

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 4, 2017

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

LITTLE BUCK COAL COMPANY #2,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2015-100  
A.C. No. 36-09860-369007

Docket No. PENN 2015-232  
A.C. No. 36-09860-380876

Mine: Buck Mountain Vein

**DECISION AND ORDER**

Appearances: Ryan Kooi, Esq., Office of the Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania, for Petitioner

Edmund C. Neidlinger, Pine Grove, Pennsylvania, for Respondent

Before: Judge Rae

**I. STATEMENT OF THE CASE**

These cases are before me upon two petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). In dispute are five violations issued by the Secretary of Labor (“the Secretary”) to mine operator Little Buck Coal Company #2 (“Little Buck”): Citation No. 8000756 in Docket No. PENN 2015-100 and Citation No. 8000752 and Order Nos. 8000753, 8000754, and 8000755 in Docket No. PENN 2015-232.

These matters were initially assigned to a different Administrative Law Judge but were reassigned to me in May 2016, after which a hearing was scheduled. The hearing was held in Allentown, Pennsylvania on January 24, 2017, at which time the parties presented testimony, arguments, and documentary evidence. The Secretary also filed a post-hearing brief. Little Buck did not file a brief.

I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based on the entire record and my observations of the demeanor of the witnesses, I uphold the violations as written and assess penalties totaling \$8,308.00, for the reasons discussed below.

## II. STIPULATIONS

The parties have entered into the following stipulations:

1. Little Buck was an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine at which the citations and orders at issue in these proceedings were issued.
2. Operations of Little Buck at the mine at which the citations and orders were issued are subject to the jurisdiction of the Mine Act.
3. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.
4. Buck Mountain Vein is owned by Little Buck.
6. The individual whose name appears in Block 22 of the citations and orders in contest was acting in an official capacity and as an authorized representative of the Secretary when the citations and orders were issued.
7. The citations and orders contained in Dockets PENN 2015-100 and PENN 2015-232 were properly issued and served by a duly authorized representative of the Secretary upon an agent of Little Buck at the date, time, and place stated in the citations and orders, as required by the Mine Act.
8. Exhibit A attached to the Secretary’s Petitions in Dockets PENN 2015-100 and PENN 2015-232 contain authentic copies of the citations and orders with all modifications and/or abatements.
9. MSHA’s Data Retrieval System, publicly available at <http://www.msha.gov/drs/drshome.htm>, accurately sets forth:
  - a. The size of Little Buck in production tons or hours worked per year;
  - b. The size, in production tons or hours worked per year, of the mine;
  - c. The total number of assessed violations for the time period listed; and
  - d. The total number of inspection days for the time period listed therein.
10. Exhibit A of the Secretary’s Petitions for the Assessment of Civil Penalty accurately sets forth:
  - a. The size of Little Buck in production tons or hours worked per year;
  - b. The size, in production tons or hours worked per year, of the mine;
  - c. The total number of assessed violations for the time period listed; and
  - d. The total number of inspection days for the time period listed therein.
11. The R-17 Certified Assessed Violation History Report is an authentic copy and may be admitted as a certified business record of MSHA.
12. As of the time the citations and orders in Dockets PENN 2015-100 and PENN 2015-232 were issued, the Buck Mountain Vein mined a total of 5,117 tons of coal.
13. Little Buck was the controller for the Buck Mountain Vein when the citations and orders in Dockets PENN 2015-100 and PENN 2015-232 were issued.
14. On October 8, 2014, Little Buck had developed the Bottom Split Mammoth Vein approximately 80 feet east off the First Level Intake Rock Tunnel.
15. On October 8, 2014, Little Buck had developed the Intake Rock Tunnel approximately 20 feet south off the Bottom Split Mammoth Vein and intersected the Middle Split Mammoth Vein.

16. Little Buck's Roof Control Plan Addendum (submitted February 27, 2014 and approved March 13, 2014) allowed for Little Buck to develop the Intake Rock Tunnel Gangway only as far as the Bottom Split Mammoth Vein.
17. On October 8, 2014, the entry cited in Order Number 8000753 was not provided with a crosscut or ventilation controls.
19. On or before October 8, 2014, two miners worked in by the entry described in Citation Number 8000756.

Joint Ex. 1; Tr. 5-6.<sup>1</sup>

### III. FACTUAL BACKGROUND

The Buck Mountain Vein mine is a small underground anthracite mine located in Schuylkill County, Pennsylvania. Tr. 7, 19-20; GX 8. Anthracite, a type of coal that is harder and purer than the more common bituminous coal, is deposited in parallel veins pitched on an angle and separated by layers of rock.<sup>2</sup> Tr. 27-29. It is mined using conventional mining methods and blasting. Tr. 7, 36. The operator first digs a slope that follows the vein underground and serves as the mine's main entry way, haulageway, and air intake. Tr. 7, 28-29, 32, 34. Gangways are driven off the slope horizontally to carry intake air and serve as the primary escapeway for the working section. Tr. 29, 34-36. Thirty-five feet above each gangway and running parallel to it, a "monkey" heading is driven to serve as both the return air course and secondary escapeway. Tr. 29, 34-36. The gangway and monkey are connected at intervals by crosscuts referred to as chutes. Tr. 29. Mining is accomplished by blasting upward from the monkey to create rooms referred to as breasts with pillars of coal between them. Tr. 29, 34-36. Coal blasted from the top of the breasts is allowed to feed down through the chutes by gravity to the gangway, where it lands in carts that are pushed to the slope to be transported out of the mine. Tr. 34-36. After the coal is mined out at one level, the operator sinks the slope another 100 or 150 feet, develops a new gangway, and starts the process over again. Tr. 35-36. Alternately, the operator can tunnel through the overlying layer of rock to reach the next vein.

The events that led to this proceeding began with Little Buck's decision to tunnel into a new coal vein. The mine's main slope is cut into the Buck Mountain Vein, which runs east to west and pitches south at an angle of roughly 65 degrees. Tr. 19-20, 32. As of 2013, the active working section where two miners worked on a normal basis was the Buck Mountain Vein first level west section. Tr. 23, 72. In December 2013, Little Buck submitted an addendum to its roof control plan proposing to develop a rock tunnel southward through the top rock of the Buck Mountain Vein first level west gangway to the next overlying vein, the Seven Foot Vein. After intersecting the Seven Foot Vein, Little Buck planned to develop a second rock tunnel back to

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<sup>1</sup> In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary submitted exhibits numbered GX 1-6, 8-15, and 17-18 and Little Buck submitted exhibits numbered LBCC 1 and 2.

<sup>2</sup> Thus, while bituminous coal often lies flat underground like a sheet of paper, an anthracite coal vein more closely resembles a sheet of paper turned on its edge and slid into the ground at an angle. To view a cross-section of the anthracite veins at the Buck Mountain Vein mine, see the third page of GX 12 (numbered "MSHA072"). Tr. 30-33.

the Buck Mountain Vein to serve as a return airway. The operator would then develop a gangway and begin mining the Seven Foot Vein. If the vein were found to be unsuitable for mining, Little Buck would continue its rock tunnel south to the next vein, the Bottom Split Mammoth Vein (referred to hereinafter as “the Bottom Split”). GX 9; Tr. 31, 49-50. After submitting this proposal to MSHA, Little Buck began developing the rock tunnel without waiting for MSHA to review and approve it. Tr. 81-82. On January 22, 2014, an MSHA inspector issued a citation for this conduct (which is not at issue in this proceeding). GX 15. That same day, MSHA approved the proposed plan addendum so it could be incorporated into Little Buck’s roof control plan and development of the rock tunnel could continue. GX 9.

The next month, Little Buck submitted addenda to its roof control and ventilation plans explaining that it had continued to tunnel south and had reached the Seven Foot Vein, which was discovered to be completely faulted to the east. GX 10; GX 11; Tr. 52-53. A “faulted” area is one that cannot safely be mined due to unsuitable geological conditions such as weak rock strata or a twist in the coal seam. Tr. 65. To avoid the faulted area to the east, Little Buck proposed to drive 40 feet west on the Seven Foot Vein and then develop the return rock tunnel back to the Buck Mountain Vein from that location. Mining would then proceed to the west on the Seven Foot Vein. MSHA approved the proposal on March 13, 2014. GX 10; GX 11; Tr. 52-55, 65.

Several months later, Little Buck submitted yet another proposed plan addendum explaining that, after advancing west on the Seven Foot Vein and developing two chutes and a return rock tunnel, it had encountered more faulting and severely unstable roof and bottom rock, meaning that the Seven Foot Vein could not safely be mined any further west. Thus, Little Buck planned to stop developing the Seven Foot Vein and continue the rock tunnel south to the Bottom Split. After intersecting the Bottom Split, Little Buck would develop a return rock tunnel from the Bottom Split to the Seven Foot Vein “using the same procedure” described in the March 2014 addendum. MSHA approved this proposal on August 19, 2014. GX 12; Tr. 41-43, 55-56, 137-39.

On October 8, 2014, MSHA Inspector Michael J. Dudash<sup>3</sup> traveled to the mine to conduct a regular quarterly inspection. Tr. 18, 21. He had already reviewed the mine’s roof control and ventilation plans, which were on file with MSHA, and had conducted an imminent danger run two days earlier. Tr. 18-19, 73, 119-20, 157-58. When he arrived at the mine at 6:00 AM, the working shift had not yet begun and the only person onsite was mine examiner and foreman Edmund Neidlinger, who is also the mine’s co-owner, operator, and pro se representative in this proceeding and is the person who prepared and submitted the three roof control addenda described above. Tr. 4, 21-22, 72, 189-91. Inspector Dudash reviewed the preshift exam record on the surface then accompanied Neidlinger underground on his preshift examination of the active working section. Tr. 23-24, 167.

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<sup>3</sup> Dudash has worked for MSHA for approximately 19 years. He became a coal mine inspector in 1999 after undergoing a year of training at MSHA’s Mine Academy in Beckley, West Virginia, and later underwent additional specialized training to become a roof control and ventilation specialist. Dudash had previously worked for a small family-owned anthracite mining business for more than 15 years, gaining experience in “all of the aspects of underground mining and then later surface mining.” Tr. 14-17.

At hearing, Dudash notated a map to show what he had observed underground. *See* GX 19<sup>4</sup>; Tr. 42-44, 54, 56-67, 74. He had expected to encounter mining consistent with the projected development depicted on the map – that is, he expected to find that the rock tunnel had been extended to the Bottom Split, a return rock tunnel had been developed back to the Seven Foot Vein workings, and the Bottom Split was being developed to the west. Tr. 44. Instead, Little Buck had developed a gangway 80 feet east on the Bottom Split with no monkey heading or return rock tunnel. Tr. 56-57, 63-64. Ventilation was being provided by a blowing fan that was pushing air approximately 180 feet through 12-inch ventilation tubing to the face. Tr. 61-62, 125-26.

In addition, Little Buck had continued to develop the rock tunnel south of the Bottom Split. Tr. 57-58. A barricade had been erected at the top rock of the Bottom Split, but Dudash asked Neidlinger to remove it so he could see how far south the rock tunnel had been developed. Tr. 13, 69, 94-95, 121. After it was removed, Inspector Dudash could travel only about ten feet south before reaching an area where the roof had collapsed at the point where the rock tunnel intersected another coal vein, which Neidlinger identified as the Middle Split.<sup>5</sup> Tr. 59-60, 73-74, 95. Although Dudash could not travel beyond the roof fall, he testified he could see into a coal face in the Middle Split which he estimated to be about 30 feet away. Tr. 59, 63, 95. (Later, after the roof had been supported, Dudash returned to the area to measure it and found that the distance from the barricade to the end of the rock tunnel was 20 feet, and the operator had driven east from the end of the rock tunnel into the Middle Split for an additional 20 feet. Tr. 95-96.) There were no ventilation controls in the area beyond the barricade and no detectable air movement. Tr. 71, 75, 94, 96. The alarm on Dudash’s Solaris multi-gas detector went off, signaling low oxygen. Tr. 68-71, 96-97, 100. The reading was 19.4% oxygen, whereas the regulations require the air to be maintained at 19.5% oxygen. Tr. 69-70, 96, 99. Dudash took an air sample with a vacuum bottle which he later submitted to an MSHA laboratory for analysis and which confirmed his oxygen reading. Tr. 97-99; GX 18.

Inspector Dudash believed that both the mining to the east on the Bottom Split and the further development to the south were outside of what was allowed under Little Buck’s roof control and ventilation plans. Tr. 64-68, 81. Accordingly, he issued Citation No. 8000752 and Order No. 8000755 for violations of the roof control plan and ventilation plan, respectively. Tr. 67-68, 115-16; GX 1; GX 4. Little Buck abated the violations by submitting an addendum proposing to convert the existing rock tunnel into a return air course and develop a separate rock tunnel to the east to serve as the intake air course. MSHA approved the proposal on October 14, 2014. GX 13; Tr. 82-88, 141-43, 148-51. The new rock tunnel branched off of the existing rock tunnel just north of the Seven Foot Vein and connected to the Bottom Split gangway. GX 13.

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<sup>4</sup> GX 19 is a blown-up copy of the map that appears in the August 2014 addendum (GX 12) on the page numbered “MSHA073.” The court reporter labeled the marked-up map “GX 18” after hearing. *See* Tr. 3. I have relabeled it “GX 19” because another exhibit is already designated as GX 18. *See* Tr. 110.

<sup>5</sup> Neidlinger later decided this was actually the Top Split. Tr. 207-08. Because the parties more frequently called it the Middle Split throughout the hearing, it is referred to as such in this decision. The Bottom Split, Middle Split, and Top Split are three coal veins that together comprise one larger formation called the Mammoth Vein. Tr. 27-28.

Little Buck was also required to develop a monkey heading in the Bottom Split. GX 13. Despite taking these corrective measures and seemingly admitting to violating his plans, Tr. 175, Neidlinger maintains that the plan violations were not as serious as Inspector Dudash indicated, for several reasons, including that the plans did not specify whether development of the Bottom Split would proceed to the east or west and that Little Buck mined past the Bottom Split by accident. Tr. 12-13, 168-70.

In addition to the plan violations, Inspector Dudash also issued Order Nos. 8000753 and 8000754 on the day of the inspection alleging that Little Buck failed to conduct an adequate preshift examination or install ventilation controls in the area south of the Bottom Split. GX 2; GX 3; Tr. 115-16. Later, after the MSHA laboratory analysis of the air sample he had taken in that same area confirmed that low oxygen had been present, Dudash issued a fifth violation, Citation No. 8000755, alleging an air quality violation. GX 5; Tr. 116. The narrative portions of Order Nos. 8000753 and 8000754 state that, to abate the violations, Little Buck extended ventilation controls into the Middle Split entry and traveled the entire area south of the Bottom Split to conduct an adequate examination, both of which would have required the operator to timber up the roof in the area where it had collapsed so that men could walk under it. GX 2; GX 3. However, Neidlinger disputes that the area where the roof collapsed was re-timbered and contends that ventilation tubing was not extended all the way to the end of the Middle Split entry. Tr. 185-87. He further argues that the area south of the Bottom Split did not need to be examined because it was part of a return air course, and he also believed that Little Buck was not required to install ventilation controls or conduct examinations because it had already fulfilled its duty to protect miners by barricading the area off. Tr. 13-14, 116-17.

#### IV. LEGAL PRINCIPLES

##### A. Violation

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

##### B. S&S (Significant and Substantial) and Gravity Findings

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S “if, based upon 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.” *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated S&S:

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.

6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987).

The Commission recently stated that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). The second step “addresses the extent to which the violation contributes to a particular hazard” and “is primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Id.* Thus, the second step requires the judge to first identify the hazard, which the Commission defines “in terms of the prospective danger the cited safety standard is intended to prevent,” then determine whether the violation sufficiently contributed to this hazard by considering “whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard.” *Id.* at 2038. At the third step, the judge must determine whether the occurrence of the hazard would be reasonably likely to result in injury, assuming the hazard were to occur. *Id.*

The S&S determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see, e.g., Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014). Evaluation of the reasonable likelihood of injury should be made assuming “continued normal mining operations,” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made “in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). The inspector’s judgment is also an important element of the S&S determination. *Wolf Run*, 36 FMSHRC at 1959; *Mathies*, 6 FMSHRC at 5.

The S&S nature of a violation and the gravity of the violation are not synonymous, although they are frequently based on the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). The Secretary assesses gravity in terms of the reasonable likelihood of injury, the severity of the expected injury, the number of persons affected, and whether the violation is S&S. The Commission generally expresses gravity as the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the

likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance on the operator's part, or a violation that could combine with other conditions to set the stage for disaster).

### C. Negligence and Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). The Secretary defines high negligence as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." *Id.* § 100.3, Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) (explaining that Commission ALJs "may evaluate negligence from the starting point of a traditional negligence analysis" rather than adhering to the Secretary's Part 100 definitions); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

More serious consequences can be imposed under the Mine Act for violations that result from the operator's unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *See CAM Mining, LLC*, 38 FMSHRC 1903, 1909 (Aug. 2016); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).



The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Assoc'd Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal*, 31 FMSHRC at 1351. However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

## V. ANALYSIS AND CONCLUSIONS

### A. Citation Number 8000752 (Roof Control Plan Violation)

#### 1. Violation of 30 C.F.R. § 75.220(a)(1)

Citation No. 8000752 was issued on October 8, 2014 under section 104(d)(1)<sup>6</sup> of the Mine Act and alleges:

The operator is not following his roof control addendum, approved August 19, 2014. The operator has developed the 1st level Bottom Split Mammoth Vein gangway east approximately 80 feet off the first level intake rock tunnel gangway (MMU-001-0)[.] In addition, the operator has developed the same intake rock tunnel gangway approximately 20 [feet] south of the Bottom Split Mammoth Vein, and intersected the Middle Split Mammoth Vein. The Middle Split Mammoth Vein gangway is developed approximately 30 feet east off the same intake rock tunnel gangway. Pages one and three of the operator's approved roof control addendum clearly states [sic] that he will only develop the rock tunnel gangway to the Bottom Split Mammoth Vein and he will only develop the Bottom Split Vein west off the same rock tunnel gangway. The operator does not have an approved plan to develop the intake rock tunnel gangway beyond the Bottom Split Mammoth Vein or to develop the Bottom Split Mammoth Vein east of the intake rock tunnel gangway. The preshift exam record states that the east Bottom Split Mammoth Vein gangway was started September 15, 2014 and that the Middle Split Mammoth Vein was worked September 16, through September 29, 2014. The preshift examiner, Edmund Neidlinger, is also the mine foreman and co-owner of this mine. He has been conducting the preshift examinations since at least July 30, 2014 to present. The operator, Edmund Neidlinger, was issued Citation 8000809, January 22, 2014 for starting this same intake rock tunnel gangway from the Buck Mountain Vein without an approved roof control plan.

GX 1.

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<sup>6</sup> The issuance of a citation under section 104(d)(1) denotes that the alleged violation was S&S and was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or safety standard. *See* 30 U.S.C. § 814(d)(1).

The standard alleged to have been violated is 30 C.F.R. § 75.220(a)(1), which states: “Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.” The purpose of the roof control plan is to set parameters governing how the mine roof and ribs will be supported to prevent them from collapsing and causing harm to miners. Tr. 45. For example, Little Buck’s plan (admitted to the record as GX 8) specifies the size, configuration, and spacing of the timbers the operator is required to install to support the roof in each different area of the mine, including the slope, gangway, monkey, chutes, and breasts. GX 8; Tr. 46, 48. An operator can amend or supplement its roof control plan by submitting a proposed addendum, which must be approved by the District Manager before it can be incorporated into the plan and implemented at the mine. Tr. 47, 134, 155-56, 204-06. After a roof control plan or plan addendum has been approved by the District Manager and adopted by the operator, its provisions are enforceable at the mine as mandatory safety standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006).

In this case, as discussed above, Little Buck submitted a series of addenda that were incorporated into its roof control plan to permit it to tunnel south from the Buck Mountain Vein to the Seven Foot Vein and eventually the Bottom Split. The Secretary contends that Little Buck violated its plan in five different ways: by continuing to develop the rock tunnel beyond the Bottom Split; by failing to adequately support the roof in the rock tunnel; by mining for 20 feet on the Middle Split; by mining to the east, rather than the west, on the Bottom Split; and by mining 180 feet without connecting a return airway or alternate escapeway. Sec’y Br. 15-17.

Regarding the first allegation, Little Buck has essentially conceded that it committed a plan violation by developing the rock tunnel south of the Bottom Split. Little Buck stipulated that although its March 2014 addendum allowed for development of the rock tunnel only as far as the Bottom Split, the tunnel had been extended approximately 20 feet south and had intersected the Middle Split by the date of the inspection, and Neidlinger admitted as much at hearing. Joint Ex. 1; Tr. 12-13, 169-70. Although the stipulations specifically reference the March addendum, I note that Little Buck’s other two plan addenda did not permit development south of the Bottom Split either. *See* GX 9; GX 12. Continuing to tunnel south without permission from the District Manager was clearly a violation.

I also agree with the Secretary’s allegation that Little Buck failed to adequately support the roof in the rock tunnel south of the Bottom Split in the area where the roof fall occurred. Neidlinger asserts that the rock tunnel was timbered in accordance with the roof control plan. Tr. 170. However, the plan and its addenda were specific to the veins where Little Buck was expected to be mining, not the rock tunnel or any of the veins south of the Bottom Split. *See* Tr. 48-49, 147-48. Moreover, the plan requires Little Buck to use whatever measures are necessary to support the top when adverse roof conditions are encountered. Tr. 146; GX 8 at 19. The roof collapsed in the rock tunnel at the point where it intersected with the Middle Split because the coal was so thick in the Middle Split vein that the roof support installed at that location admittedly “wasn’t sufficient.” Tr. 170. Thus, Little Buck violated the roof control plan and § 75.220(a)(1) by mining into a new area without implementing any measures to adequately

address the adverse geological conditions that were present there in the form of an unusually thick coal seam.

Mining coal on the Middle Split was also a violation. Inspector Dudash's sketch of the development below the Bottom Split shows an L-shaped area with an entry or gangway driven eastward on the Middle Split vein at a 90 degree angle to the rock tunnel. GX 19. Dudash initially could not determine exactly how far east the Middle Split had been developed, but estimated approximately 30 feet, which he noted in the citation. Tr. 59, 63, 95; GX 1. He testified that later, after the roof had been supported, he returned to the area to measure the tunnels and found that, in addition to driving the rock tunnel 20 feet south of the barricade at the Bottom Split, the operator had driven 20 feet east from the end of the tunnel into the Middle Split. Tr. 95-96.

Neidlinger denied engaging in any mining on the Middle Split and characterized Dudash's sketch as inaccurate. Tr. 178-81. According to Neidlinger, the rock tunnel veered slightly southeast beyond the Middle Split to avoid a patch of conglomerate rock that could not be mined without special equipment, but there was no gangway leading east nor a coal face in that vein. Tr. 180-86. Neidlinger further contended that his men intersected the Middle Split by accident. He explained that when they began developing the rock tunnel, they did not have an engineering cross-section or any bore holes to tell them exactly where the veins were or how far apart they lay. Tr. 12-13, 169-70. When they first reached the Bottom Split, they tunneled through it and continued driving south because the coal was only 10 inches thick and they believed it to be a small leader vein, a type of formation that is commonly found between larger veins in anthracite mines. Tr. 13, 169-70. It was only when they reached the Middle Split that they realized their error. Neidlinger testified that the coal in the Middle Split was so thick that he knew right away they had tunneled too far and immediately withdrew his men and equipment to the Bottom Split. Tr. 13, 170, 177-78.

Although Little Buck may have initially intersected the Bottom Split unwittingly, the evidence does not bear out Neidlinger's assertions that he withdrew his men from the Middle Split immediately upon intersecting it and did not engage in any mining on that vein. The mine's preshift examination records tell a different story. According to Dudash, the records reveal that the Middle Split was examined from September 15 or 16 until on or about September 30,<sup>7</sup> indicating that men were working in the vein for almost two weeks. Tr. 60, 63, 73. Neidlinger does not dispute Dudash's description of the exam records. Moreover, Neidlinger testified that he abandoned the area south of the Bottom Split only after the roof collapsed, contradicting his own testimony that he withdrew immediately. Tr. 170. It was not inconsistent with Little Buck's past behavior to commence or continue mining into an area without permission from MSHA, as the operator had previously received a citation for beginning this very rock tunnel without waiting for MSHA's approval. Tr. 81-82; GX 15. In addition, Inspector Dudash testified that he measured the tunnels beyond the Bottom Split after the collapsed roof in the area had been re-timbered and definitively determined that Little Buck had driven 20 feet east on the

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<sup>7</sup> There is some discrepancy regarding the timeframe in which the area was worked and when it was or should have been preshifted – specifically as to whether the examinations ended on September 26, 29, or 30. See Tr. 60, 63, 73, 114, 206; GX 1; GX 2; GX 3; GX 4; GX 6 at 12, 28. Regardless, men were working in the Middle Split for almost two weeks.

Middle Split. Tr. 95-96. Twenty feet of development in the coal vein is obviously inconsistent with Neidlinger's account that he withdrew as soon as he intersected it.

Neidlinger disputes that Dudash actually walked into the entry on the Middle Split and measured it, arguing that the area where the roof collapsed was never timbered up and it was too wet for Dudash to travel beyond the roof fall. Tr. 186-87. I reject these contentions. I have no doubt that Dudash, a roof control specialist bearing no apparent ill will toward Little Buck who testified from memory without referring to his notes once and who quite candidly admitted Little Buck likely could have taken the same actions without incurring any violations if it had simply obtained MSHA's approval first, Tr. 154, was a credible witness. Dudash testified there was only a small amount of water on the mine floor beyond the roof fall, and he could and did travel through it to take measurements and terminate the violations. Tr. 203. He also explained that the roof needed to be re-timbered so that mine personnel could travel under it to extend ventilation tubing to within 17 feet of the face of the Middle Split to abate Order No. 8000754 (the ventilation control violation). Tr. 202-04. The abatement narratives in that order and Order No. 8000753 (the preshift exam violation) support this testimony, indicating that after the inspection, Little Buck extended ventilation tubing into the Middle Split and a preshift examiner accessed the area to conduct an adequate examination so the violations could be terminated. GX 2; GX 3. Considering all the foregoing, I credit Dudash's allegation that he measured the entry on the Middle Split and found that Little Buck had mined 20 feet in this vein, which violated the roof control plan.

Mining east rather than west on the Bottom Split also violated the roof control plan. Neidlinger claims that characterizing the eastward development as a violation is "a total misunderstanding" of his plan addenda. Tr. 168. He admits the addenda he submitted were confusing, but asserts that his original plan was to drive east on both the Seven Foot Vein and the Bottom Split and eventually connect the return to the east side of the Buck Mountain Vein workings across the main slope or connect the return in the same manner as set forth in the October 2014 addendum that was submitted to abate the violation. Tr. 153, 178, 194, 200. The map submitted with the January 2014 addendum appears to support this assertion, as it shows projected development to the east of the rock tunnel on both the Seven Foot Vein and the Bottom Split. *See* GX 9 (page numbered "MSHA053"); Tr. 136-37.

However, the fifth paragraph in the narrative portion of the addendum clearly states that development of the veins will proceed to the west. GX 9; Tr. 159-61. Likewise, both the text and the maps<sup>8</sup> in the March and August 2014 addenda, which supersede the January addendum, indicate that the Seven Foot Vein and Bottom Split will be mined to the west because the Seven

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<sup>8</sup> The map in the August addendum on the page numbered "MSHA073" shows projected westward development that has been sketched in by hand and labeled "Bottom Split Vein." GX 12. At hearing, Neidlinger admitted he prepared the addendum but denied sketching in the projected westward development on the map and suggested that someone in the MSHA District Office must have added it. Tr. 191, 195-98. However, the handwriting on the map is consistent with all the other materials submitted with the addenda and appears to be Neidlinger's. Tr. 196. Further, Inspector Dudash testified that operators are responsible for submitting maps in support of plan proposals and MSHA never prepares them or marks them up. Tr. 205-06. I reject Neidlinger's assertion that he did not add the markings on the map in question.

Foot Vein was unmineable to the east. GX 10; GX 12; Tr. 53-56, 161-65, 189-91. Neidlinger has been working in the mining industry for forty years. Tr. 171. An operator with his experience should be well aware that the wording of the roof control plan and addenda and the maps submitted in support of them must be precise and accurate in order for MSHA to be able to approve them. Neidlinger prepared the maps and narratives at issue in this case and would have used terms with specific meanings. There are only two directions mining could have proceeded off the rock tunnel, east or west, and Neidlinger made it very clear which directions he was referencing whenever he encountered faulting and proposed ways to work around it. It is not plausible to believe he was simply confused about which direction he was permitted to mine.

Further, the August addendum stated that Little Buck would connect a return airway from the Bottom Split to the Seven Foot Vein “using the same procedure” described in the March addendum, which would be impossible or very difficult to accomplish if the Bottom Split were developed to the east. GX 12. The referenced procedure was to develop a chute upward in the front/overlying/south vein (in this case, the Bottom Split) then develop a rock tunnel to meet it from the back/underlying/north vein (in this case, the Seven Foot Vein) in order to “have [the] return connected in like an apex,” which would be infeasible if the workings in the front vein were not aligned at least roughly parallel to the workings in the back vein. GX 10; Tr. 65, 140-41, 192-93. Here, the workings in the two veins were not aligned at all.

Considering all the foregoing evidence, I find that the March and August addenda permitted mining on the Bottom Split only to the west of the rock tunnel. Little Buck violated its approved roof control plan by developing a gangway to the east instead.

Finally, I find that Little Buck also violated its roof control plan by mining approximately 180 feet without developing a return airway or secondary escapeway. The roof control plan mandates that chutes (crosscuts) will be developed at least every 60 feet along each gangway. GX 8 at 18; Tr. 64, 147-48. The chutes are an important feature because they connect the gangway to the monkey heading, which carries return air and serves as a secondary escapeway. Little Buck’s plan addenda indicated that chutes would be developed on 40 foot centers. Tr. 66; GX 10; GX 12. The addenda also indicated that, whenever it was feasible to do so, Little Buck would immediately develop a return after intersecting a new vein. GX 9; GX 12; Tr. 133-34. Nonetheless, starting at the Seven Foot Vein, Little Buck drove a rock tunnel south approximately 100 feet to intersect the Bottom Split and then drove a gangway directly east for 80 more feet on the Bottom Split without developing a return rock tunnel, a monkey heading, or any chutes, in violation of the roof control plan. Tr. 63-64, 148.

I conclude that Little Buck violated the mandatory safety standard at § 75.220(a)(1) by violating its approved roof control plan and addenda in the multiple ways discussed above.

## 2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners. GX 1. He testified that mining outside of the roof control plan is generally considered highly unsafe, but multiple other more specific factors influenced his opinion that this particular violation was S&S, including that intake air

was being pushed 180 feet by a fan, no secondary escapeway was provided for that entire distance, there were no ventilating devices in place to move air south of the barricade at the Bottom Split, and low oxygen was present in that area. Tr. 68-72.

With regard to the S&S determination, the first prong of the *Mathies* test is satisfied by my finding of a violation of a mandatory safety standard.

The second element of the test is also satisfied because mining outside of the roof control plan contributed to several discrete safety hazards that were reasonably likely to occur. First, by tunneling south of the Bottom Split and mining into the Middle Split without developing a plan to support the roof in this very thick coal seam and without obtaining MSHA's input and approval of the plan, Little Buck contributed to the hazard that a roof or rib fall would occur with continued normal mining operations due to the lack of roof control parameters tailored to the geological conditions in the newly developed area. A roof fall did, in fact, occur due to inadequately supported roof.

Second, the violation also created a hazard in that there was no secondary escapeway in the entire area south of the Seven Foot Vein. The operator had driven the rock tunnel a total of approximately 120 feet south (about 100 feet from the Seven Foot Vein to the Bottom Split and 20 feet beyond the Bottom Split) and developed two entries to the east (the 80-foot entry on the Bottom Split and the 20-foot entry on the Middle Split) without driving a second rock tunnel or monkey heading to carry return air separately and to serve as an alternate escapeway. If an emergency had arisen, miners working anywhere south of the Seven Foot Vein along the entirety of the rock tunnel and the Bottom Split and Middle Split workings would have had only one possible escape route – the existing rock tunnel. If passage through the rock tunnel had been impeded, they would have had no escape route at all.

The likelihood an emergency would occur with continued normal mining operations was increased by the ventilation hazards present in the area, which Inspector Dudash cited in the other four violations at issue in these proceedings and which are discussed in greater detail below. To briefly summarize, there was no monkey or return tunnel south of the Seven Foot Vein to separate the return air from the areas where miners worked and traveled. Tr. 63-64. Instead, the operator was using tubing and an air-moving fan to ventilate the Bottom Split. Tr. 125. The fan was pushing clean air through 180 feet of tubing, a much longer distance than the 40 to 60 feet (the distance between crosscuts) contemplated in the ventilation plan, and air that had swept the face was then allowed to flow back outside of the tubing. Tr. 68, 76, 126. For this reason, miners on the active MMU in the Bottom Split were required to work in 180 feet of dirty air that had already swept the face, including air that had passed the barricaded-off area south of the Bottom Split. Tr. 118, 126. The entire 40 feet of development in the barricaded area south of the Bottom Split was found to have no ventilation controls and no air movement, and low oxygen was detected there. Tr. 70-71, 96-99, 112; GX 3; GX 5. The barricade was not airtight and would not have prevented bad air from rolling out onto the working section, and moreover, by blocking access to the area, it prevented the operator from conducting preshift examinations to identify and address the hazardous ventilation conditions described above. Tr. 69-70, 80. In sum, ventilation was inadequate south of the Seven Foot Vein. If an emergency were to arise stemming from inadequate ventilation, Little Buck's violation of its roof control plan contributed

to the discrete hazard that the miners on the active working section would be unable to escape the area due to the lack of a secondary escapeway.

The third and fourth *Mathies* elements inquire whether the hazard, assuming it were to occur, would be reasonably likely to result in a reasonably serious injury. A roof fall actually occurred in this case. Fortunately, no one was injured. However, roof or rib collapses are historically a leading cause of injury in underground mines and are reasonably likely to cause serious or fatal crushing injuries to anyone in their vicinity. In this case, two miners were regularly working underground on the active working section at the time of the violation and were therefore exposed to the hazard. Tr. 72-73. With regard to Little Buck's failure to maintain a secondary escapeway, assuming an emergency were to occur underground such as a mine fire or encroachment of bad air on the working section that would necessitate the use of an alternate escapeway, any miners on the section would be trapped underground and would be reasonably likely to incur serious injuries or perish. Accordingly, the third and fourth *Mathies* elements are satisfied.

Because the four *Mathies* elements are met, I find that this violation was S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners working south of the Seven Foot Vein due to a roof or rib collapse arising out of Little Buck's failure to comply with an approved roof control plan or due to entrapment in the mine during an emergency arising out of Little Buck's failure to maintain a secondary escapeway.

### 3. Unwarrantable Failure and Negligence

Dudash marked this violation as involving a high degree of negligence and designated it an unwarrantable failure to comply with a mandatory safety standard. GX 1. He reasoned that Neidlinger is the owner, operator, and foreman of the mine who puts together the plans, signs them, and examines the mine on a daily basis, and who had received a citation less than a year earlier for mining outside of his roof control plan, yet he knowingly violated his plans again by mining to the south and east without seeking MSHA's approval. Tr. 76-77.

### Extensiveness of Violation; Duration; Degree of Danger Posed

The extensiveness of a violation is usually analyzed in terms of the physical dimensions of the affected area, the number of miners endangered, the efforts required to abate the violation, or other similar factors. This violation was extensive in that Little Buck mined 80 feet outside of its roof control plan on the Bottom Split and another 40 feet in the areas south of the Bottom Split. *See* Tr. 77. In addition, all of the miners on the working section would have been exposed to the dangers presented by the violation. Neidlinger suggested that he was required to do almost nothing to abate the violation and simply carried on with his plans to drive east, *see* Tr. 141, 153, but I find that the violation required extensive abatement actions. Little Buck was required to develop a monkey heading and crosscuts and drive a second rock tunnel all the way from the Bottom Split gangway to the rock tunnel north of the Seven Foot Vein.

At the time of the October 8, 2014 inspection, the examination records revealed that Little Buck had been mining on the Bottom Split and Middle Split since September 15 or 16, 2014. Tr. 77-78. Accordingly, the duration of this violation was approximately 23 days.

During this entire time period, as discussed above, all the miners on the active working section were subjected to the danger of roof or rib falls because they were working in locations that were not covered by an approved roof control plan. In addition, they were exposed to the hazards posed by working on a section without a secondary escapeway. Accordingly, I find that the degree of danger posed by the violation was high.

#### Knowledge of Violation; Obviousness

Knowledge of a violation is established where the operator knew or reasonably should have known of the violation. *Coal River Mining, LLC*, 32 FMSHRC 82, 95 (Feb. 2010). The knowledge or negligence of an agent may be imputed to the operator. *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015); *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

Inspector Dudash testified that he himself did not notice that Little Buck was mining in the wrong direction until he had looked over the plans in detail, but he believed the violation should have been obvious to Neidlinger because he was the person who had drafted and submitted the plan addenda, was responsible for implementing them and ensuring compliance with them, and was the foreman responsible for directing the everyday work of the miners. Tr. 21-23, 78-80, 165. Neidlinger had been examining the mine since at least July 29, 2014. Tr. 21-22. He admitted he wrote the plans at issue in this case and submitted them to MSHA. Tr. 189-91, 193. In Inspector Dudash's opinion, Neidlinger was well aware of the requirements of the roof control plan and simply ignored them. Tr. 166. I agree. As the mine's co-owner, operator, foreman, and preshift examiner who regularly traveled underground to inspect the active working section, I find that Neidlinger had knowledge of this violation. Because he is an agent of the company, his knowledge is imputable to Little Buck.

#### Notice of Need for Greater Compliance Efforts

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the unwarrantable failure analysis to the extent the past violations and warnings placed the operator on notice, before the citation was issued, that greater efforts were necessary for compliance with the cited safety standard.

Dudash testified that, at the time this citation was issued, Little Buck had already been warned not to mine outside of its roof control plan because it had received a citation in January 2014 (GX 15, Citation No. 8000809) for beginning development of this very rock tunnel without an approved plan. Tr. 81-82, 144-46. Neidlinger had also received a citation for mining outside his roof control plan at a previous mine when he was leaving pillars that were not wide enough. Tr. 82. However, Inspector Dudash believed that the January citation, alone, placed the operator on notice of the need not to initiate new development without submitting a plan and waiting for approval. Tr. 146. I find that the January citation placed Little Buck and Neidlinger on notice of the need for greater compliance efforts before the subject citation was issued.



### Abatement Efforts

Although Little Buck knew of this violation and had prior notice of the need for greater compliance efforts, the operator made no effort to abate the violation and did not submit a plan addendum addressing the many problems created by mining outside its approved plan until after the citation was issued.

Little Buck did erect a barricade to prevent travel south of the Bottom Split, which was an abatement measure of sorts in that it stopped miners from accessing some of the areas that had previously been mined without an approved roof control plan. However, the barricade did not resolve any of the ventilation issues affecting the working section because it was not airtight, and it also prevented anyone from conducting a proper preshift examination of the barricaded area. Tr. 69-70, 80. Moreover, the barricade was erected and the men and equipment were withdrawn from the area beyond it only after the roof had collapsed, at which point miners had already been working in the area for more than two weeks. Tr. 80-81. Thus, I do not consider Little Buck's installment of a barricade to be a significant mitigating factor.

### Conclusions

The evidence shows that Neidlinger flatly disregarded the requirements of § 75.220(a)(1) and knowingly forged ahead with development of new areas of the mine without an approved roof control plan. At hearing, Inspector Dudash seemed to lament the senselessness of these actions, noting that "if you [Neidlinger] would have put in for a plan like that originally, you could have done it legally. And you would have not had any problems. The district manager could have looked it over, provided whatever safeguards he deemed necessary to protect you and then allowed you to do it. It all just came for naught that you did it before you got the plan." Tr. 154. Neidlinger should have submitted another plan addendum and waited for MSHA's approval, and his negligence in failing to do so is imputable to Little Buck. Based on all the factors discussed above, particularly the obviousness of this violation, the fact that Little Buck had recently received a citation for beginning this very same rock tunnel without an approved roof control plan to do so, the extensiveness and degree of danger posed by the violation, and the knowledge and involvement of supervisor and co-owner Neidlinger, I find that Little Buck exhibited aggravated conduct constituted more than ordinary negligence. Accordingly, I find that this violation constituted an unwarrantable failure to comply with the roof control plan and with § 75.220(a)(1), and it was appropriate for Inspector Dudash to issue the citation under 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

#### B. Order Number 8000755 (Ventilation Plan Violation)

This order was issued on October 8, 2014 under section 104(d)(1)<sup>9</sup> of the Mine Act and alleges, in pertinent part:

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<sup>9</sup> The issuance of an order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or

The operator is not following his ventilation control addendum to develop a rock tunnel gangway, approved March 13, 2014. ... The operator's approved ventilation addendum clearly shows all development will be on the west side of the intake rock tunnel gangway. The operator's approved roof control addendum indicates the same. In addition, the operator can not develop a return through the 7 Foot Vein to the Buck Mountain Vein, as stated in the approved ventilation addendum. There is no 7 Foot Vein developed east of the intake rock tunnel gangway for a return connection and connecting to the Buck Mountain Vein would put the return on the intake side of the Buck Mountain gangway. The approved ventilation addendum also states that the 7 Foot Vein is totally faulted on the east side and this would make it impossible to develop a complete return rock tunnel. Thus, this addendum is to develop the return to the west. ... Two miners work on this MMU-001-0 on a daily basis and are exposed to this violation.

GX 4.

The standard alleged to have been violated is 30 C.F.R. § 75.370(a)(1), which states in pertinent part: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." Inspector Dudash explained that the purpose of the ventilation plan is to show how the operator will maintain a complete air circuit to ensure the faces are swept with clean air and any methane and noxious gases are removed from the areas where men are actively working. Tr. 46. As is the case for roof control plan provisions, the provisions of a mine's approved ventilation plan are enforceable as mandatory safety standards at the mine. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006).

Little Buck's main ventilation plan for this mine was not submitted as evidence. The only portion of the ventilation plan submitted to the record is GX 11, a March 2014 plan addendum that is substantively identical to the March 2014 roof control plan addendum. Tr. 163; *compare* GX 10 with GX 11. Dudash testified that Little Buck also submitted an August 2014 ventilation plan addendum containing the same information as the August 2014 roof control addendum. Tr. 44-45. The Secretary contends that Little Buck violated its approved ventilation plan and addenda in the same ways it violated the roof control plan. Sec'y Br. 15-17.

I have already found that Little Buck's roof control plan addenda did not discuss or permit developing the rock tunnel south of the Bottom Split, engaging in mining on the Middle Split, or mining east rather than west on the Bottom Split. Little Buck's ventilation plan addenda were substantively identical to the roof control plan addenda. Therefore, I find that Little Buck also violated its ventilation plan by extending the rock tunnel 20 feet south of the Bottom Split,

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safety standard and that the operator had already received a 104(d)(1) citation within the past 90 days. *See* 30 U.S.C. § 814(d)(1).

mining 20 additional feet on the Middle Split, and mining to the east rather than the west on the Bottom Split.

Little Buck also violated the ventilation plan by driving approximately 180 feet without developing a monkey heading or a return rock tunnel. As previously discussed, the Bottom Split workings were being ventilated with the aid of a fan that was pushing intake air through 12-inch tubing from a point 180 feet outby the face. Tr. 125. After sweeping the face, the air was then allowed to flow back along the entirety of the 180-foot intake airway before being swept up into the Seven Foot Vein. Tr. 125-26. Dudash testified that miners normally are not allowed to work in return air, which is generally defined under 30 C.F.R. § 75.301 as air that already ventilated the working place, unless the work is “rehabilitating.” Tr. 118, 127-28. Dudash further explained that in an anthracite mine with chutes on 40 to 60 foot centers, the mine operator is permitted to use an air mover to ventilate the area inby the last open crosscut only because miners are working in dirty air for a relatively short distance of 40 to 60 feet (the distance from the face to the last open crosscut). Tr. 68, 76, 117-18. By contrast, under the setup that was in place on the day of the inspection, miners working on the active section would have been exposed to 180 feet of dirty air that had already swept the face, as no separate return structures had been developed to carry this air away. Tr. 118. The District Manager likely would not have approved this arrangement or permitted Little Buck to continue mining east without implementing safeguards such as requiring the operator to develop a monkey heading and return rock tunnel, which were some of the measures taken to abate the violation. *See* Tr. 142-43. I find that driving 180 feet without developing a return violated the mine’s ventilation plan.

Because Little Buck violated its approved ventilation plan in multiple ways, I find that a violation of § 75.370(a)(1) occurred.

## 2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners. GX 4.

The first prong of the *Mathies* test for S&S is satisfied by my finding of a violation of a mandatory safety standard.

The second element of the test is also satisfied because mining outside of the ventilation plan contributed to the discrete safety hazard of inadequate ventilation controls, a hazard which was more than reasonably likely to occur. It is inherently dangerous to engage in mining without an approved ventilation plan because this creates a risk that miners will be working in an area without the appropriate safeguards and parameters in place to ensure that clean air is being delivered to the face and air carrying potentially harmful gases is being safely swept away. In this case, submission and approval of a ventilation plan covering the areas where Little Buck was mining would have likely required the operator to develop a return tunnel and monkey heading in the Bottom Split to prevent miners from working in 180 feet of dirty air. Also, Little Buck likely would have been required to install ventilation controls to move air through the area south of the Bottom Split and would have been required to conduct regular preshift examinations in that area to ensure there were no air quality problems developing such as low oxygen that might

affect the working section if air were to pass through the barricade. However, these safeguards were never implemented because Little Buck failed to develop and follow a roof control plan tailored to the areas in question, and by the time of the inspection the barricaded-off area was found to be a dead-air space with low oxygen, high carbon dioxide, and no air detectable movement. Tr. 68, 96, 99. Considering all the foregoing, Little Buck's failure to develop and follow a roof control plan did not just contribute to a potential hazard, but actually exposed all the miners working in the areas south of the Seven Foot Vein to the discrete hazard of inadequate ventilation controls.

This hazard was reasonably likely to result in a reasonably serious injury to the two miners who were regularly present on the active working section. With continued normal mining operations, inadequate ventilation leads to the accumulation of explosive dusts and gases and of noxious gases such as carbon dioxide that can cause suffocation. This was not a gassy mine and there is no evidence an explosion was likely. Tr. 76. However, low levels of oxygen and high levels of carbon dioxide were in fact detected in the unventilated dead-end area south of the Bottom Split, and no preshift examinations were being conducted in the area that would have timely identified the problem. The bad air could have seeped through the barricade erected at the Bottom Split, which was not airtight, and mixed with the atmosphere in the areas where miners were actively working. Tr. 68-72, 107. This condition, if allowed to worsen with continued normal mining operations, would be reasonably likely to result in serious and potentially fatal injuries to miners rendered unconscious and unable to escape the area due to oxygen deprivation, as miners can be overcome by oxygen deficient air and lose consciousness without even realizing what is happening. Tr. 103-04. Accordingly, the third and fourth *Mathies* elements are satisfied.

Because the four *Mathies* elements are met, I find that this violation was S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners on the active working section due to inadequate ventilation in all the areas to the south of the Seven Foot Vein.

### 3. Unwarrantable Failure and Negligence

Dudash marked this violation as involving a high degree of negligence and designated it an unwarrantable failure to comply with a mandatory safety standard, for largely the same reasons he had assessed the roof control plan violation as an unwarrantable failure. Tr. 76-77.

#### Extensiveness of Violation; Duration; Degree of Danger Posed

This violation was extensive in that Little Buck mined 80 feet outside of its ventilation plan on the Bottom Split, mined 40 feet outside of its plan in the areas south of the Bottom Split, and developed a 120-foot rock tunnel with two east-facing entries without creating any separate return structure. The violation was also extensive in that all of the miners on the active working section would have been exposed to the dangers it posed. As was the case for the other plan violation, Little Buck was required to take the fairly extensive abatement measures of developing a monkey heading and crosscuts and driving a second rock tunnel all the way from the Bottom Split gateway to the rock tunnel north of the Seven Foot Vein.

Based on the preshift examination records showing that Little Buck had started mining on both the Bottom Split and Middle Split on September 15 or 16, I find that the duration of this violation was approximately 23 days. Tr. 77-78.

During this entire time period, all the miners on the active working section were exposed to the dangers of inadequate ventilation, for the reasons mentioned above in my discussion of S&S and gravity. Accordingly, I find that the degree of danger posed by the violation was high.

#### Knowledge of Violation; Obviousness

As was the case with the roof control plan violation, the ventilation plan violation would have been very obvious to Neidlinger because he was the co-owner, operator, foreman, and examiner of the mine and had prepared and submitted the ventilation plan and addenda, which he was responsible for faithfully implementing at the mine. Tr. 21-23, 79-80, 189-93. Accordingly, I find that Little Buck had knowledge of this violation through its agent, Neidlinger.

#### Notice of Need for Greater Compliance Efforts

As previously noted, Little Buck received a citation for mining outside of its roof control plan in January 2014 after it began developing the same rock tunnel at issue in this case without waiting for the District Manager's approval. GX 15; Tr. 81-82. Although the January citation does not pertain to ventilation, it pertains to a plan violation and is factually related to the events leading to the issuance of the instant violation. The January citation should have placed Little Buck on notice of its general need not to embark on new development without creating plan addenda, submitting them to the District Manager, and waiting for approval to proceed.

The record also shows that Little Buck received a citation for a violation of the standard cited here, § 75.370(a)(1), within the fifteen months preceding the issuance of the instant violation. GX 14. This should have further placed Little Buck on notice of the need to make greater efforts to comply with this regulation.

#### Abatement Efforts

Although Little Buck knew of this violation, the operator made no effort to abate the violation or address the ventilation problems on the section until after the order was issued. For the reasons previously mentioned in my discussion of Citation No. 8000752, I do not consider Little Buck's erection of the barricade at the Bottom Split to be an adequate abatement effort or a significant mitigating factor.

#### Conclusions

As was the case with the roof control plan violation, the evidence shows that Little Buck flatly disregarded the requirements of the operative regulation and intentionally developed new areas of the mine without an approved plan or addendum in place to assure adequate ventilation. Based on all the factors discussed above, particularly the obviousness of this violation, Neidlinger's knowledge of it, and the extensiveness and degree of danger it posed, I find that

Little Buck exhibited aggravated conduct constituting more than ordinary negligence. Accordingly, this violation constituted an unwarrantable failure to comply with the ventilation plan and with § 75.370(a)(1), and it was appropriate for Inspector Dudash to issue the order under 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

C. Order Number 8000753 (Preshift Examination Violation)

This 104(d)(1) order was issued on October 8, 2014 and alleges:

The operator has not been conducting an adequate preshift examination, on the 1st level MMU-001-0, since September 26, 2014. The preshift examiner has not been traveling an entry developed over 20 feet off the intake rock tunnel gangway air course. This entry has been boarded and dangered off. This entry is not provided with a cross cut or ventilation controls. Air passes by this entry to reach the working section working face, MMU-0010, approximately 80 feet in by the entry. The calibrated permissible multi-gas detector (Ser. No. A5-146096 & Approval No. 22-A040001-0) measured 19.4% oxygen ten feet in this entry. The preshift examiner, Edmund Neidlinger, is also the mine foreman and co-owner of this mine. The preshift exam record indicates that this entry has been abandoned since September 26, 2014. Two miners normally work on this section on a daily basis and are exposed to this hazard.

GX 2; Tr. 90-91.

The standard alleged to have been violated is a subsection of 30 C.F.R. § 75.360, which governs preshift examinations. The cited subsection requires mine operators to conduct preshift examinations of any “[e]ntries and rooms developed after November 15, 1992, and driven more than 20 feet off an intake air course without a crosscut and without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift.” 30 C.F.R. § 75.360(b)(6)(ii).

The parties stipulated that the entry cited in this order, the entry on the Middle Split, was not provided with a crosscut or ventilation controls. Joint Ex. 1. As discussed above, this entry was driven 20 feet off the southernmost end of the rock tunnel, which had been driven 20 feet off of the intake air course located at the Bottom Split. The entire area south of the Bottom Split was not being examined as of the inspection date because it was barricaded off. Thus, the remaining inquiry under § 75.360(b)(6)(ii) is whether intake air was passing by or through the cited area to reach the working section.

The Secretary defines the working section to include “[a]ll areas of the coal mine from the loading point of the section to and including the working faces” where the coal is extracted. 30 C.F.R. § 75.2. Intake air is “[a]ir that has not yet ventilated the last working place on any split of any working section, or any worked-out area, whether pillared or nonpillared.” 30 C.F.R.

§ 75.301. The working place is “[t]he area of a coal mine inby the last open crosscut,” 30 C.F.R. § 75.2, and the last open crosscut is the crosscut closest to the working face that does not have a stopping. *Jim Walter Res., Inc.*, 11 FMSHRC 21, 26 (Jan. 1989); 30 C.F.R. § 75.360(c)(1).

In this case, Dudash testified that the last open crosscut was the Seven Foot Vein, so the entire area south of the Seven Foot Vein constituted the working place where miners would work and travel all day long; further, he considered all the air flowing through the working place to be intake air. Tr. 62, 72, 123-28, 158. Thus, intake air was flowing by the barricade to reach portions of the working section.

Neidlinger agreed that the Seven Foot Vein was the last open crosscut and that the active working section included the Bottom Split workings and the 100-foot segment of the rock tunnel between the Bottom Split and Seven Foot Vein. Tr. 173, 187-88. However, he characterized the air flowing by the barricade into the rock tunnel as return air because it was moving outby after sweeping the face of the Bottom Split gangway. Tr. 117, 167, 171-74. Generally, return air is defined as air that has ventilated the last working place or that mixes with other return air, although the Commission has noted that the term may have different meanings for purposes of different standards. *Zeigler Coal Co.*, 15 FMSHRC 949, 952 n.3 (June 1993); 30 C.F.R. § 75.301. Relying on this definition, Neidlinger insisted that the area south of the Bottom Split did not need to be examined each shift because it was part of the return air course and the only air passing by it was return air. Tr. 13-14, 116-17, 167, 198-99.

Inspector Dudash noted that even if the area south of the barricade were part of a return air course, it would need to be examined on a weekly basis, which Little Buck was not doing. Tr. 117; *see* 30 C.F.R. § 75.364(b)(2) (requiring weekly examinations of return air courses). But he did not consider the area to be part of a return air course. Tr. 117. For one thing, although the ambient air passing by the barricade had already swept the face in the Bottom Split and was flowing outby, the 12-inch tubing carrying fresh air to the face also passed by the barricade and could have been contaminated with and recirculated dirty air seeping from the barricade if there were any flaws or tears in the tubing. Tr. 128-30. More importantly, Inspector Dudash explained that while return air is generally defined as air that has swept the last working face, in this type of mine it is not considered return air until it hits the last open crosscut and travels up into the monkey heading. Tr. 118-19. Thus, all the air inby the Seven Foot Vein would still be considered intake air. This makes sense because everything inby the last open crosscut is part of an active working place where men work and travel daily. For purposes of ventilation standards such as § 75.360(b)(6)(ii), any air ventilating areas inby the last open crosscut should be considered intake air regardless of which direction it is flowing and whether it has already swept the face. Accordingly, I accept Dudash’s testimony that the air passing the barricade was intake air because it had not yet reached the last open crosscut.

The area south of the barricade was not being regularly examined from the time Little Buck withdrew from the Middle Split and erected the barrier until the date of the inspection. Because this was an entry developed after November 15, 1992 and driven more than 20 feet off an intake air course without a crosscut or permanent ventilation controls, and because intake air passed by it to reach portions of the working section, I find that Little Buck violated §

75.360(b)(6)(ii) by failing to regularly examine it as part of the required preshift examination of the working section.

## 2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners. GX 2. He was concerned that dangerous gases and low oxygen could accumulate in the area south of the barrier because this was a dead-end space driven more than 20 feet with no ventilation controls, and therefore it should have been examined to ensure nothing harmful was seeping out onto the active working section through the barricade. Tr. 108-10.

The first element of the *Mathies* test for S&S is satisfied by my finding of a violation of a mandatory safety standard.

The second *Mathies* element is also satisfied because the violation contributed to the discrete safety hazard that the operator would not recognize and address hazardous conditions arising in the barricaded area that could have affected miners on the working section. This hazard was reasonably likely to occur, and did in fact occur. Inspector Dudash identified several hazardous conditions that were present in the barricaded area and had not been addressed, including low oxygen and lack of ventilation controls. GX 3; GX 5. If normal mining operations had continued and the operator had continuously failed to examine the unventilated area, noxious gases or oxygen-deficient air could have accumulated there and seeped onto the active working section through the barricade undetected. Tr. 68-72, 107. Any air seeping past the barricade would mix with the ambient air in the rock tunnel where miners worked and traveled on a daily basis, exposing the miners to a discrete safety hazard. For example, carbon dioxide is invisible and odorless, and a miner exposed to high levels of this gas would not be aware of it unless he happens to be wearing a detector that alarms. Tr. 104. Because high levels of carbon dioxide cause a reduction in oxygen levels, the miner could be “overcome with the carbon dioxide without even really knowing it.” Tr. 103-04. For these reasons, I find that Little Buck’s failure to conduct preshift examinations in the cited area contributed to the discrete safety hazard that the operator would fail to detect hazardous ventilation conditions that would affect the area north of the barricade where miners worked and traveled.

This hazard, assuming it were to occur, would be reasonably likely to result in serious injuries or death under the circumstances of this case, satisfying the remaining two *Mathies* elements. Only two miners were present on the active working section on a regular basis, and they were required to work and travel in 180 feet of air that had already swept the face, including 100 feet of air that had passed by the barricaded area. If bad air were to accumulate behind the barricade and roll past it, both miners could be overcome and lose consciousness, preventing them from escaping the section. This would likely result in death or serious injuries due to suffocation.

Because the four *Mathies* elements are met, I find that this violation is S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners working south of the Seven Foot Vein, for the reasons discussed above.



### 3. Unwarrantable Failure and Negligence

Dudash marked this violation as involving high negligence and unwarrantable failure. GX 2. He testified that he assessed it as an unwarrantable failure because Little Buck knew the cited area was not ventilated, yet barricaded it off, preventing anyone from conducting regular preshift examinations of it. Tr. 106-07.

#### Extensiveness of Violation; Duration; Degree of Danger Posed

Although only a 40-foot-long area was not being examined, this violation was extensive because it affected the entire working section south of the Seven Foot Vein and all of the miners working there.

At the time of the October 8, 2014 inspection, the examination records revealed that Little Buck had stopped examining the area at some time between September 26 and 30. Therefore, the area had not been preshifted for more than a week.

As discussed above, the violation posed a risk that hazardous conditions, particularly air quality issues, arising in the unexamined area would go undetected and would affect areas where miners were actively working, potentially causing death or serious injuries to those working and traveling in the rock tunnel north of the barricade. Thus, I find that this violation presented a high degree of danger.

#### Knowledge of Violation; Obviousness

Once again, this violation would have been obvious to Neidlinger in his capacity as the mine's co-owner and operator, the foreman in charge of daily operations underground, and the preshift examiner who had been examining the active working section since July 2014. Neidlinger knew the area south of the Bottom Split was a dead-end space with no ventilation controls, but after the roof collapsed, he decided to simply abandon the area without installing ventilation controls or constructing an airtight seal. Under the circumstances, he should have known that the area needed to be examined regularly to ensure that air quality problems were not developing that could affect the active areas of the mine. Yet he barricaded it off instead, affirmatively preventing anyone from traveling the area to check for bad air or other hazards. Tr. 110. I find that he knew of this violation, and his knowledge is imputable to Little Buck.

#### Notice of Need for Greater Compliance Efforts

There is no evidence that Little Buck received past similar violations or other specific warnings from MSHA that would have placed it on notice that greater efforts were necessary for compliance with the cited safety standard.

#### Abatement Efforts

Although Little Buck knew of this violation and could have easily abated it by conducted an examination of the cited area, no abatement efforts were undertaken until after Inspector Dudash issued the order.

### Conclusions

Based on the factors discussed above, particularly Little Buck's knowledge of this violation, the danger it posed, and the fact that the operator knowingly erected a non-airtight barricade which had the effect of preventing anyone from looking into or examining the cited area, I find that Little Buck exhibited aggravated conduct constituting more than ordinary negligence in violating § 75.360(b)(6)(ii). Accordingly, this violation was an unwarrantable failure to comply with the regulation, and Inspector Dudash properly issued the order under section 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

#### D. Order Number 8000754 (Ventilation Control Violation)

This 104(d)(1) order was issued on October 8, 2014 and alleges:

The Middle Split Mammoth Vein east is developed over 20 feet off the intake rock tunnel gangway without a crosscut or line brattice installed to provide adequate ventilation. The calibrated permissible multi-gas detector (Ser. No. A5-146096 & Approval No. 22-040001-0) measured 19.4% oxygen ten feet in this entry. Air passes by this entry to reach the working section working face, MMU-001-0, approximately 80 feet in by the entry. The preshift examiner, Edmund Neidlinger, is also the mine foreman and co-owner of this mine. The preshift exam record indicates that this entry has been abandoned since September 26, 2014. Two miners normally work on this section on a daily basis and are exposed to this hazard.

GX 3.

The standard alleged to have been violated is 30 C.F.R. § 75.333(g), which states in pertinent part: "Before mining is discontinued in an entry or room that is advanced more than 20 feet from the inby rib, a crosscut shall be made or line brattice shall be installed and maintained to provide adequate ventilation." The purpose of this provision is to "prevent the creation of 'dead-air' spaces" where harmful gases could accumulate. 57 Fed. Reg. 20868, 20885 (May 15, 1992).

The location cited in the order was the entry driven east on the Middle Split, where mining had been discontinued. The parties stipulated that this entry was not provided with a crosscut or other ventilation controls. Joint Ex. 1; Tr. 71, 75, 93-94. As discussed above, the entry was driven approximately 20 feet off the rock tunnel, which had been driven 20 feet beyond the barricade at the Bottom Split where air coursed by. This created a 40-foot dead-air

space. Inspector Dudash testified there was no air movement in the area beyond the barricade. Tr. 96.

Considering the foregoing, I find that Little Buck violated § 75.333(g) by failing to develop a crosscut or install any temporary or permanent ventilation controls to ensure that the face of the Middle Split workings was being ventilated properly and to prevent the accumulation of oxygen-deficient air, methane, or carbon dioxide.

## 2. S&S and Gravity

Inspector Dudash initially marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners, citing the potential for carbon dioxide to escape to the active working section and cause harm to miners and the likelihood it would accumulate to deadly levels if normal mining operations were to continue. GX 3; Tr. 112. In hindsight, he said he would consider marking the severity of the expected injury as “fatal” because analysis of the air sample he had taken in the cited area had revealed high carbon dioxide and low oxygen. Tr. 113.

The first element of the *Mathies* test for S&S is satisfied because a violation of a mandatory safety standard occurred.

The second *Mathies* element is also satisfied because the violation contributed to the discrete safety hazard that, if normal mining operations had continued, oxygen-deficient air or high levels of carbon dioxide could have accumulated in the dead-air space and seeped through the barricade into the areas where miners were actively working and traveling. As discussed above in connection with the previous violations, the likelihood of this hazard occurring was especially high considering that the barricaded area was not being regularly examined to ensure that no bad air was accumulating; that the miners on the active section were working in 100 feet of air (in the rock tunnel between the Bottom Split and Seven Foot Vein) that had passed by the barricaded area; and that there was no alternate travelway or escapeway in which they could have sought refuge from bad air.

As was also discussed above, the two miners regularly working on the active section could be overcome by the low levels of oxygen or high levels of carbon dioxide and could lose consciousness without even recognizing the hazard. Tr. 103-04. Thus, the injuries expected to result from this hazard, if it were to occur, would likely be serious or even fatal injuries resulting from suffocation. This satisfies the third and fourth elements of the *Mathies* test.

Because the four *Mathies* elements are met, this violation is S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners on the active working section.

## 3. Unwarrantable Failure and Negligence

Inspector Dudash assessed Little Buck’s negligence as high and designated this violation an unwarrantable failure because Neidlinger had been onsite directing the workforce and

conducting preshift examinations when the area south of the barricade was developed, but when he withdrew his men and equipment from the area, he made no efforts to ventilate it. Tr. 114.

#### Extensiveness of Violation; Duration; Degree of Danger Posed

Although only a 40-foot-long area was unventilated, this violation was extensive because it affected the entire working section south of the Seven Foot Vein and all of the miners working there. In addition, the efforts required to abate the violation were somewhat extensive in that Little Buck was required to re-timber the area where the roof had collapsed so that ventilation tubing could be extended toward the face of the Middle Split. GX 3; Tr. 202-04.

At the time of the October 8, 2014 inspection, the examination records indicated that Little Buck had discontinued mining in the cited area between September 26 and 30. Thus, this violation had existed for more than a week.

As discussed above in the S&S analysis, this violation posed a danger that bad air would develop in the unventilated dead-air space, would accumulate to harmful levels, and would seep out across the barricade into areas where miners were actively working, potentially causing death or serious injuries. Accordingly, I find that this violation presented a high degree of danger.

#### Knowledge of Violation; Obviousness

Inspector Dudash testified that this violation should have been obvious to Neidlinger because he was the preshift examiner and had years of mining experience. Tr. 114-15. “He knows that MSHA requires you to ventilate dead end faces, whether it be a[n] intake or a return air course,” Dudash stated. Tr. 115. I find that Neidlinger undoubtedly knew of this violation, as he was the mine foreman and preshift examiner during the time the cited area was developed and directed his men to withdraw without installing a crosscut or any other ventilation controls. Tr. 170. Neidlinger’s knowledge of the violation is imputable to Little Buck.

#### Notice of Need for Greater Compliance Efforts

There is no evidence that Little Buck received past similar violations or other specific warnings from MSHA that would have placed it on notice that greater efforts were necessary for compliance with the cited safety standard.

#### Abatement Efforts

Despite Little Buck’s knowledge of this violation, no abatement efforts were undertaken until after Inspector Dudash issued the order. Again, I do not find the erection of the barricade to constitute a mitigating factor because although the barricade prevented miners from traveling into the dead-air space, it was not airtight and therefore did not eliminate the hazard that bad air would escape and affect miners elsewhere on the active working section.

#### Conclusions

Based on the factors discussed above, particularly Little Buck's knowledge of the violation and the fact that it posed a high degree of danger, especially when considered in conjunction with the other violations present on the date of the inspection (such as failure to regularly examine the cited area and failure to maintain a secondary escapeway and a separate return airway on the active working section where miners would be affected by bad air seeping from the dead-air space), I find that Little Buck exhibited aggravated conduct constituting more than ordinary negligence. Accordingly, this violation was an unwarrantable failure to comply with the regulation, and Inspector Dudash properly issued the order under section 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

E. Citation Number 8000756 (Air Quality Violation)

This 104(a) citation was issued on October 22, 2014 and alleges:

The air, 10 feet in by an entry along the primary intake air course to the working section (MMU-001-0), contained 19.4% oxygen and 0.52% carbon dioxide according to MSHA laboratories analysis of air samples 5 gas report (MSIS Batch Date: 10-19-2014). This analysis is the result of a bottle sample taken October 08, 2014, after a calibrated permissible multi-gas detector (Ser. No. A5-146096 & Approval No. 22-A040001-0) measured 19.4% oxygen. This entry was approximately 80 feet out by the working section's working face where 2 miners normally worked on a daily basis.

GX 5.

The standard alleged to have been violated is 30 C.F.R. § 75.321(a)(1), which states in pertinent part: "The air in areas where persons work or travel ... shall contain at least 19.5 percent oxygen and not more than 0.5 percent carbon dioxide, and the volume and velocity of the air current in these areas shall be sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes." MSHA has noted that normal air contains about 20.9% oxygen and 0.03% carbon dioxide, while percentages outside the range specified in the regulation indicate an air quality problem that needs attention. 57 Fed. Reg. 20868, 20877 (May 15, 1992).

In this case, Inspector Dudash first detected low oxygen when his Solaris multi-gas detector alarm went off at 19.4% percent oxygen while he was in the rock tunnel about 10 feet south of the barricade at the point where the roof had collapsed, which was as far in as he could safely travel at the time. Tr. 69-70, 96, 99-100. Although the gas detector alerts whenever it detects 19.5% oxygen or lower, 19.4% was the lowest percentage Dudash observed on the day of the inspection. Tr. 96. As previously noted, there were no ventilation controls and no air movement in the area south of the barricade where the low oxygen was detected. Tr. 96. Consistent with the lack of air movement, Dudash explained that low oxygen usually develops when carbon dioxide accumulates in stagnant air, which reduces the proportion of oxygen from the normal level of approximately 20.8%. Tr. 70.

Neidlinger was carrying the same type of multi-gas detector, but his alarm did not go off. Tr. 97, 121-22, 175. However, when he asked Inspector Dudash on cross-examination whether a calibration issue could have caused the one detector to go off when the other did not, Dudash testified that he checks the calibration on his detector every morning and further noted that he took an air sample that later confirmed the low oxygen reading. Tr. 122. As previously mentioned, he had taken the sample using a vacuum bottle after his detector alarmed. Tr. 97-98. He had also taken bottle samples in the Bottom Split gangway and in the rock tunnel 20 feet outby the barricade. Tr. 97, 100. After leaving the mine, Dudash submitted all three bottle samples to an MSHA laboratory to be evaluated, and the results confirmed that the air sample taken 10 feet south of the barricade contained 19.4% oxygen and 0.52% carbon dioxide. Tr. 99, 122-23; GX 18. The two samples taken elsewhere revealed normal levels of oxygen (20.48% and 20.68%). Tr. 130; GX 18.

At hearing, Neidlinger pointed out that the oxygen level was only one tenth of a percentage point out of compliance with the 19.5% threshold and that the area where the low oxygen was detected “was only 6’ by 8’ high” and “[a]pproximately just say 35’ to the longest point.” Tr. 175. Neidlinger suggested that in such a small area, two people breathing for twenty minutes could have lowered the oxygen level by a tenth of a percent. Tr. 175. This argument disregards the results of the bottle samples taken elsewhere in the mine, which yielded 20.48% and 20.68% oxygen. The oxygen level south of the barricade was more than a full percentage point lower than this normal level, a discrepancy that is likely too large to attribute to Neidlinger and Inspector Dudash being present in the area and breathing. Moreover, two miners regularly worked together on the active working section at this mine, meaning that when Little Buck was still developing the cited area before it withdrew from the Middle Split and erected the barricade, two men would have been working and breathing in this small enclosed space at any given time. If the presence of two men were sufficient to reduce the ambient oxygen below the level of compliance, this would have indicated an air quality problem which Little Buck should have addressed.

The evidence shows that the oxygen level was 19.4% and the carbon dioxide level was 0.52% in the area south of the barricade. Although these numbers were only slightly out of compliance, I reject Neidlinger’s suggestion that the violation was negligible. MSHA purposely imposed the 19.5% and 0.5% thresholds set forth in § 75.321(a)(1). The 19.5% standard for oxygen is above that identified as resulting in impaired judgment, but MSHA, mindful of the “insidious nature of oxygen deficient air,” intentionally set the standard high in order to protect miners from losing consciousness before they can escape an area of low oxygen. *Jim Walter Res., Inc.*, 29 FMSHRC 212, 223 (Mar. 2007) (ALJ); *see also McElroy Coal Co.*, 30 FMSHRC 45, 64-65 (Jan. 2008) (ALJ) (discussing MSHA Program Information Bulletin which states that oxygen concentrations below 19.5% can have adverse physiological effects); 61 Fed. Reg. 9764, 9775-77 (Mar. 11, 1996). In addition, contrary to the stated requirements of § 75.321(a)(1), the volume and velocity of the air current in the cited area clearly was not sufficient to dilute and render harmless any dangerous gases, as there was no air movement in the area. Tr. 96. Accordingly, I uphold the violation of § 75.321(a)(1).

## 2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause fatal injuries to two miners, again citing the potential for carbon dioxide or oxygen deficient air to accumulate behind the barrier and escape to the active working section and cause harm to miners. GX 5; Tr. 102-03.

The first element of the *Mathies* test for S&S is satisfied because a violation of a mandatory safety standard occurred.

The second *Mathies* element is also satisfied because the violation contributed to the discrete safety hazard that, if normal mining operations had continued, the condition could have worsened, with oxygen deficient air and high levels of carbon dioxide accumulating in the dead-air space south of the barrier and leaking out into areas where miners were actively working and traveling. This hazard was likely to occur because the barricaded area was not being regularly examined, meaning that Little Buck likely would not have noticed the bad air until the condition worsened.

The miners in the rock tunnel north of the barricade were working in 100 feet of air that had passed by the dead-end space where the oxygen deficient air was discovered, and there was no alternate travelway or escapeway in which they could have sought refuge from bad air, so they were likely to be exposed to the hazard. If so, they could be overcome by oxygen deficient air, causing loss of consciousness and inability to escape from the area. For the reasons previously discussed, the resulting injuries would likely be serious or even fatal. Thus, the third and fourth *Mathies* elements are satisfied.

Because the four *Mathies* elements are met, this violation is S&S.<sup>10</sup> This was a serious violation because it could have caused death or serious injury to the two miners on the active working section.

### 3. Negligence

Inspector Dudash charged Little Buck with moderate negligence in connection with this violation. GX 5. He testified he saw no reason to mark the negligence as high because he had already issued high negligence violations for the root causes of the problem: failure to conduct a proper preshift examination and failure to ventilate the dead-end area beyond the barricade. Tr. 105-06.

I have found that this was a serious violation that exposed miners to the risk of serious injury. The violation resulted from Little Buck's failure to adequately ventilate the cited area. However, the gas levels were only slightly out of compliance, and this was not immediately obvious, as evidenced by Dudash postponing the issuance of the citation until he received the results of the laboratory analysis of the bottle sample confirming that a violation had occurred. There is no evidence as to how long the violative gas levels existed and no indication that

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<sup>10</sup> Because I have found all five of the violations to be S&S under the Commission's interpretation of the *Mathies* test, I decline to address the Secretary's argument in favor of a slightly different interpretation. See Sec'y Br. 24-25.

Neidlinger or any other member of mine management was aware of them before the citation was issued. I find that Little Buck's negligence was moderate.

## VI. PENALTY

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and 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).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 266 (May 2006).

The Secretary asks me to assess penalties of \$2,000.00 for each of the section 104(d)(1) violations at issue in this docket, which include Citation No. 8000752 and Order Nos. 8000753, 8000754, and 8000755. This penalty amount is the statutory minimum for 104(d)(1) violations. *See* 30 U.S.C. § 820(a)(3)(A). The Secretary further asks me to assess a penalty of \$308.00 for the violation alleged in Citation No. 8000756.

The Secretary has submitted a violation history form showing that Little Buck received just twelve violations from MSHA that became final during the fifteen months preceding the issuance of these violations. GX 14. As discussed in the body of my decision above, this included a citation issued on January 22, 2014 for beginning development of the same rock tunnel at issue in this case without obtaining the approval of the District Manager. GX 15.

The size of Little Buck's business is small. Just two miners regularly work at the mine in question, and the parties stipulated that the mine had produced just 5,117 tons of coal as of the inspection date. Joint Ex. 1. However, Little Buck has not argued before me that the proposed penalties will affect its ability to remain in business nor presented any evidence to that effect.



My findings regarding the gravity and negligence associated with the violations are discussed at length above in the body of my decision. The evidence indicates that Little Buck made good faith efforts to achieve rapid compliance after the inspection by extending ventilation tubing into the dead-end area south of the Bottom Split, examining the area, promptly submitting new plan addenda, and developing a monkey heading and a second rock tunnel to adequately ventilate the Bottom Split workings and provide a secondary escapeway.

After considering the six statutory penalty criteria, I find that the statutory minimum penalty of \$2,000.00 is appropriate for each of the four 104(d)(1) violations. I also find that a penalty of \$308.00 is appropriate for Citation No. 8000756.

### **ORDER**

Little Buck is hereby **ORDERED** to pay a total penalty of \$8,308.00 for the five violations at issue in this docket within thirty (30) days of the date of this Decision and Order.<sup>11</sup>



Priscilla M. Rae  
Administrative Law Judge

Distribution:

Ryan Kooi, Esq., U.S. Department of Labor, Office of the Solicitor, The Curtis Center, Suite 630E, 170 South Independence Mall West, Philadelphia, PA 19106-3306

Edmund C. Neidlinger, Little Buck Coal Company #2, 33 Pine Lane, Pine Grove, PA 17963

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<sup>11</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.