FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 18, 2013

OAK GROVE RESOURCES, LLC, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. SE 2010-349-R
	:	Order No. 6698829; 01/06/2010
v.	:	
	:	Docket No. SE 2010-353-R
	:	Order No. 6698828; 01/06/2010
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	: : :	Mine: Oak Grove Mine Mine ID 01-00851
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. SE 2010-828 A.C. No. 01-00851-220638
v.	:	
OAK GROVE RESOURCES, LLC, Respondent	: :	Mine: Oak Grove
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. SE 2012-306 A.C. No. 01-00851-281172-A
v.	:	
MIKE SUMPTER, employed by, OAK GROVE RESOURCES, LLC, Respondent	: : :	Mine: Oak Grove
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. SE 2012-308 A.C. No. 01-00851-281172-A
v.	:	
REX HARTZELL, employed by, OAK GROVE RESOURCES, LLC, Respondent	: : :	Mine: Oak Grove

DECISION

Appearances: Thomas Grooms, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Oak Grove Resources, LLC, Mike Sumpter and Rex Hartzell

Before: Judge Zielinski

These cases are before me upon Notices of Contest and Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d) and 820(c). The petition in SE 2010-828 alleges that Oak Grove Resources, LLC, is liable for four violations of the Secretary's Safety Standards for Underground Coal Mines, and proposes the imposition of civil penalties in the amount of $182,000.00. The petition in SE 2012-306 alleges that Mike Sumpter, an agent of Oak Grove, is personally liable for two violations of the standards, and proposes the imposition of civil penalties in the amount of $14,300.00. The petition in SE 2012-308 alleges that Rex Hartzell, an agent of Oak Grove, is personally liable for two violations of the standards, and proposes the imposition of civil penalties in the amount of $14,100.00. A hearing was held in Birmingham, Alabama, and the parties filed post-hearing briefs.

In mid-December 2009 and early January 2010, due to a combination of circumstances, excessive water accumulated in a bleeder system used by Oak Grove to ventilate the gob of an active longwall panel and a number of worked-out panels. The water, and a roof fall on the headgate side of the active panel, prevented required examinations of the bleeder entries. On January 6, 2010, an MSHA inspector issued four withdrawal orders based on conditions in the bleeder. Oak Grove promptly filed Notices of Contest of three of the orders pursuant to section 105 of the Act. An expedited hearing was held on its contest of Order No. 6698830, which curtailed mining on its 11-East longwall panel. The hearing was held in Birmingham, Alabama on January 26-28, 2010, and a bench decision was issued at the close of the hearing sustaining the order in all respects.[1] A written decision was issued on February 12, 2010, dismissing Oak Grove's contest. *Oak Grove Resources, LLC*, 32 FMSHRC 169 (Feb. 2010) (ALJ). Oak Grove's petition for review was granted by the Commission, which affirmed the decision. *Oak Grove Resources, LLC*, 33 FMSHRC 2657 (Nov. 2011). That decision has become final, and the validity of Order No. 6698830 as to Oak Grove has been established.

Remaining for decision are Oak Grove's contests of civil penalties assessed for the three

[1] Pursuant to the parties' stipulation, the record compiled in the 2010 proceeding has been made a part of the record in this proceeding. Stip. 8. The record consists of the transcript of the 2010 hearing, the transcript of the 2013 hearing and the exhibits introduced at the 2010 hearing, as supplemented for the 2013 hearing. Transcript citations to the 2013 hearing transcript.

remaining orders, the amount of the civil penalty to be imposed on Oak Grove for the violation charged in Order No. 6698830, and Sumpter's and Hartzell's contests of the assessments and petitions filed against them. For the reasons that follow, I find that Oak Grove committed two of the three remaining violations, and impose civil penalties in the total amount of $61,000.00 against the operator. I find that Mike Sumpter and Rex Hartzell are each liable under section 110(c) for one violation and impose civil penalties in amounts of $3,500.00 and $2,500.00 against them respectively.

Findings of Fact - Conclusions of Law

Oak Grove Resources operates the Oak Grove Mine, an underground coal mine, in Jefferson County, Alabama. A substantial amount of its coal production is obtained through operation of longwall mining equipment, and it has mined a number of longwall panels in the East section of the mine, served by the Main East Bleeder system. In December of 2009, Oak Grove experienced problems with excessive water in the bleeder entries. Efforts to control the water and maintain the travelability of the bleeder entries were proving inadequate. In mid-December, parts of the bleeder became inaccessible, which prevented examination and monitoring of the system required by the Secretary's regulations and Oak Grove's approved ventilation plan. Efforts to address the water problems were further frustrated by MSHA's issuance of orders preventing further work pending resolution of impermissible atmospheric conditions behind seals in another area of the mine. MSHA conducted an inspection of the bleeder system on January 6, 2010, during which the four withdrawal orders at issue in these proceedings were issued.

The panel being mined when the challenged enforcement actions were taken was designated "11 East LW38" which, at the time, was the north-most of a series of panels mined in that section. The panel ran in an east-west direction. Mining commenced at the east end on March 2, 2009, and had proceeded west approximately 6,000 feet by December 15, 2009. The mined-out area of the 11-East panel, the "gob," was ventilated by the Main East Bleeder system, the primary component of which was the No. 6 fan, located off the northeast corner of the panel. That centrifugal exhaust fan also provided ventilation for fourteen or more other mined-out longwall panels through lengthy bleeder entries that ran from the end of the track entry, to the east and then north behind (east of) the old panels. The bleeder system is depicted in a number of exhibits, notably, Government Exhibit No. 35. The bleeder entry was accessed from the track entry. There was a low roof in the first part of the bleeder system, and it had to be traversed largely by "duckwalking." It took the better part of a shift to travel the bleeder entry from the end of the track to Measuring Point Location ("MPL") No. 781, a bleeder examination point near the southeast corner of the 11-East panel. Prior to January 6, 2010, persons traveling in the bleeder entry had no ability to communicate with the surface or miners in other locations of the mine.

The Oak Grove mine liberated in excess of one million cubic feet of methane in a 24-hour period, and was subject to spot inspections by MSHA pursuant to section 103(i) of the Act.

30 USC § 813(i). Mined-out areas, like the 11-East gob, continue to generate methane, and must be ventilated "so that methane-air mixtures and other gases, dusts, and fumes from throughout the worked-out areas are continuously diluted and routed into a return air course or to the surface of the mine." 30 C.F.R. § 75.334(a)(1). The ventilation system for mined-out areas must be examined in its entirety at least every seven days. 30 C.F.R. § 75.364(a). Part of the weekly examination must include:

> At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

30 C.F.R. § 75.364(a)(2)(iii).

> If the bleeder system used does not continuously dilute and move methane-air mixtures and other gases, dusts, and fumes away from worked-out areas into a return air course or to the surface of the mine, or it cannot be determined by examinations under § 75.364 that the bleeder system is working effectively, the worked-out area shall be sealed.

30 C.F.R. § 75.334(d).

Oak Grove had positioned pumps in the bleeder entries to control water accumulations. It began to experience problems with the pumps around mid-December, 2009. By the end of the month, the problems had grown, and there were significant accumulations of water in low spots of the bleeder entries that prevented access to MPLs that were required to be examined to evaluate the effectiveness of the bleeder system.[2] On December 30, 2009, an MSHA inspector issued a citation to Oak Grove for failing to make bleeder examinations required by section 75.364(a)(2)(iii). On January 1, Oak Grove initiated efforts to drill bore holes down to the bleeder entries near the rear of the 11-East panel to provide electrical power for more powerful pumps, communication lines, and additional compressed air capacity.

On January 4 Oak Grove began to operate the longwall in the 11 East panel, despite the continued inability to reach MPLs and evaluate the effectiveness of the bleeder system, as required by section 75.364(a)(2)(iii). Oak Grove ostensibly believed that an alternative method of evaluating the effectiveness of the bleeder system had shown that it was operating effectively.

On January 5, 2010, Edward Boylen, an MSHA inspector, commenced a regular inspection of the Oak Grove mine. He met with mine officials, reviewed records, and became

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[2] Oak Grove's efforts to repair and replace pumps were stymied by several orders issued by MSHA barring miners from going underground in those areas. The orders related to dangerous atmospheres behind seals located several miles from the 11-East panel.

aware that there had been roof falls in the bleeder entries on the headgate side of the 11-East panel and water accumulations in the lengthy tailgate side of the bleeder system. He decided to travel to the longwall and conduct a spot methane inspection, but did not complete it. When he exited the mine, he examined charts of pressure measurements at the No. 6 exhaust fan, and found that the pressure differential had increased by more than 50% since December 15, 2009, indicating that there were significant restrictions in the bleeder system's air flow. That same day, members of the United Mine Workers of America, the union representing miners at Oak Grove, met with MSHA officials and expressed concerns about the safety of miners who were involved in efforts to pump water from the bleeder system.[3]

MSHA was very concerned about information reported by the Union members about conditions in the bleeder entries. MSHA phoned Oak Grove on January 5 and informed it that the longwall should not be in production. Oak Grove called back to discuss the issue, and questioned MSHA's authority to impose such a condition in the absence of any official enforcement action. Joseph O'Donnell, Jr., assistant district manager for MSHA's District 11, then advised Oak Grove to "forget" the earlier call, and stated that MSHA would see them in the morning. Oak Grove operated the longwall on the evening shift on January 5 and the owl shift on January 6.

On the morning of January 6, 2010, Boylen and Jacky Shubert, an MSHA field office supervisor, arrived at the mine to conduct an inspection of the bleeder system. They met with Oak Grove officials, examined records of weekly bleeder examinations and noted that a complete examination had last been accomplished on December 14, 2009. Ex. G-9. The records reflected that the mine had been idle on December 21 due to an order related to the seal problem. The records of examinations on December 29 and January 4 reflected that two MPLs on the headgate side of the 11-East panel could not be examined because the entries were impassible due to a roof fall, and that no measurements had been taken at nine other MPLs established in Oak Grove's approved ventilation plan. Oak Grove managers readily acknowledged that required measurements had not been taken at 11 MPLs since December 14.

Shubert and Boylen traveled to the South end of the Main East Bleeder system, and began to walk up the bleeder entry. They encountered two areas where roof material had spalled from around roof bolts, leaving the plates up to six inches away from contact with the roof. At 10:15 a.m., Boylen issued Order No. 6698828, charging Oak Grove with a roof control violation. As the inspection proceeded, accumulations of water were found in five locations that were determined to present unsafe travel conditions. One accumulation, at MPL 476, was waist-to-chest-deep for a distance as far as a cap light would shine. Boylen and Shubert decided not to proceed further. That afternoon, Boylen issued Order No. 6698829, for unsafe travel conditions posed by the water accumulations; Order No. 6698830, for failing to seal the worked-out areas and operating the longwall, when required examinations to evaluate the effectiveness of the

[3] Oak Grove officials also met with MSHA on January 5, on a variety of topics. The meeting was not related to the UMWA's meeting, and Oak Grove officials were unaware of the other meeting.

bleeder system had not been conducted; and Order No. 6698831for failing to conduct proper preshift examinations of the areas where miners were traveling and working in the bleeder system. The orders were issued pursuant to section 104(d)(2) of the Act, and charged that the violations were the result of Oak Grove's unwarrantable failures to comply with the standards.[4]

Docket No. SE 2010-828 - Violations charged against Oak Grove

Order No. 6698828

Order No. 6698828 was issued by Boylen[5] at 10:15 a.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.202(a) which states, "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The violation was described in the "Condition and Practice" section of the citation as follows:[6]

> The roof, face and ribs of the areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. Areas located in the Main East Bleeders were observed to not have been safely supported for travel by miners in

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[4] Section 104(d)(2) of the Act provides:

> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

The underlying section 104(d)(1) withdrawal order had been issued on October 21, 2003, and Oak Grove had not experienced a "clean" inspection since that date. Consequently, it remained on the section 104(d)(2) "chain." Ex. G-5, G-6.

[5] Boylen had considerable mining experience involving design, set-up and operation of longwall mining systems. However, he had limited experience as an MSHA inspector, having received his authorized representative card approximately two months prior to the inspection. Tr. 58.

[6] Grammar and spelling errors have been corrected in quotations from documents prepared in the field, and post-issuance modifications have been included where appropriate.

> the following locations: (1) In the 4 East panel area in the No. 4 entry, along the barrier pillar, an area of 30 feet has 7 bolts that have no contact with the roof since the roof material has spalled from around the plates and is unsupported; (2) Two blocks inby the above, also in the Main East Bleeders, the center of the entry is unsupported because 12 bolts have no support around the roof plates. The roof is unsupported for a distance of approximately 40 feet. In these two areas, there are deteriorated roof plates. Certified Examiners have examined this area each shift and miners have traveled this way for at least 10 shifts. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence by allowing employees to travel in this area. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-39.

Boylen determined that the violation was highly likely to cause a permanently disabling injury, that it was significant and substantial, that two persons were affected, and that the operator's negligence was high, and rose to the level of unwarrantable failure. A civil penalty in the amount of $38,500.00 was specially assessed for the violation.

The Violation

During the inspection of the Main East bleeder system, Boylen and Shubert were accompanied by Larry Pasquale, an Oak Grove safety representative, Kenny Nichols, an Oak Grove foreman, and Randy King, a miners' representative with the United Mine Workers of America. They rode on a track-mounted vehicle to the track terminus, and traveled on foot from that point. The first 1,500 feet of the bleeder had a relatively low roof, which required crawling, or duck walking; very strenuous travel.

After entering the bleeder and proceeding through the low section, they encountered a crew of third-shift miners on their way out, who had stopped to rest before traveling through the low area. They related that another MSHA inspector had been in the bleeder a few days earlier, and had instructed that the route of travel through the bleeder system should be marked. Tr. 37. In response to that instruction, reflective tape had been hung from roof bolts, marking the travel route. Boylen inquired why the miners appeared to be wet, and one responded that "you'd be wet too if you had to walk through water up to your neck." Tr. 39. Nichols, verified that miners had to travel through deep water to reach the newly installed bore hole where work was being done to connect electric, air and communication lines.

After proceeding a considerable distance, to an area behind an old panel designated "3 East LW22", Boylen observed seven roof bolts that he believed were not effectively supporting the roof. Ex. G-35. The plates on the bolts were not in contact with the mine roof, because 4 to 6 inches of material had spalled away from the roof, exposing the shafts of the bolts.[7] Tr. 43-45. Oak Grove's roof control plan required that four bolts be installed across the 20-foot wide entry, in rows spaced 5 feet apart. The subject bolts were near the center of the entry, in different rows, and the condition extended for 30 feet. Boylen estimated that 30% of the area was not properly supported. Tr. 45. Material had also spalled from the ribs, and was lying on the mine floor, 2 to 3 feet out from the ribs. Approximately two breaks further inby, Boylen encountered a similar condition. There were 12 similarly defective bolts near the center of the entry in an area that extended for 40 feet. He noticed marks on the floor where something had been dragged through, and was told that a 13 horsepower pump had been brought in to address the water problems. Tr. 48. It had been dragged down the center of the entry because of the debris near the ribs. Boylen marked the areas on a map of the mine. Tr. 33; Ex. 35.

The material that had spalled from the ribs made walking next to the ribs difficult. Because of the reflective tape, and the rib spalling, Boylen believed that the route most miners would have taken through the entry would have placed them under the subject bolts. Tr. 46. Boylen did not make any detailed notes or sketches of the layout of the bolts he was concerned with. However, he conceded that miners could pass through the areas without traveling under the subject bolts. Tr. 61. He and the rest of the inspection party traveled through both areas, and passed through again on their way out of the bleeder. Tr. 60, 67.

Based on the overall conditions he observed, Boylen believed that the roof in the areas where the subject bolts were located was not supported or otherwise controlled to protect miners from falls of the roof.

Oak Grove contends that the fact that the bolt plates were not in contact with the roof did not render the support inadequate. The area had been mined many years earlier, most likely in the 1990s, and, over time, roof material had spalled from around the bolts. Other roof control issues had prompted the installation of cribs and timbers in some areas of the bleeder entries, but not at the specific locations cited. There was no freshly fallen roof material on the floor of the mine, and the roof and bolts had most likely been in that condition for a considerable period of time. Boylen knew that the area had been mined 10 to 15 years earlier, and recorded in his field notes that the conditions had existed for "a long period of time - months." Ex. G-3 at 12. The bleeder was inspected by MSHA every quarter, and the conditions would have existed during recent MSHA inspections. The crew that Boylen encountered in the bleeder had informed him that another MSHA inspector, identified as Tim Foster, had been in the bleeder only a few days earlier. Tr. 37. Pasquale and Rex Hartzell confirmed Foster's travel through the bleeder on or about December 28, 2009. Tr. 170, 182, 231. Foster had instructed Oak Grove to mark the

[7] The term "spall," in this context, means "[t]o break off in layers parallel to the surface." American Geological Institute, *A Dictionary of Mining, Mineral and Related Terms* 168 (2d ed. 1996) at 524.

travel route through the bleeder with reflective tape, but had not issued a citation for the roof conditions.

Pasquale, who may have installed some of the original roof bolts, explained that the condition develops over time as flakes of coal fall or spall away from the roof after it is exposed to the atmosphere, and that the roof had been in that condition "for a good while." Tr. 159. In response to a question about the nature of the material of the mine roof, he replied that it was basically "little flakes of coal. No big lumps had fallen out, no pots or kettle bottoms . . . . Nothing like that." Tr. 183. He had walked the bleeder with MSHA inspectors on quarterly inspections, and stated that the roof was in the same condition as when he went through on an MSHA inspection at the end of October or early November. Tr. 170, 182. There was no "fresh" material that had fallen from the roof; and the material on the mine floor had been "walked on" during weekly examinations. Tr. 182.

Under normal conditions, the bleeder is traveled only once per week, by an examiner, who should be looking for hazardous conditions and should be able to identify conditions such as those that Boylen described as obvious. However, from mid-to-late December, and especially in early January after the seal problem was resolved, crews of rank-and-file miners were working deep in the bleeder installing pumps and making the connections of the electric, air and communication lines run down through the bore hole to increase Oak Grove's capacity to deal with water. Travel into the work site was arduous, and took several hours one-way. Miners traveling to the workplace, and especially those traveling out after having worked a shift, would have been exhausted and unlikely to have been paying close attention to surrounding conditions like the roof and ribs.

In *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987) (cited in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)), the Commission held that:

> Questions of liability for alleged violations of this broad aspect of this standard [the precursor to the present section 75.202(a)] are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that hazardous condition that the standard seeks to prevent. Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. (citations omitted)

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y*

of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Oak Grove contends that the Secretary has not carried his burden of proving that the conditions violated the standard.

The bolts in question were 4 to 8 foot fully grouted bolts. Fully grouted bolts form a beam of support for the main mine roof, when the resin, or glue, around the shaft of the bolts hardens. Unlike tension bolts, the plate is not forced up against the roof.[8] It provides support only for the "skin" of the roof that it is in contact with, a very small percentage of the exposed roof area. The glued-in shaft of the bolt provides the primary roof support.[9] Boylen generally agreed. Tr. 68-69. He obviously was concerned more with skin control of the roof, because his determination that likely injuries would consist of fractures, contusions and sprains, does not appear to have been premised upon a fall of the main mine roof.[10] Tr. 54; Ex. G-3 at 13.

The critical question is whether the condition of the skin, or immediate mine roof was such that additional roof control measures were necessary to protect persons from hazards related to falls of roof material. Pasquale credibly described material that might fall from the mine roof as little flakes of coal. There were no lumps, pots, kettle bottoms, or other larger pieces that might cause injury. Boylen did not offer a markedly different description of the roof conditions. While he believed that the roof was failing, that opinion was a generalized evaluation of the overall condition of the roof, as he observed it from the time he entered the bleeder. Tr. 50-51. He did not note the presence of broken or cracked material, or any other defects in the subject area that posed a hazard. His sole focus appears to have been on the fact that the plates were no longer in contact with the roof. Tr. 43; Ex. G-3 at 9-10. At least two MSHA inspectors had been through the bleeder within the past two months, when virtually the same conditions would have existed, and neither identified them as a hazard. It is likely that the conditions, or substantially similar conditions, had existed for years, and that several MSHA inspectors had observed them without taking action. Nor had the conditions been reported as hazardous by certified persons conducting weekly examinations of the bleeder system.

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[8] Tension bolts are anchored at their point of deepest penetration, and torque is applied forcing the plate against the mine roof. The upward pressure of the plate supplies the main roof support. Where a plate on a tension bolt is no longer in contact with the roof, virtually no roof support is provided and the bolt is nothing more than a steel rod hanging down in the drilled hole. *See American Coal Co.*, 35 FMSHRC ___ (June 13, 2013) (ALJ) (slip opinion at 9).

[9] Pasquale related that the roof bolt manufacturer had advised him that after the resin had hardened around the bolt it really didn't matter whether the plate was there or not, a proposition that some MSHA inspectors had found humorous. Tr. 161-62, 184.

[10] Boylen did not know the length of the bolts that had been installed. Tr. 70. He did not opine that the spalling of 4 to 6 inches of material rendered the bolts inadequate from a length standpoint.

I find that the Secretary has not met her burden of proving that a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided additional support to the mine roof in the areas cited in order to meet the protection intended by the standard.[11] Accordingly, I find that the standard was not violated.

Order No. 6698829

Order No. 6698829 was issued by Boylen at 1:47 p.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that mine operators develop and follow a ventilation plan approved by the MSHA district manager. The violation was described in the "Condition and Practice" section of the citation as follows:

> The mine operator did not follow the Ventilation Plan submitted by the mine operator and approved by the MSHA District Manager on January 14, 2009. Page 1, Item D(3) of the ventilation plan states, "Bleeder Entries will be maintained and water will be pumped to maintain free air flow and safe travel." Water causing unsafe travel was observed in the following locations: (1) In the Main East Bleeder Entry, between 4 East and 5 East, old longwall panels in the No. 4 entry, there existed water for a distance of approximately 400 feet in length and 28 inches deep. The water was mucky and black in color with tripping hazards laying in the water that could not be seen. (2) Water was also allowed to accumulate inby 2 blocks of MPL 423 between the 5th and 6th East Old Panels. The water was 100 feet in length and 24 inches deep. The water was mucky and black in color with tripping hazards laying in the water that could not be seen. (3) Water was allowed to accumulate 3 blocks inby MPL 423, in the No. 4 entry of the Main East Bleeders. The water was 50 feet in length and 24 inches deep. The water was mucky and black in color with tripping hazards laying in the water which could not be seen. (4) The water was also found 4 blocks inby the MPL 423, in the No. 4 entry. The water was 100 feet in length and 26 inches deep. The water was mucky and black in color with tripping hazards that could not be seen. (5) Water was also allowed to accumulate at MPL 476 in the Main East Bleeders, in the No. 4 entry. The water was waist to chest deep for a distance as far as a cap light would shine. The water was black in color and mucky. Certified Mine Examiners have examined this travel way each shift and miners have traveled this way for at least 10 shifts. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence by allowing employees to travel in this area. This violation is an unwarrantable failure to comply with a mandatory standard.

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[11] A similar issue was presented in *Big Ridge, Inc.*, 34 FMSHRC 2668, 2682-85 (Oct. 2012) (ALJ). There, I found that the immediate mine roof in an area where material had spalled away from between roof bolt plates was broken and cracked, and was not adequately supported or controlled, in violation of the standard.

Ex. G-1.

Boylen determined that the violation was highly likely to cause a permanently disabling injury, that it was significant and substantial, that two persons were affected, and that the operator's negligence was high. He also determined that the operator's negligence rose to the level of unwarrantable failure. A civil penalty in the amount of $38,500.00 was specially assessed for the violation.

The Violation

Oak Grove's approved ventilation plan provided, in pertinent part, that "[w]ater will be pumped [from bleeder entries] to maintain free airflow and safe travel." Ex. G-7. Boylen encountered significant accumulations of water in the bleeder at five locations, including inby MPL 476, where it was chest-deep.[12] He described the water in all locations as black and mucky, and there were stumbling hazards such as rocks, cement blocks, and pieces of wood and line curtain. Tr. 77-78, 96. Nichols told him that he had traveled through the water, and had fallen and lost his false teeth. Tr. 91.

Oak Grove did not present any evidence disputing Boylen's description of the water accumulations. In defense of the violation, it advances a novel argument that the plan provision does not require that safe passage be maintained at all times, but, rather, it "expresses a purpose or movement towards a goal, not necessarily achievement of the goal."[13] Resp. Br. at 28. The argument is rejected. I find no ambiguity in the plan language. It requires that water be pumped to maintain safe travel at all times. The word "maintained" is included in numerous standards, and has been consistently interpreted as imposing an ongoing obligation, e.g., that warning devices on mobile equipment be "capable of performing on an uninterrupted basis and at *all* times." *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011) (emphasis in original).

The water accumulated in the bleeder entries presented a hazard to safe travel because of its murkiness and concealed stumbling hazards. The standard was violated.[14]

Significant & Substantial

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[12] The depth of the water, as reflected in the order, exceeded MSHA's informal guideline that tolerated water as long as it did not exceed the height of typical boots, i.e., just below knee level. Tr. 112.

[13] It is unfortunate that this argument was not advanced in open court, where it would have had to pass the proverbial "straight face" test.

[14] Water had also accumulated in other areas of the bleeder, rendering them impassible. Ex. C-9. While safe travel through such areas was not maintained, the impassible areas did not present hazards to miners traveling the bleeder. Boylen's focus was on flooded areas that were passable, and were being traveled by miners.

The Commission reviewed and reaffirmed the familiar *Mathies*[15] framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
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> > In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *Id*. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).
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> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous

[15] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

dangers of injury. *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

A violation of a safety standard has been established. It contributed to a hazard, that a miner attempting to travel through the bleeder entry would trip or slip and fall and suffer an injury. Whether the violation was S&S turns on whether an injury was reasonably likely to result from the hazard contributed to and whether it would have been reasonably serious.

Oak Grove also advances novel arguments on the S&S issue. It contends that, since the provision is in the ventilation plan, it "must necessarily be directed to ventilation hazards and a S&S finding should not be based on stumbling hazards." Resp. Br. at 32-33. It also contends that the exposure of the crews of miners who were working to correct the excessive water conditions should not be considered in evaluating the issue, and that the fact that no injuries were suffered by miners or the examiners who traveled through the water contradicts the inspector's theoretical assessment. Like its argument on liability, these contentions are easily disposed of.

The plan requirement that water must be pumped from bleeder entries to maintain safe travel, obviously, is not restricted to hazards posed by ventilation. The plan references section 75.364's requirement that weekly examinations be made of all worked out areas, including the requirement in subsection (a) that at least one entry in a set of bleeder entries be traveled in it entirety. The ability to travel bleeder entries free of all hazardous conditions is an essential element of the plan.

Mine examiners were required to travel the bleeder every week. Those who performed the examinations while the excessive water was present were exposed to the hazard contributed to by the violation. Crews of miners working to install pumps and connect electrical, air and communication lines that had been inserted into the mine through the bore hole were also subjected to the hazard contributed to. The argument that their exposure should not be considered in evaluating whether the violation was S&S is not supported by any citation to authority and is nonsensical.[16]

It is well-settled that the fact that the hazard contributed to did not result in an injury does not preclude a finding of S&S. *Elk Run Coal Co., Inc.*, 27 FMSHRC 899, 906 (Dec. 2005).

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[16] Under section 104(c) of the Act, persons whose presence is required to eliminate a condition described in an order are not prohibited from entering the area subject to the order. That provision does not suggest that their exposure to hazards should not be considered in the S&S analysis.

A significant number of miners traveled through the hazardous water accumulations in the bleeder entries for a period of approximately one-to-two weeks. Travel to the work places was long and arduous, and they worked long shifts. I find that the hazard contributed to was reasonably likely to result in a reasonably serious injury, and was S&S. Boylen posited that miners could suffer broken bones or sprains and that injuries could be exacerbated by the length of time required to exit the bleeder and receive medical attention. I find that such an injury would most likely have resulted in lost work days or restricted duty, and that one person would have been affected.

Unwarrantable Failure

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a

supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary asserts that the violation was the result of Oak Grove's unwarrantable failure because it knew, through Sumpter, its acting superintendent, and Hartzell, its general mine foreman, that the ventilation plan's requirement that water be pumped from the bleeder entries to maintain safe travel was being violated and, yet, they continued to mine coal. Sec'y. Br. at 8-9. Oak Grove contends that the excessive water in the bleeder system was present because of factors beyond its control, and that withdrawal orders issued because of problems with seals prevented it from addressing pump malfunctions. It contends that it acted promptly to address the issue after the seal orders were lifted, and that it had made substantial efforts to eliminate the water before Boylen issued the order.

The violative condition, excessive water in the bleeder entries that constituted a hazard to travel, was obvious, extensive, and well known to Oak Grove's managers, including Sumpter and Hartzell. Notations of excessive water that prevented examination of MPLs had been made in the bleeder examination books on December 29, 2009 and January 4, 2010. Ex. G-9. Agents of Oak Grove examined the bleeders on those days, and examiners conducting preshift or supplement examinations for crews working to install additional pumps had traveled through the areas for at least 10 previous shifts.

On the other hand, the violation did not pose a high degree of danger to miners and Oak Grove had made substantial efforts to abate the violation prior to Boylen's order. As noted above, the instant violation was S&S, however, it was reasonably likely to result in a lost work days or restricted duty injury to one miner, not more serious injuries to multiple miners.

Prior to January 6, Oak Grove had made significant efforts to abate the violative condition. When the withdrawal orders issued for the seals were terminated, in late December, it began to increase its capacity to pump water from the bleeders.[17] Additional pumps and air lines were dragged through the lengthy and difficult bleeder entries. Tr. 200-02, 229-30. On December 31, Oak Grove's managers met and formulated a plan to increase pumping capacity. Tr. 202. They determined to drill two boreholes into the mine, the first one was for the installation of electrical power for new, more powerful, pumps, additional compressed air lines for air pumps, and a phone line for communication. Efforts to establish the boreholes commenced immediately. Survey and site work for the first hole was performed on January 1. Drilling started on January 2 and was completed on January 3. Casing was installed in the hole on January 4; and conduit was installed for the phone line and electrical cable on January 5. Ex. C-7. Miners that were inby the deeper water when Boylen was inspecting the bleeder on January

[17] It is unclear exactly when such orders were in effect. Pasquale testified that there had been stoppages due to potentially explosive atmospheres behind the seals beginning in November of 2009. Tr. 174-75. The bleeder examination book reflected that no examination occurred on December 21, and bore the notation "mine idle due to 52A seal problem." Ex. G-9. Examinations were conducted, at least partially, on December 29 and January 4.

6 were connecting the electrical power and phone lines. Large pumps had been dragged in through the bleeders, as Boylen learned during his inspection. Tr. 48-49. The pumps were activated later that day, but not until after the order had been entered. Ex. C-7. Sumpter felt that they were doing "everything possible" to deal with the water. Tr. 217.

Conclusion

The Secretary's unwarrantable argument is largely premised on the fact that Oak Grove mined coal on January 4, 5 and 6. Operation of the longwall was highly significant with respect to Order No. 6698830, which was based on Oak Grove's inability to determine whether the bleeder system was working effectively due to its failure to conduct weekly examinations. The subject order, Order No. 6698829, was issued because "[w]ater causing unsafe travel was observed" at several locations in the bleeder entries. Ex. G-1. Whether Oak Grove was mining coal had little or no significance to the travel hazards presented by water in the bleeder entries.

Water accumulated in the bleeder entries because of factors largely beyond Oak Grove's control. While Oak Grove was well aware that it presented hazards to miners traveling through it, it did not present a high degree of danger to miners. Significantly, Oak Grove had added capacity to its air pumps and, more than a week before the order was issued, embarked upon a major upgrade of its pumping capacity, drilling bore holes and installing more powerful pumps. Moreover, the vast majority of travel through the areas was by miners engaged in remedial actions.

I find that the violation was not the result of Oak Grove's unwarrantable failure, but, that its negligence was moderate.

Order No. 6698830

Order No. 6698830 was issued by Boylen at 2:00 p.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleged a violation of 30 C.F.R. § 75.334(d), which requires that a worked-out area be sealed if its bleeder system does not continuously dilute and move methane-air mixtures and other noxious gases out of the mine, or if it cannot be determined from the required weekly examinations that the bleeder system is working effectively.

As previously noted, Oak Grove's contest of this order was rejected after a hearing, and the order was sustained in all respects. That decision was affirmed by the Commission. As to Oak Grove, the only remaining issue is the amount of the civil penalty to be imposed. The individual respondents, Mike Sumpter and Rex Hartzell, were not parties to those proceedings. Their liability for this violation, under section 110(c) of the Act, is discussed *infra*.

Order No. 6698831

Order No. 6698831 was issued by Boylen at 2:15 p.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.360(a)(1), which

requires that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." The violation was described in the "Condition and Practice" section of the citation as follows:

> An adequate pre-shift examination was not conducted in the Main East Bleeder entries by mine examiners. As many as 10 miners per shift were allowed to enter the bleeder entries before the preshift was conducted and the area pronounced safe to work and travel. This condition existed for at least 10 shifts. The mine operator has failed to post, correct, or record numerous hazardous conditions found by MSHA during inspections of the underground Main East Bleeder entries on this date. Three 104(d)(2) orders have been issued for obvious and extensive violations. All orders were issued in areas where required examinations by certified examiners were conducted.
> [The substantive allegations of Order Nos. 6698828, 6698829 and 6698830 were repeated].
> Citation No. 6698645 was written on 12/30/20[09] due to the bleeder not being made in its entirety.
> The mine operator has engaged in aggravated conduct by failing to post, correct, or record hazardous conditions during inspections of the Main East Bleeder entries, constituting more than ordinary negligence by allowing people to travel through hazardous conditions. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-40.

Boylen determined that the violation was highly likely to cause a permanently disabling injury, that it was significant and substantial, that ten people were affected, and that the operator's negligence was high. He also determined that the operator's negligence rose to the level of unwarrantable failure. A civil penalty in the amount of $52,500.00 was specially assessed for the violation.

The Violation

Section 75.360 requires that preshift examinations be conducted within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. A record of the examination, including any hazardous conditions found, must be made before any other persons enter an underground area of the mine. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Miners were scheduled to work underground as soon as the latest seal order was lifted, addressing the water issues in the bleeders, repairing and installing pumps and making connections to the electrical, air and communication lines inserted through the borehole. Preshift examinations, at least in the traditional sense, were not being completed prior to miners going

underground. As previously noted, travel to the work area alone consumed several hours, and until the communication line was connected, most likely on January 6, there was no way to call out the results of a preshift examination. Tr. 147. An examiner would have had to travel back out of the bleeder entries to make the report. Travel to the area of the borehole and back out would have consumed the majority of a shift.

Boylen knew that miners who were not certified examiners were working on the water problem, and he questioned how preshift examinations could be conducted under the circumstances. He was advised that Oak Grove was not attempting to conduct preshift examinations. Rather, as Pasquale and Sumpter explained, because of the logistics, they were conducting something similar to a supplemental examination.[18] Tr. 164, 219. A certified examiner would proceed ahead of the work crew, examining the area as he went. When Boylen examined the preshift record books, he found that the examinations were being recorded as if regular preshift examinations had been conducted. Tr. 136. Moreover, none of the conditions that he believed were obvious hazards had been recorded. Tr. 139-40. Hartzell, who had signed-off on the preshift examination reports, testified that Oak Grove was conducting supplemental and preshift examinations and that "people with papers were in and out of the area throughout the 24-hour period." Tr. 242.

The working conditions, and the extensive and difficult travel involved, made conducting preshift examinations extremely difficult. MSHA determined that supplemental examinations, which are more typically intended to address situations where unscheduled work becomes necessary, were not permitted for the scheduled work that was being performed. Tr. 148. Boylen posited that a proper preshift examination might be accomplished by using multiple examiners, each examining a portion of the area. Tr. 148-49. After the order was issued, Oak Grove had an examiner go in with the crew through the preshifted area, work for one hour, and then "examine his way out," thereby conducting the preshift examination for the next shift. Tr. 224-25.

Miners were scheduled to work and travel in the bleeder system for over a week prior to January 6, 2010. Oak Grove did not conduct and record preshift examinations within 3 hours of

[18] Section 75.361 provides that a supplemental examination shall be made within 3 hours before anyone enters an area in which a preshift examination has not been made. Oak Grove's "supplemental examinations" do not appear to have been conducted properly, because miners following the examiner entered the underground area before the entire area had been examined.

their entering the underground area.[19] Nor were the hazardous conditions observed by Boylen identified and corrected prior to miners traveling through the areas. The standard was violated.

Significant and Substantial

The standard was violated in two respects, preshift examinations were not completed in a timely manner, and hazards that should have been observed were not recorded and corrected. Each aspect of the violation must be analyzed to determine whether it was S&S.

The "timing" aspect of the violation was clearly a secondary consideration, judging from Boylen's order. He described the absence of an "adequate" preshift examination, and went on to discuss the failure to "post, correct, or record" hazardous conditions. Ex. G-40. His explanation of the unwarrantable failure determination was couched entirely in terms of the failure to "post, correct, or record" hazardous conditions. There is no dispute that examinations were being made frequently. As Hartzell explained, examiners were going in and out of the area throughout the day. Boylen was aware of the frequency of examinations being made. He noted in Order No. 6698828 that: [c]ertified examiners have examined this area each shift and miners have traveled this travel way for at least 20 shifts." Ex. G-39. He made the same observation in Order No. 6698829. Ex. G-1.

The Commission has recognized that the preshift examination requirements are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8,15 (Jan. 1995). Failure to conduct a timely preshift examination can be found to have been S&S when a supplemental examination has been made in lieu of a proper preshift examination. *See Jim Walter Resources, Inc.*, 28 FMSHRC 579, 601-04 (Aug. 2006). Although miners may restrict their travel to examined portions of a partially examined work area, there could be hazards in the unexamined portions of the area that could affect them. Nor does the fact that an untimely examination was completed without any hazards having been discovered necessarily preclude an S&S finding, because mine hazards can be transitory in nature. *Id.*

However, on the facts of this case, while the issue with the timeliness of the examinations may have contributed to a discrete safety hazard of miners being exposed to hazardous conditions, it was highly unlikely that a reasonably serious injury would have occurred. Unlike

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[19] Oak Grove argues that miners were in the bleeders "round the clock," and that the Secretary failed to prove that examinations were not done "in an 8-hour interval," as specified in the standard. Resp. Br. at 36. However, the standard also provides that "the operator must establish 8-hour intervals of time subject to the required preshift examinations." 30 C.F.R. § 75.360(a)(1). The precise time periods worked by the miners is not apparent. Boylen determined that there were crews of 5 miners, and that at any given point in time, two crews might be in the bleeders, one entering and one exiting. Tr. 143. The miners were, no doubt, working extended shifts because of the difficulty in accessing the working place. Preshift examinations were required prior to the start of their shifts.

the situation in *Jim Walter*, there was no active mining going on in the area. Consequently, there was no risk of miners being exposed to hazards associated with active mining, many of which can occur on short notice. The bleeder entries had been mined many years earlier and, aside from the occasional need to install supplemental roof support, and deal with water accumulations, there is no evidence of new hazards developing in the bleeders. Moreover, as Hartzell explained, there were certified examiners traversing the areas of concern on a regular basis. Boylen had noted that certified examiners had been examining the area each shift for at least 20 shifts. It is unclear how closely the pattern of actual examinations by certified examiners traveling into and out of the work area may have replicated the required preshift examinations.[20]

I find that the timing aspect of the violation may have contributed to a hazard of miners being exposed to unknown hazardous conditions, but that it was unlikely that miners would have been exposed to such conditions and it was unlikely that any such conditions would have resulted in a reasonably serious injury.

The second aspect of the preshift examination violation is the failure to record and correct hazardous conditions that should have been found during the examinations. Boylen believed that examiners had failed to "post, correct, or record numerous hazardous conditions," namely those cited in Order Nos. 6698828, 6698829 and 6698830. Ex. G-40. Boylen believed that those conditions rendered it highly likely that 10 persons (two crews of miners) would suffer permanently disabling injuries.

However, Order No. 6698828, alleging failure to control the mine roof, was not sustained. Order No. 6698829, alleging unsafe travel through water accumulations with unseen tripping hazards, was sustained as an S&S violation that was reasonably likely to result in a lost work days injury to one miner. Order No. 6698830, issued for failure to seal the worked out area, and continuing to operate the longwall, when required bleeder examinations had not been conducted, does not appear to have any relevance to the instant order, which was issued with respect to preshift examinations of the travelway and work places of the miners working to resolve the water problem in a portion of the bleeder.[21]

The failure to conduct a proper preshift examination, identifying hazardous conditions and posting them or correcting them prior to miners entering the area, can give rise to a measure of danger to miners' safety, i.e., that they would encounter hazardous conditions that were not posted or corrected. Here, the hazardous condition that miners encountered because of the

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[20] As noted above, Sumpter had explained that compliance was achieved by having an examiner "examine his way out" of the work area.

[21] Miners working to make connections at the borehole were able to reach that area, albeit after wading through chest-deep water. That travel route, obviously, did not include portions of the bleeder that were impassible. The failure to conduct a traditional preshift examination of the travel route and work place would not have contributed to any hazards associated with a failure to conduct a weekly examination of the inaccessible sections of the bleeder.

posting or correcting failure was traveling through several areas of accumulated water in which there were tripping hazards that could not be seen. Concealed tripping hazards were the subject of Order No. 6698829, which was found to be an S&S violation, because the hazards it contributed to were reasonably likely to result in a lost work days injury to one miner.

The failure to post and correct aspect of the violation contributed to the hazard of miners continuing to be exposed to travel through water with concealed tripping hazards. Combined with the possibility of exposure to newly developing hazards attributable to the timing aspect of the violation, I find that the hazards contributed to by the preshift violation were reasonably likely to result in a reasonably serious injury, a lost work days injury to one miner, and that the violation was S&S.

Unwarrantable Failure

On the face of it, it could be considered obvious that a preshift examination should have been conducted because work was scheduled in the bleeder system. On the other hand, there were severe logistical considerations that presented considerable obstacles to performing such examinations, notably the fact that an examiner could not travel into the bleeder, complete a preshift examination and call it out within the required 3-hour window. The bleeder system had been mined many years earlier, and was not as susceptible to the development of new hazards as an active working section. Certified examiners were traveling through the scheduled work area frequently over the several days that the practice of conducting supplemental examinations had existed.

Oak Grove knew that it was not conducting proper preshift examinations. It had not done so for several days and would have continued to do so while work deep in the bleeder system to address the water accumulation problems was ongoing. It had not been placed on notice that greater compliance efforts were necessary. The violation was not particularly extensive, and it did not present a high degree of danger to miners. While Oak Grove had not attempted to abate the violation by conducting preshift examinations, it had conducted what it referred to as supplemental examinations, and had numerous certified examiners traveling through the work area throughout the work day.

The failure to post and correct aspect of the violation is more troubling. Order No. 6698829 was terminated on January 15, with a notation that "cited areas of water have been pumped down." There is no mention of the removal of tripping hazards, which presumably would have remained in the travelway, but would have been rendered visible by the removal of the water. This suggests that tripping hazards were not numerous and tended to be outside the normal route of travel used by the crews, which may have been guided by the reflective tape hung in response to Foster's instruction. As Boylen had noted in the other orders, certified examiners had been examining the area for more than 20 shifts. The crews of miners working to correct the water accumulations had also been traveling through the bleeders for at least 20 shifts. All involved were, no doubt, well aware of the conditions of travel through the water accumulations, and there is no evidence that any incidents resulting in injury occurred.

On consideration of the above, I find that Oak Grove did not exhibit conduct that rose to the level of deliberate indifference or reckless disregard, and that the violation was not the result of Oak Grove's unwarrantable failure to comply with the standard. I find that Oak Grove's negligence with respect to the preshift examination violation was moderate.

Docket Nos. SE 2012-306 and SE 2012-308 - Violations charged against Sumpter and Hartzell

The petitions in these cases were filed pursuant to section 110(c) of the Act against Mike Sumpter and Rex Hartzell, in their individual capacities. In Docket No. SE 2012-306, the Secretary alleges that Mike Sumpter, Oak Grove's acting superintendent at the time, is personally liable for the violations alleged in Order Nos. 6698829 and 6698830, for which civil penalties in the amount of $7,000.00 and $7,300.00 were assessed respectively. In Docket No. SE 2012-308, the Secretary alleges that Rex Hartzell, Oak Grove's general mine foreman at the time, is personally liable for the violations alleged in Order Nos. 6698829 and 6698830, for which civil penalties in the amount of $6,900.00 and $7,200.00 were assessed respectively.

Section 110(c) of the Mine Act states: "Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c).

> The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 36264 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).
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> A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "'[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.'" *Id.* (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Ernest Matney, 34 FMSHRC 777, 783 (Apr. 2012).[22]

Order No. 6698829

Order No. 6698829 was sustained as an S&S violation as to Oak Grove. However, it was not found to be the result of Oak Grove's unwarrantable failure, rather its negligence was found to be moderate, primarily because of extensive efforts to remedy the violative conditions prior to issuance of the order.

Sumpter and Hartzell were well aware that there was flooding in the bleeder system, and were actively engaged in efforts to address the problem. They had reviewed, and Hartzell had signed, bleeder examination records that reported that portions of the bleeder system were flooded and some were impassible on December 29 and January 4. Tr. 237, 239-40; Ex. G-9, C-13. They had discussed the state of the bleeder with MSHA inspector Busby on December 30, and advised him that he could not travel the bleeder without passing through water well over his boot tops. Tr. 201, 231. Hartzell had informed MSHA inspector Foster, on December 28, that the bleeder system was flooded out, and described the efforts that were being made to address the issue. While they were aware that miners had to travel through significant accumulations of water, and that travel in the bleeder system was arduous, there is no evidence that they had been advised that such travel was hazardous. There is no indication that they had personally traveled the bleeder system, or otherwise had been advised that there were tripping hazards that could not be seen in the flooded areas.

The violation charged in Order No. 6698829 was not attributable to Oak Grove's unwarrantable failure to comply with the standard, even though detailed knowledge of the conditions was attributable to Oak Grove through its agents – its bleeder and preshift/supplemental examiners. Sumpter and Hartzell did not have such detailed knowledge of the conditions. I find that neither Sumpter, nor Hartzell, exhibited aggravated conduct that would subject them to personal liability for the violation.

Order No. 6698830

As noted previously, the validity of Order No. 6698830 as an S&S and unwarrantable failure violation has been conclusively established as to Oak Grove. Sumpter and Hartzell were

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[22] Sumpter and Hartzell argue that they cannot be subjected to liability under section 110(c) because their employer, Oak Grove, is a limited liability company, not a corporation. However, as acknowledged in their brief, the Commission has held that section 110(c) permits imposition of liability upon agents of a limited liability company. *Bill Simola*, 34 FMSHRC 539 (March 2012). Respondents point out that further appeals in the *Simola* case were frustrated by the Secretary's dismissal of the petition when the case was remanded. The Commission's decision dictates that the defense must be rejected here. Respondents will be free to seek whatever further review of the issue they deem appropriate.

not parties to that proceeding. The Secretary must establish all elements of their liability in this proceeding.

Duplication

Initially, Sumpter and Hartzell argue that Order No. 6698830 is duplicative of Citation No. 6698645, which was issued by MSHA inspector Busby seven days earlier, on December 30, 2009. The Commission held that Oak Grove waived the duplication argument in the underlying contest proceeding, and that decision has become final. Sumpter and Hartzell contend that they have not waived the argument. Resp. Br. at 42-42. Sumpter and Hartzell are not bound by the decision in the contest case brought by Oak Grove. The Secretary had not yet sought to hold them personally liable for any of the violations charged against Oak Grove, and they were not parties to that proceeding. A violation of a safety standard by the mine operator is a necessary predicate to personal liability of an operator's agent under section 110(c). "The Secretary must still fully prove his case in a section [110(c)] proceeding against the agent. The operator's violation is merely an element of proof in the Secretary's case against the agent." *Kenny Richardson*, 3 FMSHRC 8, 10 (Jan. 1981).

Had Sumpter and Hartzell been parties to the contest proceeding, they would have been entitled to present evidence and make arguments in an effort to rebut the Secretary's case against Oak Grove. If successful, that necessary predicate to their personal liability would have been defeated. Asserting the duplication argument as to Oak Grove is, and would have been, a proper element of their defense. Not having waived the argument, they are entitled to present it in this proceeding. Here the stipulated inclusion of the record of the prior proceeding provides ample evidence of Oak Grove's violation of the standard, as charged in Order No. 6698830. The duplication argument is the only additional defense to Oak Grove's violation asserted by Sumpter and Hartzell.

Citation No. 6698645 was issued by MSHA inspector Paul Busby on December 30, 2009. It charged a violation of section 75.364(a)(2)(iii), which requires that:

> (2) At least every 7 days, a certified person shall evaluate the effectiveness of the bleeder systems required by § 75.334 as follows:
>
> . . . .
>
> (iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

The violation was described in the Condition and Practice section of the citation as follows:

> The East bleeder was not made in its entirety by a certified person at least every 7 days to evaluate its effectiveness. The East bleeder was examined in its entirety on 12/22/2009.[23] The area of the bleeder from 1st East to 10-East was examined on 12/29/2009. The area from 10-East to the No. 6 fan was recorded as being impassable due to high water levels. The pumps used to maintain water levels in the bleeder have failed, resulting in high water levels in the bleeder entries. Pumps are currently being transported to the affected area to lower the water to safe, passable levels.

Ex. C-1.

Oak Grove's longwall panel was not producing coal at the time, and Busby's citation was issued pursuant to section 104(a) of the Act. He determined that the violation was unlikely to result in a lost work days injury to 8 persons and that Oak Grove's negligence was low. The citation specified that the violation was to be abated by 7:00 a.m. on December 31, 2009.

Respondents argue that Order No. 6698830 is duplicative of Citation No. 6698645 for several reasons. First, each "addressed the same condition and imposed the same duties on Oak Grove." Resp. Br. at 43. Second, the requirements of the standard cited in Citation No. 6698645, section 75.364(a)(2)(iii), are subsumed in the requirements of section 75.334(d), the standard cited in Order No. 6698830. Third, both the order and citation required the same action for abatement. Respondents' arguments are unavailing, and are based on misstatements of the law.

Whether enforcement actions are duplicative is not determined by examining whether *the enforcement actions* impose different duties on the operator. Rather, it is the duties imposed by *the standards violated* that must be identical before violations can be found duplicative. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 716 (Aug. 2008) (opinion of Commissioners Jordan and Cohen);[24] *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 553 (Aug. 2006); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (Aug. 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)).

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[23] The bleeder was last examined in its entirety on December 14. There was no examination on December 21 because, as noted in the examination book, the mine was "idle due to 52A seal problem." Ex. G-9, C-13. Oak Grove had written MSHA on December 21 stating its understanding that examinations of the bleeder and other areas in the North workings were permitted while the seal problem was being resolved. MSHA responded in writing on December 22 making clear that such examinations were not permitted. Ex. C-13, C-15.

[24] The Commission in *Spartan* split 2-2 on the issue of duplication. Commissioners Duffy and Young, disagreeing with Commissioners Jordan and Cohen, found that the violations were duplicative. As a result, the ALJ's determination that the violations at issue in the case were not duplicative was allowed to stand.

Pursuant to section 75.364(a)(2)(iii), Oak Grove had a legal duty to evaluate the effectiveness of the bleeder system by, *inter alia*, traveling at least one entry of each set of bleeder entries in its entirety and making certain measurements. Under section 75.334(d), Oak Grove had a legal duty to seal the worked-out area if the bleeder system was not working effectively or it could not be determined from the section 75.354 examinations and evaluations that the bleeder system was working effectively. It is clear from the language of the standards that they do not impose the same duties. Therefore, Order No. 6698830 is not duplicative of Citation No. 6698645. Even if violations emanate from the same events, they are not duplicative if the standards impose separate and distinct legal duties. *See Spartan Mining*, 30 FMSHRC at 719 (opinion of Commissioners Jordan and Cohen) (citing *Cyprus Tonopah*, 15 FMSHRC at 378).

Nor are the requirements of section 75.364(a)(2)(iii) subsumed in the requirements of section 75.334(d). While they both deal with bleeder systems, they impose separate and distinct requirements. One provision could be violated without violating the other, and vice versa.[25] Section 75. 364(a)(2)(iii) requires that the effectiveness of the bleeder system be evaluated by traveling the bleeder in its entirety every 7 days and taking measurements at points specified in the mine's ventilation plan. It can be violated, as here, if the bleeder is not traveled in its entirety and the measurements are not taken. Those failures would not state a violation of section 75.334(d), which requires that a worked out area be sealed if the operator was unable to determine whether the bleeder system was working effectively because of its inability to take the required measurements. Conversely, section 75.334(d) could be violated if all required section 75.364 evaluations had been made, if those evaluations showed that the system was not working effectively or were inconclusive, and the area was not sealed.

Lastly, Respondents argue that the citation and order were duplicative because the same action was required for abatement, pumping the accumulated water from the bleeder system to allow travel, citing the opinion of Commissioners Duffy and Young, in *Spartan Mining*, 30 FMSHRC at 728-30. However, as noted by Commissioners Jordan and Cohen, that is not an accurate statement of the law. *Spartan Mining*, 30 FMSHRC at 717-18.[26]

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[25] In *Western Fuels-Utah*, the Commission held that a charge of violating a specific standard was duplicative of a charge of violating a more general standard. However, the Commission made clear that its decision was not based solely upon the premise that every violation of the more specific standard would also be a violation of the more general one. Rather, it looked to whether the operator had been cited for more than one specific act or omission. Had there been evidence of additional deficiencies that violated the general regulation, such that that allegation would not have been based upon the identical evidence used to support the violation of the more specific standard, the charges would not have been found duplicative. 19 FMSHRC at 1004 n.12.

[26] Moreover, Commissioner Duffy was forced to concede that the violations in *Spartan* could have been abated by different actions. He concluded that, because one was not practical, the method of abatement was the same, and that the violations were duplicative. 30 FMSHRC at 728-29.

Nor should the method of abatement chosen by an operator be determinative of whether violations are duplicative. When MSHA issues a citation or order citing a violation, it specifies a time within which the violation must be abated. However, it does not specify particular actions that must be taken by the operator to abate the violation, and none were specified in the subject citation or order.[27] Rather, the steps to be taken for abatement are chosen by the operator. That a particular circumstance may offer an opportunity for the operator to abate more than one violation by taking a particular action, does not dictate that the violations were duplicative.[28] Turning to the requirements of the standards, Citation No. 6698645 could have been abated by pumping water down, and addressing roof falls on the headgate, so that the required examinations could have been made. However, it could also have been abated by securing MSHA's approval of an alternative method of evaluation, as provided in section 75.364(a)(2)(iv). Oak Grove expended considerable effort after the orders had been entered attempting to secure approval of its alternative "subtraction" method of evaluation, as detailed in the decision rejecting its contest of Order No. 6698830. 32 FMSHRC at 174-76. Conversely, Order No. 6698830 could have been abated by sealing the worked out area, or conducting a proper evaluation of the bleeder system that demonstrated that it was working effectively.[29]

The respective standards cited in Citation No. 6698645 and Order No. 6698830 imposed different legal duties on Oak Grove. The requirements of section 75.364(a)(2)(iii) are not subsumed in section 75.334(d). The respective violations did not dictate that the same abatement actions be taken. Order No. 6698830 was not duplicative of Citation No. 6698645.[30]

Personal Liability

As noted above, there is ample evidence in the record that Oak Grove committed an S&S and unwarrantable failure violation of section 75.334(d), as charged in Order No. 6698830, and as found in the decision in the contest proceeding. The duplication argument advanced by Sumpter and Hartzell has been rejected. Consequently, the Secretary has established the

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[27] It is apparently contrary to MSHA policy for an inspector to instruct an operator how to abate a violative condition. *See Valley Camp Coal Co.*, 7 FMSHRC 1197, 1252 (Aug. 1985) (ALJ); *Sunshine Mining Co.*, 1 FMSHRC 1535, 1542 (Oct. 1979) (ALJ).

[28] A different result might follow if two violations could be abated only by identical actions. That is not the case here.

[29] Order No. 6698830 was terminated on February 9, 2010, after water was pumped down allowing safe travel to the No. 6 fan, and the roof fall on the headgate side had been cleaned and supported allowing safe travel. The bleeder was examined in its entirety on February 8 and found to be working effectively, and the pressure differentials at the No. 6 fan had "leveled off at 20," indicating that the restriction had been removed. Ex. G-2 (termination sheet added post-hearing).

[30] Respondents also argue that the logic of their abatement argument would "compel a finding that Order No. 6698829 was also duplicative of the other two enforcement actions." Resp. Br. at 54 n. 14. The abatement prong of their duplication argument is rejected, as is its extension as proposed in the footnote.

necessary predicate to their individual liability. The remaining questions are whether they knew or had reason to know of the violative condition, and whether they exhibited aggravated conduct constituting more than ordinary negligence.[31]

Sumpter and Hartzell readily admitted that they knew that the effectiveness of the bleeder system had not been evaluated as required by section 75.364, and, consequently, that it could not be determined from the non-existent required evaluations whether the system was working effectively. They also knew that operating the longwall and failing to seal the worked-out area, was a violation of section 75.334(d). Tr. 222-23, 238, 244. Their defense rests on arguments that they did not engage in aggravated conduct.[32] They advanced several justifications for their actions; MSHA had not required sealing of the bleeder when evaluations were temporarily prevented in the past; they believed that the bleeder system was working effectively based on their alternative evaluation procedure and the fact that air changes had been made at the longwall face; and, MSHA's issuance of Citation No. 6698465 and failure to specifically order shutting down of the longwall during phone conversations on January 5 led them to believe that that action was not required. These explanations will be addressed in order.

MSHA's prior actions bore little relationship to the conditions at issue. Hartzell testified that there were several occasions in the past where measuring points in the bleeder system could not be reached during weekly examinations, and that shutting down of the longwall had not been required. Tr. 232-33. As he explained, when particular MPLs could not be reached, e.g., because of high water, a pump would be installed to pump the water down, and the measurements would then be made a "day or two later;" all of which would be recorded in the examination book. *Id*. MSHA was aware of these incidents because it reviewed the examination books during its quarterly inspections and, apparently, took no action with respect to them. Tr. 233. It is not surprising that MSHA took no action when it noted that sometime in the past there had been temporary delays of a day or two in completing weekly examinations, which may or may not have been at least technical violations of sections 75.364 and 75.334, and which apparently showed that the bleeder system was working effectively. Such instances do not justify the mining of coal when substantial portions of the bleeder system could not be examined for an

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[31] Sumpter and Hartzell are situated virtually identically as to the pertinent factors determinative of liability under section 110(c). While they operated at different levels of Oak Grove's management structure, they both had full knowledge of all of the relevant facts and the responsibility to assure the safety of Oak Grove's miners. Respondents' brief treats them as being similarly situated, all arguments being advanced on behalf of both individuals without distinctions as to their respective culpability. Resp. Br. at 62-70.

[32] Sumpter and Hartzell suggest that, since other "essentially" similarly situated officials of Oak Grove were not charged, there is an appearance of selective prosecution that violates the equal protection clause of the U.S. Constitution. Resp. Br. at 64 n.17. The argument is not developed, or accompanied by citation to authority. There is nothing in the record to suggest that the decisions to charge the individual respondents constituted an abuse of the Secretary's prosecutorial discretion.

extended period of time, here, three weeks, and there was evidence of serious restrictions in air flow through the system.

Sumpter and Hartzell explained that air changes had been made to ventilation of the longwall face, one of which was necessitated by anticipated increases in pressure as the panel was mined-out. Tr. 244. Mining had begun in the panel on March 2, 2009, and had proceeded approximately 6,000 feet by mid-December. Sumpter explained that ventilation begins to "tighten up" when a panel has been mined 3,000 feet and that air changes are eventually required. Tr. 203-04. On January 1, there was insufficient air flow across the face of the longwall, and a change was made to the ventilation system. Tr. 203. On January 3, other ventilation changes were made because Sumpter was concerned about maintaining pressure toward the gob. Tr. 204-05. However, increases in the water gauge pressure differential at the main bleeder fan, fan No. 6, had shown that something serious was occurring in the bleeder system. The water gauge had increased from 20 to more than 30 inches of water between December 15 and January 2. Ex. G-19. Hartzell acknowledged that that indicated there was a "significant restriction" in the bleeder system. Tr. 244. Notably, the air changes that Sumpter implemented on January 3 to assure there was pressure on the gob had no positive effect on the No. 6 fan pressure differentials.[33]

Sumpter and Hartzell expressed confidence that the bleeder system was working effectively. That contention, and the reasonableness of their beliefs are addressed below.

They also argue that "nothing in [the citation issued by Busby on December 30] would indicate that Oak Grove was prohibited from operating the longwall." Resp. Br. at 66. However, the longwall was not operating on December 30 and, under Oak Grove's business plan, it would not have been operated until at least January 1, 2010, a fact that may well have been known to Busby. Tr. 203. Busby specified that the violation be abated by 7:00 a.m. on December 31, less than 16.5 hours after it had been issued, and before any potential resumption of mining. Consequently, as of January 4 when mining began, Oak Grove had failed to timely abate the citation and was subject to further enforcement action. While the citation may not have specifically prohibited operation of the longwall, it was to have been abated within hours, before mining would have begun. Operation of the longwall on January 4 was not sanctioned by, or consistent with, the citation.[34]

MSHA's retraction of its directive to shut down the longwall during the exchange of phone calls on January 5, likewise offers no defense. First, Oak Grove had already been

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[33] The pressure differentials returned to the 20-inch level in February, after the water had been pumped down, and other actions had been taken, resulting in termination of Order No. 6698830 on February 9, 2010. Ex. G-2.

[34] On January 14, with Order No. 6698830 in place, the abatement time for the citation was extended to January 29, an action which has no relevance to events that occurred on January 4-6, 2010. Ex. C-1.

operating the longwall on January 4 and 5 prior to the calls.[35] There was no explicit approval by MSHA to operate the longwall, and Oak Grove had raised a legitimate question about the propriety of issuance of a verbal withdrawal order, over the phone, when MSHA was not on site to observe and evaluate actual mining conditions. MSHA promptly issued the order shutting down the longwall when the mine was inspected on January 6.

Where a mine operator acts "on a good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator's belief was in error." *Kellys Creek Resources, Inc.*, 19 FMSHRC 457, 463 (Mar. 1997). Sumpter and Hartzell argue that the same logic should apply in section 110(c) cases. Assuming that such a defense is available to an individual charged under section 110(c) of the Act, Sumpter and Hartzell cannot avail themselves of it. They both admitted that they knew that Oak Grove's operations, for which they were responsible, were in violation of Sections 75.364(a)(2)(iii) and 75.334(d). They have no colorable argument that they believed, in good faith, that their conduct was in compliance with applicable law, or that any such belief was objectively reasonable.

They also argue that an individual who reasonably believes that a particular practice is safe should not be subject to liability under section 110(c), citing *Rinker Materials*, 30 FMSHRC 104, 119 (Jan. 2008) (ALJ). Accepting, for purposes of argument, that an agent who held an objectively reasonable belief that a practice was safe should not be found to have engaged in aggravated conduct and found liable under section 110(c) of the Act, neither Sumpter, nor Hartzell can escape liability on that basis.

Sumpter and Hartzell both testified that they believed that the bleeder system was working effectively when the longwall was operated on January 4, 5 and 6. I am not convinced that they did not have some doubt about the effectiveness of the bleeder system.[36] In any event, while they may have believed that the bleeder system was working effectively and that operation of the longwall was relatively safe, their beliefs were not objectively reasonable under the circumstances.

First, they knew that Oak Grove clearly was in violation of sections 75.364(a)(2)(iii) and 75.334(d), two fundamental standards intended to assure that bleeder systems are operating effectively. Second, the section 75.334(d) violation was of high gravity. As noted in the order and the decision on the contest case, the mine liberated substantial amounts of methane and

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[35] Oak Grove's production report showed that the longwall had been operated on the "owl shift" and evening shift on January 4, and the owl shift on January 5. Ex. G-10. Following the calls, it was also operated on the evening shift on January 5 and the owl shift on January 6.

[36] Sumpter was rightfully concerned about maintaining positive pressure on the gob. After the air changes of January 1 and 2 had been made, he instructed Hartzell that the air flows critical to the "subtraction" alternative bleeder evaluation method be closely monitored. Tr. 205-06.

operation of the longwall with an ineffective bleeder system, or a bleeder system whose ineffectiveness could not be determined, posed a threat of serious injuries to the entire mining crew. Third, pressure differential readings at the No. 6 fan showed that a significant restriction in the flow through the bleeder system had developed between December 15 and January 2, and that those readings were unaffected by the air changes made on January 1 and 3.[37] Fourth, they ostensibly relied on an unproven alternative evaluation method that should have been made a part of the approved ventilation plan, but which was unilaterally implemented, without notice to MSHA.[38] As developed extensively after the issuance of the order, there were several reasons to doubt that the subtraction method accurately demonstrated that there was sufficient air flow out the tailgate entries of the panel at the back of the gob. If Sumpter and Hartzell were convinced that the alternative evaluation method was viable, it should have been proposed to MSHA as a revision to the ventilation plan before re-starting production. That was not done. Rather, the plan was implemented unilaterally, an action that suggests that problems in attempting to demonstrate its viability were anticipated.

In conclusion, I find that Sumpter and Hartzell knew, or should have known, that operation of the longwall without examinations required by section 75.364(a)(2)(iii), and under the unproven and unapproved alternative evaluation method, presented an unacceptable risk of serious injuries to miners. To the extent that they entertained a belief that operation of the longwall was safe, any such belief was unreasonable. They knowingly violated section 75.334(d), and engaged in aggravated conduct constituting more than ordinary negligence. I find that they are personally liable for the violation cited in Order No. 6698830.

The Appropriate Civil Penalties

As the Commission reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

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[37] Hartzell attempted to relate the increase in pressure differentials to normal increases in pressure as a longwall panel is mined-out, increases that Sumpter explained prompted the air changes of January 1. However, the two were obviously unrelated. The panel had been mined for a period of 9.5 months, from March 2 to December 15. The increases in the pressure differentials occurred after December 15, when no mining took place.

[38] Section 75.364(a)(2)(iv) provides that an alternative method of evaluation may be specified in the ventilation plan. Sanctioning of an alternative method of evaluation would also likely have abated the violation charged in Busby's December 30 citation. Section 75.370 specifies procedures for proposing revisions to a ventilation plan. There is no evidence that Oak Grove attempted to follow those procedures before implementing its alternative evaluation method.

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).
>
> Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."). While there is no presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

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

Findings on Penalty Criteria - Oak Grove

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that imposition of the proposed penalties would not affect Oak Grove's ability to continue in business. Stip. 4. The parties did not stipulate to the size of Oak Grove as an operator. However, forms reflecting calculations of penalty assessments were filed

with the petition and indicate that the Oak Grove Mine is a large operator, as is its controlling entity, and I so find.

History of Violations

The Secretary requested leave to submit, post-hearing, an exhibit reflecting Oak Grove's history of violations, a report generated from MSHA's database, typically referred to as an "R-17." However, the document was not filed. R-17 reports are of limited value, because they do not provide a qualitative assessment of violation history, i.e., whether the number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC at 623-24.

Qualitative violations' history information can be found on assessment forms filed with the petition, which reflect that Oak Grove had 226 violations become final, and 866 inspection days, in the pertinent time period. The Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. Under the regulations, Oak Grove's history of violations was low, and none of the alleged violations qualified for enhancement because of repeat violations.

I find that Oak Grove's overall history of violations, as relevant to these violations, was low, and should be considered a mitigating factor in the penalty assessment process.

Gravity - Negligence

Findings on gravity and negligence are set forth in the discussion of each violation.

<u>The Secretary's Penalty Assessment Process – Special Assessments vs. Regular Assessments</u>

The Secretary specially assessed penalties for all of the violations at issue. Oak Grove contends that the total of the penalties assessed for the four violations, $182,000.00, is substantially higher than the $47,906.00 in penalties that would have been assessed pursuant to the Secretary's regular assessment formula, and that the Secretary has not justified the imposition of enhanced penalties for the subject violations. I discussed considerations involved in determining appropriate penalties at some length in a recent decision. *American Coal Company*, 35 FMSHRC ___ (June 13, 2013) (slip op. at 48-51). That discussion will not be repeated here. However, the methodology set forth in *American Coal* for determining the amount of the penalty to be imposed for a violation will be followed here, and in future cases.

<u>Method for Determining the Amount of Penalties for the Litigated Violations</u>

The purpose of explaining significant deviations from proposed penalties, as Commission judges are obligated to do, is to avoid the appearance of arbitrariness.[39] Similarly situated operators, determined to be liable for violations of similar gravity, negligence and other penalty criteria, ideally should not be assessed significantly different penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of $1.00 to $70,000.00. The Secretary's regulations for determination of a penalty amount by a regular assessment, 30 C.F.R. §100.3, take into consideration all of the statutory factors that the Commission is obligated to consider under section 110(i) of the Act. The product of that regular assessment formula provides a useful reference point that would promote consistency in the imposition of penalties by Commission judges.[40]

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's regular assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator's negligence consists of five gradations, ranging from "No negligence" to "Reckless disregard." 30 C.F.R. §100.3(d). In reality, however, the degree of an operator's negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving "extreme gravity" and/or "gross negligence," or, as previously stated in section 105(a) of the Secretary's penalty regulations, "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate substantially higher penalty assessments.[41] A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the regular assessment process, e.g., a higher penalty resulting from the special assessment process, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

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Order No. 6698829 is affirmed as an S&S violation. However, it was not highly likely to result in a permanently disabling injury to two miners. Rather it was reasonably likely to result in a lost work days injury to one miner. More significantly, it was not attributable to Oak Grove's unwarrantable failure to comply with the safety standard. Oak Grove's negligence was moderate. A specially assessed civil penalty in the amount of $38,500.00 was proposed for this

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[39] *Sellersburrg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984).

[40] See *Magruder Limestone Co., Inc.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

[41] The subject language was deleted in 2007. *30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. 13592 - 13,621 (March 22, 2007).

violation. If calculated under the Secretary's regular assessment formula, the result would have been a penalty of approximately $5,000.00. The reduced levels of negligence and gravity would not justify an enhanced penalty. Considering the factors itemized in section 110(i), I impose a penalty of $3,000.00 for this violation.

Order No. 6698830 has been affirmed as an S&S violation and an unwarrantable failure to comply with the safety standard. A specially assessed civil penalty in the amount of $52,500.00 was proposed for this violation. A penalty calculated under the Secretary's regular assessment formula would have resulted in a penalty of approximately $19,000.00. The high gravity of the violation, which contributed to a risk of serious injury to the entire mining crew, justifies an enhanced penalty. Considering the factors itemized in section 110(i), I impose a penalty of $55,000.00 for this violation.[42]

Order No. 6698831 is affirmed as an S&S violation. However, it was not highly likely to result in a permanently disabling injury to ten miners. Rather it was reasonably likely to result in a lost work days injury to one miner. More significantly, it was not found to be the result of Oak Grove's unwarrantable failure. Oak Grove's negligence was moderate. A specially assessed civil penalty in the amount of $52,500.00 was proposed for this violation. If calculated under the Secretary's regular assessment formula, the result would have been a penalty of approximately $5,000.00. The reduced levels of negligence and gravity would not justify an enhanced penalty. Considering the factors itemized in section 110(i), I impose a penalty of $3,000.00 for this violation.

Penalties against individual Respondents.

The imposition of penalties against individual Respondents found liable under section 110(c) of the Act was also addressed in *Mize Granite Quarries,* 34 FMSHRC at 1764.

> The six statutory criteria also apply, with revisions appropriate to individuals, to the assessment of section 110(c) penalties against individuals. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997). As the judge noted, the relevant inquiries include whether the penalty will affect the individual's ability to meet his financial obligations and whether the penalty is appropriate in light of the individual's income and net worth. 33 FMSHRC at 916; *Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 824 (May 1997).

The parties stipulated that Sumpter and Hartzell "have no previous history of assessment

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[42] The Secretary's brief states that a penalty of $70,000.00 was proposed for this violation. Sec'y. Br. at 11. The actual specially assessed penalty is $52,500.00. The reference to $70,000.00 appears to be an error. It is not accompanied by any discussion that would indicate that the Secretary intended to urge imposition of a penalty higher than that actually assessed. *See Performance Coal Co.*, 35 FMSHRC ___ (Aug. 2, 2013). In any event, I find that a penalty of $55,000.00 is appropriate.

under Section 110(c) of the Act and the imposition of the propos[ed] penalt[ies] will not affect their financial viability." Stip. 7. In light of the stipulation, and considering that the individuals were not found liable for the violation alleged in Order No. 6698829, specific information as to their income and net worth, analogous to the "size" criteria, is unnecessary. Findings as to their negligence and the gravity of the violations were made above.

Docket No. SE 2012-306 - Respondent Mike Sumpter

Sumpter was found liable for the violation charged in Order No. 6698830, for which a specially assessed civil penalty in the amount of $7,300.00 was proposed. While he and Hartzell engaged in aggravated conduct sufficient to sustain personal liability, their negligence was not so high as to suggest enhanced penalties. Considering the factors itemized in section 110(i), I impose a penalty of $3,500.00 for his violation.

Docket No. SE 2012-308 - Respondent Rex Hartzell

Hartzell was found liable for the violation charged in Order No. 6698830, for which a specially assessed civil penalty in the amount of $7,200.00 was proposed. Considering the factors itemized in section 110(i), and considering that Hartzell was at a lower level of Oak Grove's management structure than Sumpter, I impose a penalty of $2,500.00 for his violation.

ORDER

Based on the foregoing, as to the remaining allegations against Oak Grove in Docket No. SE 2010-828, it is **ORDERED** that Order No. 6698828 is **VACATED**; and Order Nos. 6698829 and 6698831 are modified, as stated in the discussion of those orders, to citations issued pursuant to section 104(a) of the Act, and are **AFFIRMED, as modified**.

As to the petition filed against Mike Sumpter in Docket No. SE 2012-306, the allegation that he is personally liable for the violation charged in Order No. 6698829 is **DISMISSED**. The allegation that he is personally liable for the violation charged in Order No. 6698830 is **AFFIRMED**.

As to the petition filed against Rex Hartzell in Docket No. SE 2012-308, the allegation that he is personally liable for the violation charged in Order No. 6698829 is **DISMISSED**. The allegation that he is personally liable for the violation charged in Order No. 6698830 is **AFFIRMED**.

It is **FURTHER ORDERED** that Oak Grove pay civil penalties in the amount of $61,000.00 within 45 days of this order; that Mike Sumpter pay a civil penalty in the amount of $3,500.00 within 45 days of this order; and that Rex Hartzell pay a civil penalty in the amount of $2,500.00 within 45 days of this order.[6]

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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[6] 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.