FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 7, 1997

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA)	:		
	:		
v.	:	Docket Nos.	KENT 94-518-R
	:		KENT 94-519-R
WHAYNE SUPPLY COMPANY	:		KENT 95-556

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), raise the question whether a violation of 30 C.F.R. ' 77.405(b)[2] by Whayne Supply Company (AWhayne@), which led to the death of a miner, resulted from the operator=s unwarrantable failure. Administrative Law Judge Arthur Amchan determined that the miner was not Whayne=s agent, that his conduct was nevertheless imputable to the operator because of Whayne=s lack of supervision and training of the miner, but that his conduct was not sufficiently aggravated to support a finding of unwarrantable failure. 17 FMSHRC 1573 (September 1995) (ALJ). The Commission granted the Secretary=s petition for discretionary review challenging the negative unwarrantable failure determination.[3] For the reasons set forth below, we vacate and remand.

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[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 77.405(b) provides:

> No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

[3] The judge also determined that the operator did not violate the on-shift inspection requirement contained in 30 C.F.R. ' 77.1713(a). 17 FMSHRC at 1583-84. The Secretary has not appealed that determination.

I.

Factual and Procedural Background

Whayne is a contractor that sells and services Caterpillar machinery and equipment in Kentucky and Indiana. 17 FMSHRC at 1575. On January 19, 1994, Whayne dispatched James Paul Blanton, an experienced field service technician with 16 years of service with Whayne, to Addington Mining Inc.=s Job #17A, a surface coal mine in Pike County, Kentucky. *Id.* at 1574-75; Tr. 244. On January 20, Blanton drove his Whayne truck to Job #17A. 17 FMSHRC at 1575. The truck was equipped with a crane (or Aboom@), chain and cable Acome-along@ for securing raised loads. *Id.* at 1575, 1577. Addington personnel directed Blanton to repair a disabled Caterpillar D10N bulldozer. *Id.* at 1575. Blanton examined the D10N dozer and concluded that the torque converter was defective and needed to be removed. 17 FMSHRC at 1575; Tr. 155-56.

In order to gain access to the torque converter on the D10N bulldozer, one of three belly pans on the underside of the dozer had to be lowered. 17 FMSHRC at 1575 n.2. The belly pan is hinged on one side and secured to the bulldozer by three bolts each on two other sides. *Id.*; Tr. 51. When the belly pan is freed from the bolts, it swings down on its hinge. *Id.* The belly pan weighs about 500 lbs. 17 FMSHRC at 1576.

The normal practice for removing the belly pan in the field is to first dig a trench and place the vehicle over it. Tr. 61-62. Then a chain is run from the crane on the truck, passed under the belly pan and attached to the opposite bulldozer track to prevent the pan from falling abruptly when the bolts are loosened. 17 FMSHRC at 1575. An alternate method involves use of the come-along to secure a cable beneath the pan. *Id.* at 1577. After the pan is loosened from the bolts, the crane or come-along is used to slacken the restraint and allow the belly pan to safely swing open. *Id.* at 1575; Tr. 79-80, 160.

Consistent with this procedure, Addington employees dug a trench and then pushed the bulldozer over it so Blanton could begin removing the torque converter. 17 FMSHRC at 1575; Tr. 62-66. Blanton moved his truck so that the right rear portion, where the crane was located, was next to the bulldozer. 17 FMSHRC at 1575. The Addington employees left Blanton alone to repair the bulldozer. *Id.* at 1575-76. Shortly before noon, Blanton was discovered pinned under the belly pan, which had swung down on its hinges. *Id.* at 1576. Blanton was pulled from underneath the bulldozer but could not be revived, and probably died at the scene. *Id.*; Tr. 71-73, 138-39. Before the pan fell, Blanton had removed the nuts securing the pan to the bolts. Tr. 73-74; Gov=t Ex. 6, p.4, &4. In addition to the nuts, an air hose, air gun or air wrench, power drill, socket and screwdriver were discovered under the dozer at the time of the accident. Tr. 27-28, 73-74, 139-40, 158. There was no evidence that Blanton had attempted to secure the belly pan with the crane and chain, cable come-along, or any other device. 17 FMSHRC at 1576. The crane was not Aon,@ and was not extended, but instead was in the Adown@ position. Tr. 227-28.

Whayne gives its field mechanics general verbal instructions to minimize the time spent under raised equipment; however, its employees receive no formal training regarding the proper procedures for lowering belly pans in the field, nor does Whayne maintain a written policy on this subject. 17 FMSHRC at 1579; Tr. 216, 218, 349. Whayne did supply formal training on removing belly pans when the vehicle is in the shop; however, the procedure for removing belly pans in the shop differs from that used in the field. Tr. 216-17, 344-45, 383-85.

Whayne hires experienced mechanics for its field service positions, and relies heavily on on-the-job training for these employees. 17 FMSHRC at 1579. New field mechanics begin as Ahelpers@ and are assigned to jobs with more experienced field technicians. Tr. 208-09, 372. After gaining experience in the field, field mechanics may be assigned to jobs alone, or with less experienced helpers. *Id.* The field mechanic tells the helper what to do when they get to the job. Tr. 245. Whayne field mechanics are dispatched by and receive performance evaluations from the field service foreman, a supervisor. Tr. 242-45, 254. Field mechanics are dispatched to a customer=s premises, and assigned by the customer to work on a particular piece of equipment. Tr. 212-13. Whayne field mechanics are not supervised by mining company employees while on mine property. *Id.* The field mechanic evaluates the problem and corrects it, without direct supervision from the field service foreman. Tr. 209, 254.

MSHA inspector Buster Stewart issued several citations and orders to Addington and Whayne on January 25, including Citation No. 4011760 to Whayne under section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), for violating section 77.405(b). Gov=t Ex. 6, p.5. The citation alleged that blocking was not provided by Whayne to secure the belly pan. Gov=t Ex. 3. Stewart also drafted an Accident Investigation Report, which stated, inter alia: AThe cause of the accident was the failure to use blocking material to prevent movement of the belly pan while work was in progress.@ Gov=t Ex. 6, p.3.

Following an evidentiary hearing, the judge concluded that Whayne violated section 77.405(b).[4] 17 FMSHRC at 1577. He ruled that any negligence on Blanton=s part could be Aimputed@ to the operator if the operator has not Ataken reasonable steps to prevent the rank-and-file miner=s violative conduct.@ *Id.* at 1578. The judge found that, although Blanton was not a Asupervisory employee,@ his negligence could be imputed to Whayne because the operator did not take Asuch reasonable steps in training and supervising Blanton[] that it should be completely absolved of responsibility for his violative conduct . . . .@ *Id.* at 1578-79. Examining Blanton=s conduct in light of his finding that ABlanton=s actions did not compromise the safety of others,@ the judge found that Blanton=s conduct Adefie[d] explanation@ and characterized it as A>thoughtless,= rather than >inexcusable or aggravated.=@ *Id.* at 1580 & n.6. He concluded that Blanton=s negligence did not rise to the level of unwarrantable failure. *Id.*[5] The judge rejected the Secre-

[4] The judge found that the crane on Blanton=s truck was working on the morning of January 20. 17 FMSHRC at 1576. The Secretary does not challenge this finding.

[5] In another holding not challenged by the Secretary, the judge concluded that section 77.405(b) does not require the use of cribbing or two chains. 17 FMSHRC 1580-82.

tary=s proposed $50,000 penalty. *Id.* at 1582. Characterizing Whayne=s negligence as Amoderate,@ considering Aboth the >thoughtlessness= of Mr. Blanton and the lack of formal training provided by Whayne Supply regarding belly pan removal[,]@ the judge assessed a civil penalty of $1500. *Id.*

II.

Disposition

The Secretary argues that, although the judge correctly determined Blanton=s negligence was imputable to the operator due to Whayne=s failure to properly train and supervise, the judge erred in failing to impute negligence on the ground that Blanton was Whayne=s agent. S. Br. at 5-6. The Secretary contends that Blanton was authorized by Whayne to act on its behalf at the mine site, that experienced Whayne technicians Asupervise themselves@ on the job, and that they are therefore agents of Whayne. *Id.* at 8-11. The Secretary asserts that Blanton=s conduct was well within the definition of aggravated conduct in that it was deliberate, the hazard was obvious, and the condition created was extremely hazardous. *Id.* at 11-15. He argues the judge=s negative unwarrantable failure determination is inconsistent with his finding that Blanton=s conduct defied explanation, and that the number of miners put at risk by the conduct in question is not determinative. *Id.* at 15-16. The Secretary asks that the Commission remand the matter for assessment of an appropriate civil penalty. *Id.* at 17.

Whayne responds that, inasmuch as the citation never charged it with responsibility for Blanton=s negligence, it would be a breach of due process to increase the magnitude of the violation by reinstating the unwarrantable designation. W. Br. at 10-12. Whayne contends that Blanton was exercising the normal responsibilities of his rank-and-file position of field mechanic at the time of the accident, and was in no meaningful sense an agent of the operator at any relevant time. *Id.* at 13-25. Whayne asserts that, assuming arguendo Blanton=s status as Whayne=s agent, a comparison of the conduct of Whayne and Blanton shows that Blanton was principally responsible for the accident, and it would therefore be unfair to disturb the judge=s negative unwarrantable failure conclusion as to Whayne. *Id.* at 25-31. Finally, Whayne argues that the Commission should uphold the judge=s penalty assessment. *Id.* at 32-36.

1. Unwarrantable Failure

1. Agency

Under section 104(d)(1) of the Act, the Secretary is authorized to issue a citation specifying that a violation was Acaused by an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . .@ 30 U.S.C. ' 814(d)(1). It is well settled that Aan agent=s conduct may be imputed to the operator for unwarrantable failure purposes.@ *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991) (A*R&P*@). However, in the context of evaluating negligence for penalty assessment purposes, the Commission has held

that A[t]he conduct of a rank-and-file miner is not imputable to the operator.@ *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995). In analyzing a miner=s duties to determine whether he is an agent, the Commission examines whether the miner was exercising managerial or supervisory responsibilities at the time the negligent conduct occurred. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995).

The Secretary bases his contention that Blanton was Whayne=s agent on the grounds that (1) Blanton worked Amainly on his own without management supervision out in the field,@ had Athe responsibility and discretion while on the job to determine the problem and to take care of it without supervisory intervention or guidance@ and essentially supervised himself, (2) he was hired with prior experience, Athereby not receiving any formal training from Whayne,@ (3) he did not receive performance appraisals, (4) Ahe sometimes supervised junior technicians on bigger jobs,@ and (5) AWhayne guarantees the labor of its field mechanics[.]@ S. Br. at 9-10. The Secretary seeks to distinguish *U.S. Coal* on the basis that, in the present case, Blanton and the other Whayne field mechanics were Aresponsible for the operation of that part of the mine which the repairs were to be made.@ S. Br. at 9-10 n.4.

We reject the Secretary=s argument as lacking legal and evidentiary support. Although the record evidence indicates that Blanton was a highly experienced repairperson who needed little supervision and helped less experienced employees, this does not convert him into a supervisor, much less a manager. *Cf. NLRB v. Aquatech, Inc.*, 926 F.2d 538, 549 (6th Cir. 1991) (AAlthough it is true that [the employee=s] considerable experience allowed him to train and guide workers in the performance of their jobs, >[a]n individual does not become a supervisor merely because he possesses greater skills and job responsibilities than his fellow employees=@) (quoting *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 248 (6th Cir. 1983)).[6] In addition, there is no evidence that Blanton exercised any of the traditional indicia of supervisory responsibility such as the power to hire, discipline, transfer, or evaluate employees. Nor was there evidence that Blanton Acontrolled@ the mine or a portion thereof; rather, he merely carried out routine duties involving the repair of

[6] In addition, Blanton was covered by a union contract and therefore presumably part of a collective bargaining unit from which supervisors are excluded. Tr. 369, 374; *see* 29 U.S.C. '' 152(3), 159(a).

Caterpillar machinery. His duties for Whayne carried out at the customer=s premises are consistent with those of a non-supervisory leadperson.[7]

Moreover, if Blanton were considered supervisory on the basis of his duty to evaluate a given problem and effect a repair without checking first with his supervisor, potentially all repair personnel would fall into this category. The essence of the repair function is to evaluate a problem and fix it. An employee need not check in with his supervisor at specified intervals in order to maintain his non-supervisory status.

The Secretary=s assertion that Whayne=s warranty of its field mechanics= work converts them into agents is also unpersuasive. As Whayne cogently points out (W. Br. at 21), an assembly-line worker may contribute to the production of a product that her employer warrants, and her employer may have to pay out under the warranty based on the employee=s error, but this does not confer the status of agent on the worker.

In any event, as the Secretary concedes (S. Br. at 10 n.4), at the time the accident occurred, Blanton was performing the routine duties of a rank-and-file field mechanic. Thus, under *U.S. Coal*, Blanton was not an agent of the operator whose negligent conduct may be imputed to the operator. We find unsupported by record evidence the Secretary=s attempt to distinguish *U.S. Coal* by comparing Blanton with a section foreman. Blanton was alone and not supervising any employees at the time of the accident.

[7] The Secretary=s assertions that Blanton was not trained by Whayne, and did not receive performance appraisals, are inaccurate. In addition to the on-the-job training Blanton would have received on removing belly pans in the field, the record shows that Whayne field technicians received formal training on repair in the shop and from Caterpillar itself. Tr. 216-17, 255-56. Further, although Blanton=s evaluation was not based on his supervisor=s direct review of his work, his supervisor did evaluate Blanton based on feedback from customers and co-workers. Tr. 254.

In sum, substantial evidence supports the judge=s conclusion that Blanton was not a supervisory employee. We therefore affirm the judge=s conclusion that Blanton=s conduct may not be imputed to Whayne on the basis of agency.[8]

2. Whayne=s Conduct

Although an operator is not liable for aggravated conduct based on the actions of a rank-and-file miner, it may nevertheless be held responsible for an unwarrantable failure based on its own conduct. In *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (August 1982) (A*SOCCO*@), the Commission stated that, in the context of evaluating operator conduct for the purposes of penalty assessment,

> where a rank-and-file employee has violated the Act, *the operator=s* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner=s violative conduct.

Id. at 1464 (emphasis in original). Although the Commission has not expressly held this doctrine applicable to the examination of operator conduct for unwarrantable failure determinations, its applicability in the unwarrantable failure context was implied by the holding in *R&P* that the conduct of a rank-and-file miner who acts as the operator=s agent is imputable to the operator for unwarrantable failure purposes. Holding the operator responsible for its supervision, training and disciplining of employees is consistent with section 104(d)(1) of the Mine Act, which provides that a violation Acaused by an unwarrantable failure *of such operator*@ shall be so recorded on the citation.

[8] The judge merely noted that ABlanton was not a supervisory employee,@ without a further finding that he was not in any other sense an agent of Whayne. 17 FMSHRC at 1578. Such a conclusion is implied, however, by his reasoning that Blanton=s conduct may be examined only on account of Whayne=s own negligence. *Id.* at 1578-79.

The judge, however, mistakenly viewed *SOCCO* as announcing a theory of *imputed* liability. 17 FMSHRC at 1578. Based on this perspective, the judge, finding that Whayne was to some degree responsible for Blanton=s conduct, went on to analyze *Blanton=s* actions to determine whether *the operator* had acted unwarrantably. *Id.* at 1578-80. On review, the Secretary has adopted the judge=s framework. He does not quarrel with the judge=s view that, under *SOCCO*, a rank-and-file miner=s conduct may be Aimputed@ to the operator. Nor does the Secretary dispute the judge=s characterization of Whayne=s supervision and training of employees,[9] or claim that

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[9] The judge=s characterization of Whayne=s conduct was vague. He stated that Blanton=s negligence should be imputed to Whayne Abecause the record does not establish that Whayne Supply took such reasonable steps in training and supervising Blanton, that it should be completely absolved of responsibility for his violative conduct for negligence and penalty purposes.@ 17 FMSHRC at 1578-79. He went on to hold that A[i]n the absence of training in the proper procedure, the failure of a technician to secure the belly pan was not completely beyond Whayne Supply=s control.@ *Id.* at 1579. In evaluating the operator=s negligence for penalty assessment purposes, the judge stated:

> The Secretary, in its narrative findings for a special assessment, characterizes Whayne Supply=s negligence as Ahigh.@ I would characterize it as Amoderate.@ This assessment considers both the Athoughtlessness@ of Mr. Blanton and the lack of formal training provided by Whayne Supply regarding belly pan removal. While I conclude that Whayne Supply may have relied too much on Mr.

Whayne=s conduct, *in and of itself*, constituted aggravated conduct or more than ordinary negligence. Rather, he argues that the judge erred in evaluating *Blanton=s* conduct as being less than aggravated. S. Br. at 15-16.

We think the approach of the Secretary and the judge amounts to bootstrapping a conclusion of unwarrantable failure based on a rank-and-filer=s conduct which, under Commission precedent, should not have been imputed to the operator. Nothing in *SOCCO* sanctions the imputation of negligence to the operator in these circumstances. Instead, *SOCCO* clearly focuses on *the operator=s* conduct, while making clear that the rank-and-file miner=s conduct may *not*, absent agency, be imputed to the operator.

> Blanton=s prior experience, it certainly was not a ridiculous assumption that he knew not to place himself under a belly pan after the bolts had been loosened.

Id. at 1582.

Because the judge misstated the law of unwarrantable failure and failed to analyze the unwarrantable failure issue by focusing on Whayne=s, as opposed to Blanton=s, conduct, we vacate the judge=s decision with respect to the issues of unwarrantable failure and penalty, and remand on the present record for analysis of Whayne=s conduct in light of its training and supervision of Blanton.[10]

2. Remand

The judge=s civil penalty assessment was infected with the same error that tainted his unwarrantable failure conclusion: he analyzed the negligence criterion with reference to both the conduct of Whayne and that of Blanton. On remand, in accordance with *SOCCO*, the judge must take care when assessing the civil penalty to examine only *the operator=s* conduct.

[10] Given our disposition, we do not reach the question whether *Blanton=s* conduct constituted more than ordinary negligence.

III.

Conclusion

For the foregoing reasons, we vacate the judge=s negative unwarrantable failure determination and penalty assessment, and remand to the Chief Administrative Law Judge for reassignment,[11] reanalysis and penalty assessment, on the present record, consistent with this opinion.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

[11] Judge Amchan has transferred to another agency.