FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-2682
FAX: (412) 928-8689

August 16, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2011-168
Petitioner,	:	A.C. No. 36-05466-242679
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	
Respondent.	:	Mine: Emerald Mine No. 1

DECISION

Appearances: Michael Doyle, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA, for the Secretary

Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA, for Respondent

Before: Judge Harner

This civil penalty proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (2000) (the "Mine Act" or "Act"). This matter concerns two Orders (Nos. 8007973 and 8007974) issued under Section 104(d)(2) of the Act and served on Emerald Coal Resources, LP, ("Emerald" or "Respondent"). A hearing was held in Pittsburgh, Pennsylvania on December 11-12, 2012, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

JOINT STIPULATIONS[1]

The parties have stipulated to the following:

1. Emerald Coal Resources, LP operates the Emerald Mine No. 1 where the Orders in contest were issued.

2. Emerald Mine No. 1 is an underground coal mine in Greene County, Pennsylvania.

3. Emerald Mine No. 1 produced 4,901,640 tons of coal in 2010.

4. Emerald produces coal using longwall methods and continuous miners.

5. Emerald is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Act"), 30 U.S.C. § 803(d), at the coal mine at which the Orders at issue in this proceeding were issued.

6. Emerald's operations at Emerald No. 1 are subject to the jurisdiction of the Act.

7. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.

8. The individual whose signature appears in Block 22 of the Orders at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

9. True copies of the Orders at issue in this proceeding were served on Emerald as required by the Act.

10. Emerald demonstrated good faith in the abatement of the Orders.

11. The penalties that have been proposed will not affect Emerald's ability to continue in business.

12. The appropriateness of the penalty, if any, to the size of Emerald's business should be based on the fact that Emerald's controller produced over 10 million

[1] The following stipulations are contained in Joint Exhibit No. 1. Joint exhibits will hereinafter be designated JX followed by a number; the Secretary's exhibits will be designated as GX followed by a number; and Respondent's exhibits will be designated as RX followed by a letter. Pages of the official hearing transcript are designated "Tr." followed by the appropriate page reference(s).

Respondent Exhibits C, D, E and G were marked for identification, but were not offered or admitted into evidence.

tons of coal in 2009, including 5,558,640 tons of coal produced at Emerald No. 1 Mine.

13. The appropriateness of the penalty, if any, to the size of Emerald's violation history should be based on the fact that Emerald had 301 assessed violations over the course of 1, 260 inspection days during the 15-month period preceding the issuance of the Orders in this case (May 5, 2009, through August 4, 2010).

14. When the inspector arrived on the Section, mining was still progressing in the No. 3 to 2 entry, No. 16 crosscut, and an air connection was made late in the day but the connection was not yet strapped through.

15. The mining equipment was still in place to finish mining the cited area when MSHA Inspector Boring arrived on the section, but the continuous miner had not yet been operated.

16. Concerning the issue of whether there was an "intervening clean inspection" as that term is applied in the context of the Section 104(d) graduated enforcement scheme, between April 12, 2010 and the issuance of Order Nos. 8007973 and 8007974 on August 5, 2010, there were four Section 104(d) orders issued, and all such orders are under contest.

Those orders are:

- No. 7065170, issued April 12, 2010 (PENN 2010-445-R; hearing held May 15, 2012);
- No. 7065171, issued April 12, 2010 (PENN 2010-446-R; hearing held May 15, 2012);
- No. 7073102, issued June 15, 2010 (PENN 2011-125, stayed pending Commission decision in *Wolf Run*); and
- No. 7073103, issued June 15, 2010 (PENN 2011-194, no hearing scheduled yet).

If any of the above orders are upheld as Section 104(d) orders, then there will not have been an intervening clean inspection period between the date of the predicate Order (April 12, 2010) and the date of the Orders under review in this proceeding (August 5, 2010).[2]

[2] On April 29, 2013, I issued a decision in PENN 2010-647 which covered, in part, Order Nos. 5065170 and 7065171 (Contest Nos. PENN 2010-445-R and -446-R). In that decision, I found that Respondent violated Section 104(d)(1) with respect to each of those Orders. The impact of this decision on the findings herein will be discussed more fully later in this Decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Orders in dispute and discussed below have been designated by the Secretary as significant and substantial and unwarrantable failures to comply with mandatory safety standards. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). 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).

The Commission has explained that:

> [i]n 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard

contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), 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 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (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).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

With respect to citations or orders alleging an accumulation of combustible materials, the Commission has recognized that ignitions and explosions are major causes of death and injury to miners. *Windsor Coal Co.*, 21 FMSHRC 997, 1007 (Sept. 1999). The question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965,970-71(May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC, at 970-71; *Texasgulf, Inc.*, 10 FMSHRC 498, 500-03 (Apr. 1988).

B. Negligence and Unwarrantable Failure

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." 30 C.F.R. § 100.3(d). "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." *Id*. MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id*. Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id. High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id*. *See also Brody Mining, LLC*, 33 FMSHRC 1329 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." 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.*, 52 F.3d 133, 136 (7th Cir. 1995).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all the facts and circumstances of each case to determine if any aggravating factors exist, or if any 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. See *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).

The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC at 1001; *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her 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 Company*, 31 FMSHRC 1346, 1351.(Dec. 2009)

I rely on the state of the law as discussed herein in considering each issue addressed below and whether the Orders which are alleged to be S&S and unwarrantable failures meet the above noted criteria.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 8007973

On August 5, 2010,[3] Inspector Shannon Boring wrote Order No. 8007973 (GX-1) citing a Section 104(d)(2) violation of 30 C.F.R. § 75.400 stating:

> Dangerous accumulations of float dust, loose coal, and hydraulic oil were permitted to accumulate at various locations in the C-4 Section (MMU 029-0). In the 16 x-cut (3 to 2) there were accumulations of loose coal and float coal dust ranging 2 to 5 inches in depth in the middle of the entry, 18 inches in depth along the ribs, for a distance of 38 feet. Also, the #1021 Joy miner had accumulations of hydraulic oil on both sides of the miner under the top covers ranging from a film to 1/16 inch in depth, and a steady stream of hydraulic oil could be seen running down the side cover on the right side of the miner. This condition has

[3] Unless otherwise indicated, all dates herein refer to 2010.

existed for 3 weeks. Finally, the face of the #2 entry had accumulations in it ranging 4 to 6 feet high, rib to rib, and for a distance of 17 feet outby. This condition constitutes more than ordinary negligence, and exposes miners to the hazard of a mine fire. This violation is an unwarrantable failure to comply with a mandatory standard.

This Order was designated as S & S as the cited conditions were highly likely to cause injuries that would result in lost workdays or restricted duties to four miners. The inspector evaluated the operator's negligence as high and a penalty of $41,500.00 was assessed. The predicate Order cited by Boring for his Section 104(d)(2) Order was Order No. 7065170 dated April 12, 2010.[4]

The Order was terminated on August 6 after the operator removed the coal accumulations, rock dusted the two areas and had the miner's oil leak repaired and the miner degreased.

30 C.F.R. § 75.400, entitled "Accumulations of combustible materials," provides, "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel powered and electric equipment therein." 30 C.F.R. § 75.400-2 requires operators to establish and maintain a cleanup program that is available to the Secretary or authorized representative.

Boring has worked as an inspector for the Mine Safety and Health Administration ("MSHA") in the Ruff Creek, Pennsylvania, field office for 5-1/2 years and had previously worked in the mining industry for approximately ten years where he had experience working on a continuous miner. Tr. 19-21. On August 5, Boring was one of several inspectors who went to Respondent's Mine No. 1 to conduct an impact inspection of the mine as part of the regular quarterly E01 inspection. Tr. 22-23. He was accompanied by his supervisor, Robert Newhouse, who attends all impact inspections and who was evaluating Boring's performance.[5] Tr. 26, 153-154. Impact inspections are performed to get an overall view of conditions in a mine and the focus of these inspections is determined by MSHA District Managers after considering a number of factors. Tr. 22, 153. Newhouse testified that the focus of the impact inspection at Respondent on August 5, as determined by District 2 Manager Thomas Light, was to look at cleanup, ventilation and other conditions in the working sections. Tr. 152-153.

---

[4] As noted previously in Joint Stipulation #16 (JX-1) and at footnote 2, *infra*, this Order was litigated in Docket No. PENN 2010-647.

[5] Newhouse has been employed by MSHA and its predecessor since 1977 and had worked in the mining industry for approximately 10 years before that. He is currently a supervisory coal mine inspector at the Ruff Creek field office where he is responsible for overseeing 6-10 inspectors in the mines assigned to his work group. It is not unusual for Newhouse to travel with his inspectors to the mines as his job includes mentoring and evaluating inspectors that he supervises. Tr. 147-150.

Boring testified that he and Newhouse arrived at the mine at 3:15 PM on August 5, and upon arriving at the mine, Boring examined the mine records above ground and not seeing anything, he and Newhouse went into the mine. Tr. 26-28. He and Newhouse traveled to the C-4 section[6] in the mantrip with the afternoon shift production crew.[7] Tr. 28-30. When Boring, Newhouse and the crew arrived at the section, they all walked up the track entry to the dinner hole, where they stopped so Boring could conduct a safety talk. Tr. 30, 89-90. After finishing the safety talk, Boring proceeded to do an imminent danger run in the faces throughout the C-4 section. Tr. 30. During this run, Boring first observed the violative conditions that constitute the subject Order.

Boring testified that as he and Newhouse walked up the No. 3 entry they observed about 18 oil cans in the overdrive area near the 16 crosscut. Tr. 38-39, GX-3, page 5. When he and Newhouse turned into the crosscut, the bottom was uneven and rutted and they observed three distinct piles of coal material that were 18 inches high at each of the ribs and from 2 to 5 inches high in the center of the crosscut, with all three piles extending 38 feet behind the continuous miner, which was located near the No. 2 entry. Tr. 39-41, 173, GX-3, page 5, GX-4. Boring testified that he measured the piles with a tape measure and that the accumulation of material consisted of loose coal, coal dust and a "little bit of rock", but the material "mainly consisted of coal".[8] Tr. 42. His notes, taken at the time of the inspection, describe the accumulation as "loose coal and float coal dust". Tr. 25, GX-3, page 5. The coal was not rock-dusted. Tr. 64. At the hearing, I asked Boring how he knew what the accumulation consisted of, and he explained that he dug around in the piles and picked up the material to examine it. Tr. 43. Before moving on, Boring believes he told afternoon shift Section Foreman Lloyd Birt that the accumulations had to be cleaned up. Tr. 44. Boring testified when he walked up the No. 3 entry,

[6] The Respondent uses a full-face continuous miner with integral bolters in the C-4 section. The continuous miner makes a cut into the coal seam 16 feet wide and about 7-8 feet high and the coal and other material (e.g. rock) cut by the miner is then carried from underneath the miner on a conveyor out of the back of the miner. The coal is then picked up by a loader, loaded onto a shuttle car and transported to the belt tailpiece where it is transferred to a conveyor belt and taken out of the mine. The continuous miner is powered by AC electricity from a mine power center via a trailing power cable running along the rib to the back of the miner. Tr. 32-37, 151. The miner requires an operator, who uses a remote device from the rear of the miner to control the miner, and two bolters who are at the front of the miner. Tr. 50-51. Loaders are approximately 10 feet wide and 20 feet long, while shuttle cars are 10-12 feet wide and 20 feet long and able to hold 20 tons of coal material. Tr. 52.

[7] The mine operates three shifts from 8 AM to 4 PM; from 4 PM to 12 AM; and from 12 AM to 8 AM. Tr. 29.

[8] On cross-examination, Boring estimated that 30 percent of the material was rock. Tr. 105. No testing samples were taken. Tr. 104.

he believed the loader was in the No. 3 entry, but it was not in the 16 crosscut.[9] Tr. 94-95, 131. Rather, based upon his experience, he believed Respondent was not using a loader in the 16 crosscut to load coal from the miner as there were tire tracks that were consistent with using a shuttle to load coal from the miner and the spillage pattern of this accumulation was different than a loader would produce. Tr. 115, 132-133. Boring testified that coal cannot just be left behind the miner to accumulate; it has to be "reasonably removed" so there is not enough to propagate a fire. Tr. 135-136. In his opinion, based on his experience, Boring believed the 38 feet of coal in the 16 crosscut was thick enough to propagate a fire. Tr. 136.

After examining the accumulation in the 16 crosscut, Boring testified that he and Newhouse looked at the miner and observed hydraulic oil on the miner. Tr. 44. Although there was a light film of oil on both the right and left side, there was a "steady stream" of oil running down over the top of the right side of the miner, then over the cover down onto the mine floor where it was absorbed.[10] Tr. 44-46, 174-175, GX-3, page 5. The area where the oil was leaking was on the outby side of the bolter unit where there are area lights and power cables. Tr. 46. Boring testified that when he examined the miner, it was energized but no production was occurring as the day shift had already left and the afternoon shift had not yet started.[11] Tr. 46-47. Boring felt the leaking oil to ensure that it was oil and not water and the oil was "warm" to the touch. Tr. 54. Newhouse and union representative Gary Corcoran observed Boring's examination of the oil. Tr. 54. After looking at the miner and observing the oil leak, Boring and Newhouse and Corcoran proceeded to the No. 2 entry to finish the imminent danger run. Tr. 55.[12]

Boring testified that as he and the others walked up the No. 2 entry toward crosscut 16, he saw an accumulation of coal material pushed up to the face from the direction of the entry. The material was black in color, "dried out" and not rock-dusted and was 4-6 feet high, rib to rib, and extending 17 feet back from the last strap at the face. Tr. 61-63, GX-3, page 6. As he did with the accumulation in crosscut 16, Boring measured the accumulation with a tape measure and examined the accumulation to determine its content.[13] Tr. 62. Boring testified that he

---

[9] Newhouse testified that the loader was in the 15 crosscut. Tr. 169. Newhouse explained that if the loader had been in the 16 crosscut at the time of the inspection, at the shift change, the accumulation in the 16 crosscut probably wouldn't have been a violation as the coal would have been there as part of the normal mining process. Tr. 454.

[10] At the time Boring and Newhouse examined the miner, it was still energized as the day shift crew had recently stopped their production activities. Tr. 47-48.

[11] Respondent utilizes a hot-seat change out where one shift does not leave their work area until the replacement shift arrives. Tr. 46.

[12] To get to the No. 2 entry, Boring and the others walked to the No. 3 entry and then walked outby to crosscut 15 where they walked over to the No. 2 entry. The miner in crosscut 16 had not yet mined through to the No. 2 entry. Tr. 60-61, 129-131, JX-1, Stipulation 14.

[13] Boring estimated that this material was less than 30 percent rock. Tr.105.

believed this accumulation had existed for several shifts as Respondent was not mining in the No. 2 entry and the miner had not yet fully mined through the 16 crosscut so as to cause an accumulation in the No. 2 entry. Tr. 62-65.

Boring testified that he did not tell Section Foreman Birt about the oil leak on the miner until they were all in the No 2 entry looking at the accumulation there. Tr. 57. When he issued the instant Order, and told Birt about the oil leak on the miner, Birt replied that the miner had been leaking oil for 3 weeks, that they had been putting in 10-12 cans of oil per shift and that he had reported it to management but nothing had been done. Tr. 55-59, 177, GX-3, pages 5 and 7. Birt also agreed about the accumulations and did not offer any argument. Tr. 66. Newhouse and union representative Corcoran were present for this conversation with Birt. Tr. 56.

At the hearing, and in his notes taken at the time of the inspection at GX-3, page 7, Boring explained why he issued the instant Order (GX-1) and listed his findings with respect to gravity and negligence. With respect to gravity, Boring explained that he believed an injury was "highly likely" as the accumulations "were in the direct vicinity where mining was taking place." Tr. 67. In further explanation, he pointed out that there were power cables, lighting and other components beneath the covers of the miner, the fact that the mine is on a 5-day spot inspection for methane[14], the miner was cutting in sandstone and there were two different coal accumulations and the oil leak on the miner, all of which were combustible. Tr. 67-68. Boring assessed the likely injury as lost work days or restricted duty as there was the potential for mine fires where miners could suffer burns, smoke inhalation or sprains/strains from moving around to fight a fire which would result if there were an ignition. Tr. 69-70. He also believed the violation was S & S because there was a reasonable likelihood that an accident of a serious nature could occur. As to the number of persons affected, Boring determined "4" persons, likely the continuous miner operator, the two bolters and either the loader operator, shuttle car operator or utility man.[15] Tr. 71. Boring testified that he determined the negligence to be high because of the extensiveness and obviousness of the violations and also taking into account Birt's comments about the oil. Tr. 71. Finally, he determined that the Order was required to be a 104(d)(2) order because there had not been a clean inspection since the predicate 104(d)(1) Order No. 7065170 that was issued on April 12. Tr. 72-73, GX-19. As previously noted, this Order has been upheld in my Decision at Docket No. PENN 2010-647.

As a result of the Order written by Boring, this part of the mine (Section C-4) was shut down beginning at 5:40 PM on August 5 until the instant Order was terminated on August 6 at 2:30 PM. Tr. 77, GX-1. During the shut down of the section, Respondent removed the accumulations and repaired the miner.

[14] If a mine liberates more than one million cubic feet of methane in a 24 hour period, it is subject to a 5-day spot inspection. Tr. 74.

[15] Production crews consist of the section foreman, 1 operator, 2 bolters, 1 loader operator, 2 shuttle car operators, 1 mechanic, and 1-2 utility men. Tr. 52.

Supervisory Inspector Newhouse also testified at the hearing. In general, he fully corroborated inspector Boring's testimony. However, his testimony more fully explained the nature of the violations found on August 5 and gave an overview of the continuous mining process from a historical perspective. Newhouse testified at length about his numerous discussions with Respondent management about coal accumulations and particularly pushing coal to the face and not cleaning it up.[16] These discussions have occurred at pre-inspection conferences, post-inspection conferences, quarterly inspections and other times. Tr. 154-157. These discussions pre-dated August 2010 and many occurred with William Schifko, Respondent's Compliance Manager for MSHA issues. Tr. 162. There is little question that Respondent knew what MSHA's view was regarding accumulations. In fact, as a result of these discussions, and in order to address cleanup with the use of the full face miners, Respondent created a new "Cleanup Program" dated April 27.[17] Tr. 162, GX-5. Although the cleanup plan was not required to be approved by MSHA, it was nevertheless acknowledged by it as being appropriate and at the hearing, Newhouse testified that if the plan was complied with, it would meet the requirements of § 75.400. Tr. 163-164. Specifically, paragraph 4 of this cleanup plan (GX-5) provides:

> … Reasonable amounts of the cleaned up material may be deposited in an overdrive area provided that it does not impede the ventilation of or examination of the face area. In addition, any cleaned up material shall be rock dusted over until it can be loaded out. When leaving coal bottoms, extra attention will be given to eliminate accumulations of loose or fine coal.

Newhouse opined that the problem with clean-up has occurred with the institution of full-face miners in the late 1980's. Tr. 160. Before this, Respondent and other operators used place-change miners which did not have integral bolters. These miners were required to be backed out of an entry so the bolters could then go in and bolt the roof in place. When the roof was bolted to the face, a scoop would then come in and remove the coal promptly. Tr. 157. The cut made by the change-place miner was square and any remaining coal pushed to the face was there for only a short time.[18] Tr. 202. With the full-face miners, this does not happen as the miner has less maneuverability and is meant to mine coal in a straight line with the cutter expanding out to the full width of the entry, about 16 feet. As the full-face miner moves forward, the coal it mines exits at its rear to be cleaned up by a loader. When operators, including Respondent, finish an area, they "wedge that face down" so that the gas at the face can come back to the last roof strap. Tr.158. The bottom of the wedge on the coal floor is usually 14 feet back from the last strap. Tr. 452. Newhouse explained at the hearing that with the change over to full-face miners, the

[16] At one point in the hearing, during questioning by Respondent's counsel, Newhouse testified that he probably discussed the accumulation problem with Respondent's management more than 30 times. Tr. 238.

[17] Respondent's prior cleanup program was instituted when Respondent used place-change miners. Tr. 164.

[18] There was no wedge to trap methane in it as now exists with the full-face miners.

problems with ventilation did not become readily apparent, but over the years, MSHA realized that coal stockpiling and accumulations at the face created numerous problems with ventilation as the wedges were getting blocked up as they were not properly ventilated. Tr. 160, 205. At the hearing, Newhouse explained that pushing large amounts of coal into the wedge at the face impedes ventilation because no air can get to the face and when the wedge is eventually cleaned out, methane will be released. Tr. 159-161, 450, 461. Newhouse further testified that if the material at the face is 4-6 feet high, an inspector has to crawl to the top of the pile to inspect for methane and there is no way to get in the wedge to check for methane except to crawl around into an unbolted area.[19] Tr. 159, 206.

At the hearing, Newhouse credibly testified that his discussions with Schifko about pushing coal to the face have stressed that the "reasonable amount" allowed is the amount of coal that the miner is sitting on when it leaves an entry or crosscut. Tr. 159, 162, 164-165. The amount of coal behind the miner when it finished mining in an entry or crosscut should be cleaned up and removed and not pushed to the face. Respondent was on notice that a larger amount of coal pushed to the face was not acceptable. Tr. 159. Newhouse explained to Schifko in their discussions, as he did at the hearing, that accumulations at the face should be level and not impede ventilation at the face or an examination of the face area. Further any coal deposited at the face should be heavily rock-dusted.[20] Tr. 159, 164-165.

As previously noted, Newhouse accompanied Inspector Boring on the August 5 inspection. His testimony further explains why he deemed the conditions found to be violative of § 75.400. The coal in the 16 crosscut was accumulated along the ribs and in the center of the crosscut, there was pulverized coal up to 5 inches in depth. Tr. 173. He believed the production crew was using shuttle cars to load the coal from the miner because of the terrain of the crosscut and the tire tracks in the crosscut indicated that a rubber-tired vehicle, like a shuttle car or scoop was being utilized. Tr. 171-172, 456. Such a vehicle pulverized the coal under its wheels into fine coal dust. Tr. 454-455. When he and Boring examined the miner, he also observed a steady stream of oil coming from the miner. Tr. 174-175. Newhouse's testimony also pointed out that Respondent's Cleanup Program required Respondent to report all hydraulic oil leaks to the mechanic for repair and to clean up hydraulic oil spills as they occur.[21] Tr. 179, GX-5, paragraphs 6 and 7. Newhouse also confirmed the size of the accumulation at the No. 2 entry (4-6 feet high and rib to rib) and determined that it was "well beyond" the parameters of the reasonable amount of coal that was allowed as it was blocking ventilation and any examination

[19] It seems axiomatic that crawling around on these large accumulations of coal and other material would create a safety hazard for the inspector while performing his duties.

[20] I note that these same conditions are set forth in Respondent's Cleanup Program. See paragraph 4 of GX-5.

[21] Newhouse also testified that Section Foreman Birt said that the miner was using 10-12 cans of hydraulic oil per shift for 3 weeks and that he had reported the problem to management or maintenance. Tr. 177.

required crawling around in a large pile of coal. Tr. 166. He observed that only 20-30 percent of the material was rock and there was no rock-dusting of the accumulation. Tr. 167-168.

Finally, Newhouse testified why he considered the violation written on August 5 to be S & S. First, he noted that there was a history of face ignitions at Respondent's Mine (see GX-14-17) and Respondent's 5-day spot inspection status due to methane liberation. He testified on August 5 there were two areas of impermissible coal accumulations, one in the 16 crosscut and the other in the No. 2 entry. Tr. 190. In addition, there were the following possible ignition sources present: hydraulic oil was leaking from the miner and running over the power cables of the miner; the miner was engaged in hard cutting (sandstone and sulfur balls) in the crosscut so there was the potential for sparks; and because of the abnormal tramming conditions[22] in the crosscut, the loader or shuttle could damage the miner's power cable. Tr. 189-191. In summary, he concluded that it was highly likely that a face ignition could occur. Tr. 191. And because the miner had punched a small hole measuring 3 feet by 5 feet through into the No. 2 entry, there was no way to tell where the methane would travel. Tr. 176, 192. Unlike Inspector Boring, Newhouse testified that he believed there would be fatalities if there was an explosion or fire. Tr. 194. His rationale for so concluding was that an explosion would have put coal dust in suspension with a lot of fuel available for propagation. Tr. 194. Newhouse did not, however, overrule Boring as to the injury reasonably expected by the violation. Tr. 194.

In defense, Respondent presented the testimony of William Schifko, Donald Gruber, Lloyd Birt, Matthew Lee, Kenneth Haftman and John White. Schifko has been employed by Respondent for about 35 years. He started as an hourly employee (miner operator, roof bolter and general inside labor) and progressed to various positions in production, including longwall foreman and shift foreman. In the early 1990's, he assumed the position of compliance foreman and in about 2006, he became manager of safety. In about 2008 or 2009, he assumed the position of managing compliance issues for Respondent. Tr. 416-417. He has 39 plus years of mining experience and has a two-year degree in mining from Penn State University. Tr. 417. Part of his duties as compliance manager is reviewing citations and staying on top of new laws and regulations affecting the mining industry. He makes the decision on behalf of management as to whether a citation should be contested. Tr. 418.

Schifko became aware of the orders written by Inspector Boring after the fact and in his investigation of the situation, he spoke to various individuals to get a picture of what had occurred. He discovered that in the 16 crosscut, there was hard cutting[23] and a "big mud hole"

---

[22] There were elevation changes in the 16 crosscut and Newhouse believed the production crews had difficulty with the miner being stuck so they had to do a lot of different things to mine in the crosscut. Tr. 219. Because of this Newhouse opined that the crew was using the shuttle to load coal from the miner instead of the loader. Tr. 171-172. The production report for August 4 (GX-12) shows that the continuous miner was stuck and there were "bad bottoms" with the consequence that there was limited mining on the two production shifts.

[23] Although many witnesses described the rock as sandstone, Schifko believed it was hard dark shale. Tr. 420.

causing a dip in the mine floor for about 25-30 feet. The result was that on August 3-5, there were several operational delays, including the miner being stuck on the mine floor. Tr. 419-421, 435. He estimated that the seam in the 16 crosscut was about nine feet, but six feet of it was rock. Tr. 420.

As to whether coal behind the miner was a hazard, Schifko denied that such was a hazard as long as "the job is in progress". Tr. 423. He further explained that there should always be coal on the mine floor, until the mining cycle is done when there is a connection to the entry and a finished strapping through. Tr. 424. At that point, the loader will make a pass down both ribs for an initial cleanup and then scoops and shovels are used if needed. Tr. 424. Both the miner and loader will then be removed and the crosscut rock-dusted. Tr. 424.

Regarding the coal accumulation in the No. 2 entry, Schifko likewise testified that he did not believe this was a violation. When asked why not, he testified that Section Foreman Don Gruber told him there was only about two feet of coal, or one scoop-bucket.[24] Tr. 425. Schifko said he did not examine the coal material, but opined that most of it was rock given that six feet of the nine foot seam was rock.[25] Tr. 426-427.

Schifko did not deny the substance of or the number of his conversations with Newhouse regarding accumulations, but he did indicate that he disagrees with MSHA's determination as to what constitutes a "reasonable amount". Tr. 429, 443-447. He testified that the amount is "so minimal. I mean, it's next to nothing." Tr. 429. Schifko believes a reasonable amount is an amount that permits ventilation of the face and does not impede examination of the face. Tr. 429. Schifko does not believe there is any harm in pushing coal to the face because "[i]t's not going to get up in suspension if there was a problem." Tr. 430. To impede ventilation at the face, Schifko testified that in his opinion there would have to be a total blockage of the face. Tr. 448. Finally, Schifko noted that the only time Respondent does not leave coal material at the face is if the production crew is leaving an entry never to return. Tr. 430.

Schifko also testified briefly about the hydraulic oil that Respondent uses. He stated that no chemicals are used at Respondent unless they are approved by the environmental and safety groups. Tr. 432. The oil used in the continuous miner is Conoco Super Hydraulic Oil 68 that is rated as having a flashpoint of 320 degrees Fahrenheit. Tr. 432, 434.

---

[24] Although Gruber testified at the hearing, he only testified about the extent of the accumulation in the No. 2 entry, which he stated was two to two and a half feet high with "a lot of rock in there". Tr. 278, 287. He did not testify about the length or the width of that accumulation or about the dimensions of the cited accumulation in the 16 crosscut. He did not view either accumulation as a hazard. Tr. 276, 279. Gruber also testified that the accumulation in the No.2 entry had been there for "[a] couple days". Tr. 287.

[25] This estimate by Schifko seems at odds with Respondent's own production records at GX-12. Those records, from July 22 to August 5, generally report clean coal compared with total coal mined to be at around 80 percent.

Lloyd Birt, the afternoon C-4 section foreman on August 5, also testified. Birt has 31 years of mining experience, and has been with Emerald for about eight years. He was certified as an assistant mine foreman in 1993. Tr. 302-303. Birt testified that when he arrived at the 16 crosscut on August 5, he found the miner in the crosscut with the loader behind it and the miner had just "holed through" into the No. 2 entry sometime before the end of the day shift. Tr. 307, 309. His testimony was that he observed the accumulation behind the miner which consisted of coal, rock and a little mud and the length of the accumulation exceeded the length of either a shuttle car or loader. Tr. 312, 331. He explained that it was not uncommon to find a buggy with coal on it at the start of a shift because of Respondent's hot seat shift change policy. Tr. 313.

As to the oil on the miner, Birt testified that he did not see oil flowing out of the miner, but only saw a film of oil on the miner. Tr. 317. He admitted telling the inspectors that the crew was putting in 10-12 cans of oil per shift for 3 weeks. Tr. 318. Although he first denied reporting the oil leaks to management, he later admitted, on cross-examination, that he had been reporting the condition to management for 3 weeks, but nothing was done. His motivation for making the reports was to let management know about the large amount of oil being used and that continually refilling the miner with oil takes time from production. Tr. 320, 324. Birt confirmed that the miner was out of service on the afternoon shift from 5:05 PM to11:30 PM to repair the oil leak. Tr. 340.

Finally, Birt testified that he knew there was coal material in the No. 2 entry but he could not speculate as to the dimensions since he did not measure the accumulation. Tr. 332. He did testify that the accumulation in the entry was probably there "a few days". Tr. 335. He opined that when the day shift had holed through into the No. 2 entry, the miner likely kicked some coal into the entry from the crosscut. Tr. 334.

Matthew Lee, an electrician at Respondent, testified regarding the oil leak on the continuous miner.[26] His duties as an electrician include maintenance of outby equipment and handling electrical problems that section mechanics cannot solve. Tr. 350. On August 5, Lee was working on the afternoon shift and was called by maintenance foreman John White to report to the C-4 section as there was a work order on the continuous miner. Tr. 350-352. He and White traveled together to the section and they, along with section mechanic Kenneth Haftman, were to repair the miner. As they went down to the section, they encountered the inspectors coming out and the inspectors told White that there was an oil leak that needed fixed. Tr. 352-353, 365.

Lee testified that when he arrived at the miner it was not running and he observed only a light film of water with oil in it on top of the cover on the right side of the miner.[27] Tr. 354, 363.

---

[26] Lee, who has been employed by Respondent for 4 years, received his MSHA electrical card in 2004 and is certified in West Virginia as an electrician, foreman and shop fire. Tr. 348-349.

[27] Lee testified that he did not see any oil running down the side of the miner nor any oil pooled on the miner or the mine floor. Tr. 356.

When he and the others removed the covers of the miner, he observed "a couple oil drips like where the oil was dripping, but nothing where it was pouring or accumulating anywhere." Tr. 355. The oil drips were from a filter housing and from one of the hundreds of hoses in the miner. Tr. 355-356. Lee testified that they (he, White and Haftman) serviced the miner by repairing any oil leaks they saw and then degreased and hosed off the entire miner. Tr. 357, 366. Lee was shown a copy of the Maintenance Foreman's Shift Report for August 5[28] and testified that the work performed on the continuous miner was greasing the miner, tightening the JIC fitting that was loose, changing the O-ring fitting and tearing apart the O-ring as the O-ring was cracked, and tightening the middle drillers diversion valve and counter balance valve. Tr. 358-359, 372-373. Lee testified that the repair of the miner took five hours. Tr. 366. On cross-examination, Lee was asked if an oil leak would be consistent with a steady stream of hydraulic oil running down the side cover as described in Exhibit GX-1 and whether a cracked O-ring could have caused oil leaking and in both instances, Lee answered in the affirmative. Tr. 368-369, 371. Lee testified that the type of work done to repair the miner on August 5 is usually done when the miner is rebuilt. Tr. 360, 369-370. Finally, he testified that no one had reported any problems to him about the miner prior to August 5. Tr. 360.

Kenneth Haftman, the section mechanic on the August 5 afternoon shift, also testified.[29] On August 5, when Haftman arrived at the section, he was told by the inspectors that there were oil leaks that needed repaired on the miner. Tr. 384-385. He observed only a layer of water on top a layer of oil, but did not see any "puddling" or running of oil.[30] Tr. 385. Haftman testified that he, maintenance foreman White and mechanic Lee found a couple of oil drips, but nothing excessive. He testified that he took off the covers of the miner and replaced two O-ring fittings and tightened up two loose hoses. Tr. 387, 395. He testified that when the miner is cutting rock, there is a tendency for fittings to loosen up from vibration and that when the hydraulic oil gets hot, the oil will deteriorate the O-rings and the fitting will wear out. Tr. 387-388. Haftman further testified that section foreman Birt never reported to him that there was an oil leak on the miner, but if Birt had reported using 10-12 cans of hydraulic oil per shift, he would have reported it to the maintenance shop as such would have indicated an extensive oil leak. Tr. 393, 398-399.

John White, a continuous miner maintenance foreman, also testified on behalf of Respondent. White has worked for Respondent for about five years and has about 35 years of mining experience primarily in maintenance or mechanic positions. He has certifications from the Commonwealth of Pennsylvania as assistant foreman and mine electrician. Tr. 401-403. His duties as a maintenance foreman at Respondent include covering breakdowns on the mining

[28] This document was marked Exhibit D but was not introduced into evidence by Respondent.

[29] Haftman has been employed by Respondent for about 25 years and in 2010 was an underground mechanic. Tr. 377. He has 35 years of total mining experience in various positions. Tr. 377-378.

[30] The miner was idle and not running at this time. Tr. 384.

units, performing inspections, maintaining parts and supplies for repairs and directing a crew of 8-10 persons. Tr. 403.

White testified that he worked the second or afternoon shift on August 5. He received a call that a citation had been written by MSHA for an oil leak on the miner in the C-4 section and so he and outby mechanic Lee went to the section to assist the section mechanic. Tr. 404. When he arrived at the section, he started the miner up to check where the leak was, but he did not see a "whole lot of oil" or a steady stream of oil. Tr. 405, 406. He observed a lot of water in the area, and a lot of oil/water mixture with a film of oil floating on it. Tr. 405. He testified that when they took the covers off, they saw "a few oil drips here and there". Tr. 405. The crew tightened up a couple fittings and repaired a leak at the cap on the filter housing by putting a new O-ring in it. Tr. 406. White testified that the only problem with the miner that was reported to him prior to August 5 was a leak in the drum extension jack[31] and it was on the schedule to be fixed. Tr. 407.

After considering all of the evidence, I find that Respondent has violated 30 C.F.R. § 75.400, a mandatory safety standard under the Act, and this violation is S&S in nature. During the impact inspection, Inspector Boring found a coal accumulation in the No. 16 crosscut that was 2 to 18 inches deep for a distance of 38 feet,[32] an oil accumulation on the continuous miner and a second coal accumulation in the No. 2 entry ranging 4 to 6 feet in depth, rib to rib, for a distance of 17 feet. His observations were confirmed by Supervisory Inspector Newhouse. Further, the two coal accumulations were intentionally created, even though Respondent clearly had notice that these types of accumulations were a violation of § 75.400. *See* JX-1, No. 16. Any one of these accumulations standing alone would have violated § 75.400. *See Emerald Coal Resources , LLP*, 33 FMSHRC 2776 (Nov. 2011) (ALJ) (accumulation of coal eight inches in center and up to 14 inches by the ribs caused by shuttle car traffic); *Consolidation Coal Company*, 33 FMSHRC 283, 291-295 (Jan. 2011) (ALJ) (uncorrected leaks of hydraulic oil on continuous miner) ((*Cannelton Indus., Inc.*, 20 FMSHRC 726, 730 (July 1998) (Commission affirmed ALJ's finding that coal material measuring 10 feet long, 10 feet wide and 4 feet deep was an unlawful accumulation).

Respondent argues that the coal accumulations were not violations of the standard, because mining was still in progress, the accumulations would have been cleaned up per its cleanup plan at the conclusion of the mining cycle, and the accumulations were mostly comprised of rock. I am not persuaded. As has been discussed with Respondent in the past, continued mining does not afford operators the right to allow accumulations of combustible materials to amass within the mine. Further, Newhouse testified to explaining to Schifko that only "reasonable amounts" of coal may be left for future cleanup. He credibly testified that he defined reasonable amount as the amount of coal that the miner is sitting on when it exits the

[31] The drum extension jack pushes the cutter drums out to a full face width and retracts them back to move the miner from place to place. Tr. 407. This leak was not the cause of the incident set forth in the instant citation.

[32] None of the Respondent witnesses disputed the measurements of the accumulation in the 16 crosscut.

entry or crosscut. When questioned on cross-examination by counsel for the Secretary about his conversations on accumulations with Supervisory Inspector Newhouse, Schifko, an experienced witness, became argumentative and even belligerent. Tr. 442-447. When asked if he understood in April 2010 what MSHA's view of a reasonable amount was, Schifko incredibly declaimed "No, I didn't. No, I don't understand that at all to this day." Tr. 444. Also, Boring and Newhouse credibly testified that the composition of the accumulations was mostly coal. Further, in contradiction to Schifko and Respondent's other witnesses, Respondent's own production reports showed that about 80 percent of the material mined for weeks including on August 5 was clean coal. GX-12.

The reason for Respondent's recalcitrance to follow the MSHA allowed cleanup plan of a "reasonable amount" is found in the testimony of Schifko wherein he asserted that such amount is "so minimal. I mean, it's next to nothing." Tr. 429. I draw from that testimony that Respondent is more interested in production than in cleaning up hazardous accumulations of coal and other combustible material. Respondent and its management is simply ignoring MSHA's strictures and allowing coal to accumulate at will and to be left for an indefinite period of time. It cannot hide behind the excuse of engaging in continued mining operations. It has long been held by the Commission and the courts that operators are not permitted a reasonable period of time to remove coal from the mine once it reaches an accumulation. *See Utah Power & Light Co.*, 12 FMSHRC 965, 968-69 (May 1990); *Black Beauty Coal Co. v. FMSHRC*, 703 F3d 553, 558-59. Once an accumulation of combustible material exists, it must be removed no matter where the operator is in its mining cycle. And the testimony of Birt and Gruber establishes that Respondent's malevolent policy on accumulations is being handed down to its production supervisors as they saw nothing wrong with the accumulations in the 16 crosscut or the No. 2 entry.

Respondent further argues that no oil accumulation existed on the miner, and its witnesses testified to such. However, Respondent's witnesses also eventually testified that there was oil dripping from a filter housing and from one of the hoses. They also stated that miner was out of service for more than 5 hours after the issuance of the Order. For a piece of equipment that was asserted to have no issues, its maintenance took a disproportionate amount of time. At best, Respondent's witnesses gave conflicting testimony. At worst, they often recanted their own statements at hearing. But ultimately all of the witnesses (Lee, Haftman and White) did admit to the repair of leaks and damaged O-rings. Further, Section Foreman Birt admitted that he had been putting 10-12 cans of oil in the miner for 3 weeks. Because of this, I afford much more credibility to testimony of the Secretary's witnesses regarding the oil leak.

Having concluded that a violation exists, I also find that the cited conditions contribute to the discrete safety hazard of an ignition and fire. Boring and Newhouse both credibly testified that the coal accumulations were extensive and although there was some rock, they mainly were coal that was not rock-dusted. Boring's contemporaneous notes described them as "loose coal and float coal dust." The accumulations were in the direct vicinity of coal mining activities, and Respondent was engaging in hard cutting in the 16 crosscut which could create sparks. Newhouse testified that the coal in the center of the No. 16 crosscut was being pulverized by traveling equipment, exacerbating the problem of float coal dust. Further, because wedge cuts are made by full face miners, coal pushed to the face impedes ventilation in the wedge. When

the accumulations are later cleaned up, the methane that has built up in the wedge is suddenly released. The oil leaking from the miner was in an area where lights and power cables were observed. When Boring touched the oil to ensure that it was not simply water, he testified that it was warm. Given the mining conditions at the time, as well as the cited hazards, I find that a discrete safety hazard of an ignition or fire existed.

The third and fourth factors of the *Mathies* test are also met. Should an ignition or fire occur, it would propagate in an area where mining activities are taking place. At the very least, it would endanger the miner operator, the scoop operator and the roof bolter operators. Should an ignition or fire occur, the likely injuries would be burns and/or smoke inhalation, both of which can result in anything from lost workdays or restricted duty type injuries or possible fatalities. This was highly likely given that there were several potential ignition sources, including mechanized equipment, lights and power cables and sparks occurring due to the cutting of sandstone. Although Newhouse disagreed with Boring's assessment of the injuries, I find no reason to alter Boring's assessment. Based on the mining conditions at the time that the Order was issued and the evidence that several miners would be working in close vicinity to the accumulations, I agree with the Secretary that it was highly likely that the hazards contributed to would result in injuries of a reasonably serious nature.

I further find that the violation was the result of Respondent's high negligence, and that this violation was an unwarrantable failure to comply with a mandatory safety standard. According to Boring and Newhouse, both accumulations had existed for more than a shift, and in the case of the accumulation in the No. 2 entry, for several shifts. Newhouse testified that MSHA had discussed the issue of large coal accumulations with Respondent several times in the past, probably as many as 30 times. Emerald had also received citations and orders concerning this particular activity prior to the instant Order. Even though it had prior warning, including the issuance of at least four other citations or orders, Respondent continues to encourage the very activity that it has been cited for in the past. All of the evidence and history tends to show that regardless of the number of warnings received from MSHA, Respondent continues to essentially ignore the standard and, instead, substitute its own judgment for the clean up, or lack thereof, of accumulations, as indicated by Schifko in his testimony. Concerning the oil leaking from the miner, Birt admitted telling the inspectors that the condition had existed for 3 weeks. Although he first denied reporting the leak, he later admitted that it had been reported when the condition was first brought to Birt's attention, but Respondent had done nothing. Respondent's actions constitute at least "indifference," if not "intentional misconduct." Considering all of the factors, and noting particularly the high degree of danger, the notice Respondent had that greater efforts were necessary for compliance and the extensiveness of the violative conditions, I find that Respondent's conduct was "aggravated" and constituted an unwarrantable failure.[33]

Based on the foregoing, I find that Respondent violated 30 C.F.R. § 75.400, and this violation was S&S in nature and the result of Respondent's unwarrantable failure to comply with a mandatory standard.

[33] I also note that the undisputed evidence shows that Respondent knew the oil leaks had existed for three weeks and the accumulation in the No. 2 entry had been there for at least a couple days.

B. Order No. 8007974

On August 5, Inspector Boring also wrote Order No. 8007974 (GX-2) citing a Section 104(d)(2) violation of 30 C.F.R. § 75.360(b)(3) stating:

> The preshift examination conducted on August 5, 2010, for the 16:01 shift in the C-4 Section (MMU 029-0) was not adequate. The hazard that is depicted in Order #8007973 was not recorded in the preshift exam record book located on the surface. This exposes miners entering the section to unknown hazards, which constitutes more than ordinary negligence. The violation is an unwarrantable failure of an operator to comply with a mandatory standard. This order will not be terminated until mine management reviews the requirements of 30 CFR 75.360 with all certified persons at this mine.

This Order was designated as S & S as the alleged failure was highly likely to cause injuries that would result in lost workdays or restricted duties to four miners. The inspector evaluated the operator's negligence as high and a penalty of $32,800.00 was assessed. As with the earlier order discussed herein, Boring cited Order No. 7065170 dated April 12, 2010, as the predicate order for the Section 104(d)(2) violation herein.

The Order was terminated on August 9 after the operator had reviewed the requirements of 30 CFR §.75.360 with all certified persons at the mine.

30 CFR § 75.360 is entitled "Preshift examination" and (b)(3) of that section provides:

> The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:
>
> …
>
> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

Boring testified that he wrote the order on the preshift examination because the conditions that he and Newhouse found at the beginning of the second shift were not noted on the preshift report. Tr. 80. That report, at GX-6[34], shows "None" under both violations observed and reported and under dangers and hazardous conditions noted. The report was signed by Don Gruber with the time of exam noted from 1 to 2 PM. Lloyd Birt received the report at 2:45 PM.

[34] GX-6 contains a number of preshift reports from July 22 to August 5. The pertinent report that Boring relied upon to write the violation has a large "70" on it and is the next to the last page of the exhibit.

Tr. 83, GX-6. In Boring's opinion, the 38 feet of coal material found behind the miner in the 16 crosscut would have taken "probably close to a shift … to accumulate". Tr 84-85. As to the oil leak in the miner, that had existed for a while, according to Section Foreman Birt. Boring also concluded that the accumulation at the face in Entry No. 2 had been there for some time as the production crew had moved out of there and the coal that had been pushed to the face was dry.[35] Tr. 85. Supervisory Inspector Newhouse also believed that he accumulations behind the miner in the 16 crosscut existed for more than one shift based on his observations and a review of the production reports. Tr. 219.

Boring testified that the purpose of a preshift examination is "[t]o check for hazards and dangers and to make sure that miners entering the section, that it's safe for them to come into the section." And in his opinion, there was not an adequate preshift because it failed to list the violative conditions found by the inspection. Tr. 87. Boring further testified that he assessed the violation as highly likely to cause an injury where the injury would cause lost workdays or restricted duty because the accumulations were in the vicinity where mining was taking place and there were power cables and area lights present. Tr. 86-87. He assessed the operator's negligence as "high" because the oil leak on the miner had existed for 3 weeks which shows aggravated conduct and high negligence. Tr. 87-88.[36]

Donald Gruber, the section foreman on the dayshift on August 5, testified on behalf of Respondent. Gruber has been employed by Respondent for about 6 years, and has about 28 years of mining experience. Tr. 251-252. He received a mine examiner's certification from the Commonwealth of Pennsylvania in 1980, and also is certified as an assistant mine foreman and as an EMT. Tr. 252. At the time of the hearing, Gruber occupied the position of outby foreman. Tr. 253.

Gruber testified that his duties as a section foreman was to make gas checks, insure air flow through the last open crosscut and in the return, check the continuous miner for water pressure and other parameters and to make sure the other crew members are performing their duties. A crew usually has 13 persons in it. Tr. 253

Gruber testified that upon starting a shift he performed an onshift exam and that on August 5 this exam disclosed no hazardous conditions or violations. Tr. 255, 257, GX-7, page 3, RX-L, page 3. He also testified that he performed a preshift exam before ending his shift and that on August 5 this exam was performed between 1:00 and 2:00 PM. Tr. 255, 259-261, GX-6 and RX-K (page marked "70"). Gruber stated that he did not observe any hazards or dangerous conditions during this examination. Tr. 261. He did not detect any methane and the airflow was "good." Tr. 261. He did not remember seeing an accumulation behind the miner but if there was coal behind the miner that was part of the mining cycle. Tr.275-276. He did not view the coal behind the miner as a danger as the afternoon shift would have cleaned it up. Tr. 294.

---

[35] Freshly mined coal is wet or damp to the touch. Tr. 86.

[36] With respect to the oil leak and the testimony regarding it, none of the preshift reports between July 22 and August 5 identify the oil leak on the miner as being a hazard. GX-6.

Gruber testified that his crew was mining in the 16 crosscut on August 5 and that the conditions in the crosscut were not good. He pointed out that on August 4, the miner had been stuck for a few shifts, there was a bad bottom,[37] and they were cutting sandstone. Tr. 263. Production reports admitted into evidence show that on August 4, only four feet of coal was mined due to various conditions. Tr. 264-267, GX-12, RX-F. On August 5, the crew was able to mine 31 feet, but the production report showed continued difficulty with keeping the miner level due to the bottom (the right side of the miner had to be blocked), hard cutting, only using one shuttle car and the miner out of oil. Tr. 268-269, RX-F, page 18. At the end of the dayshift on August 5, Gruber testified that the crew had just "holed through" into the No. 2 entry. Tr. 270.

Gruber testified that the mining cycle consists of the miner moving forward to mine coal and every four feet the roof is strapped with two roof bolts. The coal is being dumped behind the miner where it is loaded up and dumped into a shuttle car to be taken out of the mine. Tr. 269-270. Respondent utilizes a "hot seat" practice so that miners continue working until they are relieved by the next shift. Tr. 254.

Based on the foregoing evidence, I find that Respondent violated 30 C.F.R. § 75.360(b)(3), and the violation was S&S in nature. In pertinent part, 30 C.F.R. § 75.360(b)(3) requires the operator to examine working areas and areas where mechanized equipment will be installed or removed for any hazardous conditions. Accumulations of combustible materials certainly fall within the category of hazardous conditions. *See Enlow Fork Mining Company*, 19 FMSHRC 5, 14 (Jan. 1997)(*citing* S. Rep.. No. 411, 91st Cong., 1st Sess., Ess. 65 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975). The testimony at hearing revealed that three separate accumulations existed in the Mine at the time of the inspection. The two coal accumulations were large enough that it was the opinion of Inspectors Boring and Newhouse that they had to have existed for more than one shift. Further, Respondent's own witness admits that the miner had been leaking oil for three weeks without repair. Given these facts, the accumulations should have been noted during the preshift examination. However, they were not. In light of this, I find that a violation of 30 C.F.R. § 75.360(b)(3) existed.

This violation contributed to the hazard of the occurrence of an ignition or fire within the subject area. Since the accumulations were not listed in the preshift examination report, miners entering the working area would have no idea that hazardous conditions existed and would likely take no additional precautions. As stated above, the coal in the No. 16 crosscut was being pulverized by mechanized equipment, and methane was likely trapped in the wedge where the coal in the No. 2 entry had been pushed to the face. Further, the hydraulic oil was leaking down over the electrical components of the continuous miner. Any or all of these could have resulted in the propagation of a fire had a spark been emitted or enough heat generated, which would likely result in injuries or death due to smoke inhalation or burns.

[37] Because of the bad bottom, the miner sunk into the mine floor as the bottom was clay and water, making for a messy condition. Tr. 263-264.

I also find that the violative condition was the result of Respondent's high negligence and was an unwarrantable failure to comply with a mandatory standard. The accumulations of coal were extensive and obvious; however, Respondent failed to report them as hazardous conditions. Further, Respondent was already on notice that MSHA considered the accumulations to be a serious issue, as Newhouse had discussed them with Respondent's agents numerous times in the past. The miner's leak had begun 3 weeks earlier, and had been reported to management by Birt. Yet, Respondent felt no need to either correct the condition or report it to higher management and the miners entering for their shift. This shows, at the very least, a serious lack of care for the safety of its employees.

Based on the above testimony and evidence, I find that Respondent violated 30 C.F.R. § 75.360(b)(3). I further find that this violation was S&S in nature and was the result of Respondent's unwarrantable failure to comply with a mandatory standard for the reasons discussed with respect to the previous order.

C. Impact of Previous Decision on these Orders

Respondent argues that these violations can only be found to be orders issued under Section 104(d)(2) if at least one of the orders in JX-1, No. 16 is upheld. In Docket No. PENN 2010-647, in a Decision issued on April 29, 2013, I upheld Order Nos. 7065170 and 7065171, issued under Section 104(d)(1) of the Act. Respondent filed for discretionary review with the Commission. While the Commission agreed to take review of a separate citation included in the same docket, it refused review of both of these orders. As such, my decision in PENN 2010-647 with respect to those Orders became the final decision of the Commission 40 days after its issuance. Given this fact, there has been no intervening clean inspection, and the issuance of theorders herein under Section 104(d)(2) of the Act is appropriate.

III. THE APPROPRIATE CIVIL PENALTIES

As previously noted herein, the Secretary seeks penalties for Order No. 8007973 and Order No. 8007974 of $41,500.00 and $32,800.00, respectively. Both of these penalties were assessed pursuant to the Secretary's special assessment process as permitted by Regulation. See 30 CFR § 100.5(a). The general procedures the Secretary utilizes for his special assessments can be found at *http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf*.[38] If the regular assessment process under § 100.3 had been utilized, the penalties would have been $8,421.00 (based on 114 penalty points) and $6,624.00 (based on 111 penalty points), respectively. The Secretary's special assessment added 20 more points (5 for negligence, 5 for likelihood of occurrence, 5 for severity of injury, 3 for unwarrantable failure and 2 for number of persons affected) to each of the orders in dispute resulting in substantially increased penalties. [39]

[38] This procedure is also set forth as Exhibit A in the Secretary's post-hearing brief.

[39] See Secretary's post-hearing brief, pages 50-51 and Respondent's post-hearing brief, page 55.

In his post-hearing brief, counsel for the Secretary asserts that the Secretary has broad discretion to devise a scheme implementing the Act's civil penalty guidelines, relying on *Coal Employment Project v. Dole*, 889 F.2d 1127, 1129 (D.C. Cir. 1989). In exercising that discretion, the Regulations at 30 CFR § 100.5(a) provide that the regular assessment process may be waived when there is a determination that "conditions warrant a special assessment." Counsel further asserts that the decision to waive the regular assessment was "eminently reasonable" considering the facts herein, particularly the fact that Respondent "had been on notice for a lengthy period of time that accumulations were a problem at this mine and needed to be corrected."

Respondent's counsel contends in his post-hearing brief that there is no justification for the special assessments levied on the two orders herein. While noting that the Commission and its judges determine the appropriate penalties and are not bound by the Secretary's reasoning in assessing penalties, counsel argues that the Secretary has not satisfied his burden of showing why the orders herein were specially assessed as the Secretary has not shown any additional facts beyond what would be considered in a regular assessment.

It is well established that Section 110(i) of the Act grants to the Commission and its judges the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that:

> [i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In the recent case of *American Coal Company*, LAKE 2011-183 et al, 2013 WL 3865347 (June 2013)(ALJ), Judge Zielinski made clear that whether or not the Secretary proposes a regularly or specially assessed penalty is not relevant to the Commission's determination of a penalty amount. Rather the Commission and its judges must apply the criteria set forth in Section 110(i) of the Act.

In *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012), the Commission reaffirmed that:

> [u]nder this clear statutory language, the Commission alone is responsible for assessing final penalties. See *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties

> . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.") While there is no presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.,. Sellersburg Stone,* 5 FMSHRC at 293; *Hubb Corp*., 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Canterra Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Also to be considered in assessing penalties is the deterrent purposes of the statutory penalty scheme under the Mine Act. The legislative history of the Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Act to induce compliance with the health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates. *See, Black Beauty Coal Co*., 34 FMSHRC 1856, 1865 (Aug. 2012); *Sellersburg Stone*, 5 FMSHRC at 294. Federal courts have also acknowledged and approved of the deterrent effect of penalties. *See, Nat'l Independent Coal Operators' Ass'n*, 423 U.S. 388, 401 (1976). The D. C. Circuit concluded, that after reviewing the legislative history, that "Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations." *Coal Employment Project v. Dole*, 889 F2d 1127, 1133 (D.C. Cir. 1989). That Court also found that to properly deter future violations, the penalty must "be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." *Coal Employment Project*, at 1132.

a. The Operator's History of Past Violations.

As set forth above, the parties stipulated that Respondent had 301 assessed violations over the course of 1,260 inspection days during the 15-month period (May 5, 2009, through August 4, 2010) preceding the issuance of the Orders in dispute. JX-1, Stipulation 13. Of the

301 violations, 27 were for hazardous accumulations under § 75.400.[40] Two additional violations of § 75.400 have been found to be violations in decisions issued by Judge Andrews in PENN 2009-697 and by myself in PENN 2010-647 and both are pending review by the Commission pursuant to Respondent's requests for discretionary review. Both of these dockets involved the same type of activity, i.e. Respondent's practice of pushing coal to the face until it could be later cleaned up as part of the mining cycle, as occurred herein. Further, *Emerald Coal Resources, LP*, 33 FMSHRC 2776 (Nov. 2011) involved facts that are analogous to the pattern of the coal accumulation in the 16 crosscut herein. In that case Judge Barbour found that a similar accumulation on the shuttle car roadway was S & S and an unwarrantable failure to comply with a mandatory standard.[41]

Respondent therefore has an extensive history in its violations of § 75.400, apart from my findings herein regarding Order No. 8007973. I shall consider this factor to be of considerable significance.

b. Appropriateness of the Penalty to the Size of the Operator's Business.

As set forth in 30 CFR § 100.3(b), this factor requires consideration of "both the size of the mine cited and the size of the mine's controlling entity." Respondent's controlling entity is Alpha Natural Resources, Inc., which in 2009 produced over 10 million tons of coal. More than half of that amount, or 5,558,640 tons of coal, was produced at the mine involved herein. JX-1, Stipulation 12. Accordingly, I find that the Respondent is the operator of a large mine and that the penalties found herein are appropriate to this operator's size.

c. The Operator's Negligence.

Respondent's level of negligence has been found herein to be "high" with respect to both Orders. There can be little dispute that Respondent and its Compliance Manager Schifko knew MSHA's view about its continuing practice of pushing large quantities of coal to the face that impeded inspection and ventilation. Further, this large quantity of coal at the face has the potential to trap methane in the wedge cut made by the continuous miner. Nevertheless, the Respondent has continued its practice despite MSHA's repeated efforts to obtain its compliance. Its reason for continuing this practice is simply its fundamental disagreement with MSHA regarding the safety of the practice. Finally, Respondent's supervisors who perform on-shift and pre-shift examinations have apparently not been advised by Respondent's management of MSHA's policy regarding clean-up of accumulations of coal even though Respondent's management knew that MSHA considered these accumulations to be violative.

[40] Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission are included in an operator's history of previous violations. See 30 CFR § 100.3(c).

[41] Respondent's request for discretionary review was denied by the Commission.

It is also significant that Respondent's negligence regarding accumulations of the same type as involved herein is ongoing and has been the subject of repeated litigation. And to date, Respondent has not prevailed in its arguments.

d. Effect on the Operator's Ability to Continue in Business.

The parties have stipulated that the penalties proposed by the Secretary will not affect Respondent's ability to remain in business. JX-1, Stipulation 11. Although I have substantially increased the penalty beyond that sought by the Secretary for Order No. 8007973, I find that this increase will not have an affect on the operator's ability to continue in business. My basis for so concluding is the size of Respondent's business and the large amount of coal it continues to mine.[42]

e. The Gravity of the Violation.

As noted above, I find that the violations herein are S & S as well as unwarrantable failures to comply with mandatory standards. It has long been accepted that § 75.400 is violated "when an accumulation of combustible materials exists". *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) Such a violation exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980).

Here, there were three distinct accumulations (two coal and the third hydraulic oil) present in a gassy mine with a history of face ignitions (GX-14-17) with multiple ignition sources. And in the judgment of MSHA's inspector and supervisory inspector, possessing a combined total of 60 years of mining experience, such was highly likely to propagate a fire or an explosion which would cause serious injuries or fatalities.[43] This record herein presents a grave situation affecting the safety of miners which Respondent's agents failed to remedy or even report on the pre-shift examination.[44]

---

[42] In 2010, 2011 and 2012, the Respondent mined in excess of 4, 900,000 tons, 3,710,000 tons and 4, 380,000 tons of coal, respectively, according to MSHA's Mine Data Retrieval System.

[43] Violations can be established by the credible testimony of experienced inspectors. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1270, 1290 (Dec. 1998); *Emerald Coal Resources*, 33 FMSHRC at 2784.

[44] The record herein also cast some doubt on the adequacy of Respondent's pre-shift reports in general. Section foreman Birt testified that he had been putting 10-12 cans of oil in the continuous miner for three weeks before the inspection on August 5 (Tr. 318), yet this condition was not noted on any pre-shift report by him or others (GX-6).

f. Demonstrating Good Faith in Abating the Violation.

Respondent abated the violative conduct in less than 24 hours after the Orders were issued which shut down the C-4 section.[45] It first repaired the oil leak in the continuous miner which took approximately 5 hours and then turned its attention to the other accumulations in the 16 crosscut and the No. 2 entry. Although there is scant evidence in the record about the clean-up of these accumulations, the length of time involved shows the large amount of coal involved. I consider this to be a neutral factor.

Applying the above findings, I agree with the Secretary that Respondent's violations herein should not be assessed using the regular assessment process set forth in 30 CFR § 100.3. Although the special assessment process can result in variable amounts of penalty that can be set by adding or subtracting 25 percent from the Special Assessment Penalty Adjustments, it is not a transparent process that can be easily understood. As previously noted, the Secretary's special assessment added 20 more points (5 for negligence, 5 for likelihood of occurrence, 5 for severity of injury, 3 for unwarrantable failure and 2 for number of persons affected) to each of the orders in dispute. *See* Secretary's post-hearing brief, pages 50-51. I find, given the circumstances herein, that the Secretary was warranted in assessing additional points given the egregious nature of Respondent's violations and its continued refusal to adhere to MSHA's requirements on accumulations or to report accumulation hazards as part of its pre-shift examinations. By so doing, it has exposed its miners to ongoing and continuous hazardous working conditions. This conduct clearly contravenes the purposes of the Mine Act. As set forth in Section 2(a) of the Act "the **first priority** and concern of all in the coal … industry **must be the health and safety of its most precious resource – the miner.**" 30 U.S.C. § 801 (emphasis supplied). In my view, Respondent has failed in this purpose.

Nothwithstanding the Secretary's special assessment, I find that the appropriate penalty for Order No. 8007973 is $90,000.00. For Order No. 8007974, I find that the appropriate penalty is $40,000.00. In considering the Act's Section 110(i) criteria, I give the most weight to Respondent's history of past violations, its continuing and ongoing high negligence and the gravity of the violations. But, as noted above, I have considered all six criteria. I am increasing the penalties beyond what the Secretary seeks because Respondent is a recidivist operator that has chosen to ignore MSHA's §75.400 standard, i.e. large amounts of coal and other combustible materials cannot be left accumulate and stockpile in the mine until Respondent wishes to remove the accumulations. Also, its failure to report such violative accumulations and conditions on its pre-shift examinations exposes miners to unknown hazards. Respondent must be deterred before a tragic accident occurs.

[45] The abatement of the pre-shift examination order did not occur until August 9 after the requirements of § 75.360 were reviewed with all certified persons.

IV. ORDER

It is **ORDERED** that Order Nos. 8007973 and 8007974 are **AFFIRMED** as written, with only modifications to the penalties as stated above. It is further **ORDERED** that Respondent **PAY** the Secretary of Labor the sum of $130,000.00 within 30 days of the date of this Decision.[46] Upon receipt of payment, this case is hereby **DISMISSED**.

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

Distribution:

Michael P. Doyle, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106

R. Henry Moore, Esq., and Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222

[46] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390