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MSHA V. ROCHESTER & PITTBURGH COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 5, 1991
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket Nos. PENN 88-284-R
PENN 88-285-R
v. PENN 89-72
ROCHESTER & PITTSBURGH COAL
COMPANY

BEFORE: Backley, Acting Chairman; Doyle, Holen, and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This consolidated contest and civil penalty proceeding involves the issue of whether two violations by Rochester and Pittsburgh Coal Company ("R&P") of 30 C.F.R. $ 75.305, a mandatory underground coal min+ safety standard requiring weekly examinations for hazardous conditions in specified areas of mines, were the result of R&P's "unwarrantable failure" to comply with the standard.: Commission Administrative Law Judge Roy J.

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1/ Section 75.305, which repeats the statutory standard at section 303(f) of the Mine Act, 30 U.S.C. •863(f), states:
In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with th+ mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls,at seals; in the main return, at least one entry of each intake and return aircourse in its entirety. idle workings. and insofar as safety considerations permit, abandoned areas. Such weekly examinations need not be made during any week in which the mine is idle for the entire week, except that such examination shall be made before any other miner returns to the mine. The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found. such condition shall

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Maurer concluded that R6 had violated 30 C.F.R. •75.305 and that the violations were of a "significant and substantial" nature ("S&S") but determined that the violations were not the result of R&P's unwarrantable failure. 11 FMSHRC 1978 (October 1989)(ALJ). Judge Maurer concluded that the conduct of the mine examiner responsible for the weekly examinations was not imputable to the operator for unwarrantable failure purposes because the examiner was a rank-and-file miner and the violation resulted from that employee's intentional misconduct. 11 FMSHRC at 1982-83. For the reasons set forth below, we reverse and remand this matter for further proceedings consistent with this opinion.

I.

Factual and Procedural Background

The facts are essentially undisputed. Before the judge, R&P stipulated that the mine examiner had failed to place his initials and the date and time of examination at the places subject to examination, thus conceding the two violations. (The mine in question provides date boards on which examiners are to place the date and their initials as they pass an area.) While of the opinion that the examinations in question were not done, R&P was unwilling to so stipulate. R&P conceded that the examiner had entered the examinations in the record book as though completed.

On July 13, 1988, John Daisley, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection at R&P's Greenwich Collieries No. 2 Mine, an underground coal mine located in Pennsylvania. Daisley travelled with United Mine Workers of America ("UMWA") mine examiner John Urgolites to the P-9 area of the mine. Daisley did not find any dates, times or initials to indicate that R&P had conducted a weekly examination in the area for the week ending July 6, 1988, or any date thereafter. Daisley found some dates, times and initials for the week prior to July 6, 1988, made by Joseph Mantini, indicating that he had conducted an examination of the P-9 area at that time.

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reported to the operator promptly. Any hazardous condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of the Act, until such danger is abated. A record of these examinations tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the

mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

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After Daisley reached the surface, he examined R&P's record book entitled "Weekly Reports of Air Measurements and Conditions of Aircourse... ." The record book indicated that an examination of the P-9 area had been made on July 6. 1988. The entry in the book was signed by Mantini, the miner responsible for the examination. At that time, Daisley did not take any enforcement action with respect to the P-9 area because he "actually couldn't believe" that there could be such a discrepancy and he intended to re.inspect the area. Tr. 23-4. The record book indicated that on Thursday, July 7, 1988, an examination of the main S return had also been conducted by Mantini. Tr. 63-64; Exh. R.4.

On July 14, 1988, Daisley entered the mine and went to the S and T areas of the mine, accompanied by Urgolites, mine examiner Rich Rummell, and Joe DeSalvo, R&P safety inspector. Daisley did not find any dates. times or initials indicating that an examination had been conducted in the S and T areas for the week ending July 7, 1988, or any day thereafter until July 13, 1988. However, Daisley found dates, times, and initials indicating that examinations had been conducted by Mantini in some of the areas for the week prior to July 7, 1988. In some locations, the last date Daisley found entered on the applicable date board was June 23, 1990. Exh. G.3.

On July 14, 1988, Daisley issued R&P two withdrawal orders, pursuant to section 104(d)(2) of the Act, 30 U.S.C. •814(d)(2), alleging violations of section 75.305. The orders stated that the required weekly examinations in the inspected areas had not been made although the mine examiner, Mantini, had recorded the examinations as having been conducted. Daisley marked both orders "S&S" and "high" for negligence. Daisley noted that no area was affected by withdrawal because appropriate examinations were made during the course of his inspections.

Mantini was not the regular examiner for the areas involved in this proceeding. The period June 26 through July 10, 1988, was the regularly scheduled two.week vacation period for most of the miners who worked at the mine. Although production was discontinued during the vacation period, some miners performed various tasks in the mine. Normally Mantini, a rank--and-file miner, was a belt person. However, during the miners' vacation period, he had the right, due to his qualifications and seniority, to work and to serve as the examiner charged with conducting the weekly examinations required under 30 C.F.R. □75.305. Mantini is certified by the State of Pennsylvania as a min examiner and, as such, meets MSHA's requirements for serving as a certified mine examiner. See 30 C.F.R. •75.2(a). 2/

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2/ In order to be certified by Pennsylvania, a miner needs three years of underground experience and must pass an oral and written examination. Tr. 20, 21, 47, 51. For purposes of section 75.305's weekly examinations, a certified person is a "person who [is] certified as a mine foreman (mine manager), an assistant mine foreman (section foreman), or a preshift examiner (mine examiner)." 30 C.F.R. •75.100(a).

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After the vacation period ended all the miners returned to work. ln Daisley's view, examinations were required to be made on July 6 and 7, 1988, before the miners returned underground.s

Daisley testified that, apart from Mantini, no other R&P employee was negligent in connection with the violations and no member of mine management was aware of any violative conduct prior to July 13, 1988. The Secretary proposed civil penalties of $1,100 for each violation.

MSHA also conducted an investigation of Mantini's role in the incident pursuant to section 110(c) of the Mine Act, 30 U.S.C. •820(c). MSHA apparently concluded that Mantini had falsified the examination records. Tr. 64. However, MSHA did not take any enforcement action against Mantini individually. Tr. 55. The record suggests that R&P may have suspended Mantini for misconduct. Tr. 35-36.

At the hearing, R&P did not challenge the proposition that the Mine Act imposes liability without regard for violations of the Act. As noted at the outset, R&P also conceded at least a recording violation in both instances. R&P did challenge, however, the inspector's findings of high negligence and unwarrantable failure as well as the penalties proposed by the Secretary. R&P argued that a rank-and-file miner's negligent or willful conduct may not be imputed to an operator for the purpose of making unwarrantable failure findings. R&P asserted that, in light of its own lack of negligence, the unwarrantable failure finding could not be supported and urged modification of the section 104(d)(2) orders to citations issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. □814(a)

The Secretary contended that Mantini was an agent of the operator, not merely a rank-and-file employee, when he was acting as mine examiner. The Secretary argued that Mantini's willful and aggravated conduct was, therefore, properly imputable to the operator.

In his decision, the judge found that the required examinations were not in fact made and affirmed the violations of section 75.305. 11 FMSHRC at 1981. He also found that the violations were S&S. Id. However, the judge vacated the unwarrantable failure findings associated with the inspector's orders, concluding that the record established R&P's negligence to be "nil." 11 FMSHRC at 1983. He determined that a rank-and-file miner's intentional misconduct is not per se imputable to the operator simply because the operator had appointed him as mine examiner. He further concluded that for unwarrantable findings, the requisite "aggravated

conduct" must be the operator's own conduct. 11 FMSHRC at 1981.83. The judge reasoned:

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3/ Under section 75.305, "weekly examinations need not be made during any week in which the mine is idle for the entire week except that such examination shall be made before any other miner returns to the mine." R&P does not dispute that the examinations on July 6 and 7, 1988, were required to be made.

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ln this case, Mantini's misconduct was willful and intentional. He did not perform the required examinations, he knew he did not, and yet he certified in the operator's official records that he had perform+d them. I have a lot of trouble with the idea that a rank-and-file employee's intentional misconduct is imputable to management as their own "aggravated conduct" when there is absolutely no evidence in the record that any member of mine management actually knew or even should have known that the examinations were not done....

11 FMSHRC at 1982.

The judge modified the section 104(d)(2) orders to section 104(a) citations. 11 FMSHRC at 1983. Citing Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-65 (August 1982) ("SOCCO"), the judge found that, for penalty assessment purposes, rank-and-file employee negligence was not imputable to the operator, that the operator's negligence was to be determined by an examination of the operator's own conduct, and, as noted, that the operator's negligence was "nil." Id. The judge reduced the penalties from the $1,100 proposed by the Secretary for each violation to $450 for each violation. Id.

The Commission granted the Secretary's subsequent petition for discretionary review, which challenged only the judge's determination that there was no unwarrantable failure on the part of the operator. We heard oral argument in the matter, and now reverse.

II.

Disposition of Issues

On review, there is no dispute that Mantini engaged in intentional misconduct in failing to perform the required weekly examinations. The question before us is whether the judge erred in not imputing that misconduct to R&P in assessing whether it had unwarrantably failed to comply with 30 C.F.R. •75.305. In addressing this question, three issues are presented: (A) whether intentional misconduct is within the scope of unwarrantable failure under the Mine Act; (B) whether Mantini, a rank.and. file employee acting as a mine examiner, was an agent of R&P in that capacity; and (C) if so, whether his misconduct was within the scope of

his authority and, hence, imputable to R&P as principal.

A. Scope of unwarrantable failure

The special finding of unwarrantable failure, as set forth in section 104(d) of the Mine Act, 30 U.S.C. •814(d), may be made by authorized Secretarial representatives in issuing citations and withdrawal orders pursuant to section 104. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010

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(December 1987), the Commission defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms as "indifference," "willful intent," "serious lack of reasonable care," and "knowing violation." 9 FMSHRC at 2003. In Emery. the Commission also pointed out that in Eastern Associated Coal Co., 3 IBMA 331 (1974), the Interior Board of Mine Operations Appeals ("Board") had defined unwarrantable failure as "intentional or knowing failure to comply or reckless disregard for the health and safety of miners." 9 FMSHRC 2003, citing Eastern 3 IBMA at 356 n.5 (emphasis added).

Intentional misconduct, whether by commission or omission, is similar in terms of culpability to the kinds of indifferent, willful, or knowing behavior adverted to in Emery From the perspective of plain meaning, intentional misconduct is "aggravated conduct." Eastern, cited in Emery. includes intentional failure to.comply within the scope of unwarrantable failure. Accordingly, we conclude that intentional misconduct is a form of unwarrantable failure for purposes of the Mine Act.

B. Mantini's status as R&P's agent

In SOCCO. the Commission held, in relevant part, that the negligence of an operator's agents may be imputed to the operator for civil penalty purposes. 4 FMSHRC at 1463.64. Similarly, an agent's conduct may be imputed to the operator for unwarrantable failure purposes.

On review, R&P states that Mantini, notwithstanding his status as a rank-and-file miner, was "arguably" charged with responsibility for the operation of part of a mine and, hence, was R&P's agent within the meaning of the Mine Act's definition of "agent" (see below). R&P Br. at 6. See also Tr. Oral Arg. 17. However, in R&PR's view, the determinative question in this case is "when does an agent cease to be an agent." R&P Br. at 6. R&P argues that because Mantini's intentional misconduct in failing to carry out the weekly examinations was outside the "scope of his authority" as an agent, his actions were not imputable to R&P. While the scope of authority issue is the focus of the parties' arguments on review, we deem it advisable to clarify the principal-agent relationship between an operator and those miners it charges with the responsibility of carrying out the examinations required under the Mine Act. Based on the language of

the Mine Act and settled principles of the common law of agency, we have no difficulty concluding that a rank-and-file employee like Mantini is the agent of an operator when carrying out the required examinations entrusted to him by the operator.

Section 3(e) of the Mine Act provides in relevant part that "'agent' means any person charged with responsibility for the operation of all or a part of a coal or other mine...." We concur with R&P (R&P Br. at 6) that, in carrying out such required examination duties for an operator, an examiner like Mantini may appropriately be viewed as being "charged with responsibility for the operation of ... part of a mine," and, therefore, the examiner constitutes the operator's agent for that purpose.

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Further, while the common law meaning of agent may be distinguished technically from the Mine Act's definition of the term, there is no substantive inconsistency between the two. The Commission has previously employed both the Act's definition and common law principles in resolving agency problems (see, e.g., Wilfred Bryant v. Dingess Mine Service, 10 FMSHRC 1173, 1178.80 (September 1988), aff'd sub nom, Winchester Coals v. FMSHRC, No. 89-334 (4th Cir. May 10, 1990)), and we find it appropriate to do so here as well. Generally, an agent is one who is authorized by another, the principal, to act on the other's behalf. See, e.g., Black's Law Dictionary, 59 (5th ed. 1979)("Black's"); Johnson v. Bechtel Associates Profes'l Corp., 717 F.2d 574, 579 (D.C. Cir. 1983). The Restatement (Second) of Agency (1958)("Restatement") indicates that the essential feature of the principal agent relationship is that the agent has authority to represent his principal with third parties in dealings that affect the principal's legal rights and obligations. Restatement, •10. Within the plain meaning of these common law concepts, we conclude that when R&P assigned Mantini the statutorily mandated responsibility of an operator to conduct and record the weekly mine examination required under section 75.305, Mantini became an agent of R&P for that purpose.

In this regard, Pocahontas Fuel Co.. 8 IBMA 136, 146-48 (1977), aff'd sub nom. Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), is instructive. There, the Board concluded that a rank-and-file miner, who was responsible for conducting a required preshift examination, was an agent of the operator, and that the miner's failure to detect a violative condition could properly be imputed to the operator for unwarrantable failure purposes. In Pocahontas. the operator argued that its designated preshift examiner was a rank-and-file employee and member of the UMWA and, hence, not a "management employee," nor "the company" and that, accordingly, the examiner's failure ought not be attributed to the operator. In concluding that the preshift examiner was an agent of the operator, the Board emphasized that the preshift examination was a statutorily mandated duty of the operator and had been delegated by the operator to the rank-and-file employee. 8 IBMA at 147.49. The Board

stated that the statute made clear that Congress had recognized that the preshift examination was a most important function in the operation of a coal mine. The Board noted that the Act went into lengthy detail regarding the areas required to be inspected and the procedures to be followed as part of the preshift examination and that the statute further required the operator to "designat[e]" a "certified person" to conduct the examination. 8 IBMA at 147. The Board observed that although the duties delegated to the preshift examiner were the kind of duties "that one might expect an employer more normally to delegate to management personnel," it was

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4/ Pocahontas arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. •801 et seq. (1976)(amended 1977)("Coal Act"). The preshift examination involved in Pocahontas was required by section 303(d)(1) of the Coal Act (30 U.S.C. •823(d)(1) (1976) and the parallel standard at 30 C.F.R. •75.303(a)(1975). Both section 303(d)(1) of the Coal Act and 30 C.F.R. •75.303(a) have been carried over unchanged as section 303(d)(1) of the Mine Act and 30 C.F.R. •75.303(a)(1990).

undisputed that the operator had delegated those duties to a rank-and-file miner. 8 IBMA at 148. The Board clearly recognized that whether a person is an agent does not necessarily depend on the individual's status as a supervisor but, rather, on his authority to act on behalf of the principal. We find that all of the foregoing considerations relied on by the Board in Pocahontas with respect to preshift examinations by a rank-and-file miner apply with equal force to the weekly shift examinations involved in the present case.

Accordingly, we hold that Mantini, although a rank-and-file miner, was an agent of R&P for the purpose of conducting the weekly examination. See generally, Pocahontas, 8 IBMA at 146-49; cf., SOCCO, 4 FMSHRC at 1464.

C. Scope of Mantini's authority

If Mantini's violative conduct was within the "scope" of his employment or authority as an agent, then it may be imputed to R&P for purposes of an unwarrantable failure finding.

A leading commentary on the law of torts makes clear that "scope of employment" is both a broad and flexible concept:

> It is ... a bare formula to cover the uncovered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not. It refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.

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The fact that the servant's act is expressly forbidden by the master, or is done in a manner which he has prohibited, is to be considered in determining what the servant has been hired to do, but it is usually not conclusive, and does not in itself prevent the act from being within the scope of employment. A master cannot escape liability merely by ordering his servant to act carefully. If he could, no doubt few employers would ever be held liable ... .

Prosser & Keeton, Torts, •70 (p. 502) (5th ed. 1984). See also Restatement, •28.

Under common law concepts of agency, generally it is not necessary to show that the principal (master) authorized or permitted the agent's

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(servant's) particular injury.causing conduct in order for that conduct to be viewed as lying within the scope of the agent's duties and employment. See, e.g., Restatement •232. Unauthorized acts of misconduct, including the failure to act, may bs within the agent's scope of employment. The principal's express prohibition of an agent's act does not necessarily bar a finding that the misconduct was within the agent's scope of employment. A principal is liable even for the deceit of its agent, if that deceit was committed in the business that the agent was appointed to carry out. This holds even when the agent's specific conduct is carried out without the knowledge of the principal. E.g., CFTC v. Premex, Inc., 655 F.2d 779, 784 n.10 (7th Cir. 1981). The fraud of an agent may also be imputed to the principal when an agent is executing a transaction within the scope of his authority. In re Nelson, 761 F.2d 1320, 1322 (9th Cir. 1985). See, also Restatement •257, 282.

Applying these principles, we conclude that Mantini's intentional misconduct was within the scope of his employment and, accordingly, was imputable to R&P for unwarrantable failure purposes. There is no question that Mantini was delegated the duty and was entrusted with the responsibility of the section 75.305 weekly examinations and recordings. Mantini's authority to perform those tasks is undisputed. As noted above, even if Mantini's conduct is characterized as deceit or fraud, that in itself would not necessarily bar its imputation to R&P. His actions were taken in relation to that duty: they were not separate actions unrelated to his entrusted responsibility. Moreover, we must not lose sight of the fact that statutorily mandated operator safety examinations are involved here. R&P, as the operator had the absolute duty to ensure that these examinations were made, and Mantini must be considered R&P's agent acting within the scope of his authority with respect to that duty, since he was the individual assigned by R&P to discharge that duty. See Restatement, •214; 53 Am. Jur. 2d, Mastar and Servant.•313, 322, 323.

Thus, we reject R&P's contentions that Mantini's intentional misconduct was outside the scope of his authority. Under settled principles of agency law and in the context of the Mine Act, we hold that Mantini was R&P's agent for purposes of the examinations and that the manner in which he transacted that delegated statutory duty was within the scope of his authority. Accordingly, his misconduct is properly imputable to R&P for unwarrantable failure purposes.

D. Other contentions

We also reject R&P's other contentions. R&P argues that the Commission should apply the doctrine first enunciated in SOCCO, 4 FMSHRC at 1464, that the negligence of a rank.and.file miner is not imputed to an operator for penalty purposes if, among other things, the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct. Accord: A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983). However, as already discussed, the Commission also stated in SOCCO that the negligence of an operator's agents may be imputed to the operator. 4 FMSHRC at 1464. Even though Mantini was a rank-and-file miner, he was an agent of R&P for examination purposes and, as we have held, his unwarrantable

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conduct is properly imputable.

R&P also points to the Commission s decision in Nacco Mining Co., 848, 850 (April 1981), in which the Commission declined to impute the negligence of an operator if two general conditions were met: (1) the operator had taken reasonable steps to avoid the kind of accident in question; and (2) no other miners were put at risk by the supervisor's conduct. Here, the judge found, and R&P does not contest on review, that both of the violations put other miners at serious risk. 11 FMSHRC at 1981. Thus, the Nacco exception does not apply in this case. R&P has not advance, nor do we perceive under the facts of this case, any convincing reasons why Nacco should be expanded to include unwarrantable failure, as we have emphasized, weekly mine examinations are critical to mine safety and the failure to conduct such examinations put many miners at risk.

R&P argues further that imputation of intentional misconduct to the operator frustrates the purposes of the Mine Act. However, the Act has been construed to contain a deliberate scheme of vicarious liability of operators for violations committed by their employees. Western Fuels-Utah, Inc., 10 FMSHRC 256 (March 1988), aff'd, 870 F.2d 711 (D.C. Cir. 1989). The goal of this liability scheme is "to promote the highest degree of operator care." Western Fuels-Utah, 10 FMSHRC at 261. Although it may be extremely difficult to prevent intentional misconduct on the part of employees, R&P's argument that "Mr. Mantini's intentional misconduct is of a nature that is impossible to prevent" is not plausible. The liability scheme of the Mine Act is designed to give employers the strongest

incentives to select, train, monitor, and discipline their employees in ways that will result in enhanced mine health and safety. The Act furthers that goal in addition by providing civil and criminal penalties against individuals for knowing violations (section 110(c), 30 U.S.C. •820(c)) or false statements (section 110(f), 30 U.S.C. •820(f)). Any appeal to change that scheme must be directed, not to the Commission, but to Congress.

Finally, as noted above, an agent's violative conduct is imputable to the operator for negligence purposes. SOCCO, 4 FMSHRC at 1463.65. In view of our finding that Mantini's misconduct was imputable to R&P for unwarrantable failure purposes, the judge's failure to consider Mantini's violative conduct for negligence purposes was error. Although the terms "unwarrantable failure" and "negligence" are not used synonymously in the Mine Act, the same or similar factual circumstances may be included in the Commission's consideration of both. See, e.g., Quinland Coals, Inc., 9 FMSHRC 1614, 1622 (September 1987).

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Conclusion

For the foregoing reasons, we reverse the judge's determination that the violation did not result from R&P's unwarrantable failure. In view of our finding that Mantini was R&P's agent, acting within the scope of his authority, the judge's failure to consider Mantini's violative conduct in determining negligence was also erroneous. Accordingly, we remand this matter for reconsideration of the appropriate civil penalty. In light of our conclusions, the section 104(a) citations should be converted to the originally issued section 104(d)(2) withdrawal orders.

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