuit held that a violation of 30 C.F.R. part 50 could not be “significant and substantial” because the Secretary promulgated that regulation under her general rulemaking authority provided by Coal Act section 508, instead of her authority to issue mandatory safety and health standards under section 101. In 2006, however, the Secretary issued an Emergency Temporary Standard (ETS) amending 30 C.F.R. § 50.10. See 30 C.F.R. § 50.10 (2006); Emergency Mine Evacuation, 71 Fed. Reg. 12252, 12253 (Mar. 9, 2006). This ETS was issued under Section 101(b) of the Mine Act, which authorizes the Secretary to issue emergency mandatory safety and health standards. Because there is some uncertainty as to whether all the definitions implementing 30 C.F.R. § 50.10 were repromulgated under the Secretary’s subsequent final rule, see Emergency Mine Evacuation, 71 Fed. Reg. 71452 (Dec. 8, 2006), whether any violation of 50.10 can be subject to a charge of unwarrantable failure, significant and substantial or Section 110(c) liability is unresolved.
Commission focuses on a miner’s “function and not his job title.”19 Some factors the Commission considers in deciding whether a miner is an agent of the operator include: 1) whether the miner’s job responsibilities were akin to those normally delegated to management personnel and were crucial to the mine’s operation; 2) whether the miner could hire, fire, evaluate, or discipline other miners; 3) whether the miner could take action to abate citations; 4) whether the miner could independently change another miner’s jobs or assign equipment; 5) whether the miner is paid at an hourly rate; 6) whether the miner holds himself out as a supervisor; 7) whether the miner acted as the company representative during inspections; and 8) whether the miner conducted regular mine examinations.20

Merely having the ability to assign certain tasks and to direct miners in a specific area is not necessarily sufficient to make a miner an agent under the Mine Act.21 For example, in Martin Marietta Aggregates, the Commission upheld an ALJ’s determination that the leadman of a quarry loadout crew was not an agent for purposes of imputing a negligence finding to the quarry operator, because the leadman had “very limited responsibilities to assign work” and was closely supervised by management.22 The Commission explained that classifying every miner with some authority to direct other miners in their work as an “agent” under the Mine Act would result in an “overly-broad standard” that could reach rank-and-file miners who were merely providing guidance and instruction to less experienced miners.23 Such an approach, said the Commission, could also lead to “an erosion of the current apprenticeship environment” which is key to training less experienced miners and promoting mine safety.24

19 Id.
22 Id. at 640.
23 Id.
24 Id.

The term “knowingly” is not defined in the Mine Act. Thus, the determination of whether an individual has acted “knowingly” for purposes of section 110(c) liability is guided by a series of Commission cases that have interpreted and applied the term. As established below, the Commission has rejected arguments attempting to equate the term “knowingly” with the more stringent standard required for “willful” conduct under section 110(d), and has also refused to require a showing of actual knowledge as a predicate to section 110(c) liability. Rather, the Commission has adopted a broad interpretation of the term “knowingly” as including both actual knowledge and reason to know of a violation.

[a] — Primary Principles.

The leading case in the interpretation and application of the term “knowingly” in section 110(c) is Kenny Richardson. In that case, the Commission held that a day shift master mechanic committed a knowing violation of a Mine Act regulation when he failed to remove an unsafe dragline from service. The Commission rejected the operator’s claim that individual liability for a knowing violation required a showing of willfulness. Rather, the Commission concluded that Congress intended the terms “knowingly” and “willfully” to have different meanings, based on their placement and use in the Mine Act provisions governing criminal liability.

The Commission also held that the government was not required to show actual knowledge of a violation to prove liability under section 110(c). Consistent with the statute’s “language and remedial intent,” the Commission held that the term “knowing” did not require “bad faith or evil purpose or criminal intent;” rather, it means “knowing or having reason to know.” Thus, Commission interpreted the term “knowingly” to mean:

25 Kenny Richardson, 3 F.M.S.H.R.C. 8, 20 (Jan. 1981), aff’d 689 F.2d 632 (6th Cir. 1982).
26 Id. at 17.
27 Id.
28 Id. at 18.
29 Id.
If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.30

The Commission then affirmed the Administrative Law Judge’s determination that the master mechanic committed a knowing violation because he was aware of the existence of a visible crack in the dragline, but failed to immediately remove it from service.31 Indeed, because the mechanic was aware of the crack, the Commission agreed that he had both reason to know and direct knowledge of the dragline’s unsafe condition.32

The Commission later narrowed Kenny Richardson’s “reason to know” language in Roy Glenn. In that case, the Commission held that a supervisor could not be held personally liable under section 110(c) where the supervisor had only “reason to know that miners ‘might’ perform tasks in an unsafe manner.”33 The Commission reversed the ALJ’s finding that a shift boss knowingly violated the mandatory standard requiring safety belts and lines when there is a danger of falling.34 The alleged violation occurred when the shift boss directed two miners to weld a new valve onto an oxygen line, and the miners walked across a girder to perform the work without wearing their safety lines.35 Although the shift boss did not observe the two miners traveling across the girder without their safety lines, he did observe a third miner traveling across the girder with no safety belt and immediately waved him down.36 MSHA arrived when he was waving down the third miner and issued a citation.37

30 Id. Kenny Richardson involved allegations of a knowing violation under Section 109(c) of the Federal Coal Mine Health and Safety Act of 1969 (“Coal Act”), 30 U.S.C. §§ 801 et seq., the predecessor to the Mine Act. The provisions of Section 109(c) of the Coal Act and section 110(c) of the Mine Act are substantively identical. Id. at 35 n.1.
31 Id. at 20.
32 Id.
33 Roy Glenn, 6 F.M.S.H.R.C. 1583, 1588 (July 1984).
34 Id. at 1588-89.
35 Id. at 1584.
36 Id.
37 Id.
In its analysis of the section 110(c) allegations, the Commission held that a corporate agent acts knowingly when “based upon the facts available to him, he either knew or had reason to know that a violative condition . . . would occur, but he failed to take appropriate preventative steps.” The Commission explained that to knowingly ignore that a violation will occur “would be to reward a see-no-evil approach to mine safety . . . ,” and that supervisors cannot “close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance.” The Commission also concluded, however, that knowledge a miner merely “might” violate a standard is “too contingent and hypothetical to be legally sufficient under . . . section 110(c) . . . ” and that “proof must rise above mere assertion that, at the time of assignment, an assigned task could have been performed . . . in an unsafe as well as a safe manner.”

The Commission then found that there was no evidence the supervisor either directed or knew or had reason to know that the miners would walk the girder without a safety belt. In fact, the record showed that the supervisor instructed the miners to take their safety belts with them to work on the oxygen line, and did not observe the first two miners crossing the girder in violation of the standard. There was also no evidence that the shift boss presumed the miners would violate the standard or that it was common practice to cross the girder without a safety belt.

The Commission’s decision in BethEnergy Mines, Inc. further defined the elements of section 110(c) liability, holding that a “knowing” violation involves aggravated conduct, not ordinary negligence. Aggravated conduct is characterized by reckless disregard, intentional misconduct, indifference

38 Id. at 1586 (emphasis added).
39 Id.
40 Id. at 1587.
41 Id. at 1588.
42 Id. at 1587.
43 Id.
44 Id. at 1587, 1588 n. 5.
or a serious lack of reasonable care.\textsuperscript{46} The D.C. Circuit — acknowledging Commission precedent requiring a showing of “aggravated conduct” to prove section 110(c) liability — clarified that individual liability under section 110(c) can not be premised “on the basis of any form of negligence.”\textsuperscript{47} Specifically, in \textit{Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm’n}, the D.C. Circuit held that the Secretary’s allegation of “high negligence” relating to the collapse of a walkway was not a permissible basis for section 110(c) liability.\textsuperscript{48} Rather, the court concluded that “actual or constructive knowledge of the violative condition” is required to sustain liability under section 110(c).\textsuperscript{49} Factors the Commission analyzes to determine whether there is aggravated conduct are discussed below in Section 6.02[4].

\textbf{[3] — Actual or Constructive Knowledge.}

Actual knowledge of a violation is generally proven by showing that a corporate agent observed a violation and failed to take action to remedy it, directed miners to perform work in violation of a regulation, or allowed a violation to continue after it was discovered.\textsuperscript{50} Constructive knowledge of a violation, on the other hand, is shown by demonstrating that a corporate

\begin{itemize}
\item \textsuperscript{47} Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm’n, 108 F.3d 358, 364 (D.C. Cir. 1997)(emphasis added). The D.C. Circuit also found that a person has “reason to know” of a violation “when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.” \textit{Id.} at 363.
\item \textsuperscript{48} \textit{Id.} at 364.
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} See, \textit{e.g.}, Sunny Ridge Mining Co., Inc., 19 F.M.S.H.R.C. 254, 269-71 (Feb. 1997)(finding foreman liable under section 110(c) where he inspected highwall on day of order and acknowledged area needed corrective measures); \textit{Ambrosia Coal & Const. Co.}, 18 F.M.S.H.R.C. 1552, 1563 (Sept. 1996)(holding foreman had actual knowledge of defective brakes based on complaints from highlift operator and observation of difficulties stopping vehicle); \textit{see also} LaFarge Const. Materials, 20 F.M.S.H.R.C. 1140, 1149 (Oct. 1998)(concluding foreman had “actual knowledge” of loose materials atop surge bin, but failed to take available measures to remove them).
\end{itemize}
agent had “reason to know” of a violative condition. As constructive knowledge is a more nebulous concept, and thus more difficult to prove, much of the case law analyzing Section 110(c) involves whether an agent had “reason to know” of a violation. With some exceptions, cases involving constructive knowledge principles tend to fall into three categories: common practice, self-induced ignorance and knowledge of a general risk. Below is a discussion of these three categories of cases.

[a] — Common Practice.

One way the government shows that an agent had “reason to know” of a violation is by proving that the agent had knowledge of a “common practice” at the mine that was in violation of a mandatory standard. For example, in Harold Moody, the Commission reversed an ALJ’s finding that a mine’s general manager did not commit a knowing violation of a regulation governing roadway berm height where the manager was not present at the mine when a replacement truck traveled on the roadway and testified that he did not know of the exact height of the berm at the time of the violation.

The Commission concluded that the manager had reason to know that the berm height violated the regulation because the manager traveled the roadway daily and the berm had always been maintained well below the height required for the replacement vehicle. In addition, because the vehicle at issue “regularly” substituted for the normal haul truck, the manager had reason to know it could be used on the roadway with inadequate berms.

Similarly, in Suburban Sand & Gravel, a mine manager was found liable under section 110(c) based on a miner’s performance of maintenance on a

51 See Kenny Richardson, 3 F.M.S.H.R.C. 8, 16 (Jan. 1981), aff’d 689 F.2d 632 (6th Cir. 1982).
52 Section 110(c) liability is based on an agent’s “individual knowledge and actions not on the collective actions or inferred knowledge of the company.” Charles Clevinger, 26 F.M.S.H.R.C. 485, 500 (June 2004)(ALJ).
54 Id. at 691-92.
55 Id. at 692.
56 Id. at 691.
conveyor without proper fall protection. The ALJ distinguished Roy Glenn and found that because the manager was aware that miners “often” walked up the conveyor belts to perform work yet “never took any action to stop this practice,” he was liable for a knowing violation, even though the manager was not present when the miner climbed the belt nor was he specifically aware that the miner would be climbing the belt on the date at issue.

Moreover, in Gunther-Nash Mining Const. Co., a mine superintendent was held liable under section 110(c) based on a subordinate miner’s failure to have his safety belt properly tied off while working over a shaft. Although the superintendent testified that he assumed the miner was tied off since he had observed the miner earlier wearing a safety belt, the ALJ nonetheless found him liable for a knowing violation because evidence of his “egregious” and “habitual” failure to enforce and comply with the standard in the presence of subordinate miners showed recklessness. This finding was based on testimony that the superintendent “seldom wore a safety belt” and “once taunted” a miner for wearing one. The ALJ rejected the operator’s argument that its training program and policies regarding the use of safety belts negated the finding of liability under section 110(c), concluding that the policies deserved little weight in light of the “blatant disregard for actual compliance with the safety belt requirements.”

Thus, as these cases show, liability under section 110(c) is not predicated on an individual’s presence at the mine when a violation occurs. In fact,

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58 Id. Indeed in Roy Glenn, the Commission noted that there was no evidence that the violation at issue in that case – walking across girders without a safety belt – was a common practice at the mine. Roy Glenn, 6 F.M.S.H.R.C. 1583, 1588, n.5 (July 1984).
60 Id.
61 Id. While certain miners testified as to the superintendent’s disregard for the safety belt requirement, others testified that the superintendent had at times hounded miners about wearing their safety belts and that “as a rule” miners seen without belts were told to get properly tied off. Id. at 1208.
knowledge of the common occurrence of a violative condition or practice and the failure to take remedial action is sufficient to show that an individual had “reason to know” of a violation, even when the individual is neither present at the time of the violation nor specifically directs performance of the violative acts.63

[b] — “Self-Induced Ignorance.”

The failure to act in light of information indicating the potential existence of a hazardous condition, i.e., “self-induced ignorance,” can demonstrate constructive knowledge for purposes of section 110(c) liability.64 In Target Industries, Inc., a maintenance foreman was found liable for a knowing violation of a regulation requiring withdrawal of miners in the event of a fan stoppage.65 The foreman received a call at home from a security company notifying him of a fan stoppage, but “chose not to travel to the mine to ensure that miners were removed from the mine and that the foreman on duty knew of the fan stoppage.”66 Instead, he incorrectly assumed that the fan alarm was false or that the miner in charge of monitoring the fan had restarted it, and that the running fan drowned out the sound of the phone ringing when he attempted to reach the foreman at the fan house.67 He also alleged that he did not travel to the mine because by the time of his arrival, the production shift would have been on its way out.68 Finding aggravated

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63 Id.; see also Bell County Coal Corp., 29 F.M.S.H.R.C. 506, 521, 526-27 (June 2007)(ALJ)(finding that use of nonpermissible electric chain saws within 150 feet of the pillar line was unlawful common practice that foremen were aware of and permitted).

64 See, e.g., Target Indus., Inc., 23 F.M.S.H.R.C. 945, 965 (Sept. 2001). The Commission vote in Target Indus. was evenly split — two Commissioners voted to affirm and two voted to reverse. Id. at 945. When there is a split decision, the ALJ’s decision stands “as if affirmed.” Id.

65 Id. at 964.

66 Id.

67 Id. at 949, 965.

68 Id. at 964.
conduct, the Commission rejected the foreman’s “best-case scenario” assumption and concluded that he showed “blatant disregard” for the miners working underground when he did not verify whether there was indeed a fan stoppage.\textsuperscript{69} The Commission also noted that the foreman’s failure to follow-up on the fan alarm violated the mine’s policy to verify the existence of a false alarm.\textsuperscript{70}

Failing to ensure that corrective action has been taken can also, in some circumstances, lead to section 110(c) liability based on the concept of “self-induced ignorance.”\textsuperscript{71} In \textit{Prabhu Deshetty}, the Commission found a general mine foreman liable for a knowing violation of the standard that prohibits excessive accumulations of coal and coal dust. The Commission concluded that the foreman had actual knowledge of the accumulations because he reviewed and countersigned the examiner’s report that indicated the presence of hazardous accumulations.\textsuperscript{72} The Commission also determined that because the foreman reviewed all the citations for the mine, he was on specific notice of the mine’s history of problems with combustible accumulations and thus should have had a “heightened awareness” of the issue.\textsuperscript{73} The Commission rejected the supervisor’s claim that he relied on a foreman to remedy accumulations noted in the belt examiner’s report and was therefore not liable for a knowing violation.\textsuperscript{74} Because the supervisor was responsible for verifying that corrective action was taken in response to the report, the Commission held that he could not escape liability by closing his eyes to the violation.\textsuperscript{75}

On the other hand, in at least one case, an ALJ dismissed Section 110(c) charges for failure to ensure remedial action had been taken, because the supervisor was not responsible for “implementing or carrying out” the mine’s

\textsuperscript{69} \textit{Id.} at 965.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{See} Prabhu Deshetty, 16 F.M.S.H.R.C. 1046, 1052 (May 1994)(quoting Roy Glenn, 6 F.M.S.H.R.C. 1583, 1587 (July 1984)).
\textsuperscript{72} \textit{Id.} at 1050-51.
\textsuperscript{73} \textit{Id.} at 1051.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
maintenance program. In Charles Clevinger, the Secretary alleged that a foreman committed a knowing violation under section 110(c) based on his failure to confirm that brakes had been repaired in response to a miner complaint over three weeks prior to a fatal truck accident involving the defective brakes. Although the foreman was notified of the malfunctioning brakes, the vehicle maintenance supervisor was also informed of the brake’s condition. Moreover, in the weeks between the initial complaint and the fatal accident, the vehicle had been driven without incident or complaint.

The ALJ dismissed the section 110(c) charges against the foreman, because there was no evidence that he was responsible for verifying that the brakes were in fact serviced and because there was no evidence in the weeks after the initial complaint of ongoing brake concerns. The ALJ further stated that while the foreman’s failure to confirm that the brakes had been repaired may have constituted ordinary negligence, his conduct did not demonstrate a “see-no-evil approach” to the hazard.

To what extent a supervisor can remain in the dark about a possible violation before triggering section 110(c) liability is unclear. While Roy Glenn and Prabhu Deshetty instruct that a supervisor cannot ignore information relating to a possible violation, other decisions have rejected the notion that section 110(c) imposes an absolute duty on high-level managers to ensure there is regulatory compliance at all times. Such strict personal

76 Charles Clevinger, 26 F.M.S.H.R.C. 485, 503 (June 2004)(ALJ).
77 Id. at 502.
78 Id.
79 Id.
80 Id. at 502-03.
81 Id. at 502.
82 Bell County Coal Corp., 29 F.M.S.H.R.C. 506, 526 (June 2007)(ALJ)(rejecting claim that management has obligation under section 110(c) to travel underground as often as necessary to ensure regulations are followed); see also, e.g., Sunny Ridge Mining Co., Inc., 19 F.M.S.H.R.C. 254, 273-74 (Feb. 1997)(dismissing certain section 110(c) allegations against mine president, because there was no evidence he was actually aware of or was otherwise informed of particular dangerous highwall conditions).
liability, according to these cases, would conflict with the provisions of section 110(c).83

[c] — Knowledge of General Risk.

Knowledge of a general risk associated with a certain condition or practice is not enough to establish liability under section 110(c), if the risk is adequately addressed by the operator and its agents.84 Rather, an “operator’s agent must be privy to knowledge or information that gives him reason to know of the existence of a violative condition under circumstances that his failure to act amounts to aggravated conduct” in order to prove section 110(c) liability.85

Thus, in Freeman, the D.C. Circuit concluded that neither the manager nor the vice president of a mine knew or had reason to know of the hazardous corrosion condition of a walkway support beam that collapsed in a coal preparation plant, because an inspection and rehabilitation program that was in place to identify and remedy structural problems associated with pervasive corrosion did not reveal the condition prior to collapse.86 The court stated that the manager in charge of the inspection and rehabilitation program was in the plant nearly every week and conducted quarterly inspections of the walkway.87 The court further found that there was no evidence that the vice president ever delayed recommended repairs or withheld resources for plant maintenance.88 The court explained that, while “[c]ertainly both men knew of the risk that corrosion of support beams in the old plant could cause structural instability . . . they were addressing that risk responsibly by conducting regular inspections and repairs.”89 Indeed, the court noted

83 See Bell County Coal Corp., 29 F.M.S.H.R.C. 506, 526 (July 2007)(ALJ).
85 See Bell County Coal Corp., 29 F.M.S.H.R.C. 506, 524-25 (July 2007)(ALJ)(emphasis added).
87 Id. at 361.
88 Id.
89 Id. at 364.
that none of the inspections conducted by either the operator, MSHA, state regulators or the union revealed safety concerns associated with the particular beam that collapsed.\textsuperscript{90}

Similarly, in \textit{Bell County Coal Corp.}, the ALJ found that two high level mine managers — the superintendent and general mine foreman — were not liable for an alleged roof control plan violation based on the existence of hillseams that caused a roof fall.\textsuperscript{91} The ALJ discredited the Secretary’s argument that hillseams were “obvious” prior to the fall, because “experienced MSHA personnel” had traveled with the mine foreman to the area prior to the fall — “paying careful attention to roof conditions . . . with emphasis on hillseams” — and neither observed any hillseams or other possible violations of the roof control plan.\textsuperscript{92} The ALJ also pointed out that, while hillseams had been encountered in a different area before the fall, management had addressed these conditions appropriately.\textsuperscript{93}

The ALJ dismissed the Secretary’s claim that, as high management officials, the superintendent and general foreman had an obligation to go underground as often as necessary to make certain the roof control plan and regulations were followed.\textsuperscript{94} The ALJ reasoned strict liability of high-level managers “for violations at mines over which they exercise authority . . . [is] inconsistent with the Act’s provisions on personal liability.”\textsuperscript{95} Because the Secretary did not show that the superintendent was informed of the particular hillseam problem or other alleged noncompliance with the roof control plan, she failed to establish that he had actual knowledge or reason to know of the existence of the alleged violation.\textsuperscript{96}

\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{See} Bell County Coal Corp., 29 F.M.S.H.R.C. 506, 525 (July 2007)(ALJ). The ALJ ultimately concluded that the Secretary failed to establish a violation of the roof control plan, thus precluding individual liability. \textit{Id.} at 524. Nonetheless, the ALJ explained his analysis for granting motions for entry of judgment at the hearing on the issue of section 110(c) liability. \textit{Id.} at 524-25.
\textsuperscript{92} \textit{Id.} at 525.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 526.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.}
Notably, as the cases above show, the ultimate occurrence of a violation demonstrating the existence of a previously undetected hazardous condition, or even an accident, does not necessarily establish that an examination for such a condition had been inadequate or that there was reason to know of a violation.\textsuperscript{97} In \textit{Summit, Inc.}, the ALJ held that management officials were not liable for a knowing violation resulting from a highwall failure, despite their decision to continue mining after the occurrence of a prior failure. The evidence showed that after sloughage occurred on the west highwall, three supervisors examined the east highwall from different vantage points and determined that it was stable and did not require changes prior to mining.\textsuperscript{98}

The ALJ rejected the Secretary’s argument that the supervisors should have checked for tension cracks along the bench above the highwall, concluding that a reasonably prudent miner would have followed the mine’s normal procedures, which did not include such an examination.\textsuperscript{99} The ALJ further noted that the Secretary had never before required such examinations, either by regulation, interpretive guidance or prior enforcement action.\textsuperscript{100} The ALJ explained that the ultimate failure of the highwall did not render the examination inadequate or result from a knowing violation.\textsuperscript{101}

On the other hand, the failure to exercise the appropriate level of care when circumstances pose a high degree of danger, however, can result in a finding of aggravated conduct and therefore personal liability under section 110(c).\textsuperscript{102} In \textit{LaFarge Const. Materials}, the Commission found a foreman liable for a knowing violation under section 110(c) based on his failure

\textsuperscript{97} See\textit{ Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm’n}, 108 F.3d 358, 364 (D.C. Cir. 1997); Bell County Coal Corp., 29 F.M.S.H.R.C. 506, 525 (July 2007)(ALJ); see also \textit{Summit, Inc.}, 19 F.M.S.H.R.C. 1326, 1344 (July 1997)(ALJ).

\textsuperscript{98} \textit{Summit, Inc.}, 19 F.M.S.H.R.C. 1326, 1344 (July 1997)(ALJ).

\textsuperscript{99} Id.

\textsuperscript{100} Id.

\textsuperscript{101} Id.

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to remove loose materials before allowing a miner to enter a surge bin. Although it was undisputed that the foreman observed loose materials at the top the surge bin, the foreman relied on his visual inspection of the bin from the discharge chute, to make a determination that the bin was safe to enter. The Commission rejected the foreman’s argument that he followed the supposed industry standard in examining the surge bin. Instead, the Commission affirmed the ALJ’s finding that given his knowledge of the serious danger of falling rock and that fact that his visual inspection from the discharge chute did not “give a sufficiently full perspective of what remained in the bin,” it was necessary to conduct an inspection from above the bin. The Commission held that the foreman’s “good faith belief” that the bin was safe was “unreasonable” and that he demonstrated a “lapse of judgment” by failing to view the bin from above to “enable a better-informed judgment call regarding the condition inside the surge bin.”

A foreman in Barrick Bullfrog, Inc., was found liable for a knowing violation under section 110(c) when his failure to test ground conditions in an area where a prior ground fall occurred resulted in the death of a front loader operator sent into dig out the prior ground fall. Despite having knowledge of a prior ground fall in the area of the accident, of the existence of supports prior to the first ground fall, and of generally weak ground conditions and the occurrence of numerous other ground falls, the foreman concluded that a visual inspection of the area was adequate prior to allowing the operator of the front loader to proceed. The ALJ determined that the prior ground fall was a “significant change” and that the foreman’s failure to test ground conditions and take down or support hazardous areas was aggravated conduct sufficient to satisfy section 110(c) liability.

103 Id.
104 Id. at 1145-46.
105 Id. at 1149.
106 Id. at 1150.
108 Id. at 943-44.
109 Id. at 948.
Thus, as stated in the Commission's decision in *LaFarge*, agents of operators “are responsible for recognizing” serious hazards and “meet[ing] a standard of care proportionate with the danger.” When agents fail to adequately investigate potential hazards based on information available to them, they can be found liable for a knowing violation, even in cases when a particular industry standard is allegedly met.

**[4] — Aggravated Conduct.**

As stated above, liability under section 110(c) requires a showing of “aggravated conduct.” All relevant facts and circumstances, including mitigating circumstances, must be examined to determine whether an individual’s conduct is aggravated. The Commission has identified seven factors as relevant to the determination of whether there was aggravated conduct. These factors, as well as cases evaluating them in the context of section 110(c) liability, are briefly summarized below:

- the length of time the violation existed;
- the extent of the violative condition;
- whether the operator was on notice of the need for better compliance;

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110 *Id.* at 1149.
111 *Id.* at 1146-47 (“[W]e are not inclined to permit Lafarge to disregard the clear requirements of the standard, and substitute in its place a questionable industry practice that does not satisfactorily prevent the entrapment of miners.”).
113 *Id.*
115 See Ambrosia Coal & Const. Co., 18 F.M.S.H.R.C. 1552, 1563 (Sept. 1996)(holding manager liable under section 110(c) because he was aware of hazardous brake condition “for at least five or six working days” but failed to remove equipment from service or procure repairs).
116 See Prabhu Deshetty, 16 F.M.S.H.R.C. 1046, 1049-52 (May 1994)(finding foreman liable for knowing violation based on 36-inch high accumulation near belt intake and various other accumulations ranging from 4 to 36 inches along 800 feet of belt).
117 See *Id.* at 1051 (finding section 110(c) liability where foreman on “specific notice of problems regarding combustible accumulations” based on warnings from MSHA inspector and review of numerous prior citations for same violation); *see also* Sunny Ridge Mining
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- the operator’s abatement efforts;118
- whether the violation was obvious;119
- whether the violation poses a high degree of danger;120 and
- the supervisor’s knowledge of the existence of the violation.121

Recently, the Commission reemphasized that an ALJ should consider all relevant factors and should not rely on one factor to the exclusion of

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118 See Maple Creek Mining, Inc., 27 F.M.S.H.R.C. 555, 567-68 (Aug. 2005) (concluding that supervisor was liable under 110(c) for failure to clear escapeway of water and muck because, \textit{inter alia}, he was aware that remedial actions undertaken were ineffective in remedying problem, but failed to take additional steps necessary to deal with water accumulations); see also, e.g., Cannelton Indus. Inc., 20 F.M.S.H.R.C. 726, 734 (July 1998) (remanding for consideration of foremen’s cleanup efforts in determination of whether there was aggravated conduct related to accumulations violation).

119 See, e.g., Austin Powder Co., 21 F.M.S.H.R.C. 18, 27 (Jan. 1999) (finding aggravated conduct because supervisor observed miners “dangerously close” to highwall edge without safety belts); see also Capitol Cement Corp., 21 F.M.S.H.R.C. 883, 892 (Aug. 1999) \textit{aff’d} Capitol Cement Corp. v. Secretary of Labor, No. 99-2264 (4th Cir. Aug. 24, 2000) (holding that shift supervisor’s failure to deenergize crane rail and wear safety belt while working on craneway, despite safety training to the contrary, constituted obvious violations and unwarrantable failure); Genwal Resources, Inc., 27 F.M.S.H.R.C. 580, 591 (Aug. 2005) (ALJ) (knowing violation of drill dust control standard where drill dust was “readily apparent” and mine superintendent knew of alleged inadequacy of face ventilation for dust control).

120 See Austin Powder Co., 21 F.M.S.H.R.C. 18, 27 (Jan. 1999) (finding aggravated conduct where supervisor and subordinate miners were “dangerously close” to edge of highwall without safety belts); LaFarge Const. Materials, 20 F.M.S.H.R.C. 1140, 1149 (Oct. 1998) (determining that serious hazard posed by loose materials atop surge bin required heightened care in inspecting bin prior to miner’s entrance); see also Capitol Cement Corp., 21 F.M.S.H.R.C. 883, 892 (Aug. 1999) \textit{aff’d} Capitol Cement Corp. v. Secretary of Labor, No. 99-2264 (4th Cir. Aug. 24, 2000) (determining there was an unwarrantable failure where shift supervisor knew the failure to wear a safety belt while working on the craneway was dangerous); Quinland Coals, Inc., 10 F.M.S.H.R.C. 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were “highly dangerous”).

121 See Sunny Ridge Mining Co., 19 F.M.S.H.R.C. 254, 269-71 (Feb. 1997) (holding foreman and president liable under section 110(c) because they knew of highwall’s poor condition on the date of the order).
others.\textsuperscript{122} Indeed, the Commission expressly stated that while an ALJ may ultimately conclude that, given the circumstances, certain factors are not relevant or are significantly less important than other factors, “all of the factors must be taken into consideration and at least noted by the judge” in the analysis of aggravated conduct.\textsuperscript{123}

\section*{§ 6.03. Defenses to 110(c) Liability: Fact and Fiction.}

While taking a rather broad view of the term “knowingly” in section 110(c) enforcement actions, the Commission has limited the defenses available to individuals, rejecting an individual’s ignorance as to the requirements of an applicable regulation as a defense to liability. Still, an individual’s good faith and reasonable belief that his conduct was in compliance with the regulations — \textit{and was safe} — can, in certain cases, be a defense to liability. Moreover, the Commission has recently recognized a “lack of authority” defense that can apply to individuals who, despite taking some action in an attempt to remedy a violation, lack the authority to completely abate the condition at issue.

\textbf{[1] — Ignorance of the Law.}

Although actual or constructive knowledge of a violative \textit{condition} is a required element of section 110(c) liability, knowledge that the condition was a violation of the \textit{law} is not.\textsuperscript{124} Rather, the Commission and the D.C. Circuit have consistently held that “to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted, not that the individuals knowingly violated the law.”\textsuperscript{125}

\begin{footnotesize}
\begin{enumerate}
\item See IO Coal Co., Inc., 31 F.M.S.H.R.C. 1346, 1351 (Dec. 2009).
\item \textit{Id.}
\item United States v. Jones, 735 F.2d 785, 790 (4th Cir. 1984)(explaining that liability under section 110(c) requires “knowing performance of a prohibited act rather than a knowing disobedience of the law”).
\item BethEnergy Mines, Inc., 14 F.M.S.H.R.C. 1232, 1247 (Aug. 1992); see also United States v. Jones, 735 F.2d 785, 790 (4th Cir. 1984); Target Indus., Inc., 23 F.M.S.H.R.C. 945, 964 (Sept. 2001)(explaining that miner’s ignorance as to legal source of fan inspection requirements no defense in section 110(c) action); Warren Steen Const. Inc., 14 F.M.S.H.R.C. 1125, 1131 (July 1992)(concluding that unawareness of standard requiring 10-foot clearance from power line not a viable defense to liability under section 110(c)).
\end{enumerate}
\end{footnotesize}
[a] — Reasonably Prudent Miner/Fair Notice Standard.

Indeed, the “ignorance of the law” doctrine extends even to situations where an operator is aware of a certain regulation, but because the regulation is broadly worded, the conduct subject to the regulation is not always obvious. Thus, an individual can be held liable for a knowing violation even when the reasonably prudent miner standard is applied in determining whether an operator is liable for the violation at issue.\textsuperscript{126}

The reasonably prudent miner standard is used to determine whether a particular condition violates a broadly worded standard and whether the application of a standard violates due process requirements of fair notice.\textsuperscript{127} In applying the standard, the Commission analyzes “whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.”\textsuperscript{128} Therefore, in the context of section 110(c) liability, an individual can be liable for a knowing violation if he has knowledge of a violative condition, regardless of whether he has knowledge that the condition violated a broadly worded regulation under the reasonably prudent miner standard.\textsuperscript{129}

For example, in \textit{Ambrosia Coal & Constr. Co.}, the Commission applied the reasonably prudent miner standard to affirm an ALJ’s decision holding an operator and a supervisor liable for violating the standard requiring that defective equipment be removed from service when a highlift with defective brakes remained in operation.\textsuperscript{130} The operator argued that although it was

\textsuperscript{126} See, e.g., Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm’n, 108 F.3d 358, 362 (D.C. Cir. 1997)(applying reasonably prudent person analysis to find that regulation provided fair notice of the operator’s obligations with regard to walkway, but concluding that individual defendants did not commit knowing violation); Ambrosia Coal & Const. Co., 18 F.M.S.H.R.C. 1552, 1563 (Sept. 1996).

\textsuperscript{127} See, e.g., U.S. Steel Mining Co. LLC, 27 F.M.S.H.R.C. 435, 439 (May 2005).

\textsuperscript{128} Id. (quoting Alabama By-Products, 4 F.M.S.H.R.C. 2128, 2129 (Dec. 1982)).


\textsuperscript{130} Id. at 1556-57, 1563.
The Commission explained that equipment is in unsafe operating condition under the regulation “when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action.” The Commission rejected the operator’s argument that the brakes were sufficient to perform functions on level ground and in first gear, concluding that without adequate brakes, the highlift could collide with another vehicle or a miner during loading or travel during normal mining operations.

The Commission also concluded that the supervisor knowingly violated the standard and was thus liable under section 110(c), because he had actual knowledge of the defective brakes for several days, yet failed to remove the highlift from service. The supervisor claimed that he did not knowingly violate the standard because he believed the brakes needed only an adjustment and were not completely ineffective or in unsafe operating condition. The Commission rejected this argument, however, based on the well-accepted principle that the Secretary “must prove only that an individual knowingly acted, not that the individual knowingly violated the law.”

Furthermore, in *Barrick Bullfrog*, an ALJ found an operator and foreman liable for violating a regulation requiring testing of ground conditions, “where applicable.” Because the term “where applicable” was undefined, the ALJ applied the reasonably prudent miner standard to determine that foreman should have conducted ground testing before allowing work to be performed in the drift at issue, because a prior ground fall signaled an

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131 *Id.* at 1556.
132 *Id.* at 1557.
133 *Id.* at 1156-57.
134 *Id.* at 1563.
135 *Id.*
136 *Id.* (quoting Warren Steen Const. Inc., 14 F.M.S.H.R.C. 1125, 1131 (July 1992)).
obvious and significant change in conditions that ultimately lead to a second ground fall and fatality. Rejecting the argument that neither the operator nor the foreman had any knowledge or reason to believe that the ground fall conditions were dangerous, the ALJ explained that they lacked knowledge of the true conditions, because they conducting only a “cursory” examination of the area. The foreman’s belief that he was complying with the regulation was, therefore, unreasonable.

Moreover, in Target Industries, a case involving the fair notice doctrine, an operator and two supervisors were charged with violating regulations addressing main mine fans based on the failure to examine, or properly address the stoppage of, the mine’s gob bleeder fans. The operator and the individual supervisors argued, inter alia, that they did not have fair notice that the mine’s bleeder fans were “main mine fans” and thus within the scope of the regulations. The ALJ held that an MSHA ventilation publication — which stated that a bleeder fan would be considered a main mine fan if shutting it down would have an immediate effect on section or mine ventilation — put a reasonably prudent miner on notice of MSHA’s interpretation of the standard at issue. The ALJ also determined that MSHA inspectors had given the operator actual notice of its interpretation during discussions at prior inspections and meetings.

The Commission upheld the ALJ’s finding that the operator had sufficient notice that the bleeder fans were subject to the regulations addressing main mine fans, based on evidence that MSHA informed the operator of its interpretation, as well as evidence that the bleeder fans fell within the definition set forth in the MSHA publication. The Commission also found the fan examiner liable for a knowing violation of the regulation — based on his failure to make daily examinations of the bleeder fan at issue

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138 Id. at 942-43.
139 Id. at 946.
140 Id. at 946-47.
142 Id. at 950.
143 Id.
144 Id.
145 Id. at 955.
— despite his claim that he did not understand that the bleeder fans were covered by regulations pertaining to main mine fans. The Commission held that the ALJ “correctly rejected . . . lack of understanding as a valid defense to whether [the examiner] acted knowingly.” The Commission further explained that ignorance of the existence of a standard and ignorance of a legal source of a regulation are equally unavailing defenses to section 110(c) liability.

In sum, a subjective belief that a particular condition does not violate a broadly worded standard is not necessarily a defense to section 110(c) liability if the condition is found to be in violation of a Mine Act regulation under the reasonably prudent miner standard. As discussed below, however, in certain circumstances, an individual’s good faith and reasonable belief that a particular condition was not in violation of the law can be a valid defense to section 110(c) liability, even when the operator is found liable based on the reasonably prudent miner standard.

[b] — Reasonable, Good Faith Belief.

The presumption that ignorance of the law is no defense to liability in section 110(c) cases can be overcome in certain circumstances. The Commission has dismissed actions for section 110(c) liability in cases where an individual has shown a reasonable, good faith belief that a practice or

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146 Id. at 964.
147 Id.
148 Id.; see also Warren Steen Const. Inc., 14 F.M.S.H.R.C. 1125, 1131 (July 1992)(holding that standard gave clear notice of the need for precautionary measures when clearance from power lines is less than 10 feet); Genwal Resources, Inc., 27 F.M.S.H.R.C. 580, 587, 591 (Aug. 2005)(ALJ)(finding mine superintendent liable under section 110(c) because the Secretary provided fair notice of the “carry away” requirement in the drill dust standard and a person “exercising reasonable care would have realized that the drill dust was not being controlled by the face ventilation”).
149 But see Rinker Materials Western, Inc., 30 F.M.S.H.R.C. 104, 119 (Jan. 2008)(ALJ)(dismissing unwarrantable failure and section 110(c) charges even though violation found under reasonably prudent miner standard because regulation was not clear on its face and because superintendent reasonably believed task training method —used for 30 years — was safe); Tilcon Connecticut, Inc., 18 F.M.S.H.R.C. 90, 97 (Jan. 1996)(ALJ)(accepting reasonable, good faith belief valid defense to section 110(c) liability even where reasonably prudent miner standard applied to determine violation occurred).
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condition is in compliance with applicable regulations. This defense, which originated in unwarrantable failure cases, has been accepted as a valid defense in section 110(c) cases where a corporate agent reasonably misinterprets an unclear regulation and acts with the intention of promoting safety.

For example, in Wyoming Fuel Co., the Commission affirmed an ALJ’s finding that a mine’s general manager was not liable under section 110(c) for making ventilation plan changes without MSHA’s prior approval. The Commission held that MSHA’s approval was required under the mine’s ventilation plan and rejected the operator’s claim that it had no notice of this requirement. In dismissing the section 110(c) charges against the mine manager, however, the Commission concluded that the manager, in making unilateral ventilation changes, had a reasonable, good faith belief that “he was acting within the regulations to improve safety. . . .” The Commission concluded that the manager had consulted the standard in effect at the time, but that it did not explicitly require approval for ventilation changes and there was no guidance as to the types of changes that did or did not require approval. The Commission further noted that the manager’s underlying concern in implementing the changes was safety.

151 Id.; see also Cyprus Plateau Mining Corp., 16 F.M.S.H.R.C. 1610, 1615 (1994) (“The Commission has recognized that ‘if an operator reasonably believes in good faith that the cited conduct is the safest method of compliance with applicable regulations, even if it is in error, such conduct is not aggravated conduct constituting more than ordinary negligence.’”).
153 Id. at 1624.
154 Id. at 1630.
155 Id. at 1629. While the Commission found the manager’s belief as to the meaning of the regulation to be reasonable, it rejected as unreasonable the Secretary’s position that absent a cover letter explaining that ventilation changes required approval, the operator would not have been in violation of the standard. Id. at 1624. Instead, the Commission held that regardless of the cover letter, the operator’s ventilation changes constituted a violation of the ventilation plan and regulation. Id.
156 Id. at 1630.
Interestingly, the reasonable, good faith belief defense can apply even in cases where the underlying violation was proved using the reasonable prudent miner standard. In *Tilcon Connecticut, Inc.*, an operator argued that section 56.14201 — which requires the installation and operation of a system to provide visible and audible warning that a conveyor will be started — did not require an automatic or manual device, but rather was satisfied by the operator’s administrative system involving a miner calling out just before the conveyor was started. The ALJ held that a reasonably prudent person, familiar with the mining industry, would conclude that the standard did in fact require a mechanical device based on the purpose of the standard, the meaning of the term “installed” and guidance in the MSHA Program Policy Manual.157 However, because the supervisors charged with section 110(c) violations were following a long standing company policy that had never before been questioned, and “reasonably believed in good faith that its procedure for starting individual belts was the safest method of complying with [the standard],” the ALJ dismissed both the unwarrantable failure and section 110(c) charges.158

An ALJ in *Rinker Materials Western, Inc.*, also dismissed section 110(c) charges against an individual task trainer after finding the operator liable for a violation of a training regulation based on the reasonably prudent miner fair notice analysis. The operator and individual trainer were charged with violating a training standard when they allowed a trainer to sit unsecured inside the cab of a front loader along with the equipment operator.159 Although the standard was unclear, the ALJ nevertheless held that the operator had fair notice of its requirements because a reasonably prudent miner would have recognized that the task training method was in violation of the standard, in part because the training method at issue was not typically used by operators and was, in fact, understood to be a violation by most industry operators.160

158 Id. at 97.
160 Id.
Despite being contrary to industry practice, the ALJ nevertheless dismissed the unwarrantable failure and section 110(c) charges, holding that although the standard provided reasonable notice of its requirements for purposes of operator liability, the requirements “were not clear to [the trainer].”\footnote{Id. at 116.} Concluding the standard was “poorly drafted,” the ALJ held the violation was “not obvious,” and that the trainer’s conduct did not rise to the level required to find section 110(c) liability.\footnote{Id.} The ALJ also emphasized the trainer “reasonably believed that the method used . . . was safe” because it had been used at the mine for 30 years, because the alternative method would require the trainee to maneuver the loader while using the radio, and because he had been trained using that method himself when he began operating the equipment.\footnote{Id. at 119.} The ALJ further found that the trainer had a “safety conscious attitude.”\footnote{Id.}

[c] — Incongruity of Application of the Reasonably Prudent Miner Standard and Acceptance of the Reasonable, Good Faith Belief Defense?

As discussed above, individual supervisors have successfully asserted the reasonable, good faith belief defense in cases alleging section 110(c) liability, even when the reasonably prudent miner test was used to prove the underlying violation. Thus, in these cases, the individual agent was found to have reasonably, and in good faith, believed that the conduct or condition \textit{was in compliance} with the law, even though the operator was found liable because a reasonably prudent miner would have known that the same conduct or condition \textit{was in violation}.

\footnote{Id. at 116.}
\footnote{Id.}
\footnote{Id. at 119.}
\footnote{Id. Contrast Barrack Bullfrog, 18 F.M.S.H.R.C. 933, 946-47 (June 1996)(ALJ)(concluding that general mine foreman’s belief that cursory examination of area where prior groundfall occurred satisfied regulation was unreasonable and “[a]t best . . . reflected indifference or a serious lack of reasonable care”).}
Although the Commission has not yet expressly addressed how a finding of a violation under the reasonably prudent miner standard is reconcilable with the subsequent acceptance of the reasonable, good faith belief defense to a section 110(c) charge, the principles of qualified immunity in the context of § 1983 actions provide a helpful analogy. 42 U.S.C. § 1983 provides a cause of action against any person who, under color of state law, deprives a citizen of “any rights, privileges, or immunities secured by the Constitution and laws of the United States.”\(^\text{165}\) To protect public officers from unjustifiable liability resulting from their performance of discretionary duties in the course of their employment, the Supreme Court established the doctrine of “qualified immunity.”\(^\text{166}\) Under the doctrine of “qualified immunity,” public officers are shielded from liability “as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.”\(^\text{167}\)

As in the case of the reasonable, good faith defense, “qualified immunity” in a § 1983 action can apply even when the conduct at issue could be deemed objectively unreasonable under the Constitution.\(^\text{168}\) For example, in the context of an alleged probable cause violation of the Fourth Amendment, the Supreme Court has held that even when an action could be deemed objectively unreasonable under the Fourth Amendment, such a finding does not preclude a determination that the same action “could not in any respect have appeared appropriate and reasonable to a reasonable officer at the time.”\(^\text{169}\) Indeed, because officers are often required to make split second decisions in the heat of the moment, they are afforded “qualified immunity” unless the right the officer is charged with violating is “clearly established” and based on the particular facts, “a reasonable officer would necessarily recognize that her conduct is unreasonable, and thus impermissible and unconstitutional.”\(^\text{170}\)


\(^{167}\) Id.


\(^{169}\) Id.

\(^{170}\) Id. at 1000. In evaluating the reasonableness of the officer’s action and potential application of “qualified immunity,” courts consider all the pertinent facts, and “even the
In essence, the “qualified immunity” doctrine provides an “additional layer of protection” to an officer and asks “a second time whether a reasonable police officer could have believed he had acted lawfully, after conceding that a trier of fact could determine that he did not . . . .” Application of the reasonable, good faith belief defense provides a similar second layer of protection to an individual charged with a knowing violation under section 110(c). Thus, although an operator is found in violation of a Mine Act regulation under the reasonable prudent miner standard, an individual can be relieved from liability if, based on the individual’s more fact-specific considerations and ambiguity regarding the regulation’s requirements, the individual had a good faith, reasonable belief that the conduct at issue was in compliance with the law.

The section 110(c) cases involving acceptance of the good faith, reasonable belief defense and a finding of violation under the reasonably prudent miner standard involved three similar circumstances: 1) an unclear regulation; 2) a belief that the violative practice was safe; and 3) some form of agency acquiescence. One possible rationale for allowance of the reasonable, good faith belief defense in cases involving a violation under the reasonably prudent miner analysis lies in the due process foundation for the reasonably prudent miner standard. The Commission applies the reasonably prudent miner standard to hold operators liable for violating standards that, while perhaps ambiguous, were clear enough that a reasonably prudent miner would have understood their requirements. However, it is a different inquiry whether the standard was so clear that the failure of a miner to have correctly understood its requirements should result in individual liability for a knowing violation. Thus, the law acknowledges that it may be fair

potential subjective considerations that could have been going through the mind of the defendant officer at the time . . . .” Id. at 1001.

171 See id. at 1000 n.6.


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to hold an operator liable for violating a standard that a reasonably prudent miner would have understood, but that it is unfair to punish an operator or individual miner more harshly, i.e. with a charge of unwarrantable failure or a knowing/willful violation, if the evidence shows they had a good faith and reasonable belief that their conduct was in compliance with the law.

In sum, an individual miner’s subjective belief that the conduct or condition at issue was in compliance with the law can be a valid defense to section 110(c) liability, provided it is reasonable and held in good faith, even when the underlying violation is determined using the reasonably prudent miner analysis. Long-standing company practices, conflicting MSHA enforcement history, agency acquiescence, an operator’s safety-conscious attitude and ambiguous regulatory language are all considerations that commonly support the good faith, reasonable belief defense.174


Lack of authority to remedy a violation can also be a defense to section 110(c) liability in cases where a supervisor has knowledge of a violation, but fails to take effective corrective action.175 In Maple Creek Mining, both the day and midnight shift section foremen were charged with a knowing violation under section 110(c) when an escapeway became flooded with water and mud.176 The foremen’s primary responsibilities were at the face of the section; however, they passed through the flooded area on the way to the face and were “occasionally” responsible for preshifting the flooded area.177 Different foremen were responsible for addressing problems in outby areas, including the flooded escapeway.178

174 See, e.g., Utah Power & Light Co., 12 F.M.S.H.R.C. 965, 972 (May 1990)(dismissing unwarrantable failure allegations even though accumulations violation found under reasonably prudent miner standard where MSHA enforcement policies were conflicting and operator believed its method was safer than alternative procedure).
176 Id. at 568.
177 Id.
178 Id.
The Commission found that although the foremen observed the hazardous conditions in the escapeway and took some action to address them — namely, reporting the water accumulations to the outby supervisor in charge of that area and directing two miners to repair a malfunctioning pump — they did not have the “power to take remedial action to eliminate the potential escapeway hazard . . . [because] neither was authorized to redesign the pumping system or to construct an alternative walkway.”\textsuperscript{179} Based on the foremen’s lack of authority to take “necessary remedial action,” the Commission concluded that their failure to effectively abate the water accumulations did not give rise to section 110(c) liability.\textsuperscript{180} Moreover, the Commission explained that the Secretary did not present any evidence to establish that, or how, the foreman’s action were “lacking.”\textsuperscript{181}

Significantly, the Commission noted that there were no allegations that the foreman withheld information regarding the conditions from the supervisor in charge of remediying the water accumulations or that they “otherwise kept Maple Creek management in the dark regarding the conditions of the escapeway during the time in question.”\textsuperscript{182} This comment suggests that while section 110(c) may not, in certain circumstances, reach supervisors who lack authority to make ultimate decisions regarding remedial action, supervisors may not simply ignore violative conditions either. Rather, the Commission implies that agents who observe violative conditions must at a minimum notify the supervisor in charge, or management, of the violation, in order to protect themselves from section 110(c) liability.

\section*{§ 6.04. Criminal Enforcement.}


The Mine Act also provides for criminal penalties against individuals and corporations for certain violations of the Mine Act. As set out above, section 110(c) provides that “any director, officer, or agent of [a] corporation

\textsuperscript{179} \textit{Id.} at 569.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} at 568.
[which violates a mandatory health or safety standard] who knowingly authorized, ordered, or carried out such violation . . . shall be subject to [penalties of up to one year in jail and up to $250,000 fine for a first offense].” Section 110(d) of the Mine Act provides for corporate criminal liability:

Any operator who willfully violates a mandatory health or safety standard . . . shall, upon conviction, be punished by a fine of not more than $250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $500,000, or by imprisonment for not more than five years, or both.

In the current climate, mine operators are right to be focused on this language, as prosecutors are under even greater pressure than usual to produce dramatic results in the wake of accidents. Spurred by politicians and the press, they will look to criminal charges and convictions as measures of success. There are unresolved issues in the law of criminal enforcement of the Mine Act, and pressure on prosecutors increases the risk that the Act will be applied in ways Congress never intended.

On the other hand, rather than deal with ambiguities in the law, prosecutors facing pressure to bring charges and obtain convictions may look even more closely than they usually do for evidence of crimes with which they are more familiar, regarding which the law is clear, and with which they can bring felony indictments. Specifically, prosecutors will look for evidence that can support charges of conspiracy, obstruction, or false statements. Mine operators must understand these charges in order to avoid adding grievance to prosecutors’ bans.


Despite the fact that section 110(c) authorizes criminal punishment of individuals who authorize, order, or carry out a violation of the law merely

“knowingly,” MSHA has a stated policy of referring individuals’ cases to prosecutors only where it concludes the individual acted willfully.185 The standards for proof of a “knowing” violation are nevertheless important in the criminal context because prosecutors to whom cases are referred have the discretion to seek any charges they consider appropriate. Prosecutors accordingly can and do seek indictments against individuals for merely allegedly “knowing” conduct.186 Indeed, prosecutors are not required to wait for MSHA’s referral. The Upper Big Branch investigation is a case in point — FBI agents were reported to be investigating long before MSHA had completed its investigation.187 The standards for proof under section 110(c) that an individual acted “knowingly” are explored above. They should generally apply equally in a criminal case, although criminal prosecutors are, of course, subject to the higher “beyond a reasonable doubt” standard of proof.188

185 See I MSHA Program Policy Manual: Interpretation and Guidelines on Enforcement of the 1977 Act at 39-40 (Release I-14, Aug. 2007), http://www.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%20I.pdf (stating that under sections 110(c) and 110(d) “MSHA is authorized to propose the assessment of a civil penalty against a director, officer, or agent of a corporate operator who knowingly orders, authorizes, or carries out a violation of a mandatory safety or health standard, or to pursue criminal proceedings against an operator or a corporate director, officer, or agent who willfully violates a mandatory safety or health standard”)(emphasis added).

186 Prosecutors have sought and obtained indictments against individuals for knowing conduct. See United States v. Consolidation Coal Co., 504 F.2d 1330, 1332 (6th Cir. 1974)(describing charges against company and charges that individual foreman “knowingly authorized, and ordered and carried out the violation[s] charged” against the company); see also United States v. Gibson, 409 F.3d 325, 336 (6th Cir. 2005)(upholding convictions of individual defendants in case charging them under both sections 110(c) and 110(d), without specifying in the opinion which section applied to their convictions).


188 There might also be cases in which constitutional objections to some Mine Act safety standards would be more powerfully made in a criminal case. For example, vagueness challenges are subjected to more stringent tests when criminal penalties are at stake.
Although they do not have to, prosecutors do sometimes bring charges against individuals alleging willful conduct, and they may be more likely to bring charges where they believe an individual acted willfully. Prosecutors can only prosecute companies on the basis of alleged “willfulness.” With such prosecutions in mind, the following discussion focuses on the interpretation of “willfulness” and other issues raised by section 110(d). The section also includes a short outline of section 110(f) of the Mine Act, which prohibits the making of certain false statements, and of common charges under Title 18 (prohibiting conspiracy, obstruction of justice, and certain false statements), as investigation of such charges often accompanies — or supplants — investigations of suspected knowing or willful violations under sections 110(c) or 110(d).


Corporations are only legal entities. They can neither act nor have a particular “state of mind.” Generally in criminal law, however, “a corporation is liable for the criminal misdeeds of its agents acting within the scope of their employment or authority if the agents intend, at least in part, to benefit the corporation, even though their actions may be contrary to corporate policy or express corporate order.” This rule comes directly from the principles of respondeat superior first developed in civil law, later applied to nuisance cases of nonfeasance and then misfeasance, and finally applied to crimes requiring proof of some criminal state of mind or mens rea.

189 See, e.g., United States v. Jones, 735 F.2d 785, 793 (4th Cir. 1984) (noting that “[a]lthough the Government might have charged the defendants under the knowing standard of section 820(c), it deliberately chose to charge them under the willful standard of section 820(d)

190 See, e.g., United States v. Gibson, 409 F.3d 325, 336 (6th Cir. 2005) (charging individuals and company with conspiracy, making false statements to a federal agency, and concealing material facts from a federal agency in addition to substantive section 110(c) and 110(d) violations).


192 For discussions of this history, see generally Kathleen F. Brickey, 1 Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents § 2 at 63-88 (2d ed. 1995) [hereinafter cited as Brickey].
Generally, the rule extends even to those acting in violation of corporate policy and to any employee — not just managers or directors.\textsuperscript{193}

Although this is a very broad rule, there are important limits within it. One key limit to the general rule of \textit{respondeat superior} in the criminal arena is that, generally in the common law, a corporate employee is not an “agent” for the corporation if he is acting outside of his actual or apparent authority.\textsuperscript{194} This point is illustrated by the “seminal case” on willfulness under the Mine Act, \textit{United States v. Consolidation Coal}, in which the Sixth Circuit held that “[t]he willful violations of Consolidation can be shown only through the action of an \textit{authorized} agent.”\textsuperscript{195}

Applying this rule to the facts at issue in \textit{Consolidation Coal}, the Sixth Circuit found that the defendant company could not be guilty of “willfully fail[ing] to support and otherwise control adequately the roof and ribs . . .” and “willfully fail[ing] to adopt a roof control plan and revisions thereof suitable to the roof conditions . . .” based on the actions of a particular foreman who unquestionably was supervising the conduct immediately preceding a roof fall at the heart of the case.\textsuperscript{196} Although the foreman “directed the work of the section,” the court wrote, there was no other testimony on his “authorized duties,” and specifically no evidence to “aid in determining what authority or what authorized responsibility he had for seeing that there was compliance with the statutory safety requirements” at issue, and “[t]here was no evidence that he ever had anything to do with policy matters or managerial functions of Consolidation.”\textsuperscript{197} The

\textsuperscript{193} \textit{O’Sullivan} at 164. \textit{See also} Brickey § 3.04 at 100-04; § 3.08 at 107-15.
\textsuperscript{194} \textit{See generally} Brickey § 3.07 at 105-07.
\textsuperscript{196} \textit{United States v. Consol. Coal Co.}, 504 F.2d 1330, 1333-34 (6th Cir. 1974).
\textsuperscript{197} \textit{Id.} at 1333, 1334. \textit{See also} United States v. Consol. Coal Co., 424 F. Supp. 577, 583 (S.D. Ohio 1976)(describing \textit{Consolidation Coal} as requiring that only an employee who is “in a position to control or authorize or order or carry out the operations which were allegedly in violation of the Act” may be the source for a corporation’s conviction under 110(d)).
court overturned the company’s conviction, in short, because “the willful violations of an operator can be shown only through the action of an authorized agent.”


Like the question of whose conduct may bind the company, the question of what kind of conduct can bind the company is obviously critical. The definition of willfulness under the Mine Act is actually well-settled. How that definition should play out in particular cases is not very clear, however.

The accepted definition of willfulness also comes from *Consolidation Coal*. In that case, prosecutors charged the defendant coal company and its foreman, Donald M. Kidd, with, respectively, willful and knowing violations of mandatory standards that required the company to “support and otherwise control adequately the roof and ribs of the active underground roadways, travelways and working places in the Franklin No. 25 Mine” for protection of persons from falls, and with “willfully fail[ing] to adopt a roof control plan and revisions thereof suitable to the roof conditions and mining system in the Franklin No. 25 Mine and approved by the Secretary of the Interior.” The charges arose from a roof fall at the Franklin No. 25 Mine. The government’s theory was that the roof fall reflected poor support of the roofways and that the approved roof plan for the mine had not been followed, both of which the court assumed for purposes of deciding the issues on appeal. Evidence showed that foreman Kidd had directed the work in the relevant room of the mine just before the accident.

Among the many issues on appeal, one was whether the jury had been properly charged on the standard of proof of state of mind and whether evidence supported the convictions. The Sixth Circuit held that the district court’s charge had been improper because it had not clearly enough distinguished between civil and criminal conduct. The court wrote that

199 Id. at 1332.
200 Id.
201 Id. at 1333.
202 Id.
203 Id. at 1334-35.
“willful” under section 110(d) means something more than “knowing” under section 110(c) of the Act, but it does not require proof of a bad purpose or evil motive.\(^{204}\) It added that proof of willfulness requires proof of “an affirmative act either of commission, or omission, not merely the careless omission of a duty.”\(^{205}\) In sum, the Sixth Circuit held that a violation is willful “if done knowingly and purposefully by a mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements.”\(^{206}\)

Unfortunately, the court did not elaborate on how that definition played out in light of the facts of the case. As discussed above, the court’s decision seemed to rest on the different question of whether Mr. Kidd was even authorized to act for the company. Of course, what it means to “intentionally disobey” a standard may not be difficult to understand. The question of what it means to “recklessly disregard” a standard’s requirements, however, is less clear.

One court, the Fourth Circuit, has attempted to give meaning to this element of the definition of willfulness. However, this court too gave short shrift to the factual analysis accompanying the statement of the definition, and in fact almost certainly ignored elements of its own formulation. In *United States v. Jones*,\(^{207}\) the Fourth Circuit elaborated on the standard stated in *Consolidation Coal* but defining the term “reckless disregard.”

Second, the court dealt with the issue of whether ignorance could be the basis of a defense to a charge of willfulness. The decision raises as many questions as it attempted to settle.

In *Jones*, following an explosion in a Westmoreland Coal Company mine in West Virginia, two individuals were charged under section 110(c) but the government specifically alleged and sought to prove *willful* violations

\(^{204}\) *Id.* at 1335.

\(^{205}\) *Id.*

\(^{206}\) *Id.* The court remanded the case for retrial of the Company consistent with these instructions. The court also vacated Kidd’s conviction, finding there was no evidence that he knowingly violated mandatory standards.

\(^{207}\) *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984).
Superintendent of the mine “Jones was held criminally liable for his role in (1) the movement of a power center while energized [in violation of a mandatory standard] . . . (2) the failure to conduct adequate weekly examinations, in violation [of another] . . . and (3) the failure to conduct a weekly examination of the 1 East and 2 South areas of the mine commencing the week of October 20, 1980, [a violation of another].”209 His codefendant, Neil, a night foreman, was “convicted for his role in causing miners to enter uninspected idle areas,” also in violation of a mandatory safety standard.210

First, the court approved the district court’s “willfulness instruction,” which paralleled that which the Sixth Circuit had approved in Consolidation Coal.211 The court then approved the district court’s attempt at explaining the meaning of “reckless disregard.” Specifically, the Fourth Circuit agreed that:

reckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violations.212

Unfortunately, the court’s analysis of the sufficiency of the evidence in Jones did not help clarify — and indeed may have made more confusing — the meaning of “willful” under the Mine Act, or the proper role for evidence of ignorance of or misunderstanding about mandatory safety

208  Id. at 789.
209  Id. at 787 n.1.
210  Id.
211  Id. at 789 n.6 (“At trial, the court instructed the jury: A violation of a safety standard is done willfully if it is done knowingly, purposely and voluntarily either in intentional disobedience of the standard or in reckless disregard of its requirements. Reckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation. The term willfully requires an affirmative act either of commission or omission, not merely the careless omission of a duty.”).
212  Id. at 789.
standards. As evidence that Jones willfully ordered a power center moved while it was energized, the government had offered testimony that he had ordered the center moved and that, from where he was standing “it would have been impossible for him to conclude that the power center was being moved in other than an energized state.”\(^\text{213}\) Others testified that, from this vantage point, Jones “encouraged the movement to continue at a more rapid rate.”\(^\text{214}\) The court found this to be sufficient evidence that Jones “willfully caused the violation.”\(^\text{215}\) The court did not discuss how, if at all, Jones’ conduct was more egregious than that which might have qualified as a “knowing” violation, however, making it utterly unclear how the distinctions it attempted to draw should apply to facts.

The court also did not discuss any evidence that Jones knew, “should have known,” or “had reason to know” the standard. A reason for this omission lies in the court’s disapproval of the “ignorance of the law” defense. Both defendants argued that they should not have been convicted because the government did not prove that the defendants “had knowledge of the terms of the safety standard.”\(^\text{216}\) The court disagreed. “To convict, the prosecution must prove generally only that the defendant knowingly committed the offensive act, not that the defendant knowingly violated the law,” the court wrote.\(^\text{217}\) The court derived this rule from the seminal “public welfare doctrine” case, United States v. International Minerals & Chemical Corp., in which the Supreme Court held that “where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”\(^\text{218}\) The Fourth Circuit wrote that this rule extends to all “inherently dangerous activities,” and held that, in such cases, “once a person

\(^{213}\) Id. at 790-91.
\(^{214}\) Id.
\(^{215}\) Id.
\(^{216}\) Id. at 790.
\(^{217}\) Id.
knowingly acts, the person may not escape criminal liability because of ignorance that the offensive conduct violates the law.”

The court’s broad statements and refusal to consider any evidence relating to Jones’ knowledge were inconsistent with the fact that the government should have had to prove more than that Jones acted “knowingly.” As the court itself made a point of noting later in the opinion, “although the Government might have charged the defendants under the knowing standard of section [110(c)], it deliberately chose to charge them under the willful standard of section [110(d)].” The court’s outright rejection of the relevance of “ignorance of the law” evidence in a willfulness case is inconsistent with both general principles applicable to proof of crimes requiring more than “knowing” conduct and it’s the court’s own definition of “reckless disregard.” The public welfare doctrine the court relies on in Jones applies, if it does apply, where the government need only prove “knowing” conduct, as was the case in International Minerals. It does not necessarily apply to all crimes requiring proof of intent, for example, and does not necessarily apply to all regulation of dangerous activities. Ignorance of the law is sometimes a defense to crimes requiring proof of specific intent, and

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219 Id. (“Nothing in the Act or its legislative history indicates congressional intent to deviate from the ordinary standard in criminal law that requires the prosecution to prove a knowing performance of a prohibited act rather than a knowing disobedience of the law. To convict, the jury did not need to find that the defendants knew the law’s requirements. We conclude that the court did not err in its instruction to the jury.”).

220 Id. at 793.

221 Note that scholars have criticized subsequent courts for deriving from this case a generally applicable “public welfare doctrine” applicable to any case about “knowing” conduct. See, e.g., O’Sullivan at 60 (citing Richard J. Lazarus, “Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Law,” 83 Geo. L.J. 2407, 2474-84 (1995)). These critiques are not addressed here, but may form the basis for additional objections to future reliance on this portion of Jones.
even where it is not, its cousin, good faith efforts to comply with the law, may be.

A more specific — but related — critique is that while a “knowing” act is an element of Mine Act willfulness (as construed by Consolidation Coal and Jones), it is not the only element of willfulness. As the Jones court itself agreed, proof of willfulness also requires proof of “intentional disobedience” of, or “reckless disregard” for, the standard in question. Moreover, proof of reckless disregard, wrote the Fourth Circuit, entails proof that at a bare minimum, the defendant should have known and had reason to know of the standard in question. These elements of proof of willfulness would be surplusage if the defendant’s awareness of the relevant standard were always completely irrelevant, or if any “knowing” action could justify a conviction.

This chapter does not aim to settle the question of whether ignorance of the law or good faith efforts to comply with the law may be defenses to charges of willful violations of the Mine Act in particular cases. Instead, the goal is to simply point out that in Jones, the court too quickly rejected the defendants’ proffered evidence of their knowledge of the relevant standards by ignoring the elements of willful conduct that separate it from knowing conduct. The tendency of prosecutors and even some courts to merge the two standards — perhaps most especially in cases arising from tragic accidents — is one to which practitioners should be alert in future cases.

[5] — Violations and Penalties Under Section 110(f) and Title 18.

Faced with ambiguity in the law, prosecutors can be counted on to look to what has been called the “darling of the modern prosecutors’ nursery” to amplify an indictment, or deal with difficulty proving a substantive offense, that is, conspiracy. Section 371 of Title 18 provides that:

222 United States v. Jones, 735 F.2d 785, 789 n.6 (4th Cir. 1984); United States v. Consolidation Coal, 504 F.2d 1330, 1335 (6th Cir. 1974).
224 Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925)(per J. Learned Hand), quoted in O’Sullivan at 640 & n.6.
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Conspiracy charges are attractive to prosecutors for many reasons. Procedurally, conspiracy charges are favorites because the central element of the crime — agreement — is relatively easy to prove. Conspiracy charges also facilitate proof of substantive charges because they help lay the foundation for use of the coconspirator statement exception to the hearsay rule.225 They can also facilitate joinder of defendants, broaden the universe of proper venue, and permit prosecution even after the statute of limitations for some related substantive offenses may have passed.226

Central to the allure of conspiracy charges is the fact that they alleviate the government’s need to prove successful execution of the substantive crime. This is attractive indeed to prosecutors particularly unfamiliar with the Mine Act and complex health and safety standards. The attraction is no doubt most acute in cases in which prosecutors — or at least Congress and the press — are convinced that at least one felony charge is appropriate, because the Mine Act’s basic knowing and willful violation provisions only provide for misdemeanor charges.

225 Fed. R. Evid. 801(d)(2)(E); O’Sullivan at 640 (explaining that this rule allows statements of alleged coconspirators of a party to be admitted against the party, and that such statements “if believed, can be very damaging to the defense because they often constitute the only direct evidence regarding such central issues as the defendant’s knowledge or intent”).
226 See O’Sullivan at 640-44 for discussion of these issues.
Ambiguity in Mine Act criminal law and the search for possible felony charges also no doubt enhances federal prosecutors’ attention in cases of suspected criminal Mine Act violations to whether there is evidence of false statements before or after an accident or of obstruction following an accident. Prosecutors have very legitimate reasons to be concerned about efforts to thwart investigations, of course, and are understandably driven to punish such conduct in any one case in order to discourage it in future cases. But it cannot be denied that prosecutors are also simply more comfortable bringing charges of this kind because these statutes are familiar and much of the law surrounding them is settled. In contrast, proving Mine Act violations — let alone the requisite state of mind — can often require delving into unfamiliar territory that is often scientifically complex. In short, federal prosecutors always are free to apply the “false statements” provision in section 110(f) of the Mine Act and related traditional Title 18 criminal code provisions in Mine Act investigations — and often prefer to do so.

Section 110(f) of the Mine Act prohibits “knowingly mak[ing] any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to [chapter 22 of title 30 of the U.S. Code] . . . .” Those found guilty are subject to fines of up to $10,000 or imprisonment of up to five years, or both. Charges under this provision often follow charges of safety violations. Section 110(f) has been held to apply to any person who makes a false statement, representation or certification in a document required to be maintained under the Mine Act (not just operators or agents). In addition, an individual does not have to personally sign the document at issue to be found criminally liable under section 110(f). At least one court has held that, in order to find a violation of section 110(f), the misrepresentation at issue must be a “material one.” Section 110(f) does not appear to apply to

228 See, e.g., United States v. Turner, 102 F.3d 1350, 1355-56 (4th Cir. 1996).
229 See id. at 1354-56.
oral statements of any kind. Companies must be alert to any falsification in required records. In the event of an investigation, if one falsity is discovered in a document, a company can be sure that investigators will scrutinize all of its records. If investigators find false records, this can not only severely compound the list of potential charges and penalties, but also diminish the company’s credibility as it navigates the investigation of Mine Act or other violations.

Any gap in the law left by virtue of the fact that section 110(f) of the Mine Act does not regulate oral statements is probably filled by 18 U.S.C. § 1001. Section 1001 is the most familiar of all the statutes for most federal prosecutors. It prohibits false or fraudulent statements, or affirmative concealment of facts which the defendant has a duty to disclose, where the statement or information concealed was material and within the jurisdiction of the regulatory agency and the defendant acted knowingly and willfully. Potential penalties include up to five years of incarceration. Section 1001 may be applied to a wide range of filings, oral statements or responses to investigative inquiries, and is thus broader than section 110(f). It is also broader than the charge of perjury because the government need not prove the defendant gave an oath or affirmation.231 This provision may be applied to the conduct of operators or individuals in communications with MSHA or other agencies concerning operation of the mine, or to the conduct of operators or individuals in response to investigative inquiries.

Equally broad is the reach of multiple statutory provisions addressing obstruction of justice, including 18 U.S.C. § 1503 (corruptly obstructing or impeding the due administration of justice), 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies and committees), 18 U.S.C. § 1512 (witness tampering), 18 U.S.C. § 1519 (destruction or falsification of records in federal investigations). Punishments for violations of these provisions range from five to 20 years of incarceration. Obstruction charges are particularly apt for use where the most readily provable offenses occur not in connection with the underlying conduct, but during the investigative

stage itself. In most instances, however, prosecutors will not invoke these provisions unless they are convinced of the materiality of the obstruction or attempted obstruction, meaning that the concealment or alteration was undertaken in order to suppress discovery or proof of an underlying crime.

There are many things that factor into the exercise of a prosecutor's discretion in making charging decisions. How a company reacts to a potential or ongoing investigation plays a significant part in that calculus. The steps a company takes in the wake of an incident likely to lead to a federal or state MSHA or criminal investigation must reflect this. A company should not be satisfied simply with the absence of information indicating its employees have made false statements or taken steps to obstruct justice — it should actively discourage any illegal impediment to investigations. Steps companies facing potential charges should take include issuing appropriate “document hold orders,” conducting appropriate internal investigations to inform the company of the true facts without jeopardizing work product and attorney client privileges, ensuring that employees understand the risks to themselves and to the company inherent in making false statements or attempting to impede an investigation, and appropriately arming them to avoid pitfalls, which can range from merely explaining the risks to employees to hiring individual counsel for them. Each case calls for a different approach, of course, but the guiding principle is always the same: as in any investigation with potential to result in criminal charges, the value of a passing grade on allegations of substantive Mine Act violations can be reversed by flunking the investigation.