FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 15, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION ("MSHA"),	:	Docket No. KENT 2010-161
Petitioner,	:	A.C. No. 15-18839-198843-01
	:	
v.	:	
	:	
EXCEL MINING, LLC,	:	Mine: Van Lear Mine
	:	
Respondent.	:	

DECISION

Appearances: LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky for Respondent

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

On November 24, 2009, the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), filed a Petition for the Assessment of Civil Penalty ("Petition") against Excel Mining, LLC ("Respondent" or "Excel"), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), as amended, 30 U.S.C. §§ 815, 820. Respondent subsequently filed an Answer to Petition for the Assessment of Civil Penalty ("Answer") on December 15, 2009. By Order of Robert J. Lesnick, Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission ("Commission"), dated December 13, 2010, the case was assigned to the undersigned for adjudication.

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[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the Federal Mine Safety and Health Review Commission pursuant to an Inter-Agency Agreement effective for a period beginning September 2, 2010.

The Petition alleges two violations described in Order Numbers 8230534 and 8230536, for which the Secretary seeks a civil penalty in the aggregate amount of $8,000. Order Number 8230534 alleges a violation of 30 C.F.R. § 75.202(a) for failure to provide roof support or other controls adequate to protect workers from hazards related to roof falls. Order Number 8230536 alleges a violation of 30 C.F.R. § 75.362(b) for failure to conduct an adequate onshift belt examination along each belt conveyor haulageway. Both orders were issued pursuant to Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2).

A hearing was held on the charged violations in Pikeville, Kentucky, on October 18, 2011. At the hearing, the Secretary introduced testimony from one witness, Kip Bell, and proffered five exhibits that were admitted into evidence and marked as the Secretary's Exhibits ("S's Ex.") 1–5. Respondent stipulated to these exhibits at the hearing. Transcript ("Tr.") 18. Respondent also introduced testimony from one witness, Mike Moore. The Secretary and Respondent filed Post-Hearing Briefs on January 6, 2012, and February 3, 2012, respectively. With the latter filing, the record closed.

I. STIPULATIONS[2]

Before the hearing, the parties entered into the following stipulations ("Stip."):

1. Respondent is subject to the Mine Act.

2. Respondent has an effect on interstate commerce within the meaning of the Mine Act.

3. Respondent is subject to the jurisdiction of the Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.

4. Respondent operates the Van Lear Mine, with Mine Identification Number 15-18839.

5. The Van Lear Mine produced 874,670 tons of coal in 2008, and had 398,784 hours worked in 2008.

6. A reasonable penalty will not affect Respondent's ability to remain in business.

II. BURDEN OF PROOF

In a civil penalty proceeding, the Secretary bears the burden of proving the alleged violation by a preponderance of the evidence. *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citing 30 U.S.C. § 823(d)(2); *Kenny Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981)). This standard requires the Secretary to demonstrate that "the existence of a fact is more probable

[2] The parties filed Joint Stipulations on August 6, 2011. As noted by Respondent in its Post-Hearing Brief, the Secretary represents in her Post-Hearing Brief that the parties agreed upon facts differing from those set forth in the Joint Stipulations. The only stipulations identified herein are those contained in the Joint Stipulations.

than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

III. PENALTY PRINCIPLES

To determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider the following factors: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) 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). Set forth at 30 C.F.R. § 100.3, MSHA promulgated regulations that elaborate upon these factors in order to facilitate the calculation of a civil penalty to propose for charged violations. The undersigned is not bound by these regulations or the penalty proposed by the Secretary, however. 29 C.F.R. § 2700.30(b); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291–92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Rather, the undersigned is required to determine the appropriate assessment independently by proper consideration of the six penalty criteria identified above. *Id.*

The concepts of gravity and negligence are applicable to all citations and orders issued pursuant to the Mine Act, and form part of the penalty assessment scheme used by MSHA and its inspectors. For certain violations found to be "significant and substantial" or to involve "unwarrantable failure," enhanced enforcement mechanisms are available under Section 104(d)(1) of the Act, which provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under [this Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1). As the Commission succinctly explained in a recent decision, "Section 104(d)(1) distinguishes as more serious any violation that 'could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard,' and establishes more

severe sanctions for any violation that is caused by 'an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.'" *Wolf Run Mining Co.*, 2013 WL 1249150, *2 n.4 (Mar. 20, 2013). This mechanism for enhanced enforcement serves as a "forceful incentive for the operator to exercise special vigilance in health and safety matters." *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987)). The legal standards applicable to each of these concepts are described below.

A. <u>GRAVITY</u>

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider "the gravity of the violation," among other criteria. 30 U.S.C. § 820(i). Gravity is "often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). Pursuant to the regulations promulgated at 30 C.F.R. § 100.3(e), the Secretary analyzes the seriousness of a violation with reference to three factors: (1) the likelihood of occurrence of the event against which a standard is directed; (2) the severity of the illness or injury if that event occurs; and (3) the number of persons potentially affected.

B. <u>SIGNIFICANT AND SUBSTANTIAL</u>

As discussed in greater detail below, the Secretary alleges that one of the charged violations was of a significant and substantial ("S&S") nature. As defined by Section 104(d)(1) of the Mine Act, 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)(1). The Commission first interpreted this statutory language in *Cement Division, National Gypsum Company*, 3 FMSHRC 822 (Apr. 1981), holding that a violation is properly designated as S&S "if, based upon the particular facts surrounding [the] violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Nat'l Gypsum*, 3 FMSHRC at 825. The Commission later elaborated on this standard in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984) ("*Mathies*"):

> 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. As a practical matter, the last two elements will often be combined in a single showing.

Mathies, 6 FMSHRC at 3–4.

The S&S nature of a violation is distinct from the violation's gravity. As noted by the Commission, "[t]he 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 at 1550. The Commission has also emphasized that in accordance with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), the S&S nature of a violation stems from "a reasonable likelihood that the [cited] condition . . . could contribute, significantly and substantially, to the cause and effect of a safety hazard." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984). Thus, "it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis added). Finally, the S&S inquiry must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

C. NEGLIGENCE

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to also consider "whether the operator was negligent." 30 U.S.C. § 820(i). Thus, "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Secretary defines negligence 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). When analyzing an operator's negligence, the Secretary considers mitigating circumstances, such as actions taken by the operator to remedy hazardous conditions or practices. *Id.*

D. UNWARRANTABLE FAILURE

As discussed in greater detail below, the Secretary alleges that both of the charged violations resulted from Respondent's unwarrantable failure to comply with the cited standards. The Commission has described an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "indifference," or a "serious lack of reasonable care." *Id.* at 2002–04; *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure analysis). The Commission has explained the role of Administrative Law Judges in determining whether conduct is "aggravated" in the context of an unwarrantable failure analysis:

> [W]hether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include 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 were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, [and] the operator's knowledge of the existence of the violation. . . . While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge.

IO Coal Co., 31 FMSHRC 1346, 1350–51 (Dec. 2009). Repeated similar violations are relevant to the unwarrantable failure analysis to the extent that they serve to notify the operator that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261–62 (Aug. 1992).

IV. SUMMARY OF THE EVIDENCE

At the hearing, in support of the facts underlying the alleged violations and proposed penalties, the Secretary offered the testimony of MSHA Inspector Kip Bell and copies of Order Numbers 8230534 and 8230536, the field notes of Inspector Bell, a document entitled "Assessed Violation History Report," and the revised roof control plan for Respondent's Van Lear Mine. Respondent, in turn, offered the testimony of Mike Moore.

A member of the coal mining industry for the last 25 years, including four years as a mine safety and health inspector for the State of West Virginia and seven years as an inspector for MSHA, Inspector Bell testified that he issued Order Numbers 8230534 and 8230536 while conducting an "E01 inspection"[3] of Respondent's Van Lear Mine on August 19, 2009. Tr. 10–15, 22, 34. Admitted into evidence as Secretary's Exhibits 1 and 3, respectively, Order Number 8230534 and the field notes of Inspector Bell reflect that he traveled the "off side" of the Number 5 belt conveyor[4] in the Number 4 entry of the Mine, beginning at the tailpiece of the belt conveyor, as part of his inspection. S's Ex. 1, 3. In accordance with applicable regulations, an examination of the Number 5 belt conveyor had last been performed by Respondent during the

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[3] Inspector Bell explained that an E01 inspection is an inspection conducted underground on a quarterly basis. Tr. 22.

[4] When asked to distinguish the off side of a belt conveyor, Inspector Bell explained that "[n]ormally the other side [of the belt conveyer] is what was walked or traveled" but that "the off side is supposed to be maintained 24 inches for a walkway." Tr. 49. Inspector Bell further explained that this walkway is utilized for "examinations" and that "stoppings [exist] on the offside as well, with mandoors, to go through return and airways, intakes." Tr. 61.

second production shift on August 18, 2009,[5] or between eight and 12 hours prior to Inspector Bell's inspection, which he began at 6:50 a.m. Tr. 39–41, 50–51, 64, 73–74; S's Ex. 3. Inspector Bell explained that he reviewed Respondent's records at the outset of his inspection, and in the records kept for the Number 5 belt conveyor, the examiner who performed the last examination on August 18 wrote that no hazards were observed along the belt conveyor at that time. Tr. 30–31, 34–35; S's Ex. 2, 3.

According to Inspector Bell's testimony and field notes, he was accompanied by Mr. Moore, a belt coordinator at the Van Lear Mine, as he traveled the off side of the Number 5 belt conveyor on August 19th, and Mr. Moore informed him of the presence of "draw rock"[6] along the entire length of the off side of the belt conveyor before they set off from the tailpiece. Tr. 23–24, 29, 35–36, 49; S's Ex. 3. Upon traveling this area, Inspector Bell observed three segments along the walkway totaling a distance of approximately 2730 feet where loose and broken draw rock was indeed present,[7] including one piece of draw rock that measured approximately 4.5 feet by 3 feet and that was 4 inches thick, which "had fallen and knocked the tubular belt structure out and off of the belt stand located on the off side." S's Ex. 1, 3; Tr. 19–20, 41–42, 45–47. Inspector Bell recorded in the body of the Order that the draw rock had resulted from "sloughing and scaling . . . around the permanently installed (6 feet resin grouted) roof bolts in the affected area" and that three such bolts were hanging from the roof.[8] S's Ex. 1; *see also* Tr. 19–20, 43. Describing the hanging bolts that he observed as "inoperative," Inspector Bell explained that they were not "doing their job as far as the draw rock had deteriorated away from the bearing plates." Tr. 20.

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[5] As established by the testimony of Inspector Bell and Mr. Moore, employees at the Van Lear Mine work in three shifts: the first two shifts, which together run from approximately 6:30 a.m. to midnight, are production shifts, and the third shift, which runs from approximately 10:30 p.m. to 8 a.m., is a maintenance shift. Tr. 39, 63, 74.

[6] Inspector Bell described draw rock as "laminated sandstone or slate . . . that has shifted due to air or deterioration away from the roof bolt or ribs." Tr. 20. He further explained that this loose rock "[breaks] away from the immediate mine roof and . . . kind of gap[s] down," similar to peeling paint, until it ultimately falls to the floor of the mine. Tr. 57–59. When draw rock forms, Inspector Bell testified, operators are obligated to eliminate it and install additional roof support. Tr. 20–21. He further testified that while some operators install netting on the roofs of their mines to prevent any draw rock that forms from falling to the floor, Respondent did not employ any such measures at the Van Lear Mine. Tr. 57–58.

[7] For reference, Mr. Moore testified that the length of the belt conveyor at the time of Inspector Bell's inspection was approximately 4000 feet. Tr. 73.

[8] Inspector Bell affirmed at the hearing that Respondent utilizes two types of bolts in the belt entry, resin grouted bolts and cable bolts, in order to maintain the stability of the roof, and that between 4000 and 5000 resin grouted bolts had been installed there. Tr. 43–45; *see also* S's Ex. 3. Mr. Moore also confirmed the use of these resin grouted bolts during his testimony. Tr. 82–83.

According to Inspector Bell's testimony and field notes, as he and Mr. Moore traveled the off side of the Number 5 belt conveyor, Inspector Bell observed two miners report to Mr. Moore and Mr. Moore instruct them to shovel coal along the walkway.[9] Tr. 24–25, 52–53, 60–61; S's Ex. 3. Inspector Bell testified that he questioned Mr. Moore about the instructions he had issued and Mr. Moore responded that "he told those two to shovel on the off side because we were traveling off side. And he assumed that's where the -- they had accumulations of coal." Tr. 24–25. While Inspector Bell could not recall at the hearing whether he saw the two miners shoveling along the Number 5 belt conveyor as ordered by Mr. Moore, Tr. 53, he recorded in his field notes that he "[o]bserved a Green Hat miner shoveling on the off side of 5 Belt and a Black Hat miner shoveling on the walkway side," S's Ex. 3. Later in his field notes, he identified the miners by name. *Id.*

Thereafter, at 11:30 a.m., Inspector Bell issued Order Number 8230534 to Respondent for failure to support or otherwise control the roof for hazards related to roof falls where persons work or travel. S's Ex. 1, 3. At the hearing, Inspector Bell testified that Mr. Moore "put two guys in harm's way with shoveling" in an area known to him to have loose and broken draw rock. Tr. 24. He explained his belief that the draw rock posed a risk of falling onto miners passing beneath it and causing injuries, such as broken bones and injured backs, or even fatalities. Tr. 20, 29. Inspector Bell believed that such an accident was reasonably likely to occur and that permanently disabling injuries would result. Tr. 22–23. He testified that Respondent was aware that greater compliance efforts were necessary because of a citation issued to it on August 4, 2009, related to record-keeping requirements. Tr. 27–28, 47–48. Finally, he described how Respondent remedied the cited conditions, testifying, "[t]he roof had been scaled and the roof bolt had been repaired with half -- cap wedges. The whole entry had been rescaled to knock the draw rock down." Tr. 29–30. He also recorded in the Order, "[t]he entire No. 4 entry mine roof has been properly scaled from the No. 5 belt tail piece down to the discharge head. Also, management has installed half headers over all hanging roof bolts, and the damaged belt structure has been repaired as required." S's Ex. 1. Inspector Bell terminated the Order at 4 p.m. that day. *Id.*

Upon returning to the surface of the mine, Inspector Bell also issued Order Number 8230536 to Respondent at 12:45 p.m. S's Ex. 2, 3. Explaining that operators are required to document any hazardous conditions observed during belt examinations in order to inform miners working in the affected areas, Inspector Bell testified that the records he reviewed prior to entering the Van Lear Mine failed to identify the conditions that he cited in Order Number 8230534 and three other citations that he issued during his inspection of the Number 5 belt conveyor. Tr. 30–31, 34–35; *see also* S's Ex. 3. Admitted into evidence as Secretary's Exhibit 2, Order Number 8230536 reflects that the alleged violation was abated by the mine foreman documenting the hazards cited in the aforementioned citations. S's Ex. 2. Inspector Bell terminated the Order 10 minutes after he issued it. *Id.*

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[9] Inspector Bell's testimony and field notes reflect that he also observed two miners shoveling at the tailpiece of the Number 5 belt conveyer. Tr. 36–37; S's Ex. 3. Mr. Moore confirmed that he assigned two miners the task of shoveling at the tailpiece that morning. Tr. 74–75. The record is confusing as to whether those particular miners were the same individuals who allegedly reported to Mr. Moore as he accompanied Inspector Bell on his inspection of the off side of the belt conveyor. *See* S's Ex. 3; Tr. 24–25, 26–37, 52–53, 60–61.

During questioning by Respondent's counsel, Inspector Bell agreed that a mine "can look different from different directions" and that he did not know the direction traveled by the examiner who last performed an examination of the area. Tr. 39–40. Inspector Bell also conceded that the condition of a mine roof can change over the course of a shift and that draw rock forms more readily in the Van Lear Mine during the "sweat season" it experiences in the summer months.[10] Tr. 40, 54. In addition, when questioned by counsel for the Secretary and later by the undersigned, Inspector Bell affirmed that the amount of draw rock that he observed could have formed since the last examination performed by Respondent. Tr. 56, 59. Inspector Bell also recorded in his field notes, "Evidence not available to ascertain an equitable time for existence" of the conditions. S's Ex. 3. Nevertheless, Inspector Bell estimated at the hearing that the conditions he observed had been present for "more than one day, more than three shifts." Tr. 27, 53–54.

On behalf of Respondent, Mr. Moore testified that he was not aware of the condition of the Number 5 belt conveyor at the time it was last examined on August 18 because he "hadn't traveled it for a while and they never let you know -- they never left nothing -- say anything was wrong with it." Tr. 73. Following Inspector Bell's inspection, however, Moore conferred with the miners who performed examinations of the Number 5 belt conveyor on August 18, and they informed him that they did not observe any hazardous conditions at the time of those examinations. Tr. 89–91.

Mr. Moore also denied informing Inspector Bell at the tailpiece of the Number 5 belt conveyor on August 19 that any draw rock was present along the belt conveyor:

> Q: Now, at the tailpiece did you tell Mr. Bell that loose and broken draw rock is present on the offside of the entire No. 5 belt?
>
> A: No.
>
> Q: You're certain of that?
>
> A: I'm certain.
>
> Q: Did you ever make that statement to Mr. Bell?
>
> A: No.
>
> Q: What did you say to him at the tailpiece?
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> A: He would just ask me what kind of shape -- I had never made the belt myself. I didn't know. I had no idea.

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[10] When questioned about the "sweat season," Inspector Bell affirmed that warm air entering the cooler interior of the mine can cause draw rock to form. Tr. 54. As Mr. Moore explained, "[y]ou have it like in the summer and towards the fall where draw rock falls pretty regular off the course, and it really does. And we call it sweat season, top gets wet and just loose rock breaks loose." Tr. 77.

Tr. 76.

While Mr. Moore conceded that he observed draw rock and loosened roof bolts as he traveled the off side of the Number 5 belt conveyor with Inspector Bell, he minimized the extent of these conditions, testifying that the draw rock was present in "three little places" and consisted of "a few pieces laying here and there." Tr. 78–80, 82. He further testified that he observed "3 by 4 rock or something" but that he didn't remember "the size of it or anything." Tr. 79. He also denied that draw rock had dislodged any of the belt structure, as alleged by Inspector Bell, explaining that he thought the structure had loosened simply because a miner had failed to "pin it together good" and that the absence of any fallen draw rock nearby supported his conclusion. Tr. 81–82, 87–88. When questioned about the abatement of the cited conditions, Mr. Moore testified:

> A: Well, I went back and got the belt shovelers and we took care of it. They helped me take care of the rock, fix the bolts.
>
> Q: And approximately how long did that take?
>
> A: Probably an hour, hour maybe at the most.

Tr. 84. Later extending this estimate to 90 minutes, he explained that he and the belt shovelers scaled the roof to eliminate the hanging draw rock and disposed of the fallen draw rock by using hammers to break it apart and then remove it on the belt conveyor. Tr. 88, 90.

Finally, while Mr. Moore conceded that draw rock generally poses a hazard and is capable of causing injury, he denied that the particular conditions observed along the off side of the Number 5 belt conveyor endangered any miners:

> Q: Do you believe that you put two belt shovelers in an unsafe work environment?
>
> A: No, no.
>
> Q: Why not?
>
> A: Because I left them at the tailpiece, said, "Stay right there at the tailpiece and clean it and clean the head drive."

Tr. 84–85, 87–93. Mr. Moore emphasized that miners were not permitted to work at any other location along the belt conveyor because it had not yet been subject to an examination during the current shift. Tr. 76.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. ORDER NUMBER 8230534: ALLEGED VIOLATION OF 30 C.F.R. § 75.202(a)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 11:30 a.m. on August 19, 2009, Inspector Bell issued Order Number 8230534 to Respondent pursuant to Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging in the "Condition or Practice" section as follows:

> The roof where persons work or travel, is not being supported or otherwise controlled for the hazards related to roof falls, in the No. 4 entry on the off side of the Co. No. 5 belt conveyor (walk way) in three different locations. (1) From the tail roller, cross cut No. 58 down to cross cut No. 29 down to cross cut No. 1, at the discharge head. A total distance of approximately 2,730 feet. Loose and broken draw rock is present due to sloughing and scaling from around the permanently installed (6 feet resin grouted) roof bolts in the affected area. A piece of draw rock that measured approximately 4.5 feet by 3 feet and approximately 4 inches thick, had fallen and knocked the tubular belt structure out and off of the belt stand located on the off side. The belt is not rubbing in the affected area. Also, observed three previously installed 6 feet resin grouted permanent roof bolts hanging from the mine roof, ranging from 2 inches up to 10 inches. No additional roof supports have been installed in the affected area. This area is required to be shoveled at regular intervals. This violation is an unwarrantable failure to comply with a mandatory standard.

S's Ex. 1. The Order further alleges that these conditions constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.202(a), which requires "[t]he roof, face and ribs of areas where persons work or travel [to] be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

As set forth in the Order, Inspector Bell determined that an injury was reasonably likely to occur as a result of this alleged violation, that such an injury could reasonably be expected to be permanently disabling, and that two people would be affected. S's Ex. 1. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was high. *Id.*

For the alleged violation, the Secretary proposed the assessment of a civil penalty in the amount of $4,000.

2. LIABILITY

a. Arguments of the Parties

The Secretary cites the testimony of Inspector Bell and the observations he recorded in the Order to support the alleged violation. Secretary's Post-Hearing Brief ("S's Br.") at 4 (citing Tr. 19–20, 24; S's Ex. 1).

In turn, Respondent claims that the Secretary failed to establish a violation of 30 C.F.R. § 75.202(a) and requests that the Order be vacated. Respondent's Post-Hearing Brief ("R's Br.") at 5, 7. In support of its position, Respondent first cites a number of legal authorities to describe the applicable legal standard for adjudicating an alleged violation of 30 C.F.R. § 75.202(a). In particular, Respondent argues 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.'" R's Br. at 4 (quoting *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). Respondent further argues that "'the reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation.'" R's Br. at 4–5 (quoting *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005)).

Turning to the evidentiary record, Respondent asserts that its agents had not examined the Number 5 belt conveyor for at least eight hours prior to Inspector Bell's inspection on August 19, that none of its agents had traveled the length of the conveyor in the time that elapsed between that examination and the inspection, and that Inspector Bell did not dispute that the draw rock he observed could have formed in that time. R's Br. at 5–6 (citing Tr. 39, 50, 56, 59, 64, 72–73, 80). Referring to Inspector Bell's observation of three previously-installed roof bolts hanging from the roof, Respondent argues that this small number of loose bolts, relative to the thousands of secure bolts supporting the mine roof, demonstrates "the reasonably prudent nature of the roof support measures in place along the length of the No. 5 Belt Line." R's Br. at 6 (citing Tr. 20, 43–45; S's Ex. 1). Finally, Respondent contends that the testimony of Mr. Moore clearly refutes Inspector Bell's characterization of the extensiveness of the draw rock along the Number 5 belt conveyor. R's Br. at 6–7. In particular, Respondent cites Mr. Moore's testimony that he did not consider the draw rock to be as extensive as claimed by Inspector Bell, that he was able to scale back the draw rock in no more than 90 minutes, and that the belt structure claimed by Inspector Bell to have been knocked loose by draw rock had simply worked itself loose on its own accord. R's Br. at 7 (citing Tr. 78–80, 82 84, 88).

b. Discussion

The requirements of 30 C.F.R. § 75.202(a), as applied to roofs, can be divided into three elements: 1) the cited area must be one where persons work or travel; 2) the area must be supported or otherwise controlled; and 3) such support or controls must be adequate to protect persons from falls of the roof. The first two elements are undisputed. Inspector Bell explained

that the off side of a belt conveyor is utilized for "examinations" and that "stoppings [exist] on the offside as well, with mandoors, to go through return and airways, intakes." Tr. 61. Inspector Bell also recorded in the body of the Order that he understood the area to be shoveled at regular intervals. S's Ex. 1. Respondent did not challenge this evidence or offer any contradictory evidence about the purpose for which the off side of the Number 5 belt conveyor is used. In addition, Inspector Bell affirmed at the hearing that Respondent utilizes two types of bolts in the Number 5 belt entry, resin grouted bolts and cable bolts, in order to support the roof, and that between 4000 and 5000 resin grouted bolts had been installed there. Tr. 43–45; *see also* S's Ex. 3. Mr. Moore confirmed the use of these resin grouted bolts during his testimony. Tr. 82–83.

As the first two elements of the cited standard are established, liability turns on the third element, the adequacy of the roof support or other controls in protecting miners from hazards as they work or travel beneath it. As noted by Respondent, in considering the protective aspect of the standard, the Commission has held:

> [T]he 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. . . . [T]he reasonably prudent person test contemplates an objective—not subjective—analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.

Canon Coal Co., 9 FMSHRC 667, 668 (Apr. 1987).

The undersigned finds that Respondent failed to satisfy this requirement. The testimony of both Inspector Bell and Mr. Moore establish that draw rock had loosened and broken around the resin grouted bolts installed along the off side of the Number 5 belt conveyor as of August 19, 2009. Tr. 19–20, 41–42, 45–47, 78–80, 82. Inspector Bell testified that these conditions resulted in three of the bolts hanging from the roof in such a way that they no longer supported it, a conclusion that Respondent did not dispute. Tr. 20, 43. This evidence reflects that some force was acting on the roof in the cited areas and weakening its stability enough to cause draw rock to form and fall and render some of the existing roof support inoperative. While the parties dispute the extensiveness of the draw rock, the undersigned credits the testimony and contemporaneous field notes of Inspector Bell as to the magnitude of the deteriorating condition of the roof. As a long-standing member of the coal mining industry, including 11 years of experience as an inspector for state and federal government agencies, Inspector Bell was particularly persuasive in his characterization of the conditions at the hearing. Further, his field notes provided a detailed and quantitative description of the conditions. Conversely, Mr. Moore's attempts to downplay the magnitude of the draw rock were vague and self-serving and, without more, are entitled to less weight than the countervailing evidence presented by Inspector Bell.

The danger generally posed by draw rock is not disputed by the parties. Indeed, Mr. Moore affirmed that any amount of loose rock constitutes a hazard. Tr. 87–88. Both Inspector Bell and Mr. Moore testified that draw rock can fall at any time, an assertion supported by their observations of fallen draw rock on the floor of the entry, including one piece measuring

approximately 4.5 by 3 feet and approximately 4 inches thick. S's Ex. 1; Tr. 19–20, 41–42, 45–47, 58, 78–80, 82. Inspector Bell and Mr. Moore also agreed that the likelihood that pieces of draw rock would form and fall was greater at the time of Inspector Bell's inspection due to the "sweat season" experienced by the Van Lear Mine. Tr. 54, 77. Notwithstanding the increased likelihood of such an occurrence, the record reflects that Respondent did not employ any additional measures to support the roof or prevent draw rock from falling to the mine floor, such as the netting installed by some operators for that purpose. Tr. 57–58.

Given the extensiveness of the draw rock present on the off side of the Number 5 belt conveyor on August 19, 2009, the likelihood that it would fall, and the fact that at least one large piece of draw rock had already fallen, the undersigned finds that a hazard existed and that a reasonably prudent operator would have noted and eliminated it prior to permitting any miners to work or travel in that area. While Mr. Moore disputed whether any miners would be exposed to the purported hazard because, as he maintained, he did not direct any miners to work or travel in the cited area and miners were prohibited from entering the area until an examination had been performed, the testimony and field notes of Inspector Bell support a finding that two miners reported to Mr. Moore as he and Inspector Bell traveled the off side of the Number 5 belt conveyor and that Mr. Moore issued instructions to the miners to shovel coal along the walkway in advance of their approach. Tr. 24–25, 52–53, 60–61, 76, 84–85; S's Ex. 3. Inspector Bell could not recall at the hearing whether he saw the two miners shoveling along the Number 5 belt conveyor as ordered by Mr. Moore. Tr. 53. However, he recorded in his field notes during the course of the inspection that he "[o]bserved a Green Hat miner shoveling on the off side of 5 Belt and a Black Hat miner shoveling on the walkway side." S's Ex. 3. Later in his field notes, he identified the miners by name. *Id.* The specificity and contemporaneous nature of this evidence compels the undersigned to find that at least one of the miners was performing work along the off side of the belt conveyor as instructed by Mr. Moore and that the miner, therefore, was at risk of injury by the draw rock present in the area, contrary to Mr. Moore's claims.

Based upon the foregoing discussion, the undersigned finds that, on August 19, 2009, the roof along the off side of the Number 5 belt conveyor was not adequately supported or otherwise controlled to protect persons working or traveling in that area from hazards related to falls of the roof. Accordingly, Respondent violated 30 C.F.R. § 75.202(a) as charged in Order Number 8230534.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i. Arguments of the Parties

Addressing the three factors by which the gravity of a violation is measured pursuant to 30 C.F.R. § 100.3, the Secretary notes that Inspector Bell found the draw rock to be reasonably likely to cause an accident, that such an accident would result in permanently disabling injuries such as broken bones, and that the two miners sent to clean the belt conveyor by Mr. Moore would be affected by the hazard. S's Br. at 5 (citing Tr. 23–24). As for Inspector Bell's determination that the violation was significant and substantial, the Secretary contends that

Respondent's failure to remedy the loose draw rock contributed to a significant degree of danger to the safety of the miners sent to clean the belt conveyor, upon whom the draw rock could fall. *Id.* at 6–7 (citing Tr. 30). The Secretary further contends that a reasonable likelihood existed that the hazard created by the loose draw rock would result in an injury reasonably serious in nature to those miners. *Id.* at 7–8 (citing Tr. 23).

Respondent counters that the Secretary has failed to point to specific facts demonstrating that the charged violation was properly designated as significant and substantial in nature. R's Br. at 10. In particular, Respondent notes that miners were precluded from performing any work along the length of the Number 5 belt conveyor until an examination had been conducted. *Id.* at 11–12 (citing Tr. 51, 85; 30 C.F.R. § 75.361). Further, Respondent disputes that Mr. Moore instructed miners to work at any location along the Number 5 belt conveyor other than the tailpiece, which had been subject to a preshift examination and where the roof was undisputedly free of hazards. *Id.* at 11–13 (citing Tr. 38, 53, 74–77, 85). Indeed, Respondent notes, Inspector Bell was able to recall at the hearing only that he observed miners working at the tailpiece of the belt conveyor. *Id.* at 12 (citing Tr. 53). Finally, Respondent points to the conflicting accounts offered by Inspector Bell and Mr. Moore of the conditions along the belt conveyor, which, according to Respondent, raises "serious questions . . . regarding the veracity of Bell's contentions regarding the actual roof conditions." *Id.* at 13–14 (citing Tr. 46–47, 79–80, 82, 84, 88). In view of the foregoing considerations, Respondent contends, "the Secretary's S&S designation cannot stand." *Id.* at 13–14.

ii. Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) that the underlying violation of a mandatory safety standard occurred; 2) that the violation contributed to a discrete safety hazard; 3) that the hazard in question is reasonably likely to result in an injury; and 4) that the injury in question is reasonably likely to be of a reasonably serious nature. 6 FMSHRC 1 (Jan. 1984). Having found above that Respondent violated 30 C.F.R. § 75.202(a) by failing to adequately support or otherwise control the roof along the off side of the Number 5 belt conveyor and that this violation exposed miners to the hazard of falling rock, the first two elements have already been established.

The undersigned further finds that the hazard was reasonably likely to result in injury, thereby satisfying the third element of *Mathies*. The record supports a finding that draw rock was present along an extensive stretch of the off side of the belt conveyor and that Mr. Moore directed two miners to clean the area of coal in advance of Inspector Bell's approach, despite the prohibition against the performance of any work on the belt conveyor until an examination had been conducted. Had the miners reviewed the records kept for the Number 5 belt conveyor before they commenced working in the area, they would have found that the examiner who last conducted an examination there reported an absence of hazards. While Mr. Moore testified that Respondent's agents are routinely advised to be watchful for the formation of draw rock, Tr. 77–78, as agreed upon by the witnesses and as evidenced by the draw rock that had already fallen to the floor of the entry, draw rock can form and fall at any time, and the "sweat season" experienced by the Van Lear Mine increased the likelihood of such an occurrence. Based upon

these considerations, the undersigned agrees with Inspector Bell's conclusion that the miners were reasonably likely to be struck by falling draw rock while working or traveling along the off side of the Number 5 belt conveyor.

Finally, the record contains sufficient evidence that any injury caused by falling draw rock was reasonably likely to be reasonably serious in nature. Inspector Bell testified that a mine inspector was struck by falling draw rock at the Van Lear Mine only a few months prior to his August 19, 2009 inspection, and multiple surgeries were required to repair the inspector's leg. Tr. 59–60. While this anecdotal evidence is limited, Respondent failed to elicit any contradictory testimony from Inspector Bell on this subject or present any evidence in rebuttal to discredit the possibility of such a serious injury. Tr. 66, 92–93. Additionally, as noted above, the testimony of both Inspector Bell and Mr. Moore establish that a piece of draw rock, measuring approximately 4.5 feet by 3 feet and approximately 4 inches thick, had already formed and fallen to the floor of the entry. A falling rock of that size is unquestionably capable of causing severe injury to a person beneath it.

Based upon the foregoing discussion, the undersigned affirms that the charged violation was significant and substantial in nature. Given the reasonable likelihood of a miner being struck by falling rock and sustaining a severe injury, the undersigned also finds the gravity of the violation to be serious and affirms Inspector Bell's characterizations in this regard.

b. Negligence and Unwarrantable Failure

i. Arguments of the Parties

Citing the testimony of Inspector Bell, the Secretary argues that Respondent exhibited a high degree of negligence because its agent, Mr. Moore, instructed two miners to work in an area where he knew loose draw rock to exist. S's Br. at 5 (citing Tr. 24). The Secretary relies upon *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010) ("*Coal River*"), to support her position that agents of Respondent "'reasonably should have known' of the violative conditions." *Id.* (citing *Coal River*, 32 FMSHRC at 92). The Secretary argues further that the charged violation resulted from Respondent's unwarrantable failure to comply with 30 C.F.R. § 75.202(a). *Id.* at 12. In support of this claim, the Secretary cites the following aggravating factors: 1) Respondent failed to properly support the roof over an extensive area; 2) according to Inspector Bell, the violative condition existed for more than a day; 3) the hazardous condition was obvious and posed a high degree of danger based upon the extent of the draw rock; 4) Respondent was aware that greater efforts were necessary to comply with standards related to roof support based upon its history of violations of its roof control plan and the issuance of Citation Number 8227072 to Respondent on August 14, 2009,[11] requiring that all belt examiners receive training in recognizing and recording hazards; and 5) Respondent had knowledge of the existence of the violation. *Id.* at 10–11 (citing Tr. 23, 25, 27–28; S's Ex. 4; *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *Coal River*, 32 FMSHRC at 92).

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[11] While the Secretary identified Citation Number 8227072 as having been issued on August 14, 2009, Inspector Bell documented in the body of Order Number 8230536 that it was issued on August 4, 2009. S's Ex. 1. As a copy of Citation Number 8227072 was not introduced into the record, the precise date of its issuance is unclear.

Respondent challenges each of the considerations identified by the Secretary as supporting a finding of unwarrantable failure to comply. R's Br. at 15–21. In particular, Respondent questions the veracity of Inspector Bell's testimony concerning the extensiveness of the hazardous conditions given the conflicting testimony of Mr. Moore and the small number of bolts found by Inspector Bell to be hanging loose from the roof relative to the total number installed. *Id.* at 16–17 (citing Tr. 43–45, 82–83). Respondent also contends that the length of time that these conditions existed is unclear from the record, as Inspector Bell first testified they existed for more than one day but later acknowledged that they could have developed between Respondent's last examination of the Number 5 belt conveyor on August 18 and Inspector Bell's inspection eight to 12 hours later on August 19. *Id.* at 15 (citing Tr. 27, 56, 59).

Next, Respondent disputes the Secretary's contention that the hazardous conditions were obvious and posed a high degree of danger, arguing again that the evidentiary record does not support a finding that the draw rock was extensive. R's Br. at 19. To the extent the draw rock did exist, Respondent argues, the testimonial evidence in the record demonstrates that "it had formed since the last examination of the area, was quickly eliminated, and no miners would have been permitted to work along the length of the No. 5 Belt Line tailpiece until the area had been subjected to a preshift examination." *Id.* Respondent further argues that "the Secretary offered absolutely nothing of substance to suggest MSHA had placed Excel on notice of a need for greater efforts with respect to the adequacy of roof control efforts along its belt conveyor entries," noting that the record reflects that Respondent was last cited for a violation of 30 C.F.R. § 75.202(a) at its Van Lear Mine almost two years prior to issuance of the Order at issue here, that the Secretary failed to offer into evidence the citation referenced by the Secretary in her Post-Hearing Brief, and that the standard under which that citation was issued is unclear. R's Br. at 17–18 (citing Tr. 28, 48–49; S's Ex. 4). Finally, citing the "unequivocal" testimony of Mr. Moore, Respondent denies that it knew of the conditions alleged by the Secretary. R's Br. at 19–21 (citing Tr. 73, 76–77).

ii. Discussion

As previously discussed, an unwarrantable failure to comply with a mandatory safety standard is aggravated conduct constituting more than ordinary negligence. In order to determine whether conduct is "aggravated" in this context, the Commission directs the undersigned to consider such factors as the extent of the violative condition, whether the violation was obvious or posed a high degree of danger, the length of time that the violation existed, the operator's knowledge of the existence of the violation, whether the operator had been placed on notice that greater efforts were necessary to comply, and the operator's efforts in abating the violative condition. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009).

Consistent with the discussions above, the undersigned is persuaded by Inspector Bell's characterization of the extent of the violative conditions and finds that these conditions posed a high degree of danger. However, in this case, the other factors articulated by the Commission as part of the unwarrantable failure analysis do not support a finding that Respondent's conduct was

aggravated.[12] In particular, the undersigned is unable to find sufficient support in the record for Inspector Bell's conclusion regarding the amount of time that the violative conditions existed. The Secretary presented conflicting evidence on this point. On one hand, Inspector Bell estimated at the hearing that the conditions he observed had been present for "more than one day, more than three shifts." Tr. 27, 53–54. On the other hand, he recorded in his contemporaneous field notes, "Evidence not available to ascertain an equitable time for existence." S's Ex. 3. He also conceded at the hearing that the condition of a mine roof is dynamic and can change over the course of a shift, particularly during the "sweat season" experienced by the Van Lear Mine. Tr. 40, 54. In addition, when questioned by counsel for the Secretary and later by the undersigned, Inspector Bell affirmed that the amount of draw rock that he observed could have formed since the last examination conducted by Respondent, during which, according to the records kept by Respondent, the examiner found no hazards to exist. Tr. 30–31, 34–35 56, 59; S's Ex. 3. This evidence casts significant doubt on Inspector Bell's estimate that the violative conditions had existed for more than a day, particularly as he failed to offer any rationale for this divergent opinion. The undersigned finds, therefore, that the conditions more likely than not developed between the last examination of the Number 5 belt conveyor performed on August 18 and the inspection of the off side of the belt conveyor performed by Inspector Bell on August 19.

The undersigned finds that the Secretary has also failed to establish that Respondent was aware that greater efforts were necessary for compliance with the cited standard. As argued by Respondent, the Secretary's reliance upon Citation Number 8227072 as support for this argument is untenable. A copy of that citation was not introduced into the record, and Inspector Bell admitted at the hearing that he was uncertain of the precise standard cited by it. Tr. 48. While Inspector Bell recorded in the body of Order Number 8230536 that "[a]ll belt examiners received training in recognizing hazards and the proper way to record these hazards as per citation No. 8227072," this broad assertion does little to prove that Respondent was made aware that greater efforts were necessary for compliance with 30 C.F.R. § 75.202(a), which pertains to the particular hazard of falls from the roof, face, and ribs of a mine and is unrelated to record-keeping requirements. S's Ex. 2. The Secretary also refers to Respondent's history of violations of its roof control plan in arguing that Respondent was aware that greater efforts were necessary for compliance. However, the document entitled "Assessed Violation History Report," which was proffered by the Secretary and admitted into evidence as Secretary's Exhibit 4, reflects that Respondent was last found to have violated 30 C.F.R. § 75.202(a) on December 17, 2007, close to two years prior to the issuance of this Order. S's Ex. 4. Additionally, Inspector Bell testified that he was not aware of the number of times Respondent had been cited for the presence of draw rock along belt entries. Tr. 49. Thus, the undersigned finds that the scant evidence offered by the Secretary on this issue fails to sufficiently demonstrate that Respondent was aware that greater efforts were necessary for compliance.

Finally, the undersigned turns to the question of whether Respondent knew of the existence of the violation. According to the testimony and field notes of Inspector Bell, Mr. Moore informed him of the presence of loose and broken draw rock along the entire length of the off side of the Number 5 belt conveyor as he began his inspection at the tailpiece of the belt

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[12] The undersigned notes that neither party offered any evidence related to actions taken by Respondent to improve its compliance with 30 C.F.R. § 75.202(a). Therefore, this factor will not be considered.

conveyor. Tr. 23–24, 29, 35–36, 49; S's Ex. 3. Respondent failed to elicit any contradictory testimony from Inspector Bell at the hearing:

> Q: Now, you contend that Mr. Moore told you at the tailpiece loose and broken draw rock is present on the offside of the entire No. 5 belt?
>
> A: Yes, sir.
>
> Q: That's not actually what he told you, is it?
>
> A: If it's in my note, that's what he told me.
>
> Q: He mentioned the conditions that could arise during that time of year, didn't he?
>
> A: I don't recall that.
>
> Q: He told you to be alert for draw rock along the belt entry?
>
> A: No, sir.

Tr. 49–50. Mr. Moore denied informing Inspector Bell of the condition of the roof, however, and when questioned about the conversation he had with Inspector Bell at the tailpiece, he maintained, "He would just ask me what kind of shape -- I had never made the belt myself. I didn't know. I had no idea." Tr. 76. As noted above, he also testified that Respondent's agents are generally advised to be watchful for the formation of draw rock:

> Q: How often during the course of working in the mines do you sort of give fair warning of possible draw rock?
>
> A: Oh, we talk about it all the time, you know, take care of it and watch for it . . . .

Tr. 77.

The undersigned finds the conflicting evidence on this issue to be in equipoise. While the testimony and field notes of Inspector Bell reflect that Mr. Moore informed him at the outset of the inspection that draw rock was present along the off side of the Number 5 belt conveyor, Mr. Moore denied unequivocally that he made such a statement or that he was even aware of the conditions in the area. A number of considerations appear to support Mr. Moore's claims. First, his testimony that Respondent's agents are generally advised to be alert for the formation of draw rock suggests, as counsel for Respondent implied during his questioning of Inspector Bell, that Mr. Moore merely cautioned Inspector Bell about the possibility of draw rock along the belt conveyor. In addition, having found above that Mr. Moore directed two miners to shovel accumulations of coal along the off side of the Number 5 belt conveyor in advance of Inspector Bell's approach, the undersigned would expect that Mr. Moore would have also instructed the miners to address the loose and broken draw rock if he had actually known of its presence. This

inconsistency suggests that Mr. Moore was not, in fact, aware that draw rock existed in the area. Furthermore, while the record supports a finding that the violative conditions developed at some point after the last examination of the belt conveyor had been performed on August 18, it lacks sufficient evidence that Mr. Moore or any other agent of Respondent had traveled the off side of the belt conveyor since that time and thereby had the opportunity to observe the conditions of the roof in the area. When asked whether he had traveled along the belt conveyor on August 19, Mr. Moore responded, "No. No one had." Tr. 72. He also testified that he and Inspector Bell traveled to the tailpiece of the belt conveyor to begin the inspection by way of "the next entry over from the belt." Tr. 72. With respect to the two miners assigned the task of shoveling at the tailpiece of the belt conveyor on August 19, Mr. Moore explained that he "took them up there and dropped them off at the tailpiece [that morning]." Tr. 75. While Mr. Moore did not explain the route that he and the miners traveled to reach the tailpiece, Inspector Bell acknowledged that they could have used an adjacent entry like the one that he himself traveled. Tr. 64–65. Thus, the record is unclear as to how Mr. Moore would have detected the presence of the draw rock. Given these considerations and the testimony of Mr. Moore, the undersigned finds that the Secretary has failed to carry her burden of demonstrating by a preponderance of the evidence that Respondent was aware of the existence of the violative conditions along the off side of the Number 5 belt conveyor on August 19.

Upon weighing the factors articulated by the Commission as part of the unwarrantable failure analysis, the undersigned concludes that they do not warrant a finding that Respondent's violation of 30 C.F.R. § 75.202(a) rose to the level of aggravated conduct and resulted from an unwarrantable failure to comply. In reaching this conclusion, the undersigned accords great weight to the lack of sufficient evidence in the record that the violative conditions had existed at the time of the last examination of the cited area, that Respondent was aware that greater efforts were necessary for compliance with the cited standard, or that Respondent knew of the draw rock found by Inspector Bell. Nevertheless, the undersigned finds that Respondent was moderately negligent in committing the violation. While Respondent may not have known of the specific condition of the roof along the belt conveyor, the record reflects that Mr. Moore clearly understood the likelihood that draw rock could form and fall in the area; that Respondent did not employ any additional measures to support the roof or prevent draw rock from falling to the mine floor, such as the netting installed by some operators for that purpose; that Mr. Moore was aware that an examination of the belt conveyor had not been performed since the previous day; and that he still ordered two miners to travel and work in that area. These considerations support a finding of moderate negligence.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent in committing it, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 183 violations that became final orders in the preceding 15-month period over the course of 441 days of inspection. As noted above, however, Respondent has not been found to have violated 30 C.F.R. § 75.202(a) since December 17, 2007, close to two years prior to the issuance of this Order. S's Ex. 4.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that the Van Lear Mine produced 874,670 tons of coal and had 398,784 hours worked in 2008, the year preceding that in which Citation Number 8236517 was issued.[13] Stip. 5. Finally, the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the proposed penalty assessment form attached to the Petition. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, including a reduction in the level of negligence, the undersigned finds the appropriate penalty to assess for the violation charged in Order Number 8230534 to be $950. Further, this Order shall be modified to a 104(a) citation and moderate negligence.

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[13] As described by the regulations promulgated by MSHA for the purpose of implementing its penalty assessment scheme, the appropriateness of the penalty to the size of the mine operator's business is calculated as follows:

> The appropriateness of the penalty to the size of the mine operator's business is calculated by using both the size of the mine cited and the size of the mine's controlling entity. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I to V. As used in these tables, the terms "annual tonnage" and "annual hours worked" mean coal produced and hours worked in the previous calendar year.

30 C.F.R. § 100.3(b). In the proposed penalty assessment form attached to the Petition, the Secretary accounted for both the size of the Van Lear Mine and the size of Respondent's controlling entity. While the Assessed Violation History Report reflects that Respondent's controller is Alliance Resource Partners LP ("ARPL"), a review of the evidentiary record fails to disclose the coal production of this entity. S's Ex. 4. Respondent contends, however, that it is "an independent operating subsidiary of ARLP" and that "ARLP – itself – has no 'coal produced' for which 'annual tonnage' can be measured, as described by the plain language of 30 C.F.R. § 100.3(b)." R's Br. at 21–22. Thus, Respondent contends, the Secretary improperly considered this information in calculating the proposed penalty. *Id.* The Secretary did not respond to this allegation.

B. ORDER NUMBER 8230536: ALLEGED VIOLATION OF 30 C.F.R. § 75.362(b)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 12:45 p.m. on August 19, 2009, Inspector Bell issued Order Number 8230536 to Respondent pursuant to Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging in the "Condition or Practice" section as follows:

> An adequate onshift belt examination is not being conducted along the Co. No. 5 underground belt conveyor. Obvious hazardous conditions as stated in citation No.'s 8230532, 8230534, and 8230535 that were issued on this date prior to this issuance, were not recorded in the belt examination record book. The belt examiner recorded "none observed" for the No. 5 belt on 08/18/2009 evening shift, in the book provided for such records. All belt examiners received training in recognizing hazards and the proper way to record these hazards as per citation No. 8227072, issued on 08/04/2009. This violation is an unwarrantable failure to comply with a mandatory standard.

S's Ex. 2. The Order further alleges that this practice constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.362(b), which, at the time the Order was issued, required the following:

> During each shift that coal is produced, a certified person shall examine for hazardous conditions 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).

As set forth in the Order, Inspector Bell determined that an injury was unlikely to occur as a result of this alleged violation; that should an injury occur, it could reasonably be expected to result in no lost workdays; and that no people would be affected. S's Ex. 2. He also determined that the violation was not significant and substantial in nature and that Respondent's degree of negligence in committing the violation was high. *Id.*

Finally, the Secretary proposed the assessment of a civil penalty in the amount of $4,000 for the alleged violation.

2. LIABILITY

a. Arguments of the Parties

To support the alleged violation, the Secretary cites the testimony of Inspector Bell that he reviewed Respondent's shift examination records as part of his inspection on August 19, 2009, and that these records did not contain any documentation of the hazards that he cited along

the Number 5 belt conveyor that day. S's Br. at 5 (citing Tr. 30–31). Accordingly, the Secretary asserts, Inspector Bell "issued Order Number 8230536 as a records violation for failing to record [these] hazards." *Id.*

Respondent requests that Order Number 8230536 be vacated. In support thereof, Respondent first notes that the standard cited by Inspector Bell lacks any requirement that an examiner document the conditions observed during an onshift examination and yet Inspector Bell described a deficiency in Respondent's record-keeping as the basis for his issuance of Order Number 8230536. R's Br. at 8 (citing S's Ex. 2; Tr. 30). Respondent contends, "Bell cited Excel for failing to comply with a non-existent requirement under the regulation. Bell's belief that such a requirement exists does not, and cannot, circumvent the plain language of the regulation cited. As such, the . . . Order must be vacated for this reason, alone." *Id.*

Respondent next argues that the Secretary failed to establish the inadequacy of the examination performed during the last production shift before Inspector Bell's inspection. *Id.* at 9. Respondent notes, "Bell had no recollection of inspecting the Van Lear Mine on [the date of that production shift], never spoke to the examiner who conducted the examination on that date, [and] admitted at hearing that the alleged hazardous and 'excessive' drawrock observed may not have existed at the time of the last examination." *Id.* (citing Tr. 56). Accordingly, Respondent argues, Order Number 8230536 should be vacated. *Id.*

b. Discussion

As discussed above, Order Number 8230536 cites Respondent for a violation of 30 C.F.R. § 75.362(b), which requires "a certified person [to] examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated" during each shift that produces coal at an underground coal mine. S's Ex. 2. As the condition or practice underlying the charged violation, Order Number 8230536 alleges that the examiner who performed the last onshift examination before Inspector Bell's inspection on August 19, 2009, failed to document the hazardous conditions that Inspector Bell observed during the inspection. S's Ex. 2; *see also* Tr. 30; S's Br. at 5.

As noted by Respondent, the standard cited by Order Number 8230536 (*i.e.,* 30 C.F.R. § 75.362(b)) does not expressly require an examiner to record any hazardous conditions that he or she observes during the course of an examination. Rather, the regulations at 30 C.F.R. § 75.363 set forth the applicable requirements governing the documentation and correction of hazardous conditions found by the examiner. Because the "plain language" of the cited standard lacks any record-keeping requirement, Respondent argues, in essence, that an examiner's failure to document hazardous conditions cannot form a basis for liability under that standard. R's Br. at 8. Accordingly, Respondent contends, grounds exist to vacate Order Number 8230536. *Id.*

This argument has already been considered and rejected by a number of persuasive authorities. As recently noted by Senior Administrative Judge Michael E. Zielinski:

> Section 75.362(b) is part of the preshift and onshift examination requirements, and specifically applies to entries where belt conveyors are operated. While it

> addresses onshift examinations, it provides that the onshift examination can be conducted at the same time as the preshift examination, if it is done during the time that the preshift examination must be done, i.e., within three hours before the oncoming shift. The Commission has held that the preshift standard requires a preshift examiner to find and record a hazardous condition in a preshift examination book. Section 75.362(b) imposes a virtually identical requirement.

TRC Mining Corp., 2013 WL 1856600, *9 (Mar. 7, 2013) (ALJ) (internal citations omitted). Also, Administrative Law Judge David F. Barbour held:

> It is beyond doubt that the requirement of section 75.362(b) to conduct an on shift examination during each shift when coal is produced, carries with it the obligation that the examination be sufficient to detect existing hazardous conditions. In other words, subsumed in the standard is the obligation that the examination be adequate. Among the ways of proving that an operator has not met this requirement is to show that a hazardous condition existed in an area that was subject to an on-shift examination, that the hazardous condition continued to exist after the examination and that the hazardous condition was not recorded in the surface examination book.

Twentymile Coal Co., 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ). Finally, Administrative Law Judge William Moran reasoned that the duty to record hazardous conditions is implicit in 30 C.F.R. § 75.362(b) because the standard requires operators to conduct *adequate* examinations and an examination is not adequate if it does not result in the reporting of hazards. *Bledsoe Coal Corp.*, 2012 WL 5178246, *30–31 (Oct. 2, 2012) (ALJ).

The undersigned agrees with the above-described reasoning and finds that the duty to record hazardous conditions observed by an examiner during an onshift examination is implicit in 30 C.F.R. § 75.362(b). Nevertheless, upon consideration of the evidentiary record, the undersigned finds that the Secretary has failed to establish by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.362(b) as alleged.

As noted above, among the ways of establishing that an operator has failed to perform an adequate onshift examination is to show that the violative condition cited by the inspector existed at the time of the onshift examination and that the examiner failed to document it in the examination records. *Twentymile Coal Co.*, 34 FMSHRC at 2171. The parties do not dispute that prior to Inspector Bell's inspection of the Number 5 belt conveyor on August 19, 2009, the last onshift examination of the belt conveyor was performed during the second production shift on August 18, as required by applicable regulations. Tr. 39–41, 50–51, 64, 73–74. According to the testimony and field notes of Inspector Bell, he reviewed Respondent's records at the outset of his inspection, and in the records kept for the Number 5 belt conveyor, the examiner who performed that last examination wrote that no hazards were observed along the belt conveyor at that time. Tr. 30–31, 34–35; S's Ex. 3. Respondent does not dispute this assertion. Thus, the critical question in determining Respondent's liability for the alleged violation of 30 C.F.R. § 75.362(b) is whether any of the hazardous conditions cited by Inspector Bell during his inspection of the belt conveyor also existed at the time of that last onshift examination. The

Secretary introduced little evidence pertaining to the three other violations cited on August 19, 2009. Only the field notes of Inspector Bell address those alleged violations, and that evidence is not sufficiently compelling to support a finding that the cited conditions existed at the time of the examination. As discussed above, the record also does not convincingly establish that the draw rock observed by Inspector Bell had developed by the time of the last onshift examination. Tr. 30–31, 34–35, 56, 59, 89–91; S's Ex. 3. Accordingly, the undersigned finds that the Secretary has failed to satisfy her burden of demonstrating that Respondent failed to perform an adequate onshift examination on August 18, 2009, and Order Number 8230536 is hereby vacated.

VI. ORDER

It is hereby **ORDERED** as follows:

1. Order Number 8230534 is to be modified to a 104(a) citation and moderate negligence. Respondent shall pay a penalty of **$950**.

2. Order Number 8230536 is **VACATED** in all respects.

3. Respondent shall pay the aforementioned penalty amount within 30 days of the date of this Order.[14] Upon receipt of payment, Order Number 8230534 is **DISMISSED**.

/s/ Susan L. Biro
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

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[14] Payment shall be sent to the following address: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.