FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 25, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2011-0277 A.C. No. 12-02295-242579
v.	Docket No. LAKE 2011-1030 A.C. No. 12-02295-265364
	Docket No. LAKE 2012-0543 A.C. No. 12-02295-284950-01
PEABODY MIDWEST MINING, LLC, Respondent	Docket No. LAKE 2012-0909 A.C. No. 12-02295-301060
	Francisco Mine – Underground Pit

DECISION

Appearances: Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur M. Wolfson, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Peabody Midwest Mining, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Henderson, Kentucky, and filed post-hearing briefs. Four section 104(d)(2) [1] orders of withdrawal were adjudicated at the hearing. The orders were issued at the Francisco Underground Pit in Gibson County, Indiana.

[1] Subsequent to the hearing, the parties submitted Additional Stipulations with respect to the section 104(d) sequence for each order, as discussed below.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 8428824; LAKE 2011-277

On July 20, 2010, MSHA Inspector Philip Douglas Herndon issued Order No. 8428824 under section 104(d)(2)[2] of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. (Ex. G-5). The order states that loose rocks hung about 9.5 feet above the mine floor in the face area of the No. 7 entry on MMU-022. The order alleges that one rock was 3 feet by 2 feet and was up to 7 inches thick. The other rock was 2 feet by 1.5 feet and was up to 6 inches thick. The order also alleges that miners traveled directly below the hanging rocks.

Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial ("S&S"), the operator's negligence was high, and that one person would be affected. Section 75.202(a) provides that the "roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of $17,800.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

For the reasons set forth below, I modify Order No. 8428824 to a 104(a) citation with moderate negligence.

Discussion and Analysis

I find that the conditions cited in Order No. 8428824 constitute a violation of section 75.202(a). The Secretary's roof-control standard 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Harlan Cumberland Coal Co Company*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Helen Mining Company*, 10 FMSHRC 1672, 1674 (Dec. 1988)). The requirements of the safety standard, as applied to the roof, can be broken down into three parts: (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls of roof. The cited roof conditions were inby the last open crosscut in a busy area where workers traveled. (Tr. 17). I credit Terry Morson, a safety technician of Respondent, that pie pans and more bolts than the roof plan required helped to support the roof. (Tr. 41-42). I credit, however, Inspector Herndon's testimony that despite Respondent's efforts, the cited roof control was not adequate to protect miners from roof falls. Inspector Herndon testified that the rocks he cited were "barely hanging" and shed particles onto the floor. (Tr. 20). Respondent argues that the roof was controlled beyond the requirements of its roof control plan

[2] The parties stipulate that this order was issued in the proper sequence under section 104(d). Additional Stipulations ¶ 1.

and merely showed signs of changing geology. I credit Inspector Herndon's testimony, however, that the rocks he viewed hanging from the roof required further support. A reasonably prudent person familiar with the mining industry and this standard would provide more roof support to address the hazard viewed by the inspector. Respondent violated section 75.202(a).

I find that Order No. 8428824 was S&S because the violation contributed to a hazard that was reasonably likely to cause a serious injury.[3] The cited condition violated section 75.202(a) and contributed to the hazard of a rock fall permanently disabling a miner. Although pie pans helped hold the cited rocks in place upon the roof and Respondent argues that as a result the rocks would not fall, I credit Inspector Herndon's testimony that the loose rocks were only held by the corner of the pan. (Tr. 41, 26). Clint Underhill, the shift mine manager, testified that the roof conditions at the mine changed daily due to geology and the humidity in July, which could account for this dangerous condition that occurred despite Respondent's additional roof control. (Tr. 57). Further changes in the geological conditions in the area could also lead to the cited stones falling. Although Respondent argues that the area beneath the rocks was not traveled the day of or before the inspection, assuming continued normal mining operations I find that miners would travel beneath the cited rocks. Inspector Herndon testified that rock dust in the cracks of the rock suggested that the rocks existed in the cited condition for days, which means the condition was unlikely to be corrected. The precarious position of the rocks made them likely to fall and the area underneath was often busy, making a rock fall likely to strike a miner. (Tr. 17). Due to the traffic in the cited area and the precarious position of the cited rocks, I find that Order No. 8428824 was S&S and a serious violation.

I find that Respondent's moderate negligence, but not its unwarrantable failure[4] to comply with the safety standard, caused the violation. Respondent knew or should have known

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[3] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Musser Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

[4] Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is

of the condition, but mitigated its negligence by undertaking efforts to control the roof. I find that the condition of the roof was not obvious because the positioning of the rocks made them appear trapped by pie pans. The pie pans highlight Respondent's efforts to abate the hazardous roof condition by providing additional support. The pie pans were not required by the roof plan and Respondent also used more bolts than the plan required. Although aggravating factors exist including that the condition existed for several days and the condition posed a high degree of danger, I find that Respondent's efforts to abate the citation and comply with the standard make an unwarrantable failure designation inappropriate. Respondent did not ignore the need to properly support its mine roof, it merely misjudged what was necessary to do so. These factors combine to warrant a moderate negligence designation because Respondent should have known of the violative condition.

I **MODIFY** Order No. 8428824 to a 104(a) citation with moderate negligence. A penalty of $15,000.00 is appropriate for this violation.

B. Citation No. 8433566, LAKE 2012-543; and Citation No. 8433568, LAKE 2011-1030

On June 27, 2011, MSHA Inspector Shawn D. Batty issued Order No. 8433566 under section 104(d)(2)[5] of the Mine Act, alleging a violation of section 75.220(a)(1) of the Secretary's safety standards. (Ex. G-5). The citation alleges that Peabody Midwest did not follow the provision in its approved roof control plan that requires entries in the mains to be no wider than 18 feet. The citation states that Inspector Batty measured the width of entries in Unit No. 1 and discovered 35 places where the width of an entry was greater than the permissible 18 foot maximum.

Inspector Batty determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that 14 people would be affected. Section 75.220(a)(1) requires mine operators to "develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions and the mining system to be used at the mine." 30 C.F.R. § 75.220(a). The Secretary proposed a penalty of $40,300.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

Inspector Batty also issued Citation No. 8433568 on June 27, 2011 under section 104(d)(2)[6] of the Mine Act, alleging a violation of section 75.362(a)(1) of the Secretary's safety

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obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

[5] Based upon these proceedings and the stipulations of the parties in Additional Stipulations, this violation should be a 104(d)(1) citation. Additional Stipulations ¶ 3.

[6] Based upon these proceedings and the stipulations of the parties in Additional Stipulations, this violation should be a 104(d)(1) citation. Additional Stipulations ¶ 3.

standards. (Ex. G-7). The citation alleges that Peabody Midwest did not conduct adequate on-shift examinations in Unit No. 1. The inspector determined that the on-shift examinations were inadequate based upon the conditions he cited in Citation No. 8433566. The citation states that the mine examiners' books did not contain the cited conditions.

Inspector Batty determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that 14 people would be affected. Section 75.362(a)(1) requires that at "least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift . . . ." 30 C.F.R. § 75.362(a)(1). The safety standard further provides that the certified person "shall check for hazardous conditions and violations of mandatory health or safety standards referenced in paragraph (a)(3) of this section. . . ." *Id.* Paragraph (a)(3) references section 75.220(a)(1). The Secretary proposed a penalty of $38,503.00 for this citation.

For the reasons set forth below, I modify Citation Nos. 8433566 and 8433568 to affect less than 14 people.

Discussion and Analysis

For Citation Nos. 8433566 and 8433568, Respondent accepts the violation, and the S&S, negligence, and unwarrantable failure designations. Respondent contests the fatal designation and the number of persons affected, seeking to reduce the penalty amount.

I find that fewer than 14 persons would be affected by the violation cited in Citation No. 8433566. An expansive, well-traveled area of entries of the submains were wider than 18 feet, potentially affecting multiple miners. I find, however, that it was unlikely that the cited condition would contribute to the injury of 14 miners. Although the inspector testified that 14 miners worked in the area, I find it unlikely that 14 miners would be in the same space at the time of a rock fall. I credit the testimony of Respondent's witnesses, Chad Barras, Respondent's safety director, and Jack Wells, who was a member of Respondent's safety department at the time of the violation, that 14 miners were unlikely to be in one spot due to their varied work duties. Wells testified that it "would be kind of a miracle" to see 14 miners together. (Tr. 108). Barras also testified that the mine's procedure to investigate roof falls would make it unlikely that this citation would contribute to a succession of numerous roof falls and injury causing events that would injure 14 people. (Tr. 118). I find that it was not reasonably likely that the violation at issue in Citation No. 8433566 would have affected the entire 14-person crew. The maximum number of miners affected would have been about five.

I find that the violation cited in Citation No. 8433566 was reasonably likely to contribute to a fatal injury. Respondent does not dispute that Citation No. 8433566 was reasonably likely to contribute to an injury,[7] but does contest that the likely injury in such an event would not be

[7] If Respondent had not accepted the S&S designation and argued that an accident was not reasonably likely to contribute to a serious injury, I would have determined that Citation No. 8433566 contributed to the hazard of a roof fall that was reasonably likely to result in crushing

fatal. Respondent argues that an injury causing event was unlikely to occur because the cited areas were newly mined submains instead of intersections, only marginally exceeded the standard in the roof control plan, and did not show any evidence of unsafe conditions. It is well recognized that roof falls pose one of the most serious hazards to miners in the coal mining industry. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). The Commission has noted the inherently dangerous nature of mine roofs and attributed the leading cause of death in underground mines to roof falls. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211, n.8 (July 1982); *Halfway Incorporated*, 8 FMSHRC 8, 13 (Jan. 1986). I find that the cited condition was extensive and unlikely to be corrected under continued normal mining operations. Respondent's arguments that the ribs were not cracking or falling and the submains were new suggest that danger was not imminent, but do not change the fact that a roof fall is likely to fatally injure a miner. Roof falls are one of the greatest dangers in mining and I credit the inspector's conclusion that the likely injury for Citation No. 8433566 would be fatal.

My findings concerning the fatal designation and affected people for Citation No. 8433566 apply to Citation No. 8433568, but Citation No. 8433568 could potentially affect more people. The dangers of the underlying conditions cited in Citation No. 8433566 affect the gravity of Citation No. 8433568, but a variety of other hazards also contribute to the gravity because inadequate examinations can allow additional hazards to exist. The distance covered by the violative conditions cited in Citation No. 8433568 shows that the inadequate examinations were not contained to a small area. Performing adequate examinations is one of the most important safety precautions for a mine; proper examinations lead to the identification and correction of hazards. Improper examinations allow hazards to exist and multiply. For these reasons and the ones discussed above concerning Citation No. 8433566, Citation No. 8433568 was reasonably likely to contribute to a fatal injury. The violation was serious and could affect more than five miners.

Although I reduce the number of miners affected by the conditions identified in Citation Nos. 8433566 and 8433568, I highlight the seriousness of the violations, which posed a hazard to multiple miners. Both of these violations could lead to roof falls that were likely to be fatal to miners.

I **MODIFY** Citation No. 8433566 to be likely to affect no more than five miners and Citation No. 8433568 to be likely to affect more than five miners. A penalty of $25,000.00 is appropriate for Citation No. 8433566 and $28,000.00 is appropriate for Citation No. 8433568.

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injuries. The roof control plan mandated 18 foot submains at entries. Allowing greater widths is a clear violation of the plan that can contribute to a roof fall resulting in crushing injuries. The sheer volume of violative areas, 1142 linear feet in 35 different locations, makes an injury more likely. (Tr. 83). The cited areas of the mine were active and frequented by miners. (Tr. 84). The cited condition was extensive, dangerous, and reasonably likely to contribute to a fall of rock and resulting crushing injuries.

C. Citation No. 8434301; LAKE 2011-909

On May 26, 2011, MSHA Inspector Stephen J. Wilson issued Order No. 8434301 under section 104(d)(2)[8] of the Mine Act, alleging a violation of section 75.1103-5(h) of the Secretary's safety standards. (Ex. G-9). The citation states that the carbon monoxide ("CO") sensor at crosscut 12 providing fire protection for the 2nd Southwest Main A belt line became inoperative at 02:57 am on May 26, 2011 during the midnight shift. The sensor alerted the person upon the surface who is responsible for tracking the system. The citation alleges that this person alerted the maintenance foreman of the condition but the foreman took no action to correct the condition and did not assign anyone to continuously monitor for CO at the inoperative sensor. The citation further alleges that two production units were in operation and belts continued to operate.

Inspector Wilson determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that 64 people would be affected. Section 75.1103-5(h) provides that "[i]f any fire detection component becomes inoperative, immediate action must be taken to repair the component." 30 C.F.R. § 75.1103-5(h). The safety standard further provides that "[w]hile repairs are being made, operation of the belt may continue" if, as applicable here, a "trained person . . . continuously" monitors for CO "at the inoperative sensor." *Id.* The Secretary proposed a penalty of $38,500.00 for this citation.

Discussion and Analysis

I find that Respondent's failure to immediately calibrate the cited CO sensor violates section 75.1103-5(h). I find that the cited sensor, which required calibration, was inoperative. Herbert Andy Ryder, Respondent's maintenance foreman, testified that the sensor still monitored CO, but underestimated the amount of CO in the area by 5 ppm. (Tr. 159). The screen that alerted Respondent that the sensor needed calibrated, however, did not contain specific data about the performance of the sensor. A test that exposes the sensor to a known quantity of CO had to be performed to garner this information. (Tr. 159). The sensor's CO monitoring ability could have estimated CO levels well below a calibrated sensor, which would impair the sensor enough to make it effectively inoperative. The standard requires immediate repair because an inoperative sensor cannot detect increased CO levels to provide warning of a fire, which can be true of a poorly calibrated CO sensor. Without performing a test to confirm the specific condition of the CO sensor, Respondent neglected to fix the sensor immediately, risking that an ineffective and inoperative sensor would fail to provide warning of a fire. Inspector Stephan J. Wilson testified that Respondent did not recalibrate the sensor for almost six hours, which does not qualify as immediately, which violates the standard.

I find that Citation No. 8434301 was not S&S because it did not contribute to a hazard that was reasonably likely to cause an injury. Although it required calibration to function at its

[8] The parties stipulate that this violation should be a 104(d)(1) citation. Additional Stipulations ¶ 2.

full capacity in violation of the standard, the CO monitor continued to detect CO.[9] I credit Ryder's testimony that the cited sensor continued to alert miners to a drop in CO before the level of that CO became dangerous. (Tr. 157). If a fire occurred, the CO output would be great enough to trigger the cited sensor almost as quickly as a correctly calibrated sensor. I also credit Ryder's testimony that he calibrated the sensor as part of his normal duties and not due to the violation or a threat of a violation; he did not even know that Inspector Wilson was in the area when he traveled there with the intention to fix the sensor. (Tr. 158). Under continued normal mining operations, therefore, the condition would not have existed any longer than it did and would not have further deteriorated because normal mining operations rather than the violation led Ryder to correct the condition. This violation was unlikely to contribute to the hazard that a mine fire would propagate faster due to inadequate warning, resulting in burns or fatalities and therefore is not S&S. The gravity was serious, however.

I find that fewer than 64 miners were affected by the violation. The air passing over the cited sensor traveled outby, which means that it would not bring CO to the working faces. The slight delay responding to a fire caused by this improperly calibrated sensor would most likely only affect those miners who responded to fight the fire. I find, therefore that Citation No. 8434301 affected only a few miners.

The violation was the result of Respondent's high negligence. Charles S. Lyons, Respondent's third shift maintenance supervisor, knew or should have known of the violation yet failed to calibrate the sensor immediately. Lyons admittedly saw that the sensor required calibration. (Tr. 140-41). Instead of traveling directly to the sensor, Lyons performed various other duties and repairs and never reached the sensor before the end of his shift. (Tr. 143-47). Respondent did not address this violation for six hours. Lyons' negligence is attributable to the operator. The Secretary did not present evidence to show that Respondent was on notice that greater efforts were necessary to comply with section 75.1103-5(h). As discussed above, this violation presented little danger to miners and was abated as the citation was issued. Lyons knew of this condition and should have addressed it sooner, but was distracted by numerous maintenance projects, some of which were also safety concerns. It is important to note that Respondent believed that the sensor was functional and its condition did not contribute to a serious threat to safety. (Tr. 142-47). I find that Respondent's negligence was high but it did not rise to the level of aggregated conduct. Consequently, taking into consideration all of the relevant facts, I find that the violation was not the result of Respondent's unwarrantable failure to comply with the safety standard.

I **MODIFY** Citation No. 8434301 to a non-S&S 104(a) citation with high negligence. A penalty of $8,000.00 is appropriate for this violation.

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[9] The Secretary relies upon *Black Beauty Coal Co.* to argue that this violation should be S&S, but that decision addresses the complete absence of an audible warning device in a CO censor system, which is different and more dangerous than the facts presented here. 33 FMSHRC 1504, 1525 (2011) (ALJ). Here, every other sensor continued to work and provide warning, which would not cause the same danger as a system that failed to provide an audible warning. That decision, furthermore, is not precedent.

II. SETTLED CITATIONS AND ORDERS

Docket No. LAKE 2011-277 was originally assigned to Judge Janet Harner. By order dated March 9, 2012, she approved the settlement of Citation Nos. 8426473 and 8426476 and Order No. 8430017. She ordered Peabody Midwest to pay a penalty of $8,500.00 within 30 days of the date of her order.

III. APPROPRIATE CIVIL PENALTIES

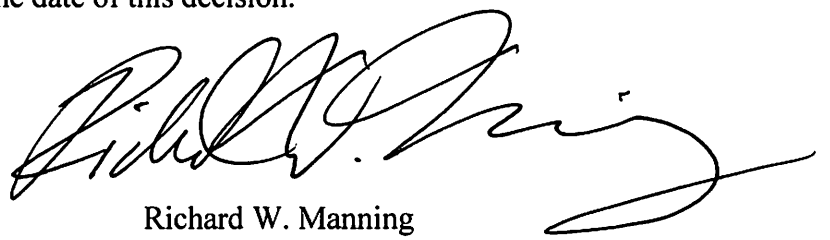
Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I reviewed the Assessed Violation History Report, which is not disputed. (Ex. G-1). Peabody Midwest paid penalties for 688 violations in the 15 months prior to June 26, 2011 and 82 of these violations were S&S. *Id.* At all pertinent times, Peabody Midwest was a large mine operator and the controlling company, Peabody Energy Corporation, was also a large operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. The gravity and negligence findings are set forth above. I have assessed the penalty for each citation *de novo* taking into consideration the six penalty criteria. Peabody Midwest argues that the penalty for each citation should be substantially reduced from that proposed by the Secretary. I have assessed relatively high penalties based primarily on the size of the mine and the controlling company and on my gravity and negligence findings.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
LAKE 2011-277		
8428824	75.202(a)	$15,000.00
LAKE 2011-1030		
8433568	75.362(a)(1)	$28,000.00
LAKE 2012-543		
8433566	75.220(a)(1)	$25,000.00
LAKE 2012-909		
8434301	75.1103-5(h)	$8,000.00
TOTAL PENALTY		$76,000.00

For the reasons set forth above, the citations and order are **MODIFIED** as set forth above. Peabody Midwest Mining, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of $76,000.00 within 40 days of the date of this decision.[1]



Richard W. Manning
Administrative Law Judge

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RWM

[1] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.