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1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BLUE DIAMOND COAL COMPANY, Respondent. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GARY L. JENT, Agent of BLUE DIAMOND COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2008-592 A.C. No. 15-09636-139419 Docket No. KENT 2008-784 A.C. No. 15-09636-144081 Mine: No. 77 CIVIL PENALTY PROCEEDING Docket No. KENT 2009-6 A.C. No. 15-09636-161762A Mine: No. 77

DECISION

Appearances: Christian Barber, Esq., and Willow Fort, Esq., Office of the Solicitor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melanie J. Kilpatrick, Esq., and Marco M. Rakjovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of Blue Diamond Coal Company;
Randall Scott May, Esq., Barret, Haynes, May & Carter, Hazard, Kentucky, on behalf of Gary L. Jent.

Before: Judge Paez

These cases are before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §§ 815, 820. In dispute are one section 104(d)(1) citation and three section 104(d)(2) orders issued to Blue Diamond Coal Company ("Blue Diamond"), each of which the Secretary contends is a "flagrant" violation under section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2). Also in dispute is a companion section 110(c) penalty assessment issued to Gary L. Jent, alleging his personal liability as an agent of Blue Diamond. To prevail, the Secretary must prove his charges "by a preponderance of the credible evidence." *In re:*

Contests of Respirable Dust Sample Alteration Citations, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *SOL v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Each of the four alleged violations occurred at Blue Diamond's Mine No. 77. MSHA issued two section 104(d)(2) orders to Blue Diamond on April 5, 2007. Order No. 4220150 charges Blue Diamond with a violation of 30 C.F.R. § 75.370(a)(1) for failing to comply with its approved ventilation plan, while Order No. 7521758 charges Blue Diamond with a violation of 30 C.F.R. § 75.220(a) for failing to comply with its approved roof control plan. On May 9, 2007, MSHA issued section 104(d)(2) Order No. 7524542, charging Blue Diamond with another violation of 30 C.F.R. § 75.220(a). Nearly 6 months later, on November 2, 2007, MSHA then issued section 104(d)(1) Citation No. 7505299, charging Blue Diamond with yet another violation of 30 C.F.R. § 75.220(a). The Secretary designated each citation and order as significant and substantial ("S&S")[1] and as the result of Blue Diamond's unwarrantable failure[2] to comply with a mandatory health or safety standard. Additionally, in one of his first opportunities under the then-new Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), the Secretary designated each violation as "flagrant"[3] and thus eligible for increased penalties. The Secretary proposes penalties of $187,400.00 for Order No. 4220150, $184,900.00 for Order No. 7521758, $196,700.00 for Order No. 7524542, and $154,500.00 for Citation No. 7505299, for a total civil money penalty of $723,500.00. Lastly, the Secretary proposes that Jent pay a penalty of $3,000.00 under section 110(c) of the Mine Act in connection with the ventilation violation in Order No. 4220150.

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[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), 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."

[3] Congress created the "flagrant" designation providing for enhanced civil penalties when it passed the MINER Act. MINER Act, Pub. L. No. 109-236, § 8, 120 Stat. 493, 501 (codified as amended at 30 U.S.C. § 820(b)(2)). The flagrant designation authorizes the assessment of increased civil penalties up to $220,000.00 for any violation "deemed" to be "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2).

This matter was originally assigned to two other Administrative Law Judges, during which the case was stayed pending MSHA's investigation under section 110(c) amidst the Commission's backlog following enactment of the MINER Act. Thereafter, Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. KENT 2008-592, KENT 2008-784, and KENT 2009-6 to me, and I held a four-day hearing in Hazard, Kentucky.[4] The Secretary presented testimony from MSHA Inspectors Patrick Stanfield, Burnice Sturgill, and Robert Ashworth, MSHA Roof Control/Ventilation Specialist Charlie Fields, and a roof control expert, MSHA Mining Engineer Michael Gauna. Blue Diamond presented testimony from Section Foreman Timothy Ray Shepard, continuous miner operator Darrell Cress, Mine Superintendent Charles Williams, and a roof control expert, Dr. David Alan Newman. Section Foreman Gary L. Jent also testified. After the hearing, I granted the parties' request to stay the briefing schedule in these cases pending the outcome of the Commission's decision on the appeal of *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ), which applied the "flagrant" provisions under section 110(b)(2) of the Mine Act. A year later, the Commission vacated its order granting review of that decision, and I lifted the stay of the briefing order in these proceedings. The parties each filed closing briefs, and both Blue Diamond and Jent filed reply briefs.

II. ISSUES

The Secretary argues that the conditions at Mine No. 77 were properly cited as violations, that the allegations underlying the citation and orders are valid, and that the proposed penalties are appropriate. (Sec'y Br. at 96.) The Secretary also contends that his section 110(c) charges and proposed penalties are valid and appropriate. (*Id.*)

For its part, Blue Diamond first admits that one of the four conditions identified in Order No. 4220150 constituted a violation of its ventilation plan (Resp't Br. at 11), but contends that the Secretary has not proven any of the other three conditions violated its ventilation plan. (*Id.* at 7, 10, 12.) In particular, Respondent disputes the accuracy of certain air velocity measurements. (*Id.* at 2–10.) In addition, Respondent denies that the conditions were S&S, unwarrantable, or flagrant violations. (*Id.* at 12–21.) Jent also denies the section 110(c) charges against him. (Jent Br. at 2–3.)

Second, Respondent admits that conditions underlying Order No. 7521758 constituted a violation of its roof control plan, but denies that any of the conditions were S&S, unwarrantable, or flagrant violations. (Resp't Br. at 36–42.)

[4] In this decision, the hearing transcript, the Secretary's exhibits, and Blue Diamond's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively. Jent introduced no exhibits at the hearing.

Third, Respondent admits that one of the two conditions identified in Order No. 7524542 constituted a violation, but denies that the other condition violated its roof control plan. (*Id*. at 43–47, 53.) Specifically, Blue Diamond disputes the accuracy of the inspector's measurements and contends that the Secretary improperly interpreted the terms of its roof control plan regarding extended cuts. (*Id.* at 44–49.) Respondent also denies that the conditions cited were S&S, unwarrantable, or flagrant violations. (*Id.* at 49–53.)

Fourth, Blue Diamond admits that one of the four conditions identified in Citation No. 7505299 violated its roof control plan, but denies that the other three conditions constituted violations. (*Id.* at 54–57.) Specifically, Respondent disputes the accuracy of certain entry measurements. (Resp't Br. at 54–56.) Again, Blue Diamond denies that any of the cited conditions were S&S, unwarrantable, or flagrant violations. (Resp't Br. at 57–61.)

Accordingly, the following issues are before me: (1) whether the Secretary's air velocity measurements for Order No. 4220150 accurately reflected the flow of ventilating air; (2) whether the Secretary's measurements accurately reflected conditions noted in Order No. 7524542; (3) whether the Secretary improperly interpreted Blue Diamond's roof control plan provisions regarding extended cuts in Order No. 7524542; (4) whether the Secretary's measurements accurately reflected conditions noted in Citation No. 7505299; (5) whether the record supports the Secretary's S&S, unwarrantable, and flagrant designations for the Citation and all three of the Orders before me; (6) whether the record supports holding Gary L. Jent liable under section 110(c); and (7) whether the Secretary's proposed penalties against Blue Diamond and Jent are appropriate.

For the reasons set forth below, Order No. 4220150 is **MODIFIED** to remove the S&S, unwarrantable, and flagrant designations, and to lower the cited level of negligence from "reckless disregard" to "moderate." Order No. 7521758 is **AFFIRMED** as S&S, and **MODIFIED** to remove the unwarrantable failure and flagrant designations and to lower the cited level of negligence from "reckless disregard" to "moderate." Order No. 7524542 is **AFFIRMED** as S&S and unwarrantable, and **MODIFIED** to remove the flagrant designation and to lower the cited level of negligence from "reckless disregard" to "high." Citation No. 7505299 is **AFFIRMED** as S&S, and **MODIFIED** to remove the unwarrantable failure and flagrant designations and to lower the cited level of negligence from "high" to "moderate." Finally, the section 110(c) penalty assessment against Gary L. Jent is **VACATED**, and the proceeding brought against him is **DISMISSED**.

III. FINDINGS OF FACT – OVERVIEW

A. Operations at Mine No. 77

Mine No. 77 is a room-and-pillar type underground coal mine located in Perry and Letcher Counties, Kentucky. (Ex. G–3; Ex. G–16; Ex. G–37.) When viewed from above, room-and-pillar type underground coal mines resemble a checkerboard containing long corridor-like entries and crosscuts driven through a seam of coal with square or rectangular pillars of coal remaining in place to bear the weight of the rock and dirt between the mine's roof and the earth's surface. (Ex. G–16; Ex. G–17; Tr. 676–77, 938, 1111–12.)

Blue Diamond uses large machines, known as continuous miners, to cut through rock and extract coal from the mine. (Ex. G–29 at 22; Ex. R–25; *see, e.g.*, Tr. 420–24, 648.) Continuous mining machines include water sprays and scrubbers to cut down on dust created during mining. (Ex. G–29 at 22; Ex. R–25; Tr. 419–21, 901–02.) The continuous miner operator completes each cut in a series of parallel "lifts" because finished entries and crosscuts are wider than the continuous mining machine. (Tr. 425–26, 475, 584.) Starting on the left hand side of a new entry or crosscut, the continuous miner operator takes a "lift" by boring forward a specified distance into the coal face. (Tr. 475, 584.) After completing the left lift, the continuous miner operator pulls back and takes a parallel lift on the right hand side of the entry. (Tr. 425–26, 475, 584.) Taken together, these lifts are considered a cut.

Blue Diamond's Mine No. 77 operates on three shifts. (Tr. 60–61, 115, 129, 142, 804; Ex. G–28 at 1.) The day shift operates from 7:00 a.m. until 3:00 p.m., the second shift operates from 3:00 p.m. until 11:00 p.m., and the third shift operates from 11:00 p.m. until 7:00 a.m. (Tr. 60–61, 804.) The third shift is a maintenance shift that does not produce coal. (Tr. 1042.)

B. Roof Control at Mine No. 77

Mine roofs include two parts: the immediate roof and the main roof. The immediate roof is the first six to eight feet of rock immediately above the entry or crosscut corridor. (Tr. 46, 70–71.) The main roof is the rock between the immediate roof and the earth's surface. (Tr. 70–71.) Mine No. 77 is between 900 and 1,200 feet below the earth's surface, and the weight of that overburden creates downward pressure on the roof of the entry and crosscut corridors. (Tr. 77, 86, 140–41, 255, 311, 676–77, 689, 711, 926.) Rock roofs sag, fragment, and twist under this pressure, which may cause pieces of the roof to collapse and fall. (Tr. 77–78, 84–86, 99, 106, 119–20, 141–43, 157–59, 263, 307, 311–12, 351, 687–689, 717, 735–36, 739, 1105–06, 1110–12, 1117–20, 1125–26, 1147–48.) Longer and wider cuts are more likely to fall because they expose more geological material. (Tr. 731, 952, 1117–18.)

To protect miners from roof collapses and falling rock, MSHA enforces standards requiring mine operators to reinforce and strengthen mine roofs. *See* 30 C.F.R. §§ 75.200–.223. Under these regulations, MSHA approves roof control plans requiring mine operators to support their mine roofs in specific ways. *Id.* §§ 75.220–.223. At the time of each of the alleged roof control violations, Blue Diamond was operating under MSHA's approved roof control plan dated September 7, 2006 ("September 7 Plan"). (Ex. G–19; Ex. G–20; Ex. G–23; Ex. G–25.) A typical roof control plan requires several steps to maintain the integrity of mine roofs. (*See, e.g.*, Ex. G–20.)

First, roof bolts stabilize the immediate roof and secure it to the main roof. (Tr. 56, 85, 262–63, 275, 684, 713, 723, 751, 764, 1111.) Using a roof bolting machine, a roof bolt operator inserts a long metal roof bolt into the mine roof, using resin glue (or grout) to hold the roof bolt in place. (Tr. 64–65, 67–68, 149, 462, 608–09, 678, 944.)

Blue Diamond used two types of roof bolts in Mine No. 77: five-foot resin bolts and ten-foot cable bolts. Resin bolts are rigid pieces of rebar that create a beam of solid rock and have a bearing plate on the bottom to secure draw rock[5] to the immediate roof. (Tr. 680–85, 937.) In contrast, ten-foot cable bolts extend into the main roof. (Tr. 59, 85, 90, 262–63, 683–84, 937–38.) Acting as a tether, these cable bolts help to suspend the immediate roof from the more secure main roof. (Tr. 85, 89, 262–63, 682–84, 937–38.) Cable bolts are designed to compress the various layers of rock within the immediate roof to create a more secure, fixed beam of rock. (Tr. 683–84.)

Second, roof bolting plans limit delays in installing roof bolt support because mine roofs begin to sag and separate when an operator waits too long to install roof support. (Tr. 1110–11, 1119, 1147–48.) This sagging and separation makes a roof more likely to fall than if an operator bolts the roof immediately. (Tr. 1117–19.)

Finally, in some parts of the mine, roof control plans require additional support mechanisms, such as straps and cribs. Straps are flexible pieces of steel that are four-feet long and a quarter-inch to a half-inch thick, with holes on the ends that allow them to be affixed to the mine roof or rib. (Tr. 72–73, 241–42, 246–47, 697–98.) Cribs are wooden blocks stacked on top of each other to brace the mine roof. (Tr. 63–64, 121–22, 964–65.)

C. Mine Ventilation

Mining coal creates coal dust and liberates methane, which is an explosive gas at certain concentrations. (Tr. 427, 463–64.) Coal dust can also contribute to pneumoconiosis. (Tr. 435–36.) At the time of the violations, Mine No. 77 liberated between 250,000 and 500,000 cubic feet of methane in a twenty-four-hour period. (Tr. 417.) If not properly ventilated, coal dust and methane present a danger to miners.

[5] Throughout the hearing, various witnesses consistently used the phrase “draw rock” to describe loose rock within the mine roof. Inspector Sturgill defined “draw rock” as “anything in the mine roof that’s not supported that could fall from the mine roof.” (Tr. 381.)

Mine ventilation systems "sweep away noxious, harmful, [and] explosive gases and coal dust and rock dust produced by coal production." (Tr. 426–27.) Mine operators use a variety of permanent devices as well as temporary devices—including burlap check (or brattice) curtains, line curtains, and deflector curtains, made of burlap—as ventilation controls that direct fresh air in a predetermined course through the mine. (Tr. 443, 450, 470–71, 808–09, 857, 861.) An anemometer is used to take air readings that measure the velocity of air flowing through a particular spot. (Tr. 471–72, 859, 868–69.)

Under 30 C.F.R § 75.370(a)(1), a mine operator must develop and follow an approved ventilation plan meeting certain requirements. At the time of the alleged ventilation violation in this case, Blue Diamond followed a ventilation plan approved on July 26, 2005 ("July 26 Plan").

IV. PRINCIPLES OF LAW AND STATUTORY ANALYSIS

A. Section 110(c) of the Mine Act – Agent Liability

Corporate directors, officers, or agents are liable under section 110(c) when they know or had reason to know of a violative condition, and fail to act to correct the condition. *See* 30 U.S.C. § 820(c); *Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003). Section 110(c) liability "is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012).

B. 30 C.F.R. § 75.370(a)(1) – Ventilation Plans

Section 75.370(a)(1) requires operators to develop and follow an approved ventilation plan designed to control methane and respirable dust and suitable to the mine's conditions and mining system; and consisting of the elements prescribed in section 75.371 and a map as prescribed in section 75.372. 30 C.F.R. § 75.370(a)(1). *See Peabody Coal Co.*, 16 FMSHRC 2199, 2203 (Nov. 1994) (affirming ALJ's conclusion that a ventilation plan is violated when an operator does not follow its specific terms).

C. 30 C.F.R. § 75.220(a) – Roof Control Plans

Section 75.220(a)(1) requires operators to develop and follow an approved roof control plan that is suitable to the prevailing geological conditions and the mining system in place at the mine and to take additional measures to protect persons if unusual hazards are encountered. 30 C.F.R. § 75.220(a)(1). An operator violates section 75.220(a)(1) when it does not comply with the terms of its roof control plan. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280–82 (Dec. 1998) (explaining how the Secretary must prove violations of roof control plans).

D. Significant and Substantial Violations

A violation is S&S "if, based on 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). To

establish an S&S 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 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. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981). Moreover, the Commission has indicated "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 33 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission indicated an evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984))

E. Unwarrantable Failure of Operator to Comply with Mandatory Standards

In *Emery Mining*, the Commission determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1998). These factors are viewed in the context of the factual circumstances of each case, and some factors may

not be relevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC at 353. All relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Id.*

F. Flagrant Violations

Section 110(b)(2) provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a *reckless* or *repeated* failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2) (emphasis added). Thus, section 110(b)(2) authorizes the Commission to assess a civil penalty of up to $220,000.00 for any violation that is deemed to be flagrant. Violations may be deemed flagrant when an operator fails either (1) recklessly or (2) repeatedly to make reasonable efforts to eliminate a known violation.

1. Reckless Failure

In my decision in *Stillhouse Mining, LLC*, I closely examined the text of the MINER Act and its legislative history, and determined the statute to be ambiguous. 33 FMSHRC 778, 801 (Mar. 2011) (ALJ). To date, the Commission has not contradicted my interpretation of the "reckless" element or the second, third, and fourth elements of a flagrant violation. For the purposes of this decision, therefore, I adopt the interpretation of each of these elements as outlined in *Stillhouse*, including:

1. Reckless – "[A]n operator is reckless for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury in failing to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard." *Id.* at 804.

2. Failure to Make Reasonable Efforts to Eliminate – "[A] 'reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard' occurs when, in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury." *Id.* at 805.

3. Known Violation of a Mandatory Health or Safety Standard – "[A] 'known violation' refers to the operator's express or implied actual knowledge of the violation" and "need not have

been previously cited by MSHA at the time the operator recklessly failed to eliminate it." *Id.* at 807.

4. Reasonably Could Have Been Expected to Cause Death or Serious Bodily Injury – "[W]hen, based on all the facts and circumstances surrounding the operator's reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard, the operator's conduct was likely to bring about death or serious bodily injury." *Id.* at 808.

2. Repeated Failure

Similarly, the Commission has not yet adopted a detailed definition of "repeated" failure. The Commission has stated that section 110(b)(2) plainly permits the Secretary to use an operator's past violation history as evidence of a "repeated" failure under section 110(b)(2). *Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013) ("We conclude that the plain language of section 110(b)(2) does not support the Judge's ruling that past violative conduct may not be considered in determining whether a cited condition represents a 'repeated failure . . . .'"). Nevertheless, the Commission limited its decision to whether the Judge had properly construed the "'repeated failure' language of section 110(b)(2) . . ." and did "not resolve which prior violations are relevant to the assessment of a 'repeated failure' violation." *Id.* at 543 & n.15.

Thus, I may consider evidence of past violations to determine whether an operator's conduct constitutes a repeated failure. Yet, the narrow, interlocutory nature of the Commission's *Wolf Run* decision leaves open the level of similarity or pervasiveness necessary for past conduct to prove a present violation as a repeated failure under section 110(b)(2) of the Mine Act.

In his post-hearing brief, the Secretary presents a two-pronged definition for "repeated":

> [W]here [s]ection 110(b)(2)'s other criteria are satisfied, a "repeated failure" is established where the operator either: (1) failed more than once to make reasonable efforts to eliminate the violation alleged to be flagrant; or (2) failed to make reasonable efforts to eliminate at least one previous violation before failing to make reasonable efforts to eliminate the violation alleged to be flagrant.

(Sec'y Br. at 8 (citation omitted).) However, the Secretary does not rely on his first proposed interpretation—i.e., that Blue Diamond failed more than once to make reasonable efforts to eliminate the violation alleged to be flagrant. (Ex. G–19; Ex. G–23; Ex. G–25; Ex. G–27; Sec'y Br. at 37, 53, 63, and 87.) Indeed, the Secretary's post-hearing brief points only to Blue Diamond's history of previous violations. (Sec'y Br. at 37, 53, 63, and 87.) Consequently, the Secretary's "repeated" failure allegations turn on his second proposed interpretation—i.e., Blue Diamond's alleged failure to make reasonable efforts to eliminate at least one previous violation before failing to make reasonable efforts to eliminate the violation alleged to be flagrant.

The Secretary argues that where section 110(b)(2)'s *other* criteria are satisfied, an operator's previous failure "to make reasonable efforts to eliminate" one prior violation is a

predicate upon which the *presently* cited failure to make reasonable efforts may be deemed a "repeated" failure. (*See* Sec'y Br. at 8.) According to the Secretary's definition, a flagrant designation under the repeated prong of section 110(b)(2) includes the following elements:

1. A present failure to make reasonable efforts to eliminate the violation alleged to be flagrant;
2. That the present violation was a known violation of a mandatory health or safety standard;
3. That the present violation reasonably could have been expected to cause death or serious bodily injury; and
4. A prior failure to make reasonable efforts to eliminate a previous violation.

Ordinarily, a question regarding the meaning of "repeated" would require that I apply the familiar, two-step interpretive framework outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Given my factual findings and conclusions of law in this case, however, I need not make a detailed analysis of the meaning of "repeated" in section 110(b)(2). *See* discussion *infra* Part V.A.5, Part VI.B.5, Part VI.C.6, and Part VI.D.6. Instead, I will assume *arguendo* that the Secretary's interpretation should be accorded deference.

V. ANALYSIS, FURTHER FINDINGS OF FACT, AND CONCLUSIONS OF LAW — VENTILATION VIOLATIONS

A. Order No. 4220150 – Ventilation Order – April 5, 2007

1. Background, Inspection, and Further Findings of Fact

a. Development of New Panel

On April 4, 2007, Blue Diamond began developing a new panel known as the 11 Section off the Daugherty Mains in Mine No. 77. (Tr. 31–34, 36, 805; Ex. G–16; Ex. G–17.) When facing the new panel, the 11 Section's No. 1 entry was located on the left-hand side and the No. 6 entry on the right-hand side. (Tr. 34–35, 228; Ex. G–16; Ex. G–17.) Fresh air ventilated the new panel from the 11 Section's No. 6 entry down the 11 Section's last open crosscut to the No. 1 entry. (Tr. 852, 856–57; Ex. R–30.) As the panel was developed, Blue Diamond recorded air readings on its overnight and day shifts demonstrating sufficient air flow. (Tr. 833; Ex. R–18.)

That same day, Inspector Robert Ashworth began an inspection of the 11 Section. (Tr. 478–79; Ex. R–13 at 1–2.) While there, Ashworth completed an imminent danger run, examined the mine roof and test holes, took methane gas readings, and took bottle samples of air. (Tr. 479–85, 496–500; Ex. R–13 at 1–10; Ex. R–16; Ex. R–17.) He also measured the air velocity in the last open crosscut to be 14,706 cubic feet per minute (CFM), well above the 9,000 CFM required in Blue Diamond's July 26 Plan. (Tr. 485, 496; Ex. R–13 at 10–10(b); Ex. G–29 at 8.) In addition, he examined ventilation curtains throughout the section and did not find any curtains missing or out of place. (Ex. R–13 at 12; Tr. 497, 504.)

b. Mining Operations and Code-A-Phone Complaints on April 5, 2007

Mining operations on the 11 Section continued through the second shift of April 5, 2007. (Tr. 773–75, 804–05.) When second-shift Section Foreman Jent arrived on the section that day, he spoke with day-shift Section Foreman Jody Roberts. (Tr. 807.) Roberts mentioned no roof control or ventilation concerns. (Tr. 807.) Jent then took an air reading in the last open crosscut between the No. 1 and No. 2 entries, and measured an air velocity of 13,500 CFM. (Tr. 784–86, 804, 806–10; Ex. R–29.)

By the time Jent completed that air reading, the continuous miner machine began cutting a crosscut between the No. 1 and No. 2 entries. (Tr. 423–25, 451–52, 811, 871; G–17; Ex. G–36.) As the miner operated, Jent took another air reading behind the line curtain in the No. 1 entry and found an air velocity of approximately 5,700 CFM, also above the 5,500 CFM that the July 26 Plan required behind line curtains. (Tr. 785, 798, 837; Ex. G–29 at 8.) The continuous miner operator, Darrell Cress, mined for approximately half an hour but stopped when he learned a shuttle car had broken down at the mine's feeder. (Tr. 775–76, 797–98.) While backing the continuous miner out of the new crosscut, Cress noticed that the last shuttle car he loaded had torn down the line curtain in the No. 1 entry. (Tr. 775–78, 797.) Cress moved the curtain out of the way so he could back down the entry without destroying the curtain, with the intention of hanging it back up when finished. (Tr. 776–80, 797.)

Meanwhile, Jent had begun his on-shift exam and noticed that the roof bolter had moved from the No. 3 entry into the No. 2 entry. (Tr. 812.) Jent observed the roof bolter sitting on the line curtain for the No. 2 entry and instructed the roof bolter operators to re-hang the curtain. (Tr. 812, 814.) Relying on the bolter operators to do as instructed, Jent headed to the No. 3 entry to continue his on-shift exam. (Tr. 814–15.) Jent noticed that the roof bolter had torn down the curtain in the No. 3 entry when moving to the No. 2 entry. (Tr. 815.) Following his policy that miners re-hang any curtains they tear down, Jent instructed the roof bolter operators to re-hang the curtain in the No. 3 entry. (Tr. 815–16.) Jent then headed to the feeder to address the disabled shuttle car. (Tr. 36–37, 439, 522, 781, 816–18, 878; Ex. R–24A; Ex. R–29; Ex. R–30.)

At that point, Inspectors Robert Ashworth and Patrick Stanfield arrived on the 11 Section with Superintendent Williams. (Tr. 30, 414–15, 821; Ex. G–18 at 1; Ex. R–8 at 2.) That afternoon, MSHA had received safety complaints regarding conditions at Mine No. 77. (Tr. 29–30, 413–14, 881–82; Ex. G–18 at 2; Ex. R–8 at 2.) Although Inspector Ashworth had already worked a full shift inspecting Mine No. 77 that day, he returned to the mine with Inspector Stanfield to investigate those safety complaints, which included drug use at the mine, unsafe roof conditions, improper ventilation, extended cuts, and oil on mine machinery. (Tr. 29–30, 413–15, 881–82; Ex. G–18 at 1, 15–20.)

When Stanfield and Ashworth arrived on the 11 Section, the double-headed roof bolter was operating in the No. 2 entry and the continuous miner was energized in the No. 1 entry. (Tr. 36, 423–25, 438, 441–42, 452, 812–14, 816, 859; Ex. G–17.) After Ashworth and Stanfield completed a search of the miners for drugs and smoking materials and found nothing, they began their inspection with an imminent danger run through the 11 Section. (Tr. 34, 415–17.) Stanfield headed

to the No. 6 entry, while Ashworth started in the No. 1 entry. (Tr. 34, 228, 233.) Stanfield estimated that eight miners were working on the 11 Section at the time. (Tr. 39.)

c. Order No. 4220150 – The Ventilation Violation

As Inspectors Ashworth and Stanfield gathered the miners to complete their search for drugs and smoking materials, Ashworth observed that required deflector curtains in the No. 2 and No. 3 entries were missing. (Ex. G–28 at 4.) Ashworth also observed continuous miner operator Darrell Cress step into the intersection of the last open crosscut and the No. 1 entry, and begin installing a line curtain. (Tr. 417–18, 781–82, 793, 797; Ex. G–28 at 5.) Ashworth "informed [Cress] that it was too late [to rehang the curtain]" and instructed him to back the miner up under the supported mine roof. (Ex. G–28 at 5; *see also* Tr. 793.) Ashworth further testified that he observed coal dust suspended in the air in the No. 1 entry.[6] (Tr. 418–20, 423–24, 426.)

After Ashworth and Stanfield completed their search for drug and smoking materials and gave a safety talk, Ashworth next took air readings to measure the velocity of air flowing through Blue Diamond's ventilation system. (Tr. 822; Ex. G–28 at 8–9; Ex. R–29.) Ashworth testified that he took three air readings between the first and second entry of the last open crosscut. (Tr. 440.) At approximately 7:30 p.m.—more than 12 hours after his work day began—Ashworth measured the air velocity to be 7,611 CFM, which is below the 9,000 CFM required in the July 26 Plan. (Tr. 445, 822; Ex. G–28 at 8–9.) Superintendent Williams contends that he told Ashworth that he was in the wrong place to take an air reading. (Tr. 858–59, 891–92.) Moreover, Jent testified that he told Ashworth that he had sufficient air on the section when he started work that shift. (Tr. 823–24.) At the time of the hearing, Ashworth did not recall either conversation. (Tr. 444–45, 528.)

[6] Both Williams and Cress testified that they did not see any coal dust in the air; instead they asserted the substance was mist from the energized continuous miner's water sprays. (Tr. 783–84; 871–72.) Further, Inspector Stanfield admitted that he saw no coal dust in the No. 1 entry when he arrived on the 11 Section or prior to the drug search. (Tr. 234.) Based on the evidence before me, I determine that the Secretary has not met his burden of proving that coal dust was present in the No. 1 entry when Ashworth and Stanfield arrived on the 11 Section.

According to Ashworth, at this point, Jent and the 11 Section crew "began to install[] ventilation controls across the section." (Ex. G–28 at 11.) Meanwhile, Ashworth examined a previous garbage accumulation violation. (*Id.*) At 9:45 p.m., he took another air reading at the same location in the last open crosscut, which measured 7,718 CFM. (Tr. 830; Ex. G–28 at 9, 12.) Although Ashworth does not recall doing so, Shepard, Jent, and Superintendent Williams each credibly testified that Ashworth then directed Blue Diamond personnel to hang and relocate certain ventilation curtains. (Tr. 555, 788–89, 799–800, 830–31, 887–88, 905; Ex. R–28; Ex. R–29; Ex. R–30.) Shortly thereafter, at 10:00 p.m., Ashworth took a third reading in that same location, measuring the air flow to be 9,648 CFM. (Tr. 446, 519; Ex. G–28 at 12, 15.)

After finding sufficient air in the last open crosscut, Ashworth then took an air reading at the end of the newly-installed line curtain in the No. 1 entry at 11:00 p.m. (Ex. G–28 at 13–15; Tr. 454.) He recorded an air velocity of 2,066 CFM. (Ex. G–28 at 14–15; Tr. 454.)

Based on his observations on the 11 Section, Inspector Ashworth issued Order No. 4220150 alleging a violation of 30 C.F.R § 75.370(a)(1):

> The operator is not complying with the Ventilation Plan, approved 07-26-2005 on the 011 MMU. The following hazards are present: 1). The operator is failing to maintain the minimum amount of air required in the last open crosscut, when measured with a[n] anemometer only 7,611 CFM was present[;] 2). The continuous miner was being operated in the No. 1 right crosscut approximately forty[-]five[-]feet inby the end of the line curtain. There is no perceptible air movement present behind the end of the line curtain. Visible suspended coal dust is present at the time this condition was observed. After repeated attempts to repair ventilation controls it took approximately 2 1/2 hours to achieve the minimum 9,000 [CFM] in the last open crosscut. After repairs were made on [sic] only 9,648 [CFM] was obtained. After an additional hour the minimum requirement of 5,500 [CFM] at the end of the line curtain could not be obtained. Only 2,066 [CFM] was measured at the end of the line curtain. When these conditions were initially observed a methane check with a hand held gas detector indicate[d] that .55% methane is present at the inby corner of the No. 1 right crosscut being mined.[;] 3). Both the No.2 and No.3 heading are not being provided with ventilating deflector curtains. The roof bolter is being operated in the No. 2 right crosscut which also requires a deflector curtain. The No. 2 heading is approximately 105 feet deep and the No. 3 heading is approximately 110 feet deep inby the last crosscut. A methane check with a hand held gas detector indicate[d] .25% methane is present in the No.2 at the last row of permanent roof supports, .05% methane is present in the face area of the No. 3 entry.

> 4). No check curtains are present in the [N[o. 2 thru [N]o. 5 entries that are necessary to direct ventilation across the section.[7] This mine is on a 15 day spot inspection requirement for excessive methane liberation. This mine has been cited numerous time[s] for similar conditions. All of the conditions present would be obvious to the most casual of observers. The foremen present on the active section is a certified foreman who is trained and skilled in the recognition of hazardous conditions. Management engaged in aggravated conduct constituting more than ordinary negligence by deeming production more important than the miners[’] health. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–27 at 1–2.) Ashworth marked "permanently disabling injuries" as "highly likely," designated the violation as S&S, and characterized Blue Diamond's negligence as a "reckless disregard." (*Id.*) He also alleged that eight miners would be affected. (*Id.*)

d. Further Findings of Fact – Ashworth's Last Open Crosscut Air Measurements

Inspector Ashworth measured the air velocity in the 11 Section's last open crosscut three times, and his first two readings found insufficient velocity to satisfy Blue Diamond's July 26 Plan requirements. Ashworth claims he took all three of these readings while positioned between the first and second entry of the new panel. (Tr. 440, 443–46, 511.) Ashworth's inspection notes, however, indicate that he took his air reading between the second and third entry of the panel. (Ex. G–28 at 9.) According to Superintendent Williams and Section Foreman Jent, Ashworth was between the second and third entry when he took air readings. (Tr. 822–23, 858–59, 869–70; Ex. R–29; Ex. R–30.)

[7] During cross-examination, Ashworth admitted that the way he worded this fourth allegation was a "mistake." (Tr. 543–44.) Although Ashworth testfied that he would modify and "totally reword" that allegation (Tr. 543), the Secretary made no motion at the hearing or since to amend the citation. Accordingly, I dismiss the fourth allegation included in Order No. 4220150.

Ashworth, Inspector Stanfield, and Williams each testified that an inspector's location within the last open crosscut affects the amount of air that is ultimately measured. (Tr. 226–27, 515–16, 893–94.) Ashworth also stated that an air reading between the second and third entries would result in a lower measured velocity than if taken between the first and second entries.[8] (Tr. 515–16.) Yet, as Ashworth and Jent made clear, the proper location to measure air velocity is difficult to determine on a new section. (Tr. 516, 562, 828–29.) Thus, Ashworth's position within the crosscut will critically affect the weight I afford those readings when assessing the Secretary's allegations.

The testimony and evidence before me demonstrate that Ashworth took his first two air readings in the last open crosscut while positioned between the second and third entries. Most importantly, Ashworth's own contemporaneous inspection notes also indicate that he took his air readings between the second and third entry of the panel. (Ex. G–28 at 9, 15.) At the hearing, Ashworth testified that his inspection notes incorrectly recorded the location where he took his air readings (Tr. 443–44, 511), and I believe that Ashworth was testifying to the best of his recollection. However, I note that Ashworth was the only person present who had worked double-duty that day. Thus, it seems likely that he might not accurately remember his location on the confusing, new 11 Section. Accordingly, I credit Ashworth's contemporaneous notes over his testimony nearly four years after the alleged violation.[9] Moreover, Williams and Jent's testimony about Ashworth's position corroborate what Ashworth himself wrote at the time of his inspection. Accordingly, I find that Ashworth's first and second air readings were taken between the No. 2 and No. 3 entries of the last open crosscut. I also find this location resulted in inaccurate air measurements.[10]

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[8] The parties disagree about the proper location for an air reading with the ventilation controls set up as they were when Ashworth and Stanfield arrived on April 5, 2007. (*See* Sec'y Br. at 70–71; Resp't Br. at 6–7; Jent Br. at 4–5.) Given Ashworth's admission that an air reading taken between the second and third entries would result in a lower measured velocity than an air reading taken between the first and second entries, I do not need to determine the proper position in which to measure air velocity in this case. Even using the Secretary's theory of the case, a reading between No. 2 and No. 3 entries would decrease the measured velocity.

[9] The Secretary argues that the commotion on the 11 Section and Ashworth's long day at the mine made him more apt to make a mistake in his notes. (Sec'y Br. at 70 n7.) However, these same factors would also make Ashworth more likely to have been confused in the newly developed section, and to inaccurately recall his precise location for his air readings four years later.

I also reject the Secretary's argument that Inspector Stanfield "corroborated" Ashworth's testimony about his location within the crosscut when taking his air readings. (Sec'y Br. at 70 n.7.) Stanfield explicitly testified that he did not know exactly where Ashworth was when he took his air reading. (Tr. 216–17, 237–38.)

[10] Such a finding—and the inaccurate reading it would produce—would account for the great disparity with the earlier air readings recorded on the 11 Section, including Ashworth's own April 4 air reading. (Ex. R–13 at 10(b); Ex. R–18.) Mining is a dynamic process, and I recognize that recent compliance does not necessarily mean that conditions in the mine have not changed. However, the Secretary did not produce *any* evidence of changed conditions in Mine No. 77 that explain the great

disparity between every *other* air reading taken April 4–5 and the substandard air measurements Ashworth took after responding to the April 5, 2007, safety complaint.

Moreover, prior to hearing, Blue Diamond raised collateral estoppel arguments regarding air flow in the last open crosscut, which I denied in a published order. (Tr. 14; Ex. R–1; Resp't Br. at 2); *see also Blue Diamond Coal Co.*, 32 FMSHRC 1511 (Sept. 17, 2010) (ALJ). Although Respondent re-raised the issue at hearing and in its post-hearing brief (Tr. 14; Resp't Br. at 2), I need not address the issue because I do not credit Ashworth's last open crosscut readings.

2. Violation of Ventilation Plan

By Blue Diamond's own admission, its failure to maintain deflector curtains in the No. 2 and No. 3 entries constitutes a violation of its July 26 Ventilation Plan. (Resp't Br. at 11.) The Secretary, however, alleges that two additional conditions violated the plan: (1) insufficient air flow in the last open crosscut of the 11 Section; and (2) insufficient air flow behind the line curtain in the 11 Section's No. 1 entry. (Sec'y Br. at 68–72.) Despite Blue Diamond's admission, I will address these two additional conditions because they have bearing on my conclusions regarding the Secretary's gravity, negligence, and flagrant allegations.

The Secretary relies solely upon Inspector Ashworth's air readings and observations to support his allegation that Blue Diamond did not maintain adequate air flow in the last open crosscut of the 11 Section. Yet, as I explained above, I find Ashworth's air readings were inaccurate and underestimated the velocity of air on the 11 Section. Most critically, the Secretary provides no other basis for me to infer that the 11 Section had insufficient air flow through the last open crosscut. Given the erroneous location of Ashworth's air readings and based on the testimony and evidence before me, I conclude that the Secretary has not met his burden of proving that air flow in the last open crosscut was insufficient.

Second, Ashworth's air reading behind the line curtain in the No. 1 entry demonstrates that the required 5,500 CFM of air was not present at the time Ashworth took his measurement. Blue Diamond does not dispute the accuracy of the measurement; instead, Blue Diamond contends that the ventilation controls in place at the time of Ashworth's line curtain measurement do not reflect the ventilation controls Blue Diamond had in place when Ashworth and Stanfield arrived on the 11 Section. (Resp't Br. at 10–11.) Thus, Respondent argues, Blue Diamond did not violate its ventilation plan. (*Id.*)

Blue Diamond's argument is appealing, and Ashworth's changes to Respondent's ventilation controls will bear on my analysis of gravity and negligence. However, the Mine Act is a strict liability statute, and operators are liable for violative conditions regardless of their level of fault. *See, e.g.*, *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). Although Ashworth mandated changes to Blue Diamond's ventilation controls during his inspection, Respondent remains liable for the conditions found on the 11 Section of Mine No. 77. Thus, I determine that both Blue Diamond's failure to provide 5,500 CFM of air behind the line curtain in the 11 Section's No. 1 entry and the missing deflector curtains each violated its July 26 Plan. I therefore conclude that Blue Diamond violated 30 C.F.R. § 75.370(a)(1).

3. Gravity and S&S Determinations

Blue Diamond's violation of section 75.370(a)(1) establishes the first element of the *Mathies* test for an S&S violation. Inspector Ashworth credibly identified a methane explosion and pneumoconiosis as the hazards to which Blue Diamond's violation contributed. (Tr. 427, 435–37, 462, 464, 566). He also credibly testified that eight miners would be affected. (Tr. 468; *see also* Tr. 38–39; Ex. G–28 at 7.) I do not doubt that either of these hazards would be reasonably likely to

cause permanently disabling or fatal injuries to all eight miners on the section.[11] Thus, I determine that the third and fourth *Mathies* elements are satisfied.

This case turns on whether Blue Diamond's violation contributed to a discrete safety hazard—in this case a possible methane explosion or pneumoconiosis. *See Black Beauty Coal Co.*, 34 FMSHRC 1733, 1739–43 (Aug. 2012) (discussing the second, third, and fourth elements of the *Mathies* test); *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010) ("The second element in *Mathies* requires consideration of whether a discrete safety hazard—that is, a measure of danger to safety—is contributed to by the violation. There is no requirement of 'reasonable likelihood.' The third element is whether there is a reasonable likelihood that the hazard contributed to will result in an injury.") Here, the Secretary's evidence does not demonstrate that either the insufficient line curtain ventilation or missing ventilation curtains actually contributed to—or provided a measure of danger to safety—either of the hazards Ashworth identified in Order No. 4220150. *Cf. Big Ridge, Inc.*, 35 FMSHRC 1525, 1528 (June 2013) (affirming ALJ's determination that *Mathies* second element was satisfied where coal accumulations and an ignition sources were present).

[11] Blue Diamond contends that the violative conditions would only affect seven miners because the eighth—electrician Mike Pease—rode to the section with Inspector Ashworth, Inspector Stanfield, and Superintendent Williams on the day of the inspection. (Resp't Br. at 14 n.10.) However, Pease was late to work that day. (Tr. 881.) In the course of continued mining operations, I find that a ventilation violation would affect a full crew of eight miners.

First, the Secretary presented no evidence from which I can conclude that the insufficient air flow behind the line curtain would contribute either to methane explosion or pneumoconiosis. I recognize that Mine No. 77 liberated methane, that methane gas wells were located in the area, and that continuous miners generally produce coal dust in the course of normal mining operations. Yet the conditions under which Inspector Ashworth took his line-curtain measurement were *not* normal. Based on the credible testimony of Shepard, Jent, and Williams, I find that Ashworth's line curtain air measurement occurred *after* he had directed Blue Diamond to make several changes to its ventilation controls. *See* discussion *supra* Part V.A.1.c. By that point, Blue Diamond had not mined coal on the 11 Section for several hours. Although methane and coal dust might accumulate if production resumed with those reconfigured ventilation controls, there was no likelihood of that happening with Ashworth on the scene and having issued a section 104(d)(2) order. Consequently, the Secretary has not demonstrated that the insufficient air velocity behind the line curtain—taken after the inspector's own actions changed the ventilation controls—contributed to either the discrete safety hazard of a methane explosion or pneumoconiosis.

Second, the conditions on the 11 Section were not dangerous when Ashworth found the deflector curtains to be missing. Based on all the evidence, the Secretary has not met his burden of proving that *any* dangerous levels of respirable coal dust were present in *any* entry of the 11 Section, or that the measured methane levels on the 11 Section were abnormal on either April 4 or April 5. (Tr. 238, 461, 463, 504–05, 531.) Furthermore, Ashworth's methane readings from April 5 and 6 were below the explosive range for methane. (Tr. 431, 898–99.) As Ashworth explained, the April 5 and 6 readings were " well within the range of not requiring any additional measures." (Tr. 531.) In addition, Jent had already identified the missing curtains[12] and had instructed the roof bolt operators to rehang these curtains. I therefore determine that the missing deflector curtains would have been rectified in the course of on-going mine operations before any coal dust or methane accumulated in the No. 2 or No. 3 entries.[13] Inspector Ashworth's instructions to the contrary

[12] In his direct exam, Jent specifically characterized these curtains as "line curtains" rather than "deflector curtains." (Tr. 814.) However, the record as a whole suggests that the nomenclature of curtains is a fluid concept. For example, Ashworth testified that only one line curtain exists, and it is located wherever the continuous miner is operating. (Tr. 471; *see also* Tr. 541–42 (conflating deflector curtains with line curtains).) Yet Williams characterized the curtains in the No. 4, No. 5, and No. 6 entries as "line curtains" when no continuous miner was present. (Tr. 857–58; Ex. G–17.) Likewise, miner operator Darrell Cress observed that the continuous miner was present in the No. 2 entry when he arrived. (Tr. 793–94.) He indicated that he tore down that "deflector curtain" when he moved the continuous miner into the No. 1 entry. (Tr. 793–94.) Based on the entirety of the record, I infer that the "line curtains" that Jent ordered to be rehung in the No. 2 and No. 3 entries were, in fact, the "deflector curtains" the Secretary claims were missing in those entries.

[13] Pointing to a citation for trash that had not been abated, the Secretary also contends that the "culture at Mine [No.]77 greatly increased the likelihood that the violative conditions described in Order No. 4220150 would result in fatal injury to miners." (Sec'y Br. at 78; *see also* G–28 at 11; Tr. 466–67, 879.) Although Blue Diamond should have abated the citation, I refrain from drawing the inference that failing to clean a trash bucket represents a "culture" that would ignore ventilation controls.

precluded that, and his changes to the ventilation controls at the end of a long workday created conditions that did not exist at the time of initial inspection.

Consequently, the Secretary has not proven that Respondent's inadequate line curtain ventilation or missing deflector curtains would contribute to methane explosion and pneumoconiosis hazards, and I determine that the Secretary has failed to satisfy the second element of the *Mathies* test. Accordingly, I conclude that this violation was not S&S and Order No. 4220150 is **MODIFIED** to remove the S&S designation.

4. Negligence and Unwarrantable Failure Determinations

The Secretary claims that Respondent's negligence in this case is a "reckless disregard" of its ventilation plan and characterizes its conduct as an unwarrantable failure. Blue Diamond asserts that Order No. 4220150 should be modified to a section 104(a) non-S&S citation and the level of negligence should be modified to "low." (Resp't Br. at 20–21, 64.)

The facts and evidence before me do not support the Secretary's reckless disregard and unwarrantable failure allegations. Looking at the Commission's aggravating factors for unwarrantable failure analysis, several weigh strongly in Blue Diamond's favor. First, the cited conditions were not highly dangerous given that no active mining was taking place at the time. The Secretary simply failed to demonstrate the presence of coal dust or dangerous levels of methane, and provided no rationale for believing these conditions would lead to accumulations of dust or methane in the course of continued mining operations. Second, the violative conditions at issue existed for a short amount of time. Third, the line curtain reading and deflector curtain conditions did not extend throughout the entire 11 Section. Fourth, both Cress and Jent took steps to abate violative conditions when they identified missing curtains. Finally, there is no indication that Blue Diamond's agents knew these conditions existed prior to Jent's discovery of the missing curtains in entry No. 2 and entry No. 3.

I recognize that the missing deflector curtains were obvious. Moreover, the Secretary presented evidence in the form of violation history reports and copies of past citations and orders that Blue Diamond has received many citations for ventilation- and curtain-related violations. (Ex. G–1; Ex. G–2; Ex. G–4; Ex. G–5; Ex. G–7; Ex. G–8; Ex. G–13; Ex. G–14.) These past violations suggest that greater efforts may be necessary to comply with its July 26 Plan. However, when weighing the mitigating factors above, I conclude that such evidence is insufficient to characterize Blue Diamond's conduct as an unwarrantable failure.

Likewise, the Secretary has not proven Blue Diamond's negligence to have been a "reckless disregard." The Secretary's standards define negligence as "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). These standards indicate that "reckless disregard" is found where "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* at Table X. Moreover, the standards prescribe moderate

negligence where "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.*

Given the evidence before me, I conclude that the Secretary has not satisfied his burden of showing that Blue Diamond acted without the slightest degree of care. In fact, Blue Diamond's conduct in this case suggests the contrary. Inspector Ashworth took his line curtain reading *after he* directed specific changes to the ventilation controls. Operators are bound not to interfere with an inspector's instructions, and Blue Diamond's adherence to Ashworth's directions does not constitute a reckless disregard for its July 26 Plan. Further, Section Foreman Jent specifically directed his roof bolt operators to rehang curtains in entry Nos. 2 and 3 immediately after finding that the curtains had been inadvertently torn down, before Ashworth arrived on the section. Moreover, mere sources of methane or coal dust accumulation, alone, do not demonstrate the dangers the Secretary contends; otherwise, no operator would be able to work in any coal mine in light of these omnipresent dangers. Similarly, the mere existence of previous ventilation curtain violations does not prove indifference on the part of Blue Diamond.

Nonetheless, Blue Diamond had a responsibility to adhere to its July 26 Plan, no matter how common or uncommon it is for its machine operators to inadvertently tear down curtains. (*See* Resp't Br. at 11.) Although I do not impute the negligence of rank-and-file miners to Blue Diamond, its agents have a duty to ensure that training and procedures address this known problem. However, Jent's steps to immediately address that condition significantly mitigate Blue Diamond's negligence. Indeed, prompt action to abate a violative condition is precisely the type of behavior the Mine Act aims to encourage. Accordingly, I determine that Blue Diamond's conduct constituted "moderate" negligence.

Based on all of the above, Order No. 4220150 is **MODIFIED** to remove the unwarrantable failure designation and change the cited level of negligence to moderate.

5. Reckless and Repeated Flagrant Designations under Section 110(b)(2)

As I noted in *Stillhouse*, a finding of S&S and unwarrantable failure does not necessarily imply a "reckless" designation under section 110(b)(2) of the Mine Act. 33 FMSHRC at 800 ("The unwarrantable failure and S&S language of section 104(d)(1) of the Mine Act does not elucidate Congress's intent on the meaning of a flagrant violation.") Yet the converse may be true. In fact, my conclusion that Order No. 4220150 is neither S&S nor unwarrantable strongly suggests the Secretary has not satisfied his burden of proving his flagrant allegations. Indeed, it is difficult to envision sustaining a reckless or repeated flagrant allegation when the underlying violation is neither S&S nor unwarrantable.

Here, the Secretary has not demonstrated *any* of the elements of a reckless failure. Ashworth's line curtain reading occurred after Blue Diamond complied with his direction to modify ventilation controls in response to the inspector taking his air readings in the wrong location of the mine. Likewise, Jent instructed roof bolt operators to rehang curtains in entry Nos. 2 and 3 before Ashworth's arrival on the 11 Section. Both actions indicate Blue Diamond did not consciously or deliberately disregard risks associated with these conditions and took reasonable

steps to address them. Moreover, the Secretary presented no evidence that Blue Diamond's agents knew or should have known of these conditions until Jent discovered the missing deflector curtains. Further, there is no indication that any methane or coal dust had accumulated in the No. 2 and No. 3 entries. Accordingly, I determine that the Secretary has not demonstrated recklessness, a failure to make reasonable efforts, a known violation, or a reasonable expectation that the conditions would have caused death or serious bodily injury for the purposes of section 110(b)(2).

Although the Secretary introduced evidence of past ventilation violations at Mine No. 77 in support of his repeated failure designation, I need not address their relevance or probity. The Secretary's definition of "repeated" conduct presupposes that section 110(b)(2)'s "other criteria" are satisfied. *See* discussion *supra* Part IV.F.2. Because the Secretary has not demonstrated that the conduct underlying Order No. 4220150 constituted a failure to make reasonable efforts to eliminate a known violation or reasonably could have been expected to cause death or serious bodily injury, I do not need to consider whether the Secretary's evidence demonstrates a previous failure to make reasonable efforts to eliminate a previous violation. Even under his own definition, the Secretary cannot prove a repeated violation without demonstrating that the "other criteria" have been satisfied.

Based on the facts before me, I conclude that the Secretary has failed to prove Blue Diamond's conduct was recklessly or repeatedly flagrant under section 110(b)(2) of the Mine Act. Accordingly, Order No. 4220150 is **MODIFIED** to remove the flagrant designation.

6. Penalty

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty, including the operator's history of previous violations; the appropriateness of the penalty relative to the size of the operator's business; the operator's negligence; the penalty's effect on the operator's ability to continue in business; the violation's gravity; and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation.[14] 30 U.S.C. § 820(i).

The Secretary initially sought a penalty of $187,500 for Order No. 4220150, and nothing in the record suggests the proposed penalty is either inappropriate for the size of Blue Diamond's business or would infringe on Blue Diamond's ability to remain in business. However, I have modified the citation to remove the S&S, unwarrantable, and flagrant designations. Moreover, I have concluded that Blue Diamond's negligence was moderate. Of the 914 number of violations in Respondent's history of violations report, 78 involved 30 C.F.R. § 75.370(a)(1). (Ex. G–1; Ex. G–2.) Moreover, once this order was issued, nothing suggests that Respondent failed to make a

[14] Blue Diamond suggests that the Secretary's specially-assessed penalties should be stricken from the record because they prejudice my penalty assessments in this case. (Tr. 570–73; Resp't Br. at 62–64.) Section 110(i) specifies the factors for me to consider and commits the penalty determination to my discretion. *See* 30 U.S.C. § 820(i). I have taken Blue Diamond's concerns under advisement, and the penalties I assess are appropriate based on the evidence before me and the criteria outlined in section 110(i).

good faith effort to achieve rapid compliance with the safety standard. Indeed, Blue Diamond followed Ashworth's instructions. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of $3,000.00.

B. Section 110(c) – Gary Jent – Ventilation Order – April 5, 2007

The Secretary seeks a separate civil penalty against Section Foreman Gary Jent for his conduct in connection with Order No. 4220150. Based on the facts before me and my conclusions of law regarding Order No. 4220150, the Secretary has not proven that Jent is personally liable under section 110(b)(2).

First, I have found that Inspector Ashworth's air readings inaccurately measured the amount of air flowing through the last open crosscut on the 11 Section. Likewise, I have found that coal dust was *not* present in the No. 1 entry when Ashworth and Inspector Stanfield arrived on the section. In light of those facts, Jent would reasonably have believed the 11 Section was adequately ventilated. Moreover, his affirmative steps to address the problems he encountered demonstrate that he did not fail to act. Finally, Blue Diamond's insufficient line curtain ventilation did not occur until *after* Ashworth altered Respondent's ventilation controls. Accordingly, Jent had no reason to know of the violative condition.

Based on the above, the Secretary has not proven that Jent failed to act or engaged in any aggravated conduct. Thus, I conclude that Jent is not liable for civil penalties under section 110(c). This violation is **VACATED** and the proceeding is **DISMISSED**.

VI. ANALYSIS, FURTHER FINDINGS OF FACT, AND CONCLUSIONS OF LAW — ROOF CONTROL VIOLATIONS

A. Roof Control Experts – Dr. Newman and Mr. Gauna – Credibility Determinations – Impact of Testimony

1. Witness Background

Blue Diamond presented testimony and an expert report from Dr. David A. Newman, who is the President of Appalachian Mining and Engineering. (Tr. 664; Ex. R–21.) In rebuttal, the Secretary presented the expert testimony and a report from MSHA Mining Engineer Michael Gauna. (Tr. 1063; Ex. G–30; Ex. G–31.) Both witnesses have advanced degrees in mining engineering and technology, and extensive experience involving roof control. (Tr. 664–70, 1063–66; Ex. R–21; Ex. G–31.) Each has also visited Mine No. 77 in the past, but neither examined the specific roof conditions at issue in any of the three roof control cases before me. (Tr. 671–73, 766–67, 1068–69.) In 1995, Newman also took a core sample of roof from Mine No. 77, which he called his KRP-7 core sample. (Tr. 671–73, 753, 755.)

2. Credibility determinations and impact of testimony

Citation No. 7505299 and Order Nos. 7521758 and 7524542 each allege dangerous violations of Blue Diamond's roof control plan. *See* discussion *infra* Parts VI.B, VI.C, and VI.D. As one might expect, Dr. Newman and Mr. Gauna reached contradictory conclusions regarding the hazards presented by nearly every item listed in each citation or Order. Each testified credibly to his interpretation of the condition or practice cited. Because neither expert observed any of the conditions firsthand or visited the parts of the mine where the alleged violations occurred, Newman and Gauna based much of their opinions on the text of the citation or orders, the Inspector's notes, the testimony of other witnesses, and their experience with mine roofs at Mine No. 77 and other mines. Their testimony regarding the mechanics of roof control is illustrative, but I accord little weight to the experts' ultimate opinions on any given condition because neither viewed the conditions in question. Such competing conjecture, no matter how well-intentioned and well-informed, is not a substitute for a credible, first-hand observation from an Inspector or miner trained to identify violative conditions and assess their gravity.

Yet, the parties' opinions were not all so limited. Dr. Newman provided an Analysis of Roof Bolting Systems (ARBS) and fixed beam examination of several items listed in the Secretary's Citation and Orders. (Ex. R–22; Ex. G–38.) Newman's report and testimony suggest that the conditions in question do not present roof fall hazards.

However, Gauna highlighted significant weaknesses in Newman's ARBS analyses. Most importantly, Gauna noted that Newman's ARBS input assumptions did not reflect the reality at Mine No. 77. According to Superintendent Williams and Section Foreman Shepherd, Blue Diamond used five-foot resin bolts that measured either five-eighths of an inch or three-fourths of an inch in diameter. (Tr. 641, 922.) However, Newman's ARBS analyses assumed five-foot resin bolts that were seven-eighths of an inch in diameter, which are also known as "seven bar" bolts. (Tr. 1084; Ex. R–22 at. 2–5 (listing "Bolt diameter" as "#7 bar").) Gauna credibly testified that the roof bolt diameter input "make[s] a big difference [in an ARBS analysis because the ARBS values are] . . . directly proportionate with the strength of the bolt, which is dependent on the diameter of the bolt." (Tr. 1084–85.) He further explained that "a smaller bolt" would "greatly diminish[]" the "actual ARBS" values, and testified that the thicker diameter input would make Dr. Newman's analyses incorrect. (Tr. 1085, 1090.)

Given the evidence before me, I have significant doubts about the validity of Newman's ARBS findings. Although I believe Newman's analysis was made in good faith, his mistaken inputs—and their concomitant impact on his ARBS results—are sufficiently troubling that I am left with no choice but to accord them no weight.

I also have serious doubts about Newman's fixed beam analysis. First, Gauna suggested that fixed beam analysis is inappropriate for unbolted extended cuts. (Tr. 1120–21.) According to Gauna, fixed beam analysis is "designed to look at the span across an opening and that span has been used rib to rib, or cross[cut] to crosscut, pillar to rib. In other words, it's used to show what's actually being spanned." (Tr. 1120.) However, one end of Newman's longitudinal beam does not extend to a fixed point (like a coal pillar). (Tr. 1120–21, 1150.) Although fixed beam analysis is "very appropriate for going rib to rib span" it is "not appropriate to use it in the coal face to the row of bolts." (Tr. 1121; *see also* Tr. 1125, 1149.)

Second, Newman's fixed beam analysis only lists safety factors for beams of shale, black shale, and bolted roof. Yet it is unclear how closely this mirrors the roof composition in the case before me. As Newman himself admitted about the KRP-7 core sample: "It is representative of the Elkhorn Three [seam]. It may not be the immediate roof, I don't know that the immediate roof in that area is exactly that, and the thickness []or the right properties, I don't know them to be exactly that, but what it is for this type of analysis is the closest information I've got from an actual drill hole . . . . So, you know, essentially I'm using that in extrapolating into this area to say on a comparative basis." (Tr. 755.) For example, the 12 Section roof at issue in Order No. 7524542 was laminated sandstone, which is sensitive roof. *See infra* Part VI.C.4. Indeed, Gauna specifically suggested that the KRP-7 sample was not a proper comparison for the roof in Order No. 7524542 because it contained no components of laminated sandstone. (Tr. 1116–17.)

In view of the above, I have serious concerns about the qualitative credibility of Dr. Newman's fixed beam analyses. I recognize Dr. Newman is a qualified expert in roof control and testified that a fixed beam analysis is an appropriate method for measuring the danger of an unbolted roof. However, Gauna's explanation of fixed beam analysis, coupled with my reservations about the comparative utility of the KRP-7 core sample, weighs strongly against the probative value of Dr. Newman's fixed beam analyses. Given these concerns, I accord no weight to Dr. Newman's fixed beam analyses.

B. Order No. 7521758 – 16 Items/Roof Control – April 5, 2007

1. Findings of Fact

The same day Inspector Ashworth issued Order No. 4220150, *see supra* Part V.A.1, Inspector Stanfield also examined roof control conditions on the 11 Section. After completing his search for drugs and smoking materials, Stanfield began an imminent danger run in the 11 Section. (Tr. 34, 233–34, 417, 883–84.) While making his way across the section, Stanfield identified sixteen different items he believed violated Blue Diamond's September 7 Roof Control Plan. (*See* G–19.) The items included conditions affecting roof bolt spacing, conditions involving roof and rib integrity, conditions involving missing equipment, and conditions involving permissible entry widths. (*Id*.; Ex. G–32; Ex. G–33; Ex. G–34; Ex. R–31.) Stanfield characterized these conditions as obvious. (Tr. 79–80, 90, 101–02, 119–20.) Depending on the item, these conditions had lasted from a few hours to several weeks. (Tr. 58–59, 89–90, 79–80, 102, 107, 109, 111, 115, 110.) He also observed no indications that Blue Diamond made any efforts to correct the cited conditions. (Tr. 79, 90, 101–02,125.)

As a result of his inspection, Stanfield issued Order No. 7521758, alleging:

> The operator failed to comply with the approved roof control plan (dated 09/07/2006) on the 011/MMU, in that;
> (1) #6 entry at the intersection of the last open crosscut, a pressure crack (lateral displacement) is present in the immediate roof. This crack has not been strapped. A roof drill test hole in the area

reflected a 10 inch crack. This is at Spad #3963[15]
(2) Just adjacent to Spad #3963, in the #6 right crosscut a roof drill test hole reflected cracks in the mine roof at 49, 52, 63, and 65 inches. This area is bolted with 5' [five foot] resin bolts.
(3) At the same location #6 right crosscut mobile equipment has torn metal straps out. These have not been replaced
(4) #1 right cross cut adjacent to Spad #3740, the width measured from 20 to 22 feet for approximately 20 feet. The approved plan requires widths to be maintained at 19 feet.
(5) At Spad # 3754, #3 entry, one of the 10 feet cable bolts has the head and bearing plate torn off. It has not been replaced.
(6) At Spad #3776, the 10 feet cable bolts have not been installed as required in the H pattern. The plan requires three to be installed across the center of the intersection, where the greatest roof stress occurs. Only one has been installed at the center of the intersection.
(7) Adjacent to Spad #3776, in the #3 right crosscut, on the outby rib the distance between installed roof bolts measured 56 inches.
(8) At the same location as cited in item #7, loose hanging draw rock of substantial size and weight is present. Most of this was pulled at the time of the inspection. Additional supports in the form of metal straps are needed to aid in controlling the draw rock at this location.
(9) #5 right (just turned) the third row of bolts outby the face, on the left rib, the first installed bolt in the third row is 56 inches from the coal rib. The approved plan requires bolts to be installed 3 feet [36 inches] from the coal rib.
(10) At the same location #5 right (just turned) the last two rows of bolts are installed only four in a row. The approved plan requires all bolts to be installed five in a row.
(11) At the same location (#5 right crosscut-just turned) the distance between the installed bolts on the inby rib at the last two rows is 56 inches. The approved plan requires the distance between rows of bolts to be no more than 4 feet [48 inches].
(12) #4 left at the last open crosscut along the outby rib, five bolts have been installed from 41 to 54 inches from the coal rib.
(13) At the last open crosscut between the #2 and #3 entries, along the outby rib, 6 bolts measured 41 to 48 inches from the coal rib.

[15] Spads are small, numbered pegs driven into the mine roof and used to show miners the proper direction to mine. (Tr. 620–21, 980–82.)

> (14) At the 14th crosscut of the #11 belt, on the left side, facing inby, a crib has not been installed
> (15) At the 15th crosscut of the #11 belt, the installed cribs (4) are not tight against the mine roof. Some of the crib blocks are turned up on the side using only four inches of the wood for support, instead of the 6 inches if it were used for maximum support.
> (16) #1 right, at the last open crosscut the outby rib is loose, (measuring approximately 3' x 15'). This loose rib could easily result in crushing injuries. This loose rib was taken down at the time of the inspection.
>
> The operator has recently received similar violations (warnings from MSHA). This mine has a history of roof falls and problems with roof and ribs. The cited condition is obvious and extensive. The approved roof control plan only specifies the minimum roof supports to be installed. All supports required by the approved plan must be installed and properly maintained to fully protect miners from the hazards associated with the falls of roof and/or ribs. An agent of the operator conducts preshift and onshift examinations on the 011/MMU, on three shifts daily.

(Ex. G–19.) Stanfield marked "fatal" injuries as "highly likely," designated the violation as S&S, and characterized Blue Diamond's negligence as a "reckless disregard." (*Id.*) He estimated the number of persons affected as 2. (*Id.*)

2. Violation of Roof Control Plan

In their post-hearing briefs, the parties sequentially address each of the sixteen items listed in this single order. (Sec'y Brief at 13–34; Resp't Br. at 21–36.) However, Respondent's post-hearing brief contends that Order No. 7521758 "should be modified to a [section] 104(a) non-S&S citation and the penalty should be substantially reduced." (Resp't Br. at 42.) Though Respondent disputes the S&S, unwarrantable failure, and flagrant designations, its contention that I modify the Order to a section 104(a) citation essentially concedes that Blue Diamond did not comply with the terms of its September 7 Plan.[16] Rather than follow the parties' lead in addressing each of these items individually, I therefore determine that Blue Diamond failed to follow its approved roof control plan. Thus, I conclude that Blue Diamond violated 30 C.F.R.

[16] The only exceptions to Blue Diamond's admission of a violation appear to be the ten-inch crack identified in Item No. 1 (Resp't Br. at 23) and the roof bolts listed in Item No. 13 (Resp't Br. at 34). Moreover, Blue Diamond's argument against an S&S finding is that none of these individual items were dangerous because each was minor. *See* discussion *infra* Part VI.B.3. Yet, the flip side of Blue Diamond's approach is that even if I concluded that Item Nos. 1 and 13 did not violate the September 7 Plan, neither determination would affect my overall conclusion regarding S&S. Accordingly, I need not determine whether items No. 1 and No. 13 were violations individually.

§ 75.220(a)(1).

3. Gravity and S&S Determinations

Blue Diamond's violation of 30 C.F.R. § 75.220(a)(1) establishes the first element of the *Mathies* test. This case again turns on the second element: whether Blue Diamond's violation contributed to a discrete safety hazard—in this case, a roof fall or falling draw rock. *See Black Beauty*, 34 FMSHRC 1733, 1739–43 (Aug. 2012) (discussing the second, third and fourth elements of the *Mathies* test). Sensing the importance of the safety hazards in this case, the parties each enlisted an expert. Yet, I find neither expert's opinion dispositive. I am therefore left with the testimony and observations of Inspector Stanfield and Superintendent Williams[17] to discern whether Blue Diamond's roof control violation contributed—or provided a measure of danger to safety—to the hazards Stanfield identified.

As Stanfield specifically stated: "[T]he more areas that are not supported per the approved roof control plan increases the likelihood of an accident . . . [These conditions extend] throughout the 11 Section, and the more exposure, the more hazard, the more likelihood." (Tr. 126.) In other words, Stanfield based his S&S designation on the cumulative contribution these items made to the hazards of a roof fall or falling draw rock, rather than each individual item's individual contribution. Rather than quantifying the *amount* each condition contributed to a roof fall or falling draw rock hazard, Stanfield proceeded on the theory that these items contributed to a hazard when taken cumulatively.

Respondent's defense amounts to a strategy of divide-and-conquer. Blue Diamond repeatedly suggests that the Secretary did not present evidence of poor roof conditions in the 11 Section and points to the Secretary's inability to quantify the amount each individual item would contribute to a roof fall or falling draw rock. (Resp't Br. at 22–36.) Thus, Blue Diamond hopes I will infer that no hazards exist. But Blue Diamond's arguments fundamentally misunderstand Inspector Stanfield's rationale for designating these conditions as S&S. Indeed, Williams' testimony regarding the cited conditions missed the proverbial forest for the trees. Although he was present for Stanfield's testimony, Williams simply did not address Stanfield's opinion that these items, taken cumulatively, contributed to a hazard of roof falls and falling draw rock when considered cumulatively.

[17] Both witnesses have extensive history working and inspecting coal mines, observed the items in question, and are familiar with the type of roof present in Mine No. 77. (Tr. 25–27, 78, 141, 143, 157–58, 162, 175–77, 840–46, 915–16, 919–20, 1032.)

Moreover, Stanfield's opinion is based on facts he observed, and his experience entitles that opinion to significant weight. *Cf. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1279 (Dec. 1998) (relying on inspector's opinion to conclude that substantial evidence supported the ALJ's S&S determination.) Further, the Secretary presented credible and uncontroverted evidence of roof falls adjacent to the 11 Section. (Tr. 50–51, 77, 108, 127; Ex. G–16.) In response, Blue Diamond made repeated reference to the roof conditions on an item-by-item basis. However, I note that "no Commission case has required the Secretary to show adverse roof conditions in a mine as a prerequisite to finding that a violation of a roof control plan is S&S." *Elk Run Coal Co.*, 27 FMSHRC 899, 906 n.13 (Dec. 2005). Instead, poor roof conditions merely provide indirect evidence that a roof fall or falling draw rock was reasonably likely to occur. Thus, Mine No. 77's history of roof falls very near to the 11 Section is similar, indirect evidence that a roof fall or falling draw rock is reasonably likely to occur in the 11 Section. Given Stanfield's credible opinion and the history of roof falls in the area, I am convinced that the cited conditions contributed to a discrete safety hazard. I therefore determine that the Secretary met his burden of proof on the second element of *Mathies*.

As to the third and fourth elements of the *Mathies* test, Inspector Stanfield credibly testified that eight miners were present on the 11 Section at the time he issued Order No. 7521758. (Tr. 39, 106–07.) He also credibly testified that the hazards to which this violation allegedly contributed—roof falls and falling draw rock—would be reasonably likely to cause reasonably serious injuries. (Tr. 48, 56–57, 77, 86, 99, 105–06, 113, 124–26, 128, 211, 250.) That roof falls and falling rock are highly likely to cause permanently disabling injuries, let alone death, borders on tautology. I do not doubt that serious injuries or fatalities would occur if the mine roof or draw rock fell on a miner during continued mine operations. Given the far-flung conditions cited in Order No. 7521758, I also do not doubt that the violation affected at least two of the eight miners present on the 11 Section. Thus, I determine that the Secretary has satisfied the third and fourth elements of the *Mathies* test and that at least two miners would be affected.

Based on my determination that the first and second elements have also been satisfied, I conclude that this violation was appropriately designated as S&S.

4. Negligence and Unwarrantable Failure Determinations

The Secretary designated Blue Diamond's conduct as an unwarrantable failure and characterizes its level of negligence as a reckless disregard. Based on the evidence before me, the Secretary has not met his burden of proof for either allegation.

Here, Inspector Ashworth traveled the 11 Section *on the day before* Inspector Stanfield issued Order No. 7521758 and examined the section for any "obvious" roof and rib hazards and checked test holes, entries, and faces for cracks. (Tr. 497–505; *see generally* Ex. R–13.) He also traveled with Section Foreman Jody Roberts as he checked test holes during his pre-shift exam. (Tr. 508–09; Ex. R–13 at 11.) Yet, after spending "his whole day on the section," Ashworth indicated that "[r]oof control measures appear to be adequate." (Tr. 505; Ex. R–13 at 12.)

Looking to the Commission's aggravating factors for determining unwarrantable failure,

two factors strongly suggest that Blue Diamond's conduct was not aggravated. First, the cited conditions were not obvious. Ashworth's failure to cite any of the cited conditions a day earlier does not excuse Blue Diamond's roof control violations, but it *does* suggest that Blue Diamond need not have acted indifferently, recklessly, or with a serious lack of reasonable care to have overlooked the conditions at issue. Indeed, Ashworth's failure to cite *any* of the conditions on the 11 Section and his testimony that he was looking for obvious violations indisputably limits the alleged "obviousness" of the violative conditions. Second, the Secretary has not demonstrated any actual knowledge of the violative conditions, and Ashworth's failure to cite these conditions mitigates Blue Diamond's constructive knowledge of those conditions.

On the other hand, other unwarrantable failure factors point the other way. Although roof control plans are detailed, expansive documents with wide-ranging application throughout a mine, Blue Diamond's history of previous violations provided Respondent with notice that the Secretary required greater efforts at compliance. In addition, the conditions underlying Order No. 7521758 extended throughout the newly-developed 11 Section. Blue Diamond's violation was also S&S, which indicated a significant level of danger. Finally, Stanfield credibly testified that he saw no previous efforts to abate any of these conditions.

The Secretary suggests the length of time that some of these conditions may have existed should have allowed Respondent enough time to identify their existence. (Sec'y Br. at 36.) Although the Secretary's suggested inference is logical, Ashworth failed to previously identify these purportedly long-standing conditions on April 4. Again, MSHA's failure to previously cite these conditions does not excuse Blue Diamond's responsibility under the Mine Act's strict liability scheme. However, it somewhat explains Blue Diamond's failure to readily identify those conditions. Indeed, Ashworth himself observed Section Foreman Roberts' on-shift exam, but identified no shortcomings. Thus, although the length of time these conditions existed is an aggravating factor, the failure of a trained MSHA inspector to observe what the Secretary has characterized as an "obvious" violation at least somewhat mitigates its impact.

I recognize the significant danger these conditions presented, the notice provided to Blue Diamond by its previous violations, and the extensive nature of these conditions. However, Ashworth's failure to identify or note even one of these conditions just one day beforehand convinces me that Blue Diamond's conduct does not rise to the level of recklessness, indifference, or serious lack of reasonable care that would constitute an unwarrantable failure.

For these same reasons, I conclude that the Secretary has not met his burden of showing Blue Diamond's level of negligence was "reckless disregard." As with his S&S designation, Stanfield characterized Blue Diamond's level of negligence based on the order as a whole, the condition of the roof, and Blue Diamond's history of violations. (Tr. 299–303.) He also admitted that he would not have marked "reckless disregard" if he had issued a citation for any individual condition. (Tr. 303.) Although I credit Stanfield's aggregate S&S theory, I do not find his theory of aggregate "reckless disregard" similarly persuasive. An S&S analysis asks simply whether the cited conditions contributed to a safety hazard. In that context, an aggregate analysis is appropriate because the marginal impact of each individual item may not be capable of quantification. In contrast, a reckless disregard designation considers whether the operator acted "without the

slightest degree of care." Accordingly, a "degree of care" on any given item would seem to preclude a reckless disregard designation.

Here, Ashworth observed Section Foreman Roberts completing Blue Diamond's examinations of the 11 Section *the day before* Stanfield's inspection, but neither identified any of the cited conditions nor suggested that Roberts' inspection was inadequate. Blue Diamonds's regular, and apparently adequate, examinations convince me that it did not act "without the slightest degree of care." *See* 30 C.F.R. § 100.3(d) at Table X. Despite the extensive nature of these conditions and danger they presented cumulatively, I have also determined that these conditions were not obvious. Ashworth's failure to record any problems with Blue Diamond's roof controls the day before this order was issued significantly mitigates Blue Diamond's reason to know that these conditions existed and suggests that Respondent's negligence was moderate. Indeed, the Secretary's own standards call for moderate negligence where "[t]he operator knew of should have known of the violative condition or practice, *but there are mitigating circumstances*." *Id.* (emphasis added). I thus conclude that Respondent's level of negligence was moderate.

Given the evidence before me, I therefore **VACATE** the Secretary's unwarrantable failure designation and **MODIFY** Respondent's level of negligence to moderate.

5. Reckless and Repeated Flagrant Designation under Section 110(b)(2)

Given my analysis of unwarrantable failure and negligence, I likewise determine that the Secretary has not met his burden of proof that Blue Diamond's conduct was either recklessly or repeatedly flagrant. The Secretary has demonstrated neither the conscious or deliberate disregard of the danger involved that would constitute recklessness nor the actual or implied knowledge necessary to characterize the cited conditions as a known violation. Inspector Ashworth spent the entire day on the 11 Section on April 4, but did not observe or record a single one of these violations. His failure to identify any of the cited conditions suggests strongly that Blue Diamond did not act with the conscious or deliberate disregard that section 110(b)(2) addresses. Although the Mine Act makes Blue Diamond responsible for ensuring miner safety, I cannot infer that Blue Diamond recklessly failed to follow its roof control plan or had implied or actual knowledge of the violative conditions when MSHA's own representative did not record a single one of these conditions, despite spending all day on the section and observing Blue Diamond's pre-shift exam one day beforehand. Instead, I infer that these conditions—while violations of the September 7 Plan—were sufficiently obscure that Blue Diamond's failure to identify them does not constitute a conscious or deliberate disregard of the risk of death or serious bodily injury. In addition, the Secretary has not demonstrated that this was a known violation. He has therefore failed to meet his burden of proving a "reckless failure" under section 110(b)(2).

Moreover, the Secretary's failure to demonstrate that the cited conditions were known violations also means that he has not proven a repeated failure. As I have explained, the Secretary's own definition of repeated failure requires that section 110(b)(2)'s *other* criteria be satisfied (i.e., that the present violation constituted a failure to make reasonable efforts, was a known violation, and could have reasonably been expected to cause death or serious bodily injury). Here, the Secretary falls far short of demonstrating that the conditions in Order No. 7521758 were a known

violation. Based on the Secretary's own definition of "repeated," I therefore need not determine whether his evidence establishes a predicate *prior* failure to make reasonable efforts because he has not met his burden of proving that the *present* violation was a known violation.

In view of the above, I conclude that the Secretary has not proven Blue Diamond's conduct to have been flagrant under section 110(b)(2) of the Mine Act. Order No. 7521758 is therefore **MODIFIED** to remove the flagrant designation.

6. Penalty

The Secretary originally proposed a $184,900.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Blue Diamond's business or that it would infringe on Blue Diamond's ability to remain in business. I have found that this violation was properly designated as S&S, but I have modified this order to "moderate" negligence and removed the unwarrantable failure and flagrant designations. Of the 914 violations in Respondent's history of violations report, 42 involved 30 C.F.R. § 75.220(a)(1). In considering all of the facts and circumstances in this matter and the criteria of section 110(i), I hereby assess a civil penalty of $18,490.00.

C. Order No. 7524542 – Extended Cuts Citation – Roof Control – May 9, 2007

1. Background – Inspection on May 9, 2007 and Order No. 7524542

A little more than a month after issuing Order No. 7521758, Inspector Stanfield returned to Mine No. 77 to continue an electrical inspection and terminate outstanding violations. (Tr. 131.) After arriving underground, he traveled to the 12 Section with Mine Foreman Burley Adams. (Ex. G–21 at 1–2, 11; Tr. 132, 1037.) At the time, the 12 Section was located in the New North Mains portion of Mine No. 77. (Ex. G–16; Tr. 132–33.) Nine entries, numbered from left to right, had been driven into the working face. (Ex. G–21 at 5, 15; Ex. G–22; Tr. 133.) The 12 Section was a "super section," which includes two crews, two continuous miners, and separate splits of air to mine two areas simultaneously. (Tr. 324, 326–27, 627–28, 641; Ex. G–22.) Approximately six people work on each mining crew. (Tr. 327.)

When Stanfield arrived, the continuous miners were energized in the No. 2 and No. 8 entries, but Blue Diamond was not cutting coal. (Ex. G–21 at 13; Ex. G–22; Tr. 133, 135, 627–28, 641.) However, a single-head bolter was bolting in the No. 3 entry and a double-head bolter was bolting in the No. 7 right crosscut connecting the Nos. 7 and 8 entries. (Ex. G–21 at 10–11, 13, 15; Ex. G–22; Tr. 135–36.) Stanfield traveled from the No. 1 entry to the No. 9 entry on an imminent danger run, took air readings, and talked with miners. (Ex. G–21 at 2; Tr. 133.)

Stanfield testified that he found two different violations of the September 7 Plan. (Tr. 137, 147–49.) First, he identified a portion of entry No. 5 that was wider than permitted under the September 7 Plan. (Ex. G–21 at 5, 7, 9; Ex. G–22; Tr. 137.) The wide portion of the entry formed a triangular sliver cut into the right hand rib of the entry. (Ex. G–22; Ex. G–21 at 7.) This wide area was 12-feet long, four-feet wide at its widest point, and had been bolted with five-foot resin bolts. (Ex. G–22; Ex. G–21 at 7, Tr. 171–72.) Stanfield saw no draw rock or cracks in the area. (Tr.

172–73.) Second, Stanfield measured the length of Blue Diamond's cuts in the No. 2 entry, No. 3 entry, No. 7 entry, the No. 7 right crosscut, and the No. 9 entry, and he concluded that the 12 Section had more than two extended, unsupported cuts. (Tr. 148–56, 163; Ex G–21 at 10–11, 14–15; Ex. G–22.)

Based on his observations, Stanfield issued Order No. 7524542 for the alleged violation of 30 C.F.R. § 75.220(a)(1):

> The operator failed to comply with the approved roof control (date 09/07/2006), on the 012/MMU in that;
> (1) The entry width in the #5 entry exceeded the required 19 feet. Thirty [sic] inby spad #4037, located at the last open crosscut, the entry width measured from 20 to 24 feet wide for 12 feet
>
> (2) Page 8 of the plan requires than [sic] no more than 2 extended cuts be left unsupported at any time. At the beginning of the second shift there were five cuts not bolted. These are; [sic] (1) #2 heading, (2) #3 heading, (3) #7 heading, (4) #7 right crosscut, and (5) #9 heading. After the cuts were bolted they were measured and the depths are; [sic] (1) #2 heading measured 18 feet deep, (2) #3 heading measured 22 feet deep, (3) #7 right crosscut measured 26 feet deep, (4) #7 heading measured 30 feet deep, and (5) #9 heading measured 20 feet and eight inches deep.
>
> The operator has a history of recent similar violations. Three 104(d)(2) orders have been issued in the last year citing the same regulation. This mine has a history of poor roof and rib conditions, including roof falls. Failure to comply with the approved roof control plan, [sic] is a highly dangerous condition. The approved plan only specifies the minimum supports to be installed. The intent of the plan to allow no more than two extended cuts to be unsupported at any time is to assure that the roof is supported prior to it bending and breaking. The sooner the roof can be supported, the less likely than [sic] it will bend, break and fall. The immediate roof on the 012/MMU is laminated sandstone, which is often known to bend[,] break, and be hard to support. An agent of the operator was present on the 012/MMU while these cuts were being taken. The cited condition is an unwarrantable failure to comply with a mandatory regulation.

(Ex. G–23 at 1–2.). Stanfield alleged that four miners were affected and that fatal injuries were highly likely. (*Id.* at 1.) He also marked the order as S&S and the result of the operator's unwarrantable failure. (*Id.* at 1–2; Tr. 143–145, 157–159, 165.) Stanfield opined that the extended cuts had existed since at least the prior shift, which had ended at 3:00 p.m. (Tr. 159.)

2. Further Findings of Fact – Length of Unsupported Cuts

When Stanfield arrived on the 12 Section, he found five entries or crosscuts that were either partially or wholly unsupported (Stanfield's alleged measurements in parentheses): the No. 2 entry (18 feet), the No. 3 entry (22 feet), the No. 7 heading (30 feet), the No. 7 right crosscut (26 feet), and the No. 9 entry (20 feet, 8 inches).[18] The September 7 Plan limited Blue Diamond to two unsupported cuts longer than 20 feet, also known as extended cuts. (Ex. G–20 at 8, 16–19; Tr. 147–48, 156.) Therefore, Stanfield's measurements bear on Blue Diamond's compliance with the September 7 Plan. Blue Diamond does not dispute the length of the No. 7 heading, but contends that Stanfield's measurements of entry No. 9, entry No. 3, and the No. 7 right crosscut are inaccurate. (Resp't Br.at 44–45.)

Although Stanfield measured the No. 9 entry at 20 feet, 8 inches in length, he measured this length from the back edge of the eight-inch bolt plate on the last row of roof bolts—in other words, the portion of the plate that was furthest from the face of the entry. (Tr. 630–32.) However, roof bolt plates play a role in securing the mine roof. I therefore find that the length of unbolted roof in entry No. 9 did not exceed twenty feet.

In entry No. 3, Stanfield testified that he marked the last row of completed bolts with rock dust, then waited to take his measurement until after the roof bolter finished bolting the entry. At the hearing and in its post-hearing brief, Blue Diamond suggested that Stanfield was unsure of the precise starting point for his measurement because he did not include it in his notes. (Tr. 185–86; Resp't Br. at 44.) However, I credit Stanfield's testimony that he marked the last row of bolts using rock dust and properly measured the distance. (Tr. 150–51.) Thus, I find that entry No. 3 had been cut to a length of 22 feet before Blue Diamond began bolting the roof.

[18] Stanfield testified that the conditions he found in the No. 2 entry suggested to him that Blue Diamond had quickly installed three rows of bolts in the No. 2 entry after he arrived at the mine. (Tr. 149–150; *see also* Sec'y 43–44.) However, he could not testify to any conversation he had with miners on the 12 Section that day indicating when entry No. 2 had been bolted. Thus, the Secretary has not demonstrated that any surreptitious bolting occurred.

Finally, Stanfield testified that he measured the left side of the No. 7 right crosscut "from the face back to the corner where the [left] rib of the crosscut intersected with the [No.] 7 heading." (Sec'y Br. at 44; *see also* Tr. 155, 188–90; Ex. G–35.) Blue Diamond again disputed the accuracy of Stanfield's 26-foot measurement at the hearing and in its post-hearing brief. (Tr. 188–91; Resp't Br. at 45.) Yet, I see no reason not to credit Stanfield's No. 7 right crosscut measurement. Regardless of any estimation he made, I have no reason to believe his estimate would have overestimated the distance by six feet. I therefore find that the No. 7 right crosscut exceeded 20 feet prior to bolting. Consequently, three entries constituted extended cuts under the September 7 Plan: entry No. 3 (22 feet), heading No. 7 (30 feet), and No. 7 right crosscut (26 feet).

3. Violation of Roof Control Plan – Wide Entry and Extended Cuts

The September 7 Plan specifically stated: "No more than 2 extended cuts shall be left unsupported at any time during [] normal production." (Ex. G–20 at 8; Tr. 147–48.) The Secretary argues that Blue Diamond violated its roof control plan by having more than two extended cuts that were unsupported. Additionally, the September 7 Plan limited the "[m]aximum extracted entry width" to 19 feet. (Ex. G–20 at 6, 15–16, 18; Tr. 139.) The Secretary contends that the twelve-foot sliver in entry No. 5 exceeded the entry width permitted under the September 7 Plan.

Blue Diamond does not dispute the existence of the wide sliver in entry No. 5; instead, it claims the wide sliver was not dangerous and eventually became part of a crosscut. (Resp't Br. at 49, 53.) I determine that the wide portion of the No. 5 entry did not comply with the terms of Blue Diamond's September 7 Plan, and I conclude that Respondent violated 30 C.F.R. § 75.220(a)(1).

Nevertheless, Blue Diamond claims it complied with the September 7 Plan's restrictions on extended cuts. (Resp't Br. 44–49.) From Blue Diamond's perspective, its active roof-bolting means that "the cut (no matter how long the depth) is no longer considered 'left unsupported.'" (Resp't Br. at 45.) Blue Diamond also argues that the September 7 Plan is ambiguous regarding the meaning of the term "unsupported," and that the Secretary has the burden of establishing the meaning intended by the parties. (Resp't Br. at 46.)

In support of this argument, Respondent indicates "cuts with less than [20] feet of unsupported roof" that were being "actively bolted" have never been cited as "an 'extended cut left unsupported.'" (Resp't Br. at 46–47.) Blue Diamond also points to Section Foreman Shepherd's testimony that he had employed Blue Diamond's proposed interpretation in the presence of Inspector Ashworth, and that Ashworth "never questioned the practice nor did he issue any citations." (Resp't Br. at 47.) I recognize that the Secretary presented no evidence of similar citations or orders, and I credit Williams' testimony that no one from MSHA had previously informed him of Inspector Stanfield's interpretation. Although these facts bear on Blue Diamond's negligence, they do not indicate that the September 7 Plan was ambiguous.

Indeed, Blue Diamond's strained attempt to muddy the waters about the September 7 Plan's extended cut provision is unavailing. The provision clearly prohibits more than two extended cuts from being left unsupported "at any time," and it is uncontroverted that portions of the No. 3 entry

and No. 7 right crosscut were "left unsupported"—in that they had not yet been bolted—when Stanfield inspected the 12 Section. The plan's terms were straightforward, and Blue Diamond should have been on notice that it could not have more than two extended cuts that were unsupported at any time.[19] Thus, I determine that the unsupported cuts in the No. 3 entry, the No. 7 heading, and the No. 7 right crosscut violated the terms of Blue Diamond's September 7 Plan.

Based on the above, I conclude that the wide sliver in the No. 5 entry and Respondent's three extended, unsupported cuts together constitute a violation of 30 C.F.R. § 75.220(a)(1).

4. S&S and Gravity Determinations

Blue Diamond's violation of 30 C.F.R § 75.220(a)(1) establishes the first element of the *Mathies* test. Once again, my S&S determination in this case turns on whether the Secretary has proven that the wide sliver and extended cut conditions contributed to the safety hazard of a roof fall. Inspector Stanfield's S&S determination depends on two key factors: the sensitive nature of the mine roof and the impact of extended cuts at Mine No. 77. First, Stanfield stated that the laminated sandstone roof in the 12 Section contained "real small layers," which can bend and break with "the least bit of pressure" (Tr. 141), and MSHA Mining Engineer Gauna concurred that laminated sandstone was "very sensitive" and "very weak roof" that "can fail even after [it is] bolted." (Tr. 1114–15.)

Second, Stanfield stated that the September 7 Plan limited the number of extended cuts to minimize roof bending and breaking before roof support is installed. (Tr. 157–58.) He also explained that resin bolts build a beam of rock, so "the sooner [the beam is built] the less likely that those individual sheets of that laminated sandstone" are to bend and break. (Tr. 158.) Thus, leaving an unsupported, extended cut for any extended period limits the effectiveness of roof bolts in the short-term and long-term, because once "[the roof] bends and breaks . . . you're not doing a good job of building a satisfactory beam." (Tr. 157–58; *see also* Tr. 307.) Gauna concurred and indicated that an extended cut is particularly dangerous in laminated sandstone. (Tr. 1117–19; 1147–48, 1151.) Finally, Stanfield indicated the September 7 Plan's limitation of two extended cuts was "the smallest [number] of extended cuts we have" and reflected Mine No. 77's past history of roof falls and the "nature of the roof." (Tr. 158–159.) In comparison, other mines were allowed up to four extended cuts. (Tr. 158.)

[19] In its brief, Blue Diamond advances a "fair notice" argument. (Resp't Br. at 47–49.) Because I have determined the September 7 Plan unambiguously prohibits more than two extended cuts that are not fully bolted, I dismiss Respondent's argument that it did not have fair notice of the conduct the roof control plan required.

For its part, Blue Diamond performs quick-and-dirty calculations to compare the surface area of unsupported roof that the September 7 Plan permitted for *non*-extended cuts (i.e., normal 20-foot cuts) with the amount of surface area Stanfield found in unsupported, extended cuts.[20] (Resp't Br. at 49.) Blue Diamond appears to hope I will infer that the latter unsupported extended cuts must not be dangerous if MSHA permits the former *non*-extended cuts. However, Blue Diamond's calculations do not account for the added danger any extended cut presents in the 12 Section.[21]

As for the wide sliver in entry No. 5, I recognize it had been bolted and Blue Diamond later turned a crosscut in that location. I also realize that Blue Diamond's roof bolters were actively bolting in both entry No. 3 and the No. 7 right crosscut when Stanfield arrived on the 12 Section. Both scenarios seem to limit the contribution these violative conditions would make to the discrete safety hazard of a roof fall in the 12 Section. However, Inspector Stanfield and MSHA's Gauna credibly explained why the 12 Section's laminated sandstone roof would bend and break under additional pressure. Despite Blue Diamond's attempts to discredit Stanfield's experience with laminated sandstone (*see* Tr. 734–35), it does not deny that the mine roof in the 12 Section is laminated sandstone. (*See also* Tr. 1152–54 (Gauna explaining why Stanfield's experience with laminated sandstone was more credible than Newman's KRP-7 core sample from several hundred feet away that contained no laminated sandstone).) Moreover, I find convincing Stanfield and Gauna's explanation that laminated sandstone is particularly sensitive. As Gauna succinctly noted: "Any bolts are better than no bolts. Yes, you do have that cut partially supported and it does help, but the fact remains that it's the issue of the depth of the cut is really prior to you getting there and actually doing the bolting. That's the issue." (Tr. 1122.)

Consequently, I determine that the wide sliver and the three extended cuts in entry No. 3, the No. 7 heading, and the No. 7 right crosscut contributed to a discrete roof fall hazard. Thus, I determine that the second *Mathies* element has been satisfied.

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[20] Blue Diamond also points to a Roof Control Plan dated April 28, 2010 ("April 28 Plan"), which states that "[a] cut will not be considered unsupported if it is being bolted." (Ex. R–11 at 51.) However, Roof Control Specialist Charlie Fields credibly testified that his recommendation that MSHA approve the April 28 Plan reflected his review of the mine's accident history at the time and the mining conditions in which Respondent was advancing. (Tr. 1057–1062.) Thus, the roof conditions underlying the April 28 Plan tell me little about the roof conditions underlying the September 7 Plan. I therefore afford no weight to Blue Diamond's later April 28 Plan.

[21] Indeed, Dr. Newman opined that "extended cuts do not create a hazardous situation under the circumstances that they can be safely taken. In other words, where the roof permits, where the strength and physical properties of the immediate roof are adequate, an extended cut does not create a hazardous condition." (Tr. 762.) Yet the converse would also seem to be true: where the strength and immediate roof are *in*adequate, an extended cut creates a hazardous condition. As I noted, both Stanfield and Gauna highlighted the danger of extended cuts in a laminated sandstone roof.

Stanfield credibly testified that these conditions could result in a roof fall hazard. (Tr. 141–43, 162–63). He also credibly testified that a roof fall was highly likely to result in fatal injuries to four of the ten miners located on the 12 Section. (Tr. 133–34, 162–63, 179–80.) As I noted in discussing Order No. 7521758, roof falls are highly likely to result in permanently disabling or fatal injuries to miners. I therefore determine that the third and fourth *Mathies* elements have been satisfied.

Given my determinations that the four *Mathies* elements have been satisfied, I conclude that Order No. 7524542 was properly designated as S&S.

5. Negligence and Unwarrantable Failure Determinations

The Secretary again alleges that Blue Diamond's level of negligence was "reckless disregard" and that its conduct constituted an unwarrantable failure. Here, Inspector Stanfield alleged that Blue Diamond's day shift foreman purposefully violated the September 7 Plan. (Tr. 161, 164–65.) According to Stanfield, miners on the 12 Section told him that mining more than two extended cuts was a common practice. (Tr. 160.) On cross-examination, he explained that he had not included his conversation in his notes because he feared the miners might be blackballed. (Tr. 184–85.) I believe Stanfield testified to his best recollection of that conversation, and I can understand and appreciate his concern for protecting the identity of the miners in question. However, Stanfield was testifying nearly four years after his inspection and had no notes about the conversation to refresh his memory. Intentional misconduct is a serious allegation, and I determine that Stanfield's testimony is insufficient to establish that the day shift section foreman intentionally violated Blue Diamond's roof control plan. Tellingly, the Secretary brought no section 110(c) case for this alleged intentional misconduct.

Looking to the remaining types of unwarrantable conduct, four aggravating factors support the Secretary's position. First, I have concluded that the September 7 Plan unambiguously gave Respondent notice of the conduct it required. *See* discussion *supra* Part VI.C.2. Moreover, the unambiguous roof control plan made the violations obvious. Further, the Secretary presented violation history reports and citations for roof bolting violations, suggesting that greater efforts were necessary for compliance. Finally, I have found that the wide sliver and extended cuts were sufficiently dangerous to be designated as S&S.

On the other hand, three unwarrantable failure factors tilt in Blue Diamond's favor. First, the length of time these conditions existed was relatively short. Second, Respondent had already bolted the wide sliver and was in the process of bolting the No. 3 entry and No. 7 right crosscut in an effort to abate the violative condition. Third, I determine that these violative conditions were not extensive because they existed in just four of the nine entries in the 12 Section.

Considering all of the facts and circumstances, this is a close case. Blue Diamond *did* bolt the wide sliver. Though its interpretation of the extended-cut provisions was misguided, Blue Diamond *was* bolting the unsupported, extended cuts. Furthermore, the Secretary's *own* evidence suggests an inconsistent interpretation: *none* of the previous roof control plan citations or orders

the Secretary introduced into evidence mention problems with multiple extended cuts. (Ex. G–6; Ex. G–9; Ex. G–10; Ex. G–15.)

Yet, Blue Diamond had a responsibility to adhere to the September 7 Plan, including its limitations on entry width and the number of extended, unsupported cuts. In this case, Blue Diamond failed to adhere to entry width limitations, and the Secretary has presented evidence that entry widths are a continuing problem at Mine No. 77. (Ex. G–6; Ex. G–9; Ex. G–10; Ex. G–15.) No matter how well-intentioned, Blue Diamond's plan interpretation (that an extended, unsupported cut became a *non*-extended cut when Respondent began bolting it) of clear plan provisions was also simply incorrect. These are serious violations that put miners at risk, and Blue Diamond has not fulfilled its duty to protect miners. I therefore determine Respondent's conduct was unwarrantable.

However, the Secretary has not proven his negligence allegations for "reckless disregard." According to his own regulations, "reckless disregard" is appropriate when an operator's conduct "exhibit[ed] the absence of the slightest degree of care." 30 C.F.R § 100.3(d) at Table X. Conversely, "high" negligence is appropriate when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Although Blue Diamond should have known that the September 7 Plan's clear plan provisions prohibited its interpretation, Respondent's efforts to bolt the wide sliver and extended cuts indicate that the operator exercised at least some care in this case. That said, I have found Blue Diamond to have exhibited a serious lack of reasonable care, and I found its conduct to be aggravated, constituting more than ordinary negligence.

Given my above analysis, I conclude that Blue Diamond's violations were appropriately designated as an unwarrantable failure and that its negligence was high in this case. Thus, Order No. 7524542 is **AFFIRMED** as to the unwarrantable failure designation and **MODIFIED** to change the cited level of negligence from "reckless disregard" to "high."

6. Reckless and Repeated Flagrant Designations under Section 110(b)(2)

In view of my S&S, unwarrantable failure, and negligence determinations, I note that the September 7 Plan's provisions were unambiguous and Respondent's unreasonable interpretation created dangerous conditions. Accordingly, I conclude Blue Diamond failed to make reasonable efforts to eliminate a known violation that reasonably could have been expected to cause death or serious bodily injury. Unlike Order Nos. 4220150 and 7521758, the Secretary has therefore demonstrated that section 110(b)(2)'s *other* criteria have been satisfied. Thus, the Secretary's flagrant designation will turn on whether Blue Diamond's conduct constituted the conscious or deliberate disregard that underlies a "reckless" allegation, and whether the Secretary's evidence demonstrates a predicate, *prior* failure to make reasonable efforts to eliminate a previous violation that would underlie a "repeated" allegation under section 110(b)(2).

Notwithstanding my other conclusions in this case, the Secretary comes up well short in proving either a "reckless" or "repeated" failure. First, the Secretary has not proven that Respondent acted with the conscious or deliberate disregard that would underlie a "reckless"

failure. Here, the evidence demonstrates that Blue Diamond tried to comply with the September 7 Plan. Respondent *did* bolt the wide sliver. It *did* make efforts—misguided though they may have been—to bolt the unsupported, extended cuts.

Moreover, Blue Diamond presented credible evidence that it was unaware that the roof control plan meant that "active bolting" did not constitute supported roof. Although the September 7 Plan was unambiguous, Blue Diamond's irrational or improper interpretation does not necessarily imply a conscious or deliberate disregard for safety. In fact, Superintendent Williams and Section Foreman Shepard credibly testified that MSHA—Inspector Ashworth in particular—had not previously enforced the extended cut provisions in the same fashion. Interestingly, the Secretary chose not to have Ashworth testify regarding Mine No. 77's extended cuts. More interesting still, the Secretary's *own* evidence corroborates this point: *none* of the previous roof control plan citations or orders the Secretary introduced into evidence mention problems with multiple extended cuts. (Ex. G–6; Ex. G–9; Ex. G–10; Ex. G–15.)

Indeed, the most natural inference is that Blue Diamond made an unreasonable mistake, but not a *deliberate* one. Although Respondent's interpretation was clearly *wrong*, MSHA's failure to enforce the extended cut terms of the September 7 Plan suggests Blue Diamond did not act outrageously in employing such an interpretation. Given the evidence before me, the Secretary has not satisfied his burden of proving that Blue Diamond's conduct was reckless, because he has not demonstrated a conscious or deliberate disregard for the risk of a roof fall.

The Secretary also falls short of his burden of proving a predicate *prior* failure. Here, the Secretary points to two section 104(d)(2) S&S orders and thirteen section 104(a) S&S citations for violations of Blue Diamond's roof control plan in the year prior to April 4, 2007. (Sec'y Br. at 53; Ex. G–6; Ex. G–9; Ex. G–10; Ex. G–15.) Yet Blue Diamond's past S&S or unwarrantable failure citations and orders do not *per se* establish a past failure to take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard. As I noted in *Stillhouse*, the language in section 104 from which the terms S&S and unwarrantable failure are drawn "is quite different from the language that defines a flagrant violation." 33 FMSHRC at 800; *compare* 30 U.S.C. § 814(d)(1) *with* 30 U.S.C. § 820(b)(2). Thus, the Secretary's attempt to use prior S&S and unwarrantable orders as a stand-alone proxy for a failure to make reasonable efforts is inapposite.

In addition, Respondent's past citations and orders[22] and Inspector Stanfield's vague testimony regarding Blue Diamond's violation history (Tr. 164, 206–10, 299) do not satisfy the

[22] In his brief, the Secretary cites Commission dicta as a rationale for crediting copies of past citations. (Sec'y Br. at 10 (*citing Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985)).) Even accepting as true the text of the citations and orders the Secretary presents, I accord scant evidentiary weight to the condition or practice section of any of these past citations or orders. Without more detail from the Secretary, such as testimony tying specific prior violations to the specific conditions found in this case, it is unclear whether these prior violations demonstrate a

Secretary's burden of proof. Flagrant designations are serious charges involving detailed analyses of multiple elements. None of the Secretary's proffered evidence provides sufficient details to establish a predicate, previous failure to make reasonable efforts to eliminate a previous violation. This was a fatal defect in the Secretary's case-in-chief.

Accordingly, I conclude that the Secretary has not proven Blue Diamond's conduct to have been recklessly or repeatedly flagrant under section 110(b)(2) of the Mine Act. Order No. 7524542 is therefore **MODIFIED** to remove the flagrant designation.

7. Penalty

The Secretary originally proposed a $196,700.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Blue Diamond's business or that it would infringe on Blue Diamond's ability to remain in business. Although I have found that this Order was properly designated S&S and unwarrantable, I have modified the order to "high" negligence and removed the flagrant designation. Of the 914 violations in Respondent's history of violations report, 42 involved 30 C.F.R. § 75.220(a)(1). In considering all of the facts and circumstances in this matter and applying the criteria in section 110(i) of the Mine Act, I hereby assess a civil penalty of $49,000.00.

D. Citation No. 7505299 – Pillar Split Citation – Roof Control – November 2, 2007

1. Blue Diamond's "Dog Leg" Section

predicate failure for purposes of section 110(b)(2).

In the fall of 2007, Blue Diamond began to rehabilitate part of Mine No. 77 that a previous operator had mined twenty or thirty years earlier. (Tr. 325–26, 359–60, 968.) Located near the intersection of the Energy Mains and the AL West 2 areas of the mine, miners called this portion of Mine No. 77 "the dog leg" because of its unorthodox shape. (Ex. G–16; Tr. 325, 968–69.) Looking toward the face, the entries were numbered sequentially beginning with the No. 1 entry on the far left and the No. 9 entry on the far right. (Ex. G-16; Ex. R–3; Tr. 339.) The previous operator drove the last open crosscut of the section from two different directions, creating a point—or "knee" of the dogleg—at the No. 5 entry. (Tr. 971; Ex. R–3; Ex. G–16 .) Because these slightly offset crosscuts came together at an angle, the panel, its crosscuts, and its pillars were irregularly-shaped, rather than the typical square or rectangular shape of a coal pillar. (Ex. G–26 at 1; Ex. R–3; Tr. 971–72, 977–78.)

The previous mining activities in the dog leg did not meet Blue Diamond's height requirements for new coal production. (Tr. 325–26, 359–60, 968.) In addition, the previous operator's past mining activity anomalously stopped one crosscut short of the working face in the No. 6 entry. (Ex. G–26 at 1; Ex. R–3; Tr. 971–72.) The offsetting angles of the "dogleg" left an oversized and nearly trapezoidal pillar bounded by the No. 5 and No. 7 entries and the last open crosscut and second-to-last crosscut. (Ex. G–26 at 1; Ex. R–3; Tr. 972.)

On October 16, 2007, MSHA approved a supplement ("October 16 supplement") to Blue Diamond's September 7 Plan that permitted Respondent to extend the No. 6 entry through the middle of the anomalous, oversized pillar. (Ex. G–20; Ex. G–26 at 1; Ex. R–3; Tr. 329, 333, 341, 348, 350, 353–54, 385, 388.) According to the supplement, the entry could not exceed 18-feet wide or 20-feet long. (Ex. G–26 at 1; Tr. 976.)

Prior to beginning the pillar split, Superintendent Williams reviewed the October 16 supplement with Section Foreman Roberts and Blue Diamond's continuous miner operators. (Tr. 353–54, 370, 976–77.) Williams instructed the foreman and miners to make their cuts a foot shorter and narrower than permitted under the supplement. (Tr. 977.) Respondent began mining the No. 6 entry through the anomalous, trapezoidal pillar on November 1, and completed the pillar split on November 2. (Tr. 358–59, 978–80.)

Blue Diamond mined from the second-to-last open crosscut towards the working face of the section and completed the spilt in three cuts. (Tr. 343, 357–60, 978–980; Ex R–3.) Because the spads the miners used to line up their cut had been misaligned, Respondent's first two cuts were slightly off-center. (Tr. 980–83; Ex. R–3.) Blue Diamond compensated to the left on the third cut, resulting in a slightly wider entry.[23] (Tr. 983–85; Ex R–3.) Finally, the combined length of all three cuts was a total of 48 feet. (Tr. 1004.)

2. Inspection on November 2, 2007

[23] For a distance of ten feet, the entry measured nineteen feet wide. (Tr. 348; Ex. G–25 at 1–2.) Another ten-foot portion of the cut measured eighteen feet, six inches wide. (Tr. 348; Ex. G–25 at 1–2.)

On November 2, 2007, Inspector Vernus Sturgill and Superintendent Williams visited the dog leg portion of the mine, which was also known as the 11 and 12 Sections (or super section) of Mine No. 77. (Ex. G-24 at 1, 32.; Tr. 323–24, 370, 987.) At the time, Blue Diamond was "cutting bottom"—in other words, lowering the mine floor to create taller entries and crosscuts. (Tr. 325–26, 968–69, 988.)

Sturgill began with an imminent danger inspection of the 11 and 12 Sections, including the No. 5 and No. 6 entries. (Ex. G–24 at 6, 14–15, 19–32; Tr. 327–28, 339, 989.) As a result of his examination, Sturgill issued Citation No. 7505299 for the alleged violation of 30 C.F.R. § 75.220(a)(1):

> The operator's approved Roof Control Plan (dated: 9–7–06) and supplement 77V-100-07 dated: 10–16–07) [sic] being complied with in the number 5 and 6 heading[s] of the 012 section. Beginning at the corner of the number 5 heading (inby survey station 4147),[24] the number 5 heading has the following hazardous conditions present: the mine roof has loose unsupported draw rock located between the second and third roof bolts installed in the heading for approximately 20 feet and a loose rock brow that measures approximately 21 inches thick and by 28 feet in length. The rock brow has been created after the operator has mined the number 5 heading, the loose unsupported[25] draw rock is an area the operator has mined through, (previously mined) . [sic] The number 6 heading is being created by the operator splitting a pillar, a pillar splitting plan was submitted and approved. An inspection of the number 6 heading revealed the last mined cut into the cross cut above it measures to be 30 feet in depth on the left side and approximately 25

[24] Sturgill claimed that he made a typographical mistake in filling out Citation No. 7505299, contending that "4147" should have been "4129." (Tr. 330–31.) Regardless of where Sturgill observed the draw rock, he admitted that the draw rock had been supported. (Tr. 380.) His problem with the draw rock was that it had not been supported with straps as the September 7 Plan required. (Tr. 333– 35, 380.) Accordingly, I find that the draw rock Sturgill identified in entry No. 5 was located in an area with roof bolt support. I also find that the draw rock in question had not been strapped or otherwise supported.

[25] Inspector Sturgill and Superintendent Williams disagreed whether Blue Diamond had previously bolted the rock brow in No. 5 entry. (Tr. 338, 1011.) However, Sturgill's contemporaneous inspection notes state: "The Number 5 heading has loose hanging draw rock and brow (rock) measuring approximately 21 inches thick by 28 feet in length on the right side approximately 20 feet [from the corner of the intersection with the last open crosscut]." (Ex. G–24 at 15.) That Sturgill's notes reference the rock brow in similar terms to the draw rock convinces me that the rock brow had also been bolted. Accordingly, I find that Blue Diamond bolted the rock brow at some point before Sturgill arrived. However, I credit Sturgill's testimony that the bolted rock brow remained loose.

> feet on the right (looking toward the face). The previous cut mined measures in width 19 feet for 10 feet and 18.5 feet for 10 feet (distance of length are approximate) . [sic] The approved supplement limits the cut depth to a maximum of 20 feet and 18 feet wide. The width measurements taken are not due to rib sloughage but actual width of cut mined. The supplement and conditions found on the section limits the cut depth to a maximum of 20 feet. The heading adjacent to the number 6, number 5 heading when mined for a distance of approximately 12 feet has fallen and continues to fall to a height of approximately 8.5 to 9 feet, from falling draw rock and adverse roof conditions. These cited conditions are obvious to the most casual observer. The operator has been issued eleven violations for non-compliance of the approved Roof Control Plan from January 2007 until this date. Citation 7505297 for similar conditions of adverse roof on the 011 section. [sic] The 012 section is one side of a super-section. The foreman has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure of the operator to comply with a mandatory standard. A condition of termination of this citation is that the operator as evidence[d] by signatures instructs miners employed at this mine for the production of coal of the operator's approved Roof Control Plan.

(Ex. G−25 at 1−2.)

According to Sturgill, these conditions created rock and roof fall hazards. (Tr. 335−36, 350−52, 372−73.) Based on his observations and experience as a miner, he characterized reasonably serious injuries to be reasonably likely to occur. (Tr. 336.) He also noted that he saw nothing suggesting Blue Diamond had taken any steps to correct the draw rock and rock brow conditions in entry No. 5, despite their obvious nature. (Tr. 337−38.) Further, Sturgill explained that Section Foreman Roberts should have identified those conditions during an on-shift examination. (Tr. 338.) Sturgill also characterized the conditions in entry No. 6 as obvious and indicated that the operator should have known of the violations. (Tr. 352−54, 370, 388.) In particular, Sturgill focused on Roberts' failure to comply with the pillar split roof control supplement despite Williams' explanation of the plan to Roberts and the miner operators the previous day. (Tr. 352−54, 370, 388.)

Based on his examination, Sturgill marked the citation as S&S and as the result of the operator's unwarrantable failure. (Ex. G−25 at 1−2; Tr. 370.) In addition, Sturgill alleged that one miner was likely to be affected. (Ex. G−25.)

3. Further Findings of Fact

a. Inspection of Entry No. 5

During his imminent danger run, Inspector Sturgill examined the No. 5 entry, which was approximately 30 feet long. (Ex. G–24 at 25; Tr. 332, 339, 990.) Roughly twenty feet of the entry had previously been mined and supported, but included loose draw rock between the bolts. (Tr. 332–33, 377, 381–82.) Blue Diamond had not strapped or supported the draw rock, and Sturgill observed fallen roof debris on the mine floor. (Tr. 333, 379–81.) Blue Diamond had also mined approximately 12 feet in the face area of entry No. 5 that remained unsupported. (Tr. 332, 377–78.) Sturgill indicated that Respondent was "having trouble cleaning up to the point that they could actually support that unsupported area. When they would attempt to clean it up, [the roof] was falling in again to the point that they couldn't get a roof bolter [into] that particular heading." (Tr. 332.) In addition, Respondent had placed a danger flag in front of the 12 foot cut. (Tr. 379, 1009–10.)

Blue Diamond's mining activities had also created a rock brow in the No. 5 entry that was approximately 20-feet, 21-inches wide and 28-feet long but of unspecified thickness. (Tr. 333, 335, 338.) No miners were actually working in the entry at the time. (Tr. 333, 378.)

b. Inspection of Entry No. 6 and Measurement of the Third Cut

The Secretary's extended- and wide-cut allegations are based on the measurements Inspector Sturgill took in the new No. 6 entry that split the section's anomalous and oversized pillar. Although Blue Diamond admits the pillar split inadvertently exceeded the width permitted under the October 16 supplement, it disputes the accuracy Sturgill's length measurements.

When Sturgill and Williams arrived on the 11 and 12 Sections, Respondent had already holed through the ribline on the last open crosscut side of the pillar. (Tr. 343, 346, 355, 357, 979, 987, 1000.) By that point, Respondent had supported its first two cuts with roof bolts. (Tr. 341, 347, 359, 363, 394, 397–98, 992–94.) A roof bolter operator was also in the pillar split supporting the third cut. (Tr. 341, 345, 992–93.) Sturgill testified that the bolter had completed rows of two bolts on the left-hand side of the third cut; however, he had not yet bolted the right-hand side of the third cut. (Tr. 344–345, 348–49, 361–63.)

Sturgill claimed that he stood at the incomplete row of bolts second closest to the working face and measured the length of Blue Diamond's third and final cut through the pillar to be 30 feet. (Tr. 342, 344–46, 397–98; *see also* G–24 at 20–21 (including measurements).) According to Sturgill, he extended the end of the tape measure until it reached the corner of the pillar split and last open crosscut. (Tr. 344–46, 397–98.) Sturgill also measured the right side of the cut but testified that on the right side he positioned himself at the second to last *completed* row of bolts, because the roof bolter had not yet begun bolting the right-hand side of the cut. (Tr. 355, 363, 366–67, 398.) Further, Sturgill stated that the right-hand side of the third cut measured 25 feet.[26] (Tr. 355, 364, 366–67; G–24 at 20–21 (including measurements).) However, he neither verified

[26] The different measurements on left and right side of the entry is at least partially explained by the mining history of this part of the mine. The last open crosscut was mined at an angle, which created an irregular and trapezoidal pillar. (Ex. G–26 at 1; Ex R–3; Tr. 355, 971–72, 977–78, Tr. 1000–02.)

that the end of his tape measure was at the corner of the newly created rib and last open crosscut, nor corroborated his measurements at any later time. (Tr. 367–69.)

Conversely, Williams claimed that the pillar split only included completed rows of roof bolts and that Sturgill took his left-hand side measurements from the *completed* row of roof bolts second closest to the working face. (Tr. 993–94; Ex. R–3.) Moreover, Williams claimed that Sturgill extended his tape measure well beyond the end of the third cut to at least the second row of bolts *in the last open crosscut* because the first bolt in the last open crosscut was loose. (Tr. 995–96.) In addition, Williams disputed Sturgill's testimony about his position within the pillar split when measuring the *right-hand* side of the third cut. (Tr. 997.) According to Williams, Sturgill positioned himself *more* than two rows of roof bolts back from the unsupported roof because the roof bolting machine was in his way. (Tr. 997.)

Based on all the evidence, the Secretary has not satisfied his burden of proving that the third cut through the pillar exceeded twenty feet. Most importantly, it is uncontroverted that the total length of *all three pillar split cuts* was forty-eight feet. If I credit Sturgill's measurements as accurate, Blue Diamond's first two cuts would have covered a total of eighteen feet. I understand that poor roof conditions sometimes force operators to make shorter-than-normal cuts, but I do not believe an operator that had recently obtained approval of a pillar split supplement, then carefully shortened its first two cuts to accommodate dangerous conditions, would swiftly change course and ignore the cut length restrictions contained in the supplement. Sturgill's measurements are simply inconsistent with the other evidence before me.

I also have significant questions about the accuracy of Sturgill's measurements. Looking at the September 7 Plan, I note that rows of roof bolts are to be spaced four feet apart. (Ex. G–20 at 15–19.) Thus, if Stanfield measured to the *second* row of bolts in the last open crosscut (rather than the end of the pillar), he would have added approximately eight feet to his 30-foot measurement. Meanwhile, if Stanfield positioned himself more than two completed rows back on the *right-hand* side, he may have added four feet to his 25-foot measurement. Yet at the time, his only source of light to illuminate the far end of his tape measure was his cap lamp. (Tr. 367–68.) In my view, estimating the "zero point" of a tape measure from a distance of twenty feet might easily, and innocently, result in a foot or two of variance.

In view of the above, the Secretary has therefore not met his burden of proving that Blue Diamond's final cut through the pillar exceeded 20 feet.

4. Violation of Roof Control Plan – Pillar Split

Citation No. 7505299 alleges that four different conditions in the No. 5 and No. 6 entries of Blue Diamond's 12 Section violated the September 7 Plan, as supplemented by the pillar split plan. I have found that the rock brow in the No. 5 entry had been previously bolted. In addition, I have found that the Secretary did not prove that Blue Diamond's final pillar split cut exceeded 20 feet in the new No. 6 entry. Accordingly, neither condition constitutes a violation of Blue Diamond's roof control plan.

Next, the Secretary contends that the loose draw rock in entry No. 5 violated the September 7 Plan requirement that Blue Diamond provide additional support for subnormal roof control conditions. As I noted, the cited draw rock in entry No. 5 had been bolted but not strapped or otherwise supported. I have also found that Blue Diamond previously bolted the rock brow, but I credit Sturgill's testimony that the brow remained loose. Given the September 7 Plan requirement that additional support be provided for subnormal roof control conditions, I determine that the draw rock and rock brow were violations of Respondent's roof control plan.

Finally, Blue Diamond does not dispute that the wide portion of the No. 6 entry existed; rather, Respondent explains that the wide portion was inadvertent and not dangerous. (Resp't Br. at 56–58.) Those explanations bear on gravity and negligence but not the fact of a violation. Indeed, the pillar split supplement prohibited Blue Diamond's pillar split from exceeding a width of 18 feet, and this cited condition plainly violated the requirements of the supplement.

In light of these determinations, I conclude that the unsupported draw rock in entry No. 5 and the wide portion of entry No. 6 each constitute a violation of 30 C.F.R. § 75.220(a)(1).

5. S&S Determination

Blue Diamond's violation of 30 C.F.R. § 75.220(a)(1) establishes the first element of the *Mathies* test. As to the second *Mathies* element, two factors convince me that the violative conditions contributed to a roof fall hazard in this case. First, Sturgill based the S&S finding on his long experience as a coal miner and his experience with roof conditions in Mine No. 77 in particular. Although I recognize that roof conditions and composition can vary widely within the same mine, I credit Sturgill's opinion that the violative conditions contributed to a roof fall hazard because of his experience and first hand observation of the roof conditions at the mine. *Cf. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1279 (Dec. 1998) (relying on inspector's opinions to conclude that substantial evidence supported the ALJ's S&S determination.)

Second, it is uncontroverted that Blue Diamond was having problems securing its newly-mined roof in the No. 5 entry. That difficulty corroborates Sturgill's concern that the mine roof in this area was sensitive and weak. In addition, Sturgill examined a test hole in the mine roof twenty feet away from Respondent's final cut and found cracks at 20 inches and 28 inches. (Ex. G–24 at 26; Tr. 347–48, 373–75.) According to Sturgill, these cracks demonstrated that some separation had occurred in the immediate roof. (Tr. 375–76, 394–95.) Although the cracks he found in the test hole in entry No. 6 may have been located within the rock beam that Blue Diamond's roof bolts created, they also suggest to me a sensitive or weak roof with an elevated likelihood of falling.

In this context, the increased marginal pressure created by the wide entry would add a measure of danger to safety over the four to six hours these conditions existed. Further, these types of roof conditions would make roof fall more likely. Moreover, Blue Diamond's danger flags in the No. 5 entry might limit access to the entry but would not address the dangers of a weak roof. Based on the evidence before me, I therefore determine that the Secretary has met his burden of establishing the second element of the *Mathies* test.

Inspector Sturgill indicated that the conditions on the 12 Section would contribute to roof fall and that a roof fall is reasonably likely to result in reasonably serious injuries or death. (Tr. 335–36, 350–51.) As with each of the other three roof control violations at issue in these consolidated cases, I do not doubt that a roof fall is reasonably likely to result in permanently disabling injuries. As Sturgill's notes succinctly observed: "Roof falls kill!" (Ex. G–24 at 34.) Thus, I determine that the third and fourth elements of the *Mathies* test are satisfied. I therefore conclude that Citation No. 7505299 was appropriately designated as S&S.

6. Negligence and Unwarrantable Failure Determinations

Based on the evidence before me, the Secretary has not met his burden of demonstrating that Blue Diamond's conduct was unwarrantable or that it acted with high negligence. First, Superintendent Williams' meeting with Section Foreman Roberts and the continuous miner operators to discuss the requirements of the pillar split supplement plan significantly mitigates Blue Diamond's negligence. The Secretary presented no evidence or testimony suggesting that Roberts was present at the time the pillar split occurred, and I credit Williams' testimony that rank-and-file miners inadvertently mined the area too wide. Indeed, Williams's meeting regarding the pillar split supplement suggests an operator taking steps to comply with its plan and protect the safety of miners. These are precisely the types of affirmative steps an operator should take, and I determine that they weigh strongly in Blue Diamond's favor. Second, I have found that Blue Diamond had already supported the rock brow in entry No. 5. Although the brow was loose when Sturgill arrived, Blue Diamond's affirmative step to secure the brow and remedy the condition suggests Respondent was not operating with indifference, reckless disregard, or a serious lack of reasonable care.

Looking to the remaining unwarrantable failure factors, I note that the conditions at issue in this case were not extensive in that they were present in only two of the nine entries of the super section. I also note that the Secretary presented no evidence that any of Blue Diamond's past roof control violations involved improper pillar splits, but two of the other Orders before me involve wide entries and draw rock. The violative conditions lasted between 4 to 6 hours, which suggests that Blue Diamond should have known about the looseness of the otherwise bolted draw rock and rock brow. Although I recognize that the draw rock, rock brow, and wide portion of entry No. 6 were fairly obvious and have been properly designated S&S, in weighing the unwarrantable failure factors before me I determine that Blue Diamond's conduct was not aggravated.

These same factors convince me that Respondent did not act with high negligence. Blue Diamond had a responsibility to follow its roof control plan, and I have found this violation to be S&S. However, Respondent's affirmative steps to discuss the requirements of the pillar split plan and to bolt the rock brow indicate a concern for plan compliance and miner safety. I therefore determine that Blue Diamond's efforts mitigate its negligence.

Thus, I conclude that Blue Diamond's conduct was not an unwarrantable failure and its level of negligence was moderate. Citation No. 7505299 is hereby **MODIFIED** to remove the

unwarrantable failure designation and to lower the level of negligence from "reckless disregard" to "moderate."

7. Repeated Flagrant Designation under Section 110(b)(2)

In view of my discussion above, the Secretary has likewise not carried his burden of proving that Citation No. 7505299 is a repeated failure. Based on his own definition, the Secretary must show that section 110(b)(2)'s "other criteria" have been satisfied. Yet the Secretary has not presented evidence demonstrating that Citation No. 7505299 represented a failure to make reasonable efforts to eliminate a known violation. Here, Superintendent Williams met with his section foreman and miners to discuss pillar split plans. Moreover, Blue Diamond had taken steps to bolt the rock brow. Although these steps did not ultimately prevent the violation at issue, they represent reasonable steps on the part of the operator.

Because the Secretary has not demonstrated that Citation No. 7505299 satisfied section 110(b)(2)'s other criteria, I need not examine his evidence of prior failures. I conclude that the Secretary has not proven Blue Diamond's conduct to have been repeatedly flagrant under section 110(b)(2) of the Mine Act. Order No. 7505299 is therefore **MODIFIED** to remove the flagrant designation.

8. Penalty

The Secretary originally proposed a $154,500.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Blue Diamond's business or that it would infringe on Blue Diamond's ability to remain in business. Although I have found that this order was properly designated S&S, I have modified the order to "moderate" negligence and removed the unwarrantable failure and flagrant designations. Of the 914 violations in Respondent's history of violations report, 42 involved 30 C.F.R. § 75.220(a)(1). In considering all of the facts and circumstances in this matter and applying the criteria of section 110(i), I hereby assess a civil penalty of $15,450.00.

VII. ORDER

In light of the foregoing, I hereby **ORDER** the following:

1. Section 104(d)(2) Order No. 4220150 is **MODIFIED** to a section 104(a) citation by removing the S&S, unwarrantable, and reckless and repeated flagrant designations, and lowering the cited level of negligence from "reckless disregard" to "moderate."
2. Section 104(d)(2) Order No. 7521758 is **AFFIRMED** as S&S and **MODIFIED** to a section 104(a) citation by removing the unwarrantable failure designation, removing the reckless and repeated flagrant designations, and lowering the cited level of negligence from "reckless disregard" to "moderate."
3. Section 104(d)(2) Order No. 7524542 is **AFFIRMED** as S&S and as an unwarrantable failure, and **MODIFIED** to remove the reckless and repeated

flagrant designations, and to lower the cited level of negligence from "reckless disregard" to "high."

4. Section 104(d)(1) Citation No. 7505299 is **AFFIRMED** as S&S and **MODIFIED** to a section 104(a) citation by removing the unwarrantable failure designation, removing the repeated flagrant designation, and lowering the cited level of negligence from "high" to "moderate."
5. Blue Diamond shall **PAY** a civil penalty of $85,940.00 within 40 days of the date of this decision.
6. The section 110(c) penalty assessment case against Gary L. Jent is **VACATED**, and that proceeding is **DISMISSED**.

Given the multiplicity of issues and docket numbers involved in this decision, the follow chart summarizes the modifications and penalties associated with each of the violations before me:

		KENT 2008-584					
Citation/Order No.	**30 C.F.R §**	**S&S**	**Negligence**	**Unwarrantable Failure**	**Flagrant**	**Type of Action**	**Penalty**
4220150	75.370(a)(1)	Removed	To "Moderate	Removed	Removed	To "104(a)	$3,000.00
7521758	75.220(a)(1)	Affirmed	To "Moderate	Removed	Removed	To "104(a)	$18,490.00
7505299	75.220(a)(1)	Affirmed	To "Moderate	Removed	Removed	To "104(a)	$15,450.00

		KENT 2008-784					
Citation/Order No.	**30 C.F.R §**	**S&S**	**Negligence**	**Unwarrantable Failure**	**Flagrant**	**Type of Action**	**Penalty**
7524542	75.220(a)(1)	Affirmed	To "High"	Affirmed	Removed	N/A	$49,000.00

KENT 2009-6
Vacated

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

Christian P. Barber, Esq., U.S. Department of Labor, Office of the Solicitor, 211 Seventh Avenue North, Suite 420, Nashville, TN 37219-1823

Willow Fort, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

Marco M. Rajkovich Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

Randall Scott May, Esq., Barret, Haynes, May & Carter, P.O. Drawer 1017, Hazard, KY 41702

/pjv