

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 15, 2019

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

v.

PEABODY MIDWEST MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2016-0421
A.C. No. 12-02295-416252

Docket No. LAKE 2017-0178
A.C. No. 12-02295-430695

Docket No. LAKE 2017-0382
A.C. No. 12-02295-434929

Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Edward B. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner,

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

These cases are before me upon three petitions for assessment of civil penalties filed by the Secretary of Labor (“the Secretary”) pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act” or the “Act”), 30 U.S.C. § 815(d). At issue are five § 104(d)(2) orders issued to mine operator Peabody Midwest Mining, LLC (“Peabody”) as a result of two separate inspections conducted by authorized representatives for the Department of Labor’s Mine Safety and Health Administration (MSHA).

A hearing was held in Evansville, Indiana, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. 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.

After consideration of the evidence and observation of the witnesses and assessment of their credibility, I uphold the five § 104(d)(2) orders as written for the reasons set forth below.

B. Stipulations

The parties have stipulated to the following facts:

1. Peabody Midwest Mining, LLC, is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. §803(d), at the coal mine at which the citation at issue in these proceedings was issued.
2. The Francisco Underground Pit mine is operated by Respondent in this case, Peabody Midwest Mining, LLC.
3. The Francisco Underground Pit mine is subject to the jurisdiction of the Mine Act.
4. At all relevant times, the products of the Francisco Underground Pit mine entered commerce or are products that affect commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.
5. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to §§ 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
6. 30 C.F.R. § 75.202(a) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
7. 30 C.F.R. § 75.364(b)(2) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
8. 30 C.F.R. § 75.400 is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
9. 30 C.F.R. § 75.362(b) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
10. 30 C.F.R. § 75.360(g) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
11. In Docket LAKE 2016-421, payment by Respondent of the proposed penalty of \$5,054.00 will not affect Respondent’s ability to remain in business.
12. In Docket LAKE 2017-178, payment by Respondent of the proposed penalty of \$154,363.00 will not affect Respondent’s ability to remain in business.
13. In Docket LAKE 2017-382, payment by Respondent of the proposed penalty of \$44,546.00 will not affect Respondent’s ability to remain in business.
14. The individual whose signature appears in Block 22 of the Orders at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
15. A duly authorized representative of the Secretary served the subject orders and any termination thereof upon the agent of the Respondent at the date and place stated therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish its issuance.

16. The orders contained in Exhibit A attached to the Petitions for Assessment of Penalty for these dockets are authentic copies of the orders at issue in this proceeding with all appropriate modifications and terminations, if any.
17. The exhibits listed in each party's List of Witnesses and Exhibits are true and accurate copies of the originals.

Joint Ex. 1; Tr. 7.¹

II. BACKGROUND

Peabody Midwest Mining, Francisco Underground Pit is a large underground bituminous coal mine located in Francisco, Indiana. MSHA inspector Ryan Seitz² conducted a quarterly inspection of the mine on June 7, 2016 at the 3rd Southwest Sub-Main R/S Return Entry #8. During his examination, he found what he determined to be hazardous rib conditions for which he issued an order, specifically at crosscuts #64-65 and #89-90 as a violation of 30 C.F.R. § 75.202(a). Upon an inspection of the weekly examination books pertaining to this entryway, he found the hazardous conditions were not properly noted in the examination record, nor were the corrective measures taken by the operator to adequately control the problem. As a result, he issued an order in violation of 30 C.F.R. § 75.364(b)(2) for an inadequate weekly examination of the entryway. Both of these orders were assessed as reasonably likely to result in permanently disabling injuries to one person, significant and substantial (S&S), with high negligence, and an unwarrantable failure to comply with the applicable mandatory standards. The proposed penalty for the violation of § 75.202(a) has been enhanced by a special assessment by MSHA.

On September 20, 2016, MSHA inspector Nicholas Vandergriff³ conducted a quarterly inspection of the mine at the 4th SE Belt Entry. The belt in this entry had been recently converted from two separate belts to one belt measuring almost one mile long. Along the belt, Vandergriff observed accumulations of coal, belt pressings, and float coal dust in what he determined to be hazardous dimensions over an extensive number of crosscuts. When compared to the examination record book, he found the hazards listed as Observed and Corrected did not correspond with the extensive conditions he observed underground. As a result, he issued three orders that day - one for accumulations of combustible materials, one for an inadequate pre-shift/on-shift examination, and the last for improper recordkeeping of pre-shift examination

¹ In this decision, the abbreviation "Tr." refers to the transcript of the hearing. There are two volumes to the transcript and the pages are numbered sequentially therefore they will not be referred to by volume number. The Secretary's exhibits are numbered Ex. S-#, Respondent's Ex. R-#

² Seitz had been with MSHA for approximately three years assigned to the Vincennes, Indiana office. He began his mining career in 2008 with Peabody Energy and then moved to Vectren Energy. He held mine foreman papers, methane certification, and respirable dust and impoundment certifications. He then attended the Mine Academy and became an Authorized Representative for MSHA.

³ Vandergriff had been employed by MSHA since 2015 at the Vincennes, Indiana office. He had worked for Sunrise Coal for nine years running all types of equipment including roof bolters and served as a face boss. He held mine foreman papers while at Sunrise. He then attended the Mine Academy to obtain his Authorized Representative card from MSHA.

results. Each of these orders was assessed as reasonably likely to result in fatal injury to 30 persons, S&S, with high negligence, and an unwarrantable failure to comply with mandatory health and safety standards.

Peabody contests each violation and asserts that each should be dismissed. In the alternative, it argues that none of the violations should be found as significant and substantial, of high negligence, or an unwarrantable failure. It also argues that there was no basis provided by the Secretary for the specially assessed penalties.

III. LEGAL PRINCIPLES

A. Standard of Proof

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 credible 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. Significant and Substantial and Gravity Findings

A significant and substantial 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 significant and substantial “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 significant and substantial:

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 has 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 significant and substantial 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 significant and substantial determination. *Wolf Run*, 36 FMSHRC at 1959; *Mathies*, 6 FMSHRC at 5.

The significant and substantial 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 significant and substantial. 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 significant and substantial 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. § 100.3(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. High negligence “suggests an aggravated lack of care that is more than ordinary negligence.” *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998).

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 § 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).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 9101931 (Docket No. LAKE 2017-0178)

1. *Finding of Facts*

Order No. 9101931 was issued by MSHA Inspector Ryan Seitz on June 7, 2016 during an E01 inspection of the Francisco Underground Pit. Tr. 25-26. Upon arrival at the mine, Seitz reviewed the inspection tracking documents to determine the areas of the mine that still required inspection. Tr. 29. He then traveled to the 3rd South West Sub-Main Return Entry #8 (“return entry”) with Matt Kamman, a mine employee escort, to begin the day’s inspection. Tr. 28. Immediately prior to their arrival, Jim Robinson, the weekly examiner, began an examination of the same section. Throughout the inspection, Seitz and Kamman encountered Robinson as he examined the area concurrently. Tr. 30-31.

Immediately upon reaching the return entry, Seitz observed loose ribs and loose coal material on the ground in the number 8 entry. Tr. 32; Ex. S-3. No timbers or floor-to-roof support was present in the areas of concern. Seitz questioned Robinson on how he identified hazards and how they are abated and communicated to management. As Seitz noted in his inspection notes taken contemporaneously with the inspection, Robinson stated there were too many hazards for one person to fix and he (Robinson) had another set of large air courses that he must examine during the same shift. Ex. S-3. Seitz testified that as he continued his examination of the number 8 entry, he remarked to Kamman and Robinson, “I’m starting to see some areas here I don’t really like.” Tr. 32.

As Seitz and Kamman walked inby, they observed Robinson, three or four crosscuts ahead of them, prying down loose ribs and hanging red flags. Tr. 34. Seitz noted at hearing that no red flagging, timbers, or any other stabling mechanisms were in place prior to Robinson’s work. Tr. 34-35. Seitz continued to observe sloughage, or coal material that comes down off the rib or ceiling, as he walked inby. The pathway measured 18 feet long and 6 feet wide. Tr. 35. Seitz rejoined Robinson at crosscut 80 and they continued together to crosscuts 89-90. Upon further discussion with Robinson, Seitz was informed that during the two years in which Robinson had been examining this area, the conditions observed by Seitz had existed. Robinson stated that it had always been “a problem area.” Tr. 94. In fact, Robinson told Seitz that the conditions were the same in 2013 and 2014 when the area was actively mined. Tr. 39. Robinson further informed Seitz that he had sat down with John Devers, Peabody’s General Manager, about 30 days prior and voiced his concerns to Devers about the conditions. Robinson said he also told Devers that an entire crew comprised of 30 to 40 miners armed with slate pry bars would spend an entire shift prying ribs down and it would not get them all. Robinson asked Devers, in fact, to take him off this examination route citing personal reasons but told Seitz the real reason was because he didn’t want to be in the area or sign the examination record book. Robinson characterized Dever’s response as minimal. Ex. S-3. Based upon his initial observations, Seitz informed Kamman and Robinson that he would be issuing a 104(a) citation because of the loose ribs. Robinson proceeded alone to continue his inspection. Tr. 33.

Upon continuing his inspection of the entryway, Seitz observed loose ribs and rib rash throughout the entire entry. He testified that most of the ribs in the area measured around 7.5 feet long, 4 feet high and 12 inches wide and gapped approximately 9 to 12 inches away from the wall. He observed rock dust within the gap behind these ribs, which indicated the conditions had been present for some period of time. Tr. 38. Additionally, Seitz stated that he did not observe any tire tracks from a scoop or a hose line for a trickle duster in the area. There were no bags of rock dust present for use in hand dusting and neither Kamman nor Robinson mentioned anything

about dusting methods used. Tr. 37. All of these factors led Seitz to the conclusion that the conditions were not new and had existed for an unreasonably long period of time without corrective action taken. Tr.37-41. Due to the number of loose ribs present and the lack of corrective action taken, coupled with Robinson's comments concerning how long the conditions had existed, Seitz informed Kamman that he was elevating the citation to a 104(d) order.⁴ Ex. S-3.

Matthew Kamman, a certified foreman, testified on behalf of Peabody. He contended that rib conditions change rapidly in a mine and the conditions observed by Seitz had occurred recently. Tr. 109, 126. Kamman stated that he worked in the area when it was actively mined and described that a mud seam ran through the ribs causing them to "flake off some" and explained that they would get worse as mining advanced. He stated that the ribs were scaled and extra bolts were added as needed. Tr. 108. He had not examined this cited air course recently. Tr. 109, 120. Kamman asserted that Seitz only found two loose ribs in the entire entry and otherwise found no violations. Tr. 111-14. He denied the comment contained in Seitz's notes that he said the ribs were "bad" when the area was actively mined in 2013 and 2014. Tr. 115, Ex. S-3, p. 22. Kamman confirmed that the black area left when a rib has been pried down will continue to appear black until the area has been rock dusted or a long period of time passes. Tr. 122. I find Kamman's denial of his comment to Seitz is not credible as Seitz recorded it in his notes contemporaneously with the event. I also find his minimization of the number of bad ribs found by Seitz to be unreliable as self-serving and contradicted by Seitz's very specific listing in his notes of the crosscuts affected and by the measurements he took. Ex. S-3.

Aaron Meador, a certified foreman, testified for Peabody. As an examiner of the cited entry, he stated that he would carry a pry bar with him and scale any loose ribs while he was making his examination. If a rib could not be addressed by him, he would hang a red danger flag. Tr. 129-30. He claimed there was a rock dust bore hole into which large quantities of dust would be dumped into the intake air course adjacent to the return causing dust to be vented through the return. Tr. 130-31. He claimed he would enter the specific location of any loose ribs he found in the examination book whether or not he pried them during his examination. However, he stated that at the time of this inspection it was not common practice to specifically identify the location where corrective action was taken during the pre-shift examination. It was only after being issued a citation by MSHA for not doing so that it became common practice. Tr. 133-34. Meador noted loose ribs recorded in numerous examination book entries and confirmed that the examination books were countersigned by management. Tr. 134-39, 144; Ex. S-4. I find Meador's testimony that he corrected all loose ribs during his examination to be contradicted by the sheer number of loose ribs found by Seitz and the fact that it took nine miners 24 hours to abate the order. Ex. S-1. It is also contradicted by the credible testimony of Seitz as confirmed by his inspection notes taken contemporaneously with the event.

⁴ Section 104(d) of the Mine Act states in relevant part that when an inspector finds a violation that is of such a nature that it could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard, and that is caused by an unwarrantable failure of the operator to comply with the mandatory standard, he shall include such finding in any violation issued to the operator under this Act.

John Devers, General Manager, testified that Robinson left Peabody in July 2016 and that he had never spoken to Devers about the rib conditions. Tr. 150. He maintained that Robinson and he never spoke of work – only personal things. Tr. 154. He also attributed the loose ribs to the mud seam and stated that it made the ribs less stable than elsewhere in the mine. Tr. 154. I find Devers’ testimony to be unreliable. There is no objective reason why Seitz would record a conversation he had with Robinson on the day of the inspection in such detail had it not taken place. It is also corroborated by the fact that shortly after this event, Robinson left the employment of Peabody when Devers did not respond to his complaint about the condition of the ribs and his request to be relieved of his duties to examine this entryway.

2. The Violation

The narrative section of Order No. 9101931 states that the 3rd South West Sub-Main R/S Return Entry #8 from crosscuts 64 to 90 were found to have rib rash and multiple loose ribs on both rib lines exposing the weekly mine examiner to the hazard of being crushed by rib rolls and/or rib failure, in violation of 30 C.F.R. § 75.202(a). Ex. S-1.

The violation is assessed as high negligence, S&S, and an unwarrantable failure affecting one person and reasonably likely to result in permanently disabling injuries. The Secretary has proposed a specially assessed civil penalty of \$40,400.00 as the cited standard is identified as a “Rule to Live By” standard and the most frequently cited as causing fatal accidents. Ex. S-5.

This regulation mandates: “The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. § 75.202(a).

Respondent argues that the violative conditions found by Seitz occurred at some time after the last examination. Further, it asserts that a violation did not occur because it took reasonable efforts to control the loose roof and ribs in the return entry as established by its witnesses. I do not find Respondent’s argument to be persuasive. While it is true that weekly examiners recorded that they had identified and pried down some loose ribs in this area, the credibility of this examination record is questionable because the examiners failed to specifically record the areas where loose ribs were located and pried down, as required. Tr. 44; Ex. S-4. Furthermore, Seitz contradicted the accuracy of the examination records based on his observations of the entry. He saw no evidence of recent pry-downs. Instead he observed dark gray rock dust on the floor, no evidence of rock dusting equipment tracks, or material for hand dusting. The gap identified by Seitz was obviously not recent as indicated by the color of the rib behind it. He was informed by Robinson that the conditions in this entry were so bad that a crew of 30 to 40 miners could not pry all the loose ribs in one shift. Indeed, Robinson had asked to be taken off the section because he no longer wanted to examine it. In addition, the extent of the hazardous conditions contradicts Respondent’s argument that examiners consistently pried down ribs in the weeks prior. While conditions can change rapidly, the existence of 35 loose ribs over the course of 4,000 feet, an overwhelming length, does not support Respondent’s claims of reasonable efforts to control the ribs in this area. Tr. 46.

Additionally, relying on the premise that adequate measures were being taken to pry loose ribs during the examinations, Respondent argues that the presence of a loose roof or ribs alone does not establish a violation of the section. Respondent relies on *Jim Walter Resources, Inc.*, (JWR), 30 FMSHRC 872, 879 (ALJ) (Aug. 2008); *Harlan Cumberland Coal Co.*, 22 FMSHRC 672, 681 (ALJ) (May 2000); and *Energy West Mining Co.*, 18 FMSHRC 1628, 1639 (ALJ) (Sept. 1996). Respondent's reliance on these cases is misplaced. While each of these decisions is an Administrative Law Judge's and thus have no precedential value, they are also clearly distinguishable on their facts. In each of these cases, a sudden rock fall or coal burst had occurred. In *JWR*, Judge Zielinski found the MSHA investigator issued no violations for unsupported roof and was of the opinion that *JWR* was following its roof control plan and a reasonably prudent person familiar with the mining industry and the protective purpose of the Act would not have concluded otherwise. Likewise, Judge Cetti found in the other two cases that the failure of the pillars was unpredictable and that the operator had fully complied with their roof control plan approved by MSHA. In the case of *Energy West*, the evidence was clear that the operator had been working in conjunction with MSHA to deal with the overburden on the pillars and had followed suggestions offered by MSHA. Judge Cetti found in both cases that a reasonable person familiar with the mining industry and the protective purposes of the Act would not have found the operator's actions to be unreasonable in light of the circumstances known at the time of the event.

I find in the instant case any reasonable person familiar with the mining industry would recognize that Peabody was not adequately addressing the loose rib problem which had been known to management for a prolonged period of time. They were not sufficiently pried down, there was no additional support through bolting or timbers and they were of such a number that, as Robinson stated, it would take more than a crew of 30 men over the course of an entire shift to begin to correct them all. While that was an exaggeration, it did in fact, require 9 miners 24 hours to pry down the ribs sufficiently to terminate this violation. Ex. S-1. I find that this violation occurred.

3. Gravity and S&S

The first prong of *Mathies* has been satisfied in my finding a violation occurred. Based upon the conditions described by Inspector Seitz, I find the second prong of *Mathies* has also been satisfied. The discrete safety hazard, a weekly examiner being crushed by rib rolls or a rib failure, was contributed to by the presence of 35 loose ribs over the course of 4,000 feet that had existed for a prolonged period of time without corrective action being taken. As even Respondent's witnesses confirmed, the condition of the ribs can change and worsen rapidly, which underscores the dangerousness of the hazard involved if corrective action is not timely, ongoing, and consistent. As Seitz stated, an examiner would be exposed to the hazards of a rib fall during each examination and he would not be walking past one loose rib for "one or two seconds," but instead traveling a large area "past a lot of ribs." Tr. 49. Because of this prolonged exposure to loose ribs, Seitz found it reasonably likely the examiner "would be struck with a rib." Tr. 49.

The third and fourth prong of *Mathies*, the reasonable likelihood that the hazard contributed to will result in an injury and that the injury will be reasonably serious, are easily

established by the inspector's common sense, as he stated being hit by a loose rib that measures as much as 29 feet long, 6 feet high, and 12 to 14 inches thick and weigh, at a minimum, approximately 10,000 pounds, would be at least permanently disabling. Tr. 50. Violation of this mandatory standard is known to be one of the most frequently cited for causing fatal accidents. Ex. S-5.

Respondent contends the violation is not S&S because it would be unlikely that the weekly examiner would be traveling the entry at the exact time and place that a rock or rib would roll, thereby causing injury. Resp. Br. 15. It further argues that an injury was not likely because the entry was only traveled once a week by one examiner who would correct the hazards as he found them during his pre-shift examination. Respondent relies on Administrative Law Judge decisions *Ohio County Coal Co.*, 31 FMSHRC 1486, 1489 (ALJ) (Dec. 2009) and *Freedom Energy Mining Co.*, 32 FMSHRC 1809, 1829 (ALJ) (Dec. 2010) for the proposition that this "simultaneous" occurrence of events is necessary to find this violation is S&S. However, these decisions are both Administrative Law Judge decisions and therefore do not express the position of the Commission, nor do they serve as legal precedent. Furthermore, this "confluence of factors" has been addressed by the Commission in cases involving explosions and fires in mines, not roof and rib falls. See *Paramount Coal Co., Virginia, LLC*, 37 FMSHRC 981 (May 2015); *Consolidation Coal Co.*, 35 FMSHRC 2326 (Aug. 2013). Those cases discussed the presence of all three elements necessary to cause a fire or explosion – potential ignition sources, fuel, and methane or coal dust. There is no requirement that the Secretary establish the likelihood of simultaneous events, as the Respondent states, for this type of violation to be S&S.

The Respondent cites to *Patriot Mining LLC*, 31 FMSHRC 1464, 1470 (ALJ) (Dec. 2009) in support of his second argument which is equally unpersuasive. Again, the decision does not carry precedential value and has been squarely addressed to the contrary by the Commission. In *Paramount*, the trial judge found that there was not a confluence of factors which would have resulted in an ignition of a belt fire because wooden baffles that were causing friction were immediately removed from service. The Commission, in its remand, stated, "the operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations continued." *Paramount*, 37 FMSHRC at 985 (quoting *Rushton Mining Co.*, FMSHRC 1432, 1435 (1989)). The Commission has also stated that the argument that a condition would be corrected in a pre-shift examination "is at odds with the basic tenets of mine inspection requirements, in that all violations could be defended against as to whether they are S&S by maintaining that they would have been recognized in the next pre-shift examination." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug 2013). Additionally, while Respondent maintains that only one miner traveled this entry once per week, it ignores the fact that in order to address the hazard it would and did require 29 miners over a 24 hour period to correct the hazard thereby increasing the exposure to the number of persons over a much broader time period if Peabody were to properly maintain the safety of the ribs.

I find that, assuming continued normal mining operations, the *Mathies* test has been met. I also find the gravity of this violation to be extremely serious affecting one miner, being the weekly examiner, and likely to result in at least permanently disabling injuries.

4. *Negligence and Unwarrantable Failure*

Seitz stated his rationale in assessing the negligence as high as that Robinson, a foreman, was acting as an agent for the operator while conducting his examination. When Seitz issued the verbal citation, Robinson had nothing to say in mitigation. In fact, Robinson stated that he had spoken with Devers 30 days earlier about the condition of the ribs and that he could not correct them during his examination because he had other air courses to examine and it would take dozens of miners to pry all the loose ribs down. Tr. 51-52, Ex. S-3. Kamman could not give Seitz any mitigating factors either when he was asked. Tr. 51. I find the conduct here exhibited an aggravated lack of care that is greater than ordinary negligence. The operator is required to be alert for hazardous conditions such as loose ribs that can cause injuries to miners and to take necessary precautions to prevent or correct them. As Seitz described, the loose and gapping ribs were throughout the entry and patently obvious to anyone. Management was aware of the problem which had existed sufficiently long to expose at least the weekly examiner to such danger. It neither took preventive measures in the form of timbers or barricades, nor did it take sufficient corrective measures as evidenced by the state in which they were found by Seitz. I find this violation is the result of high negligence.

Seitz designated the violation as an unwarrantable failure to comply with a mandatory standard, because the loose ribs were extensive in that they were “everywhere they looked” and they were hanging off the wall. Tr. 53. In his opinion, they had been that way longer than the previous weekly examination and there were no danger flags, barricades or timbers. The danger was that, while walking through this entry, ribs were hanging over a miner’s head, on both sides of the passage, and these ribs could come down and the condition was very obvious. Tr. 53-4. He determined that the operator was aware of the condition because the notation of loose ribs had been in the examination book since April 19, 2016. The book is signed by the examiner, who is an agent of the operator, and countersigned by the superintendent. Tr. 54, 60, 144. Seitz stated that management was on heightened “negligence” for loose ribs and roof from prior violations. He explained that MSHA keeps a record in their office of mines with prior § 75.202(a) violations. The lead Authorized Representative determines when to put a mine on the list and informs the operator of it. On June 7, 2016, this mine was still on that list. Tr. 55-56.

At the hearing, Seitz reiterated that the loose ribs had existed, in their current form, for at least a week and possibly since April 19, 2016, when loose ribs were marked in the weekly examination book. He based this duration estimate on the existence of dark-gray rock dust on the ground and in the gaps between the loose ribs and the passage wall. Tr. 53. Respondent’s examiner, Jim Robinson, conceded the area was known to have rib problems as the same conditions had existed in 2013 and 2014. Tr. 53. Seitz testified that “everywhere they looked . . . there were loose ribs.” Tr. 53. In addition, he observed no attempt to abate the condition, prior to Robinson’s simultaneous examination, through flagging, timbering, or prying. Tr. 58-61.

The Secretary argues the unwarrantable failure designation should be upheld based upon the inspector’s assessment of the circumstances.

Respondent argues the violation did not result from aggravated conduct. Relying on *IO Coal*, in which the Commission held that whether the operator engaged in abatement prior to the

subject inspection is a key consideration in an unwarrantable failure analysis, Respondent argues it took necessary steps to identify and pry the loose ribs during the preceding seven weeks. Tr. 43; Resp. Br. 18. In addition, Respondent argues the hazardous conditions were neither extensive nor lasted an extended period of time. Resp. Br. 20-22. Based upon my analysis below in addressing each of these factors, I uphold the unwarrantable failure designation.

(a) Extensiveness of Violation

The extensiveness of a violation can be analyzed in terms of the physical dimensions of the affected area, the number of persons endangered, the efforts required to abate the violation, or other similar factors. *Twentymile Coal Co.*, 36 FMSHRC 1533 (June 2014); *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992); *E. Assoc'd Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010). Other factors that may also be relevant to extensiveness include the number of persons affected by the violation and the measures required to abate it. The Commission has stated that the extensiveness inquiry “ultimately is a fact question concerning the material increase in the degree of risk to miners posed by the violation,” and should account for the broad scope of the circumstances surrounding the violation. *E. Assoc'd Coal Corp.*, 32 FMSHR at 1196 (instructing ALJ to consider extensiveness of abatement measure needed to terminate the citation).

In this case, the condition was found throughout almost an entire entry; a total of 35 ribs were loose on both sides of the walkway for 50 crosscuts, or 4,000 feet. Tr. 53. To terminate the violation, it required 9 miners over the course of 24 hours to pry down the loose ribs. The condition was extensive in both physical dimensions and the amount of effort it took to abate it.

(b) Duration of Violative Condition

According to the mine’s own records, the rib violations existed since at least April 19, 2016. This was seven weeks prior to Seitz’s inspection. This significant duration meant that a mine examiner walked through this passage, past loose rib after loose rib, seven times. Tr. 59. Robinson and Kamman admitted similar conditions had existed as far back as 2013 and 2014, when the area was actively mined. Tr. 39, 108. Ex. S-3. While the current conditions likely did not date back to 2013 or 2014, they had, at the very least, existed for a week, according to Seitz’s estimates based on the gray color of the rock dust and the absence of rock dusting equipment. While the exact length of time is difficult to determine, the Commission has stated that even imperfect evidence of duration should be taken into account by the judge. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). Because it was clearly established that the condition of loose ribs can worsen quickly, one week is sufficiently long to cause a serious injury.

(c) Degree of Danger Posed by Violation

Both the extent of the dangerous conditions, which increased the likelihood of a hazardous event, as well as the inability of the examiner to contact others in the case of that event, contributed to the high degree of danger that a failed rib would strike or crush an examiner, rendering him permanently disabled or worse. This violation was extremely dangerous as evidenced by the fact that this standard is the most frequently cited as the cause of fatalities.

(d) Obviousness of Violation

The violation was very obvious.

From the outset of the inspection, Seitz immediately noticed the area looked “a little rough” as he observed loose ribs. He even remarked to Kamman and Robinson, “Hey, I’m starting to see some areas here I really don’t like.” Tr. 32. These were not hidden dangers, rather “everywhere they looked . . . there were loose ribs.” Tr. 53. The gaps formed between the sloughing material and the passage wall was not insignificant. Seitz observed the material was sloughing away from the wall by 9 to 12 inches. He could easily observe rock dust in these gaps. Tr. 38.

(e) Operator’s Knowledge of Existence of Violation

An operator’s knowledge may be actual or constructive. Knowledge of the predicate circumstances is sufficient to establish constructive knowledge. *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010).

As stated above, the obviousness of the violation, the frequency with which it was recorded in the examination books, and that fact that the operator was put on notice that greater efforts at compliance were necessary to address the problem, make it clear that the operator knew of the long-standing existence of the violation. I make this finding even discounting the fact that Robinson addressed the hazards with Devers prior to this subject inspection.

(f) Operator’s Efforts at Abating Violative Condition

The focus of this element is the efforts, if any, made by the operator prior to the issuance of the order. Seitz found no evidence Respondent attempted to abate the dangerous conditions prior to his inspection. I find this assessment to be credible. Seitz asked both Robinson and Kamman what had been done to remedy this problem. Neither gave an adequate answer. Seitz did not observe any flagging, aside from the flags placed by Robinson on the day of the inspection, nor did he observe any timbers or freshly-pried sloughage (again, aside from that created by Robinson during the course of the simultaneous examination). It is evident that Respondent knew of the dangerous conditions and took no action to abate the conditions prior to Seitz’s inspection.

(g) Operator’s Notice that Greater Compliance Efforts Were Necessary

An operator’s history of past similar violations or other specific warnings from MSHA is relevant to inform the operator of the interpretation of a standard or when it can be charged with a violation. To demonstrate notice of the need for greater compliance for unwarrantable failure purposes, the operator’s history of violations, discussions with inspectors, and other forms of specific warnings by MSHA, as well as evidence of record including shift book reports evidencing notice to management of a recurring safety problem in need of correction, is relevant. *IO Coal*, 31 FMSHRC at 1353; *Lion Mining Co.*, 18 FMSHRC 695 (May 1996); *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992).

According to the inspection notes, Respondent was cited 22 times for violations of 75.202(a) since February 2, 2015. Exs. S-3, S-6. In addition, Seitz explained that the mine was put on heightened notice for greater compliance and management was made aware of this when it was added to the record kept at the MSHA office. Tr. 55-56. Furthermore, both Respondent and the Secretary introduced multiple examination reports showing prying of loose ribs and other actions such as bolting were ongoing requirements. Exs. R-2, R-3, R-5; Ex. S-4, 1, 3, 5-7, 9-11, 13-15, 17-19, 21-27, 30. Witnesses for Peabody confirmed that this area was known for having loose ribs that changed and worsened rapidly. The examination books, which are countersigned by the superintendent, clearly demonstrate that the operator should have been keenly aware by the ongoing nature of the hazard that greater efforts at compliance were necessary. Yet no additional support was present in the entry.

(h) Weighing the Factors

Obviousness and the degree of danger posed by a violation alone can support an unwarrantable failure finding. *Manalapan Mining Co.*, 35 FMSHRC 289 (Feb. 2013); *Windsor Coal Co.*, 21 FMSHRC 997 (Sept. 1999). I have already found that the rib condition existed throughout the number 8 entry and that roof and rib falls are known throughout the industry to be the leading cause of mine fatalities. In light of this, that Peabody had done nothing more to support the ribs than expect the weekly examiner to pry them down while covering thousands of feet of entries during his examination is tantamount to subjecting him to a game of Russian Roulette. These two elements are sufficient to show the complete disregard Peabody exhibited for the safety of its miners. In this case, there is also ample evidence to satisfy each of the other factors within the unwarrantable failure analysis set forth by the Commission. The existence of 35 loose ribs over the course of 4,000 feet demonstrate an extensive violation. The hazardous conditions had been present for at least one week, but had definitely existed, in some form, for at least seven weeks. Respondent knew these conditions existed, as they had been recorded in the weekly examination record, and Respondent knew greater efforts were necessary for full compliance. For these reasons, I find these factors support a finding of reckless disregard for safety and higher than average negligence.

B. Order No. 9101933 (Docket No. LAKE 2016-0421)

1. *Finding of Facts*

After making his inspection of the number 8 entry, as detailed in the above Order, Seitz went to the surface to review the examination book for the period between April 19 and May 31, 2016. Tr. 43; Ex. S-4. Upon reviewing the records, he discovered examiners had recorded the existence of loose ribs in the area and that these loose ribs had been “prided down.” Tr. 43. The examination book had been countersigned by several supervisors including Superintendent Eric Carter. Ex. S-3. He questioned Robinson as to why the precise number and locations of the ribs were not documented as required and Robinson’s response was that “he would run out of room in the book” if he did so. Tr. 43. Aaron Meador confirmed that it was not until the operator received a violation for inadequate examinations that they started listing specific locations for hazards found and he never thought it was necessary to do so if the hazard had been corrected.

He said this was because no one would have to come later to correct it so he didn't think such precision was necessary. Tr. 133. However, as I have found in the previous order, the conditions were not being corrected during the examinations or thereafter. As Seitz testified, there was no visible evidence that such prying had taken place. There were also no timbers, barricades, or other means of support in the area.

2. *The Violation*

The narrative section of this order issued by Inspector Seitz states that an inadequate weekly examination was conducted on the 3rd South West Sub-Main R/S Return air course. It cites the same conditions of the ribs as cited in the previous order and goes on to document that the record book "lists hazards as loose ribs only, and pried ribs down as the action taken." Ex. S-2. The order is assessed as reasonably likely to result in permanently disabling injury to one person, S&S, high negligence, and an unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a penalty of \$5,054.00. Ex. S-2.

The cited mandatory standard requires:

At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations: . . . (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. § 75.364(b)(2).

In his post-hearing brief, the Secretary argues Respondent violated 30 C.F.R. § 75.364(b)(2) in two distinct ways. First, a violation occurred when Respondent's weekly examiners recorded that they had pried down loose ribs in the return entry, despite the fact that Inspector Seitz observed no newly-pried materials to corroborate that claim. Sec'y Br. 14. Second, Respondent violated § 75.364(b)(2) when its weekly examiners recorded the existence of loose ribs and their actions of prying down those ribs, but did not list the exact locations of the ribs or the actions taken, despite the requirement for specificity. Sec'y Br. 15.

Respondent argues the weekly examinations, both the one conducted by Mr. Robinson on June 7, 2016, and those previous, were adequate and thus no violation of § 75.364(b)(2) occurred. Respondent summarizes the steps taken by Mr. Robinson on June 7, 2016, including checking, flagging, and prying ribs, as needed. Tr. 73, 111; Resp. Br. 12. In addition, Respondent argues that prior weekly examinations were accomplished in a similar fashion. Resp. Br. 12.⁵

⁵ Respondent also argues that the written order is invalid as it does not provide the required specificity as to the date and time of the particular examination that was inadequate. This order was issued orally during the examination by Seitz who was accompanied by a representative of management. The reason for the violation was explained to him at the time the violation was found. The Commission has consistently held a written violation is sufficient if the operator is adequately advised of the violating conditions and the operator was sufficiently

I do not find Respondent’s arguments to be persuasive. While some notations were made in the book concerning loose ribs and prying them down, Robinson and Meador confirmed conditions were omitted or not specified due to common practice of the mine and the sheer number of hazards they would have had to document. Ex. S-4. Seitz was quite clear in explaining that even hazards that no longer exist, i.e., those which have been abated, must be recorded with particularity. Tr. 45.

In a recent unpublished opinion issued by the United States Court of Appeals for the District of Columbia, the court addressed the recordkeeping requirement by mine examiners for hazardous conditions and corrective actions taken in a situation where the examiner recorded in the book “slope needs cleaned – work in progress.” *Mach Mining, LLC. v. FMSHRC*, No. 18-1048, Sept. Term, 2018 (DC Cir. 2019). The operator argued that this was sufficient to record the nature and location of the hazardous condition. The Court of Appeals upheld the judge’s determination that it was not sufficient. It concluded that the location must be sufficiently recorded so that those who read it will know where and how to address the problem. *Mach Mining, LLC.*, No. 18-1048, Sept. Term, 2018 (DC Cir. 2019).

The Commission, in its review of the trial judge’s decision in *Mach*, categorically rejected Mach’s contention that the language of the standard does not require any degree of specificity. *Mach Mining II*, 40 FMSHRC 1 (Jan. 2018). The Commission held that there were multiple locations over a distance of 105 feet where accumulations were in contact with the belt. The inspector had testified that the notations in the book were deficient because the slope belt needed cleaning every shift. The same notation appeared in the examination book over the course of dozens of examinations. The Commission stated, “MSHA has recognized that “[a] record of all hazards found, as well as the required corrective action, serves as a history of the types of conditions that can be expected in the mine. When the records are properly completed and reviewed, mine management can use them to determine if the same hazardous conditions are recurring and if the corrective action being taken is effective.” *Mach Mining II*, 40 FMSHRC at 12 (citing *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (Mar. 11, 1996)). The Commission found the vague language in Mach’s examination book frustrated the purpose and further did not enable miners to know of dangerous conditions before they went underground. *Mach Mining II*, 40 FMSHRC at 13. The language in the recordkeeping regulation involved in *Mach* is essentially identical to that contained in the regulation cited here. That is, “a record of hazardous conditions and violations . . . found during each examination and their locations, and corrective action taken” are to be recorded in the examination book. 30 C.F.R. § 75.364(h).

The purpose of both mandatory standards, § § 75.363(b) and 75.364(h), is identical – to help identify recurrent conditions, assess the effectiveness of corrective action taken, and to protect miners before going underground. Although Seitz’s Order is not charged as a violation of the recordkeeping section of § 75.364, if the record is inadequate, then the entire examination

notified of them in order to abate them. Additionally there was no prejudice to the operator in their preparing for trial as pretrial discovery was robust. *See Jim Walters Resources*, 1 FMSHRC 1827 (Nov. 1979); *Twentymile Coal Co.*, 26 FMSHRC 666 (Aug. 2004).

is for naught and frustrates the purpose of identifying ongoing problems, correcting them, and protecting the health and safety of the miners.

The facts in *Mach* are also analogous to the instant case. The hazards were numerous and widespread over the course of a 4,000-foot-long entry. The record books indicated, as did the witnesses from Peabody, that this area was known to have recurrent problems with the ribs. To abate the violation, nine miners spent 24 hours cleaning the area. Had the examination been adequate and the specific locations and corrective actions been recorded, it should have been readily apparent that the measures taken were deficient and more support was needed. It also forced the weekly examiners to go underground not knowing exactly where the hazards would be located and exposing them to an unreasonable danger.

I find the Secretary has met his burden of proving this violation.

3. Gravity and S&S

Inspector Seitz characterized this as an S&S violation essentially for the same reasons as the previous Order. Tr.57. The weekly examiner would go through the area by himself exposed to large ribs either coming down off the top or sloughing down which would be reasonably likely to cause an injury. Any injury would be serious in nature and permanently disabling. Since the examiners did not have trackers on them, he would be unable to contact anyone for help. Tr. 57-58. Respondent disputes the S&S finding and makes the same argument against such a finding as it made concerning the S&S finding for Order No. 9101931. Because the argument is duplicative, I incorporate my earlier analysis, as applied to Order No. 9101931, here.⁶

I find that this violation meets the four elements of the *Mathies* test and therefore I uphold the Secretary's characterization of the violation as S&S. Respondent violated § 75.364(b)(2), a mandatory safety standard, when it failed to adequately conduct a weekly examination of the return entry. This created a "measure of danger to safety" because it increased the likelihood that hazardous conditions within the return entry, such as loose ribs, would go unresolved. *Mathies*, 6 FMSHRC at 3-4. The Commission has found that the failure to conduct an adequate pre-shift examination satisfies the third prong of the *Mathies* test, because such a failure "exposed its miners to the underlying hazardous conditions." *Dominion Coal Corp.*, 35 FMSHRC 3557, 3600 (Dec. 2013). Here, an inadequate weekly examination exposed miners to a reasonable likelihood of an injury sustained by a rib failure and such injury would be serious.

I find that, assuming continued normal mining operations, the *Mathies* test has been met. I also find the gravity of this violation to be extremely serious affecting one miner, being the weekly examiner, and likely to result in at least permanently disabling injuries.

⁶ As stated above, the argument that a condition would be corrected in a pre-shift examination "is at odds with the basic tenets of mine inspection requirements, in that all violations could be defended against as to whether they are S&S by maintaining that they would have been recognized in the next pre-shift examination." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug 2013).

4. Negligence and Unwarrantable Failure

Seitz testified that he marked this violation as high negligence and an unwarrantable failure for the same reasons as the previous order. Peabody contests the negligence and unwarrantable failure designation based on the same arguments raised and addressed in the previous Order. I find they are not persuasive for the same reasons set forth in my analysis above.

I uphold the high negligence designation for the reasons set forth in the previous Order. I also find the unwarrantable failure designation to be supported for the same reasons set forth above and reiterated below.

(a) Extensiveness of Violation

The extensiveness was demonstrated by the fact that there was no specificity in the examination book to determine how many or where the ribs were that needed correction. In fact Seitz found far more loose and sloughing ribs, and in many more locations, than was indicated in the examination record. In fact, he found loose and sloughing ribs on both sides of the entry throughout the 4,000-foot length of it with no flagging, barricading, timbering, or prying having taken place. The violation was also extensive in the sense that it had been the historical practice at the mine not to indicate the location or corrective actions taken in the examination book until a violation for failing to do so was issued. The statements of both Robinson and Meador confirmed this.

(b) Duration of Violative Condition

Seitz reviewed the examination book back as far as April 19, 2016, in determining that the record was not being properly completed. Tr. 44, 59. The weekly examiners failed to adequately record the results of their weekly examinations for at least seven weeks. However, as Robinson told Seitz, he never put all the information in the book because he would run out of room. Meador confirmed that at the time of this inspection, they had not been in the practice of recording that information in the examination book. It was not until they were cited for not doing so that the practice changed. It is unclear just how far back the practice went but it is abundantly clear that it was far too long considering the danger posed to the examiner making his weekly examination. It would additionally pose the same danger to miners had Respondent assigned the appropriate number of persons needed to maintain the ribs in satisfactory condition.

(c) Degree of Danger Posed by Violation

The degree of danger posed by the inadequate, even misleading, record of the weekly examination was great. As discussed, despite the fact that examiners claimed to have pried down loose coal material during prior weekly examinations, Seitz witnessed no evidence to corroborate this claim. Tr. 53. Therefore, the inadequate weekly examinations created a situation where a miner would go underground without knowledge of where loose ribs were located, thus exposing him to grave danger. It did, however, enable management to ignore the fact that this was a serious ongoing problem which required greater corrective action to protect its miners. This rib

failure could have catastrophic effects, including the striking, crushing, or pinning of a miner. Tr. 49.

(d) Obviousness of Violation

A trained weekly examiner of a mining operation would have known the requirement to list the specific locations of hazards and the actions taken to abate them. The two-word notations, “loose ribs” and “pried down,” lacked any specificity sufficient to alert other examiners, miners, or mine management of the location of these hazards. This would have been obvious to any informed reader of the examination book.

(e) Operator’s Knowledge of Existence of Violation

Testimony from both Seitz and Peabody’s witnesses confirmed that once the weekly examiner signed the examination book, it was countersigned by the Superintendent of the mine. Tr. 54-55, 60, 141, 144. Based upon the extensiveness and obviousness of the rib condition compared to the vague and very few notations in the book, I find the operator had at least constructive knowledge of this violation.

(f) Operator’s Efforts at Abating Violative Condition

While the examiner noted that “loose ribs” were “pried down” in preceding examinations, Seitz found no evidence that loose material had been pried down in the passage. Tr. 48. No visible evidence, in the book or the passage, demonstrated an effort to abate the violation. Tr. 53. There was also no evidence presented that the operator took any steps to instruct or train the examiners to properly complete the examination books until they were cited for the behavior.

(g) Operator’s Notice that Greater Compliance Efforts Were Necessary

Respondent was aware of the need for greater compliance efforts in conducting weekly examinations because it had been cited 15 times for violating § 75.364(b) since June 29, 2015. Ex. S-3. Seitz stated that the mine was on heightened negligence for this condition and it was communicated to the operator. Tr. 61

(h) Weighing the Factors

There is ample evidence to satisfy each of the factors within the unwarrantable failure analysis set forth by the Commission. It had obviously been the practice of the examiners to omit from the record book the specific location and action taken of hazards found. Whether it was because the conditions were so extensive that the examiner would run out of room in the book or because it would have revealed to the MSHA investigator, who reviews the mine books during each quarterly inspection, how extensive and unabated the conditions were is immaterial. As the Commission has stated, the specificity required in the examination book is to protect miners from entering an area without warning of the potentially deadly hazards that may exist there. It also serves to identify for the operator ongoing problems that would require more

extensive remedial action. The book was countersigned by the Superintendent of the mine which means such behavior was at least condoned by management making the violation that much more egregious. I find the danger posed by this violation alone supports a finding of an unwarrantable failure to comply with the mandatory standard.

C. Order No. 9101766 (Docket No. LAKE 2017-0178)

1. *Finding of Facts*

MSHA inspector Nicholas Vandergriff issued this order on September 20, 2016, during his quarterly inspection of the mine. Tr. 163. Vandergriff started his inspection by reviewing the mine's files including roof control and ventilation plans to check for deficiencies. He also reviewed a copy he brought from the heightened negligence book retained at MSHA. This mine had been on the list for accumulations since July 2015. Tr.157, 217. He was then escorted underground by Randy Hammond, a weekly examiner and member of the mine's Compliance Assistance Safety team. Tr. 163. Vandergriff began his underground inspection at the power center of the 4th Southeast (SE) belt line, which runs coal to the outside of the mine. Tr. 163, 166. Almost immediately upon his arrival underground, the belt went down. Tr. 167. Hammond contacted Jason Fink, the head maintenance chief, who attempted to diagnose the problem with the belt. Tr. 167.

While Fink worked on the belt, Vandergriff went to observe the head drive and saw two miners who were assigned to go from belt drive to belt drive cleaning by shoveling loose coal, dusting the drive, and spraying them as needed. Tr. 168, 171. This concerned Vandergriff because he had reviewed the examination book prior to going underground and the miners were not addressing the conditions observed by the examiner and were engaged in cleanup work in an area that had been listed in the examination book as having been completed on September 19, 2016 Tr. 168-71; Ex. S-12, 34.

Traveling inby within the first break or two, Vandergriff observed loose coal on the intake side of the belt. The accumulations measured anywhere from two to four inches deep and two to four-and-a-half feet wide. Tr. 173. After observing these conditions for another three to four crosscuts, or about 200 to 250 feet, Vandergriff informed Hammond he was going to issue a 104(a) citation. Hammond did not respond. Tr. 174. After walking four more crosscuts, Hammond said, "This is going to get bad. I have to go make a phone call." Tr. 174. He did not elaborate. At that point, Hammond left. The belt had been switched on and off three or four times prior to Hammond's remark and was currently off. Vandergriff observed piles of coal along the entire length they had walked so far. Tr. 174-75. He began photographing the conditions. Tr. 174-75; Ex. S-11. At trial, referring to his photographs, he pointed out an "abnormal" amount of accumulations several crosscuts long on the intake side of the belt and a misaligned roller above a pile of coal. Tr. 175-78; Ex. S-11. Vandergriff pointed to one photograph where in one location on the intake side of the belt, a portion of the belt was not properly aligned with the top roller which would cause the belt to sway back and forth when in motion. Tr. 179-80; Ex. S-11, 7. Photograph 10, Vandergriff testified, showed the top belt shoved towards the haul road side of the entry. He explained this misalignment happens when coal is dumped onto a full belt which causes it to be deposited onto the bottom belt and then

thrown onto the ground. Tr. 192. Referring to Photograph 6, he testified that it depicts where the belt was running inside the top roller rather than underneath them causing the belt to overhang the roller by as much as 10 inches. Tr. 195-98. He additionally observed areas where the belt was resting on the metal structure and had made gouges from one-half to one inch deep. Tr. 199. During the time Vandergriff was taking photographs, Hammond repeatedly met up with him and then walked back to the haul road to call in to get people to start shoveling. Tr. 180-81.

Vandergriff was approached by MSHA Compliance Assistance Program (CAP) personnel Danny Mann and Kris Robinson. At this time, Vandergriff told Hammond he was issuing a 104(d) order. Tr. 183. Robinson requested that Vandergriff not issue the order, because they would ensure the spillage was cleared. After a short conversation with Mann, Vandergriff reiterated to Robinson and Hammond that he was going to issue a (d)(2) order. Hammond left with no response. Vandergriff walked down to the head drive and the belt was locked and tagged out. Tr. 185.

Vandergriff continued his inspection walking in by the belt drive. Six or seven miners were shoveling the accumulations. Tr. 185. He recognized an examiner, Nathan Kamman, and asked him how long the belt had been in this condition. Kamman answered that he had not examined the belt in some time, but when he had, it had always been as Vandergriff observed and he, Kamman, and management knew about it. Tr. 185-86.

Vandergriff stated that he determined the condition had existed since September 6, 2016. He explained that there had been an A and a B belt at one time but the motors on the B belt went down so the B belt drive was removed and the A and B belts were spliced together. When they did so, they removed the rollers but not the tails on the B belt and just moved it over and connected them together. While the A belt was straight, the B belt had a slight angle, so when the two were spliced together the change was “enough to throw off an entire belt line” in his opinion. Tr. 186-87. This caused the accumulations that he observed on the ground. Kamman confirmed that the situation had been like that since they removed the B belt. Tr. 187.

As he continued up the belt line, Vandergriff continued to take photographs, make notes, and take measurements of the accumulations. After 25 or 30 breaks, Hammand would walk back in at each crosscut, ask what conditions were found, and go back to the haul road and call for additional people. Tr. 188. Vandergriff stated that he found coal, float coal dust, and belt pressings anywhere from 2 to 10 inches deep. Tr. 188. At crosscut 119, he spoke to Don Moeller, another examiner, who stated he knew about the (d)(2) orders and told him the cited conditions had existed for a long time. Tr. 189. Moeller stated that management knew about the issues, but did not specifically identify any member of management. Tr. 190. By this time, two hours had elapsed since Vandergriff had placed the closure tag on the belt, which had effectively shut down the mine. Tr. 189-190. He observed nearly 20 to 25 people shoveling the accumulations in the worst part, which was located 30 breaks away from where the belts were spliced together. Tr. 191.

2. The Violation

In the narrative section of Order No. 9101766, it states that accumulations on the 4th SE belt line in the form of loose coal, float coal dust, and belt pressings were found in numerous specified locations from the 2nd Main South tail to the head drive measuring varying widths and depths primarily on the intake side. The violation is charged as reasonably likely to result in a fatality, affecting 30 miners, S&S, and an unwarrantable failure to comply with a mandatory standard. The Secretary proposes a civil penalty of \$69,417.00. Ex. S-7.

The cited mandatory standard provides: “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” 30 C.F.R. § 75.400. The purpose of the standard is to prevent the “confluence of factors” which can cause a fire and propagate an explosion in a mine. *McCoy Elkhorn Coal, Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014).

The Secretary maintains that Respondent violated § 75.400 because it allowed coal material to accumulate along a “vast majority” of the 4th SE belt line and failed to properly abate those conditions in an effective and timely manner. Sec’y Br. 40. Allowing the coal, coal dust, and belt pressings to accumulate in an environment where the belt was rubbing on the metal structure would in the course of continued normal mining operations pose the hazard of a fire or ignition.

Peabody contests the violation on three grounds. First, that Vandergriff did not actually take measurements of the accumulations. Second, that what Vandergriff cited was actually spillage rather than accumulations. Third, that it was not likely that the material was combustible.

Hammond stated that he did not see Vandergriff take the measurements listed in the narrative section of the order. However, he confirmed that he was continually darting back and forth between the belt line and the haul road to call out for shovelers to address the conditions found by Vandergriff. He maintained that he went out and back in the same crosscut each time purporting to say that Vandergriff was never out of his sight. Tr. 328. While Hammond was at the haul road, which was frequent, Vandergriff did not stop his inspection on the opposite side of the belt. It is entirely plausible that Hammond did not observe a great deal of what Vandergriff was doing during his frequent absences. And, in fact, Hammond testified that he didn’t “recall” seeing Vandergriff take measurements which is quite different from saying he did not do so. Tr. 328. When asked whether he trusted Vandergriff, Hammond testified that he found him to be competent and trustworthy and he believed the measurements he cited. Tr. 368. Hammond also confirmed, as Vandergriff had testified, that the coal was one half of an inch away from the belt at crosscuts 13 to 17. Tr. 352. I find Peabody’s first argument to be baseless.

As to its second point of contention, that the coal represented “spillage” rather than an accumulation, I find the implied significance of the distinction between the two unsupported by case law. In support of its argument, Peabody cites to *Old Ben Coal Co.*, 1 FMSHRC 1954 (Dec. 1979) and *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292 (10th Cir. 1991). However, these cases do not support the Respondent’s theory of spillage versus accumulations. In addressing whether a condition was an accumulation or spillage, the Court of Appeals stated,

“FMSHRC has expressly rejected the argument that ‘accumulations of combustible materials may be tolerated for a reasonable time.’” *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553 (DC Cir. 2012). The court went further to state that § 75.400 “was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.” *Black Beauty*, 703 F.3d. at 2 (citing *Old Ben Coal Co. (Old Ben 1)*, 1 FMSHRC 1954 (1979)). Citing *Utah Power & Light Co.*, the court recognized that the test for whether an accumulation exists is if “a reasonably prudent person familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Black Beauty Coal Co.*, 703 F.3d at 558 (citing *Utah Power & Light Co.*, 951 F.2d 292 (10th Cir. 1991)). I find Vandergriff’s testimony that the amount of material he observed was both extensive in length, sufficiently deep to be abnormal, and posed a potential for a fire or explosion credible. See *McCoy Elkhorn Coal Co.*, 36 FMSHRC 1987, 1993-94 (Aug. 2014) (finding accumulations were extensive where spillage was more extensive than normal). I further find, based upon his description, measurements, and photographs of the conditions, he found that a reasonably prudent person familiar with the mining industry would recognize the hazardous condition that the regulation seeks to prevent. The material found by Vandergriff was not spillage, as Respondent defines it, and there is no tolerance for it to exist without appropriate corrective action underway, which there was not.

With regard to its last argument, the fact that some of the coal may have been wet, mixed with mud, or dusted making it non-combustible is not persuasive. The Commission has long recognized that wet coal can dry out quickly and provide the fuel necessary for a fire or explosion. See *Consolidation Coal Co.*, 35 FMSHRC 2326 (Aug. 2013); see also *Continent Res. Inc.*, 16 FMSHRC 1226 (June 1994). Again, the photographs taken by Vandergriff, his notes taken simultaneously with the inspection, and his measurements clearly disprove the assertion that the material was mostly wet, muddy material. This is especially true in the area where the coal was a mere half of an inch from the belt.

The Secretary has met his burden of proving this violation.

3. *S&S Designation and Gravity*

I find that this violation meets the four elements of the *Mathies* test and therefore I uphold the Secretary’s characterization of the violation as S&S. The first factor is satisfied by my finding of the violation of a mandatory safety standard.

The second element is also satisfied because the discrete hazard posed by the accumulations was reasonably likely to cause harm. The testimony established that accumulations were a mere one half of an inch below the belt at points and the belt had gouged into the metal structure by as much as an inch, which could be an ignition source. Assuming continued normal mining operations and the amount of coal being dumped off the belt, it would take a very short period of time before the accumulations were sufficiently deep to make contact with the belt providing fuel to propagate a fire or explosion. The accumulations would be likely to ignite and such an ignition would be likely to result in injury.

Respondent contends that the material would have been corrected during the next examination. I have already rejected the argument that this was merely a spill. The validity of the argument that the condition would be corrected during the next examination has also been addressed in section A. 2. of this decision's discussion of *Paramount Coal Co.* under Order No. 9101931. The condition was far too extensive for correction to be made during an examination. It required numerous miners a considerable amount of time to rectify the situation.

Respondent argues that there was not a confluence of factors to make an ignition possible as there were no ignition sources present. It alleges that Vandergriff's testimony regarding the belt rubbing in the structure was essentially fabricated. Resp. Br. 49. I find Vandergriff was a credible witness. He exhibited excellent recall of the facts without having to reference his notes. That this particular fact was not in his notes is not a concern to me. His testimony as a whole was specific, detailed, and corroborated by photographs and in some instances by witnesses for Peabody. As described in some detail above, he had a photograph of a section of the belt that extended over the rollers by a significant margin. The misalignment of the belt rubbing against the rollers alone could serve as an ignition source. A belt rubbing in coal can also be an ignition source and with continued normal mining operations, it would take very little time for the accumulations to contact the belt.

The third *Mathies* factor is also satisfied. The Fourth and Seventh Circuits' application of this factor requires the assumption that the hazard occurred and looks to whether an injury would be serious. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148,162 (4th Cir. 2016); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F. 3d 611, 616 (7th Cir. 2014).⁷ Due to the extensive nature of the accumulation, an ignition would be highly likely to result in a fatality. This entry also serves as a haul road, meaning that equipment passes through it. Tr. 202. Additionally, belt rollers and head drive motors located on the belt are considered pieces of equipment. See *Buck Creek*, 52 F.3d at 135 (affirming S&S designation where the frictional heat from a roller turning in coal dust could easily cause a fire, despite no evidence that the roller was hot or defective). Tom Burnett testified that on September 16, 2016, his team changed a bad roller which he confirmed can become a fire hazard. Tr. 452-55; Ex. S-12, 27. While there was no evidence produced that this mine is gassy or methane was present, it does not negate the likelihood that rollers running in coal creates an ignition hazard. Tr. 454-55.

The fourth factor has also been met. As Vandergriff testified, the beltline is also an escapeway. It is the primary escapeway for Unit 3 at crosscut 52 and a secondary one for the other two units. Should there be a fire on Unit 3 inby crosscut 52, with the air directed outby, the fire could travel through their primary escapeway preventing escape. Tr. 203. If an explosion were to occur, it would be propagated outby and any miners located outby the explosion could be burned, overcome by smoke, or disoriented and unable to escape. Tr. 202.

I find this violation was properly designated as S&S. Vandergriff explained that the unit averaged 16 to 18 miners in Unit 3 and there were commonly mechanics, shovelers, and others working on the haul road at any one time. There could be as many as 30 persons affected. Tr. 203. I find the gravity to be extremely serious as the hazard could have caused fatal injuries to at least 20 miners.

⁷ This case was heard in Southern Indiana within the 7th Circuit.

4. *Negligence and Unwarrantable Failure*

a. Negligence

Vandergriff determined that the violation was due to reckless disregard when he issued the order. It was subsequently modified to high negligence. He stated that high negligence was appropriate due to the conditions he saw and because no one was able to offer any mitigating evidence. Tr. 204.

The Commission considers the actions a reasonably prudent person familiar with the mining industry would have taken under the circumstances to comply with the protective purpose of the mandatory standard. *See U.S. Steel Corp.*, 6 FMSHRC at 1910.

The Respondent argues that high negligence is not supported by the evidence, however, it offers no explanation as to why in its brief. It addresses only the unwarrantable failure factors.

Witnesses for Peabody testified that they were aware of the problem with the belt spilling coal. Ryan Sandefur, Peabody's safety manager, testified that he was the belt coordinator at the time of the inspection. Tr. 258. At one time, there were two belts, 4th SE A and 4th SE B, serving the three working units. Units 1 and 2 dumped onto the B belt and Unit 3 dumped onto the A belt at crosscut 50. Tr. 287. At some point around September 6, 2016, two or three reducers failed on the B belt. Each reducer costs \$25,000.00 and would require at least one shift of down time to install them. Tr. 288. Due to the time and expense, it was determined that the two belts could be joined into one without affecting the ability of the belt to function. Additional structure was added to bridge the gap between the two belts and belts were spliced together. The newly spliced belt measured 7,000 feet in length and worked well until September 13, 2016, when it started to spill coal mostly at the head of the belt. Tr. 262-70, 285. Sandefur began to investigate the cause of the spills over the next several days and assigned a belt mechanic, Travis Kyffin, to spend extra time on the belt to figure out what the cause was. Tr. 271-75. He also assigned workers to spray the belt, level the structure between the head and the 3A dump area where most of the spillage was occurring. Tr. 277. On September 19, 2016, he told his leadman that the two of them were going to come in the following day to figure out what was going on even if they "had to live down there for the rest of the week." Tr. 280. Before that plan could be put into effect, however, Vandergriff showed up the next morning to conduct his inspection of the belt line. Tr.282.

In contrast to Sandefur's testimony, when Vandergriff asked examiner Nathan Kamman how long the belt had been in this condition, Kamman answered that he had not examined the belt in some time, but when he had, it had always been like that and he had called it out. Tr. 185. Additionally, Sandefur stated that the spills were located at the head of the belt and that is where the work was concentrated. Tr. 270. Vandergriff testified that when he arrived at the head, miners were moving from belt head to belt head shoveling. However, he found the accumulations were also at the following locations:

4th SE head drive to XC 8 6" to 1" in depth by 3' in width, road side XC 6-11 1" to 5" in depth by 3 1/2 feet in width, intake side XC 8-12 1" to 2 1/2' in depth by

4' wide, intake side XC 13-18 1" to 2 1/2' in depth by 4' width, intake side XC 21-24 1" to 4" in depth by 3 1/2' in width, intake side XC 25-31 1/2" to 6" in depth by 3 1/2' in width, under belt/intake side XC 32-34 1" to 4" in depth by 2 1/2' in width, under belt/intake side XC 36-40 1" to 6" in depth by 2 1/2' in width, under belt/intake side XC 42-46 1" to 3" in depth by 3 1/2' in width, under belt/intake side XC 48-51 1" to 5" in depth by 4' in width, under belt/intake side XC 51-52 1" to 3" in depth by 3 1/2' in width, under belt/intake side XC 52-60 1" to 3" in depth by 3 1/2' in width, under belt/intake side XC 63-69 1" to 3" in depth by 3 1/2' in depth, under belt XC 71-73 1" to 3" in depth by 3' in width, under belt XC 78-82 1" to 3" in depth by 3' in width, under belt/intake side XC 86-89 1" to 3" in depth by 4' in width, under belt XC 90-93 1" to 4" in depth by 3' in width, all belt line XC 95-101 1" by 6" in depth by 10' wide, all belt line XC 104-114 1" to 3" in depth by 16' in width, under belt XC 116-119 float dust to 3" in depth.

Ex. S-7.

Shortly before arriving at the mine, Vandergriff was contacted by another examiner who had asked to speak with him. The miner met with him briefly and informed him that the 4th SE belt line was a disaster and no one was taking care of it. Vandergriff was also informed that the books were being signed off indicating the work was being done when in fact it had not been and upper management had been informed of it. Ex. S-10. While I may not give these statements full faith on their own, they corroborate the conditions Vandergriff observed for himself. They also are corroborated by the statements made to Seitz by Robinson that the hazardous conditions at Peabody were not sufficiently corrected. Both he and Meador stated that identified hazards were not accurately reflected in the examination books and management was well aware of the practice.

The testimony from Respondent's witnesses do not overcome or in any way mitigate the gross lack of care for miners' safety exhibited by Peabody. High negligence is appropriate.

b. Unwarrantable Failure

The Secretary requests Vandergriff's unwarrantable failure designation be upheld, citing the extensiveness and obviousness of the accumulations posing a high risk of danger. Sec'y Br. 45.

The Respondent asserts that the Secretary has not established any of the unwarrantable factors. It posits that Peabody took numerous steps to control and remedy the spillage; the condition did not exist for an extended period of time; it was not extensive; mine management had no knowledge of the cited conditions; and that the Secretary has disclaimed that the heightened notice due to past violations was used in support of the unwarrantable failure assessment. Resp.'s Br. 52-57.

After considering the following factors, I uphold the unwarrantable failure designation.

(a) Extensiveness of Violation

The accumulations of coal extended along the 4th SE belt line for a mile and a half as detailed in the narrative section of the Order. Tr. 166; Ex. S-7. Their depth ranged from two to six inches, while their width ranged from four to four and a half feet wide. Tr. 173; Ex. S-7. The windrow of coal, which was measured to be one half of an inch from the belt in one area, was 1,600 feet long. Tr. 349-50. This was an extensive accumulation of coal material. While Respondent has argued that Vandergriff did not take measurements, Hammond agreed at trial that Vandergriff is indeed a competent and trustworthy person and he believed the measurements he found. Tr. 368.

Other factors that may also be relevant to extensiveness include the number of persons affected by the violation and the measures required to abate it. The Commission has stated that the extensiveness inquiry “ultimately is a fact question concerning the material increase in the degree of risk to miners posed by the violation,” and should account for the broad scope of the circumstances surrounding the violation. *E. Assoc’d Coal Corp.*, 32 FMSHR at 1196 (instructing ALJ to consider extensiveness of abatement measure needed to terminate the citation). Vandergriff credibly testified that were a fire to start in by crosscut 52, the entire Unit 3 could be trapped. With return air traveling outby, a propagation could make the entire entry, which served as a secondary escapeway, impassable. Nathan Courtney testified that it required at least six unit miners, three shovelers, and several other miners at least one day to abate the violation. Tr. 469. Vandergriff characterized the amount of accumulations as “abnormal.” *See McCoy Elkhorn Coal Co.*, 36 FMSHRC 1987, 1993-94 (Aug. 14) (finding accumulations were extensive where spillage was more extensive than normal). He stated that, while he did not terminate the Order, he was aware that the entire mine had stopped production. He stated he thought it would have taken 70 to 80 people to shovel it. Tr. 247.

I find the violation was extensive based upon all of these factors.

(b) Duration of Violative Condition

While Peabody witnesses testified that the condition had only existed since September 13, 2016, Vandergriff found evidence in the examination book that it had existed since the September 6 or 7, and that the notations that it was cleaned every shift were not believable. Tr. 205. From his experience, the number of shovelers they had on staff at the time would not have been able to clean every shift. Tr. 206. Both Kamman and Moeller told Vandergriff that the conditions had existed for a long time. Tr. 186, 189. Because coal can accumulate quickly, it was already confirmed to be within one half of an inch from the belt, and there was evidence of the belt rubbing the structure, the existence of uncorrected accumulations for two weeks is sufficiently long to cause an ignition.

(c) Degree of Danger Posed by Violation

The operator’s conduct exposed miners to the hazards of a fire or explosion along the 7,000-foot-long belt line. This could have caused miners to be burned, disoriented, or trapped, thus preventing their escape. A mine fire or explosion is one of the single most dangerous of hazards in mining and has led to catastrophic results.

The degree of danger posed by the accumulations was extremely high.

(d) Obviousness of Violation

The violation was blatantly obvious to the most unsophisticated of observers. Coal had accumulated along approximately a mile and a half of the belt line and measured as much as four feet wide and two and one half feet deep. Tr. 173. Hammond testified that one windrow ran from Crosscut 6 to Crosscut 30 or 31, a distance of 16,00 feet. Tr. 349-50.

(e) Operator's Knowledge of Existence of Violation

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).

Sandefur testified that several days after the belts were spliced together, they were aware that the belt was dumping coal. It was an ongoing problem of which management was aware. Multiple agents of Respondent admitted to Vandergriff during the inspection that they knew the hazardous conditions had existed for a long time. Both Kamman and Moeller stated they personally knew about the belt problem and the resultant accumulations. General Manager Eric Carter stated to Vandergriff that he had been approached by an examiner asking for help in training miners to shovel and that he had no excuse for the conditions. Tr. 207. The miner who contacted Vandergriff prior to the examination stated that the information had been brought to management's attention and they continued to sign off on the examinations knowing the work had not been done. The unabated conditions were clearly known to management, yet the superintendent signed off on the examination books indicating corrective actions had been taken despite his knowledge that the hazard persisted.

The extensiveness and obviousness of the hazard alone would put any reasonable person on notice of the violation. Here, I find the operator had actual knowledge of the violation.

(f) Operator's Efforts at Abating Violative Condition

While some effort was taken to clear the accumulations of coal material along the belt line, these efforts were a mere fraction of that required to satisfactorily abate the conditions. As has been repeatedly stated, the coal accumulations lasted for nearly a mile and a half along the belt line. Tr. 285. Only two miners were cleaning the head drives and only one other miner was shoveling in the area of crosscuts 14 to 17. Tr. 207. Hammond observed no miners shoveling the 1,600-foot windrow of coal. Tr. 354. Vandergriff disputed the claim that the accumulations were cleared during every shift, as recorded in the examination book. He testified, "I do not believe [the accumulations] were cleared every shift like it states in the book. From my experience and the amount of shovelers that they had on staff at the time, there is no way they could have cleared it every single time." Tr. 205-06. Even the General Manager, Eric Carter, admitted the need to train more shovelers lest his examiners kill themselves. Tr. 207.

Vandergriff stated that while he did not terminate the Order, he was aware that the entire mine had stopped production. He thought it would have taken 70 to 80 people to clean it in order to abate the condition. Tr. 247.

I do not find Sandefur and his workers' efforts to determine the cause of the coal dumping off the belt to be abatement efforts. Their work was directed towards keeping the belt running so that production could continue rather than protecting the miners as evidenced by the fact that so much of the affected area was left untouched by cleanup efforts before Vandergriff's Order was issued.

I find no meaningful effort at abatement was made.

(g) Operator's Notice that Greater Compliance Efforts were Necessary

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. *IO Coal*, 31 FMSHRC at 1353. Respondent was cited for violations of § 75.400 178 times in two years at this mine. Such a high frequency of violations provided Respondent notice of a need for greater compliance efforts when it came to accumulation prevention and clean up. Additionally, Vandergriff testified that the mine was put on the heightened awareness list by MSHA for violations of accumulations throughout the mine since July 2015 and management was so informed. Tr.157, 217.

Respondent cites Vandergriff's testimony that the past enforcement actions did not play a part in issuing an unwarrantable failure. Resp's Br. 57. However, the Commission has said that an **Administrative Law Judge** must consider all relevant record evidence not limited to specific warnings from MSHA, **including shift record books**, to determine whether an operator is on notice of recurring safety problem in needs of correction. *Jim Walter Res.*, 19 FMSHRC 480, 485 (Mar. 1997) (emphasis added). This case is instructive for two reasons. First, it underscores the fact that it is the judge who determines the issue of whether past enforcement actions put the operator on notice. Second, it highlights the fact that other forms of notice are sufficient. Vandergriff testified that the records books indicated problems along the belt line for some time, although he did not believe the corrective work listed had been done as evidenced by the extensiveness of the accumulations.

I find that MSHA had sufficiently put Peabody on notice of the need for greater compliance efforts through the heightened awareness designation issued in 2015, the number of prior violations of this standard, and the repeated entries in the examination book indicating an ongoing problem.

(h) Weighing the Factors

There is ample evidence to satisfy each of the factors to satisfy the unwarrantable failure analysis set forth by the Commission. This was an extraordinary amount of accumulated coal. Mine management knew the belt line was dumping coal at an alarming rate. They had known

this for some time. In the event of continued normal mining operations, the chance of an ignition caused by the belt rubbing the structure and the ever-present possibility of the failure of a roller was great. For these reasons, I find this violation was the result of an unwarranted failure to comply with the mandatory standard.

D. Order No. 9101767 (Docket No. LAKE 2017-0382)

1. *Findings of Fact*

As Vandergriff testified, he reviewed the on-shift/pre-shift examination book for the 4th SE belt line prior to going underground. Tr. 168; Ex. S-12. Specifically, he reviewed the entries for the day before and the day of the inspection. Tr. 168-70; Ex. S-12, 33- 34. The Conditions Observed listed in the book for September 19, 2016, indicated only: “Broom 30 to 40, 47-56, Spill Head at 21.” Tr. 170; Ex. S-12, 33-34. Under Actions Taken, the book indicates those areas had been cleaned. Tr. 170, Ex. S-12, 33. As stated above, when Vandergriff went underground, he saw miners shoveling at the head. Tr. 171. The miners told Vandergriff that they were going from head to head cleaning and Vandergriff described the work they were doing as “substantial.” Tr. 171. This concerned him because this work had been recorded in the examination book as having been completed on September 19, 2016. Tr. 171. In comparing the conditions recorded in the examination book with the accumulations he observed and photographed underground, Vandergriff stated that he found and recorded 218% more accumulations than what the examiners had found and recorded from the previous day. Tr. 208; Ex. S-12, 33. Vandergriff confirmed that he had found 83 crosscuts with accumulations while three examiners had found 38. Tr. 244-45. Vandergriff was under the misapprehension at the time he made the inspection that one examiner had made the belt. At trial, he acknowledged that it had been three and stated, “if three examiners, three experienced, certified examiners, cannot find 83 [accumulation locations] – even half of what a federal man finds, then they’re not doing their job.” Tr. 246. As a result of his findings, Vandergriff issued the Order for an inadequate examination in violation of a mandatory standard.

2. *The Violation*

The narrative Condition or Practice section of Order No. 9101767 alleges in part: “The operator failed to examine for hazardous conditions and violations of the mandatory health and safety standards. Accumulations on the 4th SE belt line in the form of loose coal, float coal dust, and belt pressings were observed from the 2nd Main South tail to XC #119.” Ex. S-8.

Each of the crosscuts at which accumulations were found were listed in the order, as well as the measurements he made of each. The violation was assessed as reasonably likely to result in fatal injury to 30 persons, S&S, high negligence, and an unwarrantable failure in violation of 30 C.F.R. § 75.362(b). Ex. S-8. The Secretary has proposed a civil penalty of \$44,546.00.

This regulation mandates:

During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety

standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. § 75.362(b).

Peabody contests the issuance of this Order, arguing that the Secretary has not proven that the conditions found by Vandergriff existed at the time the pre-shift examination was done. Peabody maintains that production continued after the examination was done and again argues that what was found was the result of a “spill” that would have been cleaned during the shift. This seems to be a recurrent excuse for the operator and, as discussed at length above, I reject these arguments as unpersuasive for the same reasons as previously stated. I also take into consideration my findings that the accumulations were not recent, they had existed for some time, they represented a condition in the mine that was long standing, they were too extensive to represent a spill that had occurred just before the inspector arrived and they were of such magnitude that it required a total shutdown in production to abate the condition. I find the violation has been proven.

3. *S&S Designation and Gravity*

Respondent contests the S&S designation for the same reasons as the previous Order. I therefore find them unfounded for the same reasons as set forth above.

I find that this violation meets the four elements of the *Mathies* test and therefore I uphold the Secretary’s characterization of the violation as S&S. The first factor is satisfied by my finding of the violation of a mandatory safety standard.

The second element is satisfied because the inadequate pre-shift examination contributed to the dangers of continued accumulations, as well as the ineffective clearing of those accumulations. Both of these dangers contributed to the discrete safety hazard of a fire or ignition of accumulated coal.

The third element is satisfied because, in the event of the hazard, that is, a fire or ignition, an injury was reasonably likely. Due to the extent of the coal, it was likely a fire would quickly spread through this escapeway, burning those in the passage, as well as causing disorientation, confusion, and entrapment preventing evacuation.

Finally, the injuries sustained from the reasonably likely event of a fire would be extremely serious and likely fatal. Belt fires are probably the single-most feared occurrence in a mine and have resulted in catastrophic events.

In conclusion, considering all the facts presented by Vandergriff and other witnesses, I find the violation satisfies the *Mathies* test and was properly assessed as significant and

substantial. I also find the gravity of this violation to be very serious and likely to cause fatal injuries to as many as 30 miners.

4. Negligence and Unwarrantable Failure

This Order was designated as high negligence and an unwarrantable failure by Vandergriff for the same reasons as the previous Order. Respondent contests both assessments for the same reasons as the previous order as well. Based upon the same findings of fact and analysis of law above, I find that high negligence is supported by a preponderance of the evidence. I also find the violation was an unwarrantable failure as stated above and as summarized below.

The hazardous condition was of sufficient duration to pose a substantial threat of an explosion or fire. Examiners from Peabody confirmed the conditions had existed at least since September 6 or 7, 2016. They were extensive as they ran the course of 1 and a half mile of belt line and measured up to 4 feet wide and as much as 4 inches deep – just one half of an inch below the bottom of the belt in one area. As such, they were patently obvious and highly dangerous as they were present in the primary escapeway for Unit 3 and secondary for the rest of the units and could have prevented escape in the event of a fire or explosion propagated by the coal. Peabody's examiners and members of management stated they were aware of the conditions and were signing off the examination book which did not accurately reflect either the extent of the hazard or that the conditions had not been corrected. The mine was on heightened negligence for the hazards and had been cited numerous time for similar violations. The efforts at abatement were nil.

I find the danger posed by the violation in subjecting miners to unknown, uncorrected hazardous underground conditions, as well as the operator's knowledge of these condition to be particularly persuasive factors in finding this violation is an unwarrantable failure.

E. Order No. 9101768 (Docket No. LAKE 2017-0178)

1. The Violation

This Order was issued based upon the same findings as stated above in discussion of Order 9101767. Vandergriff stated that he found the pre-shift report dated September 19, 2016 reported correct actions taken for the 4th SE belt line included "broomed 30 to 40, 47 to 51, cleaned head number 8, 21 to 15, and 120 to 122." Tr. 211; Ex. S-9. However, only 6 of the 30 crosscuts listed in the pre-shift report had actually been cleaned. Twenty-four remained untouched and he found miners shoveling in those areas on September 20, 2016, that were listed on the previous day as having been completed. Tr. 211. He explained that, if no actions are taken to abate a condition listed in a pre-shift report, the corresponding abatement action cannot be listed in the report if it has not been completed. Instead, the condition should be recorded once again in the next examination report until it is properly abated. Tr. 247-48.

The standard violated is cited as 30 C.F.R. § 75.360(g). Ex. S-9. It is assessed as reasonably likely to result in fatal injuries to 30 persons, S&S, high negligence, and an unwarrantable failure. The Secretary proposes a civil penalty of \$44,546.00.

This recordkeeping regulation mandates in pertinent part:

A record of the results of each preshift examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards and their locations found by the examiner during each examination shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. The record shall be made by the certified person who made the examination or by a person designated by the operator. If the record is made by someone other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. A record shall also be made by a certified person of the action taken to correct hazardous conditions and violations of mandatory health or safety standards found during the preshift examination. All preshift and corrective action records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift.

30 C.F.R. § 75.360(g).

The Respondent again contests the violation, gravity, negligence, S&S, and unwarrantable failure designations with the same arguments as those posed in first Order above. Repetition of them is unnecessary and they are rejected for the same reasons as stated in Order No. 9101766. I find the violation did occur.

2. S&S Designation and Gravity

I have found the violation occurred. I also find the failure to maintain an accurate recording of the hazards found and corrective action taken in the examination book contributes to the discrete safety hazard of a miner being exposed to a fire or explosion from the accumulation of coal. Tr. 212. I also find under continued normal mining operations the rapidity with which accumulations can amass and dry out while in contact with the belt, rollers or metal structure can lead to an ignition making an injury reasonably likely. It is likely a fire would quickly propagate through the belt line which serves as an escapeway that would reasonably result in confusion, disorientation, and possible entrapment of miners leading to fatalities to as many as 30 miners. This violation is very serious and I find it to be S&S.

3. Negligence and Unwarrantable Failure

The hazardous conditions, including those not recorded by the examiners, lasted anywhere from two days to one week or even to all of the way back to September 6 or 7, 2016. Such a lengthy period of insufficient recordkeeping could have catastrophic effects, such as the

inability of mine personnel to abate hazards. Out of 30 crosscuts identified by an examiner as sufficiently broomed, only 6 of those crosscuts were actually properly broomed, meaning it was extensive. The extensiveness and obviousness of coal along the 4th SE belt line could not have been ignored by management. The inaccuracy of the record book would be obvious to those in management who countersigned the book when compared to the conditions readily observable underground. The danger posed by misleading a miner into believing a hazardous condition had been corrected is that he would face potentially deadly conditions underground without warning. There is no evidence the operator took any measures to abate the situation. In fact, management was condoning such practice.

While there is evidence of only two prior violations of this standard in the two years prior to this violation, such lack of clear notice of greater efforts at compliance is not critical to my analysis of an unwarrantable failure here. As the Commission has stated, it is not necessary to find all factors are relevant to determine that a violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520.

V. 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 § 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 has proposed a Special Assessment (SA) for Order No. 9101931 issued by Inspector Seitz. At trial the Secretary offered no additional evidence in support of his proposed enhanced penalty. As discussed by the Commission, the Special Assessment Narrative Findings (SANF) forms are general in nature and provide no specific reasons for the SA. However, the

Secretary does have the burden before the Commission and its judges of providing evidence sufficient in the Judge’s discretionary opinion to support the assessment. “When a violation is specially assessed that obligation may be considerable.” *See American Coal Co.*, 38 FMSHRC 1987, 1993 (2016). The Commission underscored the fact that the assessment of penalties is a matter addressed *de novo* by the judge based upon the evidence presented to comport with her discretionary opinion. I have considered the gravity, negligence and seriousness of the § 75.200 violation. I have explained my unwarrantable failure findings and considered that fact that there was no injury or imminent danger involved. The mine was not ordered to shut down to abate the violation, negligence was high yet not reckless, there were 29 prior violations in two years at the mine which is not excessive and I find no particularly aggravating factors involved. I also consider the fact that the closely related order issued for an inadequate examination based upon the same conditions was not given an enhancement in proposed penalty and the operator was given a 10% Good Faith reduction in the calculation of the proposed penalty. Based upon these considerations, I find the SA is not warranted and I make an entirely independent assessment of the appropriate penalties for all violations herein as set forth below.

A. Size of Operator; Ability to Continue in Business; Violation History

The mine is large and the parties have stipulated that the proposed penalties will not affect the operator’s ability to continue in business. Joint Ex. 1.

B. Good Faith

The Secretary credited Peabody with good faith in abating all violations at issue in this case except Order No. 910931. Good faith is also reflected in the portion of each citation that describes the actions taken to abate the condition and in the testimony regarding the operator’s abatement efforts.

C. Negligence, Gravity and Unwarrantable Failure

The gravity of each violation and Peabody’s negligence with respect to the violations are discussed at length within the body of my decision above. Specific findings as to each factor for unwarrantable failure of each violation are discussed within the body of my decision above.

D. Conclusion

After considering the six statutory penalty criteria, I assess the following penalties for the five violations at issue in this case:

- Docket No. LAKE 2017-0178, Order No. 9101931: \$6,000.00
- Docket No. LAKE 2017-0178, Order No. 9101766: \$69,400.00
- Docket No. LAKE 2017-0178, Order No. 9101768: \$45,000.00
- Docket No. LAKE 2017-0382, Order No. 9101767: \$45,000.00
- Docket No. LAKE 2016-0421, Order No. 9101933: \$5,100.00

ORDER

Peabody Midwest Mining, LLC is hereby **ORDERED** to pay a total penalty of \$170,500.00 for the five violations at issue in this docket within thirty (30) days of the date of this Decision and Order.⁸



Priscilla M. Rae
Administrative Law Judge

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⁸ 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.