FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W. ,6TH FLOOR
WASHINGTON, D.C. 20006-3868

January 25, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-156-M
Petitioner	:	A. C. No. 09-00075-05529
	:	
v.	:	
MARTIN MARIETTA AGGREGATES,	:	Camak Quarry
Respondent	:	

DECISION

Appearances: Leslie John Rodriguez, Esq., Fran Schleicher, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, for Petitioner; Henry Chajet, Esq., Patton Boggs, Washington, D.C., for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Martin Marietta Aggregates under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820.

This case contains three violations one of which the operator has agreed to withdraw its contest and pay the proposed penalty in full (Stip. 4).

On October 28, 1998, a hearing was held with respect to the remaining two violations. The transcript has been received and the parties have filed post hearing briefs.

The parties agreed to the following stipulations (Tr. 7-11) which are as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter because the product produced by respondent enters and affects interstate commerce.

2. The citations and order were issued by an authorized representative of the Secretary and properly served on respondent.

3. Martin Marietta Aggregates, Camak Quarry, employs approximately 40 people and produces approximately 1.4 million tons per year.

4. Respondent agrees to withdraw its notice of contest of citation 4551643 and pay the proposed penalty of $267. Petitioner agrees that the conditions cited in said citation are not in any way related to the accident that resulted in the other two citations at issue and did not affect the braking ability of the locomotive involved. The parties further agree that, except for the purposes of setting future penalties under the Act by inclusion in respondent's history of violations, the payment of the penalty and the settlement of the citation is not an admission by respondent of any fact or violation and not usable by petitioner for any other purpose other than the calculation of future penalties.

5. Respondent demonstrated good faith in promptly correcting the conditions alleged.

6. Prior to the accident which gave rise to this case, respondent Camak Quarry had a 0.0 injury frequency rate compared to a rate of 6.06 for the industry.

7. The proposed penalties would not affect respondent's business viability.

8. Prior to the accident which gave rise to the citations at issue in this case, respondent had initiated and conducted a training program that met the requirements of 30 C.F.R. Part 48, despite the fact that respondent's operations are exempt from enforcement of said training regulations by congressional statute.

9. At the beginning of the morning shift on October 20, 1997, Jut Anderson traveled to the loadout area and informed loadout personnel, including Billy Moss, of the schedule for the day, including the fact that he would be cleaning the railroad scales.

10. Respondent's employee, Jut Anderson, like other key employees throughout the site, was provided with a portable radio by respondent to assist in communications on the site despite the lack of any MSHA requirement.

11. On October 20, 1997, at approximately 8:30 a.m., Mr. Anderson commenced the cleaning of the railroad scales.

12. On the morning of October 20, 1997, Mr. Robert Hobbs stated to MSHA's inspectors that Mr. Jut Anderson did not communicate with him either by radio or in person that he would be cleaning the scales.

13. Mr. Robert Hobbs stated to MSHA inspectors that on the morning of October 20, 1997, he followed his normal procedure and performed part of his job by pushing the four railcars that were blocking the crossing toward the scale to clear the crossing.

14. As Mr. Hobbs pushed the four railcars along the track to clear the crossing, they hit the train, composed of the locomotive and ten attached cars, causing the train to move forward and critically injuring Mr. Jut Anderson, who was sitting on the track on the scales approximately 18 inches in front of the running locomotive.

15. The locomotive involved in the accident had two separate braking system control levers: One, an air brake system for the locomotive itself, and, two, another air brake system for railcars attached to the locomotive. These two systems were operated by two separate levers in the locomotive cab.

16. The railcars involved in the accident had two separate braking systems on each car: One, an air brake system that attaches by hoses to other cars and ultimately to the locomotive, and a mechanical braking system that is set or released by turning a wheel on each railcar.

17. Immediately following the accident the locomotive and railcars were moved to permit recovery of the victim.

18. The MSHA inspectors who investigated the accident and issued the citations did not examine the locomotive or railcars involved until the day following the accident.

19. The investigators who issued the citations determined through their interviews that Jut Anderson, the accident victim, communicated his activities and hazards present on the track to all of the loadout personnel both in person and using his radio but failed to communicate with Mr. Robert Hobbs on the morning of the accident.

20. Mr. Slaton acknowledges that the citation issued pursuant to his direction for an alleged violation of Section 56.14217 was issued for both the locomotive and the railcars because the standard covers both railcars and locomotives.

The stipulations were accepted with the caveat that a determination regarding the scope and effect of a mandatory standard was a matter for me to decide (Tr. 11).

Citation No. 4551641 dated, October 22, 1997, was issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), and charges a violation of 30 C.F.R. ' 56.14217 for the following conditions or practices:

> An accident occurred at this mine on October 20, 1997, severely injuring the employee. He died of these injuries the following day. The victim was seated approximately 3 feet from a 125 ton Alco RS-11 locomotive cleaning the rail scale with compressed air being supplied by the locomotive. The locomotive and the 10 rail cars attached to it were not blocked against movement. Four loaded rail cars were pushed into the locomotive and attached cars causing the locomotive to run over and pin the victim beneath the locomotive. Mine management was aware the scales were to be cleaned but failed to assure that the train was blocked against movement. The conduct of the operator was aggravated and constituted more than ordinary negligence. This is an unwarrantable failure.

30 C.F.R. ' 56.14217 sets forth the following:

> Parked railcars shall be blocked securely unless held effectively by brakes.

Order No. 4551642 dated, October 22, 1997, was issued pursuant to section 104(d)(1) of the Act, supra, and charges a violation of 30 C.F.R. ' 56.14207 for the following conditions or practices:

> An accident occurred at this mine on October 20, 1997, severely injuring the employee. He died of these injuries the following day. The victim was seated approximately 3 feet from a 125 ton Alco RS-11 locomotive cleaning the rail scale with compressed air being supplied by the locomotive. The locomotive and the 10 rail cars attached to it were left unattended and the parking brakes on the locomotive or rail cars were not set. Four loaded rail cars were pushed into the locomotive and attached cars causing the locomotive to run over and pin the victim beneath the locomotive. Mine management was aware the scales were to be cleaned but failed to assure the parking brakes were set. The conduct of the operator was aggravated and constituted more than ordinary negligence. This is an unwarrantable failure.

30 C.F.R. ' 56.14207 sets forth the following:

> Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

Statement of Facts

The essential facts are as follows: At the loadout point in the operator=s Camak Quarry, railcars were loaded with crushed stone and then gravity dropped to the storage area (Tr. 34, 114, 115). After the cars were dropped, a loader was routinely used to push them forward so they would attach to a locomotive which previously had been parked a few feet in front of the scales (Tr. 115, 140). The cars were then weighed at the scales and thereafter the locomotive moved them to a point where they were to be transported from the mine (Tr. 56, 165). On October 20, 1997, the decedent, Jut Anderson, was the leadman of the loadout crew (Tr. 139, 247, 302). He told the plant foreman, Donny Reese, and the loadout crew that he was going to clean the scales (Stip. 9, Tr. 180-181, 293-294). He did not, however, tell Robert Hobbs, the loader operator (Stip. 12). On the shift in question, Billy Moss, a member of the loadout crew, brought the locomotive to the rail scales (Tr. 113, 172). Moss parked the locomotive 18 inches to 3 feet before the scales and set the locomotive=s brake (Tr. 196). Subsequently, ten railcars were dropped and attached to the locomotive (Tr. 140, 173, 256). Anderson asked Jason Jones to assist him in cleaning the scales by shoveling debris off the scales and later by digging a ditch to remove water under the scales (Tr. 170, 247-248, 251). Anderson used compressed air from the locomotive to clean the scales. Hoping to increase the air pressure being used to clean the scales,

he told Jones to release the air brake on the locomotive and Jones did so (Tr. 248, 250, 300). Anderson was in front of the locomotive, cleaning the scales and Jones was on a backhoe (Tr. 248-249, 268, 271). At that time four cars which were previously dropped from the loadout had come to a stop and were blocking an intersection (Tr. 141). Unaware that Anderson was on the track cleaning the scales, Hobbs used a loader to push the four cars into the ten cars (Tr. 141). The impact of the four cars caused the ten cars and the locomotive to move forward (Tr. 141). The locomotive hit and killed Anderson (Stip. 14, Tr. 141).

Duplication

The operator asserts that the citations are duplicative, arguing that 30 C.F.R. ' 56.14217 covers the charges involving both the locomotive and the railcars. This assertion is without merit. Section 56.14217 specifically applies to parked railcars and does not refer to locomotives. When the mandatory standards delineate a specific requirement applicable to locomotives they use the term Alocomotive.@ 30 C.F.R. ' 56.14218. Similarly, when the standards apply a requirement to trains, it uses that term. 30 C.F.R. ' 56.14219. Indeed, an examination of section 56.14217 and the sections that follow it, demonstrates that the mandatory standards are precise in their descriptions of the equipment they cover. When the standards impose requirements upon many types of equipment, a comprehensive definition is given to which the mandates apply. This is the case with mobile equipment which is described in broad terms including rail mounted equipment that is capable of moving. 30 C.F.R. ' 56.14000. This definition plainly includes locomotives. Therefore, the requirements of 30 C.F.R. ' 56.14207 relating to mobile equipment apply to the locomotive in this case.

The inspectors apparently believed that Section 56.14217 applied to both the locomotive and the railcars. However, as I made clear at the hearing, I am not bound by their interpretation (Tr. 11). It is however, disturbing that as enforcement under the Mine Act and its predecessor, the Coal Act, enters its fourth decade, inspectors come to the hearing supposedly prepared to testify but are confused about the standards they cite and hold views that conflict with those of the Solicitor in the case.

The operator also argues that Section 56.14207 does not apply to locomotives because the inspectors admitted that locomotives do not have parking brakes. I reject this argument and do not believe the testimony of the inspectors supports the operator=s position. Inspector Wriston focused on the fact that the brakes in question were the locomotive=s only brakes and not on whether the brakes were service brakes or parking brakes (Tr. 86). And he concluded by stating that the parking brake was the service brake (Tr. 95). Similarly, the testimony of Inspector Slaton does not support the operator=s position. He also testified that the parking brake was the service brake (Tr. 191-192). The operator presented no evidence of the differences between service brakes and parking brakes. And it did not come forward with any evidence showing that the same brake cannot serve as both a service brake and a parking brake depending upon the circumstances. What the record does show is that when the locomotive was parked or came to a stop, the brake was set (Tr. 109, 113-114, 145, 147, 198, 269). I hold that this brake was a parking brake for the purposes of Section 56.14207.

Citation No. 4551642

A. Existence of a Violation

As set forth above, this citation was issued because the ten railcars attached to the locomotive were not blocked or secured effectively by brakes. When asked whether the cars were blocked, Moss who had parked the locomotive was evasive. He first asked for the question to be repeated and then said he did not understand the question (Tr. 119). But when queried from the bench, Moss finally agreed that he did not block the wheels of the railcars (Tr. 120). Hobbs, the loader operator, testified that past practice was not to block railcars (Tr. 149). He stated that the locomotive was blocked only at the end of the shift (Tr. 149). Inspector Slaton said that there was no evidence of any blocks (Tr. 176). At the hearing, the lack of any conflict on the matter of blocking was noted from the bench (Tr. 149). I find that the railcars were not blocked.

The critical issue, therefore, is whether the railcars were held effectively by the brakes. The parties addressed this issue solely in terms of whether the brakes on the railcars had been set. Their evidence on this question is unpersuasive. The inspectors testified that Parsons, the production manager and member of senior management, told them that the brakes on the railcars were not set (Tr. 30-31, 38-40, 173, 193). Parsons was not present at the quarry at the time of the accident, but went there shortly afterwards (Tr. 69-70). However, the Secretary did not call Parsons as a witness, although he was still in the area and working for another company (Tr. 308). Hearsay evidence is admissible in administrative proceedings but the probative weight to which it is entitled depends upon the circumstances. 29 C.F.R. ' 2700.63(a); REB Enterprises Inc., 20 FMSHRC 203, 206 (March 1998); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135, 1139 (May 1984); Ideal Cement Co., 13 FMSHRC 1346, 1350 n.1 (September 1991). Since Parsons was not called as a witness, he was not available for cross examination on whether the notes and testimony of the inspectors adequately and fairly set forth what he told them. In addition, Parsons himself had no first hand knowledge of what happened. He was only repeating what other individuals had told him. Because Parsons was not called as a witness, there was no opportunity to ask him to identify his sources of information. Accordingly, even if the inspectors accurately wrote down what Parsons told them, there is no way to test the accuracy of Parsons= statements or his sources of information. Under the circumstances, I determine that the notes and testimony of the inspectors regarding Parsons are not entitled to any probative weight.

Every employee of the operator who testified, denied knowing if the brakes had been set. Moss testified that he did not know if the brakes on the railcars were set (Tr. 118).[1] Jones also denied knowing whether anyone set the brakes, although the inspectors testified that he told them the brakes were not set (Tr. 40, 43-44, 193, 261). So too, Hobbs said he did not set the brakes

[1] When Moss was asked questions by the Solicitor, he had to be admonished not to look at operator=s counsel (Tr. 114, 131). And when operator=s counsel objected to a question by the Solicitor, Moss immediately suffered a loss of memory or became unable to understand simple questions (Tr. 110-113, 118, 119). His difficulty in testifying might be attributable to the fact that as the locomotive operator, he was responsible for setting brakes on the railcars. Both Reese and Hobbs stated that the locomotive operator set brakes on the railcars (Tr. 145-146, 296).

and did not know if anyone did (Tr. 144-145). In addition, these individuals said they did not know who had dropped the ten railcars and brought them forward to become attached to the locomotive (Tr. 110, 116, 140, 256). These on site witnesses seem curiously ignorant of what must have been going on before their eyes. Reese testified that as a general matter, the operator of the locomotive set the brakes and the rail crew helped (Tr. 295-296). Reese also stated that brakes were not set on every car, but perhaps on every second or third car (Tr. 296-297). However, in this instance he did not know whether the brakes on any railcars were set (Tr. 304). It is strange that the plant foreman identified by the operator as the supervisor of the loadout area, did not know and did not ask about such an important matter.

In sum, therefore, none of the evidence is definitive or convincing with respect to whether the brakes were set. However, it is possible to determine the existence of a violation without relying upon the unpalatable evidence presented by the parties. This is so because the parties have incorrectly framed the issue to be resolved and misunderstood the question that needs to be asked and answered. The mandatory standard requires that railcars be held effectively by brakes. If brakes are not set, they obviously will not hold the cars effectively. But even if brakes are set, they must be set so as to hold the cars effectively. Therefore, the issue is not whether brakes were set, but whether the railcars were held effectively by the brakes.[2] The ten parked railcars moved forward when the four additional cars were pushed into them (Stip. 14, Tr. 141). As Stipulation No. 13 recognizes, Hobbs stated that in pushing the four cars he was acting in accordance with normal procedures. At the hearing Hobbs testified that for 24 years he had been pushing cars from the railroad crossing down toward the scale (Tr. 142). His statements are uncontradicted. Therefore, there was nothing unusual about this case where four cars were pushed forward to couple with ten cars already attached to the locomotive. In this instance, however, the motion of the four cars caused the ten cars to move forward and push against the locomotive which then moved ahead, running over Anderson and killing him. Accordingly, the brakes did not hold the

[2]There was evidence that general industry practice was to set every third brake (Tr. 92, 221). However, even assuming this were so, the mandatory standard is not premised upon general industry practice. It requires that the brakes hold the cars effectively. Testimony was uncontradicted that the cars would have been held effectively if brakes on every car had been set (Tr. 148, 199).

railcars effectively or the cars would not have moved.[3] As set forth below, the brake on the locomotive was not set, but that did not cause the cars to move forward in the first instance. The cars may have kept on moving because the locomotive brake was not

[3]At an early point in the hearing, operator=s counsel stated that he would produce witnesses who would testify in the operator=s favor on the interpretation of Aeffectively@ (Tr. 89). But he did not do so. Inspector Wriston testified that effectively holding would be holding under the working circumstances that were present (Tr. 89). He further stated that effectively holding means holding when a sitting piece of equipment is hit by other equipment, if such an occurrence is normal activity (Tr. 89-90). As noted, Hobbs= testimony demonstrated that pushing the four cars forward with the loader was normal activity.

set, but they moved initially because their brakes, whether set or not, did not hold them effectively. This was a violation of the mandatory standard.

B. Significant and Substantial

A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a significant and substantial violation of a mandatory standard the Secretary must prove : (1) the existence of an underlying violation; (2) a discrete safety hazard-that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Commission=s requirements for a finding of significant and substantial have been recognized and accepted by the courts. Buck Creek Coal Inc. v. FMSHRC, 52 F.3d 133, 135-136 (7th Cir. 1995); Austin Powder, Inc. v. Sec. of Labor, 861 F.2d 99, 103 (5th Cir. 1988); Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1075 (D. C. Cir. 1987). The Commission itself has declined the invitation to change the test. United States Steel Mining Co., 18 FMSHRC 862, 865-866 (June 1996); Energy West Mining, 15 FMSHRC 1836, 1839 (Sept. 1993); Texas Gulf Inc., 10 FMSHRC 498, 500 n. 4 (April 1988).

In this case the first requirement is met because there was a violation. The second element also is satisfied because the violation contributed to the danger that the cars would move forward and together with the locomotive hit someone. I also find that the failure of the brakes to effectively hold the cars created a reasonable likelihood of an injury and the reasonable likelihood that the injury would be of a reasonably serious nature. The cleaning of the scales required Anderson and Jones to work on or next to the rails directly in front of the locomotive. In fact, a fatality occurred. The movement of the cars was the precipitating factor setting off a chain of events which ended in Anderson=s death. The violation was significant and substantial and very serious.

C. Negligence and Unwarrantable Failure

As explained in detail infra, I find that Reese, the plant foreman, was the responsible supervisor of the loadout area. It was his obligation to insure that the railcars were held effectively by the brakes. However, Reese did not know whether brakes on the railcars had been set (Tr. 304). In addition, he stated that as a general matter brakes were not set on every car, but just on some (Tr. 296). Brakes could be set on every other car or every third car (Tr. 296-297). Based on this testimony it appears that the standard for determining the number of brakes to set apparently was very flexible. Therefore, as the person in charge, Reese had a particular duty to make certain that sufficient brakes were set to hold the cars effectively. This crucial determination was not one that could be left to a non supervisor. I find that Reese was negligent in not properly performing his supervisory tasks and that as a member of mine management, his negligence is attributable to the operator.

I do not however, believe that the negligence in this case rises to the level required for a

finding of unwarrantable failure. The Commission has defined unwarrantable failure as aggravated conduct constituting more that ordinary negligence. Emery Mining Corp., 8 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by such conduct as reckless disregard, intentional misconduct, indifference or serious lack of reasonable care. Id. at 2003-04; Cyprus Emerald Resources, supra at 813; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (Feb. 1991).

The inspectors found unwarrantable failure because they said the operator=s past practice was not to set the brakes on railcars. However, the evidence they provided was not convincing. Inspector Wriston gave conflicting testimony. He first stated that Jones had told him that cars were dropped without the brakes being set, but then admitted he did not definitely know what the past practice was (Tr. 60-61, 74). Subsequently, he stated that Parsons had told him about past practice(Tr. 84). Inspector Slayton also testified that Parsons told him that past practice was not to set brakes on the railcars. As explained above, this testimony from the inspectors has no probative value because Parsons was not called as a witness. Moreover the inspectors= notes do not indicate that Parsons was asked or said anything about past practice. Inspector Slayton also testified that Hobbs told him that past practice was not to set the brakes, but here again, the inspector=s notes do not contain such information (Tr. 187-188, 194). Inspector Slayton stated that Moss had told them about past practice, but then said he was not sure that Moss had said this (Tr. 194).[4] If the inspectors had been told about past practice in their interviews as they alleged, their notes surely would have contained such information. The fact that the notes are silent about past practice renders the testimony of the inspectors suspect and unworthy of belief. Accordingly, the evidence of record does not establish the operator=s past practice with respect to setting brakes on railcars. Since there is nothing else in the record to support the allegation of unwarrantable failure, that finding must be vacated.

Order No. 4551642

Existence of a Violation

As set forth above, the cited mandatory standard, 30 C.F.R. ' 56.14207, requires that a locomotive shall not be left unattended unless the controls are placed in the park position and the parking brake is set. Inspector Wriston testified in accordance with his notes that he had been told by Parsons and Jones that the brake had not been set (Tr. 42-44). However, Inspector Slayton=s notes state that Moss had parked the locomotive and set the brake when he parked it

[4] The inspectors differed in their accounts of their interview with Moss. Inspector Wriston said they only asked Moss two questions, one of which was whether he agreed with everything Jones had said (Tr. 79-80). But Inspector Slayton testified about many statements that Moss allegedly made to him in the interview (Tr. 172-173, 200). These differences reflect poorly upon the veracity of the inspectors.

(Exh. 11). Inspector Slayton also testified that Moss told him the brake had been set (Tr. 197-198, 207). Moss testified that when he parked the locomotive, he set the brake (Tr. 109,122). Finally, Jones testified that Anderson told him to release the brake (Tr. 248, 250). I find Jones a credible witness on this point and I accept his testimony that he released the brake. Obviously, the brake could not have been released unless it was set. There is no dispute that the locomotive was unattended when the accident occurred. Accordingly, I find that a violation occurred.

B. Significant and Substantial

The four step test required for a finding of significant and substantial has already been set forth. In this case the first requirement has been met. The second requirement is also met because the release of the locomotive brake contributed to the danger that the locomotive and cars would move forward and hit someone. I further find that the released brake created a reasonable likelihood that a reasonably serious injury would result from the hazard that had been created. The cleaning of the scales required Anderson and Jones to work on or next to the rails directly in front of the locomotive. Indeed, a fatality occurred. Although the rail cars were not held effectively by their brakes, the fact that the locomotive was not braked was a major factor in the continued forward movement of the entire train which resulted in the accident and fatality. Accordingly, I conclude that the violation was significant and substantial and very serious.

Negligence and Unwarrantable Failure

Inspector Wriston testified that the conduct of the operator was aggravated and constituted more than ordinary negligence because Anderson, the decedent, was mine management and put himself in a position of great danger and failed to inform others of the work he was going to perform (Tr. 72-73). Inspector Slayton also testified that there was an unwarrantable failure because a supervisor was involved and others were exposed to the hazard (Tr. 188).

As set forth above, the locomotive=s brake was not set because Anderson told Jones to release it so more air pressure would be available to clean the scales. Based upon his knowledge and experience, Anderson surely knew that releasing the brake created the risk that the locomotive would move forward, especially since cars were being dropped at the time and could be expected to be pushed forward to couple with the locomotive. In addition, he failed to use available two way communication equipment to notify the loader operator that he was cleaning the scales (Stip. 10, 12, 19, Tr. 98-99, 233, 305-306). Under these circumstances Anderson displayed an extraordinary degree of recklessness, carelessness, indifference and wilful misconduct. His actions fit all the terms used by the Commission to describe unwarrantable failure and they constitute extreme negligence.

The issue is whether Anderson=s very high degree of negligence and unwarrantable failure are imputable to the operator. Under Commission precedent, the negligence of a rank and file miner cannot be imputed unless the operator failed to discharge its responsibilities with respect to training, supervision or discipline. U.S. Coal Inc., 17 FMSHRC 1684, 1686 (Oct. 1995); Fort Scott Fertilizer-Cullor Inc., 17 FMSHRC 1112, 1116 (July 1995). However, the negligence of a supervisor is imputable to the operator unless the operator can demonstrate that no other miners were put at risk by the supervisor=s conduct and that the operator took reasonable steps to avoid that particular class of accident. Nacco Mining Co., 3 FMSHRC 848, 849 (April 1981). The

Commission also has stated that an agent=s unexpected intentional misconduct may result in a negligence finding against the operator where the lack of care exposed others to risk or harm. Rochester & Pittsburgh, supra at 198. It is also well settled that an agent=s conduct may be imputed to an operator for unwarrantable failure purposes. Whayne Supply Company, 19 FMSHRC 447, 451 (March 1997); Rochester & Pittsburgh, supra at 197-198.

There is no dispute that Anderson received all applicable training and that he conducted safety meetings with the loadout crew (Tr. 208, 236, 249, 276-277, 284-285, 287-289). There is no suggestion that the operator did not fulfill its responsibilities with respect to supervision or discipline of Anderson. Accordingly, if Anderson was a rank and file miner, his negligence would not be imputable to the operator.

If Anderson was a supervisor, it must be determined whether the defense under Nacco would be available to the operator. Jones testified that he was working in the immediate area when the accident happened and that not long before the accident he had been on the tracks working on the scales with Anderson to clean the scales (Tr. 247-248). At the moment of the accident Jones was on the backhoe adjacent to the track (Tr. 258, 271, 275). The locomotive brushed up against the backhoe, although it did not cause any damage or injury. However, Reese, the foreman, agreed that it was possible for Jones to have been standing on the track (Tr. 299). Based upon the foregoing, Jones= proximity to danger from the unbraked locomotive is clear. He was in the immediate area and might well have been standing on the tracks. Even on the backhoe, he was in danger. The locomotive could have hit the backhoe harder than it did or Jones might have fallen off. Anderson=s actions put Jones at serious risk. The Nacco defense would not apply.

The determinative issue, therefore, is whether Anderson was a rank and file miner or a person charged with responsibility for the supervision of miners or the operation of all or part of a mine. The Commission has considered this issue on several occasions.

In U.S. Coal Inc., supra, a certified electrician suffered burns to his hand, when he failed to deenergize or lock out equipment before he began his repairs. The Commission held that he was not the operator=s agent for purposes of imputing negligence. Although the electrician was authorized to tell miners to stop working on dangerous equipment and to remove such machinery from service, the Commission held that this evidence standing alone was insufficient to support a finding that the electrician was an agent of the operator. The Commission stated that in this type of case, it did not rely upon the job title or qualifications of a miner, but upon whether his function was crucial to the mine=s operation and involved a level of responsibility normally delegated to management personnel. Id. at 1688. The Commission stated that the electrician=s negligent conduct occurred while he was repairing equipment, a routine assignment not encompassing managerial or supervisory responsibilities. Id.

In Ambrosia Coal & Construction Company, et al, 18 FMSHRC 1552 (Sept. 1996), the Commission decided that an individual was an agent of the operator when he accompanied inspectors on their inspections and attended close out conferences as the operator=s representative, gave work orders to abate citations, was responsible to see that equipment repairs were made, was paid a salary like management and did not receive extra pay for overtime like rank

and file miners, and was treated by the mine owner as a person in a responsible position. Id. at 1560-1561. Under these circumstances the Commission did not view as determinative the fact that he did not have the authority to recommend hiring or firing, discipline employees, change work schedules, or adjust pay and terms of employment. Id.

Thereafter, in Whayne Supply Company, supra, the Commission held that an experienced repairman who needed little supervision and helped less experienced employees, was not a supervisor. The repairman had been fixing a bulldozer, but failed to secure certain parts of the equipment and as a result became pinned under the equipment and was killed. He was working alone and not supervising anyone when the accident occurred. The Commission stated that an individual does not become a supervisor merely because he possesses greater skills and job responsibilities than his fellow employees. Id. at 451. And the Commission identified traditional indicia of supervisory responsibility as including the power to hire, discipline, transfer, and evaluate employees, none of which were possessed by the repairman in that case. Id. The Commission further noted that there was no evidence that the repairman controlled the mine or any portion thereof. Id. The Commission stated that if the repairman could be considered supervisory on the basis of his duty to evaluate a problem and repair it without supervision, potentially all repair personnel would fall into the supervisory category. Id. at 452.

More recently, in REB Enterprises Inc., supra, the Commission decided that a leadman on a highwall was not an agent of the operator where he did not have the authority to hire and fire employees, did not assign equipment to employees and was not given any instructions regarding discipline of employees. In addition, the Commission noted that there was no evidence that the leadman was directly responsible for controlling acts of the miners on the highwall, that he was responsible for their performance, or that he was responsible for the safety of miners and for ensuring their compliance with the mandatory standards. Id. at 211-212.

The facts of this case are similar in some respects to those already considered by the Commission. However, the instant situation viewed in its entirely, is distinguishable from prior cases and appears to fall somewhere between those where agency and supervision were not found and those where they were. Anderson assigned specific tasks to the miners in the loadout area and he had the authority to tell them how he wanted the job done and to stop them if he did not like what they were doing (Tr. 139, 303-304). On the day of the accident he told members of the loadout crew what tasks they should perform (Tr. 108, 139, 247). However, it was Reese, the foreman, who decided and told Anderson what work was to be done each day (Tr. 303). And if there was a problem with a miner Anderson, who could not discipline anyone, went to Reese (Tr. 151, 264). Anderson could not change an individual=s job or the equipment on the job without permission (Tr. 282-283). Also, Reese visited the loadout area three or four times during the shift to check on how things were going (Tr. 154, 267, 281). In addition, Anderson could not hire, fire or evaluate miners in the loadout area and he was paid at an hourly rate (Tr. 151, 153-154, 264, 281). There is no evidence that he acted or held himself out as the operator=s representative in any capacity or that it was up to him to decide what action to take to abate citations. In sum therefore, Anderson had somewhat more authority than the individuals in those cases where the Commission has held there was no agency or imputable negligence. REB Enterprises Inc., supra; Whayne Supply Company, supra; U.S. Coal Inc., supra. But he did not have the level of

responsibility which the Commission has heretofore held sufficient to establish that an agency relationship existed. Ambrosia Coal & Construction Company, supra.

After careful consideration of the evidence, I find that Anderson did exercise a certain degree of control over the loadout area and the miners who worked there. I further find, however, that the control which he exercised and the responsibilities which were given to him were tightly circumscribed. He did not decide what work was to be done and he did not set work priorities. Although he assigned specific tasks and stopped work being done improperly, he did not resolve any disputes occurring on site. And he was subject to constant supervision since the foreman visited the area several times during the shift. He possessed none of the indicia traditionally associated with a supervisory position such the authority to hire, fire, discipline or evaluate. The fact that he was paid on an hourly basis demonstrates that the operator did not look upon him as member of management. Under these circumstances, I conclude that Anderson was not a supervisor and that therefore, his negligence cannot be imputed to the operator. I further conclude that although Anderson had some authority, it cannot fairly be said that he was an agent in control of a mine or part of a mine and that therefore, his unwarrantable failure conduct cannot be attributed to the operator. Finally, since the general practice was to set the brake and because the brake was initially set in accordance with that practice, the operator was not negligent.

Remaining Criteria

The Commission has held that each Commission judge must expressly consider and make findings with respect to all six criteria. In addition, the Commission has made clear that the judge bears the responsibility of insuring that the record is sufficient to allow him to discharge his responsibilities. Sec. Labor on behalf of Kenneth Hannah, et al. v. Consolidation Coal Co., 20 FMSHRC 1293, 1302 (Dec. 15, 1998). If the record or the judge=s decision is found wanting, reversal or remand will result. Id.

As set forth above, the parties have stipulated to good faith abatement. I accept the stipulation and find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

As set forth above, the parties have stipulated to the quarry=s number of employees and annual tonnage. I accept the stipulation and based thereon find that the operator is large in size.

As set forth above, the parties have stipulated to the quarry=s accident frequency rate and the accident frequency rate for the industry. I accept the stipulation and find that the operator has a very good history of previous violations.

As set forth above, the parties have stipulated that imposition of a penalty will not affect the operator=s ability to continue in business. I accept the stipulation and find that imposition of a penalty will not affect the operator=s ability to continue in business.

Penalty

After careful consideration of the evidence of record and my findings and conclusions based thereon and with due regard for the six criteria, I determine that a penalty of $12,500 for Citation No. 4551641 and a penalty of $2,000 for Order No. 4551642 are appropriate.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

Order

It is **ORDERED** that in accordance with stipulation 4 the finding of a violation for Citation No. 4551643 is **AFFIRMED**.

It is further **ORDERED** that a penalty of $267 be **ASSESSED** for Citation No. 4551643.

It is further **ORDERED** that the finding of a violation for Citation No. 4551641 is **AFFIRMED**.

It is further **ORDERED** that the significant and substantial designation for Citation No. 4551641 is **AFFIRMED**.

It is further **ORDERED** that the finding of unwarrantable failure for Citation No. 4551641 be **VACATED**.

It is further **ORDERED** that Citation No. 4551641 be **MODIFIED** from a 104(d)(1) citation to a 104(a) citation and to reduce negligence from high to ordinary.

It is further **ORDERED** that a penalty of $12,500 be **ASSESSED** for Citation No. 4551641.

It is further **ORDERED** that the finding of a violation for Order No. 4551642 be **AFFIRMED**.

It is further **ORDERED** that the significant and substantial finding for Order No. 4551642 be **AFFIRMED**.

It is further **ORDERED** that the finding of unwarrantable failure for Order No. 4551642 be **VACATED**.

It is further **ORDERED** that Order No. 4551642 be **MODIFIED** from a 104(d)(1) order to a 104(a) citation and to reduce negligence from high to none.

It is further **ORDERED** that a penalty of $2,000 be **ASSESSED** for Order No. 4551642.

It is further **ORDERED** that the operator **PAY** a total penalty of $14,767 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Leslie John Rodriguez, Esq., Fran Schleicher, Esq., Office of the Solicitor, U. S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Henry Chajet, Esq., Patton Boggs, L.L.P., 2550 M Street, NW., Washington, DC 20037-1350

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