FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. REBCO COAL, INC., Respondent	CIVIL PENALTY PROCEEDINGS Docket No. SE 2012-341 A.C. No. 40-03177-281099 Docket No. SE 2012-386 A.C. No. 40-03177-283759 Mine: Valley Mine No. 1

DECISION

Appearances: Sean Allen, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, Colorado for the Secretary

Roy Wagner, President, REBCO Coal, Inc., 4427 Highway 190, Pineville, Kentucky for Respondent

Before: Judge Steele

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against REBCO Coal, Inc., ("REBCO" or "Respondent") at the Valley Mine No. 1 ("Mine"), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The Secretary seeks civil penalties in the amount of $13,999.00 for five alleged violations of the Secretary's mandatory safety standards for underground, surface or other mines. The parties presented testimony and documentary evidence at the hearing which was conducted on March 13-14, 2013 in Middlesboro, Kentucky. For the reasons set forth below, I affirm each citation and order and assess penalties accordingly.

STIPULATIONS

There were no stipulations in either docket.

JURISDICTION

Respondent's activities in rehabilitating a coal mine at its Valley Mine No. 1 subjects it to the jurisdiction of the Act as a "coal or other mine" as defined by Section 3(h) of the Act, 30 U.S.C. § 802(h). Further, Respondent meets the definition of an "operator" as defined by Section 3(d) of the Act, 30 U.S.C. § 802(d). Hence this proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judge pursuant to Sections 105 and 110 of the Act, 30 U.S.C. §§ 805, 813.

SE 2012-341

A. Order No. 8351502

Order No. 8351502 was issued under Section 104(d)(1) of the Act on August 10, 2011 at 11:15 a.m. and was based upon the inspector's observation of a violation of 30 C.F.R. 75.380(f)(3)(iii). This safety standard, entitled "Escapeways; bituminous and lignite mines," states:

> The following equipment is not permitted in the primary escapeway:
> (iii) Underground transformer stations, battery charging stations, substations, and rectifiers except –
> (A) Where necessary to maintain the escapeway in safe, travelable condition; and
> (B) Battery charging stations and rectifiers and power centers with transformers that are either dry-type or contain nonflammable liquid, provided they are located on or near a working section and are moved as the section advances or retreats.

Id.

In his narrative, the inspector found:

> The Extreme Power Scoop Charger, S/N AU867100011, is installed in the primary escapeway at C/Cut next to the charger, is equipped with a cathead which is not locked or tagged out, and is readily available for use. The charger is not vented to the return or coursed to the outside. There are scoop tracks in front of the charger and a scoop parked 1 C/Cut outby the charger to indicate the batteries are being charged in this location. The charger was observed in this area during a mine visit on 6-2-11, was out of service and slated to be moved. Since that time the operator has placed the charger back in service. The operator has engaged in conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory health and safety standard.

Government Exhibit 2.[1]

[1] Hereinafter, Government exhibits will be referred to as "GX" followed by a number. Respondent's exhibits will be referred to as "RX" followed by a number. Cites to the transcript will be labeled "Tr." followed by the page number(s).

The inspector noted that the risk of injury or illness for the violation was unlikely and was not significant and substantial. *Id*. The injury or illness could reasonably be expected to be lost workdays or restricted duty and would affect one person. *Id*. The negligence was assessed as high, as well as an unwarrantable failure to comply with a mandatory health or safety standard. *Id*. The proposed penalty for this Order is $2,300.00. The Order was terminated on January 12, 2012, when the scoop charger was moved close to the feeder and was vented into an entry coursed into the return. *Id*.

1. The Secretary's Evidence[2]

Inspector Kenny Dixon ("Dixon") testified that the Valley Mine No. 1 is an older mine that had been mined by a previous owner, but was then closed. Tr. 30. Respondent reopened it and began the process of rehabilitation[3] to get the mine into working order and up to code. Tr. 30-31. At the time of the hearing, the mine was in non-producing status. Tr. 30.

During his inspection, Dixon traveled with Earl Wagner ("Wagner"), the superintendent of the mine. Tr. 35. Dixon observed the scoop charger ("Charger") in the primary escapeway. Tr. 34; GX-4. He cited Respondent for a violation of 30 C.F.R. § 75.380(f)(3)(iii), which prohibits electrical installations, i.e. battery chargers, from being located in the primary escapeway unless it is needed to keep the escapeway in travelable condition or it advances and retreats with the section. Tr. 40. If the charger is needed to maintain the escapeway, it must be bratticed[4] off, there must be air lock doors going in and out and it must be enclosed in a fireproof enclosure or equipped with a fire suppression system. Tr. 40. In Dixon's opinion, Respondent did not meet either of the exceptions because, although the Charger was a dry-type charger, the rehabilitation point had advanced, but the Charger was left behind. Tr. 45-46. Also, the escapeway was in good condition, so the scoop was not needed to maintain it. Tr. 45-46.

Dixon testified that on May 17, 2011, he discussed this issue with Wagner and specifically told him that the Charger had to advance with the section. Tr. 41. Then, on June 2, 2011, the section had advanced, but Dixon observed the Charger in the same location. Tr. 41-42. He again talked to Wagner but did not issue a citation because it was unplugged with the cord wound up on top and Dixon deemed it to be out of service. Tr. 42-43. According to Dixon, when he returned on August 10, 2011, the date of the instant Order, the Charger was in the same location; however, someone had routed the cable through the brattice and back to the power

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[2] 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).

[3] Dixon testified that when a mine sits for an extended period of time, the roof and ribs deteriorate, rocks fall and water may build up. Tr. 78. In order to begin mining again, all of these problems must be corrected to meet the regulations, thus, rehabilitating the mine. Tr. 78.

[4] A brattice is a permanent stopping built basically from cinder blocks to separate air courses. Tr. 43.

center. Tr. 43, 63. It was not plugged in at that time, but it was not locked out or tagged out and was available for use. Tr. 43-44, 63. Based on the location of the plug and the scoop tracks leading up to the Charger, Dixon believed that the Charger had been used. Tr. 44. As further evidence, Dixon found a scoop part located one break outby the Charger. Tr. 44.

Upon inspection, Dixon found no faults with the Charger. Tr. 56. Further, it had short-circuit protection, which would trip the breaker if a fire were to occur. Tr. 56-57. For this reason, he designated the violation as unlikely. Tr. 56. However, Dixon testified that if a fire were to occur, the primary escapeway is in the intake, which brings fresh air into the mine. Tr. 56. Any minersinby the fire would be subjected to injuries associated with smoke inhalation, carbon monoxide poisoning and burns, which Dixon designated as lost workdays or restricted duty-type injuries in the instant case. Tr. 56. Dixon believes that preventing these types of injuries is the purpose of the standard. Tr. 55. Preshift and weekly examination records showed that miners were inby the Charger. Tr. 49-52; GX-5; GX-6. Dixon was also terminating or extending citations issued on July 15, 2011, some of which were inby the Charger. Tr. 52; GX-4. Dixon stated that he believed only one miner would have been affected because the alternative escapeway was located in the belt entry, which has an exhaust fan that brings fresh air into the alternative escapeway. Tr. 65. Under continued normal mining operations, Dixon believed the Charger would have been used. Tr. 84. Otherwise, the use of the scoop would have been exceptionally limited. Tr. 84.

Due to an impact inspection in which imminent danger orders and Section 104(d) orders were issued affecting the intake of the mine, operations were shut down between July 15, 2011 and July 31, 2011. Tr. 52-53. Respondent had to submit a comprehensive action plan to MSHA explaining the corrective actions it would take upon reentering the mine. Tr. 53. This was approved and on August 1, 2011, Respondent had completed the first two steps. Tr. 53. Dixon was sent to modify one of the imminent danger orders to allow Respondent to complete steps three through six, nine days prior to the issuance of this Order. Tr. 53-54.

Dixon determined that the Order was the result of Respondent's high negligence that constituted an unwarrantable failure to comply with a mandatory standard. Tr. 57-58. He testified that he had discussed the location of the Charger with Wagner on two previous occasions. Tr. 57-58. Preshift examination records indicated that examiners walked within feet of the Charger, but it was never moved. Tr. 57-58. By Dixon's calculation, the condition existed for almost three months. Tr. 58. Even after the Order was issued, no attempts were made to abate the condition. Tr. 59. Instead, Wagner turned to another miner and stated that Dixon was the reason that the employees would no longer have jobs. Tr. 59. Dixon said that termination would have been as easy as using the scoop to pick up the Charger and move it. Tr. 59. However, it was not moved until January 2, 2012. Tr. 60. Dixon testified that, while he found the negligence to be high and an unwarrantable failure, he did not believe it was reckless disregard or intentional misconduct by Respondent. Tr. 84.

2. Respondent's Evidence

During cross-examination, Dixon admitted that he did not see power installed in the Charger; rather, the cathead was lying next to the power center. Tr. 62. Dixon testified,

however, that the criteria for being considered out of service is some kind of physical dismemberment of the equipment. Tr. 62. Respondent admits that although it believes the Charger was out of service, it did intend to return it to service. Tr. 67. Dixon further testified that Wagner stated that the regulations allowed Respondent to keep the Charger in its location for up to six months. Tr. 63. Dixon asked Wagner to produce some evidence of this assertion, but none was presented. Tr. 63-64.

Respondent argues that it was constantly advancing and retreating, creating multiple working sections[5] within the mine. Tr. 66. It believes that Dixon's time lapse in inspecting the mine led to the assumption that it was continuously advancing. Tr. 66. It also pointed out to Dixon that it had two chargers. Tr. 69-72. Dixon testified that one was on the rehab section, and the other was the one cited here. Tr. 73.

Wagner testified that on July 15, 2011, both scoop chargers were located near the face or working area. Tr. 256. After the impact inspection, the Charger was brought back into the primary escapeway for safe storage. Tr. 256-257, 264. He stated that when miners were allowed to reenter the mine, the Charger was needed in the primary escapeway in order to maintain it. Tr. 257. He also testified that the existence of tracks was the result of mud on the mine floor. Tr. 257. According to Wagner, the tracks had been made at some earlier date, but nothing had happened following that instance to erase the tracks. Tr. 267. While he admits that the cord was unwrapped and routed to the power center, he asserts that it was out of service regardless and neither scoop was being used. Tr. 265, 267. Finally, Wagner argued that Dixon never warned Respondent about the Charger's location in the primary escapeway; although, Wagner admits that Dixon mentioned that the Charger would have to be moved. Tr. 260-261, 263.

3. Contentions of the Parties

The Secretary contends that Respondent violated 30 C.F.R. 75.380(f)(3)(iii) by placing a battery charging station in the primary escapeway. He argues that neither of the exceptions permitted in the safety standard applied to this particular case. Finally, he states that this violation was an unwarrantable failure to comply with a mandatory safety standard.

Respondent contends that the power scoop charger was permitted in the primary escapeway because it was necessary to maintain the primary escapeway. It also argues that it was located near a working station and was being moved as the section advanced or retreated. Alternatively, it argues that the battery charger was not in service because it was not plugged into the power center. Based on this evidence, Respondent asserts that the violation is not an unwarrantable failure to comply with a mandatory safety standard. Finally, it argues that the charger can remain in its location for six months.

4. Findings of Fact and Conclusions of Law

a. Validity

[5] According to Dixon, the definition of a working section is the loading point and any areas of the mine inby. Tr. 64. Based on this definition, Respondent's working section was from the feeder inby. Tr. 65.

I find that the violation existed as cited by the inspector. The regulation prohibits battery charging stations being located in the primary escapeway except in two instances – its necessity to maintain the escapeway or those that are dry-type and located near a working section, provided that they advance and retreat with the working section. The Secretary has met his burden of proving that the Charger was located in the primary escapeway and that neither exception applied.

Respondent does not deny that the Charger was located in the primary escapeway. Instead, it argues that both exceptions apply. Wagner testified that the scoop was needed to maintain the escapeway when Respondent reentered the mine after the shutdown. However, he does not describe the existence of any conditions warranting the need for the Charger and scoop to be located there. I further credit the consistent testimony by Dixon that the escapeway was in decent condition. Respondent did nothing at hearing to discredit this testimony.

I further credit Dixon's testimony that the Charger remained in the same location for nearly three months. Wagner testified that both chargers had been located near the face as the working section advanced. However, he stated that the Charger at issue was relocated to the primary escapeway when the withdrawal orders were issued. Based on Respondent's testimony, the other charger was relocated out of the mine. It begs the question why both chargers were not relocated out of the mine. If Respondent was truly concerned about the safety of this Charger, it could have moved it out of the mine since it was moving it away from the working face anyway. Respondent's testimony was riddled with inconsistencies in this way. Apparently, the primary escapeway was not the only place for safe storage since the other charger was not located here as well. Based on this evidence, I find that the violation existed as cited and the Order is valid.

Concerning Respondent's argument that the Charger could be left in its location for up to six months, this is pure assertion. There is no evidence in the testimony, regulations or case law to suggest that this is true. I discredit this argument all together.

b. Gravity

I agree with Inspector Dixon's assessment that the violation was unlikely to result in injury or illness to miners. He credibly testified that he did not find any faults with the Charger itself. I am further unaware of any citations that were issued on the Charger. It was also equipped with short-circuit protection that would trip the breaker in the unlikely event that a fire would occur. In light of this evidence, I find that the gravity was correctly designated as unlikely to cause injury or illness.

c. Unwarrantable Failure

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous

conditions or practices. *Id*. Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id. High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id*. *See also Brody Mining, LLC*, 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).

By its definition, an unwarrantable failure suggests more than ordinary negligence. 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. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). A judge may also determine, in his discretion, that some factors are not relevant or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC at 353 ("*Consol*"); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Beth Energy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Company*, 31 FMSHRC at 1351.

I do find that the violation was the result of Respondent's high negligence and unwarrantable failure to comply with a mandatory standard. Dixon credibly testified that he had discussed the issue of the Charger with Wagner on two prior occasions. Although Wagner denied this, he later admitted that Dixon had "mentioned" that the Charger would have to be moved. His testimony on this issue was disingenuous at best. I, therefore, credit the testimony of Dixon.

The Charger remained in the primary escapeway for nearly three months. During this time, Respondent's agents walked past the Charger while conducting preshift and weekly examinations; however, the Charger was never moved. When Dixon finally issued the instant Order, Wagner did nothing at all to abate the condition. Rather, he informed Rebco employees that if they lost their jobs, they could blame Dixon. In fact, the Charger was left in the location until January 2, 2012, nearly five months after this violation. While I could find that the condition was a result of Respondent's reckless disregard for the regulation, I also credit Dixon in his testimony that he did not believe the violation was the result of intentional misconduct. In light of this, I affirm Dixon's findings of high negligence and unwarrantable failure.

B. Citation No. 8406276

Citation No. 8406276 was issued under Section 104(a) of the Act on July 12, 2011 at 2:30 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. 75.202(a). This safety standard, entitled "Protection from falls of roof, face and ribs," states:

> The 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.

Id.

In his narrative, the inspector found:

> The rib between cross cuts #6 and #7 on the #2 belt travel way (secondary escape way) is not be [sic] controlled to protect persons that work and travel in the area. The rib is approximately seven feet high in this area and the top three feet of the rib is [sic] loose and is leaning out in the direction of the travel way. The loose rib measures nineteen feet long and up to a foot thick. The top three feet of the rib is rock. Persons being struck by the rib could reasonably be expected to suffer fatal injuries. The life line is installed along this rib.
>
> Standard 75.202(a) was cited 4 times in two years at mine 4003177 (4 to the operator, 0 to a contractor).

GX-13.

The inspector noted that the risk of injury or illness was reasonably likely and significant and substantial. *Id*. The injury could reasonably be expected to be fatal and would affect one person. *Id*. The negligence was assessed as moderate. *Id*. The proposed penalty for this Citation is $2,500.00. The Citation was terminated ten minutes later on the same day when the loose rib was pulled down with a bar. *Id*.

1. The Secretary's Evidence

Inspector Charles Broughton ("Broughton") entered Respondent's Mine as part of a complaint about electrical issues, smoking and drugs. Tr. 155. While there, he found a rib to be loose and leaning out into the travelway. Tr. 157. He testified that the loose rib measured nineteen feet in length, seven feet high and was about one foot thick; however, his greatest concern was the top three feet of it. Tr. 160. According to Broughton, the leaning is caused by a fracture which separates the material from the main body of the rib. Tr. 161. The material would weigh several hundred pounds. Tr. 131. If it fell or rolled, miners could receive crushing injuries resulting in death. Tr. 160-161. This concern was amplified by the fact that the condition was located in the secondary escapeway within four feet of the lifeline[6], and the mine has a history of rock falls, roof falls, rib issues and kettle bottoms[7]. Tr. 162, 172. Broughton further testified that "[m]iners work and travel in this area on a daily basis if the belt is running. And if people are assigned to work in the area, they're required to do a preshift examination." Tr. 164.

Broughton explained that 30 C.F.R. § 75.202 is one of MSHA's Rules to Live By.[8] Tr. 165; GX-16. Operators are specifically given notice of these standards in order to provide notice that special attention must be paid to these types of violations. Tr. 165-166. Broughton testified that the condition here was "very obvious;" however, he designated this violation as moderate negligence due to mitigating circumstances. Tr. 166-167. While he did not find dates, times and initials at the rib, he did find them at the entries. Tr. 167. Although he felt sure that the condition existed for more than a shift, he could not say whether Respondent's agents observed and ignored it. Tr. 167.

The condition was immediately abated when all of the loose material was pulled down. Tr. 167. According to Broughton, it only took approximately ten minutes to terminate the Citation, which indicates that the material was extremely loose. Tr. 168. In his opinion, the material was ready to fall, and a miner could have easily jarred it loose by bumping against it. Tr. 168-169.

2. Respondent's Evidence

John Golden ("Golden") testified for Respondent and stated that he was with Broughton and was the miner who pulled down the loose rib. Tr. 277. He asserted that when loose ribs were found, Respondent would danger the area off, get a slate bar and pull the material down. Tr. 278. The material subject to this Citation fell in "chunks," according to Golden, not as a piece measuring nineteen feet long. Tr. 278. He also states that he only scaled six to nine feet of the rib. Tr. 279. Although the time was logged on the Citation, Golden disputes that it only took ten minutes to pull down the material. Tr. 280-281. He also testified that there are not presently any major falls of which he is aware. Tr. 279. Under cross-examination, Broughton admitted that he was not aware of any injuries or fatalities at the mine due to rib falls. Tr. 173.

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[6] The lifeline is a cord or rope that runs from the working section to the surface. Tr. 163.

[7] Kettle bottoms are deformities in the mine roof in which the rock has a slick surface that coats it. Tr. 162. They do not necessarily cause roof falls, but they do make it difficult for roof tiles to stick. Tr. 162.

[8] MSHA's Rules to Live By program consists of the standards that are most often cited. Tr. 165. The goal of the program is to prevent these violations. Tr. 165.

3. Contentions of the Parties

The Secretary contends that Respondent violated 30 C.F.R. 75.202(a) by failing to control the ribs between crosscut #6 and #7. The area involved was an area where persons work or travel. He further argues that this violation was significant and substantial because the condition was reasonably likely to result in fatal injuries to one miner.

Respondent disagrees with the Secretary's evidence concerning the size of the rib and his contention that the top three feet was loose and leaning out. It asserts that the rib was not easily pulled out, taking longer than ten minutes. It further argues that the lifeline was at least six feet from this rib. Respondent contends that there is no history of injuries or fatalities at this Mine involving rock, roof or rib falls since it took control of the Mine in November 2008, which indicates proper control and protection. Finally, Respondent argues that proper precautions are taken if any loose ribs are found by the preshift examiner.

4. Findings of Fact and Conclusions of Law

a. Validity

I find that Citation No. 8406276 was validly issued. Broughton credibly testified and Respondent admitted that loose rib existed in an area where miners regularly travel. To make the circumstances worse, the condition existed in the secondary escapeway near the lifeline. As miners could be fatally injured by material falling from the rib, I find that 30 C.F.R. § 75.202 was violated.

b. Gravity

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

The Commission has explained that:

> [i]n order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

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

I also find that this violation was reasonably likely to result in reasonably serious injuries and is S&S in nature. As previously stated, a violation of the safety standard exists. This contributed to the hazard of a miner bumping the rib, jarring the material loose and receiving crushing injuries. Given the ease and speed with which the material was pulled down, it is likely that a miner would receive injuries resulting in his or her death.

Respondent argues that the measurement of the loose material was exaggerated by Broughton, and the lifeline was at least six feet away from the material. It also asserts that the rib was not easily pulled down and took more than ten minutes. In his testimony, Broughton credibly testified that he measured the loose rib with a steel tape. Tr. 170. Golden offered no testimony as to his knowledge of the length of the loose rib, and did nothing to explain how Broughton's measurement could have been wrong. Although Respondent argues that the lifeline was at least six feet away from the material, it presented no testimony or evidence to this. Finally, although the time of abatement was documented in real time, Golden baldly asserts that it took longer. Again, no explanation is given for this knowledge. In light of the fact that Respondent conducted no measurements and could not explain its assertions, I credit the testimony of Broughton and affirm the Citation as reasonably likely to result in a fatal injury and S&S.

c. Negligence

I affirm the Secretary's finding that the violation was the result of moderate negligence. As stated above, a violation is the result of moderate negligence when it knew or should have known about the violations, but mitigating circumstances exist. Although Broughton found

dates, times and initials at the entries, he did not find them at the location of the rib. Further, he could not prove that the condition existed at the time of the preshift examination. Finally, Broughton admitted that he was not aware of any fatalities or injuries at Respondent's mine due to rib conditions. Although Respondent should have known the condition of the rib, I agree that mitigating circumstances exist and affirm the determination of moderate negligence.

C. Citation No. 8406311

Citation No. 8406311 was issued under Section 104(a) of the Act on August 10, 2011 at 12:35 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. § 75.220(a)(1). This safety standard, entitled "Roof control plan," states:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

Id.

In his narrative, the inspector found:

> The operator is not controlling the mine roof to protect miners working and traveling in the area from hazards [sic] conditions along the #4 belt. There is a section of mine roof on the in by corner one cross cut in by the #4 belt drive on the right side of the entry that is not adequately supported. It is five feet from the last roof bolt to the rib.
>
> Standard 75.220(a)(1) was cited 3 times in two years at mine 4003177 (3 to the operator, 0 to a contractor).

GX-17.

The inspector noted that the risk of injury or illness was reasonably likely and significant and substantial. *Id*. The injury or illness could reasonably be expected to be lost workdays or restricted duty and would affect one person. *Id*. The negligence was assessed as moderate. *Id*. The proposed penalty for this Citation is $475.00. The Citation was terminated on August 22, 2011, when the operator set three timbers on the corner located one crosscut in by the #4 belt drive. *Id*.

1. The Secretary's Evidence

At hearing, Inspector Broughton testified that rib sloughage created a distance of more than five feet from any permanent roof support. Tr. 178, 194. This measurement was taken with a steel tape. Tr. 194. He testified that this was a violation of Respondent's roof control plan which allows for no more than four feet. Tr. 178, 184; GX-20. He determined that part of the

roof could fall, striking a miner, causing lost workdays or restricted duty type injuries such as amputated toes, broken bones, crushing injuries, cuts and abrasions. Tr. 184-185. Miners traveled in this area because it was near the belt line and escapeway. Tr. 185-186. Broughton designated this violation to be reasonably likely to result in injury and S&S because the mine has a history of rock falls, and injuries have occurred due to the falls. Tr. 187-188; GX-21. According to his testimony, there was a rock fall the day of the inspection, which affected his gravity determination. Tr. 189. No company official was escorting Broughton at this time. Tr. 191.

In Broughton's opinion, the condition was obvious, but he took into consideration that the fall had been cleaned and rock dusted. Tr. 190. Under those circumstances, the condition could have been missed. Tr. 190. The Citation was terminated twelve days later, and it took three supports to make the area compliant. Tr. 195, 289; GX-17.

2. Respondent's Evidence

Wagner testified that at the time that this violation was issued, Respondent was pulled back under the action plan and no one was scheduled to work in that area. Tr. 284. He states that he did not believe that a violation existed because the bolt was a little less than five feet from the rib. Tr. 287. Further, although he admits that the span was five feet after the sloughage, he argues that the existing bolt could hold the roof regardless. Tr. 284. According to Wagner, Broughton recommended that one timber needed to be set, but Wagner suggested that three be set to "remove all doubt." Tr. 285.

3. Contentions of the Parties

The Secretary contends that Respondent failed to follow its approved roof control plan and did not adequately support the Mine roof to protect miners in that there was a section of Respondent's roof that was more than five feet from the last roof bolt to the rib. He argues that this violation was significant and substantial because all four elements of the *Mathies* test were present.

Respondent argues that the area covered under this Citation was not in a working area on the date of the Citation. It contends that no examination was required in this area on the date that the Citation was issued because there was no working section in this area. It further states that the belts were not being operated, and no one, including the examiner, was required to work or travel there. Respondent asserts that one bolt that is not in compliance with the roof control plan does not constitute a violation. It states that the area was narrowed to the maximum width allowed by the roof control plan with conventional support; therefore, there was no violation of this safety standard. Finally, it argues that there is no history of injuries or fatalities at this Mine, indicating proper roof support.

4. Findings and Conclusions of Law

a. Validity

I find that a citation was validly issued under 30 C.F.R. § 75.220(a)(1). Respondent failed to follow its roof control plan when rib sloughage created a condition in which the last row of roof bolts was five feet from the rib. Respondent's agent admitted at hearing that roof bolts should be spaced no more than four feet apart, and this condition created a spacing of more than that allowed. Tr. 287.

Respondent argues that no violation exists because one bolt out of compliance does not constitute a violation and the area was narrowed by conventional roof support. Both of these arguments fail. While it may be that one bolt out of compliance may not result in a violation, this violation was the result of a row of roof bolts being out of compliance. I credit Broughton's testimony that the entire last row of bolts was more than four feet away from the rib, especially given the fact that Wagner admitted this at hearing. Further, while I credit Respondent for setting timbers to terminate the Citation, its testimony at hearing is that no timbers existed at the time that the Citation was issued. Tr.288. Therefore, I find that the Secretary has met his burden in establishing a violation.

b. Gravity

I also find that the violation was reasonably likely to result in a reasonably serious injury and is S&S in nature. I have already determined that the underlying violation is valid. This contributes to the hazard of rock falling from the span of roof and striking a miner walking or working below. Because the area in question is a belt line, as well as an escapeway, it is reasonably likely that miners would be in the area, even if work is not scheduled in this particular section of the mine. When the belt is running, miners will be observing the process from beginning to end to ensure that everything is running smoothly. As an escapeway, the area must be examined on no less than a weekly basis anyway. Regardless of whether work is being performed in the particular section of the mine, there will be people traversing the walkway. If rock were to give way, it could cause serious injuries, including fatalities. While I could increase the injury reasonably expected based on the facts and circumstances as they existed, I decline and instead choose to respect the determinations made by the inspector, which Respondent did nothing to discredit.

c. Negligence

I agree with the inspector that Respondent's negligence was moderate. Respondent had recognized the rib sloughage and had cleaned it. Given this, it should have recognized that the last row of bolts was too far from the rib. However, while the roof control plan called for bolts to be no more than four feet apart, the last row of bolts was a little less than five feet from the rib. It is possible that Respondent did not identify the hazard because it was only out of compliance by several inches. In light of this, I find that Respondent's negligence was moderate, as designated.

D. Citation No. 8406312

Citation No. 8406312 was issued under Section 104(a) of the Act on August 10, 2011 at 12:38 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. § 75.202(a)(1). As previously stated in Citation No. 8406276, this safety standard states:

> The 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.

Id.

In his narrative, the inspector found:

> The right rib one cross cut in by the #4 belt drive is loose. The rib is approximately ten inches thick and three feet high that is separated from the main rib.
>
> Standard 75.202(a) was cited 9 times in two years at mine 4003177 (9 to the operator, 0 to a contractor).

GX-22.

The inspector noted that risk of injury or illness was reasonably likely and significant and substantial. Id. The injury or illness could reasonably be expected to be fatal and would affect one person. Id. The negligence was assessed as moderate. Id. The proposed penalty for this Citation is $2,100.00. The Citation was terminated on August 22, 2011, when the operator removed the loose material from the rib. Id.

1. The Secretary's Evidence

At hearing, Broughton testified that he issued the Citation because the top three feet of the rib were loose, and the section was approximately ten inches thick. Tr. 202. According to Broughton, the rib had sloughed off some, and there was some flaking. Tr. 203. He could see a gap at the top where the rib was leaning outward. Tr. 203. When he examined it more closely, he could see rock dust behind the loose material which indicated to Broughton that the condition began some time prior. Tr. 204.

Broughton stated that miners regularly work and travel in this area. Tr. 205. They shovel the beltlines to pick up loose material. Tr. 205. Due to the size of the loose rib, Broughton testified that miners struck by the material could suffer crushing injuries likely to result in a fatality. Tr. 206. He designated the violation as S&S because, under continued normal mining conditions, the rib would only get worse, not better. Tr. 206. That said, he believed that the condition could have been easily terminated if he had had someone from the company with him to do so. Tr. 206-207. At the time of issuance, the area was not an active working section, but miners had been working in the area either that day or the day before. Tr. 210. Broughton testified that he knew this information because he was also there to terminate some previously issued citations, and Respondent's employees would have had to be in the area to do the needed

work. Tr. 210-211. Regardless, the examiner would have been traveling in the area even if the area was inactive. Tr. 209. The evidence showed that the areas inby were preshifted every day for more than a week prior to the issuance of the citation. Tr. 298-300; GX-5. In Broughton's opinion, the rib was ready to roll, and the condition was obvious. Tr. 207, 214. He stated that he noticed it immediately upon entering the area. Tr. 208.

2. Respondent's Evidence

Wagner argues that the belts were not being used on the day that the Citation was issued. Tr. 290. While he admits that this area is an escapeway and is subject to a weekly examination, he states that it was not an escapeway at that particular time, so the examination standards did not apply. Tr. 291, 296. Records show that a weekly examination had been conducted in this area. Tr. 296-297; GX-6.

3. Contentions of the Parties

The Secretary contends that Respondent violated 30 C.F.R. § 75.202(a) by failing to adequately support its roof to protect persons from hazards related to the fall of ribs, and this violation was significant and substantial. He states that the area for which this Citation was written was an area where persons work or travel, such as examiners. He further argues that the rib in the cited area was not supported or otherwise controlled, and this had to be known to Respondent because the rib was rock-dusted after it had begun to separate.

Respondent contends that the area referred to in the Citation was not in a working section on the date that the Citation was issued, as miners were not required to work or travel there. It states that this includes the examiner. It argues that the preshift examiner was using the intake air course and return air course for travel to the previous rehabilitation area, and these examinations were conducted weekly. Because there was no working section in the cited area and the belts were not being operated, Respondent asserts that the intake and return air courses were the escapeways and, therefore, no examination was required on the day that the Citation was issued. It finally contends that there is no history of injuries or fatalities at this Mine involving rock, roof or rib falls, which proves that Respondent was protecting miners working or traveling in this Mine.

4. Findings of Fact and Conclusions of Law

a. Validity

I find that the Secretary has met his burden in proving a violation of 30 C.F.R. § 75.202(a)(1). The rib by the #4 belt drive was loose and ready to roll. The standard requires that operators ensure that ribs are supported and otherwise controlled to protect miners from hazards relating to their fall. Broughton credibly testified that the condition existed as described. Respondent did nothing to argue that the condition did not exist. It, instead, argues that no one was required to be in the area, including examiners. However, the evidence proves otherwise. Respondent's own records show that the area was examined weekly. Further, as stated by Broughton, the termination of prior citations relied on Respondent's employees working in the

area to correct the cited conditions. In light of all of this, I find that Citation No. 8406312 was validly issued.

b. Gravity

I further find that the violation as correctly designated as S&S in nature. As stated above, I have found an underlying violation of the standard. This contributes to the hazard of the rib rolling and landing on any miners passing through at that time. Although Respondent argues that this is not a working area, the examiner passes through this area on a weekly basis at the very least. Further, miners were in the area the previous day in order to abate unrelated citations, and records revealed that the areas inby had been preshifted every day of the week prior to the issuance of this Citation. Moreover, this is the beltline. Regardless of whether Respondent is running coal, it is removing material from the mine using the beltline. Miners could be in this area at any given time. Given the foot traffic and the condition of the rib, I find that it is reasonably likely that a fall would result in impact or crushing injuries. There is no question that these injuries could be fatal.

c. Negligence

Finally, I agree that Respondent's negligence was moderate. Broughton stated that the condition was obvious, and he immediately noticed it upon entering the location. However, the area was not an active working area at the time of the inspection. Additionally, Broughton did not testify that management was aware of the condition at any time prior to the issuance of the Citation. In light of this, I affirm Broughton's designation of moderate negligence.

SE 2012-386

Order No. 8353129

Order No. 8353129 was issued under Section 104(d)(1) of the Act on July 15, 2011 at 1:00 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. 75.400. This safety standard, entitled "Accumulation of combustible materials," states:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Id.

In his narrative, the inspector found:

> Accumulations of combustible materials in the form of loose coal, float coal dust, and other combustible materials such as plastic soda bottles, frayed conveyor belt,

candy wrappers, hydraulic oil cans, wood and other trash were allowed to accumulate around the 006 section area rehab feeder. The exposed area measures 1 foot to 5 feet high x 20 feet in width and 25 feet in length. No rock dust is present on the mine roof in this area. These combustible materials are exposed to probable explosion and fire ignition sources, and the conditions observed could reasonably be expected to cause serious harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous conditions are eliminated. The miner operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

GX-7.

The inspector noted that the risk of injury or illness was reasonably likely, later modified to highly likely, and was significant and substantial. *Id.* The injury or illness could reasonably be expected to be permanently disabling and would affect eight persons. Id. The negligence was assessed as high, as well as an unwarrantable failure to comply with a mandatory health or safety standard. Id. The proposed penalty for this Order is $6,624.00. The Order was terminated on January 12, 2012, when the accumulations of trash were removed and a trash can was provided. Id. Further, the accumulations of loose coal were cleaned up and the area was rock dusted. Id.

1. The Secretary's Evidence

Inspector Robert Barnes ("Barnes") testified that he visited the Valley Mine No. 1 on July 15, 2011 as part of an impact inspection[9]. Tr. 91. During this inspection, Barnes issued Order No. 835329 for excessive accumulations at the feeder[10]. Tr. 92-93. Specifically, Barnes found a large amount of combustible materials surrounding the section feeder. Tr. 94, 98; GX-8. He testified that the accumulation was twenty-five feet long, twenty feet wide and five feet high. Tr. 96. Barnes stated that the accumulation was rib-to-rib, and it had to be climbed over to get past it. Tr. 102. Because of the size of the area, he deduced that it would have to be shoveled out manually unless the feeder was moved. Tr. 102. Anything inby the feeder is considered to be an active working area because although Respondent is not mining coal, it is rehabilitating issues such as rock falls and blocked roadways. Tr. 103, 123.

Within the accumulation, Barnes found black, dry loose coal, float coal dust, rocks, pieces of conveyor belt, nearly empty oil cans, soda bottles, wood, and various other amounts of trash lying around. Tr. 97, 136, 138. He testified that all are considered to be combustible materials because they easily ignite. Tr. 97-98. Further, there was no rock dust present on the roof of the mine. Tr. 98. According to Barnes, the feeder was not being used during the inspection, but it had been used to load the material that was being rehabilitated, and it was

[9] An impact inspection is a saturation inspection in which several inspectors enter a mine to get a snapshot of the conditions at that time. Tr. 91. Impact inspections typically occur in troubled mines with a history of violations. Tr. 91-92. In this particular instance, a complaint was called into MSHA concerning drugs, smoking and electrical problems in the mine. Tr. 92.

[10] A feeder is a piece of mining equipment that loads coal onto the conveyor belt for transfer. Tr. 96.

plugged into the power center. Tr. 100, 109. He observed coal dust on the top of the feeder, on the mine roof and in the surrounding areas back over the crosscut. Tr. 101. The float coal dust was located on top of the accumulation and equipment, as well as on the mine roof, which Barnes stated was an explosive hazard. Tr. 101, 129.

Barnes designated the Order as permanently disabling because he believed it could help propagate a fire or explosion, causing injuries from burns and/or smoke inhalation. Tr. 103-104. He determined that a fire was highly likely due to a confluence of factors – no rock dust present, the size of the accumulation, and the presence of electrical equipment. Tr. 108-109. He found that the violation was significant and substantial because the feeder, electrical cables and mobile equipment were all potential ignition sources, with their hot motors and electrical wires. Tr. 105. He found that this would be reasonably likely to result in a fire. Tr. 105. In fact, Barnes noted that several violations were issued on that day related to electrical equipment, some of which was located near this accumulation. Tr. 107. Barnes noted that if there had been any history or presence of methane, the violation would have been an imminent danger, and everyone would have been evacuated. Tr. 135.

Barnes also found that the accumulation was the result of Respondent's high negligence. Tr. 113. He testified that there was no effort to remove the material. Tr. 113. Further, mine management had been in the area on several occasions, but the accumulation was not listed in any examination reports, including in the reports for the prior day, and had basically been ignored. Tr. 113, 115-116; GX-11; GX-12. According to Barnes, Respondent did not view the accumulation as a problem and did nothing to abate the condition. Tr. 121. When Barnes showed coal to the foreman, Wagner and the foreman simply stated that there was no scoop available to clean it up. Tr. 142. In Barnes's opinion, the accumulation could not have occurred after the preshift examination. Tr. 116. Rather, it would have taken several days to create an accumulation of this size. Tr. 117. He stated that the accumulation was not only much larger than typical accumulations in a mine, it was also obvious. Tr. 119-120. However, it was not abated until January 12, 2012. Tr. 122.

Although Wagner disputed the existence of combustible materials, he admitted on cross examination that there was loose coal in the accumulation as well as pieces of conveyor belt, wood, oil cans, soda bottles and candy wrappers, all of which could catch fire. Tr. 239-240. He further admits that the entire intake had been cited for garbage accumulations, but argues that it was garbage left by the previous owner of the mine. Tr. 244.

2. Respondent's Evidence

Respondent entered a video into evidence taken two weeks after the Order was issued. Tr. 127; RX-1. Although dark, the video shows a large accumulation of mud, rocks or coal, wood and trash. RX-1. In the video, Earl Wagner is speaking and states that there is no coal and picks up a few handfuls of material, which it is impossible to identify by the video. RX-1. During the hearing, Barnes could not verify that the video was taken in the correct section of the mine, and the feeder was not shown. Tr. 146. At hearing, Wagner testified that the material was only eighteen feet wide and six to ten inches deep, and it consisted of rock, which he considered to be a "normal" accumulation. Tr. 229, 236-237. He also stated that the "garbage" cited

consisted of two glue boxes and a couple of empty oil cans that Respondent was preparing to remove at the time of the inspection. Tr. 229-230. He estimated that the mine used approximately twenty cans of oil a day, and the two observed had been put in the feeder the same day that the Order was issued. Tr. 230. On the day that the video was taken, Wagner stated that approximately six to eight inches of water existed in front of the feeder and opined that this was due to the mine sweating. Tr. 230-231.

During cross-examination, Barnes admits that he neither observed coal dust in suspension at the time of the violation nor did he take any dust samples. Tr. 128. However, he further testified that there was coal dust in various areas and, in order for an explosion to occur, there must be coal dust in suspension, a heat source, fuel and oxygen. Tr. 131-132. Although Respondent asserted that the mine typically dried out during the winter months, not the summer, Barnes stated that during his inspection, the garbage was not wet, water was not dripping from the roof and the area was not sweating. Tr. 128, 131, 231. He admitted that there was some mud located in the mine, but he mostly observed dry powder. Tr. 145. He further did not recall a water pump near the feeder. Tr. 139.

Wagner did not consider the materials to be combustible because the coal observed had been left by the previous owner and was minimal. Tr. 232. Instead, Respondent had been engaged in cleaning up rocks and rock falls for more than three years. Tr. 232-233. He further argues that there were no ignition sources because none of the equipment in the mine gets hot. Tr. 232. Wagner stated that he had never seen coal dust in suspension and did not know of any float coal dust issues in the mine. Tr. 233-234. The men rock dust regularly, but he acknowledges that a small portion of the area was not rock dusted due to the sweating of the mine. Tr. 238-239. According to him, the area was not cleaned because Respondent was operating under an action plan in which it had to follow step-by-step instructions. Tr. 235. Aside from this, he stated that the accumulation did not exist for more than one shift, which explained why it did not appear in the preshift examination records. Tr. 237.\

3. Contentions of the Parties

The Secretary contends that Respondent failed to clean up accumulations of coal dust, float coal dust, loose coal and other combustible materials from around a section rehab feeder, constituting a violation of 30 C.F.R. § 75.400. He states that the combustible materials were allowed to accumulate and was neither marked on a preshift or onshift examination for the morning that the violation was discovered nor the day before. He argues that this violation occurred in an active working place and was significant and substantial as well as an unwarrantable failure to comply with a mandatory health or safety standard.

Respondent argues that the MSHA inspector overstated the amount of the accumulations. It argues that the accumulations were not exposed to explosion or ignition sources due to the amount of water, lack of methane and lack of dust suspension in that area of the Mine.

4. Findings of Fact and Conclusions of Law

a. Validity

I find that a violation of 30 C.F.R. § 75.400 existed as written in the Citation. Whether the accumulation was eighteen feet wide or ten feet wide, it did not belong around the feeder. While Respondent argues that the accumulation did not consist of combustible materials, its superintendent admitted at hearing that most of the components could catch fire and were, therefore, combustible. Respondent's video did little to improve its case. Other than coal and float coal dust, which could not be ascertained given the condition of the mine and the darkness of the video, it essentially proves the existence of everything asserted by the Secretary. Further, it should be noted that the video depicts the mine after it has essentially been abandoned for two weeks, not the conditions as they were on July 14, 2011. Even if the video showed that an accumulation did not exist, it is largely irrelevant. In light of this, I find that the violation is valid.

b. Gravity

I further find that this violation was correctly designated as S&S in nature. As previously stated, an underlying violation of the mandatory standard exists. This accumulation contributes to the hazard of a fire within in the mine. The combustible materials were found lying from rib to rib around the section feeder. He further found coal dust laying on top of the feeder, on the accumulation, on the roof and in the surrounding areas of the crosscut. None of this had been rock dusted. Although the feeder was not in use at the time that the violation was issued, it was plugged into the power center. There was also mobile equipment in the area, some of which received violations. The accumulations and coal dust could be ignited by any of the equipment or electrical cables in the area. If a fire were to occur, this would be reasonably likely to result in inhalation injuries due to the smoke or burn injuries due to fire. Either could result in permanently disabling injuries to the miners, especially to those designated to fight the fire. Based on the foregoing, I find that the violation is S&S in nature as designated by the Secretary.

c. Unwarrantable Failure

Finally, I find that this violation was the result of Respondent's high negligence and was an unwarrantable failure to comply with a mandatory standard. Barnes credibly testified that the accumulation was large enough that it would have taken several days for an accumulation of this size to amass. However, it did not exist in any preshift or onshift examination records, and it was essentially ignored until, and in fact after, cited. Even though it had been cited for similar violations in the intake in the past, Respondent made no effort remove the accumulation and even climbed over it to get to get to the working section of the mine. Most disturbing, however, is the cavalier nature of Respondent's response to the violation. At one point in the video, Wagner points out the candy wrapper that he states has everyone so scared. This, coupled with the fact that Wagner does not believe that an accumulation of this size is abnormal, is indicative of Respondent's general disregard for safety regulations. Given all of this evidence, I am constrained to find that Respondent's behavior is highly negligent and an unwarrantable failure to comply with a mandatory standard.

PENALTIES

Section 110(i) of the Mine 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) and 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 and its judges shall consider the six statutory penalty criteria, found at Section 110(i) of the Act:

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

Id.

A. History of Violations

In the two years prior to these particular citations and orders, the operator had received a total of 172 citations. Of these, fifty-one were S&S and none had been issued under Section 104(d) of the Act.

B. Appropriateness of Penalties to the Operator's Size

At the time that these penalties were issued, Respondent employed approximately fifteen to nineteen employees. However, for the quarter in which these violations and, in fact, for the entire year of 2011, Respondent reported no production of coal. See MSHA's Mine Data Retrieval System at www.msha.gov. Respondent should therefore be categorized as a very small operator.

C. Negligence

As stated above, I find that Respondent's negligence in each citation or order is affirmed as written by the Secretary.

D. Effect on Ability to Continue in Business

On March 19, 2013, Respondent submitted a letter to the Commission requesting that further hearings be postponed until such time that Respondent could obtain representation by an attorney. It states that its ability to obtain counsel is limited by the fact that REBCO has made no profit in the four years since it opened. Respondent further represents that, at this time, any penalties it is forced to pay would affect its ability to continue in business. It did not disclose any financial documents as proof of this alleged hardship.

E. Gravity

As stated above, I find that the gravity of each citation or order is affirmed as written by the Secretary.

F. Good Faith Abatement

Respondent did not act in good faith in abating these citations and orders. The inspectors credibly testified that some of the violations could have been terminated easily and immediately. However, in some instances, it took Respondent five months to abate the conditions. Further, Respondent, in regard to at least one violation, explained to its workers that the MSHA inspectors, not its own lack of regard for the safety standards, were the reason that the miners would eventually lose their jobs. As such, I find no good faith abatement in this instance.

ORDER

For the reasons set forth above, the citations and orders are **AFFIRMED** as written. REBCO Coal, Inc., is **ORDERED** to **PAY** the Secretary of Labor the sum of $13,999.00 in 24 monthly installments beginning March 1, 2014 and due every 30 days thereafter. [11] REBCO Coal, Inc. shall pay 23 installments of $583.30 with a final payment of $583.10 due March 1, 2016. Should REBCO fail to make a payment under this plan, the remainder of the balance shall become due and immediately payable.

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

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/kmb

[11] 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