

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 20, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2012-278
Petitioner	:	A.C. No. 36-05018-286371
	:	
v.	:	
	:	
CUMBERLAND COAL RESOURCES, LP,	:	Mine: Cumberland Mine
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondent

Susan M. Jordan, Esq., & Douglas R. Sciotto, CLR, U.S. Department of Labor, Office of the Solicitor, Philadelphia PA for the Secretary

Before: Judge Steele

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). Cumberland Coal Resources, LP (“Cumberland” or “Respondent”) engages in coal mining activities at the Cumberland Mine that subjects it to the jurisdiction of the Act as a “coal or other mine” as defined by section 3(h) of the Act, 30 U.S.C. §802(h). Further, Respondent meets the definition of an “operator” as defined by section 3(d) of the Act, 30 U.S.C. §802(d). Hence, this proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judge (ALJ) pursuant to sections 105 and 113 of the Act, 30 U.S.C. §§805, 813. A hearing was held in Pittsburgh, PA on January 15, 2013, where the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post-Hearing Briefs.

Two citations were at issue in this proceeding. Both of those citations were issued under 30 C.F.R. §75.400. The Court upholds Citation Nos. 7022912 and 7071904 and imposes civil penalties of \$176.00 and \$392.00, respectively.

STIPULATIONS

The Secretary and Respondent agreed that the following stipulations should be included in the record:

1. Cumberland was an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. §803(d), at the mine at which the citations at issue in this proceeding was issued
2. Operations of Cumberland Mine are subject to the jurisdiction of the Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designed Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. True copies of the citations at issue in this proceeding were served on Cumberland as required by the Act.
5. Cumberland demonstrated good faith in the abatement of the citations.
6. Payment of the proposed penalty will not affect Cumberland’s ability to continue in business.
7. The appropriateness of the penalties, if any are assessed, to the size of Cumberland’s business should be based on the fact that in 2011, Cumberland Mine mined approximately 6.2 Million tons of coal, and that in 2011, Cumberland’s controller mined approximately 128 million tons of coal.
8. Cumberland mine had a total of 279 violations that have been paid or finally adjudicated issued in the 15-month period prior to the issuance of the citations in this case. Cumberland had 1,116 inspection days during that same period.

CITATION NO. 7022912

i. Contents of the Citation

On February 22, 2012 at 10:15 a.m., Inspector Carl F. Kubincanek (“Kubincanek”) issued to Respondent Citation No. 7022912. Simmons found:

An accumulation of combustible material was pushed into the wedge cut of the face of #3 entry of the 61 Headgate section (MMU 034). The accumulation went from rib to rib, 4 to 5 feet in depth and approximately 10 feet in length. Methane in the amount of 0.45% was found in the wedge cut and a light film of rockdust was applied to the accumulation. The outby area in the #3 entry was cleaned and rockdusted

Government's Exhibit 1.¹ Kubincanek noted that the gravity of this violation was "Unlikely," "Lost Workdays/Restricted Duty," and that it would affect two persons. *Id.* He further marked that Respondent exhibited "Moderate" negligence with respect to this violation. *Id.*

On February 23, 2012 at 11:00 a.m., Kubincanek issued a termination of the citation noting, "[t]he face was cleaned and the loading crew is now mining this entry." *Id.*

ii. Legal Standards

Citation No. 7022912 was issued under Section 104(a) of the Mine Act. That provision provides the following:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 814(a).

This citation deals with an alleged violation of 30 C.F.R. §75.400 (titled "Accumulation of combustible materials.") That section 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

iii. Secretary's Evidence

a. Testimony of Carl F. Kubincanek

Kubincanek testified as to his relevant coal mining experience including 30-35 years of experience with continuous miners. (Tr. 19-23). He also testified regarding his 20 years of experience and training as a coal mine inspector. (Tr. 19-23). He has mine examiner's papers and assistant mine foreman's papers in Pennsylvania. (Tr. 20-21). Before 2011, Kubincanek

¹ Hereinafter Government's Exhibits will be referred to as "GX" then the number.

inspected Cumberland Mine on occasion. (Tr. 22). After the mine was added to his group, he conducted three EO1 inspections and other special inspections. (Tr. 22). He would spend four to six days there every three months. (Tr. 22).

He reviewed the citation he issued to Respondent on February 22, 2012 at 10:15 a.m. (GX-1) and his notes from that day (GX-2). (Tr. 23-24). He also reviewed a map of the 61 headgate that showed conditions at the mine that day (GX-3). (Tr. 24). He issued the citation because, while checking the faces before the EO1 inspection, he found an accumulation of combustible material in the No. 3 Entry wedge cut.² (Tr. 25-26). This was a violation of Section 75.400, which prohibits accumulations of combustible material in an active area. (Tr. 26-27, 40-41). The area was ventilated. (Tr. 26-27). He marked the accumulation on the map with a circled "A." (Tr. 28).

The accumulation was approximately 16 feet wide (rib to rib), 10 feet long, and 4-5 feet high (though varied) where visible. (Tr. 29, 31). These are estimates because Kubincanek could not measure beyond the supports. (Tr. 31). The accumulation was mostly combustible, though it included rock, clay and other things. (Tr. 29). He knew this based on the appearance and texture. (Tr. 30). The accumulation was damp to dry and he did not see water. (Tr. 30). On cross examination, he conceded that he did not touch the accumulation. (Tr. 56). Further, continuous miners spray water when cutting. (Tr. 56). There are at least 40-50 sprays with 80-100 PSI. (Tr. 56). The water gets on the mine floor and mixes with whatever is being scooped up. (Tr. 56-57). Finally, material that is piled dries out slower than spread out material. (Tr. 63-64). However, this occurred in winter when mines are drier. (Tr. 61-62). Also, it would have dried out in the day between when the miner moved out and when it returned. (Tr. 62).

He could not travel past the last roof bolt so he stopped about 12-14 feet from the face and looked. (Tr. 27, 29, 48-49). In full-face mining, bolting occurs at the same time as mining, every four feet. (Tr. 49). Kubincanek was not sure if it was rib bolted in the cited area but it was not center bolted. (Tr. 49). There was a sign at the last bolts saying "Danger Roof" indicating not to go beyond. (Tr. 49). There was also a barrier device hung across the area to prevent people from accidentally entering. (Tr. 50). All of the material was in by the barrier. (Tr. 50).

There was a minimal film of rock dust on the top making the accumulations gray rather than black. (Tr. 30-31). Kubincanek believed that rock dust had migrated to that area during the previous shift when other areas were rock dusted and were not dusted deliberately. (Tr. 32). He did not take rock dust samples because he could not enter the wedge cut. (Tr. 57). However, the

² Wedge cuts are unique to full-face mining. (Tr. 46). The purpose of a wedge cut is to limit the amount of roof that is hanging and it serves as a warning not enter the area. (Tr. 40). It also allows the miner to cut the area and use fresh bolts when it returns to the area. (Tr. 40). Finally, methane is lighter than air so cutting a wedge makes the air migrate up and out of the cut and improves ventilation. (Tr. 40). The MSHA Tech Support Office created a drawing to show what a wedge cut looked like (GX-4). (Tr. 28, 38). Kubincanek circled an accumulation on the drawing and marked it with a circled "B" to show where the accumulation in the instant citation was located. (Tr. 28-29). The wedge cut tapered from the entry height of 8 feet to a height of 2 feet over a 14-foot stretch. (Tr. 32-33).

entry had been properly rock-dusted up to within 40 feet of the face. (Tr. 50).

The accumulations were more than just the amount left under the miner, a small amount of which is acceptable.³ (Tr. 26-27, 33). The entry was clean, so Kubincanek decided the coal had been pushed forward from the entry into the wedge and left there. (Tr. 34). The No. 3 Entry, after the belt, is a runway where scoops and shuttles travel. (Tr. 34). The mine has a history of sloughage (coal falling from the rib) and if that material stays on the bottom it will be crushed into dust if not cleaned with a scoop. (Tr. 34-35). Sloughage can stay in place as long as it is heavily rock-dusted. (Tr. 59). He could tell from the appearance that there had been sloughage and that it had been cleaned. (Tr. 59). The material pushed into the wedge could have come from the ribs, spillage from shuttle cars, or come from underneath the miner. (Tr. 35, 57, 59). Kubincanek reached this conclusion based on his experience. (Tr. 35). Respondent should have put the material on the feeder to the belt line with the scoop or loader instead of in the wedge. (Tr. 35-36). The miner was in a different entry at this time. (Tr. 36).

On cross examination, Kubincanek conceded that a scoop is used for other things on a section, like transporting supplies. (Tr. 55). If someone uses a scoop to move material to the feeder, the feeder is narrower than the scoop and there might be a spill. (Tr. 55-56). A shuttle car would put material on the feeder without spillage. (Tr. 56).

The accumulations did not block examination of the face because Kubincanek had a probe pole. (Tr. 38-39, 52). He also took a valid gas check within 12-inches of the roof and got 0.45% methane, which indicated something was wrong. (Tr. 39, 52). The Respondent's books said the pre-shift and on-shift found liberation of methane at 0.3%. (Tr. 39, 52-53). That was less than what Kubincanek found. (Tr. 53). He saw the detector, but it was not his reading so he did not record it. (Tr. 53). He conducted the gas check to make sure it was venting and it was doing so. (Tr. 39-40). He was concerned because the material in the wedge would condense the area, prevent ventilation, and cause accumulation of gases. (Tr. 41-42). When the miner returned and cut into trapped methane, an ignition could occur from the bits or cable (if not permissible). (Tr. 42).

However, on cross-examination Kubincanek conceded that a continuous miner is a permissible piece of equipment, designed to prevent explosion. (Tr. 53). Continuous miners have methane monitors that shut the machine down if it finds more than 1.8% methane. (Tr. 53-54). The miner cuts coal from the face and liberates methane. (Tr. 54). It starts at 100% then is reduced by ventilations. (Tr. 54). When the miner arrives to load out the material, it is essentially doing its typical job of cutting material at the face and loading it out. (Tr. 54).

Based on when the miners said the area was cleaned, Kubincanek determined that the

³ When a full-face miner is mining, it dumps a pile of coal behind the miner. (Tr. 47). That pile can fill a shuttle car, 8 to 10 tons, or more. (Tr. 47-48). Shuttle cars are about 14 feet wide and 30 feet long and the material will be at least 3 to 4 feet high. (Tr. 48). The pile that forms behind a miner is not rock-dusted. (Tr. 48). MSHA will not cite an operator for having a pile of accumulation behind the miner before loading it out. (Tr. 48).

accumulation existed from the midnight shift before the day shift. (Tr. 37, 60-61). The material could have been there longer; they have no way of knowing for sure. (Tr. 61). The miner had moved to Entry No. 2 to cut over to No. 1. (Tr. 55, 61). He marked the area he thought they were going to cut on the 22nd with an X on GX-3. (Tr. 55). After that it would go back to No. 3, but this could take two or three shifts (a day) based on the rate of mining. (Tr. 37, 55, 61). The material would have been loaded out when the miner returned to the entry. (Tr. 51).

On cross examination Kubincanek conceded that he also inspected the No. 1 and No. 2 entry and there were no other problems. (Tr. 50-51). The sections looked good. (Tr. 51). Having a system is important to effective clean-up. (Tr. 51).

Kubincanek found an incident was unlikely and non-S&S because he did not have an ignition source. (Tr. 42-43). Also, the ventilation was still good, though that could have changed if more material was added. (Tr. 43). By the time the miner returned it might have been S&S or more likely, but he evaluated the condition based on the facts that the time. (Tr. 43). He found that two persons would be affected because, in the event of an ignition, the two integral persons most inby would be most affected. (Tr. 45).

Kubincanek found Respondent exhibited moderate negligence because the foreman deliberately pushed material from the No. 3 Entry into the face. (Tr. 43). Also, because the material was present on the midnight shift, the foreman had seen it at the face and the daytime foreman would have seen it also. (Tr. 43-44). Further, in 2011 when Kubincanek's group took over the Mine, there was a pre-conference meeting wherein his supervisor, Robert W. Newhouse ("Newhouse"), Inspector Joseph Vargo ("Vargo"), and other members of MSHA sat down with Respondent to discuss past and future enforcement. (Tr. 44). Kubincanek chaired the meeting and Newhouse stated that Respondent was not permitted to push combustible material into the wedge as it was against policy. (Tr. 44-45).

Newhouse is the person who set the policy at the pre-conference. (Tr. 58). Kubincanek does not know if that is difference from other groups. (Tr. 58). He agreed with Newhouse. (Tr. 62). Newhouse was with Kubincanek on the day of the citation and is the person who evaluates him. (Tr. 58-59). If Kubincanek did not follow the policy, it would come up in his evaluation. (Tr. 59). He did not recall observing this condition at the mine in the past. (Tr. 45). Most mines clean up as they go, as Kubincanek did when he was in the industry. (Tr. 45-46). After that conference, Kubincanek did not observe material pushed to the face until a year later. (Tr. 62-63). If he had, he would have cited them. (Tr. 63).

Kubincanek told Respondent how he wanted them to abate the condition. (Tr. 46). He left the mine and returned the next day. (Tr. 46). Kubincanek does not know when they returned, but when he was there on the 23rd, the miner was there. (Tr. 46, 51-52). They were about 8 feet past the spot where the accumulations has been located at 11:00 a.m. on the 23rd. (Tr. 46, 52). Before they re-started, they had to probe it and check for methane. (Tr. 52-53). He spoke with their representatives and Respondent had properly scooped the material. (Tr. 47).

b. Testimony of Robert W. Newhouse

Newhouse testified as to his relevant coal mining experience including experience with continuous miners. (Tr. 68-69). He also testified regarding his 30-plus years of experience and training as a coal mine inspector and supervisor with MSHA. (Tr. 65-68). He supervises between 6 and 9 inspectors plus support personnel and, along with another supervisor, is in charge of inspecting more than 40 mines. (Tr. 66-67). As part of his duties, he must travel to mines at least 36 times a year. (Tr. 67). At times, Cumberland Mine has been under his supervision. (Tr. 69). Starting in 2011, his group inspected the mine and still does. (Tr. 69-70).

Newhouse recalled being at the mine on February 22, 2012. (Tr. 71-72). He was there to evaluate a trainee (Randy Bombach), to evaluate Kubincanek's performance (as required), and inspect the mine. (Tr. 72). Mike Konosky ("Konosky") from the company also went with them. (Tr. 72).

Newhouse is familiar with the citation Kubincanek issued at 10:15 a.m. that day for a violation of 75.400. (Tr. 72-73). It was issued for coal pushed into the wedge cut with the scoop. (Tr. 73, 85). The accumulations were rib to rib (16 feet) and around 4 to 5 feet high at the center, less on the sides. (Tr. 74-75). He could not see if it was full in the back but it was 10-12 feet long, as deep as the wedge. (Tr. 75). There was a light film of rock dust caused by dust being moved by the air, nothing purposeful. (Tr. 75-76). The accumulation was mostly coal. (Tr. 76). It was black or dark gray and appeared dry. (Tr. 76). The accumulation was coal and therefore combustible. (Tr. 76). A scoop can be used to cut into the bottom. (Tr. 85). The bottom may be coal or it may be other material. (Tr. 85).

As the miner moves up, the load machine behind it advances up to the back of the miner. (Tr. 90). The negligible amount of coal left afterwards is acceptable if heavier dust is added. (Tr. 90-91). This material would not be pushed anywhere, it would be left scattered, covered with rock dust, and removed later. (Tr. 88). The accumulation under the miner would only be a couple of inches deep 20 feet long, and 16 feet wide (about the size of the miners). (Tr. 91).

Newhouse believed the coal was pushed into the wedge cut when the No. 3 Entry was cleaned. (Tr. 76-77). The area cleaned started where "63" is shown on the map (GX-3) and was about 175 to 200 feet from the cross cut. (Tr. 77). They put the rock dust on it after they scooped it. (Tr. 77). He does not recall confirming this was Respondent. (Tr. 77-78).

The accumulations existed for about a shift, because the No. 3 Entry looked freshly cleaned. (Tr. 78). Cumberland works three production shifts. (Tr. 78). The citation was issued on the day shift and the accumulation occurred the previous midnight shift. (Tr. 78). Respondent was preparing to cut an angle chute to connect No. 2 entry to No. 1, so it would have taken three shifts for them to return to No. 3 entry. (Tr. 78-79). He does not know if they mined the No. 2 entry, but they were going to mine roughly where the X was located on the map. (Tr. 79). He does not know if the other two entries had been driven that far. (Tr. 80).

It looked like they were using a system to keep the area clean and that they had just scooped the No. 3 Entry the previous shift. (Tr. 89). Newhouse did not recall writing citations at

the No. 1 or No. 2 feeder and did not think they had. (Tr. 89). It takes significant maintenance to keep the feeder clean. (Tr. 89). He did not recall those areas being unclean. (Tr. 89-90).

Newhouse and Kubincanek both measured 0.45% methane as observed at the last strap in the No. 3 Entry. (Tr. 73-74, 85). Newhouse did not see the probe register 0.3%. (Tr. 85). The coal in the ribs and face can have methane in it can be liberated even before the coal is broken. (Tr. 85-86). Mining can create additional liberation. (Tr. 86). It is possible for broken coal to liberate more methane than unbroken coal, but not always.⁴ (Tr. 86).

Newhouse reviewed the citation and agreed that it was a violation of §75.400 because there was an accumulation of combustible material. (Tr. 80). He agreed with the gravity designation, with some reservations. (Tr. 80). The potential hazard of this condition would be that when the miner returned, the material in the wedge would interfere with ventilation. (Tr. 81). The wedge is designed to provide ventilation, but putting material inside could prevent the movement of air and trap the methane. (Tr. 81). When the miner returned and cut, it could hit rock and cause sparks. (Tr. 81-82). This increases the likelihood of methane ignition. (Tr. 82).

On cross examination, Newhouse conceded that the continuous miner is a permissible machine. (Tr. 86). When mining with a continuous miner the curtain is taken down and ventilation tubing and a fan is used to increase ventilation. (Tr. 86-87). Before cutting coal, the miners probe for methane to the extent possible. (Tr. 87). They must also check the methane at the last row of bolts twice a shift. (Tr. 87). They must pre-shift and on-shift. (Tr. 87).

Newhouse agreed with the negligence determination. (Tr. 82). He was present for the pre-inspection conference in early 2011. (Tr. 82-83). Mine Manager Jack Tackemas, Mine Superintendent Robbie Robinsons, Safety Director Bob Bohatch, Safety Inspector Konosky, production coordinators, the department heads, and the United Mine Worker's Safety Committee were all present. (Tr. 83). In that meeting he told them about the prohibition against pushing material into a wedge cut. (Tr. 83). He did not know what there practice was before and did not want to surprise them. (Tr. 83-84). He brought it up because he had seen the issue at Emerald Mine, which is owned by the same company. (Tr. 84). Before that meeting, a different field office supervisor was responsible for inspection at the mine. (Tr. 87). Newhouse does not know if there is a difference of opinion about whether material can be pushed to the face during cleanup. (Tr. 87-88). It is MSHA's policy, even though it is not written down. (Tr. 88).

iv. Respondent's Evidence

a. Testimony of Mathia Mark Mooney

Mooney discussed his four and a half years of mining experience including his time in the foreman trainee program. (Tr. 93-95). He also discussed his university training both in mining and management. (Tr. 94-95). He is an assistant foreman. (Tr. 95). At the time of the

⁴ Under Section 103(i) a mine must be inspected on a five-day spot when it liberates more than a million cubic feet of methane for a 24 hour period. (Tr. 70). This mine liberates anywhere from 7 to 12 million. (Tr. 70).

citation, Mooney was a section foreman and had been for about a month. (Tr. 111).

Mooney was supervising a continuous miner section in February 2012. (Tr. 95). When starting to mine, Mooney would go to the miner and do the parameter checks. (Tr. 96). He also checked the miner and the faces for gas before turning on equipment. (Tr. 96, 112). At the No. 3 Entry the face was considered the last row of bolts. (Tr. 96-97, 112). Methane is checked in the upper quarter. (Tr. 113). Mooney does not probe the wedge. (Tr. 113). If the probe was placed at the bottom, it would not give an accurate reading because methane rises. (Tr. 113-114)

If everything is good, they start. (Tr. 96). At the time they were using an Alpine miner, which allows simultaneous cutting and bolting. (Tr. 97). When they cut, the coal piles behind the miner where a loader gathers it and loads it into the shuttle cars. (Tr. 97). Generally, the coal is only piled for a few minutes before being loaded out. (Tr. 114). The two shuttle cars transport coal to the feeder and dump it on the belt. (Tr. 98). The amount of coal behind the miner varies but they try to keep it minimal for safety reasons. (Tr. 98). They will use a loader to clean the rib during mining and to clean spillage from the shuttle cars. (Tr. 98-99).

The amount they mine before changing to another entry varies based on the cycle. (Tr. 98). On a gate road like the No. 3 Entry, 180 feet is average. (Tr. 98). When the miner finishes a cut, they do a wedge cut and pull the miner out.⁵ (Tr. 99). They will then clean the spillage that accumulates on the sides, load it, and then push it to the face. (Tr. 99). They then dust with the loading machine and take the miner to the next location. (Tr. 99). Finally, they scoop the entry as needed. (Tr. 99-100). This is done, even though they have been cleaning the whole time, because the shuttle cars will create ruts in the bottom. (Tr. 100-101). It also cleans up a little coal spillage. (Tr. 101). If there is significant material it is taken to the face and if it is a small amount it is left where it fell until the miner returns. (Tr. 101).

While they are cleaning, the mine fan is still in place to ventilate the area. (Tr. 100). This is easier than hanging canvas, because if the canvas is used it must be moved when the scoop is in the area and this can cause methane accumulation.⁶ (Tr. 100-102).

Mooney was on the day shift when Kubincanek issued the citation and saw the material in the No. 3 Entry. (Tr. 102). It was in the area between the last row of bolts and the face where he could not enter. (Tr. 103-104). The material was rock-mud that had been drug up by the shuttle car. (Tr. 104). Mooney reviewed the illustration of a wedge cut (GX-4) but did not believe it was as substantial as in the drawing.⁷ (Tr. 103). It was not five feet tall; it was less

⁵ Wedge cuts are designed to allow them to install the last roof bolts with the miner. (Tr. 106).

⁶ The fan has fiberglass tubes that run in the upper corner of the entry and ventilates gas from the face. (Tr. 101-102). Canvas extends from the floor to the roof and goes near the middle of the entry, so the scoop cannot move past it. (Tr. 102). This fan is in addition to any other fans used to ventilate the mine. (Tr. 102).

⁷ The picture of the wedge cut (GX-4) is a representation of what a wedge cut looks like but Mooney believed an actual cut was at a sharper angle, like the angle of stairs. (Tr. 106).

than three bucket loads.⁸ (Tr. 103, 115). His men abated the condition and it was only a quarter to half of a shuttle car of material and only took 35-45 minutes. (Tr. 103, 115). Even if the wedge is full it cannot fit a substantial amount of material. (Tr. 106).

There was a rib bolter on either side of the miner and they used them on all three entries. (Tr. 109). At the time of the citation, the rib in Entry No. 3 was rib bolted and "Tensared." (Tr. 109). Tensar is a plastic mesh with a board on it for additional support. (Tr. 110).

The rock-dusting in the area was very good and it was done deliberately. (Tr. 104, 119). The area was fling dusted and dusted from the loading machine. (Tr. 104-105). The loader has a duster on it, a box with an auger attached to it that will project dust out of a hose. (Tr. 108-109). A fling duster attaches to the bucket scoop that discharges a large amount of dust. (Tr. 109). The fan also distributes dust and rock dust can be spread by hand. (Tr. 109). Outby the last row of bolts, the No. 3 Entry, ribs, and floor were dusted. (Tr. 105-106). The material at the face (the circled 65 on GX-3) had as much rock dust as the surrounding area. (Tr. 105). The rock dust could have traveled in the air currents from areas outby. (Tr. 119).

Methane liberated from the wedge cut is removed with ventilation. (Tr. 107). The cited wedge cut had adequate ventilation. (Tr. 107). The methane was within the legal limits at the last bolts. (Tr. 118). He believes that the reading was 0.3, but he only does not recall he just saw it in the on-shift and pre-shift. (Tr. 118). That amount indicates that there was methane present but nothing out of the ordinary for the area. (Tr. 118). Mooney did not believe it was unsafe to have material in the wedge cut. (Tr. 107, 110). Pushing the material up is part of the clean-up process. (Tr. 110). The material was going to be loaded out when the miner moved to the next location. (Tr. 107). Usually they like to load it out before they start cutting again, but it depends on the operator. (Tr. 107-108). There is no hazard in loading it out with a continuous miner. (Tr. 108). It would have been moved out at 9:00-10:00 that evening. (Tr. 108).

The cleanup plan states that material must be moved when it starts to impede examination. (Tr. 119-120). It would impede ventilation if he could not take a proper gas check at the last row of bolts because material extended out past the bolts. (Tr. 120). If it does not extend past the last row of bolts they do not clean it; there is no set amount that must be cleaned. (Tr. 120-121). Even if material was at the roof in the wedge cut, it would be okay if he got a good methane reading. (Tr. 121). It would not be easy to get material roofed out in the wedge cut. (Tr. 121). There could be a pocket at the toe of the wedge cut he did not know about. (Tr. 122).

There are alternatives to the practice of pushing material into the wedge including scooping it over to the next entry where the miner could pick it up. (Tr. 122). That would take the coal out faster. (Tr. 122). It is also possible to scoop out the face area and bring it to the feeder. (Tr. 122). However, Respondent does not like this because the scoop is larger than the feeder and this can create spillage. (Tr. 123-126). Further, the scoop bucket sides are 18 inches while shuttle cars are three and a half to four feet deep. (Tr. 126). Also, a shuttle car dumps on

⁸ He did not know how much the buckets could hold, but he would guess three or four tons of coal (rock and mud are heavier than coal). (Tr. 115-116).

the feeder with a conveyor chain onto the middle of the feeder. (Tr. 126). The scoop cannot dump because of its height and just has to ram, causing spillage. (Tr. 126). When they cleaned No. 3, they scooped it and took the scoop to the feeder and dumped it on. (Tr. 125). Then they had to clean the feeder. (Tr. 125). Pushing into the wedge is also faster. (Tr. 124).

The No. 3 Entry was mined before the citation, but Mooney does not remember the time of day it was finished. (Tr. 116-117). After they mined No. 3, they mined up No. 1, up No. 2 and were located in Entry No. 2 and preparing to mine an airway from 2 to 1 (at X on GX-3) when the citation was issued. (Tr. 116-117, 127). To go to No. 1, the miner could go through the No. 65 crosscut or the foreman might take it up and over to avoid tramping backward with the cables. (Tr. 116). After the airway between 1 and 2, the miner would return to No. 3. (Tr. 118).

The scoop is battery powered but the loader, shuttle car, and miner are cable powered. (Tr. 124-125). When moving across sections, Mooney has to be aware of where the cables are because they are expensive. (Tr. 125).

b. Testimony of Jason David Grasha

Jason David Grasha discussed his four and a half years of mining experience, including experience on continuous miner sections. (Tr. 127-130). He is a certified mine examiner, has foreman papers, is an EMT, is on the mine rescue team, and has blasting certification. (Tr. 128).

Grasha worked on the midnight shift prior to the shift where the citation was issued and was familiar with the material in the wedge. (Tr. 130, 139). It was scooped there after the miner holed through 2 to 3. (Tr. 130). The material was in by the last row of bolts and was not a significant amount. (Tr. 130). The material was mostly the rock cracked from the floor when the miner turned from the No. 3 to the No. 2 Entry and the insignificant amount of coal that drops through the conveyor system and from the intersection. (Tr. 131, 139-140). It was not the material from the cleanup of outby areas of the No. 3 entry. (Tr. 140). That was not the practice, only material from the last crosscut to the face was pushed in. (Tr. 140). When he worked at Enlow Fork, material left behind from the cut would be pushed into the face and loaded in the next cycle. (Tr. 129-130). No one objected to this practice. (Tr. 130).

The accumulation purposefully rock dusted by hand, usually two bags of dust. (Tr. 130-132, 140). He did not believe they brought in a duster. (Tr. 141). The material was covered in rock dust, it was more than a light film; it was white and inert. (Tr. 141).

During shifts, Grasha conducts examinations of the faces, the returns, the electrical equipment, and conducts gas checks at the proper location. (Tr. 132). He reviewed R-2, which contained an on-shift examination from February 22, 2013 of the 61 headgate section which he signed. (Tr. 132-133). At the No. 3 Entry gas checks are taken at the last channel (a strap between roof bolts) in the entry, 12 inches from the face, roof, and ribs.⁹ (Tr. 133, 142). The on-shift states that Entry No. 3 measured 0.5% methane after the cleanup. (Tr. 141-142). He knew

⁹ At the last channel there is a physical barrier to impeded travel across the entire width of the entry about waist high that holds two signs that say "Unsupported Top." (Tr. 143).

it was after clean-up because it was the beginning of his shift and the materials were already in the wedge cut. (Tr. 142). He also conducts pre-shifts at that location. (Tr. 132, 134). They are conducted three hours before the oncoming shift. (Tr. 134). Grasha reviewed R-3 which contained a pre-shift for February 22, 2012 that he signed.¹⁰ (Tr. 134-135). The methane reading at the No. 3 Entry was 0.3%. (Tr. 135).

All of the examinations show readings at the last channel strap not probes into the wedge. (Tr. 142). Probes are used when someone is actually mining. (Tr. 143). When cuts are started, the tests are at the last channel. (Tr. 143). The probe allows methane readings to be done farther than from standing. (Tr. 144). It is around 20 feet. (Tr. 144-145).

It is a little easier to clean with a scoop than a miner because of the cables and the greater size of the bucket than the pan under the head of the miner. (Tr. 136). The pan is the full width of the miner. (Tr. 136). The scoop provides a better clean because it is not the width of the whole entry so the ribs can be cleaned individually, plus the miner drops material. (Tr. 137).

c. Testimony of Michael Anthony Konosky, Sr.

Konosky, discussed his 35 years of mining experience with Respondent, including 22 years as a safety representative. (Tr. 145-146). He has assistant mine foreman and EMT certifications. (Tr. 146).

Konosky accompanied the inspection party and saw the material at the face. (Tr. 146). The material had been placed there when the crew scooped the entry after mining. (Tr. 146). The accumulation was more than just the materials left under the miner. (Tr. 148). It included materials scooped out by the area from Entry No. 3. (Tr. 149). Coal is combustible and the material contained coal. (Tr. 149). He does not know how much of the material was coal and how much was rock, it was mixed. (Tr. 151). It was harder to tell because of the rock dust. (Tr. 151). From where the entry started it was about 30 feet and it was all dusted. (Tr. 151-152). He does not recall the inspectors finding any other problems with the clean-up. (Tr. 147).

The material had “somewhat” been rock dusted, but not deliberately. (Tr. 147, 149). It was sufficient and more than a film. (Tr. 147, 149). He is not sure if it was inert. (Tr. 149).

Konosky had no problem with the material where it was; that is where it belonged and how clean-up was always done. (Tr. 147). Newhouse was not happy about it, but other inspectors and field supervisors did not enforce §75.400 the same way. (Tr. 147-148). He believes this was the first citation Respondent received for this action. (Tr. 150). No inspectors objected to the material in the wedge before this was issued, despite the fact that all of the inspectors before this had seen material in the wedge. (Tr. 150). In fact, some agreed with the practice. (Tr. 148). However, Konosky was aware Newhouse disagreed with this practice and may have learned that at the pre-inspection meeting. (Tr. 151).

¹⁰ It is normal practice to look at the pre-shift examination, in fact Grasha countersigned the previous pre-shift indicating that he seen the conditions and hazards. (Tr. 135-136). The other miner signed it when he came out. (Tr. 136).

v. Contentions of the Parties

The Secretary contends that Citation No. 7022912 was validly issued, that the violation was unlikely to result in lost-workdays/restricted duty, that two miners were affected, that Respondent was moderately negligent, and that the proposed civil penalty was appropriate. The Secretary argues that the citation is valid because there was an accumulation of combustible material in an active working section of the mine and that accumulation was not rendered inert with rock dust. (*Secretary's Post-Hearing Brief* at 4-7). The Secretary argues that, with respect to gravity, that an event was unlikely because there was no ignition source and the area was still being vented, however if an event were to occur it would result in lost-workday/restricted duty injuries to two miners. *Id.* at 8. Further, the Secretary contends Respondent's actions were moderately negligent because Respondent had deliberately pushed material to the face, the accumulations had been examined twice and were obvious, and management had been told this condition was a violation during a pre-inspection conference. *Id.* at 8-9. Finally, the Secretary argues that the penalty was appropriate. *Id.* at 9-10.

Respondent contends that Citation No. 7022912 was not validly issued. Respondent argues that the citation was not valid because the area cited was not an active working and because a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not believe the condition posed a danger. (*Respondent's Post-Hearing Brief* at 9-15). Respondent argued that a reasonably prudent person would not believe the condition posed a danger because the coal was being staged for removal in a manner that demonstrated control by the operator and management had been praised for this activity in the past both by MSHA and the Commonwealth of Pennsylvania. (*Id.* at 11-15) Finally, Respondent argues that the Secretary is not entitled to deference for his interpretation of the standard. (*Id.* at 13-14)

vi. Findings and Conclusions

a. Validity

It is undisputed that an accumulation of material was pushed into the wedge cut at the face of the No. 3 Entry at Cumberland Mine and that a citation was issued for this condition on February 22, 2012. (Tr. 23-26, 34, 43, 90-91, 99, 102, 130, 139, 146). The only issues in dispute with respect to the validity of Citation No. 7022912 are whether this was an accumulation of combustible material under §75.400 and whether the cited condition occurred in an "active working section." For the reasons laid out below, I find that the Secretary has met the burden of proof with respect to those issues.

A violation of §75.400 occurs where an accumulation of combustible material exists. *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979). While some spilling of coal and other material is inevitable in the mining processing, the standard seeks to prevent the accumulation of combustible material that could cause or propagate a fire. *Utah Power & Light*, 12 FMSHRC 965, 986 (May 1990) *aff'd* 951 F.2d 292 (10th Cir. 1991) *quoting Old Ben II*, 2 FMSHRC 2806, 2808 (Oct. 1980). Furthermore, even that type of spillage is only acceptable if it is cleaned up "with reasonable promptness, with all convenient speed." 951 F.2d at 295 n. 11. Material is

“combustible” when it is capable of undergoing combustion, burning, or catching fire when subject to fire. *Eastern Associated*, 12 FMSHRC 239, 244 (Feb. 1990) (ALJ) (citing *Webster’s Third New International Dictionary*).

In this case, the Secretary provided credible evidence that an accumulation of material was placed in the wedge cut that measure approximately 16 feet wide (rib to rib), 10 feet long, and 4-5 feet high (though varied) where visible. (Tr. 29, 31). Clearly, this amount is more than mere spillage. This was not a small, accidental accumulation; it was a purposefully-created consolidation of loose material from the area around the face. In addition, the Secretary presented evidence that the material had existed since the midnight shift before the day shift where the citation was issued. (Tr. 37, 60-61). Therefore, the spillage had been sitting for some time, so that even if it were spillage, it was not being cleaned up with reasonable promptness. Instead, it was left in place for some time.

With respect to whether the accumulation was combustible, the Secretary presented credible evidence that this material was mostly coal, though it included rock, clay and other things. (Tr. 29). Respondent concedes in its post-hearing brief that this material included coal that was staged for removal from the mine. *Respondent’s Post-Hearing Brief* at 11. Coal is, without question, a combustible material. The Secretary also established that the accumulation was not rock dusted. Witnesses both for the Secretary and Respondent testified that the accumulation was not intentionally covered with rock dust.¹¹ (Tr. 32, 75-76, 147, 149).

Respondent presented several arguments attempting to show that this was not an impermissible combustible accumulation. However, none of those arguments were compelling. For example, Respondent cites 30 C.F.R. §75.402 for the proposition that material within 40 feet of the face, including the material here, did not need to be rock dusted. *Respondent’s Post-Hearing Brief* at 14. While it is true that coal operators are only required to rock dust areas that are within 40 feet of the face, that does not mean that accumulations of combustible material are permissible in that area. The evidence presented that dealt with rock dusting was not presented by the Secretary to prove that Respondent violated 30 C.F.R. §75.402. It was used to show, persuasively, that the accumulation was not rendered inert. It is entirely possible for an area to be in violation of 30 C.F.R. §75.400 while complying with 30 C.F.R. §75.402. Here, the accumulation consisted of coal and was not rendered inert with rock dust; therefore it was an accumulation of combustible material.

Respondent also argued that this accumulation was not an illegal accumulation under §75.400 because operators are allowed some accumulations when the coal is prepared for removal from the mine. *Respondent’s Post-Hearing Brief* at 14. It notes that the Secretary does not issue citations for coal dumped behind the miner, coal dumped to be loaded out by the shuttle car, or coal when on the conveyor belt. *Id.* However, Respondent cites no authority for the proposition that accumulations are permissible when they are being prepared for removal from

¹¹ Only one of Respondent’s witnesses, Konosky, conceded that the material had not been dusted. However, Respondent’s other witnesses provided contradictory evidence regarding how much rock dust existed and how that dust had been spread. (Tr. 104, 119, 141). Therefore, I find the Secretary’s explanation as far more credible.

the mine. In fact, Emerald Coal Resources, LP, Respondent's sister company, unsuccessfully made the same argument in a case before Judge Andrews. *See Emerald Coal Resources, LP*, 33 FMSHRC 489, 494 (Feb. 2011)(ALJ) (arguing that "the material pushed up to the face was part of the active normal cleanup process, and therefore, not an 'accumulation.'")¹²

I agree with Judge Andrews' analysis in that case that, "how the mass came to be is not relevant to the determination of whether an accumulation exists." *Id.* There is no language in the standard that provides exceptions to the prohibition on accumulations of combustible material and I will not create one. There was an accumulation of combustible material at the No. 3 Entry face and it does not matter why it was there.¹³ While it is uncontested that operators are permitted to allow coal to be dumped behind the miner, near the shuttle car, or on the conveyor belt, those are not accumulations because it is presumed those incidental instances of coal spillage will be cleaned with reasonable promptness, all convenient speed. *See* 951 F.2d at 295 n. 11. That is different than this situation, where coal was permitted to sit in a large pile for an indefinite period of time.

As a result, I find that the Secretary has clearly established that an accumulation of combustible material was located at the face of the No. 3 Entry.

The Secretary also provided credible evidence to show this face was an active working section of the mine. The regulations define an active working section as "[a]ny place in a coal mine where miners are normally required to work or travel." 30 C.F.R. §75.2. The Secretary asserted that the entry had been recently mined and would have been mined again in the next day or so. (*Secretary's Post-Hearing Brief* at 6). That assertion is supported by evidence in the record. (Tr. 37, 55, 61, 78-79). Further, the Secretary noted that the entry was examined before and during each shift. (*Id. citing Respondent's Exhibits* 1-6) (Tr. 37, 60-61). I find that the Secretary provided adequate evidence to show that miners normally worked in the No. 3 Entry, therefore making this an active working section.

Respondent disagreed with the Secretary's position that this was an "active working section" and cited to *Jim Walter Resources*, for the proposition that areas inby a barrier are

¹² In a related point, Respondent argued that the Secretary's interpretation of the standard in this case constituted only Newhouse's personal aversion to accumulations of coal at the face and that it was not entitled to deference. However, as I believe that Respondent has created the "waiting for clean-up exception" to the standard out of whole cloth, I do not believe that this is an issue of the Secretary's interpretation. There is only one possible interpretation: accumulations of combustible material are not permissible.

¹³ Respondent argues that *Emerald Coal Resources, LP* is distinguishable from this case because the accumulation here is smaller and was completely inby the last row of bolts while the accumulation in that case was large and stretched outby the face. *Respondent's Post-Hearing Brief* at 11. However, I do not believe that the size of the accumulation alters the way it is treated by the standard. All accumulations of combustible material are a violation of the Act, not just larger ones. Further, as will be described further below, the location of the material relative to the face in this particular matter is irrelevant.

“inactive” sections and that, therefore, §75.400 would not apply. 16 FMSHRC 1411, 1512 (July 1994)(ALJ). Respondent claims that in the instant case, the area inby the last row of bolts was blocked with signs and therefore was an inactive area.

Beyond the fact that the Judge’s decision in that case has no precedential value, Respondent’s reading of the decision can only be described as tortured. First, in that decision Judge Melick determined that an accumulation of combustible material was a violation of §75.400. *Id.* at 1511-1512. Only after deciding that issue did the Judge also state the following:

It is undisputed that accumulations existed as cited on January 31, 1994, both inby and outby a check curtain... According to issuing Ventilation Specialist Thomas Meredith of the Mine Safety and Health Administration (MSHA) this check curtain separated the active outby area from the inactive inby area. At that time, the inactive inby area was admittedly not an area where miners typically worked or normally traveled. Under the circumstances, the inactive inby area cited in the order was not within the “active workings” and the accumulations located therein were therefore not in violation of the cited standard.

Id. Because the Judge had already determined that a violation occurred, this differing treatment of areas inby and outby the check curtain were not part of the holding regarding validity and only dealt with the size of the accumulation for the purposes of the S&S analysis. As the Secretary has not alleged S&S here, this statement by the judge is totally irrelevant.

However, even if the Judge’s statement in *Jim Walter Resources* were a holding, it would not lead to the result sought by Respondent. As noted above, according to the MSHA official in that case, the curtain separated the active outby area from the inactive inby area. In this case, the Secretary does not concede that the area inby the last row of bolts is inactive. (*see Secretary’s Post-Hearing Brief* at 6). Further, the evidence does not support a finding that this area was inactive. As noted by the Secretary, mining had recently been completed in the area, it was subject to examinations, and the miner was going to return and continue mining in, at most, a couple of days. (Tr. 37, 55, 60-61). The factual discussion in *Jim Walter Resource* are quite bare, but nothing indicates that the inactive area in that case was a spot that had just been mined and was about to be mined again. Instead, a curtain separated areas where miners traveled from where they did not. This is clearly different that the situation here, where the area was blocked to indicate that there were no roof bolts and Respondent had admittedly staged the area for further mining.

Respondent’s argument suggests two equally untenable understandings of the term “inactive.” First, Respondent’s position is that any area where miners are not presently engaged in production, even if mining has ceased only for a few days or perhaps even during lunch, is an inactive area. Alternatively, it suggests that placing up a temporary barricade or a sign that reads, “inactive” transforms a spot into an inactive area regardless of the production planned for that area as part of the cut cycle in the near future. There is no statutory or logical reason for either of these interpretations. The No. 3 Entry was an active working section because miners were regularly required to work and travel in that area.

As there was an accumulation of combustible material in an active working section of the mine, I find that there was a violation of §75.400 and that the citation issued by the Inspector was valid.

b. *Gravity*

The Secretary presented credible evidence that an ignition was unlikely as there was no ignition source and the air was not blocked in its entirety, meaning that methane was being vented. (Tr. 42-43). Respondent presented evidence that the continuous miner was designed with methane exposure in mind and that it was equipped to prevent ignition. (Tr. 53-54-86). However, the Secretary has already conceded that an ignition is unlikely. I believe that it is possible that methane could concentrate in the coal accumulation (Cumberland Mine is a gassy mine on a 5-day spot) and that with the introduction of an ignition source, it could ignite. This scenario is unlikely, but possible. If it were to occur, the evidence shows that it could reasonably result in serious burns or smoke inhalation injuries to two people. (Tr. 45).

c. *Negligence*

Under Commission precedent and promulgated standards, 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.* 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.* Finally, an operator exhibits reckless disregard where it acts without the slightest degree of care. 30 C.F.R. § 100.3(d). Mitigating circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

It is uncontested that Respondent deliberately created an accumulation by pushing coal into the face. (Tr. 23-26, 34, 43, 90-91, 99, 102, 130, 139, 146). Further, the evidence establishes that this accumulation was examined 2 times and was obvious to anyone looking at the face. (Tr. 43-44). Further, and perhaps most importantly, Respondent had been told that pushing material into the face was impermissible at the pre-inspection conference. (Tr. 44-45, 58, 62, 82-84, 87-88). Therefore, Respondent knew or should have known that the accumulation existed and that it was a violation of the cited standard. However, Respondent’s negligence was slightly mitigated by the fact that it generally kept the other areas of the mine clean, making the accumulations in the face an anomaly. (Tr. 34). Therefore, I find that Respondent exhibited moderate negligence.

d. *Penalty*

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$176.00 for Citation No. 7022912. While the Secretary's proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 7022912:

- a. The operator's history of previous violations – The parties stipulated that Respondent had been cited 279 times in the last 15 months and over the course of 1,116 inspection days.
- b. The appropriateness of the penalty compared to the size of the Operator's business – The parties stipulated that Cumberland Mine produces 6.2 millions tons of coal and Respondent produces 128 millions tons coal in all its operations. According to MSHA's penalty assessment guidelines this gives Cumberland Mine 15 "mine size points" out of a possible 15 and Respondent 10 "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.
- c. Whether the Operator was negligent – as previous shown, the operator exhibited moderate negligence.
- d. The effect on the Operator's ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent's ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation is unlikely to cause injury, but if it did it could result in lost workdays or restricted duty injuries to two persons.
- f. The demonstrated good-faith of the person charged in attempted to achieve rapid compliance after notification of a violation – The parties have stipulated to good-faith abatement.

Considering all of the factors listed above, Respondent is ordered to pay \$176.00 with respect to this citation.

CITATION NO. 7071904

i. Contents of the Citation

On March 7, 2011 at 9:00 a.m., Inspector Vargo issued to Respondent Citation No. 7071904. Vargo found:

Loose coal was permitted to accumulate in the #1 face of the 89 South Mains Left

operating section, MMU 0-31. The length of the accumulation was 12 feet from the last permanent roof support to the furthest penetration of the face, rib to rib and up to 2 feet high on the right rib and up to 5 feet on the left rib. This obstructed the face from being ventilated.

(GX-5). Vargo noted that the gravity of this violation was “Unlikely,” “Lost Workdays/Restricted Duty,” and would affect seven persons. *Id.* He further marked that Respondent exhibited “Moderate” negligence with respect to this violation. *Id.*

On March 7, 2012 at 10:25 a.m., Vargo issued a termination of the citation noting, “The accumulation was removed form the affected area.” *Id.*

ii. Legal Standards

As with Citation No. 7022912, Citation No. 7071904 was issued under Section 104(a) of the Act for a violation of 30 C.F.R. §75.400.

iii. Secretary’s Evidence

a. Testimony of Joseph Andrew Vargo

Vargo discussed his 30 years of mining experience, including his work on a full-face continuous miner section (Tr. 152-156). He also discussed his training and experience as an MHSA inspector. (Tr. 155-156). He is certified as a miner, a machine runner, shot firer, and mine examiner. (Tr. 154). Before March 2012, Vargo had conducted about three quarterly inspections at Cumberland Mine. (Tr. 156). He was there 4-6 days. (Tr. 156-157).

Vargo reviewed a 104(a) citation he issued at 9:00 on March 7, 2013 at the Mine (GX-5). (Tr. 157). Vargo also reviewed his notes for that same day (GX-6). (Tr. 158). When he issued the citation he was with Newhouse, Ron Hixson (the assistant district manager), a trainee, and Konosky. (Tr. 157, 175). Vargo observed the condition described in the citation. (Tr. 158).

Vargo reviewed a map of the 89 South Main section (GX-7). (Tr. 158-159). He marked the map on the 89 South Mains left section, No. 1 Entry inby the 51 crosscut at the face where the accumulation was located with an arrow and a circled “C.” (Tr. 159-161). Entry No. 1 is the furthest entry to the left and the entries increase in number to the right. (Tr. 159-160).

Vargo observed the material beyond the last permanent roof support in the No. 1 Entry wedge face. (Tr. 161). There was a barrier there to prevent movement past the support. (Tr. 174). He did not need to be shown the accumulation. (Tr. 162). He told Konosky he would issue a citation for an accumulation of combustible material. (Tr. 161-162). Vargo believed all the material (not just what was visible) was 80% coal and 20% rock, which he learned by poking it with his walking stick. (Tr. 162, 174). The stick went through the material and it was soft, fine, black, and dry coal. (Tr. 162-163). There were no puddles and no rock dust (although there was rock dust up to the bolts). (Tr. 163, 175). There were no other clean-up issues. (Tr. 175).

The accumulation was about five feet high at the left rib and two feet at the right. (Tr. 163). It was rib to rib (16 feet wide) and 12 feet long as measured with tape. (Tr. 163-164). At that location the roof was about 8 feet tall; in the wedge it tapered to 2 feet. (Tr. 164).

The material was pushed into the wedge from outby crosscut 51, although some could have been pushed from the No. 1 Entry and also from the corner. (Tr. 164). It was black so he believed it came from rib sloughage and from where the miner hit the ribs. (Tr. 164-165). Systematic, regular cleanup of the section is good. (Tr. 179). Respondent clean-up process was to clean with the miner and loader while still mining, then scoop the entry, and finally load it into the miner to get it out of the mine. (Tr. 180). However, pushing material into the face is not cleaning. (Tr. 179-180). It takes the material out of the Entry but it is not acceptable because it is combustible. (Tr. 180).

Vargo believed the accumulation had existed for at least four days because of the mining sequence (Entry 4 to 3, to 2, then the air connections, and then Entry 1) and because that section would be the first place idled if Respondent had man-power shortages. (Tr. 165). At the time the miner was in the No. 4 Entry. (Tr. 166).

They should have put the accumulations in front of the miner or taken to the feeder to be removed. (Tr. 165). Vargo had never seen material pushed to the face before; when he worked in the mines it was common practice to scoop the entries and take it to the feeder. (Tr. 165-166). He does not believe that material would spill transferring from the scoop to the feeder if the operator is careful. (Tr. 182-183). However, accumulations have been cited at feeders and even shuttle cars designed to dump on feeders can spill. (Tr. 182-183). It is also possible to drop some accumulation while moving it in a scoop because it is not normally used to transport coal from the face to the feeder, which is what shuttle cars are designed to do. (Tr. 183-184).

If they chose to place the coal in front of the miner after scooping the entry, Respondent would have to back the miner out to get the correct positioning, which takes a little more time and planning. (Tr. 180-181). The miner would need to move back enough for the bucket to push the material in front of the miner. (Tr. 181). However, it would also be acceptable for the scoop to take the material from that entry to the next place the miner would go. (Tr. 181). The miner would still have to pull back, not because of cleaning, but to pull the cables, so it would not interrupt mining. (Tr. 182). They would synchronize the clean-up with the move. (Tr. 182).

Vargo reviewed an illustration of a wedge cut (GX-8). (Tr. 166). The wedge cut starts at the last permanent strap and tapers in by 12 to 14 feet down to 2 feet high. (Tr. 166-167). This protects the limited amount of roof exposed to the mine atmosphere and ventilates the wedge cut. (Tr. 167-168). That day, the last bolt was 8 feet high and the wedge was 12 feet deep. (Tr. 167). Vargo then drew what the accumulations looked like on the day of the citation. (Tr. 167). The left to right tapering is not shown in Vargo's drawing because it is a side view. (Tr. 173-174).

The accumulation did not block the examination of the face; Vargo got to the last roof support. (Tr. 168). He took a gas check a foot from the roof and rib and had 0.1% methane, so it was obstructing some ventilation, but some of the air was migrating to the wedge. (Tr. 168). On cross examination he conceded that he did not check the methane with a probe from the miner.

(Tr. 175-176). It is possible that methane was migrating up and out of the cut to the two rows of bolts. (Tr. 176). The material in the wedge was loose, not compacted so any gas could migrate up through the material. (Tr. 176). The methane would then go to the highest spot, not just in the wedge but in the roof. (Tr. 176-177).

Respondent violated §75.400 because there was an accumulation of combustible material at the No. 1 face. (Tr. 169). Vargo feared methane would get trapped in the wedge and then ignite when the miner started. (Tr. 169). However, he conceded there was no ignition source. (Tr. 177). Further, he admitted that when the miner loads out, it sprays a substantial amount of water on the bits and the pan. (Tr. 177). He could not say for sure if the water would prevent sparks. (Tr. 177). He also did not check the bits to see if they were dull and therefore more likely to spark. (Tr. 177-178). The mine has methane at the face when it is mined. (Tr. 177).

Vargo marked the gravity as unlikely and non-S&S because there was no immediate ignition source but there was 0.1% methane and limited air going to the face. (Tr. 169-170). He marked seven person affected because when the miner returned there would be two integral bolters, the miner operator, the utility man/tuber, loading machine, shuttle car operator, loader machine operation, and maybe a foreman or mechanic. (Tr. 173).

Vargo marked the citation as moderately negligent for three reasons: the material was deliberately placed in the wedge cut, an exam had been done on the previous shift and likely on the on-shift, and the issue was raised in a pre-inspection conference by Newhouse. (Tr. 170). Vargo was present at that conference and took notes. (Tr. 170). Vargo reviewed those notes (GX-9) and noticed that on page 5 that they discussed that excessive coal would not be permitted in the wedge cuts. (Tr. 170-171). Specifically, the notes indicate Newhouse said, "Excessive coal will not be permitted to accumulate in wedge cuts of previously mined faces." (Tr. 178). On cross examination he conceded that "excessive" is a broad term. (Tr. 178-179). However, he felt there was not a specific amount that would be permitted and that only the coal under the miner would be allowed. (Tr. 179). His notes include an attendance sheet on page 6. (Tr. 171).

Vargo was present when the condition was abated. (Tr. 171-172) Respondent scooped four or five buckets out of the wedge cut and put them on the feeder. (Tr. 171). The weight of the material in the bucket would average about two or three tons. (Tr. 172).

b. Testimony of Robert W. Newhouse

Newhouse was with Vargo on March 7, 2012 to do a normal evaluation of his inspection procedures, evaluate conditions in the mine, to train an inspector, and to be evaluated by his immediate supervisor Hixson, the District 2 Assistant District Manager. (Tr. 185-186). He witnessed Vargo when verbally issue the citation and observed the cited conditions. (Tr. 186-187). The accumulation consisted of coal pushed into the No. 1 face. (Tr. 187). It was rib to rib (16 feet wide) and five feet tall on the left side. (Tr. 187). He could not see the face inby. (Tr. 187). There as no rock dust and the coal was dry coal and therefore combustible. (Tr. 187-188).

Newhouse believed that the roadways were cleaned outby across all of the faces, probably at 51 crosscut and were pushed into the No. 1 Entry. (Tr. 188). He believed the

accumulation existed for multiple shifts because he did not see any evidence of recent activity in the area. (Tr. 188). The miner had just started in the Entry No. 4 and he did not know where it had been last. (Tr. 188-189). In the normal mining process, the material would stay in that location for four or five days and this particular section is more sporadic than normal. (Tr. 189).

Newhouse agreed that this was a violation of §75.400 because it was an accumulation of dry coal put in an active area purposefully. (Tr. 189-190). Hixson did not object to the citation, his only comment was that Vargo did a good job. (Tr. 190-191).

The potential hazards of material in the wedge cut include the miner returning to the area and releasing the trapped methane and increasing the possibility of a face ignition. (Tr. 191).

When Vargo verbally issued the citation, Section Foreman Brennan Gallick (“Gallick”) and Newhouse discussed abatement. (Tr. 195). Gallick said he would station two people at the No. 2 entry between 50 and 49 to lift up the curtain and let the scoop in to get the material and then reverse the process and take it out to the feeder. (Tr. 195). Newhouse asked Gallick why the material was present and Gallick said he did not know and that it was his first day on that section. (Tr. 196). Newhouse was in the mine for the abatement, but he did not count how many scoops it took. (Tr. 196). There were multiple scoops. (Tr. 196).

It is possible to clean the material by putting it behind the miner for the load machine. (Tr. 201). That is less work than putting it in front of the miner. (Tr. 201). Loaders do not have water sprays or methane detectors like miners do. (Tr. 201-202). A miner constantly loads coal that could be liberating methane and Cumberland Mine usually liberates methane. (Tr. 202).

Newhouse reviewed Vargo’s notes of the January, 2011 meeting (GX- 9) and noted that the sign-in sheet accurately reflects those in attendance.¹⁴ (Tr. 191-192). At the meeting, Newhouse discussed the hazards of pushing material into the wedge, including trapping methane and obstructing ventilation. (Tr. 192). The wedge needs to be ventilated like any other area because it gives off methane. (Tr. 192). Danny Maher asked what amount of material would be excessive. (Tr. 192). Newhouse told him it was not a specific amount but instead the condition of the material, whether it is heavily rock dusted, and whether it blocked ventilation. (Tr. 193). He gave the example of the amount under the miner, if left in place and rock dusted, as fine because it does not block ventilation. (Tr. 193).

Following that meeting he held numerous discussions with management and the union regarding this practice during post-inspection conferences and pre-inspection conferences. (Tr. 193-194). Newhouse discussed the clean-up of §75.400 conditions and the reasons for citations at these meetings. (Tr. 194). Following the citation issued by Kubincanek in February, he discussed accumulations with Konosky and explained that the citation was exactly the situation they had discussed in the pre-inspection conference. (Tr. 194).

Internally, Newhouse spoke with the district manager, both assistant district managers,

¹⁴ Newhouse did not take notes at the January 11 meeting nor did he take notes during any of his other conversations on this point. (Tr. 200).

and the CLR group regarding the issue of pushing material into the wedge cut and the interpretation of §75.400 before the issuance of any citations at Cumberland. (Tr. 196-197). He raised these concerns because he and other inspectors saw accumulations. (Tr. 197-198). Further, Emerald raised issues with respect to this practice before either citation at issue here. (Tr. 197-198). That is why they had the meeting, to avoid blindsiding operators. (Tr. 198).

Other mines under Newhouse's supervision use wedge cuts, including Emerald, Bailey, and Enlow Fork and he does not believe they push material into wedge. (Tr. 198-199). Newhouse knows this information from personal observation and from discussions with mine management. (Tr. 199). In fact, the superintendent of Enlow Fork, Brett McLean, said he did not know why anyone would. (Tr. 199-200). Newhouse does not recall when he spoke with Mr. McLean, but it was the same day he took Chinese officials on a mine tour. (Tr. 200-201).

Newhouse does not recall if there were any citations for material pushed to the face before February 2012. (Tr. 202). That was the first citation as far as he knew. (Tr. 203). He does not believe they have been pushing the material to the face for a long time and does not recall Konosky saying they had been doing it forever. (Tr. 202).

iv. Respondent's Evidence

a. Testimony of Brennan Paul Gallick

Brennan Paul Gallick described his mining experience, including his union experience while receiving a bachelor's degree at Pitt-Johnstown. (Tr. 204-205). He is certified as a mine examiner, assistant foreman, EMT, in mine rescue, blaster, and shot-firer. (Tr. 205).

On March 7, 2012 Gallick was in the 89 mains section left side to do the on-shift and get the crew started. (Tr. 205). He was not going to be there the whole day; he was going to be relieved at 10:00 a.m. (Tr. 206). At the time, 89 mains was running on every shift. (Tr. 206). When he arrived on the section there was an MSHA trainee there with four inspectors. (Tr. 206-207). After safety speeches, Gallick did his on-shift which included methane and oxygen readings, checking for hazards, checking electrical equipment, taking return readings, checking dust parameters, and checking tubing at the face. (Tr. 207). The entire inspection team went with him, going from the No. 4 entry over to No. 1 Entry and then back to the return entry. (Tr. 207). He took a gas test in each entry at the intake and return curtain, if possible. (Tr. 207-208). No. 1 had a curtain instead of a tube because they were no longer mining. (Tr. 208).

There was material at the face of No. 1 entry that was scooped in by the last channel. (Tr. 211). It was put there to control it and keep the area clean. (Tr. 211). That clean-up would not have been the shift before the cited shift, they were mining 4 at the time and they did not go right from 1 to 4. (Tr. 221-222). To know for certain when it occurred, he would have to look at the production records. (Tr. 222). Material is supposed to stay in the wedge until the miner pulls back. (Tr. 211). It is not an accumulation, it is controlled. (Tr. 211). It is not a hazard when it is sitting at the face or when the miner loads it out. (Tr. 211). The miner is designed to handle pockets of methane in solid coal, so even if methane were trapped there, as it is in solid coal, it would not be a problem. (Tr. 212).

As for when it was going to be removed, after mining Entry No. 4, the cycle is finished and they move back to Entry No. 1. (Tr. 233). On that day they had holed 4 and were coming back to No.1 within 2 hours. (Tr. 233). It would not have taken four or five days. (Tr. 233).

It was Gallick's understanding that after they cleaned up behind the miner and got the entry clean the miner would move and anything left could be pushed to the face as long as it was not outby the channel. (Tr. 228-229). They were not supposed to push material from outby, just from the entry. (Tr. 229). That is not just the material under the miner, but nothing outby the last open crosscut. (Tr. 229-230). If material were outby the last channel it would hinder examination and gas checks. (Tr. 230-231). It is not the amount that is a problem; it is whether it is outside the wedge cut. (Tr. 231). It does not matter if it is "roofed out" the ventilation still goes to the face and gets the methane out. (Tr. 231).

Gallick could not see the end of the wedge from the last bolt. (Tr. 214). The accumulation described by the Secretary's witnesses was generally accurate but did not think the high side got up to 5 feet and that it might have only been 8 feet deep. (Tr. 223-224). It went rib to rib. (Tr. 224). The material in the wedge was page rock from the bottom. (Tr. 215-216, 230). In Entry No. 1, the rock breaks on the sides, so they push that to the wedge to make it smoother. (Tr. 230). The coal from under the miner was the only coal in the wedge. (Tr. 216). Also, the miner is also 16 feet wide and sometime bangs the rib and knocks coal down. (Tr. 232).

The inspection team brought up their concerns about the material in the No. 1 Entry at 8:49 and then again in the return at 8:52. (Tr. 212). He remembers the time because it was when they took the gas check with the trainee. (Tr. 212). Sometime around 8:52 Newhouse told him that there was too much in the wedge and that it needed to be dealt with. (Tr. 212-213). Gallick thought that if the material was not past the last permanent support then it was okay. (Tr. 213).

No. 1 Entry was the return entry. (Tr. 208). Respondent uses the auxiliary fans as the primary duster in a return. (Tr. 208). Those fans can hold anywhere from five to seven 50-pound rock dust bags and blows dust 24 hours a day. (Tr. 208-209). Mining does not occur unless the fan is on. (Tr. 209). The fan can blow two or three pallets of dust a day so anything behind the fan is white. (Tr. 209). The dust goes into the ventilating current. (Tr. 209). At the cited wedge, Gallick believed that the fans had caused the material to be very white and inert (above 80% noncombustible). (Tr. 222-223). The fan was not spreading rock dust that day and he is not sure where it was. (Tr. 220-221). The No. 1 Entry was dusted. (Tr. 213).

Gallick does not recall the methane reading in the No. 1 entry but it was anywhere from 0.1 to 0.3, which is normal. (Tr. 209-210). Gallick reviewed his on-shift book, which he signed, and looked on the last page which showed the methane reading of 0.1% methane (RX-6). (Tr. 210). It also showed on-shift records filled out by foremen on prior shifts. (Tr. 210). No one probed for methane. (Tr. 214). When material is pressed into the face, methane will rise out of the material because it is lighter than air and will find a way out. (Tr. 231).

He did not bring the scoop to the feeder because it would cause a mess to transport it the distance and cause more trouble than it solved. (Tr. 215). It is common during mining for spillage around the feeder, though they try to prevent it. (Tr. 224). Part of the clean-up plan is to

clean spillage at the feeder. (Tr. 224).

Since Gallick started at Cumberland this has been the clean-up method. (Tr. 219). He saw other inspectors observe material at the face without issuing citations. (Tr. 219). Newhouse had not been there at those times. (Tr. 219). Gallick does not recall which inspectors did not issue citations. (Tr. 227). He does not recall what date that occurred but it was during the midnight inspection blitz by MSHA in the 59 headgate before 2012. (Tr. 227-228). There were also other times. (Tr. 228). MSHA inspectors are at Cumberland Monday through Friday and sometimes on Saturday. (Tr. 234). Until March 7, 2012, Gallick had never seen an inspector write a citation for material pushed into the face. (Tr. 235).

Further, as part of the Running Right Program, Gallick traveled to 13 mines in several states and those mines had continuous miners. (Tr. 234). He talked to people at those mines about pushing material into the face and they said MSHA wanted the material there. (Tr. 234). They said it was company policy based on regulation and they would get written up if it was not in the face. (Tr. 234). However, the other mines that Gallick looked at were place-change continuous mining, not full-face mining, and do not result in wedge cuts. (Tr. 235-236).

Gallick told Newhouse that he did not agree with the citation and that the material was not affecting ventilation current at the face. (Tr. 219-220). The benefit of the clean-up plan is that it takes the sloughage that they are trained to remove and puts in one controlled area where no one is walking. (Tr. 241). Also, no equipment is operating over it and crushing it. (Tr. 214). That is where it should be. (Tr. 214).

Gallick did not recall telling Newhouse that he did not know how the material got to be in the wedge. (Tr. 215). Gallick was filling in as foreman on that section but had spent the better part of nine months there. (Tr. 224-225). His normal duty was working for the Running Right Department. (Tr. 225). He was not sure the last time he had worked on there but he had been there probably two days earlier in his role in the Continuous Improvement Program. (Tr. 225-226). He had "necked in" a section of this area. (Tr. 226).

Gallick directed the abatement efforts. (Tr. 216). They rolled the curtain up and eliminated the current to the face to get to the wedge causing methane to rise above 1%. (Tr. 216-217). This rise was not from the accumulation, it was because the mine liberates 12 million cubic meters of methane in a 24-hour period. (Tr. 217). They filled four buckets about a third to a half full (the first was full). (Tr. 217-218). They put the curtain up and down as the scoop moved in and out. (Tr. 218). On the fourth trip, the methane was becoming a problem and they were making a mess so they just dug the rest out from the wedge and spread it around the last four channels. (Tr. 218-219). They did not rock dust that material and picked it the next time they went through. (Tr. 226-227). The material would not have filled a shuttle car. (Tr. 219).

b. Testimony of Coalbe Nelson

Coalbe Nelson described his six years of mining experience, including working at three mines with full-face continuous miners. (Tr. 236-238). In March 2012, Nelson was the section foreman for the 89 mains on the afternoon shift and had been for a year. (Tr. 244-245).

On March 7, 2013, He was on the 89 south mains at some point when it was cited for material at the face of No. 1 Entry. (Tr. 239). It was his regular section at the time and he saw the material. (Tr. 239). The material got there because, according to the map work, Nelson's crew had scooped it. (Tr. 239).

Nelson did not know when his crew had scooped the entry. (Tr. 239). He reviewed a document that included a "Bolting Summary" that he had filled out on his shift (RX-4A).¹⁵ (Tr. 239-240). That document lists the things that Nelson accomplished on his shift. (Tr. 240). Nelson reviewed the entries he filled in on March 6, 2012 and it shows that he scooped the faces that day during the afternoon shift on March 6. (Tr. 240-241, 246). That was part of the normal clean-up. (Tr. 241). However, according to sheet, they scooped the cut through the rest of the faces to the left (3, 2, and 1) after they finished mining Entry No. 3. (Tr. 241, 249). That would mean they pushed material into the wedge cuts on all three. (Tr. 247). Everything was not pushed into the No. 1 face, material was pushed into each face. (Tr. 250). Material in the crosscut between 1 and 2 would have gone to the No. 1 face, but nothing from farther up the No. 1 Entry would have been pushed in. (Tr. 250). When they holed through No. 3 they would not have had a lot of canvas to deal with and they took advantage and scooped. (Tr. 247).

On the initial cleanup, any material that the miner or loader did not get would have been pushed to the face. (Tr. 251). That has been the practice ever since Nelson worked there. (Tr. 251). The written policy does not specifically say to do that, but it is best practice to push into the face. (Tr. 251).

On March 7, 2013 they were mining No. 4 and when they were done they would go back to No. 1. (Tr. 242, 247). Nelson does not recall when No. 1, No. 2, or No. 3 were last mined. (Tr. 247-248). They would have mined 1, 2, and 3 before getting to 4. (Tr. 247). The best case for mining 1, 2, 3, and 4 would be less than a week. (Tr. 248). So the cleaning on March 6 was a second pass, adding to maybe a little bit that was already in the face. (Tr. 249). Nelson had seen that material scooped in. (Tr. 253-254). After the miner left the No. 1 Entry, the area was cleaned, but then the center bolter went in and then they would rib bolt, occasionally pulling material down from the rib. (Tr. 248-249).

The material was mostly rock. (Tr. 242). That material came from inby the crosscut and from the cut from 2 to 1 so there may have been some coal, but it was mostly rock. (Tr. 242). He does not believe it affected ventilation. (Tr. 243). The material would not affect the ability to take gas tests at the last row of bolts. (Tr. 243).

Prior to this citation, Nelson's understood that they would push anything to the face that was not cleaned up by the loader or miner. (Tr. 243). He had never discussed this with an inspector, it was never an issue. (Tr. 243). There had been inspectors on the section when material was pushed to the face. (Tr. 243). Further, three mines he worked at previously (Federal No. 2, Mettiki, and Enlow Fork) had full-face miners. (Tr. 237). Sometimes at those

¹⁵ GX-4A where the sticker is located is for the day shift, so Nelson would have taken over after that shift. (Tr. 244).

mines he would clean the miner sections. (Tr. 238). At Enlow Fork they would push the material into the face after mining, but the other two mines had different processes. (Tr. 238). On cross examination, he conceded that when he saw material at the face at Enlow Fork, that process was in preparation for Nelson and his crew to lay rail, not in the mining cycle or clean up process. (Tr. 245). They would sometimes take excess rib sloughage and put it at the closest face, but usually they would back drag the material to get a smooth surface. (Tr. 245-246). They would not usually scoop, but if they had to scoop they would take it to the face. (Tr. 246).

He would not move material with a loader because a bucket full of spillage traveling across the section will result in spillage and even more spillage will occur at the feeder. (Tr. 252). Even if the bucket is not overloaded, this can occur. (Tr. 252). Nelson does not know where the feeder was on March 7 but believed it would be in No. 4 because that was the belt entry. (Tr. 252-253).

Nelson did not see the abatement. (Tr. 243-244). He was not there when the citation was issued, he only returned to the area after the inspectors had left. (Tr. 254).

c. Testimony of Michael Anthony Konosky, Sr.

Konosky was with the inspectors on March 7, 2012 and saw the condition cited. (Tr. 255). The cited material was well rock-dusted and inby the last row of bolts. (Tr. 255). The rock dust here was spread by the auxiliary fan purposefully and well. (Tr. 259).

To abate the condition, Respondent brought a scoop in and they rolled back the canvas. (Tr. 255-256). There were four or five buckets but they were not full. (Tr. 256). They left the canvas down while the scoop was moving the material but he does not know if they took the material to the feeder or miner. (Tr. 256). When the curtain was down they had 0.4% methane but when they rolled it up it over 15 until they dropped the curtain and it went down again. (Tr. 256). That methane was not coming from the material inby, it was being ventilated properly. (Tr. 256). Konosky told Newhouse that this method of interrupting the ventilation was more dangerous than doing it on clean up. (Tr. 256-257). On cross examination Konosky conceded that it was Respondent's choice to abate in this manner, no one from MSHA told them they had to roll up the curtains. (Tr. 259-260). However, Vargo helped them do it. (Tr. 260). They could have moved the curtains to the left so that it would not have to be raised and lowered while still maintaining air flow, but they might not have gotten all the material out. (Tr. 260).

There is a statement in the inspector's notes about his closeouts and they indicate that Konosky agreed with all of the findings. (Tr. 257). It is true that everything MSHA cited was in the citation, but he did not agree that the citation should be issued. (Tr. 257). He does not remember if No. 2 and 3 were no longer wedge cuts, they were on different cycles. (Tr. 259).

Konosky was a continuous miner operator at Cumberland before he became management. (Tr. 257-258). When he operated miners they were place change miners and he scooped material to the face. (Tr. 258). Before Newhouse did so in 2012, nobody cited him. (Tr. 258).

d. Testimony of Robert Allen Bohach

Robert Allen Bohach (“Bohach”) is the safety manager for Respondent’s parent company and he discussed his mining experience including his early experience as a union miner. (Tr. 261-262, 267-268). He has a degree in mining engineering from Penn State and a master’s in safety management from West Virginia University. (Tr. 262).

Bohach is familiar with the cleanup plan at the mine. (Tr. 263). The reason they scooped material to the face was that it was part of the production cycle to remove the material from the mine. (Tr. 263). Before Newhouse began citing, that method was not only acceptable, it was promoted. (Tr. 263). It was promoted by the agencies (MSHA, the state Department of Environmental Protection) and by the management team. (Tr. 263-264). They would promote it because it cleans the active roadways and prevents pulverization and float coal dust. (Tr. 264).

While Bohach worked at Cumberland, they used continuous miners, including full-face miners and wedge cuts. (Tr. 262). He is not aware of any citations for scooping material into the wedge cuts. (Tr. 265). He is not aware of any ignitions of methane in material in the wedge cut when it was being removed by the miner at Cumberland or any other mine. (Tr. 265). Any methane in that area will rise up. (Tr. 265-266). However, Bohach was familiar with a case at Emerald where a 40 foot overdrive was full of material from the face back 40 feet. (Tr. 269).

Bohach does not consider material at the face to be an accumulation because it is part of the production cycle and part of the process of removing the coal. (Tr. 264). There is also no issue with the coal being removed by the continuous miner because that is what it is for, it has the proper ventilation, water sprays, and is permissible. (Tr. 264-265).

There is no hazard with pushing material to the face as long as it does not interfere with examinations. (Tr. 266). They do this because it is more efficient, it is safer, coal does not need to be hauled around the section, and cleans active roadways of sloughage, and prevents float coal dust. (Tr. 266). Moving material with the scoop to the feeder would cause spillage on the way and at the feeder. (Tr. 266-267). It is possible to dump it in front of the miner, but pushing it up to the face while the tubes are still in place is more efficient and effective. (Tr. 267).

Respondent has not requested a modification for the practice of pushing material to the face because it believes to be safe because they did not believe it was a violation. (Tr. 270). They have asked for manager’s conference on this issue with MSHA on the citations but have not gotten one. (Tr. 270). Bohach is familiar with the modification petition and they often take a few years. (Tr. 271). In fact a CO monitoring modification took six years and a longwall high voltage modification took five or six years for approval. (Tr. 271). They currently have a horizontal gas line petition that has been pending for at least three years. (Tr. 271).

v. Contentions of the Parties

The Secretary contends that Citation No. 7071904 was validly issued, that the violation was unlikely to result in lost-workdays/restrict duty, that seven miners were affected, that Respondent was moderately negligent, and that the proposed civil penalty was appropriate. The

Secretary argues that the citation is valid because there was an accumulation of combustible material in an active working section of the mine and that accumulation was not rendered inert with rock dust. (*Secretary's Post-Hearing Brief* at 14-15). The Secretary argues that, with respect to gravity, an event was unlikely because there was no ignition source and the area was still being vented, however if an event were to occur it would result in lost-workday/restricted duty injuries to seven miners. *Id.* at 15. Further, the Secretary contends Respondent's actions were moderately negligent because Respondent had deliberately pushed material to the face, the accumulations had been examined as many as three times and were obvious, and management had been told this condition was a violation during a pre-inspection conference. *Id.* at 16. Finally, the Secretary argues that the penalty was appropriate. *Id.*

Respondent contends that Citation No. 7071904 was not validly issued. Respondent argues that the citation was not valid because the area cited was not an active working and because a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not believe the condition posed a danger. (*Respondent's Post-Hearing Brief* at 9-15). Respondent argued that a reasonably prudent person would not believe the condition posed a danger because the coal was being staged for removal in a manner that demonstrated control by the operator and management had been praised for this activity in the past both by MSHA and the Commonwealth of Pennsylvania. (*Id.* at 11-15) Finally, Respondent argues that the Secretary is not entitled to deference for his interpretation of the standard. (*Id.* at 13-14)

vi. Findings and Conclusions

a. Validity

As with Citation No. 7033912, it is undisputed that an accumulation of material was pushed into the wedge cut at the face of the No. 1 Entry at Cumberland Mine and that a citation was issued for this condition on March 7, 2012. (Tr. 159-161, 187, 211, 239, 263). Once again, the only issues raised with respect to the validity of Citation No. 7071904 are whether this was an accumulation of combustible material under §75.400 and whether the cited condition occurred in an "active working section." The facts are substantially similar to the relevant facts in Citation No. 7033912 and Respondent's arguments were identical. I incorporate by reference the legal point contained in the discussion of that citation. For the same reasons as set forth above in the discussion on Citation No. 7033912 I find that this was an accumulation of combustible material and that the face area of Entry No. 1 was an active working section.¹⁶ As a result, I find that the condition in cited was a violation of §75.400 and that Citation No. 7071904 was validly issued.

b. Gravity

The Secretary presented credible evidence that an ignition was unlikely as there was no

¹⁶ Unlike Citation No. 7033912, None of Respondent's witnesses testified that the area was not rock dusted. However, I credit the testimony of Vargo and Newhouse that this material was combustible.

ignition source and the air was not blocked in its entirety, meaning that methane was being vented. (Tr. 168-170, 176-177). With respect to this citation, Respondent presented arguments identical to those described above with respect to Citation No. 7033912. For the reasons discussed there, I find that an ignition from this condition was possible but unlikely and that, if it were to occur, the evidence suggests that it could reasonably result in serious burns or smoke inhalation injuries to seven people. (Tr. 173, 191).

c. Negligence

The relevant facts are substantially similar to the ones described with respect to Citation No. 7033913, except for the fact that Respondent had additional notice of MSHA's enforcement posture following the issuance of that citation. Further, the legal arguments and points were identical to that discussion. Therefore, for the same reasons as set forth above, I find that Respondent exhibited moderate negligence.

d. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$392.00 for Citation No. 7071904. While the Secretary's proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 7071904:

- g. The operator's history of previous violations – The parties stipulated that Respondent had been cited 279 times in the last 15 months and over the course of 1,116 inspection days.
- h. The appropriateness of the penalty compared to the size of the Operator's business – As with the other citation, the parties stipulated that Cumberland Mine produces 6.2 tons of coal and Respondent produces 128 million tons coal in all its operations.
- i. Whether the Operator was negligent – as previous shown, the operator exhibited moderate negligence.
- j. The effect on the Operator's ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent's ability to remain in business.
- k. The gravity of the violation – as previously shown, this violation is unlikely to cause injury, but if it did it could result in lost workdays or restricted duty injuries to two persons.
- l. The demonstrated good-faith of the person charged in attempted to achieve rapid compliance after notification of a violation – The parties have stipulated to good-faith abatement.

Considering all of the factors listed above, Respondent is ordered to pay \$392.00 with respect to this citation.

ORDER

Respondent, Cumberland Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$568.00 within 30 days of the date of this decision.¹⁷

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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¹⁷ 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