**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**601 NEW JERSEY AVENUE, NW**

**SUITE 9500**

**WASHINGTON, DC 20001**

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| SECRETARY OF LABOR, | : | | |
| MINE SAFETY AND HEALTH | : | | |
| ADMINISTRATION (MSHA) | : | Docket Nos. | CENT 2006-151-M |
| | : | | CENT 2006-201-M |
| v. | : | | CENT 2006-203-M |
| | : | | |
| NELSON QUARRIES, INC. | : | | |

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Administrative Law Judge Richard W. Manning concluded that Nelson Quarries, Inc. ("Nelson Quarries") violated 30 C.F.R. § 56.6130(a) when it failed to store an explosive in a magazine, and that the violation was significant and substantial ("S&S").[1] 30 FMSHRC 254, 260-61 (April 2008) (ALJ). He further determined that the operator violated 30 C.F.R. § 56.6300(b) when an employee who allegedly lacked adequate training and experience used explosives while unsupervised. *Id.* at 265. The judge also held that Gene Andres, Ronnie Head, and Jeff Benedict were agents of Nelson Quarries within the meaning of the Mine Act, and that their negligence was imputable to the operator for unwarrantable failure purposes for three citations and one order.[2] *Id.* at 262-63, 284-85, 288-89. Nelson Quarries filed a petition for discretionary review, challenging the judge's determinations that the violation of section 56.6130(a) was S&S, that the operator violated section 56.6300(b), and that the three individuals were agents. The Commission granted the petition. For the reasons that follow, we affirm the judge's decision.

[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation.

I.

Factual and Procedural Background

In October and November 2005, Nelson Quarries operated five portable limestone quarries in Allen and Crawford Counties, Kansas. 30 FMSHRC at 255. Nelson Quarries is owned in part by Kenneth Nelson. Gov't Ex. 137, at 9-2; Tr. 661. During the time in question, the operator referred to Patrick Clift and Mike Peres as superintendents, and to Andres, Head, and Benedict as foremen of Plants 4, 5, and 2, respectively. N. Br. at 6; Tr. 42, 184, 473-74, 558, 661, 663.

Inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted hazard inspections of the plants after a former employee of Nelson Quarries filed a complaint with MSHA listing unsafe conditions that allegedly existed at the plants. 30 FMSHRC at 255-56. In addition, the inspectors conducted regular inspections of the plants. Those regular and hazard inspections gave rise to the three citations and one order that are the subjects of these proceedings. Tr. 185.

A. Citation No. 6291250

On November 15, 2005, MSHA Inspector Dustan Crelly conducted regular and hazard[3] inspections of Plant 4 at the Cherryvale location. Tr. 183. When he arrived at the mine, Inspector Crelly introduced himself and asked for the person in charge. Tr. 184. Gene Andres stated that he was the foreman and accompanied the inspector throughout the inspection. Tr. 188; Gov't Ex. 12, at 4.

Inspector Crelly inspected the parts trailer, which was a semi-van with doors toward the back of the trailer. Tr. 193, 194. He observed two partial rolls of primer or shock tubing[4] stored under shelves toward the front of the trailer. Gov't Ex. 13; Tr. 191, 194. The shock tubing was not in the original manufacturer's packaging. Tr. 193. The material had apparently been in the parts trailer for some time. 30 FMSHRC at 261-62; Tr. 195, 216. Inspector Crelly issued Citation No. 6291250, alleging a violation of section 56.6130(a) because the shock tubing was not stored in a magazine.[5] 30 FMSHRC at 258. The inspector designated the violation as S&S and as caused by the operator's unwarrantable failure to comply with the standard. *Id.* at 258, 259.

[3] The hazard complaint received by MSHA alleged in part that "Explosives are left unguarded and hid around the plants to save time and money (Cherryvale)." Gov't Ex. 11.

[4] Shock tubing is used as a lead line to detonate high explosives, and is considered a low explosive. 30 FMSHRC at 259; Tr. 191.

[5] 30 C.F.R. § 56.6130(a) states that "[d]etonators and explosives shall be stored in magazines."

B. Order No. 6291251

On November 16, 2005, Inspector Crelly inspected the crusher shack at Plant 4 and discovered a stick of Boostrite, a high explosive, stored in the shed next to initiation devices. Tr. 206-07. The inspector asked Travis Tomlinson, the crusher operator, why the Boostrite was being stored in the crusher shed. Tr. 204-05. Tomlinson replied that on the preceding Monday, he had used one stick in the hopper of the crusher to break up large or hung-up material. 30 FMSHRC at 263; Tr. 204-05. Tomlinson stated that, while he was using the explosives, Andres was loading trucks. 30 FMSHRC at 265; Tr. 207-08. He further explained that rather than put the Boostrite back in the magazine, he had just placed it in the crusher shack. Tr. 205. The inspector stated that he observed Tomlinson smoking in the crusher shack. 30 FMSHRC at 263; Tr. 209-10. The inspector determined that Tomlinson was inexperienced in the handling and use of explosives, and that he had used the Boostrite while he was not in the presence of an experienced miner. 30 FMSHRC at 263. Accordingly, the inspector issued Order No. 6291251, alleging a violation of section 56.6300(b).[6] *Id.* The inspector designated the alleged violation as S&S and as caused by the operator's unwarrantable failure. Gov't Ex. 15.

C. Citation No. 6291595

On October 26, 2005, Inspector Chrystal Dye arrived at Plant 5 to conduct an inspection. Tr. 531, 553. When she asked for the person in charge, Ronnie Head introduced himself as the foreman and accompanied Inspector Dye throughout the inspection. Tr. 558. During the inspection, Inspector Dye tested the parking brake of a Euclid haul truck while it was empty on a slight grade and determined that the brake did not hold the truck against movement. 30 FMSHRC at 283; Tr. 553-54. She also noted that the condition had been documented since late September 2005 by three different truck operators in preshift reports. 30 FMSHRC at 283; Tr. 555. Inspector Dye asked Head if he knew about the condition, and he stated that he did. Tr. 555. Head explained that he had called the mechanic to fix the parking brake, but that the mechanic had allegedly stated that the brake did not need to work. *Id.* Inspector Dye issued Citation No. 6291595, alleging a violation of section 56.14101(a)(2).[7] 30 FMSHRC at 283. She designated the alleged violation as S&S and caused by the operator's unwarrantable failure. *Id.*

D. Citation No. 6321288

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[6] 30 C.F.R. § 56.6300(b) provides that "[t]rainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material."

[7] 30 C.F.R. § 56.14101(a)(2) provides, "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

On October 5, 2005, Inspector James Timmons went to Plant 2 to investigate allegations about an accident included in the hazard complaint.[8] When he arrived at the plant, the inspector asked to see the foreman on the site, and Jeff Benedict stated that he was the foreman. Tr. 663. The inspector was informed that on September 23, 2005, Travis Larson had been directed by Benedict to operate the IH 530 front-end loader, which had non-functioning service brakes, to remove a lime pile. 30 FMSHRC at 287; Tr. 663-64. When Larson had driven up a ramp and raised the bucket, the loader's motor failed. Tr. 664. The loader then ran down the ramp and through a guardrail. *Id.* Before the accident, the mine superintendent, Patrick Clift, had instructed Benedict not to use the loader until a mechanic had worked on the loader's brakes. 30 FMSHRC at 288; Tr. 666, 675. The inspector issued Citation No. 6321288, alleging a violation of 30 C.F.R. § 56.14100(c).[9] 30 FMSHRC at 287. He designated the alleged violation as S&S and as caused by the operator's unwarrantable failure.

Nelson Quarries challenged these citations and this order in addition to 96 other citations and orders not currently before the Commission on review. *Id.* at 255. The matter was heard by Judge Manning.

E. The Judge's Decision

The judge concluded that, as alleged in Citation No. 6291250, the operator violated section 56.6130(a) when it stored shock tubing, which is an explosive, in the parts trailer and not in a magazine. 30 FMSHRC at 260-61; 30 C.F.R. § 56.6130(a). He further determined that the violation was S&S because the shock tubing was reasonably likely to propagate a fire in the trailer and was reasonably likely to misfire, if used. 30 FMSHRC at 261. In addition, the judge found that the violation was caused by unwarrantable failure because the condition was obvious

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[8] The hazard complaint stated in part:

> A new hire was put on a loader at Gas City. He had no training. There were no brakes on the loader. He rolled the bucket back to kill the engine. The loader operator rolled down the hill through a rail. He tipped over. It took quite some time to get him out.

Gov't Ex. 11.

[9] 30 C.F.R. § 56.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

and had existed for some time. *Id.* at 262. He also held that Gene Andres was an agent of Nelson Quarries and that his negligence was imputable to the operator for purposes of penalty assessment and unwarrantable failure findings. *Id.* Accordingly, the judge assessed a penalty of $1,000, as proposed by the Secretary. *Id.* at 259, 263.

The judge next determined that Nelson Quarries violated section 56.6300(b) as alleged in Order No. 6291251 based on his findings that Travis Tomlinson, who was inexperienced, used explosives to shoot material out of the hopper without the presence of a miner who was trained and experienced in the use of explosives, such as Gene Andres. *Id.* at 263-65. In so concluding, the judge credited the testimony of Inspector Crelly and the Secretary's exhibits. *Id.* at 265. He also upheld the S&S designation based on his determination that it was reasonably likely that the hazard contributed to by the violation would result in death or serious injury assuming continued normal mining operations, since inexperienced and untrained miners pose a hazard to themselves when handling explosives. *Id.* The judge further determined that the violation was unwarrantable, noting that the violation had been obvious; there had been little to no supervision of the use and storage of explosives; no effort had been made to properly train Tomlinson; and nothing in the record suggested that the incident giving rise to the order had been an isolated or unusual event. *Id.* at 265-66. Accordingly, concluding that the operator had exhibited indifference and a serious lack of reasonable care, the judge assessed a penalty of $1,500, rather than the penalty of $1,300 proposed by the Secretary. *Id.* at 263, 266.

As to Citation No. 6291595, the judge determined that the operator violated section 56.14101(a)(2) because the parking brake on the haul truck did not function properly. *Id.* at 283. The judge further determined that the violation was S&S, noting that the condition had existed for almost a month, and it was reasonably likely that the hazard contributed to by the violation would lead to a serious accident. *Id.* at 284. The judge upheld the unwarrantable failure designation, concluding that Head, who was an agent whose conduct was imputable to the operator, knew of the condition, that the condition posed a significant risk to employees, and that Head allowed the truck to be used. *Id.* at 284-85. Accordingly, the judge assessed a penalty of $625, as proposed by the Secretary. *Id.* at 283, 285.

The judge upheld the violation of section 56.14100(c) and the S&S designation alleged in Citation No. 6321288 arising from the accident that occurred when Larson used the loader with defective brakes. *Id.* at 289. The judge also upheld the unwarrantable failure designation based on his finding that Benedict, who was the agent of Nelson Quarries when he directed Larson to operate the loader, demonstrated a serious lack of reasonable care. *Id.* The judge determined that because Benedict disregarded the instruction of his supervisor to remove the loader from service, the operator's negligence was not as high as it otherwise would have been. *Id.* Accordingly, the judge assessed a penalty of $800, rather than the penalty of $1,500 proposed by the Secretary. *Id.* at 287, 289.

The operator filed a petition for discretionary review challenging the judge's foregoing determinations, which the Commission granted.

II.

Disposition

A. Whether the judge correctly determined that the operator's violation of section 56.6130(a) was S&S?

Nelson Quarries argues that the judge erred in finding that its violation of section 56.6130(a) was S&S. N. Br. at 1-3. It contends that the judge failed to give sufficient weight to evidence that hazards related to shock tubing are from fumes from burning plastic rather than from explosions, that the shock tubing's blast would be limited, and that blow-outs are caused by improper transportation of shock tubing and not by improper storage. *Id.* The Secretary responds that the evidence focused upon by the operator does not relate to either of the two bases for the judge's S&S determination – that the improperly stored shock tubing was reasonably likely to propagate a fire and was reasonably likely to misfire, if used. S. Br. at 24-25.

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

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

*Id.* at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

We conclude that substantial evidence supports the judge's S&S determination.[10] As the judge found, the improperly stored shock tubing could propagate a fire. 30 FMSHRC at 260-61. It is undisputed that the protective packaging of the shock tubing had been removed, and that the shock tubing was not in any other container. 30 FMSHRC at 259; Tr. 193. The shock tubing would burn vigorously in the event of a fire. 30 FMSHRC at 261; Tr. 199. Smoking was permitted in the area, and the inspector observed cigarette butts in and around the trailer. 30 FMSHRC at 261; Tr. 201. Miners entered the parts trailer on a daily basis for first aid materials, hearing protection, and to review information on a bulletin board. Tr. 201, 312.

Moreover, there is substantial evidence to support the judge's conclusion that the improperly stored shock tubing could misfire, if used. 30 FMSHRC at 261. The Secretary's expert, Thomas Lobb, testified that since the shock tubing was not stored in its packaging, the shock tubing could be degraded so that it would misfire when it was used. Tr. 238-41. He explained that if the tubing lost its integrity or the explosive powder migrated, there could be a shut-down in the explosive train or a loss of detonation pressures inside the tubing, resulting in a misfire. Tr. 239-40. Migration of the explosive powder within the tubing could occur if the shock tube windings are oriented vertically. Tr. 238-39; Gov't Ex. 14b, at 3. In the parts trailer at the time of the citation, one roll of shot tubing was leaning at an angle, so that the windings were not in a horizontal position. Tr. 201-02; Gov't Ex. 13c. Because the shock tubing was not stored in its packaging or any other container, it could also be contaminated by grit and sand, which typically exist in a parts trailer. 30 FMSHRC at 259; Tr. 200. The operator's witness, Jon Bruner, testified that the exposure of the tube ends to dirt or moisture could cause the shock tubing to misfire. 30 FMSHRC at 259; Tr. 264-66.

We are not persuaded by the operator's argument that the judge failed to give sufficient weight to evidence that it maintains detracts from the S&S finding. The evidence relied upon by the operator does not detract from the judge's determination that the violation was S&S because the improperly stored shock tubing could propagate a fire, or misfire, if used. For instance, even if we were to conclude, as asserted by the operator, that hazards associated with improperly stored shock tubing are from fumes from burning plastic rather than from explosions, such a conclusion does not detract from the judge's finding that the improperly stored shock tubing could also propagate a fire.

Nor are we persuaded by the operator's argument that the judge failed to give sufficient weight to evidence that the shock tubing's blast would be limited. Nelson Quarries notes that the Secretary's expert, Thomas Lobb, indicated that the tubing may be relatively safe from a

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[10] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

distance of 25 meters away. N. Br. at 1. It emphasizes that, in contrast, the material safety data sheet ("MSDS") states that shock tubing is "packed or designed so that any hazardous effects arising from accidental functioning are confined within the package." *Id.* at 1-2 (quoting Gov't Ex. 14b, at 17). The operator's argument based on the MSDS assumes that the shock tubing was still in its packaging. Here, however, the protective packaging of the shock tubing had been removed, and hazardous effects would therefore not be confined within the package. Tr. 193.

Finally, the judge did not err by failing to give more weight to evidence that "blow outs" due to powder migration are caused by shock tubing being transported over mining roads while the windings are in a vertical orientation, rather than by improper storage. N. Br. at 2. The document relied upon the operator provides that if shock tubing "is in a spool holder with shock tubing windings oriented vertically, powder migration may occur." Gov't Ex. 14b, at 3. Here, the hazards due to improper storage identified by the judge included the propagation of a fire and the possibility of misfiring if the shock tube were used, rather than a "blow out" during transportation. 30 FMSHRC at 260-61.[11] Accordingly, we affirm the judge's determination that Nelson Quarries' violation of section 56.6130(a) was S&S.

B. Whether the judge correctly concluded that the operator violated section 56.6300(b)?

The operator requests that the Commission vacate the judge's determination that it violated section 56.6300(b) because it contends that the judge erred in crediting the testimony of Inspector Crelly that Tomlinson was inexperienced in the handling and use of explosives. N. Br. at 3-5. It maintains that it provided credible testimony that Tomlinson had been trained by other company personnel before coming to work at Plant 4. *Id.* at 5. It disputes the inspector's testimony that he witnessed Tomlinson smoking in the crusher operator's shack because Tomlinson should not have been in the crusher shack during the inspection since the crusher was not operating during that time. *Id.* at 3. It further notes that the judge did not rely upon Inspector Crelly's testimony with regard to other unrelated citations. *Id.* at 3-5. The Secretary responds that the Commission should affirm the violation. S. Br. at 27-29.

Section 56.6300(b) requires that "Trainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive

[11] The operator also contends that the shock tubing was not in plain view, as testified by Inspector Crelly, because it was at the far end of an unilluminated trailer, underneath shelving and against the wall. N. Br. at 3. As the Secretary argues (S. Br. at 25 n.10), it appears that the operator's argument that the shock tubing was not in plain view is an objection to the judge's negligence finding. In any event, we conclude that substantial evidence supports the judge's finding. The inspector testified that he immediately observed the shock tubing when he entered the trailer. Tr. 194; Gov't Ex. 13c. In addition, Gene Andres was responsible for daily examinations of the parts trailer, and the shock tubing had been in the trailer for some time, perhaps since June 2005. 30 FMSHRC at 262; Tr. 194-95, 202-03, 216.

material." 30 C.F.R. § 56.6300(b). Inspector Crelly testified that Travis Tomlinson had told the inspector that Andres was loading trucks on the day that Tomlinson used explosives in the hopper, so nobody was supervising him. Tr. 208. Andres acknowledged that he must not have been with Tomlinson while he was shooting the hopper. Tr. 306. The judge found that because Andres was operating a loader at the time, Tomlinson had used explosives when he was not in the immediate presence of someone trained and experienced in the use of explosive material. 30 FMSHRC at 265. The operator has not challenged that finding on review.

The remaining factor relevant to the finding of violation is whether Tomlinson was inexperienced in the use and handling of explosives and, thus, required the immediate presence of an experienced miner. The judge explicitly considered the operator's evidence that Nelson Quarries states should have been credited. Specifically, the judge noted Clift's testimony that Tomlinson had been trained to handle and use explosives, that other Nelson Quarries employees had shown Tomlinson how to shoot out crushers at other plants owned by the company, and that Tomlinson had helped other more experienced miners perform the task before he did so on his own. *Id.* at 263-64. He also noted Andres' testimony denying that he ever told Inspector Crelly that Tomlinson was not qualified to handle and use explosives and that he had only meant that he had not personally trained Tomlinson. *Id.* at 264. In addition, the judge noted Nelson Quarries' argument that Tomlinson came to Plant 4 already trained. *Id.* However, the judge credited the Secretary's evidence over the operator's evidence. *Id.* at 265.

The Commission has recognized that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has also recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

We conclude that overturning the judge's credibility determinations is unwarranted, and that substantial evidence supports the judge's determination that Tomlinson was neither sufficiently trained nor experienced in the handling or use of explosives to use them without supervision. 30 FMSHRC at 265. Inspector Crelly testified that when he asked Andres if Tomlinson was experienced or trained in the handling of explosives, Andres had replied, "no," and that Andres usually shot the hopper. Tr. 207, 211-12: Gov't Ex. 12, at 11. The inspector also noted that Andres had stated that he knew it was wrong to have an inexperienced person using powder or explosives. Gov't Ex. 12, at 8. The inspector testified that Tomlinson had also informed him that he was "uncomfortable doing it." Tr. 207. The inspector noted Andres' statements in his field notes. Gov't Ex. 12, at 11. Andres reviewed the inspector's notes, made

changes, and signed his name to the notes. *Id.*; Tr. 212. Andres did not make any changes to the summary of his statements regarding Tomlinson's experience. Gov't Ex. 12, at 11.

Moreover, the judge's conclusion that the operator failed to present "credible" evidence "to show that Tomlinson had actually been trained or was sufficiently experienced" is supported by substantial evidence. 30 FMSHRC at 265. Clift's testimony that other miners had trained Tomlinson on using explosives and that he had observed Tomlinson use explosives in a crusher was vague as to details and dates. *Id.*; Tr. 275. Furthermore, Clift acknowledged that he himself had little experience with explosives. Tr. 286. Andres testified that he had only been told by others that Tomlinson had been trained and that he had never seen any task-training records. Tr. 318-19. The operator provided no documentary evidence, such as training records, revealing that Tomlinson had been trained. In addition, the operator did not present testimony at the hearing by Tomlinson regarding his training or testimony by other miners who had allegedly trained him.

Tomlinson's actions in storing a high explosive in the crusher shack and in smoking around the explosives also demonstrate a lack of training and experience requiring the immediate presence of an experienced miner. Rather than returning Boostrite, a high explosive, to the magazine, Tomlinson stored it near initiation devices in the crusher shack. *See* 30 FMSHRC at 263; Gov't Ex. 137f, at 8-4; Tr. 204, 206, 212. Andres remarked, "I liked to have had a heart attack when I saw the explosive in there." Tr. 314-15; Gov't Ex. 137g, at 9-5. Furthermore, we do not find persuasive the operator's argument that Tomlinson could not have been observed smoking in the crusher shack since Tomlinson was not working in the crusher shack during the inspection. Inspector Crelly testified that he observed Tomlinson smoking near the explosives, which may have occurred when Tomlinson and Andres accompanied him during the inspection. Tr. 210. In any event, the inspector noted in his field notes that he observed an ash tray and cigarette butts in the operator shack. Gov't Ex. 12, at 8. Thus, there is substantial evidence supporting the judge's finding that the inspector had, in fact, seen Tomlinson smoking near the explosives.

Finally, we reject the operator's argument that the judge erred in crediting Inspector Crelly's testimony because the judge declined to credit the inspector's testimony with regard to other citations. The Commission has recognized that it does "not subscribe to a 'false in one, false in everything' rule of testimonial evidence." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813 (Apr. 1981). Thus, if the judge declined to credit the inspector's testimony regarding one citation, he is not required to discredit the inspector's testimony as to all citations. Moreover, in the instances referred to by the operator, the judge did not specifically discredit Inspector Crelly's testimony. Rather, he concluded, after weighing the record evidence, that the Secretary had not established violations. *See* CENT 2006-230-M: 30 FMSHRC at 308-09; Gov't Ex. 112a; CENT 2006-230-M: 30 FMSHRC at 309; Govt' Ex. 113; CENT 2006-237-M: 30 FMSHRC at 309, 313; Gov't Ex. 129 and 30 FMSHRC at 314; Gov't Ex. 131a.

In sum, substantial evidence supports the judge's finding of violation. Accordingly, we affirm the judge's determination that Nelson Quarries violated section 56.6300(b).

C. Whether the judge correctly determined that the three employees in question were agents of the operator?

Nelson Quarries contends that the judge erred in concluding that Andres, Head, and Benedict were its agents and that their negligence related to Citation Nos. 6291250, 6291595, and 6321288, and Order No. 6291251, was imputable to the operator for unwarrantable failure purposes. N. Br. at 5-7. The operator explains that although it referred to the three employees as foremen, they were, in fact, only lead men who did not have the authority to hire, fire, or discipline employees, to assign equipment, or to perform any duty that was not well established by company protocol. *Id.* It asserts that, on the other hand, Peres and Clift were the foremen of the plants and functioned as management. *Id.* at 6. Accordingly, it requests that the Commission vacate the judge's unwarrantable failure determinations. *Id.* at 7. The Secretary responds that substantial evidence supports the judge's finding that Andres, Head, and Benedict were agents of Nelson Quarries. S. Br. at 17-23.

Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine." 30 U.S.C. § 802(e). The Commission has recognized that the negligence of an operator's "agent" is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982) ("*SOCCO*"). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure determinations. *Whayne*, 19 FMSHRC at 451, 453; *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *SOCCO*, 4 FMSHRC at 1463-64.

In considering whether an employee is an operator's agent, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (quoting *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) (alteration in original). We consider factors such as the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine. *Ambrosia*, 18 FMSHRC at 1553-54, 1560-61; *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints). We are mindful that the term, "agent," must be interpreted in light of the overall purpose of the Mine Act to protect the health and safety of miners. *See RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 187 (3d

Cir. 1997) (construing Mine Act provision broadly to effectuate statutory purpose of protecting miner safety); *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (same).

The judge's conclusion that the employees acted as agents whose conduct was imputable to Nelson Quarries is amply supported by substantial evidence. The Commission has concluded that in carrying out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation of part of a mine. *R&P*, 13 FMSHRC at 194; *see also Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979) (holding that preshift examiner's knowledge was imputable to the operator for unwarrantable failure purposes under principles of respondeat superior); *Ambrosia*, 18 FMSHRC at 1561 (finding relevant that employee made required daily examinations and entered findings in an examination book). It is undisputed that Andres, Head, and Benedict were responsible for conducting the daily workplace examinations at the plants. 30 FMSHRC at 262, 284; Tr. 832; *see also* Tr. 280-81.

In addition, Andres, Head, and Benedict demonstrated that they had been charged with responsibility for the operation of part of the mine or for the supervision of employees through their actions in directing work to be done at the plants. 30 FMSHRC at 262, 284-85, 288. In an interview with MSHA, Benedict stated that he could direct the work force assigned to him. Gov't Ex. 137b, at 6-2. Similarly, Andres testified that he could direct the crew and assign tasks. Tr. 308; Gov't Ex. 137g, at 9-2; *see also* Gov't Ex. 137f, at 8-2 (Tomlinson's statement that Andres directed the work force on his crew). Inspector Dye testified that, during the inspection, Head directed the work force at the plant and addressed problems that the employees were having as they repaired items that had been cited. Tr. 559.

Evidence of the manner in which Andres, Head, and Benedict were treated by those with whom they worked also supports the judge's agency determination. Employees who were on the crews of Andres, Head, and Benedict treated them as supervisors. For instance, when asked by MSHA who his foreman was, Tomlinson replied, "Gene Andres. I answer to him." Gov't Ex. 137f, at 8-2. During Inspector Dye's inspection, when employees had problems with their work, they contacted Head. Tr. 559. Travis Larson used a front-end loader when directed to do so by Benedict, even though the loader had been removed from service. 30 FMSHRC at 288-89; Tr. 663. Moreover, Peres and Clift relied upon the supervisory functioning of Andres, Head, and Benedict. Tr. 602-04. Peres testified that he reviewed the workplace examination reports about weekly and otherwise relied upon the reports of the foremen. *Id.*

Andres, Head, and Benedict also identified themselves as functioning in supervisory roles. Each identified himself as a foreman when the MSHA inspectors arrived at the plants and requested the person in charge. Tr. 184, 558, 663. Similarly, the employees held themselves out as representatives of Nelson Quarries when they accompanied the inspectors during the subject inspections. Tr. 188, 558. There was no indication that Nelson Quarries, through Clift or Peres, took any actions to indicate that Andres, Head, or Benedict were not in charge at their respective plants. *See* Tr. 278.

Moreover, Nelson Quarries itself identified the three as foremen in reports that it was required to file with MSHA. For instance, the legal identity report for Plant 4 identifies Andres as "Foreman" under the section entitled, "person at mine in charge of health and safety (superintendent or principal officer)." Tr. 184; Gov't Ex. 10. The legal identity report for Plant 2 identifies under the "person at mine in charge of health and safety" as "Jeff Benedict, Foreman." Tr. 283. An MSHA report required for mine start-up and closure activity lists Head as the person in charge at Plant 1 from December 2004 to June 2005. Gov't Ex. 139; Tr. 565-66. Inspector Dye stated that she had no reason to believe that the notations in the report would not apply to Plant 5. Tr. 566. While the identification of Andres,[12] Head, and Benedict as foremen is not necessarily dispositive of their status as agents, it is very relevant that Nelson Quarries and the employees themselves represented to MSHA that they were the persons in charge at the plants. *R&P*, 13 FMSHRC at 195; *see also Ambrosia*, 18 FMSHRC at 1561 n.12 (finding relevant, based on analogy to common law agency principles, that employee held himself out as the employee in charge at the mine and signed MSHA documents as mine foreman).

Finally, the record shows that the employees exercised managerial conduct at the time of the alleged violations and that their actions impacted safety. With respect to Citation No. 6291250, Andres was responsible for daily examinations of the parts trailer. Tr. 280-81, 309-310, 832. The shock tubing existed in the trailer for some time, perhaps since June 2005, approximately five months before the citation was issued. 30 FMSHRC at 260; Tr. 296; Gov't Ex. 13b. As to Order No. 6291251, Andres, a certified blaster, acknowledged that he would normally be with the crusher operator when he shot explosives, but that he was not with Tomlinson when he used the explosives during the time in question. 30 FMSHRC at 264; Tr. 306; Gov't Ex. 137g, at 9-5. As to Citation No. 632188, Benedict instructed Larson to move a lime pile with a front-end loader that did not have functioning brakes.[13] 30 FMSHRC at 287,

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[12] In an unrelated proceeding, MSHA issued citations to Andres pursuant to section 110(c) of the Mine Act, and Andres apparently paid the related civil penalties. Tr. 833, 836, 1172-74. Section 110(c) provides in part that, "Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under [section 110(a)]." 30 U.S.C. § 820(c).

[13] The operator states that lead men lacked the authority to assign equipment. N. Br. at 7; Tr. 823, 842. Clift testified that he had told Benedict to take the loader out of service until the mechanic could repair it. Tr. 841. The Commission has recognized that unauthorized acts of misconduct may be within an agent's scope of employment and imputable to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 197. It appears that Benedict had the authority to direct work at the quarry, but in doing so, directed an employee to use equipment that had been taken out of service. We conclude that the judge correctly determined that Benedict was acting as an agent for Nelson Quarries when he directed Larson to operate the front-end loader because he was acting within his authority to direct the workforce. 30 FMSHRC at 288.

289; Gov't Ex. 40; Tr. 663, 665-66, 840-41. With respect to Citation No. 6291595, the pre-shift reports established that the parking brake had not been working on the haul truck since late September 2005. 30 FMSHRC at 283; Tr. 554-55. Although Head knew that the truck had faulty brakes, he allowed the truck to be used and did not remove it from service. 30 FMSHRC at 283; Tr. 561-63.

We find unpersuasive the operator's argument that Andres, Head, and Benedict had no managerial responsibilities as evidenced by the hazard complaint's statement that members of the Nelson family, such as Clift and Peres, were in charge at every quarry and made all of the decisions, and that quarry foremen, such as Andres, Head, and Benedict, had no power. Gov't Ex. 11, ¶¶ 12, 14. As the judge concluded, evidence that Clift and Peres could make the ultimate decisions does not negate the fact that Andres, Head, and Benedict also were given responsibilities that are normally delegated to management personnel. 30 FMSHRC at 262.

In light of the level of the three men's respective responsibilities, the fact that none had the authority to hire, fire, or discipline employees does little to detract from the conclusion that each was an agent of the operator. First of all, it appears that Andres, Head, and Benedict were involved in decisions concerning hiring, firing, and disciplining employees by making recommendations. 30 FMSHRC at 262, 285.[14] Secondly, the Commission has never suggested that the authority to take such actions, in and of itself, is a prerequisite to a finding of agency. That the ultimate authority to hire, fire, or discipline miners resides at a higher level of an organization is simply not surprising, given the potential impact of such decisions, and thus is of little relevance to a determination of whether a lower level supervisor was acting as an agent of the operator, where other circumstances indicate that an agency relationship existed.[15]

In that regard, it is significant that Andres, Head, and Benedict had been identified on legal identity and required start-up and closure reports filed with MSHA as the "person at mine in charge of health and safety (superintendent or principal officer)" at the plants. Tr. 184, 283, 565-66; Gov't Exs. 10, 139. We have found that such evidence is "relevant by analogy to common law agency principles" and may, if unrebutted, support a finding that the persons so

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[14] For instance, in an interview with MSHA, Andres acknowledged that he could make recommendations regarding hiring and firing, and could recommend that employees be disciplined "or maybe talk to them if they [did] something wrong." Gov't Ex. 137g, at 9-2; *see also* Gov't Ex. 137a, at 6-2. Travis Tomlinson confirmed that Andres "could put [him] to shoveling if he wanted to, but he never has." *Id.* at 8-2.

[15] Nor do we find compelling the evidence focused upon by the operator that Andres, Head, and Benedict were paid hourly wages rather than a salary as an indication that they were rank-and-file miners. *See Mettiki Coal Corp.*, 13 FMSHRC 760, 769-72 (May 1991) (imputing negligence of hourly employee assigned to conduct monthly electrical inspections to the operator). It is undisputed that Andres, Head, and Benedict were compensated at a higher rate than other members of their crews. Tr. 823.

identified were empowered to act on behalf of the operator. *Ambrosia*, 18 FMSHRC at 1561 n.12.

In sum, the actions of Andres, Head, and Benedict in conducting daily examinations and directing the work force, the representations made to MSHA concerning their authority, the manner in which they were treated by others and by themselves, and their actions at the time of the violations constitute substantial evidence supporting the judge's agency determinations. Thus, we affirm the judge's determinations that Andres, Head, and Benedict were acting as agents for Nelson Quarries with respect to Citation Nos. 6291250, 6321288, and 6291595 and Order No. 6291251 and that their conduct was imputable to the operator.[16] We therefore affirm the judge's unwarrantable failure findings.

[16] We are mindful that under some collective bargaining agreements, a more senior rank-and-file employee is sometimes referred to as a "lead man." It does not necessarily follow that such employees should be considered agents of the operator or that their conduct is imputable to the operator. Their status must be determined under the terms of the analysis we have undertaken in this case in order to determine whether they should be considered agents of the operator for purposes of imputed liability.

III.

Conclusion

For the reasons discussed above, we affirm the judge's conclusion that Nelson Quarries' violation of section 56.6130(a) set forth in Citation No. 6291250 was S&S; affirm the judge's conclusion that Nelson Quarries violated section 56.6300(b) as set forth in Order No. 6291251; and affirm the judge's determinations that Andres, Head, and Benedict were acting as agents for Nelson Quarries and affirm the judge's unwarrantable failure findings with respect to Citation Nos. 6291250, 6321288, and 6291595 and Order No. 6291251.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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