FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004

September 30, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-328 A.C. No. 12-02010-177009
v.	
BLACK BEAUTY COAL COMPANY, Respondent	Mine: Air Quality #1 Mine

DECISION

Appearances: Emily L.B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Arthur M. Wolfson, Esq., and Patrick W. Dennison, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Paez

This case is before me upon the Secretary's Petition for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815 (2006). In dispute are four section 104(d)(2) orders issued to Black Beauty Coal Company ("Black Beauty" or "Respondent") over a 40-day period at its Air Quality #1 Mine operation ("AQ1 Mine"). The Secretary has proposed a total penalty of $163,225.00 for these four alleged violations.

The parties stipulated to the following:

1. Black Beauty is an "operator" as defined in [section] 3(d) of the [Mine Act], as amended, 30 U.S.C. § 803(d), at the coal mines at which the Citations and Orders at issue in this proceeding were issued.
2. Operators of Black Beauty, at the coal mine at which the Citations and Orders were issued in this proceeding, are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. The individual whose signature appears in Block 22 of the Citations and Orders at issue in this proceeding [was] acting in the official capacity and as an authorized

representative of the Secretary of Labor when the Citations and Orders were issued.

5. True copies of the Citations and Orders at issue in this proceeding were served on Black Beauty as required by the Mine Act.
6. The total proposed penalties for the Citations and Orders in this proceeding will not affect Black Beauty's ability to continue in business.
7. LAKE 2009-328 involves six [section] 104(d)(2) orders, four of which remain at issue for the hearing. The [section] 104(d)(1) order giving rise to these four orders was issued on August 15, 2007 (Order No. 6670623) and is a final [section] 104(d) order. In the period from August 15, 2007 to November 24, 2008, thirty-one orders (including those at issue here) were issued pursuant to [s]ection 104(d) of the [Mine] Act. Ten of these orders are listed as being final 104(d) orders. The rest are still in contest.
8. The R-17 Assessed Violation History Report ([Ex. G–9]) is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

I. STATEMENT OF THE CASE

The Secretary has filed a Petition for Assessment of Civil Penalty, and two of the six alleged violations in this docket were settled and disposed by a separate decision and order prior to the hearing. The remaining four violations, Order Nos. 6681061, 6681064, 6681073, and 6682224, charge Black Beauty with violating the health and safety standard at 30 C.F.R. § 75.400 that prohibits accumulations of combustible materials in active workings.[1] In addition, the Secretary determined these violations were significant and substantial ("S&S"),[2] constituted an unwarrantable failure[3] to comply with a mandatory health and safety standard, and resulted from Black Beauty's high negligence.

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[1] Section 75.400 provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400.

[2] 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."

[3] 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."

Chief Administrative Law Judge Robert J. Lesnick assigned this case to me, and I held a hearing in Evansville, Indiana.[4] The Secretary presented testimony from MSHA Inspector Glenn Fishback, who issued the contested orders on October 15, October 20, October 23, and November 14, 2008. Currently an MSHA Roof Control Specialist, Fishback has twenty-eight years of experience in the coal mining industry, first as a general laborer, then in supervisory positions, including eight years with AQ1 Mine, and he has four mining certificates. (Tr. 16–20.)

Respondent presented nine witnesses. Randall Hammond, a Compliance Supervisor with Black Beauty at the time of the hearing, was a Section Foreman at the AQ1 Mine at the time of the inspections. (Tr. 117.) Matthew Benjamin, the current Section Foreman for AQ1 Mine, was a Section Foreman on the midnight maintenance shift at the time. (Tr. 98.) Stephen Elliot, currently a Belt Examiner, was a utility worker. (Tr. 157.) Eric Carter, currently a third-shift Mine Manager, was an Assistant Mine Manager. (Tr. 170.) Harry Luckett was and is a hauler driver for the mine. (Tr. 177.) Del Culbertson, currently an Examiner, Assistant Mine Manager, and Operator, was an Assistant Mine Manager whose duties often included escorting MSHA inspectors. (Tr. 250–53.) Todd Armstrong, currently a Belt Mechanic, was an outby laborer in 2008 and accompanied MSHA inspectors on occasion. (Tr. 308–09.) Rick Carie, a Shift Foreman for the AQ1 Mine in 2008, currently works with Special Projects. (Tr. 331.) Chad Barras is the Midwest Safety Director for Peabody Energy, which was the parent company of Black Beauty at the time of the inspection, and who previously worked with MSHA for one year as a ventilation engineer. (Tr. 345–46.)

The Secretary and Respondent each submitted post-hearing briefs and reply briefs.

II. ISSUES

The Secretary asserts that the four conditions before me were properly cited as violations of section 75.400, and that the significant and substantial ("S&S"), unwarrantable failure, and high negligence determinations are valid. (Sec'y Br. at 1, 10–20, 22–26, 29–34.) The Secretary emphasizes that the opinions of an experienced MSHA inspector are entitled to substantial weight. (*Id.* at 35–36; Sec'y Reply Br. at 1–4, 6.)

Respondent denies that the alleged accumulations described in three of the four orders—Order Nos. 6681061, 6681064, and 6682224—constituted violations of section 75.400. (Resp't Br. at 5–7, 24–26, 34–35.) In addition, Respondent contends that the record is insufficient to support the Secretary's S&S,[5] unwarrantable failure, and high negligence

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[4] In this decision, the hearing transcript, the Secretary's exhibits, and Black Beauty's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively.

[5] Black Beauty also argues that I should consider the presence of functioning carbon monoxide (CO) monitors, self-contained self-rescuers (SCSRs), and other fire detection, suppression, or management systems "in evaluating what would occur in continued mining

determinations for all four orders. (Resp't Br. at 7–20, 26–30, 35–45, 48–55.)

Accordingly, the following issues are before me: (1) whether the cited conditions in three of the four orders constitute a violation of 30 C.F.R. § 75.400; (2) whether the record supports the Secretary's S&S designation in each order; (3) whether the record supports the Secretary's allegations that Black Beauty's level of negligence was high in each order; (5) whether the record supports the Secretary's unwarrantable failure designation in each order; and (6) whether the proposed penalty for these violations is appropriate.

For the reasons that follow:

1. Order No. 6681061 is **AFFIRMED** as S&S, and **MODIFIED** to remove the unwarrantable failure designation and to lower the level of negligence from "high" to "moderate";
2. Order No. 6681064 is **AFFIRMED** as written;
3. Order No. 6681073 is **AFFIRMED** as S&S, as an unwarrantable failure, and as the result of Black Beauty's high negligence, and **MODIFIED** to reduce the number of miners affected from ten to three;
4. Order No. 6682224 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Air Quality #1 Mine – Background

The AQ1 Mine is a room-and-pillar coal mine located in Vincennes, Indiana. (Tr. 18, 20; Ex. G–10; Ex. R–20.) The strata below the AQ1 Mine's coal seam is made up of fireclay, which is an incombustible rock. (Tr. 121, 130–31, 134, 136, 173–74, 198–99.) Respondent uses an intricate system of conveyor belts to transport the newly-mined coal and rock out of the mine. (Tr. 30–31, 35, 100.) The belt system contains several distinct parts, including the tailpiece, the

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operations." (Resp't Reply Br. at 8; *see also* Resp't Br. at 51–52.) According to Respondent, "[t]his inquiry is relevant in analyzing the third element of the [test for S&S], which is to be considered assuming continued normal mining operations." (Resp't Reply Br. at 8–9 (citations omitted).) However, the Commission has repeatedly rejected operator arguments that additional fire safety measures prevent an S&S finding. *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369–70 (Oct. 2011), *aff'd, Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety and Health Admin.*, 52 F.3d 133, 136 (7th Cir. 1995) ("The fact that [Respondent] has safety measures in place to deal with a fire does not mean that fires do no pose a serious safety risk to miners. Indeed, the precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires."). Accordingly, I decline to consider the presence or functionality of Black Beauty's CO monitors, SCSRs, and other fire detection, suppression, or management systems in evaluating the Secretary's S&S allegations.

rollers, and the feeder. (Tr. 30–37, 100.) At the end of the tailpiece is a roller, two-and-a-half to three feet in diameter, which turns while the belt is running. (Tr. 34–35; Ex. G–21.) The feeder sits directly on top of the tailpiece and is the point at which coal is loaded onto the belt. (Tr. 37–38, 100, 109, 122, 168.) The tailpiece is used to maintain belt alignment and is constructed of a metal I-beam framework. (Tr. 34–35, 39.) The belts themselves vary from three feet to seven feet in width. (Tr. 34.)

B. Air Quality #1 Mine – Operations

At the time of the inspections, the mine operated on three shifts: day shift, second shift, and midnight shift. (Tr. 122–23.) Black Beauty performed maintenance on the midnight shift. (Tr. 122, 222.) During midnight maintenance shifts, a crew typically checked the tailpiece at least three times: once upon arrival at the unit, once during an on-shift examination, and once around 4:00 a.m. during the preshift examination in preparation for the day shift. (Tr. 101–102, 236–37.) Before the day shift arrived, the maintenance crew typically dusted and cleaned the tailpiece and fixed any hazards. (Tr. 99–104, 123, 237.)

The day shift typically arrived between 7:15 a.m. and 7:30 a.m. (Tr. 102.) Compliance Supervisor Hammond was a section foreman on the day shift in 2008, and he normally conducted a cursory check of the tailpiece within the first twenty minutes of the shift. (Tr. 123–24, 147–48.) The section foreman typically conducted another six to ten checks throughout the shift. (Tr. 123.) If it was clear of accumulations, Hammond would date, time, and initial the tailpiece. (Tr. 124–25.) He testified he normally—but not always—instructed someone to clean up any accumulations and address any hazards immediately. (Tr. 125–26, 149.)

Notwithstanding Black Beauty's examinations and maintenance efforts, the AQ1 Mine has a history of section 75.400 violations. (Ex. G–9; Ex. G–10; Ex. G–11.) Specifically, MSHA records show 94 final orders involving section 75.400 between July 2007 and December 2008. (Ex. G–9.) In addition, Inspector Fishback testified that numerous conversations took place between mine management and MSHA inspectors regarding accumulations violations in the AQ1 Mine. (Tr. 46, 47–49, 286.) Specifically, Fishback recalled issuing an order on September 11, 2008, and discussing belt problems with mine management. (Tr. 46, 47–49, 286.)

As part of MSHA's regular inspections of the AQ1 Mine, Fishback visited the mine on October 15, October 20, October 23, and November 24, 2008. (Ex. G–1; Ex. G–3; Ex. G–5; Ex. G–7.) Based on his observations, he issued Order Nos. 6681061, 6681064, 6681073, and 6682224, respectively. (Ex. G–1; Ex. G–3; Ex. G–5; Ex. G–7.) These orders each charge Black Beauty with violating 30 C.F.R. § 75.400, which prohibits accumulations of combustible materials in active workings. (Ex. G–1; Ex. G–3; Ex. G–5; Ex. G–7.) These orders are addressed seriatim below. *See* discussion *infra* Part V.B–.E.

IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 75.400 – Accumulations

A violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) ("Old Ben II") (footnote omitted). This judgment is viewed through the objective standard of whether a "reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light, Mining Div.*, 12 FMSHRC 965, 968 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991) ("UP&L"). In addition to being combustible, the material cited must be of a sufficient quantity to cause or propagate a fire or explosion. *UP&L*, 12 FMSHRC at 968 (quoting *Old Ben II*, 2 FMSHRC at 2808). Although spills can occur quickly, accumulations of combustible material substantial enough to cause or propagate a fire are prohibited, even if recent. *See Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 703 F.3d 553, 558–59 & n.6 (D.C. Cir. 2012) (rejecting operator argument regarding recency of spill); *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of the spill). Finally, the Commission has observed that damp coal and coal mixed with fireclay remains combustible; thus, excluding such materials would defeat Congress' intent to remove fuel sources from mines and prohibit potentially dangerous conditions. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120–21 (Aug. 1985).

B. Significant and Substantial Determinations

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.*, 52 F.3d at 135–36 (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 third *Mathies* element is often heavily contested. In the accumulations context, the third element is met where a "confluence of factors" such as the extent of the accumulation and presence of possible ignition sources make the hazard reasonably likely to result in injury. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). This evaluation should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). Materials need

not be hot when inspected to prove friction as an ignition source, if heat will eventually result during continued normal mining operations. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (finding the lack of a hot spot immaterial where friction was present between belt rollers and accumulations).

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).

C. Unwarrantable Failure and High Negligence Determinations

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); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). The Commission's 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.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Combustibility and Ignition

Based on the evidence at hearing, loose coal, coal fines, and float coal dust are each combustible materials. (Tr. 26–27, 91–92.) Combustion requires fuel, oxygen, and an ignition source. (Tr. 352.) Methane is the most common source of ignition and becomes explosive at

concentrations of 5–15%. (Tr. 22, 80–81.) The AQ1 Mine is considered a "gassy" mine and liberates over a million cubic feet of methane in a 24–hour period. (Tr. 22.) During October and November 2008, the AQ1 Mine was on a five-day spot inspection for methane gas. (Tr. 22–23, 69–70, 204.) A five-day spot inspection means that MSHA must inspect the mine's ventilation every five days to ensure that methane is properly being ventilated out of the mine. (Tr. 22–23.) However, methane levels never tested above 0.3% during any of the four inspections at issue in this case. (Ex. G–2 at 19–20; Ex. G–4 at 10; Ex. G–6 at 12–13; Ex. G–8 at 19–21.)

Frictional heat is another common ignition source, particularly for belt fires. (*See, e.g.*, Ex. R–25 at 20 (indicating that friction along the belt or belt drive ignited 36% of belt entry fires).) Friction also increases the likelihood of a fire by creating small fragments of material with an increased surface-to-mass ratio. (Ex. G–12 at 85.) Although dampness and incombustible materials decrease flammability (Tr. 27–28), frictional heat can first dry accumulations and then ignite the material. (Tr. 92.)

Both belt rollers and coal rubbing the belt structure framework are methods by which coal may be ground into float coal dust. (Tr. 27.) Float coal dust is coal that has been ground into extremely small pieces, with the consistency of baby powder. (Tr. 27.) Float coal dust is highly combustible. (Tr. 27–28.) Conversely, rock dust lowers the combustibility of float coal dust. (Tr. 27–28.) Although float coal dust also requires suspension in order to combust on its own, a nearby ignition can "kick up" non-suspended float coal dust and propagate the explosion. (Tr. 80, 353.)

B. Order No. 6681061 – Accumulations at 5 North on October 15

1. Order No. 6681061 – Accumulations at 5 North on October 15

Inspector Fishback visited the AQ1 Mine to conduct a quarterly inspection on October 15, 2008. (Ex. G–1; Tr. 24.) Upon arriving at the mine, Fishback first met with mine management and reviewed Black Beauty's record books. (Tr. 24–25.) Next, he traveled into the mine along with Belt Examiner Elliot as his escort. (Tr. 25; Ex. G–2 at 3.) The pair arrived at the section tailpiece of the 5 North energized belt conveyor between crosscuts 12 and 13 in the MMU-003 active working section at approximately 11:00 a.m. (Ex. G–2 at 10–11, 13; Ex. G–13; Tr. 24.) At the time the working face of the section was just seventy feet away from the tailpiece. (Tr. 41–42; Ex. G–2 at 20.)

Previous production at the AQ1 Mine had mined 5 North Section twelve crosscuts deep, but the section was then flooded with water. (Tr. 119–20, 179.) When Black Beauty restarted production in the area approximately two weeks prior to October 15, they pumped the water out of the panel's crosscuts and entries. (Tr. 120, 179–80.) However, the geologic conditions of the mine meant there was a constant inflow of water through the floor of the mine. (Tr. 120–21, 179–80, 245–48.) Because the floor was wet, Black Beauty tried to soak up the water in the area using rock dust and placed the belt tailpiece on crib blocks. (Tr. 86, 121, 246.) Notwithstanding

these efforts, the tailpiece structure and feeder were sinking into the floor. (Tr. 122, 154, 246.) The tailpiece was therefore closer to the mine floor than normal. (Tr. 122.) At the time, the belt was just four inches above the mine floor. (Tr. 38.)

According to Fishback's contemporaneous notes and testimony, he observed coal underneath the belt line that measured three feet in width, three feet in length, and two to eight inches in depth. (Tr. 32; Ex. G–2 at 11–12.) He also indicated that the belt was in contact with the loose coal and coal fines below the tailpiece. (Ex. G–2 at 11–12; Tr. 32.) In addition, Fishback observed float coal dust on the framework of the tailpiece, and he characterized the dust as black in color and dry. (Tr. 28, 32; Ex. G–2 at 12–13.) He measured the float coal dust at nine-inches wide, seven-feet long, and one-to-three inches deep. (Tr. 32; Ex. G–2 at 12–13.) However, the float coal dust was not in suspension. (Tr. 79, 135–36, 161, 184.) Fishback also testified that Elliott agreed with his observations. (Tr. 59, 84–85; *see also* Ex. G–2 at 13–14 (noting Elliot's agreement).)

Elliot then shut down the belt and called for section foreman Randall Hammond. (Ex. G–2 at 14; Ex. G–13; Tr. 84.) Hammond gathered a sample of the alleged accumulation for testing after he arrived; however, the material was accidentally placed on the belt and discarded. (Ex. G–2 at 15–16; Tr. 71–74, 134–35.) Based on his observations, Fishback issued Order No. 6681061, providing:

> Combustible material in the form of loose coal, coal fines and float coal dust (black in color and dry) have been allowed to accumulate on the 5 North Energized belt conveyor tail located between crosscut 12 and crosscut 13 on the roadway side of the belt line located on the MMU-003. The combustible material under the belt line measured approximately 3 feet in width by 3 feet in length by 2 to 8 inches in depth and was observed rubbing the belt for this total distance. On the tailpiece structure directly above these accumulations dry float coal dust was present which measured approximately 1 to 3 inches in depth by 9 inches in width for a length of 7 feet. The operator, Randy Hammond (Section Foreman) showed more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This [v]iolation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–1.) Fishback also designated the order as S&S. (*Id.*) In Fishback's judgment, the materials were "obvious to the most casual observer" (Tr. 51) and had existed for two to three shifts. (Ex. G–2 at 18; Tr. 50.)

To abate the condition, Black Beauty cleaned the area from rib-to-rib and spread rock dust. (Ex. G–1; Ex. G–2 at 18). According to Fishback, four employees spent sixty-five minutes

abating the cited conditions. (Ex. G–1).

2. Additional Findings of Fact

Black Beauty challenges three factual details underlying the Secretary's allegations in this case. First, Respondent disputes the amount of time that any such conditions existed. Black Beauty claims that any coal at the tail piece had been deposited only recently. (Resp't Br. at 1–3, 7.) Respondent explicitly points to evidence that the unit was checked and found clear of accumulations multiple times: no accumulations were noted during Section Foreman Benjamin's preshift examination at 4:52 a.m., or during Compliance Supervisor Hammond's check at 7:41 a.m. (Ex. R–3; Tr. 103–06, 126.) Conversely, Inspector Fishback testified that the conditions existed for two-to-three shifts and based his estimation on his observations and experience. In particular, he claimed it would take a "substantial amount of time for that much dust to develop." (Tr. 52.) Yet, it is also uncontroverted that coal deposits may accumulate quickly. (*See, e.g.*, Tr. 262–63.) Indeed, a well-worn aphorism in mining law is that mining is a dynamic process. Moreover, I note that Fishback issued no citation for improper preshift examinations. This failure does not *prove* that the tailgate section was clean at the time of the preshift examination, but, coupled with the potential for rapid accumulation, I have doubts about Fishback's testimony on this point. Given the evidence in this case, I therefore find that the conditions at issue in Order No. 6681061 developed *after* Hammond's check at 7:41 a.m.

Second, Black Beauty contends that the cited material was not combustible. (Resp't Br. at 6.) Specifically, Compliance Supervisor Hammond, Belt Examiner Elliot, and hauler driver Luckett each claim that the material under the belt contained minimal amounts of coal and was mostly mud and water. (Tr. 128, 134, 160, 185.) As for the alleged float coal dust accumulation, Elliott, Hammond and Luckett each testified that the material was a gray mix of float coal and rock dust. (Tr. 135–36, 160–61, 182.)

At first blush, contrary testimony from three operator employees would appear convincing. However, upon closer examination, I have serious questions regarding the testimony of Elliot and Luckett. In particular, Elliot's testimony conflicts with the text of his Inspector Report.[6] Moreover, it appears that Luckett conflated the inspections that took place on October

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[6] Elliot prepared this "Inspector Report" as he traveled with Inspector Fishback on October 15. Notably, the "Inspector Report" states: "Arrived at #3 unit at approx 11 am. Found belt & tail roller of 5N running in accumulations." (Ex. G–13.) The report also states that "[a]though not written up [the] unit needed [to be] cleaned better. Unit was heavily dusted." (*Id.*) Elliot testified that his notations reflected *Fishback's* observations rather than his own. (Tr. 162–69.) In other words, Elliot claimed a Black Beauty employee would record an inspector's observations—observations with which the escort specifically disagreed—to produce a report of what the Inspector observed. Paradoxically, however, those same details would be recorded in any citation or order Inspector Fishback issued. If believed, Elliot's self-serving testimony would neutralize the probative value of his "Inspection Report." However, Elliot

15 and 20. (Tr. 187–88, 192) As he admitted: "[T]hey kind of blend together, because they're so close together and they're in the same location . . . ." (Tr. 188.) Given the number of accumulations violations Black Beauty received during this period, it is understandable why Luckett might conflate some of the events of the days in question. Nevertheless, these deficiencies give me significant pause regarding the testimony each witness provided.[7]

In light of my doubts regarding two of the operator's three witnesses, it appears this is a simple case of conflicting testimony. Here, Fishback credibly testified that he observed loose coal and coal fines in contact with Black Beauty's belt. Likewise, Fishback credibly testified regarding the color, size and composition of the float coal dust he observed on the belt's tailpiece. In particular, he testified that he saw and touched the float coal dust. (Tr. 28.) He also indicated that loose coal, coal fines, and float coal dust are combustible. (Tr. 26–28, 92–94.) Moreover, he explained his basis for identifying each type of accumulation. (Tr. 199.) Finally, his contemporaneous notes also support his observations. (Ex. G–2 at 12–15.)

Although Fishback had only been an inspector for a few months, I recognize that he has more than twenty-eight years of experience in the coal mining industry. In addition, he specifically worked in the AQ1 Mine before becoming an inspector, and is therefore familiar with the specific conditions found at this mine. His opinion is therefore entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that the substantial evidence supported an ALJ's S&S determination).

I also note that neither Hammond nor Luckett were present at the time Fishback arrived at the tailpiece. Although both witnesses arrived thereafter, neither were able to observe the precise conditions Fishback encountered. Further, Fishback's testimony about the color of the float coal dust is consistent with my above factual findings regarding the duration of these conditions. Benjamin and Hammond testified that the tailpiece was free of accumulations and had been rock dusted, so the *recent* accumulation of float coal dust predictably would be black in color. I also note that Fishback's own testimony admitted that the area around the tailpiece was wet. (Tr. 86.) Based on the evidence before me, I therefore find that the accumulations appeared as Fishback described them in his written order except that they were wet.

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curiously did not explain why Black Beauty would adopt a seemingly redundant system. Accordingly, I do not credit Elliot's testimony on this point. On the contrary, I determine that the "Inspector Report" supports Fishback's testimony regarding the cited conditions.

[7] I recognize that Fishback also admitted that the passage of time had affected his memory. (*See, e.g.*, Tr. 37, 70–73, 86.) Unlike Luckett, Fishback was able to refer to his contemporaneous notes to refresh his memory and differentiate this case from the many accumulation citations and orders MSHA issued to Black Beauty during this time period. Accordingly, I find his testimony to be more credible than Luckett's testimony.

Third, Respondent also questions Fishback's testimony that four miners spent 65 minutes abating the conditions he found. Hammond testified the material took at most fifteen minutes to clear. (Tr. 132.) In addition, Hammond testified that Fishback's 65-minute estimate included time to lock the belt, assemble miners, collect necessary equipment, and clean the material. (Tr. 133.) Further, Luckett stated that shoveling the material took only a few minutes. (Tr. 182–86.)

Although Fishback may have correctly estimated the amount of time from his arrival to ultimate abatement, I credit Hammond's testimony that his estimate included time not spent removing the material. Further, four miners operating in concert would seem likely to remedy coal deposits of the size Fishback cited in fewer than 65 minutes. Thus, I find that the conditions at issue were cleared in approximately 15 minutes.

3. Violation of 30 C.F.R. § 75.400

Order No. 6681061 alleges that Respondent violated section 75.400 by allowing extensive accumulations of combustible material in the form of loose coal, coal fines and float coal dust at 5 Main North belt tailpiece located between crosscuts 12 and 13. The Secretary contends that Inspector Fishback's testimony and notes support his allegations. (Sec'y Br. at 10–11; Sec'y Reply Br. at 2–4.) In addition, the Secretary claims that Black Beauty's history of previous violations "raises serious doubts about the mine's ability to control accumulations . . . including those in [Section Foreman] Benjamin's section." (Sec'y Br. at 11–12.)

For its part, Respondent argues the material was a non-combustible mix of mud, water, and minimal coal under the belt and a mix of rock dust and float coal dust on the tailpiece. (Resp't Br. at 6.) Black Beauty also argues that any combustible material was "de minimis and constituted non-violative spillage because it did not exist until shortly before the Order was issued." (*Id.* at 6 n.6.) Finally, Black Beauty also disputes the credibility of Inspector Fishback's testimony. (*Id.* at 7.)

In light of my factual findings, I determine that a reasonably prudent person, familiar with the mining industry and protective purposes of section 75.400, would have recognized these coal deposits were the type of hazardous conditions the regulation seeks to prevent. *See Old Ben II*, 2 FMSHRC at 2808 ("[T]hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe.") In this case, Fishback observed loose coal and coal fines underneath the belt in question, as well as significant deposits of black float coal dust on the framework of the tailpiece. Despite the presence of fireclay and water in the area, it is uncontroverted that loose coal, coal fines, and float coal dust are combustible. Although these accumulations were relatively small in size, Fishback also testified that these materials were combustible and could ignite. (Tr. 26–28, 43–44.) These accumulations developed between Hammond's 7:41 a.m. check of the tailpiece and Fishback's arrival on the scene at 11:00 a.m., but the Commission has *rejected* the argument that "accumulations may be tolerated for a 'reasonable time.'" *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957–58 (Dec. 1979)

("Old Ben I"). Thus, a reasonably prudent person who is familiar with the mining industry and protective purposes of section 75.400 would therefore have recognized that these were the types of materials that could propagate a fire or explosion and were impermissible accumulations. I therefore conclude that Black Beauty violated 30 C.F.R.
§ 75.400.

4. S&S

Black Beauty's violation of section 75.400 establishes the first element of an S&S violation. In addition, Inspector Fishback credibly testified that the violation at issue contributed to fire and mine explosion hazards. (Tr. 43–45.) I do not doubt that combustible material along the belt contributes to—or makes more likely—mine fire and explosion hazards. Further, Fishback credibly described that smoke inhalation, burns, or death were the type of injuries that would reasonably result from a mine fire or explosion. (Tr. 45–46.) In view of Fishback's testimony, I determine that the Secretary has satisfied his burden of proof on the second and fourth elements of the *Mathies* test.

The parties most heavily contest whether the mine fire and explosion hazards are reasonably likely to result in injury. According to the Secretary, the "energized belt rubbing against loose coal and coal fines created an ignition source as it produced friction and, under continued mining operations, would cause the loose coal and coal fines to ignite." (Sec'y Br. at 15.) The Secretary also contends that the "ignition of the loose coal and coal fines would, in turn, ignite the float coal dust above it." (*Id.*) In contrast, Black Beauty contends that the material under the tailpiece was not in contact with any point of friction. (Resp't Br. at 9.) In addition, Respondent argues that the float coal dust at issue "was not in contact with any ignition sources." (*Id.* at 10.) Further, Black Beauty argues that an ignition of methane was unlikely to place the dust into suspension because methane was not present at the time of the inspection. (*Id.*) Finally, Respondent also suggests that the dampness of the area makes an S&S determination inappropriate. (Resp't Br. at 11 n.9.)

Based on the evidence before me, I determine that the Secretary has satisfied his burden of proof on *Mathies*' third element. I have credited Fishback's description of the accumulations he found. Thus, the loose coal and coal fines under the tailpiece were in contact with the belt, which provided an ignition source as the coal dried out and heated up in the course of continued mining operations. Given the belt as an ignition source and the loose coal and coal fines as fuel, these accumulations were reasonably likely to ignite. Moreover, these ignitions were also reasonably likely to place the float coal dust in suspension, which could lead to a mine explosion.

Furthermore, I note that the tailpiece in question was located just seventy feet from the working face of the mine. Given that the AQ1 Mine is a gassy mine, methane may quickly accumulate on the section. I also note that MSHA's Assessed Violations History Report for the AQ1 Mine shows thirty-two violations of the approved ventilation plan in the twenty-seven months prior to the citation at issue. (Ex. G–9 at 5–6.) Moreover, Fishback and Safety Director

Barras each mentioned arcing as a potential source for ignition at the AQ1 Mine. (Tr. 94, 351.) In light of the proximity of the tailpiece to the working face and the potential for methane accumulation, I also determine that is reasonably likely in the course of continued mining operations that a methane ignition at the face would put the float coal dust in suspension and propagate an explosion.

Finally, I recognize that this area of the AQ1 Mine was very wet at the time of the inspection. Yet, the Commission has consistently found that wet or damp coal will dry out and fuel or propagate a fire or explosion. *See, e.g.*, *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329–30 (Aug. 2013) (citing *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120–21 (Aug. 1985), and *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1230, 1232 (June 1994)). Given Respondent's regular on-shift and preshift examinations, I recognize that a section foreman might have identified this accumulation in the next few hours. However, Hammond's 7:41 a.m. check of the tailpiece was the last recorded examination. Accordingly, these extremely dangerous conditions created a window of several hours where a quick uptick in methane, a spark, or frictional heat were reasonably likely to lead to disaster.

In view of the above, I therefore determine that *Mathies*' third element has been satisfied. Given my prior determinations regarding the first, second, and fourth elements, I conclude that this violation was appropriately designated as S&S.

5. Unwarrantable Failure and High Negligence

The Secretary characterizes Black Beauty's negligence as high and has designated this violation to be an unwarrantable failure. In support of his allegations, the Secretary points to the obviousness, extent, and duration of the cited conditions. (Sec'y Br. at 17.) In addition, the Secretary characterizes the violative condition as highly dangerous and claims that Respondent did not take steps to address the conditions prior to Inspector Fishback's arrival. (*Id.* at 17–18.)

Conversely, Black Beauty claims the Secretary's unwarrantable failure and high negligence allegations are inappropriate. (Resp't Br. at 15.) Respondent contends that the condition existed only for a short time and was not extensive. (*Id.*) Further, Black Beauty argues that its past accumulations violations did not put the operator on notice that greater efforts were necessary to comply with section 75.400 because there is no "nexus" between the "basis for heightened alert" and "the facts of the alleged violation at issue."[8] (*Id.* at 16.) Finally,

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[8] Black Beauty focuses much of its argument on explaining the "nexus" required between past and present violations. (*See* Resp't Br. at 16–20 (citing *Brody Mining, LLC*, 33 FMSHRC 1329, 1366–67 (May 2011) (ALJ), *petition for review granted* (June 30, 2011).) However, the Commission has indicated:

> [i]t was appropriate for the Judge to conclude that such [section 75.400] violations were sufficient to place the operator on notice

Respondent avers that the condition was not highly dangerous. (*Id.* at 20.)

Looking at the Commission's factors for unwarrantable failure, three of the unwarrantable factors suggest that Black Beauty's conduct was aggravated. First, I have concluded that Black Beauty's conduct was serious and dangerous enough to constitute an S&S violation. Second, Respondent had a sizable history of violations: Fishback specifically testified that Black Beauty had a "terrible reputation of belt violations" (Tr. 47), and MSHA's records demonstrate a significant history of accumulations violations. (Ex. G–9; Ex. G–10; Ex. G–11.) These violations put Black Beauty on notice that greater efforts were necessary for compliance. Third, the obviousness of the condition is also an aggravating factor. Here, Fishback asserted the accumulations were "seen as soon as I walked up, obvious to the most casual observer" and he did not have to get down on his hands and knees or move anything to see the accumulations. (Tr. 51–52.)

In contrast, four of the Commission's unwarrantable factors mitigate Black Beauty's conduct in this case. First, I have found that the accumulations in question had been present for less than a shift. *See* discussion *supra* Part V.B.2. Notwithstanding Black Beauty's on-going duty to correct dangerous conditions, this relatively short duration suggests that Respondent's conduct was not aggravated. Second, the cited accumulation was not extensive. Although the float coal dust itself was deeper than Fishback had seen in the past, the remainder of the accumulation spanned only a few feet. Indeed, I have found that Respondent was able to abate the condition in approximately 15 minutes. Third, this relatively swift abatement and the examinations by Section Foreman Benjamin and Compliance Supervisor Hammond suggest that Black Beauty efforts to keep the tailpiece free of accumulations were having at least some effect. *See Manalapan Mining, Co.*, 35 FMSHRC 289, 295 (Feb. 2013) ("The evidence of the number of miners and time necessary to clean up the accumulations after the issuance of the citation and orders is relevant to [an operator's efforts to abate the violative condition prior to a citation or order's issuance], as it is to the factor of extensiveness of the violation.") Finally, the Secretary has not demonstrated that Black Beauty or its agents had knowledge of the condition in question.

> that greater efforts were necessary for compliance with the standard. We do not agree that past violations of section 75.400 can provide such notice only if they are factually indistinguishable from the cited condition.

Big Ridge, Inc., 35 FMSHRC 1525, 1530 (June 2013). Although operators may draw "a distinction demonstrating an anomaly," they bear the burden of rebutting the Secretary's "contention that the prior violations did, in fact, put the operator on notice." *Twentymile Coal Co.*, 36 FMSHRC 1533, 1539 (June 2014). Here, Respondent's arguments do not demonstrate that the violation in question was an anomaly. Accordingly, I determine that Black Beauty's past accumulations violations put the operator on notice that greater efforts were necessary to comply with the Secretary's regulations.

In fact, the Secretary presented no evidence that any supervisor or other agent had been through the area since Hammond's on-shift examination at 7:41 a.m. that morning. Thus, it is unclear that Respondent *should* have known about the violative condition.[9] *Cf. E. Associated Coal Corp.*, 32 FMSHRC 1189, 1199–1200 (Oct. 2010) (affirming ALJ conclusion that operator had no knowledge of the violative condition where Secretary made no attempt to establish actual knowledge, and did not establish "predicate" circumstances necessary to conclude that Eastern reasonably should have known of the violative condition.").

In light of the facts and circumstances, I do not believe the Secretary has met his burden of establishing aggravated conduct. Nevertheless, I recognize that the aggravating factors before me are significant. The float coal accumulations presented significant dangers to miners in the AQ1 Mine. As Fishback succinctly observed: "Float coal dust is what blows up coal mines." (Tr. 43.) Moreover, it is extremely troubling that Black Beauty received a series of accumulations violations but did not adequately solve the problems in this mine. These are significant shortcomings, and Respondent's failure to adequately fulfill its safety duties under the Mine Act despite repeated warnings is the epitome of negligence.

Yet, after weighing these serious concerns against the mitigating circumstances of this case, Respondent's failure in this case does not cross the line from ordinary negligence to aggravated conduct. The condition in question was *dangerous*, but its relatively short duration and limited extent circumscribes the window within which a hazard could develop. Indeed, given the accumulations' obviousness and Respondent's regular exams of the area, it appears likely that Black Beauty's section foreman would have identified the accumulations and had them cleaned up within a few hours. Although Respondent's procedures were ultimately inadequate to satisfy its duties, the Secretary has not demonstrated that Black Beauty's missteps constitute intentional misconduct, indifference, reckless disregard, or a serious lack of reasonable care. *Cf. Twentymile Coal Co.*, 36 FMSHRC 1533, 1534, 1538–39 (June 2014) (affirming ALJ determination of unwarrantable failure where accumulation existed in a large area over several shifts).

For these same reasons, I conclude that the Secretary has not met his burden of showing Black Beauty was highly negligent. Respondent had a duty to ensure that coal did not accumulate in the AQ1 Mine, and it failed to fulfill that duty. I also recognize that these accumulations posed a significant danger to miners, and their abatement required only a small

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[9] Fishback relied on Respondent's history of past violations, finding the operator should have known about the accumulations on October 15 "from the previous history." (Tr. 50.) The Secretary also introduced into evidence Order No. 6681046, a section 104(d)(2) order involving accumulations along a belt. (Ex. G–20.) However, I know little about the actual facts involved in Order No. 6681046. Although Black Beauty's previous history of accumulations violations is relevant to an unwarrantable failure analysis, *see* discussion *supra* note 8, Fishback's vague testimony and the text of Order No. 6681046 are insufficient for me to infer that Respondent had constructive knowledge in this case.

amount of effort. *Cf., United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Nevertheless, the Secretary's own standards call for moderate negligence where "there are mitigating circumstances." 30 C.F.R. § 100.3(d) at Table X. Black Beauty's regular examinations of the area in question, the relatively short time frame, and the limited extent of these accumulation somewhat mitigate Respondent's negligence in this case. Accordingly, I conclude that Respondent's level of negligence was moderate.

Based on all of the above, Order No. 6681061 is **MODIFIED** to remove the unwarrantable failure designation and change the cited level of negligence to moderate.

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. 30 U.S.C. § 820(I).

The Secretary initially sought a penalty of $41,574.00 for Order No. 6681061, and nothing in the record suggests the proposed penalty is inappropriate for the size of Black Beauty's business. Moreover, the parties have stipulated that the proposed penalty would not infringe on Respondent's ability to remain in business. I have affirmed the Secretary's S&S allegation noting the seriousness of the float coal dust accumulations, but I have removed his unwarrantable designation and concluded that Black Beauty's negligence to be moderate. Of the 787 violations in Respondent's history of violations report, 94 involved 30 C.F.R. § 75.400. (Ex. G–9.) Once this order was issued, nothing suggests that Respondent failed to make a good faith effort to achieve rapid compliance with the safety standard. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of $14,000.00.

C. Order No. 6681064 – Accumulations at 5 North on October 20

1. Order No. 6681064 – Accumulations at 5 North on October 20

Just five days later on October 20, 2008, Fishback returned to the 5 North Section accompanied by Mine Manager Eric Carter. (Tr. 60–61, 171.) The belt's tailpiece still remained in the same location. (Tr. 61, 107–108, 171.) However, during the early morning hours of October 20, Section Foreman Benjamin and his midnight shift crew lifted the feeder off the tailpiece to install belt hangers, which would facilitate a future belt move. (Tr. 108–109, 114.) Before resetting the feeder, Benjamin's crew attempted to stabilize the ground in the area with a load of gob rock. (Tr. 109.) The crew also used a "slinger duster" to apply rock dust to the area around the tailpiece. (Tr. 109–110, 114–15.) According to Benjamin, the area was clean and "snow white." (Tr. 110.)

Upon inspecting the same tailpiece, Fishback again observed loose coal, coal fines, and float coal dust underneath and on the structure. (Ex. G–4 at 5–6; Tr. 60–62.) In Fishback's judgment, these materials were obvious and excessive. (Tr. 64–65.) According to Fishback, he and Carter both observed contact between the loose coal and the belt. (Ex. G–4 at 5–6.) The belt was shut down, and at 10:05 a.m. Fishback issued Order No. 6681064, providing as follows:

> Combustible material in the form of loose coal, coal fines and float coal dust (Dry and black in color) have been allowed to accumulate on the 5 Main North energized belt conveyor tail located between crosscut #12 to crosscut #13 on the roadway side of the belt line located on the MMU-003. The combustible material under the beltline measured approximately 2 foot in width by 3 [feet] in length and 1 to 2 inches in depth and was observed rubbing the belt for approximately 1 foot of this distance. On the tailpiece structure directly above these accumulations dry float coal dust was present which measured approximately 9 inches in width by 5 feet in length by 1 to 2 inches in depth. The operator, Randy Hammond (Section Foreman) showed more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–3 at 1–2.) Fishback designated the Order as S&S. (*Id.* at 1.) Further, Fishback testified that four employees worked for forty-five minutes to abate the violative condition. (Tr. 66, 88; Ex. G–4 at 8.) He also indicated that he saw no evidence that Black Beauty attempted to abate the condition prior to his arrival. (Tr. 65.)

2. Further Findings of Fact

Black Beauty again challenges three important aspects of Inspector Fishback's testimony. First, Black Beauty claims that when Compliance Supervisor Hammond performed his check at 9:17 a.m. the tailpiece area was free of accumulations and had been recently rock dusted. (Resp't Br. at 21.) As I noted above, coal deposits may accumulate quickly. Given the evidence before me, I therefore find that the conditions at issue in Order No. 6681064 developed after Hammond's check at 9:17 a.m. and had recently been rock dusted.

Second, Respondent disputes the composition of the material Fishback identified. (Resp't Br. at 24–26.) Specifically, Respondent's witnesses claimed the material under the belt consisted largely of mud and standing water. (Tr. 111, 141–42, 172–75; Ex. G–14 at 1; Ex. R–13.) Hammond and Mine Manager Carter also contended that the dust on the framework of the tailpiece was a lighter gray than five days earlier because of the recent rock dusting. (Tr. 145, 173.) Hammond also claimed that the dust was not 1–3 inches deep. (Tr. 145.)

Nevertheless, the evidence in this case again convinces me that the cited conditions generally appeared as Fishback described them. Despite Hammond and Carter's opinion that the material under the tailpiece was mostly fireclay and water, Fishback's credible testimony reflected his personal observations. Further, I have accorded Fishback's testimony significant weight based upon his long experience as a coal miner. Considering the evidence before me, I find that the cited materials were as Fishback described them. However, I also find that the coal deposits themselves were wet.

This finding is consistent with my factual determinations for Order No. 6681061. *See* discussion *supra* Part V.B.2. Although Black Beauty had treated the mine floor and applied rock dust, the tailpiece and feeder in question remained in the same location. Accumulations predictably developed in the same spots of the tailpiece. Those accumulations in Order No. 6681061 developed during the three-and-a-half hour window between Black Beauty's last check of the tailpiece and Fishback's 11:05 a.m. order on October 15. Here, in contrast, Hammond last examined the belt at 9:17 a.m. on October 20, and Fishback issued Order No. 6681064 at 10:05 a.m. Thus, this smaller window predictably allowed a smaller amount of coal to accumulate.

Third, Black Beauty disputes the amount of effort required to abate the condition at issue. (Resp't Br. at 22, 28–29.) According to Hammond, the majority of the forty-five minutes recorded by Fishback consisted of informing Carter of the order, shutting off the belt, finding and informing Hammond, gathering shovels, and removing the guarding from the belt. (Tr. 144–45.) Hammond testified that he and Luckett spent ten minutes shoveling soupy material from underneath the tail to abate condition. (Tr. 144.) Again, I credit Hammond's testimony that Fishback's estimate included time not spent removing the material, and I find that the conditions at issue were cleared in approximately 10 minutes.

3. Conclusions of Law — Violation of 30 C.F.R. § 75.400, S&S, Unwarrantable Failure, and High Negligence — Order No. 6681064

The Secretary and Black Beauty each revisit the arguments they made in connection with Order No. 6681061 to reach the identical conclusions regarding Order No. 6681064 issued on October 20. Given the similarities between the conditions at issue, the parties' redundance is unsurprising. Unfortunately, the rematch proves less compelling than the original. I need not follow the parties' lead and mechanically rehash each argument. Instead, I focus below on identifying any differences between the orders and determining whether those differences impact my analyses.

Very little distinguishes the conditions Inspector Fishback identified in Order No. 6681064 from the conditions he cited five days earlier in Order No. 6681061. As I noted, Respondent had installed chain hangers at the tailpiece, attempted to stabilize the ground with additional rock, and applied rock dust to the area on the preceding midnight shift. In addition, the materials Fishback identified on October 20 were slightly smaller in size than were present in

Order No. 6681061 on October 15. Finally, the materials in question had been present for less than an hour.

Yet, none of these three differences palpably affect my analyses. First, a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.400 would have recognized that these materials could propagate a fire or explosion. Fishback credibly testified that the cited material was combustible and would ignite (Tr. 63, 92), and neither Respondent's maintenance efforts nor the smaller size of the materials nor the somewhat shorter amount of time they existed renders the materials incombustible. Accordingly, I conclude that Black Beauty violated 30 C.F.R. § 75.400.

Second, those differences also do not alter my S&S analysis. Although I recognize the accumulations in this case were smaller in size than those present in Order No. 6681061, they would have continued to grow in on-going mining operations until Hammond performed a check of the tailpiece area in a few hours. Moreover, Black Beauty's maintenance efforts *preceding* the accumulations in question do not affect my determination that the Secretary has demonstrated all four elements of the *Mathies* test. As with Order No. 6681061, the accumulations at issue in Order No. 6681064 developed *after* Compliance Supervisor Hammond found the tailpiece area clean and rock dusted at 9:17 a.m. Consequently, Black Beauty's midnight-shift maintenance efforts affect neither the hazards the developing accumulation presented nor the reasonably likelihood of those hazards causing reasonably serious injuries.

Indeed, the circumstances that remained *constant* convince me that the Secretary has again met his burden of proving his S&S designation. Here, Fishback again credibly testified that the violative condition contributed to—or made more likely—mine fire and explosion hazards that were reasonably likely to cause reasonably serious injuries. (Tr. 62–63, 65.) The coal accumulations under the tailpiece were in contact with the belt, which presented an ignition source. Further, the AQ1 Mine remains a gassy mine that is susceptible to rapid methane buildup. Given the evidence before me, I therefore determine that the Secretary has met his burden of proving all four elements of *Mathies*, and I conclude that he properly designated Order No. 6681064 as S&S.

Third, Black Beauty's maintenance efforts on the previous shift, the somewhat smaller accumulations at issue in Order No. 6681064, and the shorter duration the accumulations existed have little impact on my unwarrantable failure or negligence analyses. None of these factors counterbalance the obviousness of these accumulations or the grave danger they presented in continuing mining operations.

However, I am extremely troubled that loose coal, coal fines, and float coal dust were able to accumulate in the *same spot and same fashion* as occurred five days earlier. Indeed, the rapid build-up of accumulations in Order No. 6681061 placed Black Beauty on notice that greater efforts were necessary to comply with section 75.400. Given that accumulations had so recently developed at this precise spot in the mine, Respondent reasonably should have known

about this violative condition. Instead, Black Beauty apparently continued to adhere to the same processes for checking the tailpiece it had used before Order No. 6681061 but with an "extra eye" on the tail. (*See* Resp't Br. at 29–30 (quoting Tr. 139–40).) Unfortunately, this reaction was inadequate to prevent this violative condition from recurring in a location where dangerous amounts of coal were known to rapidly accumulate. Based on the accumulations' obviousness and danger, the nearly identical order just five days earlier, and Respondent's resulting reason to know of the violation, I determine that Black Beauty's conduct constituted a serious lack of reasonable care. Accordingly, I conclude that Inspector Fishback appropriately designated Order No. 6681064 as an unwarrantable failure. For these same reasons, I conclude that Respondent was highly negligent.

4. Penalty

The Secretary originally proposed a $41,574.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Black Beauty's business. The parties also stipulated that the penalties would not infringe on Respondent's ability to remain in business. I have found that this violation was properly designated as S&S, and affirmed the Secretary's high negligence and unwarrantable failure allegations. Of the 787 violations in Respondent's history of violations report, 94 involved 30 C.F.R. § 75.400. (Ex. G–9.) I also note that the conditions underlying Order No. 6681064 were extremely similar to the conditions cited just five days earlier in Order No. 6681061. Given the gravity, egregiousness, and similarity of Black Beauty's missteps in this case, I conclude that a significant penalty is appropriate. Considering all of the facts and circumstances in this matter and the criteria of section 110(i), I hereby assess a civil penalty of $41,574.00.

D. Order No. 6681073 – Accumulations at 4 Main North on October 23

1. Order No. 6681073 – Accumulations at 4 Main North on October 23

Just three days later on October 23, Inspector Fishback again conducted an inspection at the AQ1 Mine. (Tr. 276; Ex. G–5.) Upon examining the mine's Belt and Roadway Inspection Reports, Fishback noted that a "spill" at Crosscut 178 had been present for three shifts with no action taken. (Ex. G–6 at 18; Ex. G–16; Ex. G–17; Ex. G–18; G–19; Tr. 286–91, 295.)

After checking the exam books, Fishback traveled with Belt Mechanic Todd Armstrong to examine the belt in the 4 Main North C entry. (Tr. 310, 369.) The belt ran down the middle of the entryway until it reached Crosscut 178. (Ex. R–20; Tr. 320–21.) At that point, it intersected at a right angle with another belt—the 4 Main North A—that ran through the middle of Crosscut 178. (Ex. R–20.) Because the 4 Main North C belt bisected the entry, the entry was split into a travel/roadway side and a "back" side. (Tr. 297, 320–323; Ex. R–20.) The belt was four feet wide and located just one foot off of the ground. (Tr. 325.)

Fishback and Armstrong traveled into the mine along the roadway/travel side of the 4 Main North C entry. (Tr. 370–71.) As they approached Crosscut 178, Fishback testified that he observed loose coal, coal fines, and float coal dust under the belt conveyor tail. (Tr. 277–78, 295–96.) According to Fishback, the material was black. (Ex. G–6 at 5; Tr. 277–78.) In addition, he testified that one of the belt's bottom rollers was running in the material. (Ex. G–6 at 5; Tr. 277–81, 297–98, 304–05.) In Fishback's judgment, the accumulations had existed for more than one shift (Ex. G–6 at 6) and were obvious to the most casual observer (Tr. 292). At 9:40 a.m., Fishback issued Order No. 6681073, providing as follows:

> Combustible materials in the form of loose coal and coal fines, including float coal dust, black in color have been allowed to accumulate under the 4 Main North [C] energized belt conveyor tail located at crosscut #178. These accumulations measured approximately 35 feet in length by 4 feet in width and 6 inches to 1 ½ feet in depth. One of the bottom rollers was observed running in these accumulations for a distance of half the length of the roller. Due to past history of accumulations of combustible material on belt lines at this mine, this violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–5.) In addition, Fishback indicated that the cited condition was reasonably likely to result in lost workdays or restricted duty from smoke inhalation and burn injuries.[10] (Ex. G–5; Tr. 279, 281–82.) Fishback testified that the abatement required six men and 2-½ hours and that he saw no evidence of previous efforts to abate the condition. (Tr. 293–94.) No methane was present at the time the order was issued. (Tr. 298–99.)

2. Additional Findings of Fact

Although Black Beauty admits an accumulation existed (Resp't Br. at 47), the operator again disputes Inspector Fishback's testimony on three points. First, Respondent contends that the admitted accumulations of loose coal were much smaller than Fishback had indicated in Order No. 6681073. Specifically, Belt Mechanic Armstrong claimed that Fishback issued the order on account of a small pile of coal that was one-foot tall and eight-inches in diameter. (Tr. 310–11, 320.) He also testified that the remainder of the thirty-five feet of material

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[10] Fishback initially wrote that the cited condition would affect ten persons. (Ex. G–5.) However, at hearing he testified that the Order should be modified to three persons affected based on the miners who were likely to be present in the outby area. (Tr. 283–84, 307.) In light of his testimony, counsel for Black Beauty moved to modify Order No. 6681073 to reflect three persons affected. (Tr. 307.) The Secretary did not object, and I noted for the record that the number of persons affected would be modified to three. (Tr. 307.)

contained "sprinkles" of coal.[11] (Tr. 314.) Although I believe Armstrong testified to the best of his recollection, Respondent's own preshift belt examination reports for the three shifts *preceding* Fishback's inspection identify spills at crosscut 178 that had not been cleaned. (Ex. G–16 at 2; Ex. G–17 at 2; Ex. G–18 at 2.) Notwithstanding Respondent's argument that these spills were non-hazardous, the preshift examiners's notations on the report suggest to me that the materials in question include more than mere "sprinkles" of coal. In addition, Fishback's contemporaneous notes support his description of the size of the accumulation in question. (Ex. G–6.) Accordingly, I find that the coal accumulations in question appeared as Fishback described them in Order No. 6681073 and his contemporaneous notes.

Second, Black Beauty disputes the allegation that the cited material was in contact with a roller on the 4 Main North C belt. (Resp't Br. at. 45, 48–49, 54–55.) According to Fishback, he and Armstrong approached the tailpiece at Crosscut 178 on the roadway side of the belt line. (Tr. 370–71.) He testified that he then observed the accumulations running in the belt rollers on the back side of the belt and crossed the belt to examine and measure the accumulations. (Tr. 296–97, 370–71; Ex. R–20.) Fishback also credibly testified that he examined the coal pile while on his hands and knees, and that he observed the coal to be in contact with the belt roller. (Tr. 277–81, 296.) Finally, Fishback's contemporaneous notes also indicate that Armstrong, Superintendent Gary Campbell, Section Foreman Emery Cain, and Safety Technician David Weisigner all agreed the roller was in accumulations. (Ex. G–6 at 5.)

In contrast, Armstrong claimed that material was not in contact with the roller. (Tr. 311.) He agreed that Fishback pointed out the pile of coal from the roadway/travel side of the belt. (Tr. 310–11.) However, Armstrong claimed that he alone crossed to the back side of the belt, bent down on his knees, and shined a light up towards the rollers to determine whether the pile of coal was in contact with the roller. (Tr. 310–11, 327–29.) Finally, Armstrong initially claimed that Fishback made his determination regarding the pile of coal from 10–15 feet away. (Tr. 311, 326–27.)

Yet, on cross-examination Armstrong admitted that Fishback later joined him on the back side of the belt. (Tr. 328.) Thus—even according to Armstrong's version of the events—Fishback had a close-up opportunity from which to measure and observe the materials. In light of that opportunity and Fishback's contemporaneous inspection notes, I credit Fishback's account over Armstrong's contrary testimony. Based on the evidence before me, I therefore find

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[11] Shift Foreman Carie also testified that members of the clean-up crew told him that "'there wasn't very much stuff here.'" (Tr. 337.) However, Carie did not arrive at 4 North Main C tail until the materials in that portion of the mine had already been cleaned. (Tr. 333–34, 337.) Given Carie's position as a Shift Foreman, the members of a clean-up crew might have a strong incentive to minimize the seriousness of the violation to their boss. Further, Carie had no basis to judge the accuracy of the clean-up crew's statements because he arrived *after* the crew had finished cleaning the area. Although hearsay evidence is admissible in Commission proceedings, *see* 29 C.F.R. § 2700.63(b), I accord no weight to this testimony.

that the pile of coal accumulation Fishback identified was in contact with a roller on the 4 Main North C belt.

Third, Respondent again disputes Fishback's claim that six miners required two and half hours to abate the violative condition. (Resp't Br. at 46, 50–51, 53.) Armstrong described three areas that Fishback required to be cleaned before the 4 Main North C belt could be restarted: (1) the actual pile of coal under the tailpiece, which Armstrong claimed was cleaned in less than one minute; (2) the 4 Main North C area was cleared and rock dusted from rib to rib, which required 30–40 minutes to clean; and (3) the area out to the 4 Main North A takeup—located sixty feet from the intersection with 4 Main North C belt, which was cleaned in 90 minutes.[12] (Tr. 313–16.) Although Carie was not present when clean-up began, he testified that the area around 4 Main North C belt was "pretty well finish[ed] up" and rock dusted when he arrived 20–25 minutes after the belt was shut down. (Tr. 333–34.) Further, he testified that cleaning the area to the 4 Main North A takeup required an additional 1-½ hours because it required removal of guards and time-consuming mud removal. (Tr. 333–35.) Curiously, Fishback did not testify about the extent of the clean-up efforts he required; instead, he testified only that clean-up required six miners "a period of two and a half hours to remove the materials and rock dust the affected area." (Tr. 293–94.) Based on Armstrong and Carie's credible testimony on this point, I therefore find that the cited conditions on the were abated within thirty minutes.

3. S&S

Black Beauty admits that the cited material violated 30 C.F.R. § 75.400; therefore, the first *Mathies* element is met. In addition, I have found that the accumulation was in contact with one of the belt rollers on the 4C belt. As Fishback credibly testified, friction from the belt roller could lead to a mine fire. (Tr. 279–80.) Accordingly, I determine that the Secretary has met his burden of proof for *Mathies*' second element has been satisfied because the coal accumulations in question contributed to a mine fire hazard. *Cf. Buck Creek Coal, Inc.*, 52 F.3d 133 at 136 (noting precautions are in place "because of the significant dangers associated with coal mine fires"); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117 at 1120 (noting "ignitions and explosions are major causes of death and injury to miners").

The Secretary has also met his burden of proof for the third *Mathies* element. The cited accumulations were in contact with a roller on the 4C belt, which provided a frictional ignition source. (Tr. 279–80.) Moreover, I have found that the accumulations of coal stretched approximately thirty-five feet in length, spanned four feet in width, and measured between six and eighteen inches in depth. *See* discussion *supra* Part V.D.2. According to Fishback, the size of the accumulations increased the likelihood of fire because it provided additional material to burn. (Tr. 280.) I also note that the belt in question was located just a foot above the mine floor. Further, Shift Foreman Carie claimed that the "spills" mentioned on these reports were nonhazardous and were something that "*may* need attention later." (Tr. 340.) Given the repeated

[12] Notably, this area is not listed on Order No. 6681073.

notations in Black Beauty's own preshift reports and Carie's testimony, it appears likely that Respondent had no plans to clean this area in the course of continuing mining operations. Thus, the accumulations would have continued to grow deeper—eventually contacting the belt located just one foot above the mine floor— and exposed the accumulations to additional points of frictional ignition. Finally, it is uncontroverted that three miners would be present in this outby area. In light of the record before me, I therefore determine that the Secretary has satisfied his burden of proving that the mine fire hazard was reasonably likely to result in injuries.

Finally, I determine that Fishback's testimony regarding the smoke inhalation and burn injuries that are likely to occur also satisfies the Secretary's burden of proof for *Mathies*' fourth element. As I determined in Order Nos. 6681061 and 6681064, these injuries are reasonably likely to be reasonably serious. In view of these determinations and the evidence before me, I therefore conclude that Order No. 6681073 was properly designated as S&S.

4. Unwarrantable Failure and High Negligence

The evidence in this case also convinces me that Black Beauty's conduct was both an unwarrantable failure to comply with section 75.400 and highly negligent. Indeed, *each* of the Commission's factors for the analysis of unwarrantable failure suggest that Respondent's conduct was aggravated in this case and constituted more than ordinary negligence. As I noted above, *see* discussion *supra* Parts V.B.5 and V.C.3, Black Beauty has a significant history of accumulations violations—including two section 104(d)(2) orders from the preceding seven days also involving accumulations on a belt line—that put Respondent on notice that greater efforts were necessary for compliance. In addition, Black Beauty's own preshift reports demonstrate the operator's knowledge that coal was accumulating along the 4C belt. Yet those same reports, Shift Foreman Barras' testimony, and Inspector Fishback's observations make clear that no steps had been taken to clean up the coal. (*See also* Resp't Br. at 53–54 (characterizing the accumulating coal as non-hazardous and claiming that immediate correction was not required).) Likewise, Black Beauty's reports and Inspector Fishback's testimony also indicate that the accumulations were obvious and had been building over three shifts. In addition, I have found that the accumulations in question extended for thirty-five feet and required six miners thirty minutes to abate. Finally, these accumulations were sufficiently dangerous to warrant an S&S designation. Based on all of the above, Black Beauty's conduct was more than ordinary negligence and constituted a serious lack of reasonable care. Thus, I conclude that Order No. 6681073 was appropriately marked as an unwarrantable failure. Given the lack of mitigating factors, I also conclude that the Secretary has also demonstrated Black Beauty's high level of negligence.

5. Penalty

The Secretary originally proposed a $41,574.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Black Beauty's business. The parties also stipulated that the penalties would not infringe on

Respondent's ability to remain in business. I have found that this violation was properly designated as S&S, and affirmed the Secretary's high negligence and unwarrantable failure allegations. However, I have modified the citation to reduce the number of miners affected from 10 to 3. Significantly, of the 787 violations in Respondent's history of violations report, 94 involved 30 C.F.R. § 75.400. (Ex. G–9.) Specifically, I note that the conditions underlying Order No. 6681073 were similar to the conditions cited in the previous seven days in Order Nos. 6681061 and Order Nos. 6681063. 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 $31,000.00.

E. Order No. 6682224 – Accumulations at 5 Main North on November 24

1. Order No. 6682224 – Accumulations at 5 Main North on November 24

Just one month later on November 24, 2008, Inspector Fishback conducted another inspection in the 5 Main North section of the AQ1 Mine—the same section where he observed the violative conditions described in Order Nos. 6681061 and 6681064. (Tr. 205–06, 220–21.) During that month, Black Beauty's mining had progressed and the tailpiece unit was accordingly advanced to Crosscut 24 so that the tailpiece and feeder would remain near the working face. (Tr. 206–07, 220–21, 240–245.) Crosscut 24 is only 700 feet deeper into the 5 Main North section, but the mine floor in this area was generally dry and level. (Tr. 206–07, 220, 246–48, 254.)

Upon arriving at the 5 North energized conveyor belt with Assistant Mine Manager Del Culbertson, Fishback checked the tailpiece. (Tr. 202, 204, 254; Ex. G–8 at 2–3, 8–9.) According to his notes and testimony, Fishback once again observed coal underneath the tailpiece and float coal dust on its framework. He testified that the material was black and dry, and the entire width of the belt was running in accumulations. (Tr. 202–06, 209–10.) In Fishback's judgment, the material had been present for several shifts. (Ex. G–8 at 13–14; Tr. 215, 222.) He also found the material obvious without having to bend down, although he was "pretty sure" he did bend down to check for friction. (Tr. 217, 221.) Fishback observed rock dust in the area but asserts it was not mixed with float coal dust. (Tr. 223.) At that point, Culbertson shut off the belt, and at 10:20 a.m. Fishback issued Order No. 6682224, providing:

> Combustible material in the form of loose coal, coal fines and float coal dust (black in color and dry) have been allowed to accumulate on the 5 North energized belt conveyor tail located in the #4 entry between crosscut #24 and #25 on Unit #3 MMU-003. The combustible material under the belt tail piece measured approximately 2 inches to 6 inches in depth by 3 feet wide by 4 feet in length and was observed rubbing the belt for this total distance. On the tailpiece structure directly above these accumulations dry float dust was present which measured approximately ½ inch to 3 inches in depth by 6 inches wide for a length of 7 feet. The

> operator, Bob Smith (section foreman) showed more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G–7 at 12.) The order states that abatement required four employees and took fifty-five minutes. (*Id.*) Fishback testified that the mine offered no mitigating factors. (Tr. 216.) He also characterized these accumulations as "[e]xactly the same" as those at issue in Order Nos. 6681061 and 6681064. (Tr. 210.)

2. Additional Findings of Fact

In its briefs, Black Beauty admits that loose coal was present underneath the tailpiece. (*See, e.g.*, Resp't Br. at 31–32 ("Upon removing the tailguarding, Mr. Culbertson . . . found a small pile of coal at the tail inside the guard.").) In addition, Respondent's arguments also admit that float coal dust was intermixed in the material Inspector Fishback found on the tailpiece's framework. (*See, e.g.*, Resp't Br. at 37 ("Mr. Culbertson disagreed with Mr. Fishback's assessment [that the] float dust was hazardous because the dust was 80% incombustible, 'layered' rock dust mixed with coal dust.").) However, Respondent again disputes four important facts underlying the Secretary's allegations in this case.

First, Black Beauty disputes the length of time the loose coal was present. (Resp't Br. at 36–37.) Black Beauty once again points to Benjamin's testimony that the tailpiece area was cleaned and dusted at the end of the midnight shift.[13] (Tr. 239; Ex. R–30.) Further, Culbertson testified that the "skirt rubber" around the tailpiece had become detached, allowing coal to collect underneath the tailpiece. (Tr. 262–63, 266–67.) Finally, Respondent suggests that the depth of the loose coal underneath the tailpiece—here, two to six inches—suggests that the coal had only recently piled up. (Resp't Br. at 32, 34, 36–38.) Although Fishback estimated that the loose and float coal were both present for several shifts, he provided no explanation as to why he reached

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[13] The Secretary suggests that I should not find Benjamin's testimony credible because Black Beauty has a long history of coal accumulations. (Sec'y Br. 22–23.) Although he does not make this clear in his brief, it appears the Secretary would like me to infer that Respondent *did not* regularly clean and dust the tailpiece from Black Beauty's repeated accumulations. Yet, correlation does not necessarily imply causation. Indeed, a failure to clean and dust the belt lines is not necessarily the best or most natural inference of causation in this case. Fishback's own testimony suggests that poor belt installation and repairs contributed to Black Beauty's ongoing accumulations problem. (*See* Tr. 213, 221 (noting that the mine had a history of "very poor" belt installation and suggesting it caused accumulations).) Repeated installation or repair errors are also unacceptable, but they do not imply that Benjamin failed to clean or dust the tailpiece on the midnight shift.

that conclusion. As I have noted, coal can accumulate quickly. Given this dynamic environment, Fishback's conclusion that the loose and float coal were both present for several shifts appears tenuous. Accordingly, I find that the coal deposit underneath the tailpiece developed at some point after the day shift at began 7:00 a.m.[14]

Second, Black Beauty claims that the coal pile underneath the tailpiece was not in contact with the belt. (Resp't Br. at 38.) Here, Inspector Fishback observed the coal deposit and instructed Assistant Mine Manager Culbertson to shut down the belt. (Tr. 231, 256.) Moreover, Fishback credibly testified that he got down on his hands and knees to examine the coal in contact with the belt. (Tr. 221.) Assistant Mine Manager Culberston agrees that he first shut down the belt, but he testified that he then joined Fishback near the accumulations in question. (Tr. 256–57.) At that point, Culberston claims he was able to run his pen between the pile of coal and the belt itself. (Tr. 257–58.) Culbertson also claims that Fishback did not physically examine the materials. (Tr. 258, 264.)

Despite Culbertson's testimony, the record as a whole convinces me that the coal pile was in contact with the 5 Main North Belt when the inspection party arrived at the tailpiece. As I have noted, I credit Fishback's observations based on his long experience as a coal miner. Specifically, Fishback explained that he physically inspected the coal accumulations in question on his hands and knees and measured it using a tape measure. Moreover, Fishback's contemporaneous inspection notes and Culbertson's Escort Report both indicate that the belt was running in coal.[15] (Ex. G–8 at 10; Ex. G–15.) Culbertson also admitted that he did not immediately join Fishback at the coal deposit because the belt needed to be shut down. Fishback therefore had an opportunity to examine the materials independently, and the conditions may have changed after Culbertson shut down the belt. Given the evidence before me, I therefore find that the Secretary has met his burden of demonstrating that the coal underneath the tail piece was in contact with the belt.

Third, Respondent claims that the dust that Fishback found on the framework of the tailpiece was "part of a dust mixture that was incombustible and 'layered' with rock dust."

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[14] I note that the size of the loose coal deposit under the tailpiece in Order No. 6682224 is comparable to the size of similar accumulations in Order Nos. 6681061 and 6681064. *See* discussion *supra* Parts V.B.2 and V.C.2. My finding that the loose coal at issue in Order No. 6682224 developed in the hours between 7:00 a.m. and 10:20 a.m. on November 24, 2008, is therefore consistent with those earlier findings.

[15] Culbertson's Escort Report indicates: "5MN tail roller running in fines - terminated." (Ex. G–16.) Black Beauty again claims that this Escort Report reflects *Fishback's* observations rather than Culbertson's. (*See* Resp't Reply Br. at 7). I have previously explained that I do not find Respondent's position to be credible. *See* discussion *supra* note 6. Accordingly, I determine that Culbertson's Escort Report weighs in favor of finding that the 5 Main North belt was in contact with the coal when Fishback and Culbertson arrived at the belt tailpiece.

(Resp't Br. at 41.) Specifically, Culbertson described the surrounding area as very white from a recent rock dusting. (Tr. 261–63.) He also recalled Fishback dragging his walking stick through the dust material, revealing layered float coal and rock dust. (Tr. 260.) In addition, Culbertson testified that roadway dust would also collect on the tailpiece because it was located near a ventilation regulator. (Tr. 260–61.) Nevertheless, I again credit Fishback's testimony regarding the color and depth of the dust accumulations based on his long experience as a miner.

Finally, Respondent again disputes the clean-up time recorded in the order. (Resp't Br. at 41.) Culbertson claimed that he shoveled the loose coal within 5 minutes, spent another 5 or 10 minutes washing the float coal dust mixture from the structure, and spent 20 to 25 minutes locking and tagging the belt and pulling the guarding. (Tr. 264–65.) In light of Culbertson's testimony, the size of the coal deposits, and the similarity to the condition underlying Order Nos. 6681061 and 6681064, I find that the cited materials required fifteen minutes to clean.

3. Violation of 30 C.F.R. § 75.400

Despite the presence of loose coal under the tailpiece and float coal dust on the framework of the tailpiece, Black Beauty contends the cited conditions do not constitute a violation of section 75.400. Specifically, Respondent characterizes the loose coal as "spillage" rather than an accumulation. (Resp't Br. at 34.) Yet, Respondent's argument is a red-herring. Combustible materials of sufficient quantity to cause or propagate a fire are prohibited, even if recent. *Prabhu Deshetty*, 16 FMSHRC at 1049; *see also UP&L*, 12 FMSHRC at 968 (discussing Congress' intent to prevent accumulations rather than cleaning them up in a reasonable period of time).

Given my factual findings in this case, I determine that the cited conditions violated section 75.400. It is uncontroverted that loose coal, coal fines, and float coal dust are combustible. Although these accumulations were relatively small in size, Fishback also testified that these materials were sufficient to ignite. (Tr. 209–11.) Thus, a reasonably prudent person that is familiar with the mining industry and protective purposes of section 75.400 would therefore have recognized that these were the types of materials that could propagate a fire or explosion and were impermissible accumulations. I therefore conclude that Black Beauty violated 30 C.F.R. § 75.400.

4. S&S

Black Beauty's violation satisfies the first element of the *Mathies* test. Further, Fishback credibly testified that the cited accumulations contributed to belt fire and explosion hazards. (Tr. 211–12.) Accordingly, the Secretary has satisfied *Mathies'* second element.

Once again, Black Beauty focuses its attention on *Mathies*' third element. (Resp't Br. at 35–40.) Black Beauty claims that the "'confluence of factors' necessary to make an explosion or fire reasonably likely was not present at the time the Order was issued." (*Id.* at 36.) Specifically,

Respondent claims that the cited accumulations were "minimal" and had recently developed. (*Id.* at 36–37.) Further, Black Beauty claims that no ignition source was present. (*Id.* at 38.) Finally, Respondent also contends that the float coal dust was not hazardous because it was incombustible, was not in suspension, and only 0.1% methane was present at the time of the citation. (*Id.* at 38–39.)

Given the similarities between Order Nos. 6681061, 6681064, and 6682224, I am not surprised to see Respondent revisit this dispute for a third time. Yet such persistence does not ultimately prove effective. Despite Black Beauty's claims that these accumulations were minimal, the loose coal and float coal dust spanned several feet and had significant depth. Moreover, it is well known that S&S determinations are to be made in the context of continuing mining operations. Although I agree that these accumulations developed at some point since the beginning of the day shift, in the course of continued operations these combustible materials provided potential fuel for a mine fire or explosion. Again, the AQ1 Mine is gassy and methane could rapidly develop in the course of continued mining.[16] In addition, I have found that the loose coal accumulations were in contact with the belt, *see* discussion *supra* Part V.E.2, which Fishback credibly testified would provide an ignition source. (Tr. 211.) In light of the evidence before me, the confluence of factors convince me that an ignition or explosion hazard was reasonably likely to lead to an injury-causing event. Thus, I determine that the Secretary has established the third element of *Mathies*.

Finally, Fishback again credibly testified that smoke inhalation and burn injuries would result from a mine fire or explosion. (Tr. 212.) Accordingly, I determine that *Mathies*' fourth element has been satisfied. Based on my determinations above, I conclude that the Secretary properly designated Order No. 6682224 as S&S.

5. Unwarrantable Failure and High Negligence

Once more, the Secretary has characterized Black Beauty's negligence as high and has designated this violation to be an unwarrantable failure. According to the Secretary, each of the seven aggravating factors support a conclusion of unwarrantable failure and high negligence. (Sec'y Br. at 25–26.) In contrast, Black Beauty claims that the extent, duration, notice, and

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[16] As Black Beauty admits in its posthearing brief, the "presence of methane increases the likelihood of a fire or explosion when accumulations are present." (Resp't Br. at 39.) The tailpiece and the feeder are purposely located near the active working face to cut to down on travel time. (Tr. 206–07, 220–21, 240–245.) Although little methane was present at the time, S&S determinations are made considering continued mining operations. *See* discussion *supra* Part V.B.4.

degree of danger each suggest that its conduct was not unwarrantable. (Resp't Br. at 40.) Looking at the evidence before me, the Secretary has met his burden of proof on both his unwarrantable failure and high negligence allegations.

I note the accumulations in question were comparatively small and had developed at some point after the day shift began. Nevertheless, I have concluded that these accumulations presented significant dangers to Black Beauty's miners. As Fishback testified, the conditions at issue in Order No. 6682224 were nearly identical to the conditions he identified in Order Nos. 6681061 and 6681064. These recent and nearly identical violations in the same 5 Main North section of the mine—not to mention Black Beauty's significant history of accumulations violations—should have put Respondent on notice that greater efforts were necessary for compliance. Those extremely similar orders also suggest that Respondent reasonably should have known that accumulations would predictably pile up at the tailpiece. Perplexingly, Black Beauty appears to have continued to employ the same measures and procedures that had produced recurring and dangerous accumulations along its belt lines. Further, it appears Black Beauty made no efforts to clean up the loose coal and float coal dust accumulating in this area since the beginning of the shift. Finally, it is uncontroverted that the accumulations were obvious. In light of the record in this case—especially the similarity to recent tailpiece accumulation violations—I determine that Respondent's conduct constituted a serious lack of reasonable care. Accordingly, I conclude that Black Beauty's conduct was unwarrantable in this case. Given the ease with which these accumulations were ultimately cleaned relative to the danger they presented, I also conclude that Black Beauty's negligence was high.

6. Penalty

The Secretary originally proposed a $38,503.00 civil penalty for this violation. Again, nothing in the record suggests that the proposed penalty is inappropriate for the size of Black Beauty's business. The parties also stipulated that the penalties would not infringe on Respondent's ability to remain in business. I have found that this violation was properly designated as S&S, and affirmed the Secretary's high negligence and unwarrantable failure allegations. Of the 787 violations in Respondent's history of violations report, 94 involved 30 C.F.R. § 75.400. (Ex. G–9.) I also note that the conditions underlying Order No. 6682224 were extremely similar to the conditions cited just five days earlier on Order Nos. 6681061 and 6681064. 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 $38,503.00.

VII. ORDER

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

Section 104(d)(2) Order No. 6681061 is **MODIFIED** to a section 104(a) citation by removing the unwarrantable failure designation, and lowering the cited level of negligence from "high" to "moderate."

Section 104(d)(2) Order No. 6681064 is **AFFIRMED** as written.

Section 104(d)(2) Order No. 6681073 is **AFFIRMED** as S&S, as an unwarrantable failure, and as resulting from Black Beauty's high negligence and **MODIFIED** to reduce the number of miners affected from "10" to "3."

Section 104(d)(2) Citation No. 6682224 is **AFFIRMED** as written.

Black Beauty shall **PAY** a civil penalty of $125,077.00 within 40 days of the date of this decision.

Alan G. Paez
Administrative Law Judge

Distribution:

Emily L. B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, Cesar E. Chavez Memorial Building, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Arthur M. Wolfson, Esq., and Patrick W. Dennison, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

/tw & pjv