FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 31, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 98-156-M
MARTIN MARIETTA AGGREGATES	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), former Chief Administrative Law Judge Paul Merlin[1] determined that Martin Marietta Aggregates ("MMA") committed a significant and substantial ("S&S") violation of 30 C.F.R. § 56.14207.[2] 21 FMSHRC 76, 85 (Jan. 1999) (ALJ). He found that, although the violation was caused by a miner's high degree of negligence, the miner's negligence was not imputable to MMA for penalty assessment and unwarrantable failure purposes, because the miner was not an agent of MMA. *Id.* at 85-88. The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's finding that the miner's negligence was not imputable to MMA. The United Steel Workers of America ("USWA") and the National Mining Association ("NMA") sought and were granted amicus status in this proceeding. For the following reasons, we affirm the judge's decision.

[1] Judge Merlin retired on December 31, 1999.

[2] Section 56.14207 provides in pertinent part that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set."

I.

Factual and Procedural Background

MMA operates the Camak Quarry, a stone quarry in Camak, Georgia. At the loadout point in the quarry, railcars were loaded with crushed stone and gravity-dropped to a storage area before being weighed on scales. After the cars were dropped, a loader was routinely used to push them forward so they would attach to a locomotive parked a few feet in front of the scales. The cars were weighed on the scales and then the locomotive moved them to a dispatch point from where they were transported from the mine. On October 20, 1997, the decedent, Jut Anderson, was the leadman of the loadout crew. At the start of the shift, plant foreman Donny Reese gave Anderson his work assignment for the day, which included cleaning the scales with a shovel. Later in the morning, Anderson told foreman Reese and the loadout crew that he was going to clean the scales. He did not, however, tell Robert Hobbs, the loader operator. On the shift in question, Billy Moss, a member of the loadout crew, parked the locomotive 18 inches to 3 feet before the scales and set the air brake. Subsequently, ten railcars were gravity-dropped and attached to the locomotive. Anderson asked Jason Jones, a backhoe operator, to assist him in cleaning the scales by shoveling debris off the scales and later by digging a ditch to drain water under the scales. Anderson used compressed air from the locomotive to clean the scales. Hoping to increase the air pressure from the locomotive, he asked Jones to release the air brake on the locomotive and Jones did so. 21 FMSHRC at 78-80; Tr. 246, 293.

Later, Anderson was in front of the locomotive, cleaning the scales, and Jones was in his backhoe. At that time, four cars previously gravity-dropped from the loadout area had come to a stop and were blocking an intersection. Unaware that Anderson was on the track cleaning the scales, Hobbs used a loader to push the four cars out of the intersection and into the ten cars that were attached to the locomotive. The impact of the four additional cars caused the first ten cars and the attached locomotive to move forward. The locomotive hit and killed Anderson. 21 FMSHRC at 80.

Following an investigation of the accident, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a violation of section 56.14207. The order alleged that the violation was S&S, resulted from MMA's unwarrantable failure, and involved a high level of negligence by the operator. MSHA proposed a civil penalty of $45,000. Pet. for Assessment of Civil Penalty at 2. At trial, MMA disputed the amount of the proposed penalty and the Secretary's imputation of Anderson's negligence to it for penalty assessment and unwarrantable failure purposes. MMA Post-hearing Br. at 2-3, 27-31.

The judge found an S&S violation of section 56.14207. 21 FMSHRC at 84-85. He held that Anderson displayed extreme negligence in instructing Jones to release the locomotive's brake and in failing to notify the loader operator that he was cleaning the scales. *Id.* at 85.

However, in considering whether to impute Anderson's negligence to the operator for purposes of deciding whether the violation was caused by an unwarrantable failure and for assessment of the appropriate penalty, the judge determined that, although Anderson assigned specific tasks to other miners, he was not MMA's agent. *Id.* at 85-88. Accordingly, the judge determined that Anderson's negligence was not imputable to MMA, vacated the Secretary's unwarrantable failure allegation, and declined to find that the violation resulted from MMA's high negligence. *Id.* at 88-89. The judge assessed a penalty of $2,000. *Id.* at 89.

II.

Disposition

The Secretary contends the judge erred in finding that Anderson's negligence was not imputable to MMA for purposes of an unwarrantable failure determination and penalty assessment. S. Br. at 7. She argues that the judge erred in failing to accept her interpretation that, under the plain language of section 3(e) of the Mine Act,[3] 30 U.S.C. § 802(e), the term "agent" includes a miner such as Anderson who has the authority to assign tasks to other miners and the responsibility of keeping an area of the mine safe. S. Br. at 9-16; S. Reply Br. at 13. She also argues that, even if the meaning of section 3(e) is ambiguous, the judge erred by not deferring to her interpretation of the term "agent." S. Br. at 13 n.7; S. Reply Br. at 13-15. The Secretary contends that, under both existing case law and common law principles of agency, the judge erred in concluding that Anderson was not an agent. S. Br. at 16-22.

MMA responds that substantial evidence supports the judge's finding that Anderson was not an agent and that his negligence should not be imputed to MMA. MMA Br. at 7-13. It argues that, even if Anderson was an agent, his negligence should not be imputed to MMA because his negligence did not endanger any other persons. *Id.* at 14-16. The operator contends that the Secretary's interpretation of section 110(i), 30 U.S.C. § 820(i), is not entitled to deference because the Commission has authority under the Mine Act to impose penalties under that provision. *Id.* at 17-22. It also argues that imputing Anderson's negligence to it for penalty assessment and unwarrantable failure purposes is contrary to common law principles of agency. *Id.* at 23-24.

Amici USWA and NSA both contend that the judge correctly found that Anderson was not an agent of the operator. USWA Br. at 2, 5-6; NSA Br. at 8-10. USWA argues that the judge erred in not finding high negligence and unwarrantable failure by MMA because the operator failed to appropriately train and supervise the rank-and-file miners in the loadout area. USWA Br. at 6-7. NSA contends that the Secretary is not entitled to deference concerning her interpretation of section 110(i) because the Mine Act specifically authorizes the Commission to

[3] Section 3(e) provides that an agent is "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." 30 U.S.C. § 802(e).

assess penalties under that provision. NSA Br. at 13-16. It further argues that imputing Anderson's negligence to MMA would discourage operators from seeking the highest safety standards. *Id.* at 11.

Under Commission precedent, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure.[4] *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982) ("*SOCCO*"). However, it is well established that the negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Whayne*, 19 FMSHRC at 451; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *SOCCO*, 4 FMSHRC at 1463-64. The main issue in this case is whether substantial evidence[5] supports the judge's finding that Anderson was not an agent of MMA, and, as a consequence, that his negligence was not imputable to the operator for unwarrantable failure and penalty assessment purposes.[6]

A. Deference

We note that the Secretary's argument regarding deference is not properly before the Commission.[7] Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause

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[4] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[5] 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)).

[6] Although an operator is not liable for unwarrantable failure based on the aggravated conduct of a rank-and-file miner, its "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." *Whayne*, 19 FMSHRC at 452-53 (quoting *SOCCO*, 4 FMSHRC at 1464) (emphasis in original). The Secretary has not argued on appeal that MMA's supervision, training, or discipline of Anderson was inadequate.

[7] The Secretary's formulation of her "plain meaning" argument is contradictory. If the statute is plain, then no "interpretation" of the Secretary is required and, hence, no deference is due. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Secretary supported her argument before the judge that Anderson was an agent by quoting section 3(e) and citing to *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996), which itself employs common law principles of agency. S. Post-hearing Br. at 28-29. However, she made no reference below to either the plain meaning or ambiguity of section 3(e), did not interpret that provision, and did not request the judge to defer to any interpretation of that provision. Accordingly, we need not reach the Secretary's contention regarding deference. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (Aug. 1992) (declining to consider theory raised for the first time on review). Even if the deference argument had been presented below, we would reject it. The fundamental premise of the Secretary's argument is that the inquiry into Anderson's status as an agent is determined solely by reference to section 3(e). This premise is inconsistent with Commission case law.

In determining whether a miner is an agent of an operator for purposes of imputing negligence to the operator, the Commission has developed a multi-factor test. In formulating the factors, the Commission has in some cases considered the statutory definition of agent contained in section 3(e). *REB Enters., Inc.*, 20 FMSHRC 203, 211 n.11 (Mar. 1998); *Ambrosia*, 18 FMSHRC at 1560; *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1686 n.3 (Oct. 1995). It has also been guided in some cases by common law principles of agency. *See R&P*, 13 FMSHRC at 195 ("The Commission has previously employed both the Act's definition and common law principles in resolving agency problems."); *Ambrosia*, 18 FMSHRC at 1561 n.12 (citing 3 Am. Jur. 2d *Agency* §§ 78-79 (1986) for the proposition that "a principal is liable for the acts of an agent that are apparently within the agent's authority and which the principal permits the agent to exercise"); *see also Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that the acts or knowledge of an agent are attributable to the principal). Thus, the Commission's multi-factor test is not limited to the terms of section 3(e). Moreover, the core concepts of imputation of an agent's negligence to the operator for purposes of penalty assessment and unwarrantable failure are Commission-fashioned doctrines that do not spring solely from specific statutory language. *Whayne*, 19 FMSHRC at 451; *R&P*, 13 FMSHRC at 194-97; *SOCCO*, 4 FMSHRC at 1463-64; *see Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1981).

The Secretary's request for deference here is, at bottom, a request that the Commission defer to the Secretary's application of the Commission's test for agency to the record facts. This is the essence of the adjudicative function and is therefore the Commission's province, not the Secretary's. We therefore find that the judge correctly based his analysis of Anderson's status as an agent on the Commission's multi-factor test as elaborated in Commission precedent.

B. Substantial Evidence Supports the Judge's Finding that Anderson Was Not an Agent of MMA

When deciding whether a miner is an agent of an operator, the Commission has focused on the miner's function and not his job title. *REB Enters.*, 20 FMSHRC at 211; *Ambrosia*, 18

FMSHRC at 1560. It has examined whether the miner's function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine's operation. *REB Enters.*, 20 FMSHRC at 211; *Ambrosia*, 18 FMSHRC at 1560; *U.S. Coal*, 17 FMSHRC at 1688. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct. *R&P*, 13 FMSHRC at 194.

Commission cases that have found the lack of an agency relationship include *U.S. Coal*, 17 FMSHRC at 1688 (electrician was not an agent even though he was authorized to tell miners to stop working on dangerous equipment and to remove such machinery from service); *Whayne*, 19 FMSHRC at 451-52 (experienced repairman who needed little supervision and helped less experienced employees was not a supervisor); and *REB Enters.*, 20 FMSHRC at 211-12 (leadman on highwall was not an agent because he did not have authority to hire and fire employees, did not assign equipment to employees, and was not given any instructions regarding discipline of employees).

In deciding agency questions, the Commission has also examined precedent on the distinctions between supervisors and employees under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 et seq. (1994). *Whayne*, 19 FMSHRC at 451. The National Labor Relations Board ("NLRB") has consistently found that the authority to assign tasks is not by itself sufficient to find supervisory status. *See Micro Pacific Dev. Inc. v. NLRB*, 178 F.3d 1325, 1333 (D.C. Cir. 1999) (holding that leadmen waiters and bartenders were not supervisors under NLRA even though they made assignment and scheduling decisions); *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 921-23 (6th Cir. 1991) (holding that leadmen warehouse workers were not supervisors under NLRA even though they assigned work to other employees every day). In *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 248 (6th Cir. 1983), the court held that "the mere performance of routine tasks or the giving of instructions to others is not sufficient to afford an individual supervisory status."

The Secretary relies on *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307 (7th Cir. 1983), for the proposition that Anderson was an agent because he had the authority to assign tasks. S. Br. at 11 & n.4. *Ajax* is readily distinguishable. The employee in *Ajax* had the authority to assign work without management approval, maintain discipline, send employees home if they were drunk or did not work, and make recommendations to discharge employees. 713 F.2d at 1312. Anderson's narrow authority to assign specific tasks under close management supervision in this case does not constitute the level of supervisory responsibility involved in *Ajax*. We also disagree with the Secretary (S. Br. at 16) that under the theory of *NLRB v. Thermon Heat Tracing Servs.*, 143 F.3d 181 (5th Cir. 1998), Anderson was an agent because he was responsible for the safety of part of the mine. The court in *Thermon Heat* stated that the employee was an agent because "he was the safety professional for [the company] and that his duty was to assist in promoting, providing, and maintaining a safe work environment at the company." 143 F.3d at 186 (internal quotations omitted). The employee at issue in that case was the company's safety director. *Id.* at 184. As such, he was responsible for the safety of at least 100 employees, and had authority to issue safety rules for the company. *Id.* Anderson's narrow work duties in the

loadout area are not comparable to the far-reaching responsibilities of the company's safety director in *Thermon Heat*.

The judge found that Anderson assigned specific tasks to miners in the loadout area and "had the authority to tell them how he wanted the job done and to stop them if he did not like what they were doing."[8] 21 FMSHRC at 87. However, the judge concluded that, although Anderson exercised "a certain degree of control over the loadout area and the miners who worked there," his control was "tightly circumscribed."[9] *Id.* at 88. He found that Anderson was closely supervised by foreman Reese and it was Reese who decided what daily jobs were to be completed. *Id.* at 87-88. The judge found that Anderson could not hire, fire, evaluate, or discipline other miners and that Anderson could not take any action to abate citations, or change a miner's job or the equipment on the job without Reese's permission. *Id.* The judge also found that Anderson was paid at an hourly rate and did not hold himself out in any capacity to be an agent of MMA. *Id.* Similarly, the Commission in *REB*, 20 FMSHRC at 211-12, found that a leadman was not an agent because, like Anderson, he did not have the authority to hire, fire, or discipline other miners, and could not independently change other miners' jobs or assign equipment.

We conclude that the facts upon which the judge relied constitute substantial evidence in support of his conclusion that Anderson was not an agent of MMA. Under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *accord Wellmore Coal Corp. v. FMSHRC*, No. VA-95-9-D, 1997 WL 794132, at *3 (4th Cir. Dec. 30, 1997). Under the deferential substantial evidence standard, our task is a narrow one. "[E]ven if we would have weighed the evidence differently," our sole responsibility

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[8] We disagree with the Secretary's argument that Anderson was responsible for safety in the loadout area. S. Br. at 2, 12. Although the judge found that Anderson conducted safety meetings with the loadout crew (21 FMSHRC at 86), he made no findings regarding Anderson's responsibilities for the safety of the loadout area and we do not think the record compels a conclusion that he had such responsibilities. The Secretary bases her claim on the following colloquy at trial between her counsel and backhoe operator Jones: Q. "Anderson was the man you relied on to make sure the work area was safe?" A. "Right." Tr. 249-50. We agree with MMA (MMA Br. at 9 n.4) that this exchange reveals little about what Anderson's safety responsibilities were in the loadout area.

[9] The Secretary claims that Anderson was an agent in part because when Moss, an hourly worker in the loadout area, was asked if Anderson was a supervisor, he answered "Yes." S. Br. at 2; Tr. 108. However, we do not think that this evidence compels a finding that Anderson was an agent. As MMA points out (MMA Br. at 9 n.4), Moss's answer is of limited value because the record does not explain what Moss understood the term "supervisor" to mean. In addition, the Commission has focused on a miner's function and not his job title when determining agency status. *REB Enters.,* 20 FMSHRC at 211; *Ambrosia*, 18 FMSHRC at 1560.

is to "determine whether a . . . reasonable factfinder could have reached the conclusions actually reached by . . . the ALJ." *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) (internal quotations omitted); *see also Eastern Associated Coal Corp.*, 13 FMSHRC 178, 185 (Feb. 1991) ("The Commission's task is not a de novo reweighing of somewhat conflicting evidence but a determination of whether there is substantial evidence in the record to support the judge's conclusions.").[10] We conclude that the judge's finding that Anderson was not an agent was reasonable given Anderson's very limited responsibilities to assign work, and his close supervision by management.[11]

We disagree with the agency standard proposed by the dissent under which a miner would be an agent if he or she had the "authority to tell . . . other miners what to do." Slip op. at 17. This overly-broad standard could potentially reclassify the vast majority of rank-and-file miners as agents — every time an experienced miner tells a less experienced miner "what to do" on the job, the experienced miner would be acting as the operator's agent. In our view, however, a standard that would automatically transform a rank-and-file miner into an agent merely by providing guidance to co-workers is ill-advised. Indeed, the real world ramifications of such an approach are alarming. A miner learns the intrinsic nature of the environment in which he or she works primarily through "on-the-job" training with guidance and support provided by fellow rank-and-file miners. Yet if such guidance and support were to be considered proof of agency, many experienced rank-and-file miners would likely be reluctant to instruct less experienced miners on how to safely perform their jobs. Moreover, as an agent, an experienced rank-and-file miner could be individually exposed to the "civil penalties, fines, and imprisonment" imposed on agents under section 110(c) for violations of the Mine Act. *See* 30 U.S.C. § 820(c). The very threat of exposure under section 110(c) would likely result in an erosion of the current apprenticeship environment, and replace it with an "every man for himself" atmosphere that would clearly be detrimental to the health and safety of our nation's miners.

Our dissenting colleague's claim that our decision takes "a giant step" toward establishing an overly restrictive agency standard which may "insulat[e] management from negligence findings" (slip op. at 16) is overstated and ignores that the question of Anderson's agency is quite close — and depends on the particular facts and circumstances of this case. Indeed, *any* case where agency is at issue will turn on its facts. Any operator that attempts to insulate itself from negligence findings by providing its miners with substantial supervisory

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[10] Rather than applying the substantial evidence test to the judge's findings, the dissent reweighs the evidence de novo, concludes that Anderson was an agent, and advocates reversing the judge's agency findings. But even if the record evidence could support a finding that Anderson was an agent, the Commission would not be permitted to overturn the judge's conclusion to the contrary, which in this case is supported by the record.

[11] Commissioner Riley notes that USWA takes specific exception to the Secretary's "misguided perception of the term 'agent' and its application to rank-and-file miners." USWA Br. at 5-6.

responsibilities without calling them supervisors will run the risk of crossing the line at issue in this case and rendering such miners agents.

We do not mean to suggest that the violation was anything other than extremely serious. Nor do we hold that the judge's reduction of the penalty from $45,000 to $2,000, based on his finding that Anderson's negligence could not be imputed to MMA, was required by this record. Judges have the discretion to accord different weight to the six statutory penalty criteria for assessing civil penalties based on the facts and circumstances of the case.[12] *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Here, the gravity of the violation, one of the six criteria, was very high. However, the question whether the judge abused his discretion by reducing the penalty by over 95% has not been presented to the Commission on review, and we therefore do not reach the issue.

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[12] The six penalty criteria set forth in section 110(i) include:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that Anderson's negligence was not imputable to MMA for unwarrantable failure and penalty assessment purposes because he was not an agent of MMA.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

Commissioner Marks, concurring:

While I concur in the result of this case, based on the limited issue it presents and our law on that issue, I write separately to delineate some differences with the majority's approach to this case.

Like the judge, I believe that this case, when viewed in light of Commission precedent, is a close one with respect to the question of whether decedent Anderson was an "agent" of MMA for purposes of imputing his negligence to MMA for unwarrantability and penalty assessment purposes. *See* 21 FMSHRC at 87. I am concerned that our decision will be interpreted by operators as a license to delegate more and more supervisory responsibilities to rank-and-file miners in order to avoid the negligence of those miners being imputed to the operators. As the majority opinion makes clear, we presently look at a number of factors in deciding this issue. Slip op. at 5-6. Operators will no doubt be tempted to get "as close to the line" as possible, and may assign as many supervisory responsibilities as they can to rank-and-file miners, without crossing the now very complex line between rank-and-file miner and agent. The present multi-factor analysis we use to determine whether a miner is an "agent" of the operator may increase that temptation. For that reason, I would be very interested in hearing from parties in future cases regarding whether the Commission should abandon its policy of not imputing to operators the negligence of rank-and-file miners for purposes of unwarrantable failure and penalty determinations.[1]

Eliminating this Commission doctrine would greatly simplify some of the unwarrantable failure issues that come before us. For instance, in the present case the majority, incorrectly in my opinion, discounts the importance of Anderson's safety responsibilities in the loadout area, because of the judge's failure to make a finding on the degree of Anderson's responsibilities. *See* slip op. at 7 n.8.[2] The judge's failure to make such a finding is understandable, given that the complexity of the Commission's present multi-factor analysis requires that a number of fact-intensive findings be made in a case such as this.

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[1] As the majority points out this is a Commission-created doctrine (slip op. at 5), so there is no potential in our revisiting this issue that we would disturb the distinction between rank-and-file miners and agents for purposes of individual liability, which is governed by section 110(c) of the Mine Act and therefore cannot be altered by Commission decision. *See* 30 U.S.C. § 820(c).

[2] The majority holds that the record does not compel the conclusion that Anderson was responsible for safety in the loadout area. Slip op. at 7 n.8. The judge found that Anderson conducted the safety meetings for the miners in the loadout area (21 FMSHRC at 86), and backhoe operator Jones testified that he relied upon Anderson to make sure the loadout area was safe. Tr. 249-50. I believe this is more than enough evidence to establish Anderson's responsibility for safety.

In addition, like amicus curiae United Steelworkers of America ("USWA"), I am struck by evidence in this case that the operator failed to appropriately train and supervise rank-and-file miners with respect to use of the locomotive air brake. *See* USWA Br. at 6-7. Anderson's use of compressed air from the locomotive air brake to clean the scales was not, as operator MMA would have the Commission believe, "unforeseeable," "contrary to all reasonable expectation," or "wholly aberrant and unpredictable." MMA Resp. to USWA Br. at 9, 10. As Anderson's immediate supervisor, plant foreman Reese, acknowledged, compressed air had been used on a prior occasion to clean the scales (Tr. 294-95), and there was additional testimony that air from a locomotive had been so used (Tr. 120), so the air brake's utility for cleaning the scales was not unknown in the loadout area. Moreover, there was testimony that Anderson had on a prior occasion attempted to use the air compressor on the locomotive for something other than its ususal purpose. Tr. 123.

Despite this history, there is no evidence that the operator's training or supervision was directed at warning miners of the danger of the particular action that led to Anderson's death — using air pressure from a locomotive to clean the scales and failing to inform everybody that he would be cleaning the scales. There is also no evidence that, despite this history, Reese was vigilant in his supervision of Anderson to prevent him from engaging in such a risky practice, even though he knew that Anderson was going to be cleaning the scales on the day of the accident. Tr. 293. Indeed, the judge implicitly criticized Reese's supervision of the loadout area on the day of the accident, remarking that it was strange for Reese to neither know of or be curious about the important question of whether the brakes on the rail cars had been set. 21 FMSHRC at 82. In light of the foregoing, I must take issue with the judge's conclusion that operator fulfilled its duties with respect to training and supervising Anderson. *See id.* at 86. However, because the Secretary did not pursue the issue of the extent of the operator's negligence in training and supervising Anderson, we cannot consider it in determining unwarrantable failure or the degree of the operator's negligence.

Lastly, I must express my concern regarding the penalty that was assessed by the judge in this case. Reducing it from the $45,000 proposed by the Secretary to a mere $2,000 is simply not justified by the fact that Anderson's negligence cannot under Commission case law be imputed to MMA. Moreover, even if were, the judge's reduction in this case contravenes a number of Commission instructions regarding penalty assessments. Even though we have held that a judge's assessment may not "substantially diverge" from the penalty proposed by the Secretary without sufficient explanation (*Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983)), the judge provided no such explanation. *See* 21 FMSHRC at 88. In addition, in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1504-05 (Sept. 1997), we pointed out the inequity of a judge's 95% reduction in the penalty the Secretary had assessed against a large operator, because of our common-sense concern that small penalties are insufficient to get the attention of a large operator. *See Coal Employment Project v. Dole*, 889 F.2d 1127, 1135 (D.C. Cir. 1989). Yet incredibly, a similar reduction occurred in this case against a large conglomerate. The threat of a $2000 penalty is hardly sufficient to get the attention of the likes of MMA.

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Marc Lincoln Marks, Commissioner

Chairman Jordan, dissenting:

I disagree with my colleagues' conclusion. Substantial evidence does not support the judge's finding that Jut Anderson was not an agent of Martin Marietta Aggregates. It is clear from this record that Anderson had been delegated authority over the employees in the loadout area. In light of this fact, the record compels the conclusion that Anderson must be considered an agent of the operator and the Secretary could appropriately rely on Anderson's negligence in determining that an unwarrantable failure violation occurred. Likewise, it is appropriate for the Commission to consider Anderson's negligence in determining a penalty in this case.

The detailed and unequivocal testimony of both rank-and-file and management employees demonstrates that Anderson was responsible for work assignments and miner safety in the loadout area. Tr. 108, 302-04. Robert Hobbs, the loader operator, stated that he took instructions from Anderson, who assigned work to him. Tr. 139. Foreman Earl D. Reese testified "it's up to him [Anderson] to direct what individuals he wants each task to be done [sic]." Tr. 303. Reese also stated that Anderson could stop a worker and redirect him if he did not like his performance. Tr. 303-04. Although Anderson did not conduct performance evaluations, Reese received information from him regarding the performance of members of his crew.[1] Tr. 281. Reese further testified that Anderson's leadman job required him to constantly inspect the area and see that crew members understood how to perform their jobs safely. Tr. 282. Anderson held the weekly safety meetings with the crew and it was Anderson on whom the miners on the loadout crew depended to keep the loadout area safe. Tr. 249-50.

It would appear from the record that Anderson also viewed himself as being in charge of the loadout area. About a month or two prior to the accident, Anderson told Billy Moss, a member of his crew, to hook a valve up so that he could use the air compressor on the locomotive for purposes other than a braking system. Tr. 123. According to Moss, there was no indication that Anderson felt it necessary to consult with superiors before ordering that adjustment. Tr. 123. On the day of the accident, Anderson again ordered the air pressure from the air compressor to be diverted from the locomotive. Tr. 248. Ultimately, it was that order to redirect the air pressure and release the brake which led to the tragic accident underlying this case. Tr. 49, 248.

The description of Anderson recounted by the witnesses does not fit the profile of a rank-and-file miner. The record evidence shows that Anderson was in control of the activities in the loadout area — telling workers what to do, correcting their mistakes, and adapting equipment. Moreover, the workers on the crew perceived him as being in charge. Under the plain language of the Mine Act (which defines "agent" 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," 30 U.S.C. § 802(e)), Anderson must be deemed an agent.

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[1] At least some members of the crew believed that Anderson could fire them. Tr. 278.

My colleagues point out that, when deciding whether a miner is an agent of an operator, the Commission has

> focused on the miner's function and not his job title. It has examined whether the miner's function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine's operation. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct.

Slip op. at 5-6 (citations omitted).

Applying this approach to the case at hand merely reinforces the appropriateness of designating Anderson an agent. Although Anderson did not have a job title such as superintendent or foreman (which would readily convey managerial status), focusing on his function — the person in charge of the loadout area — confirms that it is proper to consider Anderson an agent. Did he carry out responsibilities normally delegated to management? Absolutely. He supervised the employees in his crew and conducted the weekly safety meetings. Were his responsibilities crucial to the mine's operation? I don't think anyone could deny that the loadout area is an integral part of the mining operation. Lastly, was Anderson exercising managerial responsibility at the time of his negligent conduct? It is undisputed that the accident occurred as a direct result of Anderson instructing backhoe operator Jason Jones to release the air brake on the locomotive.

In declining to consider Anderson an agent, my colleagues claim support for the judge's finding that the control Anderson exercised over the loadout area was "tightly circumscribed." However, other than visiting the loadout area several times a shift to check on how things were going, Tr. 154, 267, 281, it is unclear how Reese, the plant foreman, exercised this allegedly tight control. Although Reese may have told Anderson what work was to be performed each day, it was Anderson who decided how to direct the crew in order to get that work done. Indeed, far from exhibiting a tight control over the loadout area, the record would indicate instead that supervision by Reese was quite loose. Like Commissioner Marks, I also find telling the judge's remarks that it was strange for Reese, on the day of the accident, to neither know of, nor be curious about, whether the brakes on the rail cars had been set. 21 FMSHRC at 82. In fact, I find such stunning lack of involvement by higher management to be inconsistent with, and indeed to fatally undermine, the claim that Anderson's control of the loadout area was "tightly circumscribed."

My conclusion regarding Anderson's status is consistent with Commission decisions resolving whether certain miners should be considered agents or supervisors. Cases where the Commission has considered a miner to be an operator's agent include *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560-61 (Sept. 1996) (miner was agent when he accompanied inspectors on their inspections, gave work orders to abate citations, was responsible for seeing

that equipment repairs were made, was paid a salary like management, and did not receive extra pay for overtime) and *Rochester & Pittsburgh Coal Co.* ("*R&P*"), 13 FMSHRC 189, 194-96 (Feb. 1991) (miner was an agent when he conducted statutorily mandated weekly shift examination); *see also Pocahontas Fuel Co.*, 8 IBMA 136, 146-48 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (miner was an agent when he conducted pre-shift examination which was statutorily mandated duty of operator). Although the particular job duties in these cases differed from Anderson's, the level of responsibility was comparable.

The cases cited by the majority, in which the Commission found that the miner was not an agent or supervisor, are readily distinguishable. In *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997), for example, the miner simply carried out routine repair duties, and helped less experienced miners. In *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995), the miner was an electrician qualified to repair and maintain equipment, who could take it out of service when warranted. Finally, in *REB Enters., Inc.*, the miner did not have the authority to directly initiate the assignment of work to employees. 20 FMSHRC 203, 211 (Mar. 1998). The Commission in *REB* noted that, unlike in the instant case, the Secretary had failed to present evidence that the miner was directly responsible for controlling the acts of miners or that he was responsible for their safety. *Id.* at 211-12.[2]

In holding that only an agent's negligence may be imputed to an operator, *R&P*, 13 FMSHRC at 194, the Commission has already eliminated the actions of rank-and-file miners as a basis for unwarrantable failure findings. I share the concern expressed by Commissioner Marks that if the Commission adopts an overly-restrictive view regarding who qualifies as a supervisor or agent, we may be insulating management from negligence findings in some circumstances where it is warranted. This could ultimately undermine the optimal vigilance about safety and health matters which is the core purpose of the Mine Act, as operators who know that they will avoid unwarrantable findings and be subject to only minor penalties for the actions of most individuals under their control may be tempted to cut corners when it comes to complying with safety and health regulations.

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[2] In addition, the majority observes that the Commission has also been guided by common law principles of agency, stating that "the acts or knowledge of an agent are attributable to the principal" (slip op. at 5 (citing *Pocahontas Fuel Co.*, 8 IBMA at 147)), and that "a principal is liable for the acts of an agent that are apparently within the agent's authority and which the principal permits the agent to exercise," (*id.* (quoting *Ambrosia*, 18 FMSHRC at 1561 n.12)). These precepts are not violated by a determination that Martin Marietta (the principal) unwarrantably violated the Act on the basis of the actions of Anderson (the agent) . The manner in which Anderson attempted to clean the scales is the behavior which underlies the citation. Cleaning the scales was within Anderson's authority and was a job that Marietta permitted him to exercise.

Unfortunately, I believe my colleagues have taken a giant step toward that overly-restrictive approach with their decision in this case. They decline to consider Anderson an agent even though Anderson regularly supervised employees in the loadout area, an activity which brings him squarely within the Act's definition of agent. The fact that Anderson did not have responsibility for hiring or firing these individuals, and the fact that Anderson was himself subject to supervision does not change his status as agent. The relevant factor, it seems to me, is that Anderson had ongoing authority to tell the other miners what to do. The miners acknowledged this authority. Accordingly, when Anderson told Billy Moss to hook up the valve which allowed the air compressor on the locomotive to be used for purposes other than braking, Moss complied. Likewise, on the day of the accident, when Anderson told Jones to release the air brake, Jones did as instructed. Anderson died as he was cleaning the scales with the compressed air from the locomotive. Had Anderson chosen instead to instruct a member of his crew to clean the scales, that miner would no doubt have complied, and would have been killed instead of Anderson. I suggest that when the operator gives an individual like Anderson the authority to direct miners regarding what tasks will be performed, and how those tasks will be carried out, that individual should be considered acting on the operator's behalf and the operator should be held accountable for that individual's actions.

For the reasons stated above, I would reverse the judge's determination that Anderson was not an agent of Martin Marietta Aggregates. I would find that he was an agent, hold that the violation was the result of the operator's unwarrantable failure, and impute his negligence to the operator for the purpose of determining a penalty. Accordingly, I respectfully dissent.

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Mary Lu Jordan, Chairman

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