CCASE:
MSHA V. SOUTHERN OHIO COAL
DDATE:
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 31, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. VINC 79-227-P

SOUTHERN OHIO COAL COMPANY

DECISION

This penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. IV 1980), and involves two alleged violations of 30 C.F.R. $ 75.200. 1/ The administrative law judge found that two violations of the standard had occurred, and assessed the maximum penalty of $10,000 for each violation. Southern Ohio Coal Co., 2 FMSHRC 350 (February 1980)(ALJ). Southern Ohio Coal Company (SOCCO) filed a petition for discretionary review of the judge's decision, which we granted in part. For the reasons that follow, we affirm the judge's finding that the two violations occurred. 2/ We find, however, that lower penalties are warranted and we assess penalties totalling $10,000.

On the day before the events at issue, miners employed by SOCCO encountered abnormal conditions while advancing the face in entry 15. There was excessive water and soft bottom, and several shuttle cars were damaged while the miners were trying to load coal. To circumvent the problems, the miners stopped advancing the face and tunneled back through

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1/ The cited standard provides in pertinent part:

$ 75.200 Roof control programs and plans.

[Statutory Provisions]

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and

approved by the Secretary shall be adopted .... No person shall proceed beyond the last permanent support unless adequate temporary support is provided.

2/ Our review of the record convinces us that there is substantial evidence to support the judge's conclusions that there were two violations of the Mine Act. As discussed further infra, however, in certain respects we find the judge's decision to be in need of modification. Therefore, where necessary we make factual findings. 30 U.S.C. $ 823(d)(2)(C); 5 U.S.C. $ 554(b) (1980).

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in an outby direction from a crosscut driven from the number 14 entry. This unusual mining procedure resulted in an area of about 23 feet 9 inches by 17 feet 6 inches of unsupported roof.

During the midnight to 8:00 a.m. shift on May 5, 1978, an overhanging rib in number 15 entry was sheared, spilling coal onto the mine floor. Three temporary supports were then set at the inby end of the unsupported area. Three temporary supports were also set at the outby end of the area. Tr. II at 172, 174. Later that day during the 4:00 p.m. to midnight shift, Ronnie Darst, the section foreman, instructed James Six, a member of his crew, to remove the inby row of temporary supports with a loading machine. The supports were to be removed so that equipment could be brought in to load out coal from the sheared rib and to clean up the area. After giving the instructions to remove the temporary supports, Darst left the area. While under roof supported only by temporary supports, Six removed two of the inby temporary supports by hand. He was assisted by Johnny Lee Endicott (a shuttle car operator and helper) who removed the third inby support by hand. Six and Endicott then walked outby about 18 to 21 feet under unsupported roof to remove the outby supports. As Six and Endicott were removing these supports the roof fell, killing Six.

The Mine Safety and Health Administration (MSHA) conducted an investigation and issued two citations to SOCCO alleging violations of 30 C.F.R. $ 75.200. Citation No. 279023 stated:

The results of a coal mine fatal[ity] investigation revealed that two persons were inby permanent supports in the No. 15 entry of the section. The area of unsupported roof was 23 feet 9 inches in length by 17 feet 6 inches wide.

Citation No. 279024 stated:

The investigation of a fatal accident revealed that the approved roof control plan was not being complied with because temporary roof supports were not being removed remotely or additional temporary supports were not installed so that workmen removing the supports remain[ed] in a safe area. The operator's approved roof control plan requires that if it is necessary to remove temporary supports before permanent

supports are installed, such supports shall be installed in such a manner that the workman removing the supports remains in a supported area.

After a hearing the administrative law judge rendered a bench decision, which he later adopted and supplemented in a written decision. The judge concluded that the two alleged violations had occurred and

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that SOCCO was liable for the violations. Because the violations were the "proximate cause" of a miner's death, the judge found them to be "extremely serious." The judge also found that SOCCO was negligent in that it was responsible both "for the imputed negligence of its agents and employees [and] its own acts of independent and contributory negligence." He concluded that a $10,000 penalty was warranted for each violation.

On review, SOCCO disputes the judge's findings that it is liable for the violations, that "top management," its foreman, and the miners were negligent, and that the negligence of the foreman, as well as the rank-and-file miners, should be imputed to it.

Actions of the Foreman and the Miners

The judge concluded that foreman Darst was negligent in supervising the miners involved in the accident. SOCCO argues that Darst was a safe foreman and that any negligent acts were committed by Six and Endicott in direct contravention of company policy and Darst's instructions. SOCCO also urges that it was unusual for miners to work under unsupported roof, and that because Six and Endicott were safe and experienced miners, Darst had properly determined that they did not need special attention.

In deciding whether Darst was negligent, we look to whether Darst acted with the care required under the circumstances. We conclude that he did not. 3/ The evidence establishes that both Six and Endicott had been observe...under unsupported roof on other occasions, and that Six had received two prior warnings for violations of roof control procedures. Tr. at 94, 131, 136, 160; Tr. II at 77. The evidence also establishes that chronically bad, potentially dangerous roof conditions existed in the section where the accident occurred, and in the accident area on the day of the roof fall. Tr. at 56, 72, 87, 89-90, 105-106, 108, 111, 137, 139, 172-174, 177-178; Tr. II at 21, 23-24, 44-45, 82-83, 116-117. The poor condition of the roof in the section should have caused the foreman to pay particularly close attention to any activity occurring in the vicinity, in this instance the removal of temporary supports. Furthermore, Darst's directions as to the removal of the jacks were, at best, incomplete. In the dangerous situation confronting the miners that day, the foreman did not give specific instructions as to how to remove the

jacks with a loader, and left the area while the work was in progress. Tr. II at 101, 107-109. Consequently, we conclude that the judge's finding that Foreman Darst negligently supervised Six and Endicott is supported by substantial evidence.

3/ SOCCO's major premise is that the judge erroneously determined that Darst never instructed the miners to remove remotely the first row of temporary supports with the loader, and that this finding is inconsistent with other parts of his decision. We agree that the judge's decision permits the inference that Darst did not give the loader instructions, and to the extent it does so is wrong. The evidence is undisputed that Darst instructed Six to remove the jacks with the loader. This fact does not, however, resolve the ultimate issue of Darst's negligence.

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The judge further found that the violations also were the result of reckless disregard for safe mining practices by both Six and Endicott. The evidence amply demonstrates that in going under unsupported roof the miners knowingly behaved in a manner contrary to safety instructions, company policy. Tr. at 62-63, 109-111, 113, 131, 140, 160; Tr. II at 144. Both failed to exercise reasonable care for themselves or for each other under hazardous conditions. Thus, substantial evidence supports a finding that both rank-and-file miners acted in a negligent manner.

SOCCO's Liability for the Miners' Violative Acts

Section 75.200 provides that "[n]o person shall proceed beyond the last permanent support unless adequate temporary support is provided." There is no dispute that the miners violated this proscription. SOCCO's approved roof control plan requires that temporary supports be remotely removed. There also is no dispute that Six and Endicott did not do so. Although SOCCO does not dispute the facts underlying the violations, it contends that the miners' behavior was idiosyncratic and unpredictable, and, therefore, that imputation of their violative acts to it is improper.

It is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by its employees. Allied Products Co. v. FMSHRC,_____ F.2d_____, No. 80-7935, 5th Cir. Unit B (Feb. 1, 1982); American Materials Corp., 4 FMSHRC 415 (March 1982); Kerr-McGee Corp., 3 FMSHRC 2496 (November 1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981). Thus, we reject SOCCO's argument that it is not liable for the violations.

Number of Violations

The judge concluded that the operator was liable for two violations of the Mine Act. SOCCO asserts that it was charged twice with the same violation: "The required conduct was the same [i.e., persons

should not work under unsupported roof]; the alleged violations merged; and MSHA should have been required to elect to proceed under one provision or the other for the single occurrence." SOCCO argues that the same evidence supporting the allegation that the miners removed temporary supports by hand, rather than remotely, demonstrates also that these miners traveled and were working under unsupported roof. 4/

4/ SOCCO also challenges the judge's conclusion that it was legally responsible for designing and enforcing a safety program to ensure compliance with the Mine Act. It is clear that under the Mine Act, the operator is responsible for maintaining a safe workplace. S. Rep. 95-181, 95th Cong., 1st Sess., 18 (1977); reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 606 (1978) (Legis. Hist.). The Act, however, imposes no specific duty to design and implement a safety program which ensures employees' perpetual compliance with the mine safety laws. The question properly before the judge was to determine, in assessing a penalty, whether the operator was negligent. SOCCO's safety procedures are relevant.only in judging whether SOCCO exhibited a lack of care in regard to the occurrence of the violations. See discussion, infra.

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The miners violated section 75.200 and the roof control plan adopted thereunder in two ways: by omission, in failing to remove remotely the temporary supports, and by commission, in traveling and working under unsupported roof. Despite the fact that these transgressions arose out of a single series of events, the miners committed separate violations. Cf. Peabody Coal Co., 8 IBMA 121, 129 n.2 (1977); Eastern Associated Coal Corp., 1 IBMA 233, 236 (1972). Thus, we affirm the judge's conclusion that two violations occurred. 5/

Imputation of the foreman's and miners' negligence for penalty purposes 6/

Two distinct imputation principles are involved in this case: (1) as we have already discussed, the imputation of the employees' acts to establish the operator's liability for violations; and (2) the imputation of the employees' negligent acts for penalty purposes. We have concluded that the judge properly imputed the miners' violative acts to the operator for purposes of liability. The remaining question is whether he properly imputed the foreman's and the miners' negligent acta to SOCCO for penalty purposes.

Section 110(i) of the Act requires that in assessing penalties the Commission must consider, among other things, "whether the operator was negligent." 30 U.S.C. $ 820(i). We have previously held that "[s]ince operators typically act in the mines only through

such supervisory agents, ... consideration of a foreman's actions is proper in

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5/ The judge also concluded: "The record shows the section foreman failure to supervise and monitor the remote recovery of the temporary supports [violated] the safety precautions set forth in 30 C.F.R. $ 75.200-14." He then specified the ways in which Darst purportedly violated 30 CFR $ 75.200-14, and in each instance he found that Darst's failure to comply with the provisions was indicative of the foreman's and top management's negligence. The judge erred in using $ 75.200-14 as a benchmark for negligence. Sections 75.200-6 through 75.200-14 are criteria promulgated by the Secretary for the guidance of his District Managers in their approval of roof control plans. These sections do not impose a duty upon an operator. Rather, the duty is imposed by the approved and adopted roof control plan, which may or may not contain provisions equivalent to the criteria. The judge's error is not prejudicial, however, because there is substantial evidence apart from this finding to support the findings of violations and SOCCO's negligence.

6/ Although the judge's primary conclusion was that the foreman and the miners were negligent, and that their negligence was imputable to SOCCO, he.also concluded that the operator was independently negligent. The record does not support the judge's inferred findings that SOCCO failed to supervise its foremen adequately and that SOCCO "top management" decided to remove the coal, necessitating removal of the temporary supports. The error is not material, however, because, as discussed infra, the operator's negligence is established by that of its foreman.

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evaluation of negligence for penalty assessment purposes." Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981)(construing analogous penalty provision in 1969 Coal Act). Therefore, we hold that the judge properly imputed the foreman's negligent actions to the operator in considering the amount of penalty to be assessed. 7/

Whether the negligence of a rank-and-file miner may be imputed to an operator for penalty purposes has not yet been addressed. Congress imposed primary responsibility on operators for providing a safe work environment, although it noted that the effort must be a joint one with miners. Legis. Hist. at 606. Congress further stated that the purpose of civil penalties is to ensure the operator's compliance with the requirements of the Mine Act. Legis. Hist. at 628-629, 1347-1348. "Operators" include their agents, who are defined in section 3(e) of the Mine Act 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." (Emphasis added.) 30 U.S.C.

$ 802(e). Furthermore, the legislative history of the 1969 Coal Act, from which the relevant provisions of the Mine Act were derived, stated that the provision for assessment of civil penalties is "necessary to place the responsibility for compliance with the Act and the regulations, as well as the liability for violations on those who control or supervise the operation of coal mines as well as on those who operate them." It declared further that agents of operators should include supervisors such as foremen. S. Rep. 91-411, 91st Cong., 1st Sess. 39, 44 (1969); reprinted in Legislative History of the Federal Coal Mine Safety Act of 1969 at 165, 170 (1975). The Senate Report on the Mine Act reiterated this view and added: "In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." Legis. Hist. at 628-629. Thus, where agents are negligent, that negligence may be imputed to the operator for penalty purposes.

As seen from the above review, the statutory language and the legislative history are not directed at imputing the negligence of rank-and-file miners to the operator for penalty purposes. Thus, we reverse the judge's holding that the negligence of a rank-and-file non-supervisory employee may be directly imputed to the operator for purposes of penalty assessment. However, where a rank-and-file employee has violated the Act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. Nacco, supra, 3 FMSHRC at 850-851. We examine below the record evidence in this regard in the context of the proper penalty assessment.

7/ In Nacco, we described the circumstances in which a foreman's negligence might not be considered to be the operator's for penalty assessment purposes: "Where ... an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for 'negligence.'" 3 FMSHRC at 850. The Nacco holding is inapplicable here because the foreman's negligence helped to expose miners, whose supervision was his responsibility, to danger.

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Assessment of penalty

We have affirmed the judge's finding of two violations and his imposition of liability on SOCCO. We must now consider whether, in light of our discussion regarding imputation of negligence for penalty purposes, the judge's penalty assessments are appropriate. Section 110(i) requires that in assessing a penalty the Commission consider the operator's history of previous violations, the appropriateness of

the penalty to the size of the business, the effect on the operator's ability to continue in business, the operator's good faith in attempting to achieve rapid compliance, the gravity of the violation, and whether the operator was negligent. The parties stipulated as to the first four of these criteria, and the judge accepted their stipulations. Tr. at 29-31. With respect to gravity, the judge found the violations were extremely serious, and we agree.

We do not agree, however, with the judge's discussion of the negligence criterion and his assessment of maximum penalties in this case. We have held that the judge erred in directly imputing the rank-and-file miners' negligence to SOCCO for penalty assessment purposes. As discussed, the correct inquiry is to determine whether their violative conduct was attributable to an omission of the operator. In this regard, SOCCO presented evidence directed at establishing the adequacy of its safety programs. Tr. at 26, 63, Tr. II at 70-73, 161-162, 194, 199-204, 220. While there may be some question about the overall effectiveness of these programs (Tr. at 95; Tr. II at 115-116, 132, 165, 167-169, 191-193, 219-220), the record does not support a finding that the safety programs contributed directly or indirectly to the violations at issue. Thus, we conclude that apart from the foreman's negligence, which has been established and is imputable to the operator, the evidence does not establish further negligence by SOCCO.

Because the judge's assessment of maximum penalties for each violation was in large part based on his conclusions that the rank-and-file miners' negligence was imputable to the operator and that the operator was independently negligent, conclusions that we have overturned, we must re-evaluate the penalties to be assessed. Through his special assessment procedures, the Secretary proposed that a penalty of $6,000 be assessed for the failure to remotely remove roof supports, and that a penalty of $4,000 be assessed for travelling and working under unsupported roof. Under the Act the Secretary is authorized to propose penalties for violations (30 U.S.C. $ 815(a)), but in a contested case the responsibility for assessing penalties rests with the Commission. 30 U.S.C. $ 820(i). Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, No. 79-3393, 6th Cir. (March 9, 1981). Based on our independent review of the record and application of the statutory penalty criteria, we agree with the Secretary that penalties totalling $10,000 for the two violations are appropriate. However, unlike the Secretary, in the circumstances of this case we find no basis for assessing a higher penalty for the roof support removal violation than for the working under unsupported roof violation. Rather, we find that, in light of the interrelation of the two violations, penalties of $5,000 for both violations are appropriate and consistent with the statutory criteria.

Did the judge comply with 29 C.F.R. $ 2700.65?

We have stated previously that Commission Rule 65, 29 C.F.R. $ 2700.65, 8/ and the Administrative Procedure Act, 5 U.S.C. $ 557(c)(3) 9/:

> [R]equire findings of fact, conclusions of law, and supporting reasons in order to prevent arbitrary decisions and to permit meaningful review. As the D.C. Circuit has emphasized, these requirements "are not mere procedural niceties; they are essential to the effective review of administrative decisions." U.S.V. Pharmaceutical Corp. v. Sec'y of HEW, 466 F.2d 455, 462 (1972). Our function is essentially one of review. See 30 U.S.C. $ 823(d) .... Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively. See Duane Smelser Roofing Co. v. Marshall, 617 F.2d 448, 449-450 (6th Cir. 1980); U.S.V. Pharmaceutical Corp., supra;. UAW v. NLRB, 455 F.2d 1357, 1369-1370 (D.C. Cir. 1971); Anglo-Canadian Supply Co. v. F.M.C., 310 F.2d 606, 615-617 (9th Cir. 1962); R.W. Service Systems, Inc., 235 N.L.R.B. No. 144, 99 L.R.R.M. 1281 1282 (1978).
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> The Anaconda Co., 3 FMSHRC 299-300 (February 1981).

The judge's decision under review minimally complies with our rules and the APA. It contains findings of fact supporting the conclusion

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8/ 29 C.F.R. $ 2700.65 states in pertinent part:

> (a) Form and content of the judge's decision. The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript....

9/ 5 U.S.C. $ 557(c)(3) provides in part:

> All decisions, including initial, recommended, and tentative decisions are a part of the record and shall include a statement of--
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> (A) findings and conclusions, and the reasons or basis therefor, on all material issues of facts, law, or discretion presented on the record; and
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> (B) the appropriate rule, order, sanction, relief, or denial thereof. (Emphasis added.)

5 U.S.C. $ 557(c)(3) is applicable through $ 105(d) of the Mine Act, 30 U.S.C. $ 815(e), which provides for hearings in accordance with 5 U.S.C. $ 554.

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that the violations occurred and that SOCCO was liable for the violations. It also contains findings sufficient to support the conclusion that SOCCO, through its foreman, was negligent in allowing the violations to occur, and that the violations were extremely serious. It does not, as did the decisions in Anaconda, "cross the line from the tolerably terse to the intolerably mute." 3 FMSHRC at 302.

Conclusion

Accordingly, we affirm the judge's conclusion that two violations of 30 C.F.R. $ 75.200 occurred and assess penalties of $5,000 for each violation. 10/

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10/ We respectfully disagree with our dissenting colleague's suggestion that failure to grant paragraphs 3 and 4(a) of the operator's petition for review which were specifically directed toward the appropriate penalty, precludes us from reviewing and reducing the penalty assessed by the judge in this case. Failure to grant review of a portion of a petition may bar consideration of the issues raised therein. 30 U.S.C. $ 823(d)(2)(A)(iii). However, in this case we do not reach the question. Here, among the issues which we did direct for review is the question of whether the judge correctly evaluated the operator's negligence in relation to the violations found (see paragraphs one and two of the operator's petition).

The Act mandates determination of an operator s negligence as a component in penalty assessments. 30 U.S.C. 820(i). Accordingly, we have reviewed the negligence issue raised by paragraphs one and two of the petition on review. We conclude that on the record before us the negligence that can be attributed to the operator is considerably less than suggested by the judge. Under these circumstances, it is appropriate for us to reduce the maximum penalties assessed by the judge. To not do so would afford the operator little relief in light of our findings regarding negligence.

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Commissioner Lawson concurring in part and dissenting in part:

I am in agreement with the majority and the judge below in their respective findings of two violations of the Act. Roof falls continue to be the leading cause of death in the mines, and the roof here was indisputably bad. 1/ Tr. I at 63, 137, 177-178; Tr. II at 107. Further, the violations here directly resulted in the death of miner James Six. But I dissent from my colleagues' reduction of the

penalties imposed on this mine operator.
The petition for discretionary review filed by the operator sought review of numerous questions. On some of these review was granted. However, review was sought but specifically denied on all issues involving the amount of the penalty, and reducing the penalties in this case is thus procedurally improper. 2/
As a consequence of the Commission's denial of review of these issues, neither the operator nor the Secretary, of course, briefed the Commission on whether or not the penalties assessed were excessive. The operator's contentions in its petition for review were restricted to whether it was responsible for the violations, not the amount of the penalties assessed. Nevertheless, the majority has determined that the penalties assessed by the ALJ are excessive, and that "lower penalties are warranted." Page 1, supra.

1/Indeed, fatalities as the result of roof falls from January 1 to June 4, 1982 have dramatically increased; twenty-nine miners have died this year, compared with nine deaths in 1981, and twelve deaths in 1980 for this same time period. Daily Fatality Report, U. S. Dept. of Labor, MSHA, June 4, 1982 and June 4, 1980.
2/More specifically, review was denied on the issues of:
"(3) Judge Kennedy's Decision and Order is contrary to law in that SOCCO was denied the due process of law by being ordered to pay a penalty $10,000 higher than the proposed assessments it would have been obligated to pay if it had not exercised its right to challenge the proposed penalties through the hearing process;
(4) The following substantial questions of law, policy or discretion are involved in this matter:
(a) Whether an Administrative Law Judge can properly increase and impose penalties to a total of $20,000 "in order to deter further violations, to heighten top management's awareness of the need for meaningful supervision and sanctions to back up the mine safety laws, and to ensure, if possible, voluntary compliance with those laws;" Petition for Discretionary Review, page 2.
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Section 113(d)(2)(A)(iii) of the Act sets forth the relevant requirements of a petition for discretionary review, viz: "If granted, review shall be limited to the questions raised by the petition." Section 113(d)(2)(B) enumerates the procedural requirements under which the Commission may, on its own motion, order a case before it for review, whether or not a petition for discretionary review has been

filed, but the issue of the amount of penalty was not raised here by the Commission on its own motion. As that section provides: "If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph." Thus, the Commission did not grant review of any issue asserting that the penalty amount was excessive--indeed denied review when such was sought by SOCCO--nor did it raise this issue sua sponte. Accordingly, the statute prohibits considering the issue of penalty excessiveness in this review proceeding.

Although one need not endorse every step of the penalty assessment process taken by the judge below, my colleagues have failed to provide a more reasoned analysis for reducing by fifty percent the penalties to be imposed. All statutory penalty assessment criteria (set forth in section 110(i) of the Act) were agreed to before the judge, except "negligence" and "gravity." There is no disagreement with the judge's conclusion that "the violations were extremely serious," nor that this operator was negligent.

However, the majority seeks to sever the negligence criterion, not pursuant to the statute--which incorporates no separation of the enumerated criteria to be considered in assessing penalties--but on the totally unsupported assertion that the judge's penalty assessment "...was in large part based on his conclusions that the rank and file miners' negligence was imputable to the operator and that the operator was independently negligent, conclusions that we have overturned, (and) we must reevaluate the penalties to be assessed." Page 7, supra.

The decision below, however, does not suggest, much less state, that any dollar, percentage, or other numerical value is to be assigned to the "negligence", or any of the other criteria listed in section 110(i) of the Act. Notwithstanding this void, the majority would now embark upon the uncharted waters of independent penalty assessment. My colleagues have thus determined that miner Six's death is worth $5,000 for each violation, contrary to not only the evaluations of the judge below, but those of the Secretary and the MSHA Office of Assessments as well. 3/ Nor does the majority herein cure what it views as the deficiencies in the opinion below by any independent assignment of numerical or other objective indicia to the Act's "negligence" criteria. No future guidance is therefore furnished for either mine operators or the Secretary, and conclusorily glossing over the fifty percent penalty reductions may be superficially attractive, but falls short of being statutorily satisfactory or in accord with the Act.

3/The majority's disagreement with the quantum of negligence assigned to these violations by the judge fails to address the inseparability of the six statutorily required criteria required to be considered in penalty

assessment, and, as noted, review was denied on the issue of penalty assessment, and the parties consequently denied the opportunity to present their views thereon.

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The majority thus holds that these penalties are "appropriate and consistent with the statutory criteria" (page 7, supra), but its opinion is entirely silent as to four of the section 110(i) criteria, does not dispute the gravity of the violations, and parses the negligence admittedly involved in a manner obviously different than did the judge below, but in a manner substantially less explicated. The judge below was closer to the mark--and the Act--in noting that the purpose of penalties is deterrence, and that the amount warranted for each violation was imposed for that reason. Contrary to the majority's opinion herein, that at least is in accord with the legislative history of the Act. Legis. Hist. at 603, 628-630.

As the Senate Committee Report notes:

"In overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low, and when combined with the difficulties being encountered in collection of assessed penalties (to be discussed, infra), the effect of the current enforcement is to eliminate to a considerable extent, the inducement to comply with the Act or the standards, which was the intention of the civil penalty system." Legis. Hist. at 629, (Emphasis added).

The majority's contradictory analysis is best summarized in its own words, as quoted in the Legislative History:

"In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." Legis. Hist. at 628-629. Page 6, supra.

In addition to ignoring the procedural requirements of the Act by reviewing an issue denied review, and reducing the penalty assessed below by 50% founded upon no more than disagreement with the judge, the majority has further erred in reversing the judge's imputation of non-supervisory miner negligence to the operator for penalty purposes. 4/

The question before the Commission is more properly framed as:

"If an operator is responsible without fault for a violation, should it not also be responsible without fault for the penalty imposed for the violation?"

It is well established that "...an operator is liable without fault for violations of the Act and mandatory standards committed by its employees." Page 4, supra, (and authorities cited). The statute

does not shield the operator, nor should we, from penalty assessment solely because no fault by the operator may have been established. An operator acts only through

4/ There is no dispute concerning the imputation of negligence to the operator for his agents or supervisory personnel, for penalty purposes. "Thus, where agents are negligent, that negligence may be imputed to the operator for penalty purposes." Page 6, supra.

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its employees, and if a non-supervisory or rank and file miner has violated the Act--indisputably the case here--and negligence is established--also not in dispute--that negligence is properly required to be considered in assessing penalties. United States v. Illinois Central Railroad Co., 303 U.S. 239, 244 (1938).

Here, both supervisory and non-supervisory miner negligence unquestionably occurred. To artificially allocate penalty dollars for that negligence between the operator and its rank and file miners provides a ready avenue for an operator to escape penalties and their intended deterrent effect. The operator which structures its operations to avoid supervisory responsibility will now be rewarded. Neither the resulting reduced penalty, nor this denied supervision, is in accord with the intent of the Act, nor does this scheme accord with the mandatory penalty assessment processes required by the Act. While one can perhaps conceive of a case in which the only negligence could be that of the rank and file miner, this is not that case, and, as we have recently noted, examining claims "in a legal vacuum" is contrary to Commission precedent. Frederick G. Bradley v. Belva Coal Co., 4 FMSHRC 982, 987 (June 1982). The majority's dicta is particularly unfortunate in this case, given its unprecedented independent excursion into penalty assessment.

The majority has apparently read the legislative history as silent with regard to the imputation of the negligence of rank and file miners to the operator for penalty purposes, and leaped from that reading to the assumption that Congress did not therefore intend to include in penalty calculations any negligence of the operator's rank and file miners.

However, providing a means for the avoidance or drastic reduction of penalties is clearly to undercut compliance, more particularly in this case in which there is no question of the presence of negligence admittedly assignable to the operator. This operator is therefore not without responsibility for the violative actions of its rank and file miners, to which it has confessed. 5/

Examination, as the majority suggests, (page 6, supra), of this operator's "supervision, training, and disciplining of its employees", reveals that the judge below found substantial evidence that this operator's "safety programs" contributed to the violations. The

majority not only ignores that evidence, and cites none to the contrary, but admits that "...there may be some question about the overall effectiveness of these programs." Page 7, Tr. II at 196.

As to this operator's disciplining its miner-employees for misconduct in performing.their assigned duties in violation of the Act--and although the decision of the judge below is silent--the majority refers to Miner Six's having received "...two prior warnings for violations of roof control procedures." While Six had received "two unsafe practice reports,"

5/ This operator has conceded that "...it did have miners who were engaged in practices that were stated in those citations." Tr. I at 16.

~1472

admittedly non-punitive, no disciplinary action was ever taken against him, despite his having twice failed in his obligations, to properly set a jack as required, and to set temporary supports for the roof in the mine section in which he was working. Tr. II at 76-79, 191-192. Nor had any non-supervisory miners ever been suspended for safety violations. Tr. II at 163-164.

Miner Endicott had never been warned or otherwise disciplined for working under unsupported roof, although the operator had observed both Endicott and Six working under such roof on "other occasions." Page 3, supra. Tr. I at 94, 151, 160; Tr. II at 77-78. Even more shockingly, neither Miner Endicott nor Foreman Darst received any unsatisfactory slips, much less.warnings, for their action at the time of the violations which here resulted in the death of Miner Six. Tr. I at 151; Tr. II at 132. To ignore roof control violations, as did this operator, is to invite precisely the sort of disaster which ensued. 6/

Operator witness Darst, the foreman in charge of these miners, testified that he had never issued written warnings or taken any miners to the superintendent for "reckless" behavior. 7/ Tr. II at 115-116. On direct examination this operator named those actually disciplined for safety violations; neither the miners here involved nor their supervisor were ever so disciplined. Tr. II at 162, 165-168. Indeed, Mine Superintendent Roberts made "a conscious decision in this case not to take any disciplinary action." Tr. II at 168-169. In response to the judge's questioning, Superintendent Roberts agreed that he "didn't consider that what occurred on May 5th, 1978, as officially serious as to warrant any disciplinary action with the miners involved." Tr. II at 165.

This operator's supervisory deficiencies are also amply reflected by this record. 8/ Although there was an approved safety training program, as required by the Act (Tr. I at 26), the record fails to reveal any instruction of either miners Endicott or Six,

notwithstanding the latter's previously known performance deficiencies.

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6/ This operator also stipulated to an admitted fifty-one violations of mandatory standard 30 CFR 75.200 between May 1976 and May 1978. Tr. I at 29.

7/ Foreman Darst testified that while he had supervised miners he considered to be reckless, "what I call reckless is if he's running a piece of machinery and he don't take care of it." Tr. II at 115.

8/ As to instructions to Miner Six to perform the work that killed him, Foreman Darst responded to the judge's questioning: (Tr. II at 109).

Q.91 Is that the only jack that you intended to have him knock out?

A. Yes.

Q.92 Is that what you told him?

A. No, I just told him to knock the jacks out with a loader. I didn't specify on certain jacks.

Miner Endicott received no instructions from Foreman Darst as to what he "and Six were supposed to be doing in the 15 Entry." Tr. I at 94, 106-107; Tr. II at 108.

~1473

In summary, the determination of the judge below that there was substantial--indeed ample--evidence that this operator was grossly negligent in supervision, discipline and training of its rank and file miners is fully supported by this record and SOCCO's negligence, in this regard as well, is fully established. There are no more serious derelictions in underground coal mining than those affecting roof control. Must there be multiple deaths to warrant imposition of the full penalties provided for by the Act?

I therefore dissent to the reduction of the penalties imposed.

~1474

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