

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

875 GREENTREE ROAD
7 PARKWAY CENTER, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-2682
FAX: (412) 928-8689

September 23, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2011-346
Petitioner,	:	A.C. No. 36-05466-253551
	:	
v.	:	Docket No. PENN 2011-388
	:	A.C. No. 36-05466-256778
EMERALD COAL RESOURCES, LP,	:	
Respondent.	:	Mine: Emerald Mine No. 1

DECISION

Appearances: Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Patrick W. Dennison, Esq. and R. Henry Moore, Esq., for Emerald Coal Resources, LP

Before: Judge Lewis

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Act” or “Mine Act”). The Secretary of Labor has filed a Petition for Assessment of Civil Penalty pursuant to Sections 104(a) and 105(d) of the Act, 30 U.S.C. § 815(d), in connection with Order Nos. 7082871, 7082872, 7073116, and 7073117 and Citation No. 7082869. A hearing was held in Pittsburgh, Pennsylvania on December 5 and 6, 2012. The parties subsequently submitted post-hearing briefs, and their positions and arguments have been duly considered.

I. BACKGROUND AND SUMMARY OF EVIDENCE

The parties read the following joint stipulations into the record at hearing:

1. Emerald Coal Resources, LP, operates the Emerald Mine No.1, where the citations and orders in contest were issued.¹
2. Emerald Mine No. 1 is an underground coal mine in Greene County, Pennsylvania.
3. Emerald Mine No. 1 produced 4,901,640 tons of coal in 2010.

¹ The citations and orders are referred to collectively as “the citations.” Tr. 11.

4. Emerald produces coal using both the longwall method and the continuous miner method.
5. Emerald is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 as amended, 30 U.S.C. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued.
6. Operations of Emerald at the coal mine where the citations were issued in this proceeding are subject to the jurisdiction of the Act.
7. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.
8. The individuals whose signatures appear in Block 22 of the citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the citations were issued.
9. True copies of the citations at issue in this proceeding were served on Emerald as required by the Act.
10. The R-17 assessed violation history report is an authentic copy reflecting Emerald’s history of violations and may be admitted as a business record of the Mine Safety and Health Administration.
11. The imposition of the proposed civil penalty will not affect Emerald’s ability to remain in business.
12. Citation Nos. 7082869 and 7082870 and Orders Nos. 7082871 and 7082872 were issued on October 18, 2010, by MSHA Inspector David Leverknight.
13. Inspector Leverknight was accompanied by Company Representative Adam Strimer.
14. Citation No. 7082870 is a final order of the Commission.
15. Order No. 7082871 was issued at 10:15 on October 18, 2010, and terminated at 1:25 on October 19, 2010.
16. Citation Nos. 7082869 and 7082870 and Order Nos. 7082871 and 7082872 were issued with respect to the C-2 longwall belt.
17. The Emerald Mine Shift Production Report is an authentic copy reflecting Emerald Mine No. 1’s coal production from October 15, 2010, through October 18, 2010, and may be admitted as a business record of Emerald’s.
18. Order Nos. 7073116 and 7073117 were issued on October 21, 2010, by MSHA Inspector Allan Jack.²
19. Inspector Jack was accompanied by Company Representative Adam Strimer.
20. Order No. 7073116 was issued at 9:30 on October 21, 2010, and terminated at 22:30 on October 21, 2010.

² The Transcript inexplicably omits number 18, proceeding from number 17 to 19. Tr. 13. Therefore, stipulations 18-24 are enumerated in the transcript as 19-25.

21. Order Nos. 7073116 and 7073117 were issued with respect to the B-main's left haulage.
22. Emerald demonstrated good faith in the abatement of the citations.
23. Order No. 8007973 is a Section 104(d)(2) order, which was issued on August 6, 2010. This order was contested by Emerald and is scheduled for hearing within the next 20 days.
24. Order No. 8007974 is a Section 104(d)(2) order, which was issued on August 9, 2010. This order was contested by Emerald and is also scheduled for hearing within the next 30 days.³

Tr. 11-14.

FINDINGS OF FACT⁴

Citation No. 7082869

Inspector David Leverknight issued Citation No. 7082869 after observing the bottom belt at the C-2 longwall in contact with the belt structure.⁵ GX-1.

³ 104(d)(2) Order Nos. 8007973 and 8007974 were affirmed as written with only modifications to the penalties by Judge Harner on August 16, 2013. PENN 2011-168

⁴ The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

⁵ David Leverknight is a Mine Emergency Unit (MEU) Specialist for MSHA at the Pittsburgh Technology Center for Technical Support. Tr. 28. In this capacity, he is responsible for purchasing and maintaining all equipment for the MEU, training team members, and responding to all emergencies. Tr. 28. He has served in this position since July 2012. Tr. 28. As part of his duties, Leverknight inspected the Emerald Mine No. 1. Tr. 30.

Prior to this position Leverknight was an underground coal mine inspector from January 2007 until July 2012. Tr. 28. He received his AR card in January or February of 2008. Tr. 28-29. Before coming to MSHA, Leverknight spent five years working at the Enlow Fork Mine for Consol Energy as an underground trackman, and another five years at that mine as a mine examiner. Tr. 20. Prior to that, he worked for Line Mining Company in Jennerstown, Pennsylvania for seven years and for Pierrepont Mining Company in Stoystown, Pennsylvania for one year. Tr. 30. Leverknight has assistant mine foreman papers, machine runners papers, and other related certifications. Tr. 30.

The Emerald Mine No. 1 is a large longwall mine, with continuous miner development for the longwall three entry sections. Tr. 30. The C-2 longwall was only one of the longwall sections producing at Emerald Mine. Tr. 195. It was estimated that the section would produce approximately 7,000-9,000 tons of coal per day or shift.⁶ On October 18, 2010, the mine was planning on mining all three shifts. Tr. 195. In October 2010, Emerald was on a five-day spot inspection for liberating in excess of one million CFM of methane in a 24-hour period.⁷ Tr. 31.

Inspector Leverknight went to Emerald Mine on October 18, 2010 in order to perform part of the E01 inspection for the quarter.⁸ Tr. 31. Generally, there would be two or three inspectors at a mine as large as Emerald. Tr. 31. On that day, Leverknight intended to go into the C-2 longwall section and walk the belts from the section up to the mains. Tr. 31. Prior to going underground, he reviewed the preshift books for that belt for that section. Tr. 32.

Leverknight went underground with David Baer from the union and Adam Strimer from the company.⁹ Tr. 32, 157-158, 166-168. Strimer was still a “redhead,” meaning that he was a

Leverknight has significant experience dealing mine emergencies during both his tenure at MSHA and his work for operators. Tr. 29. He was on the rescue team that responded to two Loveridge Mine fires in West Virginia, the VP 8 Mine fire in Virginia, the Buchanan Mine fire in Virginia, the Mine 84 fire in Pennsylvania, the Quecreek water inundation in Pennsylvania, the Sago Mine explosion in West Virginia, the Upper Big Branch Mine explosion in West Virginia, the San Juan Mine fire in New Mexico, and the Pleasant Hill seal explosion in West Virginia. Tr. 29. The Mine 84 and VP 8 fires were belt fires. Tr. 29. There were no recordable injuries on these belt fires. Tr. 71-72.

⁶ It was not clear from the testimony whether the figure was in reference to shift or daily production.

⁷ A spot inspection occurs when a mine liberates excessive methane in a 24-hour period. Tr. 30-31.

⁸ An E01 inspection is the mandatory quarterly inspection for all underground coal mines. Tr. 31.

⁹ At the time of hearing, Adam Strimer was the Health, Safety and Environmental Coordinator for Axens North America. Tr. 155. He received a master’s degree in Safety Management in 2010 from West Virginia University. Tr. 156. In October 2010, Strimer was an intern in the safety department of Emerald Mine. Tr. 156. As an intern, his duties included traveling with the inspector, filing papers, and taking part in internal communication at the mine. Tr. 156.

David Baer worked at the longwall at Emerald Mine. Tr. 166. He has worked for Emerald since April, 2005, and has also worked as a motorman and outside as a repairman and GI. Tr. 166. Prior to working at Emerald, Baer was a bottom man and outside tippie operator for Maple Creek for four and a half years. Tr. 166. He had a total of 10-11 years of mining experience and was a member of the United Mine Workers. Tr. 166.

new miner with less than a year experience, and was not allowed to travel unaccompanied in the mine.¹⁰ Tr. 32, 16-157. At the time of the inspection, Strimer had only been escorting inspectors for three to five months. Tr. 156-157. Prior to this date, Strimer had not been present when orders were issued. Tr. 156-157, 164. He only witnessed an inspector issue an order on October 18 and October 21, 2010. Tr. 164.

They rode the mantrip all the way into the track up to the section, got out of the mantrip and walked up to 32 crosscut, which is the last open crosscut where the longwall faces and the belt ends. Tr. 32-33, 158-159, 168.

Leverknight began walking the belt at 32 crosscut, and first noticed something out of the ordinary at 27 crosscut. Tr. 34. There he saw the belt rubbing on the belt structure on the stands at the walkway side of the belt. Tr. 35-36. Leverknight had Strimer shut the belt off because Section 75.1725(a) requires that a belt in unsafe condition be taken out of service immediately. Tr. 36, 158-159. Once the belts were shut down, Leverknight felt the stands and testified that they were hot. Tr. 36. He did not see any belt shavings. Tr. 77.

Baer confirmed at hearing that there was an indication that the belt was cutting into the structure. Tr. 168-169. However, Baer did not see the belt cutting into the structure or belt shavings. Tr. 169.

Strimer took notes on the inspection.¹¹ Tr. 157-158; RX-8. He testified that his notes were descriptions of Leverknight's comments, but that he did not confirm that the conditions were as Leverknight described them.¹² Tr. 159-160. Therefore, he cannot remember if he actually witnessed the belt rubbing the structure as his notes indicate or if he saw rollers compacted with coal fines. Tr. 160; RX-8. He could not recall at hearing whether the conditions of the belt line stuck out in his mind. Tr. 161. He also could not recall seeing any belt shavings at the belt line. Tr. 162.

Leverknight continued walking the entire length of the belt, all the way to the main. Tr. 37. During that walk, he noticed several other locations where there was damage to the belt. Tr. 37. At 23 to 22 crosscut, on the tight side of the belt, Leverknight noticed the belt out of

In October 2010, Baer was escorting MSHA inspectors approximately two to three times a week when he was on the daylight shift, which he was on every third week. Tr. 166-167.

¹⁰ The terms "redhead" and "red hat" appear to be used interchangeably by the witnesses.

¹¹ Strimer's notes are labeled October 12, 2010, but Strimer testified at hearing that they were actually for October 18, 2010. Tr. 158.

¹² Baer testified that he took notes 99% of the time when he served as a union representative, and that he probably took notes for the October 18, 2010 inspection. Tr. 171-172. However, Baer was not able to locate his notes prior to the hearing. Tr. 172.

alignment, rubbing along the stands. Tr. 37-38. At 3 crosscut, which is almost at the mouth of the section by the takeup unit, the belt was cut into seven stands in a row. Tr. 38. The belt was cut 2.5 inches deep into the steel stand, and Leverknight found the belt in the cut, meaning that it had been running in the cut when he turned off the belt. Tr. 38.

The stands are made of three inch by three inch tubing, and the cut was almost the entire way through.¹³ Tr. 38. The seven stands were each ten feet apart from each other. Tr. 39. He did not see any belt shavings at 23 to 22 crosscut, but did see belt shavings at 3 crosscut. Tr. 77-78. Leverknight testified that he does not consider the presence or absence of shavings meaningful because shavings can be cleaned prior to the inspection. Tr. 78.

Leverknight testified that it was impossible for a rubber belt to cut 2.5 inches into a steel belt stand within a few shifts; it would take an extended period of time. Tr. 83. He concluded that it would not have been possible for the belt to have cut entirely into the structure prior to his inspection, because after the belt was shut off it was still resting 2.5 inches deep in the seven stands. Tr. 84-85.

Gregory King conducted the preshift examination for the belt system between 9:00-11:30 p.m. on October 17, 2010.¹⁴ Tr. 101; RX-5, 34. He found float coal dust on the C-3 belt. Tr. 101; RX-5, 34. He found that the belt needed to be trained on the C-2 belt at the nine to 15

¹³ A structure that has been cut into does not need to be replaced because it is suspended from chains. Tr. 83. The relevance was that it was evidence that the belt was rubbing in the structure, thereby producing heat. Tr. 83-84.

¹⁴ Gregory King has worked for Alpha Resources at Emerald Mine for 11 years. Tr. 97. During that time, he has held the following positions: pumper, motorman, general inside laborer, and mine examiner. Tr. 97. Prior to working at Emerald, he worked for Dilworth Mine for 21 years and Robena Mine for three years. Tr. 97. King received his Pennsylvania assistant mine foreman papers in 1994. Tr. 97-98. He is currently a fire boss and mine examiner at Emerald. Tr. 98. His duties as examiner include performing preshift examinations, walking the belt lines, tracking haulages, performing methane checks, examining roof and ribs, and examining the condition of equipment and belt lines. Tr. 98. During these examinations, King looks for violations and hazards. Tr. 98.

In October 2010, King had approximately one and a half years of experience performing preshift examinations on the C-2 longwall belt. Tr. 99. Sometimes he would conduct the examination of the entire C-2 belt, and sometimes he would split the belt. Tr. 100. When he would split the belt, King and another mine examiner would usually start at the tailpiece. Tr. 100. The other examiner would stay at the tailpiece, while King would go to the haulage, and they would each begin the examination at a pre-determined time. Tr. 100. They would proceed to a split point, which was at 15 crosscut on this section, enter the belt line and continue out. Tr. 100.

Though he could not recall any specifics, King testified that he likely would have begun his preshift examination at around 9:00 or 9:30 p.m. Tr. 104.

crosscut, and was either starting or very close to coming in contact with the structure at four room to the takeup. Tr. 101-102; RX-5, 34. He found float dust from C-2 transfer to C-3 transfer and fines at the tight side of the C-2 transfer on the C-mains belt. Tr. 102; RX-5, 34. When he finished the examination, he would have gone outside and recorded the findings, as well as any corrective actions taken. Tr. 104-105. On October 17, 2010, King did not find any hazards. Tr. 105.

King testified that when he finds a hazard on the C-2 longwall belt, he shuts the belt down. Tr. 105. On October 12, 2010, King found one hazard on the C-2 belt and one hazard on the C-3 belt. Tr. 105; RX-5. As a result, he shut down both belts and reported the hazards to the computer room, and computer room personnel in turn reported it to the belt department. Tr. 105-106. King testified that Emerald's policy is that if the hazard cannot be fixed by the examiner, then the belt should be shut down, reported, and fixed. Tr. 106. There were no repercussions for shutting the belt down, but there were also no repercussions for not reporting hazards. Tr. 106, 108.

King testified that a longwall belt could get out of train due to a movable tailpiece or moveable takeup unit not being straight or the front end not running the belt straight. Tr. 102. He stated that it was possible for the longwall belt to get out of train every time it pushes or advances. Tr. 102-103. In order to train the belt, one moves the rollers and steers the belt like a car. Tr. 103.

Come-alongs were used on the C-2 belts to help straighten the structure, and there was a structure that was out of line in by the takeup unit around 4 crosscut.¹⁵ Tr. 103. King testified that if the come-along were detached it would not serve its purpose of keeping the structure straight so that the belt would run true. Tr. 103.

David Simkovic was responsible for the C-2 longwall belt in October 2010.¹⁶ Tr. 121. On October 12, 2010, Simkovic assigned one of his beltmen to the C-2 longwall because there was float dust and fines. Tr. 122-123; RX-5, 1. Simkovic described the process of training the belt as necessary after the fire boss reports the problem when the belt is rubbing into the structure or running off to one side. Tr. 124. Reviewing the "Action Taken" section of the book, Simkovic testified that he either trained the belt or was present while his repairmen or beltmen trained the belt. Tr. 123-124; RX-5, 34. He then marked it as "Belt Trained" and "Men Assigned." Tr. 124; RX-5, 34. To remedy the problem of the belt rubbing the structure,

¹⁵ Leverknight defined a "come-along" as a hand winch used to pull materials. Tr. 79.

¹⁶ David Simkovic has worked at Emerald Mine for 23.5 years, and was working as a belt foreman in 2010. Tr. 120. He has 38 years of total mining experience, and has worked at Western Electric, Nemaquin Mine, Vesta 5 Mine, Pickass Mine, Bobtail Mine, and Gateway Mine. Tr. 120. He has assistant mine foreman and EMT certifications. Tr. 120-121. As a belt foreman, Simkovic's responsibilities include keeping the belts of the mine running, taking care of violations or hazards in the book or that occur during the shifts, and making sure that the belts perform in good working order. Tr. 121. Simkovic also assists the fire bosses if they encounter a problem. Tr. 121. Simkovic finds out about conditions in the mine by reviewing the books. Tr. 122. He is usually responsible for approximately 10 beltmen and two repairmen. Tr. 123.

Simkovic repositioned the rollers and lined the belt so that it did not rub the structure or run off the belt. Tr. 124.

Simkovic testified that prior to putting the come-along on the stands at 3 crosscut, the belt had cut into the stands. Tr. 134. They tried to train the belt with rollers, but could not train it. Tr. 134-135. Therefore, they put a jack to push everything into place. Tr. 135. Belt structures do not get replaced simply because they have been cut into, so they believed this solution to be sufficient. Tr. 135.

Simkovic testified that he trained the belt at the 4 crosscut to the takeup at approximately 1:00 or 2:00 a.m. Tr. 125-126. He remembered seeing come-alongs that were placed in the 4 crosscut to the takeup in order to keep the belt in line because it was cutting into the structure. Tr. 126. If the come-along was detached then the belt would go back out of line and cut into the structure. Tr. 126-127. Furthermore, the belt plow is put on the return belt in order to remove excess debris from the belt so that it does not end up at the tailpiece of the belt. Tr. 127.

On the midnight shift of October 18, 2010, when he trained the belt, Simkovic continued walking up to the C-2 belt. Tr. 127. He walked four to six blocks in order to ensure that he had not moved the belt such that it was rubbing elsewhere. Tr. 127. Simkovic did not recall seeing the belt rubbing anywhere else. Tr. 127.

Leverknight determined that the belt rubbing the structure and cutting into the stands was unsafe because it caused frictional heat. Tr. 40. Emerald Mine uses a fire resistant belt, however, the belt is not fireproof. Tr. 81. Leverknight found the violation in Citation No. 7082869 to be Significant and Substantial (S&S) because the combination of frictional heat, accumulations of coal, and bad rollers at the mine created a belt fire hazard. Tr. 40, 42-43; GX-1. If the belt rubbed on the structure long enough, it would create shavings that could pile up and smolder, leading to a fire. Tr. 43.

Leverknight assessed the negligence as high because, in his experience, a belt cannot cut 2.5 inches into steel in a short period of time. Tr. 41. This indicated that the conditions had existed for an extended period. Tr. 41. Furthermore, the conditions at three crosscut were obvious because the structure was hanging at eye level for anyone walking past. Tr. 41. The conditions at 27 crosscut were obvious because they were on the side of the belt where miners travel. Tr. 41. He determined that one person would be affected by the violation because he did not see anyone working on the belt. Tr. 42. Therefore, Leverknight concluded that the only person who would be affected would be the mine examiner. Tr. 42.

There were numerous safety systems on the belt line, which the Respondent argues would have mitigated any danger. There were CO sensors on the belt, spaced approximately 1,000 feet apart. Tr. 70. Leverknight tested the sensors and they were functioning. Tr. 71. He estimated that the sensors were set to five or seven parts per million, however safety manager William Schifko testified that the the alarm detects five parts per million and alerts when it detects 10

parts per million.¹⁷ Tr. 70-71, 206-207. CO sensors were used to detect when the belt gets hot and releases carbon monoxide in order to catch the initial stages of combustion. Tr. 71. They provide a warning that would be given to the section to prompt the evacuation of the section. Tr. 71. The C-2 belt also has a fire suppression deluge system in the drive areas, storage areas, motors, and other areas. Tr. 207. There were also handheld detectors and extinguishers along the belt. Tr. 207-208. However, in Leverknight's experience, CO sensors will not sense when the belt is burning. Tr. 91-92. He testified that he has placed a CO detector beside a pile of shavings that were smoldering with visible smoke, and the alarm was not triggered. Tr. 92. In addition to the CO sensors, there is a barrel of fire protection, a fire hose, fire valves, and overhead water sprays that are equipped to react to a rise in temperature. Tr. 72. However, the fire suppression system is only at the belt drive and the belt takeup, and it does not cover the middle of the belt. Tr. 92.

The condition could not be fixed until the other orders that Leverknight issued were terminated, because they had to turn on the belt in order to train it. Tr. 43. In order to do so, they had to clean the accumulations and rock dust, and change the rollers before training the belt. Tr. 43. In total, Emerald changed 46 rollers to terminate this citation. Tr. 93; GX-8, 2.

Schifko was not at the mine when Leverknight was conducting his inspection on October 18, 2010; however he did speak with Leverknight later in the day. Tr. 202. Leverknight told Schifko that the come-along at the No. 4 crosscut was not performing properly, so Schifko began investigating the matter. Tr. 202-203. Schifko interviewed Levo and Oros, the two mine examiners who would have performed the preshift examination prior to the inspection. Tr. 203; RX-4. Levo told Schifko that the belt was being pulled by come-alongs and that the belt was in operation during their examination. Tr. 20. He said that the belt was bulk dusted from crosscuts six to 10 and from 10 to 15. Tr. 205.

Order No. 7082871

Order No. 7082871 was issued for accumulations of combustible materials on the C-2 belt at 9 ½ crosscut to the tailpiece at 32 crosscut. Tr. 106-107; GX-3, 1. Leverknight observed accumulations at the 25 to 23 crosscut while traveling along the longwall belt. Tr. 44-45. These accumulations were under the rollers, contacting the rollers, and built up around the rollers. Tr. 45. The belts are approximately 8 to 10 inches off the floor in that area of the mine. Tr. 46.

Depending on the area, the accumulations were a combination of loose coal, fine coal, and coal dust. Tr. 45-46. He testified that he used the word "dirt" in his report to mean "coal" because it is a habit he picked up while working as a mine examiner. Tr. 45. The coal that was in

¹⁷ William Schifko worked at Emerald for 34.5 years, and in 2010 was working as manager of safety managing compliance issues. Tr. 200-201. At Emerald, he has worked in production, safety, and with the continuous miner and longwalls. Tr. 200-201. He is certified in Pennsylvania as a mine foreman. Tr. 200. His responsibilities as safety manager include ensuring that everyone knows the laws and regulations and investigating circumstances that lead to citations and orders. Tr. 201.

contact with the belt was primarily finer coal dust. Tr. 45-46. Leverknight did not specify in his notes which areas were wet and which were dry. Tr. 75. However, he testified that wet material can become combustible. Tr. 75-76.

Next, Leverknight observed accumulations at the 22 to 21 crosscut contacting two rollers on the tight side of the belt.¹⁸ Tr. 46. He testified that it was a similar combination of loose coal, fine coal, and coal dust. Tr. 46-47. At the 16 to 15 crosscut, Leverknight observed accumulations under the rollers and in contact with the roller on the tight side of the belt. Tr. 47. Because it was on the tight side of the belt, Leverknight had to look under the belt to see the accumulation in contact with the roller. Tr. 47. Leverknight testified that the mine examiner should look under the belt in order to be sure that the belt is not in contact with anything when it is running. Tr. 47.

Leverknight then observed similar conditions at the 14 to 13 crosscut, including accumulations and coal in contact with rollers on the tight side of the belt. Tr. 47. He explained that the cause of this condition is often that belt cleaners only clean the walk side and ignore the tight side of the belt. Tr. 47-48. This allows accumulations to build on the tight side. Tr. 47-48.

Leverknight also observed coal accumulations under the rollers on the walk side at 12 crosscut. Tr. 48. These accumulations were similar to the others, with a mixture of loose coal, lump coal, and fine coal dust. Tr. 48. All along the belt, Leverknight noticed a coating of float coal dust on the rock dust. Tr. 48. He believed that these accumulations had existed for some time because the amount of accumulations, the distance that the accumulations covered, and the fact that the spillage was under the rollers indicated that it had not simply spilled off the sides. Tr. 49.

Neither Strimer nor Baer recalled seeing rollers in coal. Tr. 160, 168-169. Strimer testified that he did not get underneath the belt to look to see if the rollers were in contact with accumulations. Tr. 160.

On the afternoon shift of October 17, 2010, Gregory King performed the preshift examination on the C-2 belt from 9 ½ crosscut to 15 crosscut, and John Hoak examined the C-2 belt from 15 crosscut inby to the tail.¹⁹ Tr. 106-107, 116-117. Hoak was “pretty sure” that the

¹⁸ The longwall belt has a “walk side” where individuals travel and a “tight side” where individuals do not travel. Tr. 37, 41.

¹⁹ John Hoak works at Emerald Mine as a mine examiner. Tr. 113. He has worked at Emerald for two years as a roof bolter, nine years as a miner operator, five years as a motorman, one and a half years as a pumper, and 2.5 years as a mine examiner. Tr. 114. Prior to Emerald, he worked at Shannopin Mine for 11 years and Banning Mine for three years. Tr. 114. He has been a certified Pennsylvania mine examiner since September 1993, and has been conducting examinations once a week since that time. Tr. 114-115. As an examiner, his responsibilities are to inspect belt lines and haulages for dangers, hazards, violations or conditions, methane content, and direction of air. Tr. 115.

belt was running during the examination, but the mine was not producing coal. Tr. 117-118. Hoak did not find any hazards or conditions. Tr. 117. King testified that he did not find any accumulations of combustible materials or material in contact with rollers during his examination. Tr. 107.

King did not train the belt on October 17, 2010, but he was familiar with how it would be done. Tr. 109. One would work from outby in to train the belt between four and three crosscut. Tr. 109. He testified that one could cause accumulations when training the belt if one performed the task incorrectly, however it would be impossible to get accumulations ten crosscuts away. Tr. 108-109. Furthermore, when the belt moves, it can go out of train. Tr. 110. Every time there is a longwall panel completed, which occurs every 90 minutes, the tailpiece moves. Tr. 110. Therefore, the belt could go out of train every 90 minutes. Tr. 110. Additionally, King testified that if the come-along holding the belt in train detached, it could result in the belt running out of train. Tr. 111. If this were to happen, it could result in coal being dumped off the side of the belt in a quick time frame of 10-15 minutes. Tr. 111.

The longwall belt moves about 950 feet per minute, which makes it a very fast belt. Tr. 132. The other section belts move about 350 feet per minute. Tr. 132. Simkovic testified that accumulations could occur on the C-2 longwall belt very quickly if the tailpiece was moving from the belt running out of train. Tr. 133. Simkovic did not recall seeing any of the conditions described in Order No. 7082871. Tr. 133; GX-3.

Reviewing Order No. 7082871, Mine Examiner James Levo testified that he was responsible for the 9 ½ crosscut to the belt tailpiece, and that he did not recall seeing any accumulations in those areas.²⁰ Tr. 150; GX-3, 1. He testified that if he had seen accumulations or the belt cutting into the structure, he would have listed these in his report. Tr. 150-151. Levo further testified that if there were rollers that were broken or popped out, he would have recorded them as a condition in the book. Tr. 152.

The hazards from coal accumulations include damaging rollers and causing the belt to rub the accumulations and cause a fire. Tr. 51. A mine fire could result in injuries including smoke inhalation and burns. Tr. 51. Additionally, if there was an explosion on a longwall face with the float coal dust, that could propagate an explosion on the belt line. Tr. 51. Leverknight did not detect any methane during the examination, making a methane ignition unlikely. Tr. 73.

²⁰ James Levo has 30 years of mining experience, with 18 years at Emerald, and 12 years at Clude Mine, Gateway Mine, and Target Mine. Tr. 142. In 2010, Levo worked as a mine examiner at Emerald Mine. Tr. 142. He became certified as a mine examiner in 1984 and has been conducting preshift examinations since 1986. Tr. 142-143. As a mine examiner at Emerald, Levo examines belts and haulages and air courses for hazards and conditions. Tr. 143.

In 2010, Levo conducted preshift examinations on the C-2 longwall belt once a day for five to six days per week. Tr. 144. By that time, he had been conducting these examinations for approximately four to five years. Tr. 144. Levo typically conducted the examination of the outby portion of the belt, the head area to 15 crosscut outby, and Bruce Oros would conduct the examination inby. Tr. 144-146.

The float dust was not in suspension, but Leverknight testified that float dust does not have to be in suspension for it to constitute a hazard. Tr. 73-74.

Leverknight issued Order 7082871 as Significant and Substantial because all the elements were present to cause a mine fire. Tr. 52; GX-3. There were accumulations, bad rollers, belt rubbing on the structure, and belt rubbing on the accumulations. Tr. 52. He assessed the violation as high negligence and unwarrantable failure because he believed that the violation had existed for some time, and the preshift examination was performed only a few hours earlier. Tr. 52-53. According to the Emerald Mine Shift Production Report, coal was produced on the C-2 longwall on the daytime and midnight shift of October 15, 2010, and on the midnight shift of October 18, 2013. Tr. 53-54; GX-10-1. Therefore, a preshift examination was required prior to the midnight shift on October 18. Tr. 55. Leverknight testified that the coal produced during the midnight shift was not likely to have caused the accumulations he saw because the accumulations were under the belt and around the rollers, ground fine, and had other qualities indicating they had been there for some time. Tr. 55. Leverknight described the accumulation violation as obvious because of the extensive amount of materials on the belt and the distance that they were spread out. Tr. 55-56. Additionally, Emerald Mine had a history of Section 75.400 violations. Tr. 55.

When Leverknight left the mine at 3:30 pm, this Order had not yet been terminated. Tr. 56-57. The operator originally told Leverknight that they would be finished cleaning up the accumulations and rock dusting by the end of the day shift. Tr. 57. However, at some point the mine superintendent told Leverknight that they would not be finished until later in the afternoon shift. Tr. 57. Therefore Leverknight decided to go back to the Ruff Creek Field Office, which is approximately 10 miles from the mine, and told the superintendent to call him when they were an hour or two from being ready to run the longwall. Tr. 57-58.

Steven Simmons was employed as the belt moving foreman on October 18, 2010, but since there were no belts being moved that day, he was helping with other tasks underground.²¹ Tr. 175-176. He became aware of the circumstances that led to the issuance of Citation No. 7082869 on October 18, 2010 at 10 a.m. Tr. 176. At that time, the computer room attendant called Simmons and told him that there were issues that needed to be resolved. Tr. 176. Simmons went to the drive location at 22 or 23 room and found the belt shoveler who was in charge of cleaning the belt that day. Tr. 177. There were typically two shovelers to a longwall belt line per shift. Tr. 177-178.

²¹ Steven Simmons worked at Emerald Mine for eight years, with the first four as a belt foreman and the last four as the belt moving foreman. Tr. 174. Simmons stated that the difference between these positions is that the belt foreman performs any work related to the belt, while the belt moving foreman is primarily in charge of advancing the belts in the working sections. Tr. 175. Prior to working at Emerald, Simmons performed conveyor maintenance for four years at Conveyor Services and four years at Stahora Company. Tr. 175. He had approximately 16 years of experience with mining belts. Tr. 175.

Leverknight discussed with Simmons his findings and what needed to be addressed. Tr. 178. Simmons gathered men to clean the area, and he testified that when he arrived there the necessary shoveling was minimal. Tr. 178. Simmons arrived at the longwall belt when it was already down and stated that there were no hot rollers. Tr. 179-180. Simmons testified that the C-2 longwall belt was rock dusted and that the area was easily “whitened up” with rock dust. Tr. 179. He described the consistency of the material underneath the belt as “light, flakey, what they call corn flakes,” that flake off the belt. Tr. 179. Simmons further described the materials as slightly wet or moist. Tr. 179.

Simmons looked at the entire length of the belt and assigned men to clean the material in the areas where Leverknight specified. Tr. 180. Simmons testified that those areas each required less than a shovel full of material to be cleaned out. Tr. 180. Simmons stated that the material was barely in contact with the rollers, and would have only required the moving of a three-quarter inch diameter roof bolt under the belt to clear it. Tr. 180-181. Simmons had 13 men working with him to clean up the accumulations and rock dust. Tr. 184, 186. When Simmons ended his shift at 5 p.m. on October 18, 2010, the entire belt was shoveled and his men were in the process of applying rock dust to the area. Tr. 182.

On October 18, 2010, shift foreman Keith Mills was at an annual retraining class.²² Tr. 188-189. After it was called out that citations and an order were written on the C-2 belt, Mills and Joe Privolo went to investigate the situation. Tr. 189. They arrived at the belt at approximately 11:30 and went to nine room. Tr. 189. Privolo went to the tight side, and Mills went to the wide side, and they began walking the belt. Tr. 189-190. From nine room to 20 room, the area ranged from damp to wet, and the rock dust was a grayish color, indicating moisture. Tr. 190. They continued to 13 to 14 room, where the rollers were marked as needing to be cleaned, and got down on their hands and knees. Tr. 190. They scraped the material with a fiber pin, and concluded that the material was mainly rock dust and wet. Tr. 190. They continued to 15 room and similarly concluded that the material under the bottom roller was mainly rock dust and damp. Tr. 190. They continued to 15 to 16 room and found that two rollers were missing. Tr. 190. The belt was in contact with the mine floor, but the area was wet and rock dusted. Tr. 190-191.

They then proceeded to 16 to 17 room and found fines and rock material in the bottom roller. Tr. 191. At 17 to 18 room, they found that rollers were missing. Tr. 191. At 20 room, they found three men cleaning the area. Tr. 191. The area at around 20 room was dryer and the rock dust was white. Tr. 191. At 26 to 27 room there were missing rollers; at 27 to 28 room

²² Keith Mills worked at Emerald Mine for approximately five years. Tr. 186-187. In his first year and a half, he was a section supervisor; he then worked as a shift foreman for three years; and then as a section coordinator. Tr. 187. In 2010, he worked as a shift foreman, where he was responsible for the safety, production, and cost for the entire shift. Tr. 188. Prior to working at Emerald, Mills worked for 30 years at Wabash in Illinois, as safety committeeman, section supervisor, assistant shift foreman, shift foreman and coordinator, and production coordinator. Tr. 187. Mills has Pennsylvania mine foreman papers, Illinois mine examiner and mine manager papers, and Indiana mine manager papers. Tr. 187-188.

there were four missing bottom rollers; and at 28 to 29 room there were seven missing bottom rollers. Tr. 191. The belt from the tail to 17 room had been cleaned and placed on the belt. Tr. 192.

Mills testified that when he left the mine at 12:30 p.m. the majority of the cleaning was complete, but Order No. 7082871 was not abated until 1:25 a.m. Tr. 192-193; GX-3, 3. The only areas that still needed to be cleaned up after Mills left were from 17 room down to nine room. Tr. 193. Mills testified that the area between the tail to the 17 to 18 room was cleaned in approximately one and a half hours. Tr. 193.

Leverknight received a call from the operator at approximately eight hours later, at 11:00 or 11:30 pm. Tr. 58. He returned to the mine and terminated Order No. 7082871 at 1:25 am. Tr. 58; GX-3-3.

Citation No. 7082870

Leverknight issued Citation No. 7082870 for the damaged rollers he observed along the C-2 longwall belt.²³ Tr. 59-60; GX-2. He first saw the damaged rollers at 22 to 21 crosscut. Tr. 60. He observed bad bottom rollers down in the coal on one side that were not turning and were worn flat from the belt rubbing on the roller. Tr. 61. One of the rollers had not been turning, so it was dropped down on one side. Tr. 61. However, the other side of the roller was still in contact with the belt, resulting in a flat spot on the roller. Tr. 61.

Leverknight next observed a damaged bottom roller at the 17 to 16 crosscut. Tr. 61. Similar to the previous situation, one side was hanging down on the coal, and the side in contact with the belt resulted in a flat spot on the roller. Tr. 61.

²³ Leverknight provided the following extended definition of “bad” or “damaged” rollers:

Some of the rollers, they have bearings on both ends where they ride on the axle shaft. The bearings go bad and fly apart, and the steel barrel of the roller actually just rubs on the shaft itself.

Some of them, the steel barrel itself of the roller wears in half, and they just start flopping on the shaft.

Some of them are actually damaged on one side. So they drop them down out of the hanger so they're not in contact with the belt. That's the damaged rollers.

Flat spots wear in the barrels because the bearings go bad and it locks the roller up so it won't spin, and the belt just rides on top of it, flattens it from rubbing on it.

Tr. 60.

Leverknight next observed a missing bottom roller at the 16 to 15 crosscut, which allowed the belt to go slack and ride on coal fines under the belt. Tr. 61-62.

Leverknight next observed a damaged bottom roller at the 4 to 3 crosscut. Tr. 62. This roller was dropped down into the coal on one side, while the other side made contact with the belt, leading to a flat spot on the roller. Tr. 62. Leverknight observed a come-along in place that was hooked to the structure to move it over. Tr. 79. It was being used in order to keep the belt trained, however only one side was hooked up. Tr. 79.

Reviewing Citation No. 7082870, Levo testified that the bad rollers cited at four to 3 crosscut and 16 to 15 crosscut would have been in the area where he conducted a preshift examination. Tr. 152; GX-2, 1. He testified that he did not remember seeing the bad rollers cited. Tr. 152-153.

Leverknight issued Citation No. 7082870 as Significant and Substantial because of the combination of damaged rollers and missing rollers that allowed the belt to ride on the coal accumulations. Tr. 62. Leverknight did not observe any frictional heat when he saw the bad rollers because the belt had been shut off from the moment he originally observed it rubbing on the structure. Tr. 63.

The Respondent did not contest this citation. Tr. 62-63. It changed the rollers on the belt during the process of cleaning accumulations and rock dusting. Tr. 63. It is Schifko's responsibility to decide which citations and orders to contest, and he decided not to contest Citation No. 7082870. Tr. 206. Schifko testified that "if the rollers were bad or damaged, they were what they were. I don't frivolously contest issues." Tr. 206.

Order No. 7082872

Leverknight issued Order No. 7082872 for an inadequate preshift examination of the longwall belt. Tr. 63; GX-4. Such examinations are necessary in order to ensure that there are no hazards or violations that would be detrimental to miners in the oncoming shift. Tr. 64. Preshift examinations are required within three hours prior to the oncoming shift for any area in the mine where there will be persons working or traveling. Tr. 64. When a mine examiner discovers a hazard or violation in any area of the mine, he is required to record it in the book and make sure that it is taken care of immediately. Tr. 64. Leverknight issued Order No. 7082872 after he observed the conditions that he cited in Citation Nos. 7082869, 7082870, and Order No. 7082871. Tr. 64-65.

Leverknight issued Order No. 7082872 for inadequate preshift examinations as Significant and Substantial because the underlying conditions were assessed as Significant and Substantial. Tr. 65. He assessed the negligence as high and determined that it was an unwarrantable failure because the examiners are agents of the operator and the conditions appeared to predate the prior examination. Tr. 65-66. The preshift examinations for October 18, 2010 indicate that there were no violations or hazard reported. Tr. 66-67; GX-9-12, 13. Leverknight testified that the accumulations should have been recorded as dangerous and hazardous conditions because they were in contact with the rollers and the belt. Tr. 67. He also

believed that the belt rubbing along the structure and the bad rollers should have been recorded as dangerous and hazardous conditions. Tr. 67.

Simkovic testified that if the belt in the C-2 longwall had been observed by a preshift examiner as rubbing along the stand, it would be recorded as a violation. Tr. 136. If the belt were rubbing against the stand or running through the structure where it had cut before, Simkovic would not consider it a hazard. Tr. 136-137.

Leverknight determined that one person was likely to be affected by the failure to conduct an adequate preshift examination because no one was assigned to work on that belt. Tr. 67-68. When he walked the belt, he did not see anyone along the entire length of the belt. Tr. 68. Furthermore, the belt dumps out into the return, so it does not affect the section. Tr. 68. Therefore, he assumed that the only person that would be on the belt would be the examiner. Tr. 68. However, Leverknight also testified that he did not take into account that there were two examiners that split the belt. Tr. 68.

On the October 17, 2010 preshift examination, Mine Examiner James Levo indicated that the belt needed to be trained at the 4 crosscut to the takeout. Tr. 147; RX-5, 34. On October 18, 2010, Levo did not find any hazards or conditions on the C-2 belt, and he did not recall seeing that the belt needed to be trained. Tr. 145-147; RX-5, 34, 37. Levo recalled seeing a set of come-alongs from the 4 crosscut to the takeout that were attached to the rib and the wide side of the belt structure in order to keep the belt structure in place and not let it run out of train. Tr. 147-148. He recalled that the belt structure ran out of train and rubbed the structure prior to October 18, 2010. Tr. 148. When this happens, the belt will usually leave belt shavings and sometimes cut the structure. Tr. 148. Levo testified that if he did not witness the belt rubbing the structure, causing friction or smoke, he would not note in his examination if there were grooves in the structure. Tr. 148-149. He testified that such grooves were not meaningful. Tr. 148-149. Levo testified that when he finishes his examinations of the belts, he fills out the book and then reports his results to his shift foreman or the mine foreman. Tr. 149-150.

In October 2010, Bruce Oros and his co-examiner, Jim Levo, examined the C-2 longwall belt every day.²⁴ Tr. 287-288. On a typical inspection, they would come out of the C-3 area and proceed into the C-2 area, with Levo walking the belt in from the C-3 head and Oros walking toward the tail from 15 room. Tr. 288. Oros conducted the five to seven a.m. examination on October 18, 2010. Tr. 289; RX-5, 36. He did not identify any hazards or conditions during his

²⁴ Bruce Oros worked as a supervisor and acting shift foreman for Emerald Mine. Tr. 285. Prior to working at Emerald, Oros worked for 13 years at Nemaquin Mine fire bossing, working on the river, at the prep plant, running a buggy shuttle, and bolting. Tr. 286. He has mine examiner and assistant mine foreman papers. Tr. 286. In 2010, Oros was a mine examiner for Emerald, where his duties included insuring that state and federal laws were followed, and that there were no imminent dangers, hazards, and conditions in the mine. Tr. 286-287. Between 1992 and 1996, Oros was the chairman of the safety committee for two locals of the UMWA, where he was responsible for ensuring the safety and health of mine workers. Tr. 286. He has between 25 and 30 years of experience conducting mine examinations. Tr. 286-287.

preshift examination. Tr. 289; RX-5, 36. Oros preshifted the area at 15, 26, 21, 22, 23, and 25 tailpiece at 32 crosscut, and he testified that he did not recall seeing the conditions described in Order 7082871. Tr. 290.

Oros described the longwall belt as volatile stating that “conditions can change at any time. Belt runs dry, you get float dust. Belt walks, you get spillage.” Tr. 291. However, he testified on cross-examination that if material were to spill off the belt, it would be pieces of coal. Tr. 291. Dust would only be produced if the conditions were dry or if the belt was rubbing the structure. Tr. 291-292. Oros testified that if the belt were rubbing the structure, he would shut it down. Tr. 292.

Leverknight terminated the citation when he came back to the mine that night after the operator gave all the preshift examiners a short retraining on conducting proper preshift examinations on the belt. Tr. 68.

Order No. 7073116

Inspector Allan Jack issued Order No. 7073116 after observing damaged roof bolts and straps, which he determined constituted a violation of 30 C.F.R. § 75.202(a) in that they provided inadequate roof supports.²⁵ Jack was at Emerald Mine No. 1 on October 21, 2010 in order to conduct the normal E01 quarterly inspection. Tr. 222-223. Jack arrived at the mine at 7:05 a.m., let the company know that he was on the property, and checked the on-shift and preshift examinations. Tr. 223. He testified that there was nothing of note in the preshift examination records. Tr. 224.

Jack intended to inspect the B-left haulage and B-inlets, which are the B-main haulage.²⁶ Tr. 224. At the time, Emerald was recovering a longwall at the B-main section, which involves removing and disassembling the longwall and moving it to another section of the mine. Tr. 224. He traveled underground with Adam Strimer, as the company representative, and Matt Shiflet, as the miners’ representative. Tr. 225, 294-295.

They started the inspection at the bottom of the No. eight shaft and traveled on foot towards B-4 section. Tr. 295. While traveling up the B-left haulage on foot, Jack observed roof straps hanging from the mine roof, which prompted him to inspect the area more closely. Tr. 225. Jack described the purpose of the roof straps or channels as helping to support the roof by holding up localized loose roof material. Tr. 229. Upon closer inspection, Jack found damaged roof support, missing roof support, and loose hanging materials. Tr. 225. Jack issued Order No.

²⁵ Inspector Allan Jack worked for MSHA for four years in the Ruff Creek Field Office. Tr. 221. Prior to working for MSHA, he worked for Consol Energy at Enlow Fork Mine for approximately 10.5 years as a miner bolter, center bolter, mining machine operator, and mine examiner. Tr. 221-222. He has assistant mine foreman and Pennsylvania shot fires certifications. Tr. 222.

²⁶ Inspector Jack defined a “haulage” as the entry in the mine that the miners use to travel in and out on something akin to a railroad system on personnel carriers, or mantrips. Tr. 225.

7073116 upon finding the condition of the B-left haulage, citing a violation of 30 C.F.R. §75.202(a). Tr. 226-227; GX-5.

Haulages are the primary way to enter and exit the mine and also the primary escapeway for the side of the mine Jack was traveling. Tr. 226. All the equipment for the longwall is transported through the haulage. Tr. 265. Miners using the haulage as an escapeway would be traveling on foot. Tr. 226. Some of the vehicles that the miners travel on have canopies, but there are no certified falling object protections on them. Tr. 226.

Jack sketched a diagram in his notes of the mine roof in order to illustrate where the bolts were damaged and missing, and where the mine roof straps were damaged. Tr. 227; GX-13, 3. He reviewed his notes and illustrations at the hearing.²⁷ Tr. 228. In total, Jack observed seven rows of damaged roof support. Tr. 232. In the second row, Jack observed a mine channel roof strap that was torn in two pieces and had a twisted bolt plate. Tr. 229. In the third row, he observed a bolt that had the head sheared off of it and was damaged severely. Tr. 229. Furthermore, there were bent and smashed bolts that were put in supplementally, as well as several twisted and bent straps. Tr. 229. In the fourth row, Jack observed a channel that was ripped two times, with the straps pointing aimlessly, as well as damaged bolts and twisted plates. Tr. 229-230. In the fifth row, he observed a mine channel severely battered and smashed, as well as some twisted plates. Tr. 231. In the sixth row, he observed a roof channel that was severely damaged and torn in pieces, as well as bolt heads smashed and missing and twisted plates. Tr. 231. In the seventh row, he observed one damaged bolt head and one bolt head missing. Tr. 231-232.

He described the roof in the area as having loose material hanging, with old and new potted out coal, and rock showing. Tr. 232. There was also roof coal and rock lying on the mine floor that had fallen. Tr. 232. Jack took pictures of the conditions that he described, and interpreted the photos at hearing. Tr. 232-233, -233-245; GX-15; GX-29, 3. Jack did not observe signs of sagging or slicks during his inspection on October 21, 2010. Tr. 261-262.

The plan called for a minimum of five-foot bolts. Tr. 262-263. The bolts used in this section of the mine were combination bolts that were eight-foot long and resin assisted. Tr. 230, 262. The bolt comes in two four foot sections, with the top half being a rougher diamond shape bolt that gets installed in the mine roof with resin. Tr. 230. There is then a coupler in the center where the lower four foot half is inserted with dowel pins. Tr. 230. The bolt is spun for approximately 30 seconds, which permits the resin to set in the mine roof in the top four foot

²⁷ In the diagram, a circle represented a bolt that was bent or damaged, a star represented a solid bolt with no damage, a circle with an "X" through it represented bolts that were damaged to the point of having the heads missing, a rectangle with a circle or an "X" within it represented a bolt in a mine roof strap that was damaged with a twisted plate, a squiggly rectangle represented a roof strap that was battered and smashed, and a rectangle represented a roof strap. Tr. 228. GX-13, 3.

section and allows the bottom half to be torqued.²⁸ Tr. 230. The dowel pin then breaks, causing the two pieces of the roof to come together and form a beam in the mine roof. Tr. 230-231. Jack testified that a bolt head is like a bearing surface holding all the bearing weight, and that a damaged bolt affects its integrity. Tr. 230-231.

The roof bolts are permitted to be as far as five feet between rows and five feet from the center bolt to the rib bolt. Tr. 263. Jack testified that the spacing between the bolts was less than five feet, and there were more bolts than were necessary. Tr. 264-265.

Inspector Jack testified that rock dust and rust were indications of whether the damage he observed was old or new. Tr. 234. The area was rock dusted only a few times per year, therefore the presence of flaking rock dust on damaged bolts indicate that the damage was old. Tr. 234.

The hanging strap that Jack described was approximately five feet from the mine floor. Tr. 239. This was a low area of the mine, with the roof being only five feet 11 inches high. Tr. 239. The rest of the haulage was approximately six and a half feet high. Tr. 239-240. In the area of the roof with newer damage, Jack estimated that the roof had been potted out in a six by 12 foot area. Tr. 240. He could not measure the area because there was unsupported top and inspectors will not travel under unsupported top. Tr. 240.

Jack identified a switch near the haulage that is used to go into another sidetrack. Tr. 243-244. Fire bosses and examiners would need to use the switch, and when doing so they would write down the time, date, and their initials. Tr. 244. The mine examiner's initials prior to Jack's inspection were "DT," which Jack understood as a reference to Dave Thearle. Tr. 244. Thearle indicated that he did the examination at 6:12 a.m., and Jack issued the citation at 9:30 a.m. Tr. 244-245.

While underground, Jack told the company representative, Adam Strimer that he was issuing (d) orders on the condition and on the preshift examination. Tr. 245-246. When he reached the surface, he talked with William Schifko about the issues. Tr. 246. After Schifko viewed the conditions, he told Jack that he did not believe that the violation was an unwarrantable failure. Tr. 246.

Jack issued the citation as Significant and Substantial because the top was inadequately supported, there was material hanging, and it was a hazard to a miner traveling through the area. Tr. 246-247. The Emerald Mine has experienced roof falls and there was a large roof fall outby in the same haulage as the condition cited, which occurred prior to the citation. Tr. 247. If an accident were to happen as a result of the hazard cited, it would be fatal because falling materials from the mine roof can kill a miner. Tr. 247. Jack issued the citation as one person affected because he felt that only one person would be entering the area at a time. Tr. 248. Jack estimated that some of the damage had existed for hours and some for weeks. Tr. 248.

²⁸ The B-main left haulage had combination bolts installed, which have a required torque range of 200-300 foot pounds. Tr. 360-361. Each bolt is torqued upon installation. Tr. 361.

There were indications that a number of individuals traveled through the area, including a mine examiner, motormen, a longwall coordinator and his crew, a fire boss pumper, and one other foreman. Tr. 248. Other individuals that traveled through the area on October 21, 2010 include Pumper Fire Boss Jack Favro at 9:09 a.m., Fire Boss Don Hardey at 8:38 a.m. and 8:48 a.m., and Longwall Coordinator Robert Wolfe at 8:22 a.m. Tr. 252; GX-27. The motormen, John Gech and Scott Price, told Jack that they did not damage the ceiling or mine roof. Tr. 248, 250. Gech told Jack that he was hauling shields, but that they did not hit the mine roof. Tr. 250-251. Shields are larger than the normal rolling stock of material in the mine, so they present more of a likelihood for damage to the mine roof. Tr. 252.

The condition was fixed by bringing in a track miner bolter and bolting the area into compliance with the mine's roof control plan. Tr. 253. Jack was told that the mine added more than 40 bolts. Tr. 253. Jack left the mine at approximately 3 p.m on October 21, 2010, and gave his phone number so that they could contact him when they were close to fixing the problem. Tr. 253-254. Jack returned to the mine later in the evening and terminated Order No. 7073116 at 10:22 p.m. Tr. 253.

Jack assessed Order No. 7073116 as high negligence and unwarrantable failure because the obviousness of the condition. Tr. 254. He testified that anyone could have seen the condition and known that it was a violation. Tr. 254. Furthermore, mine management knew that the area was a problem area because there was supplemental bolting used. Tr. 254. This gave Jack reason to assume that the Respondent was aware that the condition existed or should have been aware that it existed. Tr. 254-255. Emerald was cited 27 times in the two years prior to the hearing for failing to have an adequately supported roof. Tr. 279-280.

Order No. 7073117

Jack also issued Order No. 7073117 for a violation of Section 75.360(b)(1) in conducting the preshift examinations. Tr. 255; GX-6. Section 75.360(b)(1) requires a certified examiner to examine an area not more than three hours prior to the start of an oncoming shift for hazards, air quality, and other issues. Tr. 255-256. There were no violations, dangers, or hazardous conditions observed or reported in the preshift examination report for the morning of October 21, 2010. Tr. 256; GX-16, 9. Jack testified that based on his experience as a mine examiner, he would have recorded the conditions in the B-main left haulage as dangerous and hazardous conditions in order to warn miners in the oncoming shift. Tr. 257. The preshift examiner, fire boss, and any other management that came through the area should have reported the damaged roof strap. Tr. 280.

Mine examiner David Thearle was first made aware of Order No. 7073117 the day after the order was issued.²⁹ Tr. 317. Thearle defined bad roof as roof where there are visible cracks,

²⁹ David Thearle had been employed at Emerald Mine since 1981, working as a fire boss for the five years previous to the hearing. Tr. 309. Prior to Emerald, Thearle was a supervisor and section foreman at Montour 4 from 1973-1978, and a general laborer at Marianna from 1978-1981. Tr. 309. He got his fire boss papers in 1976. Tr. 309. Thearle had a brief stint as an

sagging in places, hanging slate, or with coal that is cracking off from pressure. Tr. 313. Potting and roof sloughage are not reportable until they are above the anchorage. Tr. 279. He testified that the roof in the B-main was “good.” Tr. 313. Thearle testified that when he sees a bad bolt, he marks it and reports it in the book for the oncoming shift. Tr. 314. Thearle has shut down the belt and haulage as a consequence of conditions, and has not been criticized by management for his actions. Tr. 315.

Thearle performed the preshift examination on October 21, 2010. GX-16, 9. He did not mark down any hazards, and he testified that there were no hazards present that he did not mark. Tr. 317; GX-16, 9. Thearle testified that he did not see any slips and that there was no strap hanging that would have made an examiner duck to avoid it. Tr. 319-320.

Jack issued Order No. 7073117 solely on the basis of the conditions that he cited in Order No. 7073116. Tr. 257. He assessed it as S&S because the extent of the condition, the unsupported mine roof, and the loose rock hanging were not examined properly to warn miners on the oncoming shift. Tr. 257-258. The violation was obvious because Jack could see the roof straps hanging from a distance. Tr. 258-259. He testified that if one were operating a personnel carrier at the time that he observed the conditions, one would have to duck and move out of the way from the hanging straps. Tr. 259. Strimer testified that he did not believe that the strap would have struck someone. Tr. 296-297. He disagreed with Jack’s assessment that it was a center strap, and that someone would have to duck in order to avoid the strap. Tr. 297. The only way that one could travel in the area without walking under unsupported roof was if one stayed on the far walk side, which would be difficult in the narrow walkway. Tr. 258. Jack testified that he expected injuries resulting from the roof conditions to be fatal, but he assessed it as only one person affected because only one person would be underneath the exposed top at a time. Tr. 258.

Jack assessed the Order as high negligence and unwarrantable failure because he concluded that it was an obvious condition that the mine examiner neglected to report. Tr. 259. In order to terminate the Order, Jack had mine management review Section 75.360 with all certified people at the mine. Tr. 259. He terminated Order No. 7073117 on October 28, 2010 at 10:44 a.m. Tr. 260. At hearing, Jack was informed that the mine examiners had been retrained on Section 75.360 three days prior to his inspection, and he testified that this information would indicate an even higher level of negligence. Tr. 260.

inspector trainee with MSHA from June, 2006-August, 2007. Tr. 310. During that time, he went to training in Beckley for roof control, ventilation, respirable dust, and surface training. Tr. 310.

As an examiner, Thearle examines the mine for hazards and dangers, inspects the belt lines and haulages, and examines the returns and bleeders weekly. Tr. 311. He examines the roof and ribs for accumulations of coal, explosive dust, and gases in order to make sure that conditions are safe for the oncoming shift. Tr. 311. He is responsible for reporting hazards and dangers, but can also record certain violations in the fire boss book. Tr. 311.

In October 2010, Thearle was examining the B-main haulage. Tr. 312. He would travel from the east corridor haulage up to B-7. Tr. 312, 315-316.

Strimer estimated that the damage to the strap was fresh, because of the shiny markings, and guessed that it was caused by the longwall move. Tr. 297. Strimer testified that the roof appeared as if something had rubbed against it, based on the lack of rock dust on it. Tr. 299. Strimer did not recall anyone scaling loose material or seeing any loose material on the ground. Tr. 299.

After Strimer, Jack, and Shiflet exited, Strimer, Schifko, Privolo, and John Hunchuck went back down to the area. Tr. 299-300. Hunchuck was the mine foreman and Privolo was the safety manager. Tr. 300. The group took measurements and mimicked the inspector's investigation. Tr. 300-301. Strimer testified that the company investigation occurred approximately two hours after Jack's and the conditions had not changed in that time. Tr. 301. Strimer testified that the notes he took at the time reflected what Jack told him, and that he felt Schifko's diagram and findings were more accurate than Jack's. Tr. 302-304.

William Schifko performed an investigation after Order Nos. 7073116 and 7073117 were issued. Tr. 325. With him were Hunchuck, Privolo, and Strimer. Tr. 326. They went to the B-mains haulage just outby the B-4 track switch. Tr. 326. Schifko testified that when he arrived underground, there was one strap that was hanging from the mine roof. Tr. 345-346. He testified that he saw no evidence of sagging or cracking on the roof. Tr. 327-328.

He determined that the area had been damaged in the past and recently. Tr. 327, 347. The more recent damage was likely caused by the longwall move, which involved moving 265-275 shields, head drives, tail drives, stage loaders, and shears. Tr. 348. There were motormen traveling back and forth through the cited area after the preshift examinations were completed. Tr. 349. The motormen denied causing the damage, and denied hauling anything out of the mine that would have caused the damage. Tr. 350-351. However, Schifko believed that they were not being honest. Tr. 351, 362. The motormen were not disciplined. Tr. 362-363.

Schifko then evaluated the roof bolts for effectiveness and tightness, and sounded the roof as he progressed in order to determine if there is "drummy, hollow roof, weak roof, broken strata." Tr. 328. He found none of these conditions. Tr. 328-329. Schifko testified that he hit boltheads horizontally and vertically and they were "pinging," indicating that they were solid. Tr. 336. Schifko did not observe any loose material, and saw little material on the ground. Tr. 351-352.

Schifko testified that there was nothing in MSHA's program policy manual or from the manufacturer of the roof bolts concerning guidance for roof bolts. Tr. 336-337. Schifko did not observe any areas that were potted out, and relayed that to Jack.³⁰ Tr. 338.

Schifko identified several of the bolts as non-pattern bolts. Tr. 340. He testified that the minimum length of bolt allowable under Emerald's mine plan is five feet long, and the bolts that were being used were either eight or twelve feet long. Tr. 343-345.

³⁰ Schifko defined "potted out" as "when you have an inversion into the roof. You could get that on initial mining. You could get that at a later date also where materials fall out. Typically, it's domed shape." Tr. 338.

ANALYSIS

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Citation No. 7082869 Violated 30 C.F.R. § 75.1725(a).

Citation No. 7082869 was issued by Inspector Leverknight on October 18, 2010 at 9:45 a.m. for a violation of 30 C.F.R. § 75.1725(a). It states:

The C-2 Longwall belt, MMU-032 was not being maintained in safe operating condition. The bottom belt was in contact with the belt structure on the walkway side at 27 crosscut. The bottom belt was in contact with the belt structure from 23 to 22 crosscuts on the tight side of the belt and the bottom belt was in contact with the belt structure at 3 crosscut. There were 7 stands in a row with the belt cut through the structure approximately 2 ½ inches deep with the belt remaining in the cut. All of these areas were resulting in frictional heat from the belt contacting the steel structure. The operator removed the belt from service immediately.

The inspector assessed gravity as “Reasonably Likely,” “Lost Workdays or Restricted Duty,” and “S&S.” He assessed the negligence as “High,” with 1 person affected. GX-1, 1. The inspector terminated the citation on October 19, 2010 at 1:25 a.m. after the “belt was re-trained and profiled to prevent the belt from contacting the structure.” GX-1, 2.

The Secretary contends that the conditions of the belt, which included its rubbing against and cutting into the belt structure, significant coal accumulations under the belt, and damaged rollers constituted violations of 30 C.F.R. § 75.1725(a). He argues that inspector Leverknight’s testimony sufficiently established proof of the violations, and that the Respondent’s eight witnesses provided testimony that was either consistent with Leverknight’s, not credible, or irrelevant. He argues that the violation was S&S because (1) it violated § 75.1725(a), (2) indicated that the machinery was operating in an unsafe condition, (3) resulted in the discrete safety hazard of a mine fire, an occurrence which (4) presented a reasonable likelihood that smoke inhalation and burns will result.³¹ The Secretary further argues that the violation resulted from the Respondent’s high negligence because there was evidence that the belt had been rubbing against the structure for an extended period of time, the condition was obvious, and it was due to a recurring problem.

The Respondent contends that there was no evidence that Emerald failed to maintain the longwall belt in safe condition, and therefore there was no violation of 30 C.F.R. § 75.1725(a). Respondent argues that the belt did not cut into the stand at crosscut 27, there were no belt shavings present, it was not generating heat sufficient for an ignition of the belt or coal, and the Secretary failed to establish that the condition was unsafe. It argues that if a violation occurred,

³¹ The Secretary also provided an alternative argument based on the third element of the *Mathies* test prior to the Commission’s clarification in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (2010). In light of *Musser Engineering*, as well as *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (2011), this alternative analysis is unnecessary.

it was not S&S because there was no “confluence of factors” present to make it reasonably likely that a fire, ignition, or explosion would occur. The Respondent further argues that the Secretary failed to establish high negligence because the cuts in the stand were pre-existing, the come-alongs were used to correct the condition, and there were no belt shavings present.

Section 75.1725(a) requires that “mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The Commission has held that the standard for determining whether machinery or equipment is in an unsafe operating condition is “whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129-2130 (Dec. 1982). Section 75.1725(a) imposes two duties upon an operator: “(1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation. The Commission requires that the unsafe equipment be removed from service immediately.” *Id.* (citations omitted).

The Commission has held that a belt rubbing or cutting into the belt structure, along with combustible accumulations and possible ignition sources, constituted a hazard in violation of § 75.1725(a). *Martinka Coal Co. v. MSHA*, 15 FMSHRC 2452, 2456 (Dec. 1993); *MSHA v. Jim Walter Resources*, 18 FMSHRC 804, 817 (May, 1996) (“[T]he belt was not in alignment and was contacting some belt stands, ten rollers were missing, and at three locations one end of a roller was lying on the floor. These condition can cause heat and friction which can lead to smoke or a fire.”); *MSHA v. Alabama By-Products*, 4 FMSHRC 2128, 2130-2131 (Dec. 1982) (finding a combination of frozen rollers and belt running out of train cutting into support structures a violation of § 75.1725).

In the case *sub judice*, inspector Leverknight testified that he observed the belt rubbing on the belt structure at 27 crosscut, and proceeded to have the belt shut down. Tr. 34-36, 158-159. He felt the stands and testified that they were hot from the rubbing. Tr. 36. Leverknight observed at 23 to 22 crosscut the belt out of alignment rubbing along the stands. Tr. 37-38. The belt was cut into seven stands in a row at 3 crosscut. Tr. 37-38. The belt was cut 2.5 inches into the 3-inch structure, and Leverknight determined that since the belt was in the cut, it had been running in the cut when he had the belt shut down. Tr. 38. In addition there was float coal dust and fines present. Tr. 101. Leverknight determined that the belt cutting into and rubbing the structure had caused frictional heat and represented a fire hazard. Tr. 40.

Leverknight testified that he observed five areas of significant coal accumulations under the belt. Tr. 44. These accumulations consisted of loose coal, fine coal, and coal dust. Tr. 46. The accumulations were in contact with bottom rollers, and at some of the locations, Leverknight found damaged belt rollers. Tr. 60-61. These accumulations were cited in Order No. 7082871, and are discussed *infra*.

Respondent’s witnesses offered no evidence that contradicted Leverknight’s testimony. King testified that the belt may have run out of train as a result of the come-alongs detaching. Tr.

103. Simkovic testified that prior to putting the come-alongs at the stands at 3 crosscut, the belt had cut into the stands. Tr. 134. However, Leverknight testified that after the belt was shut off, it was 2.5 inches in the structure, meaning that it was running fully within the cut. Tr. 38. Therefore, even if Simkovic's testimony is to be credited, it appears that the belt continued to cut into the structure up until it was shut off.

Respondent makes much of the fact that Leverknight did not observe belt shavings at crosscut 22 to 23, and only saw them at crosscut three. Tr. 77. However, Leverknight testified that he does not consider the absence of belt shavings meaningful, because they can be cleaned prior to the inspection. Tr. 78. The apparent absence of belt shavings in crosscut 22 to 23 does not alter the inspector's conclusion.

I credit Leverknight's testimony over the testimony of the three examiners and the intern Strimer. Tr. 117, 145, 147, 169-172. The examiners each denied seeing hazardous conditions along the C-2 belt, however accumulations had to be cleaned and rollers replaced, which indicates that there were violations present. Based upon the evidence presented at hearing, I find that the described *supra* constituted a violation of 30 C.F.R. § 75.1725(a).

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Leverknight determined that the violation in Citation No. 7082869 was S&S due to the combination of frictional heat, accumulations of coal, and bad rollers. Tr. 40, 42-43. He concluded that these circumstances created a hazard of a belt fire. Tr. 42-43.

S&S is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Powder Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of the most controversies. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.*,

Inc., 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance: “We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Further, “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” and “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

Having found, *supra*, that the conditions described in Citation No. 7082869 violated 30 C.F.R. § 75.1725(a), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. In the case *sub judice*, Emerald Mine was on a five-day spot inspection for liberating in excess of one million CFM of methane in a 24-hour period. Tr. 31. Furthermore, Leverknight testified that the belt cutting into and rubbing the structure caused frictional heat. Tr. 40. These factors, combined with the accumulations and bad rollers present could reasonably lead to an ignition or fire. Tr. 40, 42-43. See e.g. *Big Ridge, Inc. v. MSHA*, 2010 WL 361647, *3 (Aug. 26, 2010)(ALJ)(finding that a belt cutting into the structure exposed miners to an identifiable and discrete safety hazard of a belt fire); see also *MSHA v. Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The third and fourth prongs of the *Mathies* test are also met. The Respondent misstates the S&S analysis repeatedly in its post-hearing brief. In making the argument that a “confluence of factors” test is appropriate it states the following: “The S&S designation is inappropriate because ‘the confluence of factors’ for an injury-causing event were not present. *The relevant inquiry in this case is whether a ‘confluence of factors’ was present so that a fire causing serious injury was reasonably likely based on the particular facts surrounding this violation.*” Resp. Post Hearing Brief, 21 (emphasis added). It repeats some version of this argument throughout the brief. *Id.* at 26-27, 52. Respondent’s description of the S&S analysis is incorrect, as it conflates the second and third element of the test.

The second and third elements of the S&S test are to be considered separately. In the second element, the question is whether the violation at issue could contribute to a discrete safety hazard. If the violation is found to contribute to a discrete safety hazard, then the analysis proceeds to the third step, which is to be considered individually. In the third step, one must assume that the hazard found in step two will be present, and the sole inquiry is whether the hazard will reasonably likely lead to an injury. At this step, one no longer considers the “confluence of factors” found in the individual violation.

The Commission has clarified this test in no uncertain terms. It stated that the third element of the S&S test “is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *see also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not “prove a reasonable likelihood that the violation itself will cause injury...” *Id.* The Respondent here makes the selfsame argument that the Respondent in *Musser* made unsuccessfully, that argues that “there must be a reasonable likelihood that the violation will cause injury.” 32 FMSHRC at 1280-1281. In so doing, it “conflates ‘violation’ with ‘hazard.’” *Id.* The Commission answered the Respondent in *Musser* succinctly, stating, “However, that is not the test...The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* Further, the Commission reaffirmed the well-settled precedent that the absence of an injury producing event, where a cited practice occurs, does not preclude an S&S determination. *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). In an 81-page post-hearing brief, with 20 pages devoted to S&S analyses, there is no excuse for Respondent’s continual misreading of the S&S test.

In the case *sub judice* the hazard is a fire. Mine fires have long been recognized by the Commission and Congress as reasonably likely to result in injury. *See Black Diamond Coal Mining*, 7 FMSHRC 1117, 1120 (1985)(“We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners.”) *Oxbow Mining, LLC*, 2013 WL 1856627, *22 (April 11, 2013) (ALJ)(“Fires cause many serious injuries, including burns and smoke inhalation.”); *Buck Creek Coal, Inc. v. Federal Mine Safety and Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995)(referring to the conclusion that a fire burning in an underground coal mine would lead to a serious risk of smoke and gas inhalation to miners present as “common sense.”) Inspector Leverknight testified that a mine fire could result in injuries including smoke inhalation and burns. Tr. 51. Additionally, if there was an explosion on a longwall face, it could propagate an explosion on the belt line. Tr. 51, 73-74. Under these circumstances, I find that the third prong of the *Mathies* test has been satisfied.

The fourth prong of the *Mathies* test requires the Secretary to show that the injuries expected to result from the hazard will be of a reasonably serious nature. As noted *supra*, a belt fire would expose miners along the C-2 belt to smoke inhalation and burns. Tr. 51. The Commission has repeatedly held that such injuries are serious in nature. *See Oxbow Mining*, 2013 WL 1856627, *22 (“Fires cause many serious injuries, including burns and smoke inhalation.”); *Consolidation Coal Co.*, 15 FMSHRC 855, 870 (May 7, 1993)(ALJ)(“Smoke inhalation and burns can severely injure miners.”) Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Citation No. 7082869 was S&S.

Respondent’s Conduct Was Reasonably Designated As Being “High” In Nature.

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent

hazardous conditions or practices.” *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d).

In the case *sub judice*, Inspector Leverknight determined that the Respondent’s negligence was high for allowing the belt to run in an unsafe condition. Tr. 40-41; GX-2. Leverknight testified that in his experience a belt cannot cut 2.5 inches into steel in a short period of time, which indicated that the condition had existed for an extended period. Tr. 41, 63. Therefore, the conditions likely preexisted Leverknight’s inspection on October 18, 2010. Furthermore, many of the conditions were obvious. The conditions at 3 crosscut were hanging at eye level when one is walking, and the conditions at three and 27 crosscut were on the side of the belt where miners travel. Tr. 41.

Respondent argues that the negligence should have been lower because mitigating circumstances were present. Resp. Post-Hearing Brief, 41. It argues that the cuts in the structure pre-existed the day of the inspection, the company was using come-alongs to correct the belt condition, and there were no belt shavings present. These arguments repeat their previous contentions against the validity of the citation, and do not present mitigating circumstances. When the belt was shut down, it was completely within the cut in the structure, indicating that it continued to cut and rub the structure. Tr. 38. The fact that the belt began cutting into the structure well before Leverknight’s inspection does not mitigate the level of negligence; rather, it raises it. Though the company did install come-alongs, the fact that the belt continued to need retraining indicated that they were not working. I find no mitigating circumstances and affirm the negligence as high.

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7082871 Violated 30 C.F.R. § 75.400

104(d)(2) Order No. 7082871 was issued by Inspector Leverknight on October 18, 2010 at 10:15 a.m. for a violation of 30 C.F.R. § 75.400. It states:

Accumulations of damp to dry float coal dust, coal fines, and loose coal, black in color were allowed to accumulate along the C-2 Longwall belt. The accumulations were under the belt rollers from 9 ½ crosscut to the belt tailpiece at 32 crosscut. There were bottom return rollers in contact with the accumulations at the following locations, 25 to 23, 22 to 21, 16 to 15, 14 to 13, and 12 crosscuts. There were a total of 8 return rollers in contact and turning in the accumulations. Between 16 and 15 crosscuts there is a bottom return roller missing allowing the belt to hang down and come in contact with the accumulations making a flat spot where the belt is running in contact with the coal accumulations for the

entire width of the belt. The rest of the affected area has accumulations built up under the rollers which is close to being in contact with the bottom return rollers for the entire distance and width of the belt. There is also accumulations of coal fines and coal dust on the ribs, roof, belt structure, and water lines for the entire distance.

The inspector assessed gravity as “Reasonably Likely,” “Lost Workdays or Restricted Duty,” and “S&S.” He assessed the negligence as “High,” resulting from an unwarrantable failure to comply with a mandatory safety regulation, and affected 1 person. GX-3, 1-2. The inspector terminated the order on October 19, 2010 at 1:25 a.m. after the “accumulations were cleaned up and rock dusted in the entire affected area.” GX-3, 3.

The Secretary contends that the five areas where coal accumulations came into contact with bottom rollers, one area where the belt was running in coal accumulations for the entire width of the belt, and the presence of coal dust coating the ribs, roof, belt structure, and water lines along the length of the belt constituted violations of 30 C.F.R. § 75.400. The Secretary argues that the fact that it took 14 miners at least 12 hours to clean the accumulations show that they were extensive. The Secretary further argues that the violations were S&S because (1) it violated § 75.400, (2) that accumulations of combustible materials create significant explosion and propagation hazards, (3) resulted in the discrete safety hazard of a mine fire or propagation of an explosion, an occurrence which (4) presented a reasonable likelihood that smoke inhalation and burns will result. The Secretary argues that the violation resulted from the Respondent’s high negligence and was an unwarrantable failure to comply with the regulation because the accumulations were obvious, extensive, existed for a significant length of time, and posed a high degree of danger.

The Respondent contends that the material cited was not a citable accumulation of coal, and therefore did not constitute a violation of 30 C.F.R. § 75.400. It argues that a review of all surrounding circumstances, factors, and considerations does not establish the existence of an accumulation of combustible materials. Rather, the materials were primarily wet, non-combustible rock dust. Any combustible material present was the result of the spillage from the belt running out of train after the most recent preshift examination of the C-2 longwall belt, but before the inspection. The Respondent argues that the S&S designation was improper because there was no “confluence of factors” present such that “a fire causing serious injury was reasonably likely based on the particular facts surrounding this violation.” Furthermore, it argues that a belt fire would be unlikely to lead to an injury, and that any injuries resulting from a fire would not be serious in nature. The Respondent argues that even if a violation is found to have existed, it did not result from an unwarrantable failure to comply with a mandatory standard.

Section 75.400 requires that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” Leverknight testified that he first observed accumulations at the 25 to 23 crosscut that were under the rollers, contacting the rollers, and built up around the rollers. Tr. 44-45. The accumulations were a combination of loose coal, fine coal, and coal dust, with the coal in contact

with the rollers being the finest. Tr. 45-46. Some of the materials were wet, however he testified that wet material can become combustible. Tr. 75-76, 190.

Leverknight also observed similar accumulations at 22 to 21 crosscut, which were contacting two rollers on the tight side of the belt. Tr. 46. He observed accumulations at the 16 to 15 crosscut, under and in contact with the rollers. Tr. 47. He similarly observed accumulations at the 14 to 13 crosscut and the 12 crosscut. Tr. 47, 48. Along the belt, Leverknight observed a coating of float coal dust on the rock dust, indicating that the conditions had existed for an extended period. Tr. 49.

Respondent's witnesses, including Strimer, Baer, Hoak, and Levo testified that they did not recall seeing rollers in the coal, however they did not testify that there were no accumulations present. Tr. 107, 150, 160, 168-169. Furthermore, Strimer testified that he did not look underneath the belt to see if the rollers were in contact with accumulations. Tr. 160. Each asserted that the accumulations were the result of the belt being out of train and dumping coal on the mine floor. Tr. 111, 117, 133, 150, 169, 178, 193-194, 290-291. However, Leverknight testified that the accumulations were under the belt, around the rollers, ground fine, and had other qualities that indicated that they could not have resulted from recent spillage. Tr. 49, 55.

Respondent argues that the accumulations had a mixture of moisture contents, and that because some of the accumulations were damp or wet, they posed no danger. However, Leverknight's credible testimony revealed that much of the accumulations were dry. Tr. 49-50. Furthermore, the Commission has held that "dampness in the coal did not render it incombustible and...wet coal can dry out in a mine fire and ignite." *Utah Power & Light Co.*, 12 FMSHRC at 969; *see also Clinchfield Coal Co.*, 21 FMSHRC 231, 241 (Feb. 1999)(ALJ)(finding that the belt rubbing against the belt structure produced friction, which generates heat, and was a reasonably likely ignition source.) It has also held that a "construction of [Section 75.400] that excludes loose coal that is wet or allows accumulations of loose coal mixed with non-combustible materials, defeats Congress' intent to remove fuel sources from the mine and permits potentially dangerous conditions to exist." *Black Diamond*, 7 FMSHRC at 1121.³²

Though Simmons minimized the extent of the accumulations, testifying that the shoveling required was minimal, he assigned 14 men to shovel the accumulations on the beltline. Tr. 178, 183-184, 188. I credit Leverknight's testimony that it took Respondent approximately 12 hours to clean these accumulations, indicating that the accumulations were far more extensive than Simmons described. Tr. 56-58. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (1992)(extensiveness of condition inferred through significant abatement efforts). Based on all the evidence presented, I credit Leverknight's testimony and find that the accumulations constituted a violation of 30 C.F.R. § 75.400.

³² The Commission recently reaffirmed that accumulations may still be designated as S&S despite being wet at the time of inspection. *Consolidation Coal Co.*, 2013 WL 4648491, *3 (Aug. 2013). Likewise, the Commission "categorically" rejected the mine operator's argument that safety measures, including rock dusting, carbon monoxide monitors, and fire fighting equipment reduced the degree of danger and rendered the violation non-S&S. *Id.* at *4.

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Leverknight determined that the violation in Order No. 7082871 was S&S because all the elements for a mine fire were present. Tr. 52. Having found, *supra*, that the conditions described in the Order violated 30 C.F.R. 75.400, which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The Commission has long recognized the dangers caused by combustible accumulations. *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970 (1990)(describing Congressional concern over loose coal and explosion hazards); *Consol Pennsylvania Coal Co.* 32 FMSHRC 545, 560 (May 2010)(ALJ)(finding burns and smoke inhalation as injuries reasonably likely to occur from fire or explosion). In the case *sub judice*, there were accumulations, bad rollers, belt rubbing on the structure, and belt rubbing on the accumulations. Tr. 52. These conditions contributed to the discrete safety hazard of a mine fire or propagation of an explosion resulting from damaged rollers rubbing the accumulations. Tr. 51. Therefore the second *Mathies* prong has been satisfied.

The third and fourth prongs of the *Mathies* test are also met, as there was a reasonable likelihood that the hazard contributed to—a mine fire or explosion—would result in injuries of a reasonably serious nature. As discussed, *supra*, the Commission has long recognized that mine fires are reasonably like to result in an injury. Such injuries could include smoke inhalation and burns, which are of a reasonably serious nature. Tr. 51. Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Order No. 7082871 was S&S.

Respondent's Conduct Was Reasonably Designated As Being "High" In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Leverknight determined that Respondent's negligence was high and that Respondent's violation of 30 C.F.R. § 75.400 resulting from an unwarrantable failure ("UWF") to comply with a mandatory safety regulation. The UWF terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with...mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23

FMSHRC 588, 593 (June 2001). 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.

In the case *sub judice*, the cited coal accumulations were extensive, obvious, existed for a significant length of time, and posed a high degree of danger. Leverknight observed extensive accumulations at numerous crosscuts, which required 14 miners over 12 hours to clean. Tr. 44-49, 56-58, 178, 183-184, 188. There was float coal dust covering the ribs, roof, belt structure, and water lines for the entire length of the C-2 longwall belt. Tr. 48. In five of the areas, the accumulations of coal, fines, and dust came into contact with the bottom belt rollers, which were approximately eight to ten inches above the mine floor. Tr. 46-48.

The nature of the accumulations indicated that they had existed for a significant length of time. Leverknight testified that the coal fines and float coal dust that were built up under the rollers are created over time from the rollers chewing up the coal. Tr. 55. Additionally, they were under the belt, indicating that the accumulations were not the result of recent spillage. Tr. 49, 55. These accumulations posed a high degree of danger to miners, as they could lead to a mine fire or explosion. Tr. 51. Having found no mitigating circumstances, I find that the conditions were the result of Respondent's high negligence and unwarrantable failure.³³

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7082872 Violated 30 C.F.R. § 75.360(b)(10).

Inspector Leverknight issued Order No. 7082872 on October 18, 2010 at 10:30 a.m. for an inadequate preshift examination of the longwall belt in violation of 30 C.F.R. § 75.360(b)(10)³⁴. Tr. 63; GX-4. It states:

After reviewing records, it was determined that an adequate Preshift Examination on the C-2 Longwall section belt MMU-032 was performed on 10/18/2010 on the 12 to 8 shift for the oncoming 8 to 4 shift. The examination was conducted between 000 and 0700 and the hazardous conditions found in Citation Nos. 7082869, 7082870, and 7082871 were not found and/or recorded in the Preshift Exam book. The hazardous conditions are being corrected and this Order will be terminated after the Preshift examiner who conducted the examination is re-instructed on making a proper examination.

The inspector assessed gravity as "Reasonably Likely," "Lost Workdays or Restricted Duty," and "S&S." He assessed the negligence as "High," resulting from an unwarrantable

³³ The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was "seemingly at odds.>").

³⁴ The Order was first erroneously issued pursuant to 30 C.F.R. § 75.360(b)(2). On November 10, 2010, the error was corrected, and the Order was changed to indicate a violation of 30 C.F.R. § 75.360(b)(10). GX-4, 3. This correction was unopposed.

failure to comply with a mandatory safety regulation, and affected 1 person. GX-4, 1. The inspector terminated the order on October 19, 2010 at 12:15 a.m. after the “mine examiner was re-instructed on making a proper preshift examination.” GX-4, 2.

Section 75.360(b)(10) requires in pertinent part that “[t]he person conducting the preshift examination shall examine for hazardous conditions and violations [at]...[o]ther areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination.” The Commission has recognized preshift examinations as being “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal*, 17 FMSHRC at 15; see also *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Chairman Jordan and Commissioner Marks have referred to the preshift inspection requirement as “the linchpin of Mine Act safety protections.” *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (August 1996) (Jordan and Marks, concurring and dissenting in part). MSHA requires several layers of examinations, including on-shift, preshift, and weekly examinations, in order to ensure miner safety. “These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine.” *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ). Quoting the preamble to the final rule, the D.C. Circuit recognized that:

Preshift examinations assess the overall safety conditions in the mine; assure that critical areas are properly ventilated; assure that the mine is safe to be entered by miners on the oncoming shift; identify hazards, whether violations or not, for the protection of miners; and through this identification facilitate correction of hazardous conditions.

National Mining Association v. MSHA, 116 F.3d 520, 540 (D.C. Cir. 1997).

The Commission has clarified that the term “hazardous conditions” in 30 C.F.R. § 75.360(b) does not require that the condition be S&S or reasonably likely to result in injury; rather, the term “hazard” denotes a measure of danger to safety or health. *Enlow Fork Mining Co.*, 1997 WL 14346, *7 (1997). “The Commission has approved the definition of “hazard” as “a possible source of peril, danger, duress, or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Id.*

The Secretary contends that the preshift examinations performed on the C-2 longwall belt at 5:00 a.m. on October 18, 2010 were inadequate because the examiners failed to record or correct the hazards described in Citation No. 7082869 (belt rubbing structure) Citation No. 7082870 (damaged rollers), and Order No. 7082871 (accumulations). The Secretary argues that these conditions preexisted the preshift examination, and yet none of them were recorded. The Secretary further argues that the violation was S&S because (1) it violated 30 C.F.R. § 75.360(b)(10), (2) that failure to conduct adequate preshift examinations contributed to the safety hazards of mine fire and explosion, (3) that such hazard is reasonably likely to result in an injury, and (4) that the injuries suffered, such as burns and smoke inhalation are reasonably serious in nature. Furthermore, the Secretary argues that the violation resulted from the Respondent’s high negligence and was an unwarrantable failure to comply with the regulation because the preshift examiners failed to record or correct obvious and extensive conditions.

The Respondent contends that preshift examinations were conducted in accordance with the requirements of 30 C.F.R. § 75.360. The Respondent argues that the Secretary has not proven the predicate violations, and therefore cannot prove that there were inadequate preshift examinations. Specifically, it argues that there is no evidence that the belt was out of train prior to the preshift examination, that the accumulations were extensive or combustible, or that the examiners observed damaged rollers. The Respondent argues that if a violation occurred, it was not S&S because “it was not reasonably likely that a fire would occur or that such fire would result in serious injury.” Resp. Post-Hearing Brief, 52. Furthermore, Respondent argues that negligence was lower than assessed because it routinely noted hazards and conditions after preshift examinations. Similarly, Respondent contends that the unwarrantable failure designation was inappropriate because the evidence establishes that the required examinations were conducted in an adequate fashion, and that any conditions existed for only a short time.

In the case *sub judice*, Inspector Leverknight observed several hazardous conditions for which he issued citations and orders: the longwall belt rubbing against and cutting into the structure at various locations; numerous damaged rollers; and extensive and obvious coal accumulations, some of which had rollers or belts running in them. GX-1-2-3. As discussed, *supra*, Citation No. 7082869 was validly issued for the C-2 longwall belt rubbing the belt structure; Citation No. 7082870 was validly issued for numerous damaged rollers on the C-2 longwall belt; and Order No. 7082871 was validly issued for hazardous accumulations. Each of these citations and orders was assessed as S&S, and all but one were assessed at high negligence. As discussed previously, these conditions and hazards existed for an extended period of time that preceded the previous preshift examination. Despite these obvious and extensive hazards, the 5:00 a.m. preshift examinations of the C-2 longwall belt noted “none” under both the Dangerous/Hazardous Conditions section and the Violations section. GX-9, 12-13; TR. 66-67. Therefore, I find that there was not an adequate preshift examination, in violation of 30 C.F.R. § 75.360.

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Leverknight determined that the violation in Citation No. 7082872 was S&S. Having found, *supra*, that the conditions described in the Citation violated 30 C.F.R. 75.360(b)(10), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard, namely a mine fire or explosion. The third and fourth factors are similarly discussed, *supra*, and similarly extend to the inadequate preshift examination.

Respondent’s Conduct Was Reasonably Designated As Being “High” In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Leverknight evaluated Respondent’s negligence as high and the violation as an unwarrantable failure to comply with the cited regulation. The evidence demonstrates that Respondent engaged in aggravated conduct by failing to record obvious hazards which threatened miners’ safety. Respondent’s examiners failed to record or correct the hazards of the

belt rubbing the belt structure, damaged rollers on the longwall belt, and extensive coal accumulations, despite the fact that they were obvious and extensive.³⁵ GX-9, 12-13; Tr. 66-67.

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7073116 Violated 30 C.F.R. § 75.202(a):

Inspector Jack issued Order No. 7073116 on October 21, 2010 at 9:30 a.m. for inadequate roof support in violations of 30 C.F.R. § 75.202(a). GX-5. It states:

An area of mine roof on the B-left haulage 5 feet outby the B-4 track switch measuring approximately 12 feet in width and 25 feet in length was not supported to protect miners from hazards related to falls of the mine roof. 3 bolts had the heads of the bolts torn off having no support to the bolt plate or strap. 3 bolts were dislodged from the mine roof having no bearing surface with the mine roof. 8 bolts were damaged from being hit by mining equipment or mining supplies being hauled in and out of the mine causing bolt heads to be bent and smashed hurting the integrity of the roof bolt. This condition was most obvious to any miner traveling the area because some of the straps that have been torn in half were hanging down from the mine roof posing as another hazard to miners traveling in and out of the coal mine. The top in this area consisted of coal and rock which was potted out in areas with some loose material hanging. This condition constitutes more than ordinary negligence, and exposes miners to hazards from roof falls. This violation is an unwarrantable failure to comply with a mandatory standard.

Standard 75.202(a) was cited 27 times in two years at mine 3605466 (27 to the operator, 0 to a contractor).

The inspector assessed gravity as “Reasonably Likely,” “Fatal,” and “S&S.” He assessed the negligence as “High,” resulting from an unwarrantable failure to comply with a mandatory safety regulation, and affected 1 person. GX-5, 1-2. The inspector terminated the order on October 21, 2010 at 10:30 p.m. after the “area of unsupported roof was bolted.” GX-5, 3.

Section 75.202(a) provides that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” The comments accompanying the final rule recognize the high death toll caused by inadequate roof support and the need for mandatory roof controls. 53 FR 2354-01, 2354 (Jan. 27, 1988); see also *United Mine Workers of America, Int’l. Union v. Dole*, 870 F.2d 662, 664 (D.C. Cir.1989) (recognizing that roof falls are among the most serious hazards to miners).

Judge Manning has described Section 75.202(a) as having three requirements: (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls or bursts of rib. *Oxbow Mining, LLC*, 2013 WL 1856627, *13 (April 11, 2013)(ALJ). The

³⁵ The details of the obviousness and extensiveness of the violations are discussed *supra* and will not be repeated here.

Secretary's roof-control standard in 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission has held that “the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987).

The Secretary contends that the damaged roof bolts and straps constituted inadequate roof support in violation of 30 C.F.R. § 75.202(a). The Secretary argues that the violation was S&S because (1) it violated §75.202(a), (2) the violation contributed to the discrete safety hazard of a roof fall, (3) there was a reasonable likelihood that a roof fall will cause injury, and (4) such injury included miners being struck by falling rock leading to possible death. Furthermore, the Secretary argues that the violation resulted from the Respondent’s high negligence and was an unwarrantable failure to comply with the regulation because the inadequately supported roof was obvious, extensive, posed a high degree of danger to miners, and existed for a substantial period of time.

The Respondent contends that there was no violation of 30 C.F.R. § 75.202(a) because the standard is “performance-based” and depends on the “reasonableness of the operator’s efforts to control the roof, given the particular conditions it knew or should have known existed.” Resp. Post-Hearing Brief, 57-58. Respondent argues that the Secretary failed to establish that the roof was unsupported and that Emerald knew or should have known of the cited condition. The Respondent argues that if a violation occurred, it was not S&S because it was unlikely that two events—material falling from the roof and someone standing beneath it— would occur simultaneously. Furthermore, the Respondent argues that the condition was not the result of high negligence or unwarrantable failure.

Roof straps in a mine are used to help support the roof by holding up localized loose roof materials. Tr. 229. I credit Inspector Jack’s testimony where he described his observations and why the noted conditions violated the regulation. Jack observed roof straps hanging from the mine roof, damaged roof support, missing roof support, and loose hanging materials while he was traveling up the B-haulage in areas where miners work and travel. Tr. 225. The roof had loose material hanging, with potted out coal and rock showing. Tr. 232. There were piles of roof coal and rock that had fallen lying on the mine floor. Tr. 232. In total, Jack observed seven rows of damaged roof support. Tr. 232. In the second row, Jack observed a mine channel roof strap that was torn in two pieces and had a twisted bolt plate. Tr. 229. In the third row, he observed a bolt that had the head sheared off of it and was damaged severely, which affects the bolt’s integrity. Tr. 229, 230-231. Furthermore, there were bent and smashed bolts that were put in supplementally, as well as several twisted and bent straps. Tr. 229. In the fourth row, Jack observed a channel that was ripped two times, with the straps pointing aimlessly, as well as damaged bolts and twisted plates. Tr. 229-230. In the fifth row, he observed a mine channel severely battered and smashed, as well as some twisted plates. Tr. 231. In the sixth row, he observed a roof channel that was severely damaged and torn in pieces, as well as bolt heads smashed and missing and twisted plates. Tr. 231. In the seventh row, he observed one damaged bolt head and one bolt head missing. Tr. 231-232.

The bolt heads for the bolts used in this mine are necessary to form the beam properly, because they function as bearing surfaces that hold all the bearing weight for the bolts. Tr. 231. Therefore, the bolts with damaged or missing bolt heads had compromised the integrity of the bolts, and were not adequately supporting the mine roof. Tr. 230, 235.

Inspector Jack observed flaking rock dust on the damaged roof bolts. Tr. 234. Because the area was only rock dusted several times per year, this indicated that the conditions were old. However, none of these conditions were reported in the examination book, which Jack reviewed prior to entering the mine. Tr. 223-224. The condition ultimately took over 12 hours to correct by bringing in a track miner bolter and adding more than 40 additional roof bolts. Tr. 253. Applying the reasonably prudent person test to the facts, I find that Inspector Jack correctly concluded that the roof in the cited area was not adequately supported.

The witnesses presented by Respondent were not entirely credible. Strimer, who accompanied Jack as an intern at the time of the inspection, testified that he disagreed with Jack's assessment of the roof. Tr. 298-300. However the notes he recorded at the time of the inspection discuss the same conditions that Jack observed, with no mention of disagreement. RX-17; Tr. 302-303. Furthermore, he offered no credible testimony as to why he did not mark any possible disagreement in his notes. Tr. 302-303. Similarly, Schifko was not present when the order was issued. Tr. 246. After Schifko viewed the conditions, he took issue only with the unwarrantable failure designation. Tr. 246.

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Jack determined that the violation in Order No. 7073116 was S&S because the top was inadequately supported, there was material hanging, and it was a hazard to a miner traveling through the area. Tr. 246-247. Having found, *supra*, that the conditions described in the Order violated 30 C.F.R. § 75.202(a), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The Emerald Mine had experienced previous roof falls, making a roof fall an acute possibility. Tr. 247. There was a clear danger to miners traveling in the area of rock or coal falling from the roof as a result of the damaged roof supports.

The third and fourth prongs of the *Mathies* test are also met, as there was a reasonable likelihood that the hazard contributed to—a roof fall—would result in injuries of a reasonably serious nature. The Commission has repeatedly stated that a roof fall is reasonably likely to result in an injury. *See Consolidation Coal Co.*, 6 FMSHRC 34 (Jan. 1984)(recognizing the likelihood of injury from miners being exposed to a roof fall hazard). If an accident were to happen as a result of the hazard cited, it would be fatal because falling materials from the mine roof can kill a miner. Tr. 247. Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Order No. 7073116 was S&S.

Respondent's Conduct Was Reasonably Designated As Being "High" In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Jack evaluated the Respondent's negligence as high and determined that the violation was an unwarrantable failure to comply with a mandatory safety regulation. I affirm both determinations. The inadequately supported roof was obvious, extensive, posed a high degree of danger to miners, and existed for a substantial period of time. Respondent was on notice that greater efforts were needed to prevent such violations from occurring, and multiple supervisors and examiners passed through the cited area and failed to correct the hazard.

Inspector Jack cited seven consecutive rows of inadequate roof supports, indicating that the hazards in the cited area were extensive. Tr. 232; GX-5. The extent of the condition is also illustrated in the efforts needed to terminate the Order, which in this case required more than 40 roof bolts. Tr. 253. Rock dust was present, which indicated that the condition had existed for an extended period of time. Tr. 234-238. Jack also testified that he made his observation of the inadequate roof supports while simply walking down the haulage, indicating that the hazards were obvious to anyone walking in the area. Tr. 239. Further, he testified and presented photographs of a roof strap hanging over the haulage track, which should have been obvious to any individual traveling in the area. Tr. 239; GX-15, 28. Numerous individuals, including mine management traveled in the area after the damage occurred. Tr. 252; GX-27.

Mine management knew that the area posed a problem, because supplemental bolting had been used to previously remedy the matter. Tr. 254, 323, 347. Further, the existence of a roof fall in the same entry provided Emerald additional notice that the haulage roof needed special attention for deteriorating roof conditions. Tr. 247. Emerald was also cited 27 times in the previous two years for failing to have adequately supported roof, which should have placed Respondent on notice that greater efforts were required to comply with the regulation. Tr. 279-280. I find no mitigating factors that would reduce the level of negligence, and affirm the Order as written.

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7073117 Violated 30 C.F.R. § 75.360(b):

Inspector Jack issued Order No. 7073117 on October 21, 2010 at 9:30 a.m. for an inadequate preshift examination in violation of 30 C.F.R. § 75.360(b). GX-6. The Order states:

The preshift examination conducted on October 21, 2010 for the 08:01 A.M. shift on the B-mains left haulage was not adequate. The hazards observed and depicted in Order # 7073116 were not recorded in the preshift exam book located on the surface. This exposes miners entering this area on the 08:01 A.M. shift to unknown hazards, which constitutes more than ordinary negligence. This violation is an unwarrantable failure of the operator to comply with a mandatory standard. This Order will not be terminated until management reviews all the requirements of 30 C.F.R. § 75.360 with all certified persons at this mine.

The inspector assessed gravity as “Reasonably Likely,” “Fatal,” and “S&S.” He assessed the negligence as “High,” resulting from an unwarrantable failure to comply with a mandatory safety regulation, and affected 1 person. GX-6, 1. The inspector terminated the order on October 28, 2010 at 10:44 a.m. after “mine management reviewed 75.360 with all certified people at this mine.” GX-6, 2. For the reasons that follow, I affirm the Order as written.

Section 75.360(b)(1) requires in pertinent part that “[t]he person conducting the preshift examination shall examine for hazardous conditions ...[at] [r]oadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.” As described *supra*, the Commission has recognized that this regulation is “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995).

In the case *sub judice*, much of damage to the roof support was at least a week old, meaning that some pre-existed the inspection. Tr. 232, 234, 248, 347. During the time that Jack conducted his inspection, at least five miners traveled the B-main haulage, including a mine examiner, motormen, a longwall coordinator and his crew, a fire boss pumper, and one other foreman. Tr. 248; GX-27. Examiner Thearle traveled the same route as Jack, and failed to record or correct the hazards posed by the inadequately supported roof. Tr. 244, 256, GX-5). In spite of the obvious and extensive damage to the roof and roof supports, there were no violations, dangers, or hazardous conditions observed or reported in the preshift examination report for the morning of October 21, 2010. Tr. 256; GX-16, 9. Based on the extensive and obvious hazards and the lack of any record in the preshift book, I find that the Respondent violated Section 75.360(b)(1).

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Jack determined that the violation in Order No. 7073117 was S&S because the failure to record hazards contributed to the discrete safety hazard of roof falls. Having found, *supra*, that the conditions described in the Order violated 30 C.F.R. § 75.360(b), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The inadequate preshift examinations contributed to the hazards described in Order No. 7073116, thereby satisfying the second element. The third and fourth prongs of the *Mathies* test are also met, as there was a reasonable likelihood that the hazard contributed to—a roof fall—would result in injuries of a reasonably serious nature. Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Order No. 7073117 was S&S.

Respondent’s Conduct Was Reasonably Designated As Being “High” In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Jack evaluated the Respondent’s negligence as high and determined that the violation was an unwarrantable failure to comply with a mandatory safety regulation. I affirm both determinations. Respondent’s failure to record the hazards present during the preshift examination constituted high negligence and an unwarrantable failure to comply with the

regulation. As discussed *supra*, the hazards were obvious and extensive, and none of the examiners or miners traveling the haulage recorded or corrected them. Tr. 252; GX-27. For the same reasons that the underlying Order were an unwarrantable failure, the inadequate preshift was an unwarrantable failure.

Penalty Assessed:

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Act are well-established. Section 110(i) of the Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Furthermore, the Commission has held that the judge should consider the deterrent purposes of the Act. *See Jim Walter Resources, Inc.*, 28 FMSHRC 579, 606 (Aug. 2006).

The Secretary proposed a penalty of \$4,500.00 for Citation No. 7082869, \$10,700.00 for Order No. 7082871, \$9,100.00 for Order No. 7082872, \$32,800.00 for Order No. 7073116 and \$30,200.00 for Order No. 7073117. Applying these criteria, I affirm the penalties proposed by the Secretary.

Respondent had 443 assessed violations during the 24 month period preceding the issuance of the citation and orders in this case. GX-25. These included 33 for hazardous accumulations prohibited under Section 75.400 and 27 for inadequate mine roof supports. Tr. 279; GX-25. Emerald Mine No. 1 is a large mine, having produced 4,901,640 tons of coal in 2010. Stip. 3. The Respondent exhibited high negligence and unwarrantable failure in the citation and orders above. The conditions were obvious, extensive, and existed for an extended period of time. Though Emerald demonstrated good faith in abating the violation, the weight of the other factors weighs in favor of the penalties proposed by the Secretary.

ORDER

Citation No. 7082869, Order No. 7082871, Order No. 7082872, Order No. 7073116 and Order No. 7073117 are **AFFIRMED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$87,300.00 within 30 days of the date of this decision.³⁶

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution (Certified Mail):

Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

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

/mzm

³⁶ 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