FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 5, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2011-1059
Petitioner,	:	A.C. No. 12-02010-265360
	:	
v.	:	
	:	
PEABODY MIDWEST MINING LLC	:	Air Quality #1 Mine
Respondent.	:	

DECISION

Appearances: Emily Hays, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Peabody Midwest Mining LLC ("Peabody" or "Respondent") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Evansville, Indiana, and filed post-hearing briefs.

The Air Quality #1 Mine is a large underground coal mine in Knox County, Indiana. Two section 104(d)(2) orders and three section 104(a) citations were adjudicated at the hearing. Ten citations and orders were settled prior to the hearing. The Secretary proposed a total penalty of $268,600.00 for the citations and orders that were adjudicated.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial ("S&S") nature. An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that 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 order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is most difficult to apply. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575.

All of the citations and orders in this case involve roof control issues. It is well recognized that roof falls pose one of the most serious hazards to miners in the coal mining industry. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989) *citing* Roof Support Standards, 53 Fed. Reg. 2,254 (1988)). The Commission has noted the inherently dangerous nature of mine roofs and attributed the leading cause of death in underground mines to roof falls. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211, n.8 (July 1982); *Halfway Incorporated*, 8 FMSHRC 8, 13 (Jan. 1986).

B. <u>Negligence and Unwarrantable Failure</u>

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining*

Corp., 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

C. Burden of Proof and Credibility Determinations

In order to establish a violation of a safety standard, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (*citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). This same standard applies to the Secretary's burden to establish that the violation was S&S and was the result of the operator's unwarrantable failure to comply with the safety standard. When determining whether the Secretary met this burden, I was required to make a number of credibility determinations. Determining the credibility of witnesses is one of the most important and difficult responsibilities that a Commission administrative law judge must complete. Although a judge will occasionally find himself in a situation where he believes that a witness is lying, most of the time resolving credibility issues involves determining whether a particular witness's testimony is worthy of trust. The primary issue is whether the testimony is believable. Often, a judge credits the testimony of witness A over witness B because he believes that the witness A is in a better position to know the particular facts at issue. Credibility determinations involve not only weighing the trustworthiness of a witness but also determining whether a particular witness has the knowledge necessary to give his testimony weight. The witness may be competent to testify about the conditions at a mine but he may not have a complete understanding about factors such as the sequence of events that transpired, the hazard presented by a cited condition, and the length of time that the condition existed. Credibility can be defined as "that quality in a witness which renders his evidence worthy of belief." *Black's Law* Dictionary 330 (5th ed. 1979). Thus, a witness's experience in the mining industry, his experience evaluating mine safety issues, and his knowledge of the mine at issue can be crucial in evaluating credibility.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8415059

On July 31, 2010, MSHA Inspector Stanley Reeder issued Citation No. 8415059 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states:

> The roof where persons work or travel was not being supported or otherwise controlled to protect persons from hazards related to falls of the roof. This condition existed at the 1R/MS seals

> between the number 5 and number 6 seals and in front of the number 6 seal. Loose and cracked material was observed that had fallen out between the roof bolts between the two seals. Loose material was also observed in the roof between the pins that had not fallen out as of yet. The loose material extended from the end of the hog panel at the number 5 seal to the beginning of the hog panel at the number 6 seal. This area had no hog panels placed in it to prevent loose material from falling out between the pins.

(Ex. G-1). Inspector Reeder determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 75.202(a) of the Secretary's safety standards provides that "[t]he 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 outbursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of $50,700.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

1. <u>Summary of the Evidence</u>

Inspector Stanley Reeder testified that during his inspection on July 31, 2010, he determined that the mine roof in the 1 Right, Main South between the No. 5 and 6 seals was not being adequately supported. (Tr.I 17; Ex. G-1).[1] He observed an area of unsupported roof where he saw multiple cracks and large chunks of loose hanging material in the roof that had not fallen. *Id*. Inspector Reeder also saw chunks of material throughout the middle of the 19-foot entry. *Id*. The inspector believed that the lack of hog paneling in this unsupported area was allowing loose material to fall from the mine roof. (Tr.I 18).

The inspector testified that he designated the citation as S&S because the conditions he observed made it reasonably likely for an accident to occur that would permanently disable a miner hit by a falling rock. (Tr.I 25). In addition, he testified that one person would be affected in a potential accident because he was primarily concerned with a mine examiner traveling through the area. (Tr.I 30). He also believed that because of the constant weathering in this part of the mine, "huge" chunks of material would fall more frequently. (Tr.I 20-21).

The inspector determined that the violation was the result of Peabody's high negligence. (Tr.I 33, Ex. G-1). He believed that the examiner knew or should have known about the hazardous roof conditions between the No. 5 and 6 seal because the examiner had walked through the area the previous day and the conditions would not have changed. (Tr.I 34). The inspector also considered that the mine had been cited 219 times in the previous two years for violating this standard; the mine had notice of recurring violations. (Tr.I 36).

The inspector testified that there was hog fencing present in the front of the Nos. 5 and 6 seals. (Tr.I 43). The inspector testified that in his field notes, he stated that the material lying on the mine floor was "fresh," meaning that the material could have been there for a few days. (Tr.I 48, Ex. G-3). The inspector also stated that there has never been a fatality from a rock fall at the Air Quality #1 Mine. (Tr.I 45).

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[1] Each day of this two-day hearing has a separate transcript and each transcript begins at page 1. Therefore, I refer to the transcript from the first day of the hearing as "Tr.I" and the transcript from the second day as "Tr.II."

Nathan Leighty was the miner who performed the examination of the mine roof in the Main South. (Tr.I 70-71). Leighty testified that he examined that area once a week. (Tr.I 72). At the time of his most recent examination, which was a day before Inspector Reeder inspected the Main South, Leighty testified that he did not observe any adverse roof conditions. (Tr.I 78). He also believed that due to the constant weathering in this part of the mine, roof conditions can change in a span of 24 hours. (Tr.I 78).

Todd Waldroup was the safety technician who escorted Inspector Reeder when he inspected the Main South. (Tr.I 90-91). Waldroup testified that he observed only loose material lying on the mine floor. (Tr.I 95, Ex. R-1). Waldroup also stated that he disagreed with the citation because there were no loose bolts, just some loose rock. *Id*.

2. Summary of the Parties' Arguments

The Secretary argues that the Respondent violated section 75.202(a) by failing to adequately support and control the roof of the Main South between the No. 5 and 6 seals. The Secretary cites Inspector Reeder's testimony that he observed an area of unsupported roof, large chunks of loose hanging material, and material lying on the mine floor of that area. (Sec'y Br. at 6). The loose hanging material presented a hazard to miners of being permanently disabled if hit by falling rock. *Id*.

The Secretary asserts that the violation was S&S because it met the four elements of the *Mathies* test. There was a violation of the mandatory safety standard, the violation contributed to the discrete safety hazard of material falling from the roof, roof falls are highly dangerous, and the extent of the roof conditions created a reasonable likelihood that the hazard would have resulted in an injury. Additional factors include the likelihood of loose chunks falling down because the Main South suffers from constant weathering, the chunks of material that fall in this section of the mine are usually large, and the lack of hog paneling between the No. 5 and 6 seals. *Id*.

The Secretary maintains that the violation was the result of Respondent's high degree of negligence because the roof conditions were obvious and extensive and Respondent should have known about them. The Secretary argues that the weekly examiner knew or should have known about the hazardous roof conditions because he had examined the area the previous day and conditions would not have changed. Additionally, at the time the citation was issued the mine had been cited 219 times in the previous two years for violating section 75.202(a).

Respondent argues that the citation should be vacated for the reason that the Secretary did not meet his burden of establishing a violation because the mine examiner did not observe adverse roof conditions at the time of the most recent weekly examination. Leighty's testimony indicated that the Main South is subject to increased weathering that changes roof conditions quickly. Respondent asserts that because no credible evidence exists to suggest that the mine violated section 75.202(a), the citation should be vacated.

Respondent contends that the S&S designation is inappropriate. Very few miners enter the cited area. Therefore, the reasonable likelihood that roof material would fall upon a miner was unlikely. Additional factors include that there has never been a fatality from a rock fall at

the Air Quality #1 Mine and the area of unsupported roof was limited to a space between the No. 5 and 6 seals.

Respondent argues that the high negligence designation is inappropriate. The designation is unfounded because the inspector was not present the day of Leighty's examination of the Main South and he guessed that such conditions were present for several days. Because the Main South is subject to constant weathering, it is likely that the roof conditions changed between the examination and the MSHA inspection.

Respondent asserts that the $50,700 penalty proposed by the Secretary is excessive because the Secretary provided no evidence to support his specially assessed penalty. In the absence of any evidence or rationale for proposing a specially assessed penalty, the Secretary's proposed $50,700 penalty against Respondent should be rejected and reduced.

3. Discussion and Analysis

I find that the conditions described in Citation No. 8415059 was a violation of section 75.202(a) because the mine roof in the 1 Right, Main South between the No. 5 and 6 seals was not being adequately supported. Credibility determinations for this citation were critical in determining whether Respondent violated the cited standard.

Inspector Reeder has worked for MSHA as a coal mine inspector and ventilation engineer/ventilation specialist for four and a half years and has inspected the Main South for three years. (Tr.I 9-13). Inspector Reeder holds bachelor's degrees in mining engineering and geology from Southern Illinois University. Before becoming an MSHA inspector, he worked in various positions in several underground coal mines including the Air Quality #1 Mine. Additionally, the inspector has an Illinois examiner's certificate.

I credit the inspector's testimony that he observed an area of unsupported roof where he saw large chunks of loose hanging material that had not fallen and multiple cracks in the mine roof. (Tr.I 17). The Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). Inspector Reeder has extensive knowledge in the mining industry to accurately determine whether a mine roof is adequately supported. Applying the reasonably prudent person test to the facts, I find that Inspector Reeder correctly concluded that the roof in the cited area was not adequately supported because the lack of hog paneling caused material to fall. (Tr.I 18). The "dozens" of large chunks of rock on the mine floor and loose, unsupported rocks in the roof between the seals that the inspector observed are further evidence of a hazard. (Tr.I 17). I find that the Secretary established that the roof was not adequately supported.

I find that the Secretary did not establish that this violation was S&S. Although the Secretary established the first, second, and fourth elements of the *Mathies* test, evidence presented by Respondent shows that an injury was unlikely. The likelihood of an injury occurring must be evaluated by considering the likelihood of two simultaneous events: a rock or other material falling from the roof and the presence of a miner underneath it. The frequency with which rocks sufficient to cause a serious injury would fall from the inadequately supported

area is unknown and unpredictable. Although there is evidence of material falling from the roof, exposure to the hazard was minimal because examinations in the area occurred only once a week and it only took approximately 30 seconds to traverse the cited area each way. (Tr.I 72). The examiner in this case was trained to recognize roof hazards and either flag the hazard or fix it immediately.

The Commission has observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). Inspector Reeder qualifies as an experienced MSHA inspector. However, while it is possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur. *See Amax Coal Co.*,18 FMSHRC 1355, 1358 (Aug. 1996) (a showing that an injury producing event could occur is not sufficient to establish that a violation is S&S). Accordingly, I find that the violation was not S&S. The gravity of the violation was serious.

I find that Respondent's negligence was moderate for Citation No. 8415059. In reaching this conclusion, I considered that 219 citations were issued to Respondent for violating section 75.202(a) in the two years preceding this citation. Nevertheless, it is not clear how long the cited condition existed. I credit Leighty's testimony in which he stated that he observed no roof hazards during his weekly examination. (Tr.I 78). It is possible that the adverse roof conditions that the inspector observed on July 31 were not present during Leighty's examination, which occurred over 24 hours before. Accordingly, I find that Respondent's negligence was moderate for Citation No. 8415059.

I find that a penalty of $10,000.00 is appropriate for this violation given my finding of moderate negligence and the fact that the violation was not S&S.

B. <u>Citation No. 8415060</u>

On July 31, 2010, Inspector Reeder issued Citation No. 8415060 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states:

> The roof where persons work or travel was not being supported or otherwise controlled to protect persons from hazards related to falls of the roof. This condition existed on the Main South Roadway between crosscuts 60 to 63 and crosscuts 74 to 75. Loose material that had fallen out between the pins was observed at these locations along the riblines on both sides of the travelway that created areas between 5 and 6 ½ feet where no additional support had been placed

(Ex. G-2). Inspector Reeder determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that two people would be affected. The Secretary proposed a penalty of $56,900.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

1. <u>Summary of Evidence</u>

Inspector Reeder testified that during his inspection on July 31, 2010, he determined that the mine roof and rib in the Main South travelway between crosscuts 60-63 and 74-75 were not being adequately supported. (Tr.I 107; Ex. G-2). The inspector observed a large amount of material hanging from the roof and material on the ground that had already fallen. (Tr.I 108). He also observed loose material hanging between the last row of the roof bolts and the ribs on

both sides of the travelway. *Id*. In between both crosscuts, the inspector testified that he saw "wide spacing" of up to 6.5 feet between the last bolt in the roof and the rib. (Tr.I 110-111). The inspector believed that because this was a travelway for miners, the unsupported areas created a roof fall hazard.

The inspector testified that he designated the citation as S&S because the roof and rib conditions made it reasonably likely for an accident to occur that could permanently disable a miner hit by falling material. (Tr.I 115). Two miners were affected because this section of the mine was a supply line for miners. (Tr.I 116-17). In addition, the inspector testified that the constant weathering and guttering this section of the mine experiences increased the risk of material falling upon miners. (Tr.I 113-15).

The inspector determined that the violation was the result of Peabody's high negligence. (Tr.I 117; Ex. G-2). He believed that the hazard was obvious and that mine personnel should have flagged the hazard due to the number of miners that travel this section of the mine. (Tr.I 118). The inspector also considered that the mine was cited 219 times in the previous two years for violating this standard; the mine had notice of recurring violations. (Tr.I 119-120).

Jonathan Land was one of the miners who performed a pre-shift examination of the mine roof in the Main South before the citation was issued. (Tr.I 165). Land testified that one of his responsibilities was to examine the width between the bolts and ribs and add additional support for distances in excess of 48 inches. *Id*. He indicated that there were other areas of the South Main travelway that exceeded the 48 inches and additional support was added during his shift. Land also testified that, due to the weathering in the Main South travelway, the roof conditions can change quickly. (Tr.I 168-69).

Todd Waldroup was the safety technician who escorted Inspector Reeder when he inspected the Main South. (Tr.I 90-91). Waldroup testified that he observed loose material along the riblines at the cited areas of the travelway. (Tr.I 141-42). He testified that miners are taught to walk in the middle of the entry, not the riblines. *Id*. Waldroup stated that the middle of the entry of the travelway contained no loose material. (Tr.I 145).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.202(a) by failing to adequately support and control the roof and rib of the Main South travelway between crosscuts 60-63 and 74-75. There was an area of unsupported roof where "massive" rocks hung down from the roof and there was material on the ground that had already fallen. The hanging material presented a hazard to miners of being permanently disabled by a roof fall.

The Secretary asserted that the violation was S&S because Peabody violated section 202(a), the violation contributed to the discrete safety hazard of material falling from the roof, and the extent of the roof conditions created a reasonable likelihood that the hazard would have resulted in a serious injury. Additional factors include that the cumulative amount of unsupported roof could create a large roof fall, the travelway was a supply road used by many

miners daily, and the constant weathering and guttering in the Main South necessitated additional roof support.

The Secretary maintains that the violation was the result of Respondent's high degree of negligence because Respondent should have known about the obvious and extensive roof conditions. Respondent examined the travelway three times a day before each shift. Many miners use this travelway.

Respondent argues that the citation should be vacated because no violation of the cited standard occurred. Respondent asserts that the cited standard only applies "where persons work or travel." Inspector Reeder testified that the condition was along the ribline. No travel occurred along the riblines of the Main South travelway because miners walk along the center of the entry and travel is not possible along the riblines due to the buildup of material from both guttering and weathering.

Respondent contends that if a violation is found, the S&S designation is inappropriate. Travel did not occur along the riblines of the travelway, so exposure to material falling was minimal. Respondent also maintains that mere the possibility of a roof fall is not S&S because the Secretary presented no evidence as to the likelihood of a roof fall.

Respondent argues that the high negligence designation is inappropriate. A high negligence designation is unfounded because an examiner conducted a pre-shift examination of the Main South travelway and observed no hazards between crosscuts 60-63 and 74-75. Examiners detected and fixed other loose material in the Main South travelway before the citation was issued, which showed that the examiners corrected all the roof hazards in that section of the mine. Respondent contends that the Secretary adduced no qualitative assessment to support his position that Respondent's previous roof control violations mandate a high negligence finding.

Respondent asserts that the $56,900 penalty proposed by the Secretary is excessive. Respondent contends that the Secretary provided no evidence to support his specially assessed penalty. The Secretary's proposed $56,900 penalty against Respondent should be rejected and reduced.

3. Discussion and Analysis

I find that the Secretary established a violation of section 75.202(a) because the mine roof and rib in the Main South travelway between crosscuts 60-63 and 74-75 was not being adequately supported. Credibility determinations were once again important to determine whether Respondent violated the cited section.

I credit the inspector's testimony that he observed loose material hanging between the last row of roof bolts and the ribs on both sides of the travelway. (Tr.I 108). In between both crosscuts, the inspector testified that he saw "wide spacing" between the last bolt in the roof and the rib. (Tr.I 110-11). In applying the reasonably prudent person test to the facts, I believe that Inspector Reeder correctly concluded that the mine roof in the cited areas was not being adequately supported based upon his extensive experience and his observation of the wide bolt spacing adjacent to the ribs. Inspector Reeder also observed a large amount of material hanging from the roof and upon the mine floor of the cited areas. (Tr.I 108).

I reject Respondent's argument that there was no violation of the cited standard because the cited conditions were primarily located along the ribline and miners do not walk adjacent to the ribs. First, there was nothing to prevent a miner from approaching the ribline, although he might not want to walk along it for a great distance due to the stumbling hazards present. Second, a large rock fall could extend beyond the area immediately adjacent to the ribs. Respondent construes the safety standard too narrowly.

I find that the Secretary established that the violation was S&S. The violation of section 75.202(a) was extensive and dangerous because there were "massive" chunks of material hanging from the roof in the cited areas, which presented a reasonable likelihood that the violation would result in an event in which there was a serious injury. Even though much of the loose material was along the ribline, the potential for loose material hanging from the roof to hit a miner in other areas of the entry warrants an S&S designation. Unlike the conditions in the previous violation, the area cited was a frequently used travelway which greatly increased the likelihood of an injury. The gravity of this violation was serious.

I find that Respondent's negligence was moderate. The cited area was subject to pre-shift examinations three times per day. The violation was extensive because there were large pieces of material hanging from the roof and the space between the last roof bolt and the rib wall in both crosscuts was six feet or more. Peabody was also on notice that it needed to do more to adequately support the roof because the standard had been cited numerous times in the previous two years. I credit Land's testimony that he detected and fixed other areas with poorly supported roof in the Main South travelway before the citation was issued. (Tr.I 165). Although I credit the testimony of the inspector with respect to the conditions he observed, it is not clear that these same conditions existed at the time of the previous pre-shift examination. I also credit the testimony of pre-shift examiner Land that weathering in the Main South travelway can cause roof conditions to change quickly. (Tr.I 168-69). Accordingly, I find that Respondent was moderately negligent with respect to this citation. I find that a penalty of $20,000.00 is appropriate for this violation.

C. <u>Citation No. 8415064</u>

On August 6, 2010, Inspector Reeder issued Citation No. 8415064 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states:

> The roof where persons work or travel was not being supported or otherwise controlled to protect persons from hazards related to falls of the roof. This condition existed on Unit #1 (MMU-001) in the left hand crosscut adjacent to entry #1. This crosscut was directly adjacent to the working section and had not been re-bolted during the rehab of the unit. An unsupported area approximately 19 feet wide and 20 feet in length was observed where about a dozen or more loose roof bolts were hanging down, Loose material was also observed still hanging in the roof.

(Ex. G-5). Inspector Reeder determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that two people would be affected. The Secretary proposed a penalty of $56,900.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

1. Summary of Evidence

Inspector Reeder testified that during his inspection on August 6, 2010, he determined that the roof in the left crosscut adjacent to Entry Number 1 in Unit Number 1 was not adequately supported. (Tr.I 186; Ex. G-5). He observed loose material that hung from the roof and material that had already fallen upon the mine floor. (Tr.I 188-90). The inspector testified that the loose material was "pretty good-sized material," four or five inches thick by one foot long. *Id*. He testified that he observed more than a dozen loose bolts in the cited area of the mine roof. *Id*. He also observed tire tracks under the unsupported area of the mine roof. *Id*. The inspector believed that, because the unsupported area was directly adjacent to a working entry, the hazard exposed miners to falling material or a roof fall. (Tr.I 192).

The inspector testified that he designated the citation as S&S because the conditions he observed made it reasonably likely for an accident to occur that would permanently disable a miner hit by a falling rock or roof fall. (Tr.I 194). Two miners were affected by the violation. (Tr.I 193-94). The tire tracks that the inspector observed demonstrate that the non-working entry was entered by miners. *Id*. The inspector also considered that the unsupported section had no barricade, flagging, danger tape, or any other type of warning signals to prevent miners from entering the left crosscut. (Tr.I 186).

The inspector determined that the violation was the result of Respondent's high negligence. (Tr.I 194-96; Ex. G-5). Inspector Reeder believed that Respondent knew or should have known about the unsupported roof in the left crosscut. *Id*. He determined that Peabody was aware that the left crosscut needed to be rehabilitated before loading coal in Unit Number 1 because he spoke to mine personnel about the matter on August 3, 2010, just three days before he issued the citation. *Id*. Inspector Reeder also considered that the mine had been cited 219 times in the previous two years for violating this standard. (Ex. G-5).

Inspector Reeder also testified that on August 3, 2010, he indicated which sections of Unit Number 1 needed to be rehabilitated. (Tr.I 200). He testified that the left crosscut, adjacent to Entry Number 1, was not flagged, but other sections that needed additional bolts were flagged. (Tr.I 201).

Mathew Carie and Matt Benjamin were two of the section foremen that rehabilitated the areas of Unit Number 1 that needed additional support. (Tr.I 210, 232). Both foremen testified that no mining was occurring in the left crosscut and there was no reason for any miner to enter that section. (Tr.I 231). During rehabilitation and prior to mining, Carie testified that two rows of roof bolts were installed in the cited left crosscut so miners could use the adjacent entry. (Tr.I 217). Both foremen also testified that the left crosscut was not part of Unit Number 1 and that they believed adding additional support to the entire crosscut was not required. (Tr.I 197, 220, 240).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.202(a) by failing to adequately support and control the roof in the left crosscut adjacent to Entry Number 1 in Unit Number 1. There was loose material hanging from the roof, chunks of material that had already fallen upon the mine floor, and more than a dozen loose roof bolts. Additionally, there were tire tracks under

the unsupported area of the mine roof. The loose hanging material presented a permanently disabling roof fall hazard.

The Secretary maintains that the violation was S&S because Respondent violated section 75.202(a), which contributed to the discrete safety hazard of material falling from the roof and the extent of the roof conditions created a reasonable likelihood that the hazard would have resulted in an injury. The unsupported left crosscut posed a hazard to miners because this section was directly adjacent to a working section of the mine. Additional factors include that there was no barricade, flagging, or danger tape to warn miners to stay out of the unsupported left crosscut.

The Secretary maintains that the violation resulted from Respondent's high degree of negligence because the roof conditions were obvious and extensive and Respondent should have known about them. The Secretary argues that Respondent knew of the need to rehab the entire unit before loading coal because the inspector spoke to mine personnel about the matter on August 3, 2010, three days prior to issuing the citation. Additionally, at the time the citation was issued, the mine had been cited over 200 times in the previous two years for violating section 75.202(a).

Respondent argues that the citation should be vacated because it did not violate the cited standard. Peabody maintains that the cited standard only applies to areas "where persons work or travel." Respondent argues that the cited area was not where miners worked or traveled and was not part of Unit Number 1. Respondent maintains that the tracks cited by the Secretary were present due to the installation of the two rows of bolts at the mouth of the crosscut to allow miners to safely use the #1 entry. Therefore, Respondent maintains that the left crosscut was not a location where miners work or travel.

Peabody contends that the S&S designation is inappropriate. In order to establish an S&S violation for section 75.202(a), Respondent argues there must be evidence that miners were exposed to the relevant area on a somewhat regular basis. Respondent maintains that it no work was being performed in the left crosscut and there was no reason for any miner to travel into that crosscut.

Respondent argues that the high negligence designation is inappropriate. The designation is incorrect because Respondent began rehabilitating the unit one week before the citation was issued and the area was extensively rebolted. During Inspector Reeder's August 3 inspection, he flagged hazard areas in Unit Number 1, but did not flag in the crosscut cited in Citation No. 8415064. Respondent asserts that if the crosscut would have been identified as needing rebolting, it would have been rebolted along with other areas that were identified on the August 3 inspection. Respondent believes that mitigating factors show that the negligence designation should be lowered.

Respondent asserts that the $56,900 penalty proposed by the Secretary is excessive. Respondent contends that the Secretary provided no evidence to support his specially assessed penalty and that the Secretary's proposed $56,900 penalty against Respondent should be rejected and reduced.

3. Discussion and Analysis

I find that the Secretary established a violation of section 75.202(a) because the mine roof in the left crosscut adjacent to Entry Number 1 in Unit Number 1 was not adequately supported. I credit the inspector's testimony that he observed loose material hanging from the cited area of the roof and material that had already fallen upon the mine floor. (Tr.I 188-90). Inspector Reeder testified that he observed loose bolts in the cited area of the mine roof and that he saw tire tracks under the unsupported area of the mine roof. (Tr.I 188-90; Ex. G-6). The inspector also stated that the hazardous area was immediately adjacent to an active area and was not barricaded or flagged, making it possible that a miner could travel through it by foot. *Id*. In applying the reasonably prudent person test to the facts, I believe that Inspector Reeder correctly concluded that the mine roof in the cited area was not being adequately supported. Although it is a close question, I find that the Secretary established that the cited crosscut was an area where persons work or travel and was therefore subject to the requirements of section 202(a).

I find that the Secretary did not establish that the Citation was S&S because he did not fulfill his burden to show that an injury was reasonably likely. Although there is evidence of material falling from the roof, exposure to the cited roof was minimal because it was unlikely that anyone would enter the crosscut. (Tr.I 231). Given the roof conditions and the material that had fallen on the mine floor in the cited crosscut, it is unlikely that a miner would attempt to cross through the cited area. Although it was possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur. The tire tracks observed by the inspector could have been made when roof bolts were installed in the adjacent entry. Accordingly, I find that the violation was not S&S. The gravity was serious.

I find that Respondent's negligence was moderate because mine personnel installed two rows of roof bolts at the entrance of the left crosscut. (Tr.I 217). This was to protect miners traveling in the entry adjacent to the active mining right crosscut and anyone at the mouth of the cited left crosscut. *Id*. Respondent's belief that no miners would enter the left crosscut was reasonable, but it should have flagged or barricaded the area. I find that Respondent's negligence was moderate for Citation No. 8415064. A penalty of $10,000.00 is appropriate for this violation.

D. <u>Order Nos. 9425955 and 8425956</u>

On August 19, 2010, MSHA Inspector Ken Benedict issued Order No. 8425955 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.220(a)(1) of the Secretary's safety standards. The order states:

> The mine operator is not following the roof control plan approved by the District Manager on Unit #1 (MMU-001). The operator's approved plan states that roof bolt spacing shall be 4.5 feet by 4.5 feet. The roof bolt spacing in the #3 and #4 entries and adjoining crosscuts from the faces to the #7 crosscut in both entries exceeded the approved plan from 3 inches to 20 inches in numerous areas along the haul roads where persons are continuously working and traveling during a normal production shift.

(Ex. G-8). Inspector Benedict determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The safety standard requires that each mine operator develop and follow a roof control plan approved by the district manager that is suitable to the prevailing geological conditions and the mining system to

be used at the mine. The Secretary proposed a penalty of $47,200.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

On August 19, 2010, Inspector Benedict also issued Order No. 8425956 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.360(b)(3) of the Secretary's safety standards. The order states:

> An adequate preshift examination of the #3 and #4 entries and adjoining crosscuts from #7 crosscut to the faces on Unit #1 (MMU-001) was not performed. There were numerous areas along the haul roads where persons are continuously working and traveling during a normal production shift that the bolt spacing exceeded the allowable limits . . . by 3 inches to 20 inches.

(Ex. G-9). Inspector Benedict determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The safety standard requires, in part, that the person conducting the pre-shift examination in working sections shall examine for hazardous conditions and that the examination should include tests of the roof and rib conditions on these sections. The Secretary proposed a penalty of $56,900.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

1. <u>Summary of Evidence</u>

Inspector Ken Benedict testified that during his August 19, 2010, inspection, he determined that the roof bolt spacing in the #3 and #4 Entries exceeded Respondent's Roof Control Plan in violation of section 75.220(a)(1). (Tr.I 271-73; Ex. G-8). The inspector observed a slip above a continuous mining machine in the #3 Entry where the roof had fallen out and the bolt spacing across the slip was off. *Id*. The slip, which is an imperfection in rock where the roof falls out when mined, was ten to twelve feet long and had fallen out up to nine feet high. (Tr.I 274; Tr.II 34). Respondent's Roof Control Plan requires that bolts be no more than 4.5 feet apart, but the inspector measured two rows that were six feet apart or more. (Tr.I 275-77). The inspector also observed another slip in the No. 4 Entry with the same bolt spacing problems. (Tr.I 278-79). Inspector Benedict began measuring the bolt spacing in this entry, but the "rows and rows of over-spaced bolts" became too much for him to measure. *Id*. Section Foreman Matt Carie assisted the inspector in measuring the bolt spacing. They measured over 100 locations that ranged from a few inches to 20 inches over the required 4.5 feet. (Tr.I 282-83). The inspector believed that additional bolts should have been placed in the mine roof of the two entries as a result of the adverse conditions resulting from the slip. (Tr.I 274-75).

The inspector testified that he designated the order as S&S because the conditions he observed made it reasonably likely that a serious rock fall or roof fall would occur because Respondent failed to properly support the roof. (Tr.II 6-7). The inspector believed that, because the hazards were in intersections, a roof fall was more likely. *Id*. Inspector Benedict also testified that the significant number of slips, over-spaced bolts, and miners working directly under these hazards increased the likelihood of injury. (Tr.II 7-10).

The inspector determined that the violation was the result of the operator's high negligence and unwarrantable failure to comply with a mandatory standard. (Tr.II 10, 21; Ex. G-8). The inspector believed that Peabody should have been aware of the condition because there were hundreds of widely spaced bolts found throughout the two entries. *Id*. Additionally, Inspector Benedict considered the fact that the hazard existed for three days, the mine had been

cited 50 times for violations of section 75.220(a)(1) in the previous two years, had a history of unintentional roof falls, and had problems with the No. 29 Roof Bolter a few days earlier. (Tr.II 2-7, 10-11, 19, 77-80). Respondent had additional notice when Inspector Reeder issued a similar citation in the same area just three days prior to the issuance of this order. (Ex. G-11). Inspector Benedict testified that Respondent's efforts to correct the problem and ensure that the bolts were properly spaced were insufficient. (Tr.I 282-83).

On August 19, 2010, Inspector Benedict also issued Order No. 8425956 as a violation of section 75.360(b)(3) for failing to conduct an adequate pre-shift examination of the roof bolt spacing in the #3 and #4 Entries. (Tr.II 22; Ex. G-9). Inspector Benedict testified that he reviewed Respondent's pre-shift examination books for the No. #3 and #4 Entries and there were no wide bolting hazards listed for the cited entries. (Tr.II 24-25). The only time that wide bolt spacing was noted on an examination report was during the on-shift examination after the inspector informed Respondent of a violation. (Tr.II 25). The inspector determined that Respondent performed an inadequate examination when the pre-shift examination records failed to identify the over-spaced bolts for the No. #3 and #4 Entries. (Tr.II 26-27).

The inspector testified that he designated the order as S&S because the conditions he observed made it reasonably likely that a serious rock fall or roof fall would occur. (Tr.II 28). The inspector believed that at least one miner would be affected, and most likely the injury would be fatal. (Tr.II 29; Ex. G-9). Inspector Benedict testified that the significant number of over-spaced bolts in a mine entry used by miners is a safety hazard that must be identified and remedied to keep miners safe. (Tr.II 30).

The inspector determined that the violation was the result of the operator's high negligence and unwarrantable failure to comply with a mandatory standard. (Tr.II 30-31, 21; Ex. G-9). Inspector Benedict determined that Respondent knew or should have known about the roof hazard because pre-shift examiners examined the entries before the regular shift. (Tr.II 164). The inspector testified that factors he considered for Order No. 8425955's high negligence and unwarrantable failure designations also apply to this order. He believed that Respondent's examiners should have been aware of the wide-spaced bolts because it was their responsibility to inspect the roof and note where bolts are incorrectly installed. (Tr.II 183). Inspector Benedict testified that the high negligence and unwarrantable failure designations were justified because there were a significant number of over-spaced bolts that had been present for three days and the condition was obvious. (Tr.II 282-83).

Matt Benjamin, the section supervisor, was responsible for overseeing the pre-shift examination of the #3 and #4 Entries. (Tr.II 163). Benjamin testified that pre-shift examiners cannot be expected to measure every bolt spacing to see if the width complies with the roof control plan. (Tr.II 164-65). Benjamin testified that the presence of hog paneling, rock dust, and a line curtain at the cited entries made it difficult to detect excessive bolt spacing. (Tr.II 166-71). Additionally, Benjamin testified that the crosscut between the cited entries was a "slab cut," which occurs when a continuous miner turns from the entry to create a crosscut angle, which can obscure the view of excessive bolt spacing. *Id.*

Joe Biley, the maintenance supervisor, testified that he was assigned the job of correcting the faulty roof bolter three days prior to the issuance of the order. (Tr.II 94-95). Biley testified

that he and Evans performed maintenance work upon the roof bolter and had Mike Fox, a production foreman, drill multiple test holes to determine if the machine was operating correctly. (Tr.II 96-97, 71-73). Fox measured several bolts from center to center and testified that "everything measured up good," determining that the machine was functioning properly. (Tr.II 73). Neither of the supervisors testified that they measured any bolt spacing in the #3 and #4 Entries. According to their testimony, it was their belief that the roof bolter was fixed and that if the problem reoccurred, the machine would be taken out of service. (Tr.II 118-19).

Matt Carie, the section foreman who assisted the inspector at the time the order was issued, testified that the slip in the two entries had fallen out at the time of mining, which was prior to roof bolting. (Tr.II 112). Prior to the August 19 inspection, Peabody discovered widely spaced bolts outby Crosscut No. 11. Carrie testified that he and other miners flagged off the hazardous areas and added additional bolts to support the roof. (Tr.II 114-15). Carie testified that, prior to adding additional bolts after the order was issued, the inspector instructed him to bring ram cars through the hazard zone in order to run coal so that the inspector could collect a dust sample, which demonstrates that the hazard was not significant. (Tr.II 116-17).

After Respondent added additional bolts in response to Inspector Benedict's order, Superintendent Terry Courtney drilled test holes with the No. 29 Roof Bolter. (Tr.II 143). He testified that the booms on the machine collapsed when the holes were drilled, which demonstrated that the booms were once again spreading too wide and were causing the bolts to be spaced too far apart. (Tr.II 143-44, 153-54). The reoccurring problem with No. 29 Roof Bolter was initially corrected during the machine's maintenance on August 16. It was not until after the issuance of the order that Respondent had knowledge that the problem with the machine had reoccurred. (Tr.II 118-19).

2 Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.220(a)(1) because the roof bolt spacing in the #3 and #4 Entries exceeded the permitted distance in Respondent's Roof Control Plan. The inspector observed wide bolt spacing in the two entries that was five to six feet or more in length, which is longer than the permitted 4.5 feet. Additionally, the Secretary argues that, because there was a slip in the two entries, adequate bolt spacing was crucial for sufficient roof support. The Secretary maintains that failing to adequately support the mine roof in the #3 and #4 Entries jeopardized the safety of the miners who worked in those entries.

The Secretary asserts that the violation was S&S because Respondent violated section 75.220(a), contributing to the discrete safety hazard of material falling from the roof, which created a reasonable likelihood of an injury. The inspector testified that the roof fall hazard was magnified because the bad bolt spacing was located in wide intersections where there were slips. The Secretary argues that the S&S designation is warranted because the vast number of over-spaced bolts in the cited entries was located where miners work.

The Secretary maintains that the violation was the result of Respondent's high negligence and an unwarrantable failure to comply with a mandatory safety standard. The roof hazards were obvious and extensive and Respondent should have known about them. The Secretary argues that Respondent knew of the need to add additional bolts because more than 100 wide-spaced bolts were easily observed by looking at the roof. The Secretary also argues that Peabody knew

that there had been problems with the No. 29 Roof Bolter, a similar citation was issued for that area of the mine, the mine was cited 50 times in two years for roof control plan violations, and there were numerous unintentional roof falls.

The Secretary also argues that Respondent violated section 75.360(b)(3) because it failed to conduct an adequate pre-shift examination of the roof in the #3 and #4 Entries. The inspector testified that he reviewed Respondent's pre-shift examinations for the #3 and #4 Entries, but there were no wide bolting hazards listed.

The Secretary contends that the violation was S&S because Peabody violated section 75.220(a) and the magnitude of the cited roof conditions created a reasonable likelihood that the hazard of roof falls would have resulted in an injury. The Secretary asserts that conducting adequate pre-shift and on-shift examinations is crucial to ensure a safe environment for underground coal mines.

The Secretary maintains that the violation was the result of Respondent's high degree of negligence and unwarrantable failure to comply with a mandatory safety standard because Respondent knew or should have known of the hazardous conditions. A pre-shift examiner examined the area prior to the issuance of the order and failed to note the obvious hazard. Additionally, the Secretary argues that the designations were appropriate because the hazards were obvious, mine examiners were trained to spot and correct these types of hazards, and mine examiners were on notice of previous roof bolt spacing violations in the same area of the mine.

Respondent does not dispute that a violation of the cited standard occurred with respect to Order No. 8425955. Respondent contends that Order No. 8425956 should be vacated because no hazard occurred within the meaning of the cited standard.

Respondent argues that the S&S designation for Order Nos. 8425955 and 8425956 is inappropriate. Respondent maintains that the excessive spacing was minimal. According to the inspector's testimony, there was only one location where the spacing between bolts was 20 inches greater than 4.5 feet. Peabody refers to Inspector Reeder's non-S&S determination for Citation No. 8415068, where he concluded that the presence of a series of minimally excessive widths between bolts did not present a condition that is reasonably likely to result in a roof fall. Peabody also relies upon Procedure Instruction Letter No. 110-V-4 (the "PIL"), which states that "bolt spacing in a plan represents nominal dimensions and that reasonable tolerances for instillation are permitted." (Ex. R-37). Respondent maintains that the evidence presented demonstrates that the cited bolt spacing had no detrimental effect upon the integrity of the roof and the chance of an injury-causing event was unlikely.

Respondent contends that the high negligence and unwarrantable failure designations for Order Nos. 8425955 and 8425956 are inappropriate. The wide bolt spacing was minimal and the Secretary did not establish that the condition had existed for a significant amount of time. Respondent maintains that on August 16, the No. 29 Roof Bolter was corrected and the next day it was determined that the machine was functioning properly. If Respondent knew that the wide bolt spacing problem had not been corrected, the No. 29 Roof Bolter would have been taken out of service and replaced. Respondent did not have any knowledge of the wide bolt spacing in the #3 and #4 Entries. Examiners are not expected to measure the spacing between roof bolts while conducting their examinations and excessive bolt spacing would not be readily observable to passing miners. The presence of hog paneling, rock dust, and a line curtain at the cited entries made it difficult to detect excessive bolt spacing. Respondent contends that the cited conditions did not pose the high degree of danger required to maintain a finding of unwarrantable failure or high negligence.

Respondent argues that the $47,200 penalty proposed by the Secretary for Order No. 8425955 and the $56,900 penalty for Order No. 8425956 are excessive. The Secretary has provided no evidence to support his specially assessed penalties. In the absence of any evidence or rationale for proposing specially assessed penalties, the Secretary's proposed $47,200 and $56,900 penalties against Respondent should be rejected and reduced.

3 Discussion and Analysis

I find that Order No. 8425955 was a violation of section 75.220(a)(1) because the roof bolt spacing in the #3 and #4 Entries violated Respondent's Roof Control Plan. Credibility determinations for this order were critical to determine whether Respondent violated the cited standard.

Inspector Benedict has worked for MSHA for more than five years as a coal mine inspector and health specialist. (Tr.I 266). Prior to MSHA, the inspector had worked for Old Ben Coal since 1972, where he performed jobs such as a mine examiner, electrician, maintenance person, general laborer, longwall shearer operator, and refuge truck driver on the surface. (Tr.I 268). Inspector Benedict holds an Illinois examiner's certificate, dust certification, electrical card, and an associate's degree. *Id*.

The Commission has held that the requirement to develop a roof control plan is a fundamental directive of the Mine Act. *Elk Run Coal Co.*, 27 FMSHRC 899, 904 (Dec. 2005). The intent behind the requirement to develop roof control plans was "to afford comprehensive protection against roof collapse the 'leading cause of injuries and death in underground coal mines.' " *UMWA v. Dole*, 870 F.2d at 669 (*quoting* Roof Support Standards, 53 Fed. Reg. at 2,354). I credit the inspector's testimony that he observed and measured bolt spacing in the cited areas that were six feet apart or more. (Tr.I 275-77). Respondent's Roof Control Plan requires that the bolt spacing be no more than 4.5 feet. (Tr.I 275-77, Ex. G-14 at 5). I find that Respondent violated section 75.220(a)(1) because the bolts that the inspector measured were over the permissible 4.5 feet.

I find that the Secretary also established that the order was S&S. The over-spaced bolts posed a serious rock fall or roof fall hazard because Respondent failed to properly support the roof. The excessive bolt spacing was located in wide intersections and there were slips present in the cited areas. Throughout the #3 and #4 Entries, the wide bolt spacing was more than a slight deviation from the Roof Control Plan. Some of the bolt spacing was only off by one or two inches, but in other areas the deviation was significant. According to the inspector's testimony, there were well over 100 locations throughout the two entries where "row after row" had over-spaced bolts. (Tr.I 278-79). It was reasonably likely that the cited hazard would cause a serious injury assuming continued mining operations.

Respondent argued that the Secretary's PIL should be applied to this situation because there were only occasional instances of excessive roof bolt spacing which did not detrimentally affect support performance. After reviewing the inspector's testimony, it is apparent that the over-spaced bolts detrimentally affected support of the roof. I also credit Inspector Benedict's testimony that he instructed mine personnel to move ram cars in order to take a dust sample, but he did not instruct them to go under the unsupported roof.

I find that Respondent's negligence was high for Order No. 8425955 and that the violation was the result of its unwarrantable failure to comply with the safety standard. The widely spaced bolts were obvious and extensive. Respondent had actual knowledge that the No. 29 Roof Bolter was installing bolts with spacing that was greater than allowed by the roof control plan. Although mine personnel performed repairs in an attempt to fix the problem, Respondent did not measure any bolts in the #3 and #4 entries to determine whether the bolter was working correctly. It installed widely spaced bolts in both entries without measuring to see if the bolter had been completely repaired and was properly spacing the bolts. Although Peabody did drill a

few test holes after the attempted repair, it did not take sufficient steps to ensure that the No. 29 Roof Bolter functioned properly after these repairs were made.

The violation was extensive because there were hundreds of widely spaced bolts throughout the two entries from crosscut 7 to the face at crosscut 11. The violation existed for multiple days. Peabody was placed on notice that greater efforts were necessary to comply with the standard because was issued a citation for violating the same standard three days earlier, it had been cited 50 times over the previous two years for violations of its Roof Control Plan, and the mine had a history of 46 roof falls during the previous two years. Even though Peabody had knowledge of problems with the No. 29 Roof Bolter, its attempt to fix it was inadequate and insufficient. The violation was obvious because there were hundreds of widely spaced bolts throughout the two entries and the hazard posed a high degree of danger to miners working in an active area of the mine. Inspector Benedict noticed the problem as soon as he arrived in the area. After reviewing the totality of the evidence presented, Respondent exhibited a serious lack of reasonable care when it failed to adequately support the mine roof in the two entries. The high negligence and unwarrantable failure designations for order No. 8425955 are affirmed.

I find that Order No. 8425956 was a violation of section 75.360(b)(3) because Respondent failed to conduct an adequate pre-shift examination of the roof bolt spacing in the #3 and #4 Entries. I credit the inspector's testimony that he reviewed Respondent's pre-shift examination books for the #3 and #4 Entries and there were no records of the problem with bolt spacing. (Tr.II 24-25). The weekly examiners also failed to record that the No. 29 Roof Bolter was incorrectly spacing bolts. I credit Inspector Benedict's testimony that the condition was both obvious and extensive.

I find that the Secretary established that the violation was S&S. Examiners were not conducting adequate pre-shift examinations of the roof, which created a roof fall hazard. The extensive conditions cited in Order No. 8425955 and the mine's history of roof falls created a reasonable likelihood that the hazard cited by the inspector would contribute to a serious injury, assuming continued mining operations. Failure to perform adequate pre-shift examinations would allow the roof conditions to continue to deteriorate.

I find that Respondent's negligence was high for Order No. 8425956 and that the violation was the result of its unwarrantable failure to comply with the safety standard. Inspector Benedict testified that it was easy to see that the roof bolting pattern was not correct by looking at the roof. (Tr.I 272-78). Respondent's examiners knew or should have known of the hazardous conditions because if the inspector could see the violation from the mine floor, the examiners should have too. Hog paneling, if present, should not have prevented an adequate pre-shift exam. Examiners should be adequately trained to examine mine environments for safety hazards and non-compliance with the Roof Control Plan.

Pre-shift examiners are agents of the operator, so their negligence is attributable to the mine operator. *See, Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-196 (Feb. 1991). A high degree of danger is posed by conducting inadequate pre-shift examinations; such examinations are crucial to maintaining a safe environment in underground coal mines. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997). The unwarrantable failure factors for this order are very similar to the previous order discussed. Although pre-shift examiners were able to identify and flag off other hazards in the two cited entries, they failed to identify the wide bolt spacing. Peabody's violation of the standard was extensive because there were hundreds of widely spaced bolts which had been present for multiple days. The mine examiners should have been placed on notice that greater efforts were necessary because Respondent had been issued a

citation for violating the same standard three days earlier, it was cited 50 times over the previous two years for violations of its Roof Control Plan, and the mine had a recorded history of 46 roof falls during the previous two years. The violation should have been obvious to the examiners. The unwarrantable failure designation for order No. 8425956 is affirmed.

I assess a civil penalty of $35,000.00 for each order. I have reduced the penalty from that proposed by the Secretary principally because Peabody made an attempt to repair the roof bolting machine. If not specially assessed, the proposed penalty would have been less than $20,000.00 for each order. Although Peabody demonstrated aggravated conduct constituting more than ordinary negligence, its conduct demonstrated a "serious lack of reasonable care" rather than "reckless disregard," "intentional misconduct," or "indifference."

III. SETTLED CITATIONS AND ORDERS

On May 23, 2012, I granted the Secretary's motion to approve partial settlement in this case. I approved the settlement of two section 104(a) citations and eight 104(d)(2) orders. I ordered Peabody to pay a total penalty of $34,828.00 for the settled matters.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty.[2] Peabody's history of previous violations is set forth in Exhibit G-13. During the period between 8/19/2008 and 8/18/2010, Peabody had a history of 1,562 paid violations at the mine of which 340 were S&S violations. At all pertinent times, Respondent was a large operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Respondent's ability to continue in business. The gravity and negligence findings are set forth above.

V. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
8415059	75.202(a)	$10,000.00
8415060	75.202(a)	20,000.00
8415064	75.202(a)	10,000.00

[2] Commission judges assess penalties *de novo*. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). "In determining the amount of the penalty, neither the judge nor the Commission is bound by a penalty recommended by the Secretary." *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). "However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act." *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission in *Sellersburg* explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone* at 293. Congress intended civil penalties to provide a "strong incentive for compliance with mandatory health and safety standards." *Nat'l Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976). The penalties I have assessed in this decision provide a strong incentive for compliance taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(c), and my findings and conclusions.

8425955	75.220(a)(1)	35,000.00
8425956	75.360(b)(3)	35,000.00
	TOTAL PENALTY	$110,000.00

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED**, as set forth above. Peabody Midwest Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of $110,000.00 within 40 days of the date of this decision.[3]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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RWM

[3] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.