

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

October 30, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. SE 93-119
	:	
U.S. COAL, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) (Mine Act or Act). The issue is whether the negligence of a non-supervisory certified electrician is imputable to his employer, U.S. Coal, Inc. (U.S. Coal), for civil penalty purposes. Administrative Law Judge William Fauver concluded that the electrician's negligence was imputable. 16 FMSHRC 649 (March 1994) (ALJ). The Commission granted U.S. Coal's petition for discretionary review of the judge's decision. For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

On April 16, 1992, Lonnie Phillips, a certified electrician qualified by U.S. Coal to do electrical work at its No. 3-2 Mine, removed the electrical panel covers on a continuous mining machine and began working on the panel board with a screwdriver. He did not deenergize or lock out and tag the continuous miner before beginning his repair.<sup>1</sup> 16 FMSHRC at 649; Tr. 18. As a result, Phillips suffered electrical shock and burns to his hand. 16 FMSHRC at 650. The accident

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<sup>1</sup> Electrical equipment is locked out and tagged by placing a padlock through a hole in the disconnecting device and attaching a tag stating that work is being performed on the circuit. Tr. 19. The padlock prevents reenergization of the electrical equipment while the work is performed. Tr. 26-27.

was investigated by MSHA Inspector Don A. McDaniel, who issued two citations to U.S. Coal alleging significant and substantial (S&S) violations of 30 C.F.R. §§ 75.509 and 75.511.<sup>2</sup> MSHA filed a petition for assessment of civil penalty, which sought to impute Phillips' negligent conduct to the operator.

The judge determined that Phillips violated the cited standards, that the violations were S&S, and that Phillips was grossly negligent. 16 FMSHRC at 651-52. Citing *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991), and *Rochester and Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991) (AR&P), the judge concluded that Phillips' negligence was imputable to U.S. Coal because a designated person to conduct electrical examinations of electrical equipment is regarded as an agent of the operator and his negligence is imputable to the operator. 16 FMSHRC at 652. The judge noted *Nacco Mining Co.*, 3 FMSHRC 848, 850 (April 1981), in which the Commission declined to impute a supervisor's negligence because the operator had taken reasonable steps to avoid an accident and the supervisor's conduct did not expose other miners to risk. 16 FMSHRC at 652. The judge found the *Nacco* defense inapplicable because the electrician endangered other miners. *Id.* Accordingly, the judge affirmed the citations and ordered payment of civil penalties in the amount of \$8,000. *Id.* at 652-53.

## II.

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<sup>2</sup> Section 75.509 provides:

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.

Section 75.511 provides, in part:

Disconnecting devices shall be locked out and suitably tagged by the persons who perform [electrical work on circuits or equipment] . . . .

## Disposition

U.S. Coal contends that Phillips' negligence is not imputable to it and that the judge erred in determining that Phillips was its agent. U.S. Br. at 11-13. It asserts that it had acted to ensure compliance and that the accident resulted from Phillips' idiosyncratic and unforeseeable conduct, which was not associated with any management function on his part. *Id.* at 10, 12-13. Alternatively, the operator argues that, even if Phillips were considered its agent, the *Nacco* defense applies because it had taken precautions to avoid the accident and other miners were not placed at risk by Phillips' conduct. *Id.* at 13-16. It also asks the Commission to take judicial notice of the Secretary's proposed rule regarding decertification of certified and qualified persons (59 Fed. Reg. 54,855 (1994) (to be codified at 30 C.F.R. pts. 42, 48, 70, 71, 75, 77, & 90) (proposed Nov. 2, 1994)), asserting that the proposed rule should be considered in relation to the Secretary's argument that certified persons are to be considered agents of corporate operators. U.S. Supp. F. at 1-2.

The Secretary responds that substantial evidence supports the judge's determination that Phillips was the operator's agent and his negligence was imputable to the operator. S. Br. at 5-10. He asserts that Phillips was an agent because he was qualified and designated by the operator to perform electrical work and had supervisory authority to order miners to stop operating dangerous machinery and to remove machinery from service. *Id.* at 6-7. The Secretary contends that the *Nacco* defense does not apply because Phillips' conduct exposed other miners to risk of injury. *Id.* at 9-10. The Secretary replies that U.S. Coal mischaracterizes the proposed rule on decertification and that the preamble to the rule does not mean that certified persons are not agents when the operator is a corporate operator. S. Supp. F. at 1-2.

Under the Mine Act, an operator is liable for its employees' violations of the Act and the mandatory standards. *E.g.*, *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (August 1982) (*ASOCCO*). Further, absent a *Nacco* defense, the negligent actions of an operator's agent<sup>3</sup> are imputable to the operator for the purpose of assessing civil penalties.<sup>4</sup> *Mettiki*, 13 FMSHRC at 772; *R&P*, 13 FMSHRC at 194-98; *SOCCO*, 4 FMSHRC at 1463-64. However, [t]he conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes.<sup>5</sup> *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995) (citing *SOCCO*, 4 FMSHRC at 1464). Rather, the operator's supervision, training,

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<sup>3</sup> Section 3(e) of the Mine Act defines agent as any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . . .<sup>6</sup> 30 U.S.C. ' 802(e).

<sup>4</sup> Section 110(i) of the Mine Act requires that in assessing civil penalties the Commission consider six criteria, one of which is whether the operator was negligent.<sup>7</sup> 30 U.S.C. ' 820(i); *see generally Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984).

and disciplining of [rank-and-file] miners is relevant.@ *Id.* (citing *SOCCO*, 4 FMSHRC at 1464; *Western Fuels*, 10 FMSHRC at 261).

Here, the judge concluded that, because Phillips was the operator's agent, his negligence should be imputed to the operator. We examine whether substantial evidence supports the judge's finding that Phillips was U.S. Coal's agent.<sup>5</sup>

The Secretary attempts to establish that Phillips is the operator's agent by arguing that he is certified and designated by the operator as "qualified" to perform electrical work,<sup>6</sup> and that such a qualified person is cloaked with the responsibility to discover electrical malfunctions and correct them, and his failure to discover or properly repair electrical malfunctions exposes miners to a multitude of dangerous violative conditions and to the very real danger of injury or death. S. Br. at 8.

U.S. Coal's superintendent, Johnny Mack Smitty, testified that U.S. Coal employs two

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<sup>5</sup> The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C.

' 823(d)(2)(A)(ii)(I). The term "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 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

<sup>6</sup> The Mine Act and the Secretary's mandatory standards require that repair and maintenance of electrical equipment be performed only by "qualified" persons. 30 U.S.C. ' 865(f) & (g); 30 C.F.R. ' ' 75.511 & 75.512; see also 30 U.S.C. ' 878(b)(2); 30 C.F.R. ' 75.153.

supervisory electricians to whom rank-and-file maintenance employees report. Tr. 59, 61, 63-64. Phillips is not one of those supervisors but, rather, a rank-and-file maintenance employee; he is responsible only for upkeep on his section, i.e., finding and fixing electrical problems. *Id.* The record indicates that, prior to the accident, the operator of the continuous miner had sent for Phillips because the miner was malfunctioning. 16 FMSHRC at 649; Tr. 17.

Inspector McDaniel testified that Phillips performed rank-and-file electrical work on the section (Tr. 35) but that, in his opinion, electricians are part of mine management. Tr. 23, 27, 35. McDaniel's opinion is based on his general belief that electricians are authorized to order miners to stop operating dangerous machinery and to order machinery taken out of service for repairs. Tr. 35-36. No other evidence supports the judge's finding that Phillips was the operator's agent.

In *Mettiki*, the Commission determined that a rank-and-file miner was acting as an agent while conducting required electrical examinations in the mine. 13 FMSHRC at 772. Similarly, in *R&P*, the Commission concluded that a rank-and-file miner was acting as the operator's agent while he performed a statutorily mandated weekly examination. 13 FMSHRC at 194-96. In both cases, the Commission relied, not upon the job title or the qualifications of the miner, but upon his function, which was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel. Here, Phillips's negligent conduct occurred while he was repairing a continuous miner, a routine assignment not encompassing managerial responsibility or the supervision of other miners. There is no record evidence that Phillips was engaged in work entailing responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . . .@ 30 U.S.C. ' 802(e).

We hold, as a matter of law, that Phillips's certification as an electrician, his qualification by the operator to repair and maintain electrical equipment, and his authority, as understood by the inspector, to take that equipment out of service if he found it in dangerous condition, are insufficient, standing alone, to support a finding that he is an agent of the operator. Thus, under the facts of this case, we conclude that Phillips was not functioning as an agent of U.S. Coal when he repaired the continuous miner. Accordingly, we reverse the judge's determination that Phillips's gross negligence is imputable to U.S. Coal.<sup>7</sup>

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<sup>7</sup> In light of our disposition, we do not reach U.S. Coal's other arguments.

III.

Conclusion

For the foregoing reasons, we reverse the judge's imputation of negligence to U.S. Coal and remand for assessment of appropriate civil penalties.

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner