FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOLIDATION COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2015-651 A.C. No. 46-01433-376507 Docket No. WEVA 2015-762 A.C. No. 46-01466-381152 Mine: Loveridge #22

DECISION

Appearances: Brian P. Krier, Esq., Office of the Solicitor, for the United States Department of Labor

Rebecca J. Oblak, Esq., Bowles Rice LLP, for the Respondent

Before: Judge Moran

Introduction:

These two dockets involve three 104(d)(2) Orders, issued by MSHA Inspector Ronald Postalwait at Consolidation Coal's Loveridge No. 22 Mine, during September and October, 2014. Each order was specially assessed. Involved in WEVA 2015-651 is Order No. 8061842, issued September 5, 2014, alleging a 30 C.F.R. §75.400 accumulations violation at a scoop haulage entry. The Order was specially assessed at $23,800. A regular assessment would have resulted in a $4,810 penalty.

The other docket, WEVA 2015-762, involves two alleged violations: another Section 75.400 accumulations violation, (Order No. 8061991) and a Section 75.360 inadequate preshift examination violation, (Order No. 8061992), which was associated with the accumulations violation. MSHA specially assessed these two orders as well, with the accumulations violation assessed at $30,200 as compared to the $6,115 a regular proposed penalty assessment would have yielded. The preshift violation was specially assessed at $15,900 while a regular assessment would have been $4,000. In sum, MSHA's special assessments for these three alleged violations totaled $69,000.

For the reasons which follow, the Court finds that all three violations were established and, following the Commission's recent decision in *American Coal*, imposes civil penalties in the amount of $9,620.00 for the violation set forth in Order No. 8061842. *Sec'y of Labor v. The Am. Coal Co.*, No. LAKE 2011-701 et al., 2016 WL 5868551 (FMSHRC) (Aug. 26, 2016). For Order No. 8061991, another accumulations violation, again based upon the credible record evidence and the Court's independent consideration of the statutory criteria, the Court imposes a civil penalty in the amount of $18,345. For Order No. 8061992, which was issued for the inadequate preshift examination, following the same approach, the Court imposes the same special assessment figure of $15,900, although it notes that a larger amount could have been justified.

Findings of Fact

Inspector Ronald Postalwait has been an MSHA inspector for 14 years. His career in mining, all of it with coal, began in 1975 at age 18. Tr. 62. Regarding the mine in this litigation, Consolidation Coal's Loveridge No. 22, an underground coal mine which utilizes both longwall and continuous mining, Postalwait believed that during September and October 2014, in terms of working sections, the mine had four continuous miners and one longwall operating, employing about 500 miners. Tr. 70. Shifts at the mine are 8:00 a.m. to 4:00 p.m. for the day shift, 4:00 p.m. to midnight for the afternoon shift and then a midnight shift from 12:00 a.m. until 8:00 a.m. Tr. 73. The mine had MMUs (mechanized mining units). An MMU is one section. The mine had two separate panels, with a section on each one. They also had the mains, where there are two MMUs, again with two separate sections running side by side and the longwall as an MMU. At the time in issue, the mine was on 103(i) five day spot inspections for methane liberation, which is the most frequent level of inspections. Tr. 69-71.

Docket No. WEVA 2015-651; Order No. 8061842

The Secretary's Evidence

On September 4, 2014, Postalwait was at the Loveridge mine for an E01 inspection. Tr. 73-74. The mine was under a (d) order at that time.[1] On that day he planned to inspect the mine's 23D panel. Larry Broadwater, with the company's safety department, and Travis Anderson, the UMWA miners' representative, joined him. Coal mine inspector trainee Jeff Burns also accompanied Postalwait. The 23D was a continuous miner section and it had 3 entries, with the No. 2 entry serving as the intake air course, the track entry and also as the

[1] Inspector Postalwait identified Order No. 8055581 as a violation which he had earlier issued on April 9, 2014, citing 75.360(a)(1). Gov. Ex. 3A. That order was issued for not performing an adequate preshift inspection. The inspector described it as a "perfunctory" preshift exam. Tr. 77. He marked the violation as S&S, high negligence, and an unwarrantable failure. That Order has since become a final order of the Commission. Gov. Ex. 3B. The information was presented at the hearing in order to establish that the orders at issue in this litigation were properly designated as 104(d)(2) orders. During the time after that violation and continuing through the inspector's September 2014 inspection, the mine did not have an intervening clean inspection. Tr. 78. These issues were not challenged by the Respondent.

primary escapeway.[2] The No. 1 was the return course and the No. 3 entry had the belt. Tr. 83-84. The blocks between the No. 2 and No. 3 entry are 137.5 feet, but the block between the No. 1 and No. 2 was 275 feet, because there was a block in the middle between the belt and the track. In other words, under that arrangement there was a long block followed by a short block. Tr. 85-86. The entries, from rib to rib, were 16 feet wide and the mine height around 7 feet. Tr. 86. On September 4, 2014, the last open crosscut[3] was at the 52 block, between the No. 1 and No. 2 entry. Miners reached the face by walking up the No. 2 entry and in so doing they walk through the 46 block intersection. Tr. 87. This is past the 1 to 2 and 2 to 3 crosscuts. Tr. 87-88. In that area, the inspector took various readings for methane, air velocity and oxygen at the faces. Tr. 88-89.

As the inspector was walking up the entry towards the No. 46 crosscut, he saw an accumulation on the floor in the intersection. It extended into the 1 to 2 and the 2 to 3 crosscuts. Tr. 90. Seeing this condition, Inspector Postalwait issued **Order No. 8061842**, alleging a violation of 30 C.F.R. § 75.400. Gov. Ex. 4, Tr. 90. The cited standard 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.

The inspector found the accumulation to consist of loose, lumpy coal, fine coal and coal dust. Tr. 91-93. The condition he observed was,

> through the entire area. It was along the rib on the 2-3 crosscut on the inby rib. It was a pile of coal that was pushed up in the 1 to 2 crosscut. And it was -- it measured 27 inches tall. The rest of it where I measured it -- I made different measurements over the area, to find out what the average thickness of the combustible materials was. And the least measurement I could find was 5 inches. And on the floor, through the powdery stuff, it was 10 inches. But the piles was -- was higher. And the main pile, was the one big one, what was along the rib, was just a little bit higher than what was out in the roadway.

Tr. 94.

In using the term "coal dust" in his Order, he stated that referred to "real fine coal dust" which he observed over,

> the whole mine floor, almost the entire floor, where the scoop tires -- where they was running the scoop back and forth. It was grounded up. And it's really

[2] As noted, the No. 2 entry is the primary escapeway. The primary is in the intake air split, which leads directly to the surface. The cited accumulation in the primary factored into the inspector's gravity determination, because both the primary and secondary escapeways would be impacted if there was a fire. As the No. 1 entry is a return, if there is smoke it travels back down and out of the mine. Therefore smoke would be in the return air split. Tr. 122.

[3] During the testimony, crosscuts were sometimes referred to as "breaks."

> powdery, fluffy dry. Just walking through it, the dust would spin up from your feet, just as you walked through.

Tr. 95.

The inspector also described the presence of "fine coal" in the Order, by which he meant of a size no more than 1/8 to 1/4 of an inch, making it smaller than "lump coal." He found most of such fine coal "down underneath the fluffy -- the fluffy, powdery, dry stuff was what you seen on top. Underneath of that you have some fine coal. And then in the piles, we had the fine coal and lump coal." *Id.*

Exhibit 5B, reflecting page 29 from his notes, is Postalwait's drawing of what he observed at the 46 block that day. Tr. 96. Augmenting the drawing on that page, further explaining the depiction, the measurements he took of the condition were listed and recorded as five inches to 10 inches deep and 14 feet wide by 120 feet in length, with a pile up to 27 inches deep, shown on the left side of the drawing, in the No. 1 to 2 crosscut.[4] Postalwait stated that he took at least 10 measurements of the accumulation. Tr. 210. The 5 to 10 inches of accumulations he found were on top of the coal bottom. Tr. 211.

The Court would note that the inspector's testimony about the measurements he took was detailed and extensive. The Inspector stated that he showed the dry characteristics of the coal to Broadwater and Burns. Tr. 103. When Broadwater and Burns agreed the coal was dry, the inspector responded to them that it was "powder dry." Tr. 103. Upon cross-examination, the inspector did not waver on the question of whether the road was powder dry. Tr. 144. The inspector also pointed out to those individuals who accompanied him how the coal was being suspended in the air, simply by walking through it. Tr. 103. Being dry, such coal is easier to ignite. Tr. 104. Postalwait stated that, based on his observations, it did not appear that, at the intersection of the 46 block, the two crosscuts had been watered down recently. Tr. 105. While many factors impact the determination of when an area has last been watered down, the inspector stated that an area will not become dry in one shift. That area was required to be watered down because the scoop runs there, as it is a scoop supply haul road. Tr. 105. Any scoop road has to be watered down so that it remains damp. Here, the roadway wasn't damp; it was dry. Tr. 106.

As the inspector explained, the condition, the dry supply road "was generated from the scoop hauling supplies, where it was turned around." Tr. 107. As the section advances, supplies are continually needed and the scoop brings those supplies. The inspector agreed that "the scoops on that section would continue to travel to and from the 46 block to supply the face," as that is how the section get its supplies. "The supplies are hauled in on flatcars on the rail. And they haul them from the end of the track up to the section with the scoops." Tr. 108. The 5 to 10 inch accumulation meant that it would take a lot of scoop trips to generate the level of dust he found. Tr. 109.

Speaking generally to the subject of a "coal bottom," that is, a practice where coal is left on the mine floor, which is referred to as the "bottom," the inspector explained that such an arrangement is used,

[4] The horizontal part of the drawing is the 46 block, the vertical part represents the No. 2 entry, the left side is the No. 1 to 2 crosscut and the right side represents the No. 2 to 3 crosscut. Tr. 97.

> if the main bottom is soft and you're sinking in and getting hung up, then the mine will leave some coal at the bottom because it makes the bottom stronger and therefore it will support the heavy equipment, so that the equipment can run on that. If they don't do that, some bottoms are so soft that one can't even mine . . ."

Tr. 111-12.

Loveridge was mining using a coal bottom in the cited section. Tr. 112. The mine had no choice but to employ this technique because the bottom was so soft they couldn't mine without a coal bottom. Postalwait's coal work experience included using equipment in coal bottoms. Tr. 112. In fact, his prior employment included being a foreman in a mine utilizing a coal bottom. Maintaining such a bottom requires a lot of work; one has to keep it damp or the bottom will grind up from the equipment traveling over it. Tr. 113. The arrangement also requires "more emphasis on clean up" and more rock dusting. Tr. 114.

Based on the situation he encountered, the inspector concluded that the coal bottom at the 46 block had not been properly maintained because "several inches of combustible material [had been] allowed to accumulate. And if -- if they had kept that [bottom] maintained damp, it wouldn't have been an issue to start with, but it would be compressed down. What dust would have been there would have compressed down to very little." Tr. 114. Another maintenance requirement when a mine uses a coal bottom is to keep it scooped up, if the bottom breaks while running equipment on it. Also, one must apply a good layer of rock dust after it gets cleaned. Tr. 115.

The inspector identified the hazard pertaining to Order No. 8061842 as fire and smoke. Tr. 118. While he did not observe any ignition sources *at the time* when he issued the order, he explained that when the scoop is running and the area is dry, that creates an ignition source in the area. Tr. 118. Scoop batteries can catch on fire, as can battery plugs, and there are times when a scoop, by simply running, can arc and catch fire. Tr. 119. The inspector marked the gravity as "unlikely" only because the scoop was not running at the time he was there, but under normal mining operations the scoop would resume running, creating the ignition source. Tr. 120. Fourteen miners were listed as the number of persons affected. *Id*.

Further explaining the basis for the hazard those miners would face, he stated,

> Because this is the intake, [it is] the main intake for that section. And if you get smoke in that entry right there, it's going directly to the face. And not only is it going to the face, but you'll have some air that will go down the belt. So that air will have smoke in it. And then your return entry, which would be No. 1 entry, it would have smoke in it. So that everything would have smoke in it, except No. 2 entry outby, in that condition.

Tr. 121.

He added that the smoke would travel from the 46 block very quickly. The expected injuries would be smoke inhalation or burns. The inspector listed lost workdays or restricted duty only because the miners had self-contained self-rescuers ("SCSRs"), otherwise he would have listed the expected injuries as more severe. Tr. 122.

The inspector listed the negligence as "high" because he had spoken to the mine about violations under the 75.400 standard before this instance, and therefore they were on notice of

this issue, and also because he found no mitigating circumstances. Tr. 123. When the inspector told the section foreman, Glenn Lee, that he was going to issue a citation, Lee protested and told him he had to realize they were running on coal bottom, to which Postalwait replied that the bottom still has to be maintained and one can't permit accumulations to develop. Tr. 123, 193.

As noted, the inspector issued a 104(d) order, finding that it was an unwarrantable failure. That finding was based upon two factors: he had previously put the mine on notice about this and the condition he found was obvious.[5] Tr. 125. The inspector believed that the mine displayed indifference to the problem and a serious lack of reasonable care as well. Tr. 204. The standard invoked, Section 75.400, had been cited 267 times in the past two years, all to the operator.[6] Tr. 126.

Referring to his conclusion that the condition had existed for more than one shift, the inspector stated this was based upon:

> The amount of the fine dust that was -- it was powdery, fluffy dry, 5 to 10 inches deep. And that takes time, a lot of trips and time for it to get that dry. Because if you start out where it's compressed, and then you're running over it, it dries out a little more and a little more each time. So it takes an extended period of time for it to dry out and get to that amount of it.

Tr. 126-27.

The inspector considered the area involved to be extensive, adding,

> Because it was over that large of an area, there was a lot of powdery, fine dust in there. And whenever they cleaned it up, it took seven miners four hours, and it took nine scoop loads, full scoop loads, to clean it up. And that -- that's excessive, extensive."[7]

Tr. 127.

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[5] Supporting his view that the condition was obvious, Postalwait stated, "Before I even got up to the crosscut, as I was walking up the walkway, you could see it in -- in the intersection, where they'd been running through it. And then as I walked up to the intersection and looked, you could see it both ways. I mean it was obvious. And it should have been obvious to anybody, but especially an examiner, a foreman. It should have been obvious to them." Tr. 128.

[6] Respondent's counsel made a brief challenge on this issue, asserting that a majority of the previous 75.400 violations were on the belt as opposed to the section. The inspector did not know how many were on the section versus the belt. Tr. 206. The Court notes that, wherever the location, it still involved the same standard and that it remains a large number of citations for that standard.

[7] Each bucket from the scoop represented a significant amount of material. The inspector estimated the bucket size to have a width of 9 to 10 feet, a depth of 5 to 6 feet, and an 18 inch height. Tr. 132. The Respondent asked about the size of the scoops at the mine and the inspector acknowledged that a 620 scoop is "pretty good size." Tr. 148. The point behind that question was the suggestion that the accumulation could have developed in a very short time, challenging the inspector's view about the time it would take for the extent of such conditions to develop. The Court, upon considering the entire record testimony, does not adopt that claim.

The inspector also concluded that the condition presented a high degree of danger because "miners were working inby it, then in the event you have a fire there, all that smoke is then going to go directly to the face. So that's a high degree of danger to the miners." Tr. 129. Further, all three entries would be affected, but the No. 2 entry would be affected from the point of accumulation in because "the air that ventilates of the belt, it was up to the tailpiece, and some air goes back down the belt. The rest of it goes across the faces, back down to the return." *Id.*

Upon cross-examination it was suggested that the accumulation included rock and dirt, but Postalwait responded that, while there might have been some of such material, it was basically ground up coal. Tr. 138. Although he did not take samples of the material, the Court would comment that there was no reasonable need to do that, as the inspector's long mining experience enabled him to determine the nature of the material in a coal mine.

Referring again to Gov. Ex. 5B,[8] the inspector's drawing of the accumulation and its location, Postalwait stated that the accumulation is reflected on the dotted lines he drew on that exhibit. Tr. 140. Dealing with nearby areas, the inspector agreed that where the track haulage is depicted, that area was cleaned and dusted. Tr. 141. He stated that after one passes through the crosscut to just inby it, the area started to become clean. Tr. 142. However, that nearby areas did not have an accumulation issue does not diminish the accuracy of the area cited or its extent.

The same observation applies to questions about the source of the accumulations at the end of No. 1 to the No. 2 crosscut where the inspector observed an accumulation of 27 inches. While Counsel for the Respondent suggested that could have occurred from the scoop hauling supplies, the inspector could only respond that something pushed the material up there or that perhaps the scoop dumped it out of its bucket. However, the Court notes that competing claims about the source for the accumulation should not distract from its presence or extent. Tr. 143.

On the issue of the duty to water crosscuts, a matter which was not genuinely in dispute, the inspector stated that one must water that if the scoop is running through such areas. He added that the crosscut is part of a scoop supply haulage road because it's used to turn around. Rock dusting is not an alternative to watering. Tr. 143. When the questioning turned to whether

[8] Joint Exhibit 4, is an annotated version of the schematic drawn by the inspector. Accordingly, besides its additional markings, red ink, and enlargement, it is essentially the same drawing as Gov. Ex. 5A at page 29 and Gov. Ex. 5B. The inspector agreed that the drawing looks like a cross and that the face would be in the direction of the top of page for that exhibit. An arrow was marked by Respondent's counsel, pointing to the top of the page. Track haulage is marked at the bottom of the page and the inspector added that is where the track is located. Tr. 213. The left side of the paper depicts where the No 1 & 2 entry is located. Tr. 214. The No. 2 to No. 3 entry is on the right side of the paper. Respondent's counsel added markings in red to signify this information. The inspector noted that his drawing shows ventilation controls; the stopping and the crosscut. The stopping is depicted in the middle of the 2 to 3 crosscut; also a stopping is in the 1 to 2 crosscut, which is the No. 46 block crosscut. Tr. 215. As described by Respondent's counsel, the accumulations are reflected in the drawing as follows: "the little dots that go around the No. 1 to No. 2, go all the way across 120 to No. 2 and No. 3 entry." Tr. 216. In the Court's view, Jt. Ex. 4 provides little additional information.

he saw scoops using bolt tubs,[9] the inspector stated that he did not observe any scoops running when he issued the violation. Tr. 145.

With the Respondent challenging the inspector's claim that he had previously put the mine on notice about Section 75.400 violations, the inspector stated that he had informed the mine's Jeremy Devine and Don Jones about such violations. Tr. 150. While the cross-examination belabored this point, it was clear that the inspector supported his statement about prior notice to management people at the mine. Tr. 152. Though he couldn't remember the individual's name, Postalwait stated that it was the next section foreman coming on shift who informed him as to the number of scoops loads it took to remove the accumulation. Tr. 154-55. Although the Respondent suggested that there was no such exchange between a supervisor and the inspector, Postalwait did not retreat from his assertion, stating that he did speak with the afternoon shift foreman, and also advised that supervisor that he wanted to have a safety talk with all the miners. Tr. 156. The Court finds Postalwait's testimony on these issues credible.

Upon additional cross-examination, the inspector agreed that the accumulation *could have* been from the scoop dropping supplies. Counsel also inquired about the inspector's procedure for taking measurements of an accumulation. The inspector explained his process with detail:

> I walk through the whole area and take it in the whole area, to see what the whole area is, to try to determine the measurements and where it appears to be the least amount. Because my walking stick, like I said, it's got measurements on it, plus I hold my thumb at the top of the material, and pull it up and actually measure. And the ones I actually measure, that's the ones I count. And I was just going through, and if it was between 5 and 10 inches, then I didn't even measure, because I could see on my stick that it was in between that. I measure areas to get the least and the areas to get the most.

Tr. 167.

Although he didn't actually witness a scoop running through the cited accumulation, the inspector drew upon his experience to conclude that was what happened, "The tires from the scoop, as it passes through there, grinds it up." Tr. 169.

The inspector elaborated about the need for the mine to be watching for the 75.400 violations: "the examiners [are] their eyes. So they need to put something in place to prevent this from occurring. They need to talk to their examiners. If it takes cleaning up more, whatever it takes to put in place to prevent this from occurring to reduce their exposure." Tr. 170.

Postalwait reaffirmed the basis for his conclusion that the condition had existed for more than one shift, as follows,

> Based on my experience. And that's what I tried to explain earlier. From the time the scoop road is watered down and it starts drying out, it takes a lot of trips for -- because it's going to be compressed. And then once -- once it dries, it takes a lot

[9] A bolt tub is a container which holds bolts, plates, and glue to be hauled up to the section. Tr. 145.

of trips to accumulate that much powdery dust. It ain't going to take just one trip or ten trips. It takes a lot of trips for it to do that.

Tr. 172.[10]

The inspector did not look at the production report for the day shift on this section but he did look at the preshift report. Tr. 174. Although he didn't see each scoop of material that was removed, he did observe some of them and those scoops were full. Tr. 176.

Explaining how he marked it non-S&S, but was still concerned about fire or smoke going to the face, he stated: "[b]ecause I did not see an ignition source in there *at the time that I was there*. Which I do believe the scoop's ignition source -- and it was in the area, but I didn't see it. So I was being conservative in marking non S and S, based on that." Tr. 176 (emphasis added).

In terms of justifying his high negligence determination, Postalwait related that he told Broadwater and Anderson what he observed about the scoop and the area and asserted that they agreed with his conclusions. Tr. 178. Thus, according to the inspector, Broadwater agreed that the scoop had generated the conditions. Tr. 178. The inspector defined "high negligence" as where an operator knew or should have known and there are no mitigating circumstances. Tr. 178-79. He supported his conclusion on the basis that management had walked through the area. The area had been preshifted and he concluded that the conditions had not just occurred. The preshift would have been done between 5:00 and 8:00 a.m. Tr. 179. The inspector did look at the preshift exam but nothing stood out. Tr. 182. The aim of Respondent's questions was to assert that the condition must have arisen more recently than inspector stated, as he made no note of anything. However, the court would note that it could equally mean that the preshift was inadequate or failed to note that which should have been noted. The Order was issued at the end of the day shift that day.[11]

Respondent's Counsel also suggested it was possible that during the time from 8:00 a.m. until 5:00 p.m. that day, the scoop's usage could've created the conditions Postalwait observed, i.e. that the scoop "could have broken up enough to have left a lot of debris and mess on the -- on the coal bottom." Tr. 185. The inspector agreed that it was "possible" but that he "didn't see any place that showed any signs of it hooving or breaking up like that." *Id.* Despite those efforts to show that the condition developed quickly during the shift in which the inspector found the condition, the inspector refuted that idea, stating "[b]ecause that -- that didn't dry out and get that powdery dry in one shift. There is no way. It can't dry out that quick and run through it and -- it can't go from not being fluffy dry to have that much fluffy dry material." Tr. 189. The Court finds the inspector's view of the origin and duration of the accumulation to be credible.

[10] Respondent contended that another MSHA inspector, Paul Walters, was on the same exact section the day before and didn't issue any violations, with the same condition. Postalwait had no idea about that assertion and has never spoken with Walters about the issue. Tr. 171. Walters was not a witness in the proceeding.

[11] The inspector thought that the mine employs a "hot seat" procedure, which refers to a miner staying with his equipment until next shift worker arrives to take it over. Tr. 183-84. Later testimony confirmed the mine did use that procedure.

Continuing with the theme that the condition could have developed quickly, Respondent's counsel also attempted to show that the area could dry out quickly, assuming that the CFM was 65,000. The inspector agreed that would be a high rate of ventilation. Tr. 190. However, he stated that it still wouldn't dry out in one shift.[12] Tr. 191. He added that, while it might start drying out if it was damp, one wouldn't have 5 to 10 inches of fluffy, powdery material created in one shift. Tr. 191.

The inspector also stated that the roof and ribs had been rock dusted but the mine floor was not. Tr. 191. He explained there were no mitigating circumstances, because,

> "if the accumulations [were] there and they had been watered down, then that would be a mitigating circumstance. But you've got agents of the Operator that go [ ] through that area, at least at the beginning and the end of the shift. And most of the time that foreman walks down to the end of the track more than once per shift."

Tr. 192.

Reviewing the inspector's remark in his notes that the operator engaged in "aggravated conduct," Respondent went through the basis for the inspector's conclusion. The inspector wrote: "The listed condition or practice poses a high degree of danger to the miners, because the listed condition is located in the intake air course, primary escapeway for the 23-D section." Tr. 195. Postalwait stated that the hazard was smoke entering the section. He did not feel that marking the order as non-S&S undercut that view. The smoke would derive from a fire, if the fire was allowed to continue, and the originating source would be from the scoop. The second basis for his aggravated conduct conclusion was the obviousness and the extent of the condition or practice. It was plain to him as soon as he entered the cited area. Tr. 195.

Challenging the inspector's contention that an agent of the operator had been through the area, namely the claim that the 23D section foreman walked through the listed area several times on each shift, it was asserted that the foreman would have only traveled through the area in the morning. However, the inspector noted that it would also have been preshifted for the afternoon shift. Tr. 199. The inspector also refuted the claim that, under his interpretation, the mine would have to stop after each turn of the scoop and clean up the area, countering that, if the area is kept damp, as the ventilation plan required, then the scoop's tires would not grind up the coal bottom so rapidly. He explained that it is when the bottom is left dry that it starts breaking down. Tr. 207-08. Thus, the inspector made it clear that one doesn't need to clean it up after every trip, "or ever ten trips" either. Instead, it takes "a lot of trips" for accumulations of this degree to develop. Tr. 209.

In response to a question from the Court regarding the inspector's listing of aggravating factors, Postalwait stated it was his view that the establishment of only one of the factors would *not* be sufficient to show aggravated conduct[13] and that, personally, he has always required at

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[12] Respondent's counsel also suggested that the inspector embellished his testimony from describing the accumulation as "powder dry" at the deposition to "fluffy material" at the hearing. The Court does not view the "powder dry" versus "fluffy" descriptions, which are nearly synonymous, to constitute a significant difference.

[13] As it is a legal determination, the ultimate decision of whether conduct is "aggravated" is for the Court.

least three of the factors for him to deem a violation as aggravated conduct. Tr. 220. The inspector attributed more weight to some of the factors too. For example, among the eight factors he listed, he considered an agent/operator presence in the area as a more significant factor. Tr. 222. The inspector also believed that it was critical to his aggravated conduct determination that an agent of the operator was in the area; "[t]he 23 D section foreman walks through the listed area several times each shift." Tr. 223. Another factor to which he attributed more weight is that he had personally put the operator on notice about the issue of 75.400 violations. Tr. 222.

The Respondent's Evidence

Glenn Lee testified for the Respondent. Tr. 225. He began working in the mines after completing high school, and he has 15 years of mining experience. Tr. 227-28. Presently, he is a section boss at the Loveridge No. 22 Mine, in charge of seven to eight men. Tr. 229. Lee stated he became aware of the order when he got out of the mine that day; he had been working the day shift that day, September 4, 2014, as the section foreman. Although the day ends at 4:00 p.m., one doesn't actually leave until 5:30 p.m. because the mine does, in fact, hot seat. Tr. 230. The mine has three production shifts. (There is no maintenance shift; instead Lee stated they fix things if the equipment needs it, and this includes maintenance.) He confirmed that the mine employs about 500 miners. Tr. 232. Miners ride a rail on the track to the mouth of the section, and from there, they walk to the face. On the day in issue, he arrived at the section around 8:30 to 9:00 a.m. He affirmed that he saw nothing odd, nor any hazardous conditions when he came through that area. Tr. 233. Supplies are at the end of the track. The scoop charger will be a break or two breaks from the end of the track; they are in the crosscut. Tr. 234. In that crosscut he had a bolt tub. The tub holds roof control bolt supplies and rock dust, and roof bolt plates and glue and 3 foot roof bolts. In essence, it is used to bring supplies to the face. Tr. 235. The tub is heavy, 2 tons when empty and he estimated that, when full, it would weigh 8 to 10 tons. Tr. 235.

Lee stated again that he saw nothing unusual; that he looked down the No. 1 & 2 entry and the No. 2 & 3 and in "every crosscut, all the way to the face." Tr. 236. Though he looked at the preshift, he couldn't recall what was on it. However, if there was something on it that stood out he would have corrected it right away. Tr. 237. Lee spends most of his day with his men on the continuous miner section. As for viewing the No. 1 to No. 2 entry or the No. 2 to No. 3 entry or the crosscut, he stated he would have been in those areas "twice, probably, at the most . . . going in … [a]nd then at quit time." Tr. 237. The preshift would've been done by the "outby bosses that fire boss the track and the belt for your section bosses." Tr. 237. Lee stated that he is responsible "from the mouth of that section in." The mouth is where the track starts into the section all the way to the face. Tr. 238.

Lee stated that the scoops that travel in this area are the 620's. They weigh around 30 tons. There are also 488 scoops and they weigh around 20 tons. Tr. 240. With a full load a 488 scoop would weigh around 28 to 30 tons. *Id.*

It is fair to state that Lee did not agree with anything in Postalwait's order. He did not consider the condition to be an "accumulation" because that term applies, in his view, to something you neglect to clean as you mine. There also was no fine coal, he stated. It was only loose coal plowed up by the bolt tub when they scooped it up. Tr. 241-42. Also, he asserted that "none of the haulage was dry that they was running on." Tr. 242. Lee stated what the scoop was running on was wet. Tr. 242. He stated that on his way in that day, he observed it to be wet.

Further, his scoop operators know they have to water it before they run on any roadway. Lee stated that the scoops will make 10 to 15 runs during the day with supplies. Tr. 243. There are two scoops and there are times when both will be running. On that day there were a 620 and a 488 scoop operating. Lee did not agree that the mine had been put on notice about the issue either. Tr. 244. In his estimation of the condition, he didn't see "where there was no hazardous condition with that [accumulation]." Tr. 244. Accordingly, Lee and Postalwait presented two very different descriptions of the conditions for this order. The differences continued throughout Lee's testimony, creating a need for the Court to resolve their testimonial conflict.

Directed to Respondent's Exhibits 3a and 3b, a production report for the 23D section, Lee stated that he had seen it and noted that it is dated September 4, 2014. Tr. 245-46. He was the section manager on that day. The report "shows the number of footage you mine. Any delays that keep you from mining. Any maintenance problem. It shows the conditions, and the work you've done on a section." Tr. 246. The report indicates that there were delays that day due to a pre-op, a conveyor belt off, rock dusting, another incident of the conveyor belt down and more rock dusting (for a second and third time). The second page of the report reflects more details of the record of the work shift. Tr. 246-49.

Lee agreed that the report reflects that the entire area was rock dusted and scooped. Tr. 251. He agreed that the area was adequately rock dusted and that no told him there was a problem with the section. Tr. 252. Lee then was directed to Ex 4 and identified it as the preshift that was called out before he went underground that day. The same exhibit reflects the daily and on-shift report for September 4, 2014, and (line) number 7, which states: "shuttle car roadways, Location. The Violation: needed watered. Action taken: watered roadways." Tr. 254.

Lee did not agree with the inspector's assertion about accumulations in the area,

> Well, to start with, at the end of the shift when he found the loose coal, it's where the bolt tub had been scooped up on the coal bottom. And the weight of that bolt tub, it plowed that coal bottom up, and it's piled up around where that bolt tub was. And as far as being dry, you don't water the crosscuts down much, if you're going to travel through them. And it's impossible to travel through [the crosscuts] because there are stoppings there.[14] You just don't do it.

Tr. 255.

Lee stated that scoops don't travel through the stoppings area. At the location where the exhibit lists 27 inches, Lee asserted that was where the bolt tub was located and where it was scooped up. Tr. 256.

There were other fundamental disagreements between Lee and Postalwait. Lee stated that the purpose of rock dusting and watering is to keep the dust down. He also stated that watering will not stop the coal bottom from digging up. Weight, he stated, causes the coal bottom to break up. Rather, he asserted, "Well, water won't, but weight is what causes it, with water." Tr. 256-57. To the suggestion from Respondent's counsel that the bottom will still dig up, regardless of the amount of water, Lee stated: "after a while water, when it settles, it will loosen coal up. But what really gets it is the weight of the piece of equipment running on it. It will bust the coal bottom up after a while." Tr. 257. When the bottom breaks up, Lee asserted

[14] The stoppings were marked in red on the exhibit.

that "[a]s soon as you find it, you ask someone to get the scoop and clean it." Tr. 258. Lee also stated that only the scoop operators travel in the area; foremen are not traveling in the crosscuts. Further, the tires of the scoop never go in the crosscut. Tr. 258.

Lee did meet Postalwait at the end of that shift and stated that in that meeting the inspector was "yelling, loud" and "pointing his finger." Tr. 259, 261. Lee described the inspector as "acting crazy" and mad over the matter. Tr. 261. He said, "I'm tired of telling you people. This is unwarrantable." He said, "I've told you and told you." Lee responded, "You ain't told me. I ain't ever seen you before." Tr. 259 Lee also asserted that he told the inspector that the accumulations were from the scoop getting the bolt tub. "Yeah, my scoop operator -- I sent him down here to get a supply tub." I said, "He's done that when he scooped his supply tub up." Tr. 260. Lee also agreed that this was the first time he had been in the cited area since the start of the shift that day. Tr. 261. Under the procedure used, supplies were all brought down to the end of the track, then the scoop picked up those supplies from the end of the track and then took them to the face. Tr. 261. Lee asserted that the scoops are carrying a lot of weight and that it doesn't take long to break up the coal bottom. Tr. 262. Also, the outby foreman normally fire bosses the area and no one ever told him of a problem. Tr. 263.

Lee's explanation for the accumulation was: "That the bolt -- it's the width of the bolt tub had been shoved and plowed the bottom up. You could see the print of it. It was plain as day. Like the coal had been shoved. You could see the width of it and everything." Tr. 263. The tub is pushed to get it loaded on the scoop. Lee asserted that this was the cause of the accumulation because there was no accumulation present at the start of the shift and the tub's imprint also supported his explanation for it. Tr. 264-65. Lee maintained that he told the inspector the condition was caused by the bolt tub, but the inspector just wouldn't listen. Tr. 266. Thus, Lee completely disagreed with the inspector's claim, in the words of Respondent's counsel "that this condition, from the No. 1 to No. 2, and then in the No. 2 and No. 3, the whole area, he said, had accumulations all over it." Instead, Lee maintained that "the only thing I seen at the end of the shift is where the bolt tub had plowed the bottom up. And we had mine inspectors the previous days before, and they walked right through that same area, inspected it and never found a problem or a hazardous condition." Tr. 267.

Again, Lee stated that the areas identified by the Respondent's counsel, the No. 1 to No. 2 and the No. 2 to the No. 3 and in the crosscuts, are not going to be watered, because nothing travels through there. Lee stated that the scoop's tires never enter the crosscut, because the tub sticks out a bit into the entry. Lee was not involved with the abatement. Tr. 269.

On cross-examination by the Secretary, Lee agreed that it was his testimony that the condition was caused by a single bolt tub being pushed up into a crosscut. Tr. 271. Lee also agreed that, as the section foreman, he is in charge of and responsible for the entire section. He conceded that, in his role as section foreman, he spends most of his production shift down at the faces. Tr. 274. Also, he acknowledged that the mine has three production shifts and no dedicated maintenance shift. On the date of the citation, it was Lee's first day as the section foreman on that shift. *Id*. Lee admitted that on that day the track was in the No. 2 entry and the track ended just outby the 46 block and that, to get to the face from the track, one passes through the 46 block and the No. 2 entry. Lee agreed that one of his duties is to complete the production reports and that one item is called "budget," which Lee defined as "a quota they want you to hit, to be productive." Tr. 277. For a continuous miner, the budget is 120 for a production shift, meaning that he is expected, as the shift foreman, to mine at least 120 feet per shift. *Id*.

In his testimony, Lee acknowledged that there is a section in the production report titled, "Delays" and that there are a number of things that interfere with being able to mine coal:

> The pre-op -- you can't mine when you're pre-opping. When the conveyor belt's off, you can't mine because the coal pile will get too big . . . If the miner breaks down, the bolter on the miner. Just anything. Maintenance, conveyor belts, shuttle cargo down behind the loader, you're unable to mine.

Tr. 278.

Cleaning up part of a section, would also cause a delay, "if one had to stop to scoop, yes." *Id*. Rock dusting also causes delays. In fact, Lee agreed that "[a]ny delay that causes you to stop production on the face must be -- it has to be written down in [the] delay section [of the report]." Tr. 278-79. Therefore, underscoring the importance of production, the testimony of Lee was clear that the reason for any production delay must be documented.

The delays must also note what was being done during that time, but Lee noted that was *to his benefit* to show what was accomplished. "Yes, it stops you from mining. For your benefit, you want it [documented] too. Because if you don't have a delay in there and you didn't mine no coal, it's hard to explain." Tr. 280. The Court notes that it is fair to conclude by this testimony that there was considerable pressure to keep producing, and to fully explain such delays to production.

Directed to Respondent's ("R's") Ex. 3, which has Lee's handwriting on it, Lee stated that he mined 164 feet on that shift. As noted, the goal is 120 feet, so he made his "budget" that day. Tr. 283. Lee agreed that the No. 2 entry was being mined during his shift, and that the continuous miner was at that time just inside the 52 block, where the last opening was. Tr. 283. Lee confirmed that there was no record in his production report of scooping, shoveling or cleaning the 4 block in the No. 2 entry for that shift, stating that when cleaning up the No. 2 entry, it was "[i]n the face itself, inby the last opening, *where we was mining at*." Tr. 284 (emphasis added). Lee agreed that he performed no cleanup of the No. 2 entry any farther outby than the 51 block because it had been previously cleaned. The tailpiece was at the 50 block that day. Tr. 285. Lee didn't rock dust the No. 2 entry any further outby the 50 block during his shift. Tr. 286.

Regarding his on-shift exam duty, Lee stated he is to walk the section every two hours to do the faces, which are all inby the tailpiece. He will also go to the scoop chargers to make sure they are charging. They are located before one gets to the end of the track. Tr. 287. Lee stated that someone else fire bosses from the end of the track at the 46 block outby and from the tailpiece to the belt line. Tr. 288. He could not recall the individual who did that. He reaffirmed that he walked through the 46 block intersection in the No. 2 entry twice that day, at the start and end of his shift. Tr.288. He also repeated that wherever the scoop would run that day, the bottom was wet. Tr. 288-89. Last, he admitted that in R's Ex. 4, under the violations section, item number 7, that record notes, "Shuttle car roadway … needed watered and watered roadways." The shuttle car roadway is inby the tailpiece. Tr. 290. On redirect, Lee stated that scooping, if it was in the 46 block, was within his responsibility and if it needed it, it would have been scooped. Tr. 291.

The Court had some questions of Mr. Lee, directing his attention to Ex. 5B. Lee agreed with the Court's impression that the only area where Lee saw a problem was where the bolt tub had been deposited. Tr. 293. Thus, Lee disagreed with the inspector's drawing showing the area covered 120 feet, and extended all the way across the intersection and the entry. Tr. 293. Thus, Lee saw the only area where there could be a 75.400 issue as the dotted area on the exhibit where the bolt bin was placed by the scoop. Tr. 293. Lee had left the mine when the abatement was being performed. Tr. 293. Asked if he later learned how long it took to abate the accumulation, he answered, "I don't remember." *Tr. 294.* The Court was surprised by that answer and pursued the questioning further, asking: "How would you explain that it would take seven men four hours to clean up this small area that you identified as being the only problem area as depicted on 5B?" *Id*. Lee responded: "Well, to start with, you can't get in a scoop in to clean it. You'd have to use a shovel. And I don't see seven men -- the boss sending seven men to do it. That's another thing. Because you cannot scoop it, because you have a ventilation stopping there. If you scoop towards it, you're going to knock the stopping down." *Id*.

The Court continued, "Let's assume that shoveling is the way it's done. My question to you is: Based upon what you observed as being the only problem in this area, can you explain why it would take seven men shoveling to clean out this one area?" Lee admitted, "No. It would take a couple of hours shoveling to kind of -- . . . [with] [t]wo to three men." Tr. 295.

Despite testimony from Lee suggesting that the coal bottom was ineffective, when the Court inquired further he retreated from that position. The Court expressed that it had

> the impression [from Lee's testimony] that . . . having a coal bottom, as this mine had, is really ineffective. It doesn't last very long when you have a scoop running over it. Even though you have the coal bottom there so that the floor can withstand that activity, I got the sense from you that it's not very effective in terms of the purpose of it. Is that fair?

Tr. 297.

Lee's response was, "Well, it's effective, because if you don't have it, then you don't mine at all. They tried it before, previous -- they tried to mine in the main bottom, the rock bottom, and the equipment was stuck in water, ceased mining, no production. It was bad." Tr. 297-98.

The Court takes note that Lee and Postalwait presented diametrically opposed descriptions of the conditions, which factual dispute the Court must resolve. However, Lee could not remember how long it took to abate the condition. In contrast, in the Court's view, the inspector presented a more credible recounting, as he did offer specifics and it was acknowledged that he was quite animated about the conditions he found. The Court rejects the claim that the accumulation was solely created by the bolt tub and finds that the failure to water down the area explains why the accumulation developed. That finding, while important, should not cause one to lose sight of the fact that, apart from the source, there was an accumulation and it was extensive.

Jerry Michael Baker then testified for the Respondent. Baker's work for Consol began in 2011, as a section foreman. Tr. 304. Shown R's Ex. 1, Order No. 8061842, Baker stated he was the afternoon shift boss on the 23D panel on September 4, 2014. Tr. 305. He arrived on the section at 4:45 p.m. that day. *Id*. As section foreman, he has to fill out the production report. Tr. 307. As with Lee, Baker stated that the report shows where they mined that day and delays.

Tr. 308. His report reflects a stoppage of production, a delay, from 4:50 until 9:20 a.m., a delay of 4 hours and 30 minutes. *Id*. Baker learned of the Order from the safety department, specifically from Larry Broadwater. He could not recall the substance of their conversation. Tr. 309. Nor could Baker recall speaking with the Inspector. After learning of the Order, Baker made arrangements to take care of it. Baker stated that he observed the cited area, but he could not recall what he observed. Tr. 310. The Court finds Baker's testimony uninformative, as he was unable to recall much about the specifics of the cited condition.

Jeremy Devine was also a witness for the Respondent. He began working for Consol, at the Loveridge Mine, in August 2010. Tr. 317. In 2013 he was the safety director and safety supervisor at the mine. Tr. 319. Shown R's Ex. 1, Devine stated he did not agree with the Order. Tr. 321. That said, he did not take issue with the date involved, nor that the 23D panel was the name of the section, or that the 46 block was the crosscut location, and 1 to 2 and 2 to 3, were the crosscuts involved.

Devine did not agree however, with the measurements that were taken and he did not know if it was an "accumulation" or not. Tr. 321. The Court, concerned about the lack of a foundation, interceded with the examination. It then was revealed that Devine never went to the site to see the condition. Tr. 323. His information therefore was based entirely on what others told him. Apart from the particulars of the cited condition, about which Devine had no firsthand knowledge, he stated that he had seen scoops operating in the cited section. Tr. 330. He also was aware of the types of scoops being used and the contents carried by the bolt tubs. Tr. 330-32. Devine stated that the coal bottom will break up every time scoops drive over it. Further, he stated that watering does not make the bottom less likely to break up. Tr. 333. The bottom, he stated, will still get crushed and crumbled the same way and the purpose of watering is to keep the dust down. Tr. 333-34.

On cross-examination, Devine admitted that he has never been an equipment operator; that before coming to Loveridge he was primarily doing engineering and landscaping. Tr. 334. At the time of this order, Loveridge had no requirement to take notes during safety inspections. Tr. 336. However, while not required, he stated he "encouraged" taking notes. Tr. 336. Devine agreed that Broadwater was the mine's safety department representative accompanying Inspector Postalwait for this matter. Tr. 336. Broadwater took no notes about the matter, communicating only orally to him. It was Devine's understanding that Broadwater assisted the inspector in taking the measurements of the accumulations. Tr. 336. Devine made no notes of his conversation with Broadwater. He stated that his only notes would be in his conference request about the matter. Tr. 337.

The Court asked some questions of Devine. Devine agreed that he spoke with Mr. Lee, Mr. Baker and Mr. Wine about the order. The Court then asked if any of those individuals disagreed with the inspector's assertion that there was an accumulation. Devine's answer was a matter of semantics, his issue being whether it was correct to call the material an "accumulation." As he expressed it,

> All except for the word "accumulation." Whether it's an accumulation or whether it's broken up coal bottom, you know, that's what they were -- they didn't describe it to me as an accumulation. *They described it as there was broken up coal bottom.* This material was pushed in this hump here. The amount of material, the

5 to 10 inches deep, was on the edge of the -- you know, pushed up on the scoop tire tracks. They just didn't use the word "accumulation."

Tr. 339 (emphasis added).

Thus, Devine's recounting of the three employees' description supports the inspector's view of the source of the accumulation.

Discussion of Docket No. WEVA 2015-651; Order No. 8061842

The Court read and fully considered the parties' post-hearing briefs.

As noted by the Commission in *Sec. v. ICG Hazard, Inc.*, 36 FMSHRC 2635, 2641, October 7, 2014, Section 104(d)(1) establishes a "d-chain"[15] framework in which an initial violation that is both S&S and an unwarrantable failure is designated as a section 104(d)(1) citation, and any subsequent unwarrantable failure violation within the next 90 days, even if not S&S, necessarily results in the issuance of a section 104(d)(1) withdrawal order. 30 U.S.C. § 814(d)(1).[16]

The predicate Section 104(d)(1) order having been established and conceded for all three orders in these two dockets, in order to establish the validity of a section 104(d)(2) Order, the Secretary's remaining burden of proof is to show a subsequent violation of a safety or health standard, which violation was also caused by an unwarrantable failure.

The Court notes that the cited accumulation in the primary escapeway factored into the inspector's gravity determination, because both the primary and secondary escapeways would be impacted if there was a fire. The accumulation can only be described as extensive and the inspector's testimony and his drawing, per Gov. Ex. 5B, was detailed, his measurements reliable. Being dry, such coal is easier to ignite. As the inspector noted, smoke would travel from the 46 block very quickly. The Court also agrees with the inspector's designation that the negligence was high. This conclusion is supported by the fact that the condition was obvious and had existed for more than one shift, that he found no mitigating circumstances, and that he had spoken to the mine about violations under the 75.400 standard before this instance and therefore they were on particular notice of this issue. The source of the accumulation was as put forward by the inspector. The bolt tub cannot explain away the extent of the accumulations and,

[15] The "d-chain" refers the Mine Act's graduated enforcement scheme promulgated in section 104(d). Once a Section 104(d)(1) order has been issued, subsequent similar violations at the same mine must be issued as 104(d)(2) orders until such time as an inspection of the mine discloses no similar violations. 30 U.S.C. § 814(d)(2); *see Lodestar Energy, Inc.*, 25 FMSHRC 343, 345 (July 2003).

[16] As expressed by Judge Zielinski in *Sec. v. Tri County Coal*, "For mines without a current history of Section 104(d) violations, a violation must be found to be both S&S and unwarrantable to justify issuance of a citation pursuant to section 104(d)(1) of the Act. If another unwarrantable violation is found within 90 days of such a citation, a withdrawal order is issued pursuant to Section 104(d)(1). Thereafter, any unwarrantable violation results in issuance of a withdrawal order pursuant to Section 104(d)(2) (the 'd-chain'), until a complete inspection of the mine discloses no similar violations (a 'clean' inspection) . . ." 30 U.S.C. §114(d)." 34 FMSHRC 3255, 3283 (Dec. 2012).

assuming arguendo that it was the cause, the extensive accumulation was present regardless of its origin. The inspector's unwarrantable failure finding was also supportable based, as it was, upon his previously putting the mine on notice about complying with the standard and that the condition he found was obvious, taking seven miners four hours, entailing nine full scoop loads to clean it up. The standard had been invoked 267 times in the past two years, all to the mine operator.

The Court finds that the violation was established and that it was the result of an unwarrantable failure. As the Commission has stated, "Unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "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, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *10 Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co*., 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist." *Sec. v. Cam Mining* 2016 WL 5594251 *5, August 12, 2016. Among the listed factors, items one, two, and four through seven are consistent with the Court's findings of fact that the violation was an unwarrantable failure.

Penalty Assessment for Order No. 8061842

As noted, **Order No. 8061842** was specially assessed at $23,800 while a regular assessment would have resulted in a $4,810 proposed penalty.

The Commission has recently spoken to the approach the Administrative Law Judge is to take under such circumstances. *Am. Coal Co., supra*. To begin, it noted that

> Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100 or his special assessments. Their duty is to make a de novo assessment based upon their review of the record. The Commission does require an explanation of any substantial divergence from the penalty proposal of the Secretary. However, the Judge's assessment must be independent, and the Secretary's proposal is not a baseline or starting point that the Judge should use a guidepost for his/her assessment.

Id. at *3.

It goes on to state,

> Penalty assessments must reflect proper consideration of the penalty criteria set forth in section 110(i). The Commission requires a duality in judge's penalty analysis, stating on the one hand, that, essentially, it was "[re]affirming the right and duty of Commission Judges to make assessments independently," while, on the other hand, simultaneously requiring an "explan[ation] [for] any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge.

Id. at *6 (citing *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).

How a judge is to address the special assessment seems to rest upon the oft invoked legal response that "it depends." The Commission noted that the "Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable."[17] *Id*. That said, the Secretary's proposed penalty cannot be glided over, as the Commission also stated,

> "Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. The rationale was plain and continues to be important. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness."

Id. at *7 (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)).

The Commission's reason for requiring an explanation for a substantial divergence between the Secretary's proposed penalty and a Judge's assessed penalty is to maintain the integrity of the assessment process. *See Id.* at 8*; Cantera Green*, 22 FMSHRC at 621..

Accordingly, as this Court reads the Commission's decision in *American Coal*, a judge must, on one hand, consider the Section 110(i) penalty criteria in making a de novo penalty assessment, but in doing so a judge must also explain the basis for agreement with, or any substantial divergence from, the Secretary's proposed penalty. *Id.* at 10. This approach applies to regular or special assessments.[18]

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[17] The Commission suggested that MSHA's special assessment form "Exhibit A" may, or may not, explain the basis for its proposed penalty, "When MSHA elects to specially assess violations under Section 100.5, its Office of Assessments sends operators a special assessment version of 'Exhibit A' that includes Narrative Findings for a Special Assessment ('Narrative') purportedly to explain the agency's rationale for the proposed special assessment." *Id*. at 5. It added that "[a] lack of explanation or justification for the Secretary's special penalty proposal may fail to provide sufficient notice to the operator of the facts upon which the Secretary relied to specially assess the penalty to prepare its rebuttal." *Id.* at n. 6. It seems fair to conclude that, where the information supporting the special assessment is scant, less attention may be paid to Exhibit A.

[18] "For either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record." *Id*. at 9. Accordingly, "if the Judge did

The Secretary's narrative findings for Order 8061842, once past the boilerplate language, provide only a very sparse explanation. Jt. Ex. 2. The findings state, "[t]he gravity was considered serious." *Id*. After repeating the description of the accumulation, it adds "[i]n the event of sparks from operating equipment [sic] could have propagated a fire and coal dust explosion that could have resulted in serious or fatal injuries." *Id*. The narrative then continues with the assertion that the "violation resulted from the operator's high degree of negligence," citing an inadequate preshift exam in failing to identify the accumulations, and it ends by noting that the cited standard had been cited numerous times at the mine. *Id*.

The Court notes that, while the conditions were extensive, and the negligence was marked as "High," the inspector deemed the violation non-S&S, marking the injury or illness as unlikely and, among the four choices for the reasonably expected injury or illness, listed it as "Lost Workdays Or Restricted Duty," and not either of the two, more serious, categorizations of permanently disabling or fatal.

The Secretary argues that, per Jt. Ex. 2, the Respondent's unwarrantable failure and high negligence indicates the need for greater deterrence than the regular assessment. The Court agrees with the need for greater deterrence, but the Secretary's sparse justification falls short of demonstrating that a nearly five-fold increase is warranted. **Instead, the Court doubles the regular assessment figure and imposes a $9,620.00 penalty for the violation.** Assessing twice the amount yielded under the regular assessment will have the effect of greater deterrence. The assessment also is reasonable in light of the fact that the violation was not deemed to be S&S by the issuing inspector. Properly, the negligence and unwarrantable failure figured prominently in the penalty determination. The other penalty criteria were each duly considered. Good faith by the operator, that the penalty would not affect the ability to continue in business, and that the mine is large and owned by a large operator, were agreed upon. However, as noted, the Court cannot adopt the assertion of the Secretary that the "gravity was serious and the violation posed a *high degree* of danger," given the inspector's evaluation on the order itself and his testimony at the hearing. Sec. Br. at 29 (emphasis added).

Docket WEVA 2015-762 and Order Nos. 8061991 and 8061992.

Inspector Postalwait testified for these Orders as well. He was at the Loveridge Mine again on October 21, 2014. Two 104(d)(2) orders are in issue. Gov. Ex. 6 relates to **Order No. 8061991**, while Gov. Ex. 7 relates to **Order No. 8061992**.[19] The inspector arrived at the mine at 7:40 a.m. that day whereupon he reviewed the preshift examination report for the 24D section, which was conducted for the day shift's benefit and use, which shift began at 8:00 a.m. Tr. 348. That preshift report did not note any hazards. Tr. 349. The report did list one violation, pertaining to an emergency car, which was referred to as an "E" car. Gov. Ex. 9 is the mine's preshift report for the day shift on the 24D for October 21st. That preshift was performed by

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rely on the Secretary's specially assessed proposed penalties as a benchmark, the Judge should explain whether and how he also independently arrived at the penalty amounts based on the statutory penalty criteria and the record. Essentially, we are affirming the right and duty of Commission Judges to make assessments independently. . ." *Id.* at 11.

[19] Gov. Ex. 8 reflects the inspector's notes for those two orders.

Justin Tinney, who was the section foreman for the midnight shift. Tr. 349-50. Tinney called out his preshift at 7:10 a.m. The locations and violations section of the report lists, at line 1, that the E car needs wedges and headers and, at line 2, it lists "tailpiece" and, under violations, "[a]ccumulations on tail roller," which was marked as "identified."

Critically, when asked if that entry, in line 2, in the preshift examination record was present before he went underground that day, the inspector answered "No." Tr. 351. Gov. Ex. 9. Postalwait first saw that entry in the preshift book *after* he returned to the surface at the end of the shift, which was *after* he had issued the two orders in this docket. Tr. 351-52.

Because of the import and potential significance of the inspector's answer, the Court wanted to make sure that it understood the inspector's answer. The inspector confirmed that the information on Line 2 *was not recorded* when he examined the preshift report. Tr. 353. Further questioning from the government underscored this. Directed to the Remarks section at the bottom of Ex. 9, the inspector read that it states: "Area safe at time of exam. . . . except above noted accumulation at tailpiece, air in proper direction and all COs and electrical installation visuals okay." Tr. 353. Asked if any of those remarks were in the preshift examination that he reviewed before going underground that day, the inspector stated that "[t]he only thing I seen that day was the first part where it says: Area safe at time of exam." Tr. 353. Further, asked about the next sentence, which states: "Except above-noted accumulation at tailpiece," the inspector responded that he did not see that statement either at the time before he went underground. Tr. 353. To be clear, the reader should understand that the preshift exam report had been altered at some point after the inspector viewed it that morning. The Respondent does not contend otherwise.

The inspector was then asked about the 24D section, which is also referred to as the 24 West section, and Gov. Ex 10, which is a map of the underground area for 24D.[20] The 24D belt line was a little less than 4 blocks long at that time. The belt line had been installed the day before, as it was running on October 20, 2014. Tr. 357.

Postalwait then went underground with Mike Savasta of the mine's safety department and Frank Cabo, the miners' representative. Tr. 358. The inspector issued the violation at about 8:55 that morning, as they were walking to the section. Tr. 359, Gov. Ex. 8, at page 9. The day shift had not yet started. The inspector saw the midnight crew leaving and the day shift crew arriving. Tr. 360. Postalwait was walking up the No. 2 entry when he observed accumulations and immediately issued a violation. The violation was in the scoop haul supply road, coming up to a crosscut, where the tailpiece was located. Part of the accumulation was inby and part of it was in the crosscut leading to the two entries. He observed Justin Tinney, the section foreman for the midnight shift leaving, passing him just outby of the area that he cited. Tr. 361.

As he was looking at the accumulations he heard the sound of coal grinding in the tailpiece. This was about 80 to 90 feet inby from his location at that time. Tr. 362-63. From his

[20] The inspector confirmed that Ex. 10 is a map of the section where he issued the two orders in this docket, and that it shows the section's development as of October 21, 2014. Tr. 354. 24D is the fourth entry over and it is the area marked in blue, a vertical line, where it lists "24 West," going to the bottom of the page. Tr. 355-56. The numbers seven, eight, nine, and 10 refer to the crosscuts. Tr. 356. The blue line represents the main line conveyor belt. Tr. 357.

experience, he was familiar with the sound of tail rollers running in accumulations. Tr. 363. He stated that Mike Savasta and Frank Cabo agreed they heard the sound too. As he described it,

> When we got down, walked down to the tailpiece, there was a shuttle car sitting on the tailpiece, where it had been dumping coal on it. And we seen that it was gobbed out[21] and there was coal coming out of the sides, from around the roller on the tailpiece. And I don't know if I asked Mike to turn it off or he just turned off the conveyor belt, because it was still running.

Tr. 365.

The belt was running when he observed the condition. Tr. 365. The inspector took photos of the condition that day, October 21, 2014. Tr. 366. Gov. Ex. 11A through 11G. In addition, Gov. Ex. 12A through 12G, are the same photos as Gov. Ex. 11A through 11G, but they are enlarged. Ex. 12A shows the tailpiece gobbed out, with the tail roller and conveyor belt turning in accumulations.[22] Tr. 368. The inspector confirmed that the accumulation he observed was coal. Tr. 371. Parts of the coal accumulations were dry and parts were damp. The tailpiece roller itself is about 5 or 6 feet wide and it was in contact with the coal. The roller is about 6 inches off the mine floor. Tr. 376. The belt itself is about 5 feet wide. Tr. 373.

The inspector stated that the accumulations developed because

> They was using the shuttle car instead of the feeder.[23] Normally you have a coal feeder sitting on the tailpiece, where you dump the whole shuttle car, and the feeder will regulate how much goes onto the belt. So your coal feeder is not there, so they was dumping it straight out of the shuttle car onto the belt. And that's where those accumulations came from.[24]

Tr. 374.

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[21] "Gobbed out" refers to his seeing spillage and accumulations, with the tailpiece roller turning in the accumulations. Tr. 365.

[22] The inspector added details to the photograph noting, among other things, that in the top right corner of Ex. 12A the grey or brownish object is the end of the shuttle car, sitting where it was dumping onto the tailpiece. Guarding is on the inby end of the tailpiece. Between the inby piece of guarding and the tailpiece, coal had been spilled where they were trying to dump it. Tr. 369. Ex. 12B is additional evidence of the accumulation, with the inspector confirming that, "[i]t shows the same thing, where you can see the coal is around the tail roller. And as the tail roller turns, where the coal is in it and the tail roller is turning in it, it's pushing the coal back. That's the reason that guarding was on an angle, because it's pushing it -- trying to push it away from it." Tr. 370.

[23] A coal feeder, as defined by the inspector, "is what you dump larger amounts of coal into it, and then it's got a choker chain in it to where it regulates what it dumps onto the belt and how much it dumps on the belt." Tr. 459.

[24] A feeder reduces spillage but it is not required to have one. Consequently, when dumping coal directly on the tailpiece more spillage is generated. Tr. 375. As noted, in this instance no feeder was present. Tr. 376.

Postalwait agreed that, in his mining experience he has seen a feeder totally covered up because of a shuttle car operator dumping haphazardly. Tr. 459.

Gov. Ex 11C and the enlarged image at Ex. 12C, shows what was in-between the roller and the guard, on the inby side of the guard. The inspector took the photo facing outby. Tr. 377. There are two black mounds, representing coal spillage where they were dumping, in front of the tailpiece guarding and the tailpiece. Tr. 377-78. Gov. Ex. 11D depicts "part of what was shoveled up, cleaned up, gobbing the conveyor belt, in front of it. The piles in front of it." Tr. 380. The inspector explained that this was done to abate the order, "This is what they done to clean it up. They shoveled it up." *Id.* The middle of the photo shows the accumulation of the coal that they shoveled up. Tr. 381. The accumulations were of a degree that the belt couldn't hold anymore, "[s]o they goosed the belt a little bit, moved it down, and they shoveled more. This is where they goosed it down. This is what was on down the belt. And the other part was on the belt, still up on the tailpiece." Tr. 381. Exhibits 12D and 12E depict the amount of coal that had accumulated. Tr. 381.

Postalwait took six measurements of the accumulations at the tailpiece. Tr. 388. The shallowest area was seven inches and the deepest was 30 inches, inby the tailpiece, as depicted in the right upper quadrant of the photos, per Gov. Ex. 11A and 12A. Tr. 389. The accumulations were six feet in length and 10½ feet wide. Tr. 390. The area measured included under the tailpiece because the accumulations were there as well. As noted above, the accumulations were damp to dry, a determination he made by picking up samples in his hand in "several different places." Tr. 390-91. Though some of it was damp, it was not so damp that it would stick together and some of it was dry and dusty. Tr. 392. He added that, "all the way around, where the belt and the tailpiece was running, it was dry. And it extended back in a little bit, from where the heat would dry it out as it was pushing it back." Tr. 392. His finding that the coal accumulations were dry near the tailpiece roller informed him that it was generating heat from the friction where the tailpiece roller and conveyor belt were turning in those accumulations. Tr. 393. Some of the accumulations were compacted, "inby the tail roller, where it was pushing the tail back this way, to push it away from it as it was turning. Then once it started building up, it started pushing it in tighter." Tr. 394, referencing Gov. Exhibits 11A and 12A; in the center area of those photos between the tailpiece roller and the inby guarding.

Postalwait also found a second accumulation in the belt entry. This one was at the overcast, about a block and a half to two blocks outby the tailpiece. Tr. 395. This accumulation was dry and it appeared to the inspector that it resulted from something being left behind and not initially cleaned up. Tr. 396. This second area of accumulation was cited in the same order. Tr. 396; Gov. Exhibits 11F and 12F (photos of this second area of accumulations). Using the same procedure as before, the inspector determined that the accumulations were coal. The accumulations at the overcast were measured by the inspector who found them to be: "20 to 30 inches deep, 5-1/2 feet [wide] from the rib out to the edge of it, and 26 feet in length along the rib." Tr. 402. As mentioned, the inspector concluded that this other accumulation was not due to rib sloughage, nor spillage off of equipment, but that it was simply left behind by not initially cleaning up after the area was mined. Tr. 403.

After seeing the two accumulation areas, the inspector planned to issue a 75.400 violation. Because the entourage could not find any "DTIs" [date/time/initials] marking on a board, nor anywhere else, to show that Justin Tinney had done that preshift, Postalwait wanted to speak with Tinney, the section foreman during the midnight shift, and as such, the person who

did the preshift exam for that oncoming day shift crew. Tr. 405. The inspector and the two others with him walked the full length of the 24D belt, including to the point where that belt had the transfer point with the mother belt, but no DTI's were found. Tr. 407. Speaking with foreman Tinney afterwards, Tinney admitted to the inspector that he didn't put DTIs anywhere, as there was no board and, while he contended that he went to the face to get a board, he didn't make it back. Tr. 408.

Compounding this concern, the inspector asked Tinney "if he [had] seen the accumulations at the tailpiece, where the belt was running in it and the tail rollers was running in it." Tinney admitted to Postalwait that he had seen the accumulations while doing his preshift exam, but that he did not call it out in his preshift report, nor did Tinney shut the belt off. Tr. 408-09. Tinney's explanation to Postalwait was that he told the shuttle car operator to clean it up. However, the inspector saw no evidence that any efforts to clean up the accumulation at the tailpiece had been made. Postalwait recorded this information in his daily notes for the day, October 21, 2014. Tr. 409-11 and Gov. Ex. 8 at page 29.

The Court concludes that Postalwait justifiably issued a (d) order on the 75.400 violation because the accumulation was present when Tinney did his pre-shift exam. Tr. 412. For the related violation, citing the preshift obligation under 75.360, his determination for that violation was made after he spoke with Tinney on the telephone. Tr. 412. Of great and understandable concern, when the inspector returned to the surface that day, he looked at the preshift exam for the 24D a second time. This time the exam listed the "accumulations" in the tailpiece. Tr. 412. The inspector also noted that it was not described as "spillage." While spillage refers, in his view, to something that just occurred, it is not synonymous with the term "accumulation," as the latter refers to something that was known, allowed to exist, and not corrected. Tr. 413.

Order No. 8061991 was issued at 10:15 a.m., and marked as reasonably likely and S&S. Tr. 414. Gov. Ex. 6. The reasons for those findings were, "Because the conveyor belts and the tailpiece was running in accumulations. You had the combustible material, and then you also had the friction heat source present. Because it was drying out, and there was an ignition source . . . [and the hazard was] [f]ire, smoke." Tr. 414.

The inspector affirmed his view that a "fire triangle" was present: oxygen, fuel and an ignition source. Tr. 414. He also marked the injury as lost workdays or restricted duty, due to smoke inhalation or burns from a fire. Upon determining that the air at the tailpiece was going outby on the belt, instead of going through the section, the number affected was later modified downward from eight to two persons - the shuttle car operator and the beltman.[25] Tr. 415. The inspector also marked it as high negligence, because there had been several 75.400 violations at this mine. He saw no mitigating circumstances; Mr. Savasta offered none and he did not view Tinney's statement that he told the shuttle car operator to clean up the accumulation as mitigation, as the belt was not shut down. Tr. 416-17. Further, Postalwait expressed that, as the section foreman is the responsible person, it is insufficient to merely instruct that work or cleanup be done, one must make sure the corrective action is actually then done, especially in this situation where there was a risk of fire. Tr. 418. The inspector believed that the condition

[25] The examiner, while in that area, could have been included, but the number affected remained at two.

occurred during the midnight shift. No coal had been run on the belt until the midnight shift and Tinney admitted to him that the condition existed during the midnight shift. Tr. 419.

The 24D midnight production shift for October 20, 2014, Gov. Ex. 13, reflects that the 24 West belt was in place so that the mine could test run it and train the belt. Tr. 420. There was no indication that the belt was used to deliver coal during the October 20th afternoon shift. Tr. 421. Tinney's production report for the next day, the midnight shift for October 21st, Gov. Ex. 14, reflects that 27 feet of coal, some 108 tons, was mined on that shift. The delay section of the report shows that there were numerous delays and that no coal was running past 5:00 a.m. on that shift. That informed the inspector that the same conditions he found were there from when Tinney's preshift exam was made. Tr. 423. One of the delays, from 6:35 a.m. to 7:00 a.m., reflects cleaning up tailpiece and shuttle car dumping, but the inspector saw no indication that any shoveling had been done. Tr. 425-26.[26]

Returning to his conclusion that both conditions, at the conveyor belt and tail roller as well as at the overcast, were unwarrantable failures, the inspector stated that he considered both accumulations to be extensive. For the overcast area, however, there was no ignition source. Tr. 424. In terms of Postalwait having put the operator on notice for this type of violation, as noted, he stated that previously he had verbally warned the mine about this and had issued violations for 75.400 too. Tr. 425. He considered the conditions cited in Order 8061991 to be obvious – because they could be viewed on either side of the belt and because one could hear the condition. Tr. 426. The inspector believed that the accumulations at the belt posed a high degree of danger

[26] Upon review of the testimony, the Court adopts the Secretary's position that "according to Mr. Tinney's midnight shift production report, the section had not produced coal from 5:00 a.m. through the end of the midnight shift. There are six entries in the delay section of the production report that cover the entire time between 5:00 a.m. to 8:40 a.m. during which the section did not produce coal (Gov. Ex. 14; Tr. 542-44). The section was not producing coal at the time the Inspector arrived on the section at 8:55 a.m. and no coal was being dumped on the belt when he arrived at the tailpiece at 10:15 a.m. (Tr. 365-66; 471). Further, it defies logic for the section to continue to dump coal on the tailpiece when the belt was down from 5:00 a.m. until 8:40 a.m. because there would be no place for the coal to go. Therefore, it is unlikely that spillage at the tailpiece could have gotten worse after the examination; it is more likely that the accumulation existed in the same condition as the Inspector observed at 10:15 a.m. Although Mr. Tinney testified the tailpiece had been cleaned and that shuttle cars continued to dump coal on the tailpiece after 5:00 a.m., he never actually witnessed this (Tr. 543-44; 565). When asked if he saw anyone cleaning the tailpiece, he responded, "Like I said, it's been so long ago" (Tr. 544). When asked if he may have written the entry in the production report for "cleaning at tailpiece" from 6:35 a.m. to 7:00 a.m. because someone had told him it took place, he said, "Yes, ma'am. Well, I mean I'm not -- I can't remember exactly, but that's usually how it happens" (Tr. 544). Mr. Tinney could not remember when he actually performed the examination between 5:00 a.m. and 7:00 a.m. (Tr. 545). Mr. Tinney could not remember which side of the beltline he walked during his examination (Tr. 535). He could not remember what time he instructed the shuttle car operator to clean the tailpiece and what, if anything, the shuttle car said in response (Tr. 560). He could not remember if he walked the beltline again after examination (Tr. 561). One of the few things Mr. Tinney did remember was that he never returned to the tailpiece or followed up with the shuttle car operator to see if the tailpiece had been cleaned (Tr. 561). Mr. Tinney could not reliably account for his whereabouts during the shift, and no other evidence supports that he was in the area of the 24-D beltline." Sec'y Br. 35-36.

due to the friction heat source and the combustible materials, creating a hazard of fire and smoke. He also believed that there was a "good chance" it could catch on fire, if the conditions had been permitted to continue. Further, the operator, through its agent, knew of the condition, because the condition was present when the preshift examiner made his exam, a conclusion the inspector reached based upon the production reports and the admission Tinney made to him. Tr. 427.

Turning to the related preshift violation order, **No. 8061992**, Gov. Ex. 7, the inspector issued that order, citing 30 C.F.R. § 75.360(a)(1). The section from that standard provides,

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

30 C.F.R. § 75.360(a)(1).

The inspector issued the order at 10:25 a.m., after speaking with Tinney. It references his earlier-issued order, No. 8061991. The inspector affirmed that the conditions cited in Order 8061991 should have been identified in the preshift, resulting in the violation for Order No. 8061992. By failing to so identify the conditions, the oncoming miners would not be alerted to the hazard. Tr. 428. Summarizing the basis for that conclusion, the inspector stated,

> Whenever I talked to him on the phone, he told me that the condition was there. Whenever I reviewed the production reports, it shows me that it was there at that time, based on when that report shows that they mined. And from my experience, it didn't just occur. It was dried out, and it takes a bit of time for it to dry out.

Tr. 429.

Postalwait stated that Tinney, had he acted properly, should have immediately shut down the belt and directed that the accumulation be cleaned up. Tr. 429. Further, on his preshift report, it should have been called out so that the oncoming crew could have dealt with it. His conclusion that it was an S&S violation was based upon his view that, "It's reasonably likely by failing to do the right thing, to do an adequate exam, that this condition is going to create a fire. Because you've got all the – all three triangles [to create a fire are] there." Tr. 430-31. Smoke inhalation and burns were marked as the type of injuries from a fire.[27] Tr. 431. As expressed previously, demonstrating his reasonableness in evaluating the violation, the inspector modified the number of persons affected from 8, as originally marked, down to 2 – the beltman and the shuttle car operator. Tr. 431. He deemed it to be high negligence because, as noted, he had previously put the operator on verbal notice about the accumulations problem and had issued violations for that standard. Nor were any mitigating circumstances presented, as neither Savasta

[27] Respondent's cross-examination of Postalwait included an inquiry about whether the area was adequately rock dusted, an attempt to show that the combustibility was diminished and therefore that the risk of hazard occurring was lessened. Tr. 442-48. The Court would comment that rock dusting does not address the accumulation hazard, nor negate the combustibility of the cited condition.

nor Cabo offered any and they agreed there were no DTIs markings along that conveyor belt. Tr. 432. Both those individuals helped Postalwait look for DTIs and Tinney admitted he made none. Tr. 433. Nor did he consider Tinney's assertion that he told the shuttle car operator to clean up the accumulation to be a mitigating factor, because Tinney allowed the belt to continue running and he did not follow up to see that the condition had been corrected. Tr. 433. Adding the condition later on to his preshift exam record was certainly of no help because the next shift had already entered the mine and therefore could not be alerted to the problem. Tr. 434-35.

Regarding Tinney's admission as to not marking any DTIs, the inspector stated again that he asked Tinney if "he put any DTIs on the 24-D conveyor belt" and "he [Tinney] said he did not put on any DTIs." Tr. 449-50. When Respondent's counsel suggested that there is no requirement that DTIs be on the belt, the inspector agreed but added,

> Normally they have them at the tailpiece, at the head drive, and sometimes they're at the discharge roller. …. you have to put them in enough places to show you covered the entire area. But that's where you always see them at. Then you see them -- if it's a longer belt, you'll see them spread out down the belt, every so far, showing that they traveled that whole thing.

Tr. 449-50.

When it was suggested that Tinney saw something different than the inspector, the inspector made his position plain yet again, "I asked him if he seen where the tailpiece and the belt was running in the accumulations, at the tailpiece. And he said yes." Tr. 453. Thus, Postalwait made it clear that if Tinney were to assert that he saw nothing turning in coal, the inspector was not about to retreat from his statements about Tinney's admission to him. Tr. 453. Respondent's counsel suggested that only a small amount of spillage, not an accumulation, was the condition that was present and that Tinney's direction to clean up the material was sufficient and reasonable and did not require that he follow up to see that it was done. Tr. 456. However, that focus avoids the issue of the integrity of the belt and the rollers. The Court reaches two conclusions about these issues. First, the questions assumed that it was merely 'spillage' that was involved. Second, assessing the inspector's credibility, the Court was struck by the reasonableness and believability of his testimony on those issues.

The inspector distinguished between mere spillage and a conveyor belt or roller turning in coal. Tr. 460. As he explained, "Where you dump the coal onto the feeder, where it will overflow, that is too far away from the conveyor belt to affect the conveyor belt." Tr. 460. Further distinguishing spillage, the inspector added that one can have spillage, "[b]ut that's what the feeder is made for. If you have spillage around the feeder, then you've got to address it in your cleanup plan how you're going to keep that cleaned up around the feeder." Tr. 461.

Respondent's counsel noted, per Gov. Ex.14, that at the entry for 6:35 to 7:00 a.m. a delay is recorded, and it states, "Dumping in tailpiece, T/P." Tr. 466. The inspector agreed that "T/P" would be shorthand for "tailpiece, and that literally it indicates that they were cleaning the tailpiece during that time. However, the inspector did not buy into the words, adding in his response, "that's what it says."[28] Tr. 467. Drawing the distinction, the inspector emphasized

[28] Further, upon inquiry by the Court, Postalwait stated that, when referring earlier to the delay from 6:35 a.m. to 7:00 a.m. and his remark "that's what it says," the inspector confirmed that his remark suggested that he was skeptical of the explanation for the delay and whether that was

that he was relying on what Tinney told him directly, not the written claim that they were cleaning the tailpiece. Further, the only 'mitigation' that was presented to Postalwait at the time had nothing to do with such a claim; rather it was simply that Tinney had just begun working as a foreman, and the inadequate response was implicitly attributed to his inexperience. Tr. 469. Postalwait reasserted that he knew they had not been running coal because "the shuttle car was sitting there." Tr. 471. The dumping that was going on was directly onto the tailpiece, because they were trying to get the feeder working. Tr. 472.

Revisiting, during the cross-examination, Tinney's failure to put DTIs on the tailpiece, the inspector stated that Tinney told him he didn't have a board, that he went to the section to get one, and that he didn't make it back. Tr. 479. Directed to the inspector's deposition, at page 36, the inspector acknowledged this was the excuse Tinney offered. However, the inspector added that "But I asked him *about the whole belt, not just at the tailpiece*. . . . [the inspector] asked him if he done the exam on the belt and where his DTIs were . . . [a]nd that's -- *and he said he didn't put any up*." Tr. 481 (emphasis added).

In terms of gravity for Order No. 8061991, Gov. Ex. 6, the inspector repeated that his S&S determination was based upon the triangle of fire presence. Tr. 483. As for his high negligence marking, Postalwait saw no mitigating circumstances because no one presented such information, such as showing that the mine was doing something to prevent, correct or reduce the hazard. Tr. 484. The inspector utilizes summary cards to remind him of the criteria for negligence, aggravated conduct and mitigating circumstances. Regarding mitigation, the inspector read that his card provides,

> May include but are not limited to actions taken by the operator to prevent or correct hazardous conditions or practices [and may include that] [o]perators are required to be on alert for conditions and practices in the mine that affect the safety or health of miners and to take the steps necessary to correct or prevent hazardous conditions and practices.

Tr. 487.

This was the predicate for Respondent's counsel to point out that Tinney told the inspector that he did perform a preshift and direct the shuttle car operator to clean it up. Tr. 488. As noted, Postalwait did not see this as mitigation because he believed that the belt was turning in the accumulations when Tinney did his exam. Tr. 488.

Turning to his unwarrantable failure (UWF) designation, Postalwait again referred to his summary card when contemplating that designation. He considers it an UWF when "on the aggravating conduct. And I look at that chart and go down through it and see if any of that

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really going on. Tr. 503. This, the inspector stated, did not imply that Tinney was lying, but rather that he saw no evidence of anything being cleaned, adding "Nothing. I didn't even see a shovel at the tailpiece. They had to go get one. But there was nothing -- nothing shoveled nowhere. And they -- if they had cleaned at that time, you would have been able to have seen it. And it wouldn't have dried out in that length of time." Tr. 504. To be clear, even though there was an attempt to repair the damage from the inspector's assertion of doubt about the production report, he stated, "Well, I have doubt in that report, based on what I seen." Tr. 505. The inspector clarified that apart from his doubts about that part, he was not asserting that the entirety of the production report was untrue. *Id*.

criteria is there." Tr. 489. In a sense, Postalwait viewed it as indifference, not rising to the level of intentional misconduct. He characterized it as indifference because the condition "should have been obvious to anybody. That there should not be no indifference in there. Anybody should have been able to seen it. Even the most prudent miner walking through there should have seen that, not only just an examiner. [Preshift] examiners have a higher standard." Tr. 491.

Postalwait also believed the mine operator displayed a serious lack of reasonable care with regard to Order 8061991, but not reckless disregard, nor intentional misconduct. Tr. 491. For the same reasons, he felt that indifference was present, as the condition was there yet examiner Tinney failed to call it out, failed to put his DTIs up, and failed to shut the belt down. The Court notes that, by this credible testimony, the inspector identified not one, but three failures. Again, citing the same rationale, the inspector believed the mine was guilty of a serious lack of reasonable care regarding 8061992.

On re-direct, the Secretary revisited the inspector's rationale for his determining if there were mitigating circumstances. This occurred because, during cross-examination, the inspector did not read the entirety of such circumstances. Completing that reading, from R's Ex. 11, the inspector continued,

> Operators are required to be on alert for conditions or practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The mine operator or contractor might withdraw equipment, personnel and/or immediately proceed to correct the violation, but none of these actions taken after they have been cited alters the negligence evaluation made by the inspector when the violation was cited.

Tr. 496.

Thus, the point was made that mitigating efforts does not refer to miners or hourly employees or subordinates taking such steps, but rather to management. Tr. 497. Further, the inspector stated that, new or seasoned, the responsibilities of the preshift examiner are the same. Tr. 498. Accordingly, neither the inspector, nor this Court, viewed Tinney's newness to the position as a mitigating factor. Last, regarding the presence of dust on accumulations, in response to the questions asked by Respondent on that point, the inspector expressed that rock dust on an accumulation shows that it has been there longer. Tr. 498.

Justin Tinney then testified for the Respondent. Tinney, who is now 35 years old, is a 1999 high school graduate. He received his mine foreman's card in 2014 and he has a mine rescue certification. Tr. 510. He has been employed in mining since 2008 and became a section foreman at Loveridge in September 2014. Tr. 512. Tinney informed the Court that he had been a preshift examiner since September 14th and the call from inspector Postalwait to him was made on October 21, 2014. Tr. 516. Tinney stated that the mine had been running coal on his shift that day, which was the midnight shift, on October 21st. Shown the P and D report,[29] which is the production report, Gov. Ex. 14, Tinney identified it as his report. Tr. 517. His October 21, 2014 production report shows that they mined 27 feet, which Tinney described as not being a large amount. Tr. 517. He believed this was the first shift for which the belt line had been in

[29] No witness explained the "D" for that P and D report, but Respondent's counsel offered, without objection that the "D" refers to "delay." Tr.576.

place. Shown his preshift and on-shift exam for that same day, Gov. Ex. 9, he stated that his preshift was performed between 5:00 and 7:00 a.m.

According to Tinney, during his preshift he saw spillage at the tailpiece, where the mine was "using the shuttle car as a feeder, at the tailpiece." Tr. 522. He told the shuttle car operator to clean it up. Tr. 522. Tinney stated that he saw only spillage and no coal turning around the roller. Tr. 523. He heard nothing strange either. Tr. 523. He did not turn off the belt because there was no danger and it only needed some shoveling. Tr. 523. There was only one shuttle car operator at this location.[30]

Tinney stated there was no need to shut down the belt, contrary to Postalwait's assertion, because "there was no imminent danger at that time."[31] Tr. 525-26. He stated he would have shut the belt off if there was an accumulation in the roller. Tr. 526. According to Tinney, he denied to Postalwait that he saw the same conditions as the inspector. Rather, he stated that Postalwait asked about his DTIs. Tinney told the inspector that he did preshift the belt, but that there was no date board at the tailpiece, and he told Postalwait, "I don't know where I put it." Tr. 527. He also told the inspector that he found some "spillage at the tailpiece, where we was dumping." Tr. 527. The inspector asked why he didn't put that in the book, and Tinney responded that it wasn't a violation as "it wasn't rolling in it or anything like that." Tr. 527-28. As to whether the inspector asked him if anything was turning in the tailpiece roller, Tinney answered, "Not that I - - not that I remember."[32] Tr. 528. Tinney also claimed that the inspector stated that he believed Tinney's claim, but advised him that he still had to issue a violation. Tr. 529. However, displaying another inability to recollect, Tinney could not recall if the inspector asked why he did not shut off the belt. Tr. 529. Tinney stated that he told the shuttle car operator "to shovel at the tailpiece." Tr. 530.

Referring to the other area cited, the accumulation of combustible material along the inby rib, inby the 24D overcast, this was also an area that Tinney would have preshifted. One can

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[30] Respondent's attorney suggested the following through a leading question: "So you only have one shuttle car operator. Most of the other -- so is it possible that when another shuttle car operator comes to the shuttle car operator that is located -- I'll call it number one -- at the tailpiece, they have to first dump onto that shuttle car." Tinney agreed. Tr. 524. He also agreed there could be spillage from that, "Oh, yeah, you have spillage from the front, if that guy's not, you know -- if he's dumping it and the guy -- because it's got to be -- it's a chain reaction. The guy's that's on the feeder, he's got to be bumping his conveyor, his chain, as that guy's dumping onto him, or it will overflow in the front." Tr. 524-25. In the Court's view, this assertion, offered to support the claim that the accumulation occurred after Tinney's preshift was performed, being based on speculation, is not credible and is also dispelled by the amount of material that was present.

[31] Unless one were to view Tinney's remark as simply misspeaking, his equating the need to shut down the belt only with the presence of an imminent danger represents a serious misunderstanding of the circumstances when there is a need to take action. Viewed in the context of the entirety of his testimony, the Court does not view Tinney's remark as merely misspoken.

[32] From a credibility standpoint, the Court finds Tinney's failure to remember such an important issue surprising.

walk on either side of this area of the belt, but one side, the one next to the rib, is a tight side. Tr. 532. Having another memory issue, Tinney, who, by any measure is still a young man, stated he didn't remember ever seeing the condition. Tr. 532. Shown Gov. Ex. 12G, Tinney expressed that, to him, the picture looked like coal, and that "[w]e rock dusted over [the] accumulation." Tr. 533. As Tinney said that he saw nothing remarkable, ostensibly his opinion of the photo would be about a condition he never saw during his preshift. Accordingly, his testimony about the photo, being speculation, is of no probative value. This was noted by the Court. Tr. 533-34. Tinney also could not recall which side of the rib he walked. Tr. 535.

Again, Tinney maintained that he didn't note the accumulation in his preshift, Ex. 9, because it wasn't a violation. He then stated that he did put the condition in his on-shift, although the testimony is unclear on this point, as Respondent's counsel's question began with a hypothetical about what Tinney *would* do and then inferentially asked if he actually did put the condition in his on-shift. Tr. 536. The second page of Ex. 9 repeats Tinney's earlier testimony that he told the shuttle operator to clean up the 'spillage.' However, Tinney's reading from that exhibit, refers to a tailpiece accumulation, not spillage, "Location and tailpiece, where you've got haul roads -- which are dry, and actually taking water. Tailpiece *accumulation* under tail roller. And Action Taken, instructed shuttle car operator to clean." Tr. 537 (emphasis added).

Further, at the first page of his preshift report, at item number 2, "Location, Violations and Action Taken, it states: "Tailpiece *accumulation* on tail roller." Tr. 537 (emphasis added). Making matters worse, Tinney admitted he put that descriptive term in his preshift report when he came to the surface. Tr. 537. Tinney also admitted that he added that information *after* speaking with inspector Postalwait. Tr. 538. Jeremy Devine asked Tinney about this and told him, "You know what we got to do." Tr. 538. Devine told him he couldn't put that in his preshift, but if Tinney had told the shuttle operator to clean it up, it was to be noted in Tinney's on-shift. Tr. 538. Tinney asserted this was due to his inexperience. Tr. 538. Further, he agreed that he put the information in both the preshift and the on-shift report. Tr. 538.

Tinney was then asked about the production report, per Gov. Ex. 14, and the delays recorded that day. Regarding the 5:50 to 6:20 notation, Tinney stated that the last shuttle car was loaded at 8:45 a.m. on October 21. Tr. 540-41. Among other items related to the delays, Tinney stated that at 6:35 a.m. to 7:00 a.m. they were cleaning the tailpiece and the shuttle car was still dumping on it at that time, but then it was suggested that he stopped everything in order to clean the tailpiece. Counsel for Respondent suggested, "[s]o someone told you that they were cleaning the tailpiece and then you had to put it in your production report." Tinney responded, "Yes, ma'am. Well, I mean I'm not - - I can't remember exactly, but *that's usually how it happens*." Tr. 544 (emphasis added). Asked, "[d]o you recall them cleaning up the tailpiece?" Tinney responded, "Like I said, it's been so long ago." Tr. 544. He also could not recall when he finished his preshift examination. Tr. 545. Tinney, using the time frame when he would have done his preshift and comparing that to the time the inspector issued the violation, calculated that it was issued some 3 hours and 15 minutes after his preshift, thereby suggesting that the condition could have developed long after his preshift, because dumping was still occurring at the tailpiece. Tr. 545-46.

Tinney stated there was no feeder at this location. Tr. 547. As noted, in situations where there is no feeder, a shuttle car dumps directly onto the tailpiece. Tr. 554. He also affirmed, in response to questions from Respondent's attorney, that accumulations can occur within a matter of seconds and that the skills of shuttle car operators will vary. Tr.

548. In conflict with Postalwait's testimony, Tinney stated that he did put his DTI on the 24D transfer under the main line, but could not recall if he put them at the tailpiece. Tr. 549.

Upon cross-examination, Tinney admitted that he was trained as a section foreman and that his training included how to record information in the preshift records. Tr. 552. Tinney also admitted that he is responsible, in part, for the safety of the oncoming shift and that he is trained to look for accumulations of coal and other combustible materials. Tr. 553.

Tinney continued to distinguish spillage from an accumulation in that the former "just happens" but the later involves something that's been neglected. Tr. 555. Tinney acknowledged that he was responsible for the belt line on the 24D, as a foreman and also as a preshift examiner. Yet, while admitting that he is responsible for both sides of the belt line, he didn't know how long it took to do the preshift that day, how long it took him to walk the line, nor which side of the belt he walked. He also admitted there was coal at the tailpiece roller and underneath it. Tr. 557-58. Tinney could not recall if the spillage was on both sides of the tailpiece. Nor could he state the amount of coal he saw at the tailpiece during his preshift. Tr. 558-59. He could not recall when, during the 5:00 to 7:00 am preshift, he told the shuttle operator to clean up clean up the material nor, as noted, did he follow-up to see if anyone had shoveled the tailpiece. Tr. 560-61. Further, at 7:10 that morning, when he called out his preshift exam to the surface, the only thing he mentioned was the E car needing wedges and headers. Tr. 562. Later, as noted earlier, under Violations, at line 2, he put tailpiece and listed "*Accumulation* at tail roller." Tr. 562 (emphasis added).

Significantly, when it was put to him whether inspector Postalwait asked him if he saw the tailpiece roller turning in the coal accumulations, Tinney responded, "I don't remember." Tr. 565. Tinney admitted that he was disciplined as a result of the inspector's orders being issued, receiving a written warning and lost time. The discipline was for not following up and not checking the tailpiece at the end of his shift. Tr. 566. Upon questioning by the Court, Tinney denied ever seeing any conditions like those depicted in photos, Ex. 12A and 12B. Tr. 567. Upon additional questions by the Court, regarding Gov. Ex. 9, on page 2, item 2, Tinney confirmed that reflects his handwriting where it records, "tailpiece accumulation under tail roller, and that on the first page, and where it also lists "tailpiece accumulation at tail roller. It is noted that while Tinney admitted that he distinguishes between accumulations and spillage, on both those items he recorded the descriptions as an "accumulation," not "spillage." Tr. 571.

However, on re-direct from Respondent's counsel, Tinney stated that, before he spoke with the attorney, he thought of the terms as the same thing. Tr. 572. With that said, Tinney then repeated that what he observed was "coal underneath the belts, or flakes underneath the belts, what we would call it." Tr. 573. Thus, he fell back to his assertion that there was no grinding in the coal. Tr. 574. The Court then asked, if the matter was merely spillage, why he was disciplined. Tinney stated the discipline was for failing to follow-up after he did the preshift, that is, for not checking the tailpiece at the end of the shift. Once the (d) order had been issued, Tinney's shift foreman asked him whether he made sure the material had been shoveled up. Tinney told the shift foreman, "I don't remember." Tr. 575. Still, Tinney maintained that the material could have resulted from somebody else dumping at the end of the shift. Tr. 575.

Michael Savasta also testified for the Respondent. He has worked in mining for 11 years, and has been at the Loveridge Mine since March 5, 2007. Tr. 582-83. He has had foreman's

papers since 2014. Tr. 580. In 2014, he also became a salaried employee, as a "safety inspector." Tr. 584. He traveled with Inspector Postalwait on October 21, 2014. They traveled to the 24D section, which was a new section. Savasta stated that he did not hear any grinding or noise until they got to the No. 3 entry, where the tailpiece was located. Tr. 588-89. Savasta acknowledged that the inspector may have mentioned something about hearing noise, but Savasta did not know exactly where they were in the No. 3 entry. Savasta asserted they were about 20 to 30 feet from the tailpiece when the inspector mentioned the noise but that no coal was being mined at that time. Tr. 589-90. The last shift to have mined coal was the midnight shift; this was also the shift where mining started on October 21. Tr. 591. Savasta stated that when the inspector saw the tailpiece, he informed him that he would issue a violation and, after speaking with Tinney, that two orders would be issued. Tr. 592-93.

Savasta also took issue with the inspector's measurements, contending that he didn't "think they [were] 100 percent accurate." Tr. 593. He had doubts about the inspector's use of his walking stick and whether his measurements took into account the soft bottom and he also criticized that only the longest and widest measurements points were taken. Tr. 594. As with Tinney, Savasta asserted that spillage, not an accumulation, was involved. Tr. 597. Savasta also had issues with the second condition listed in the order, the accumulation at the overcast, stating that there wasn't five and a half feet between the rib and the overcast stairs. Tr. 599. Savasta did see material along the rib, but didn't know if the correct term was accumulation or spillage, adding that it was covered up in rock dust and therefore inert. He believed the correct term was spillage for the material at the tailpiece. Tr. 600.

Shown Gov. Ex. 12B, a photo, Savasta stated he had never seen it before, although he asserted that it looked like the conditions at the tailpiece. Tr. 600-01. Savasta described the condition as follows:

> The belt was running, so the roller was turning. I don't know if the entire roller was in contact with the coal. But it was not only coal, there was rock and mud mixed in with it. It was damp to wet. There was nothing hot, there was not smoldering, no smoke.

Tr. 601.

He did not know how long the condition had been present. Tr. 601. He also stated that the material was wet or damp, asserting that he touched it. Tr. 602. Therefore, Savasta's description conflicted with Inspector Postalwait's. Savasta did acknowledge that the inspector was quite unhappy about the condition, admitting, "[h]e was irritated, you know. He said that he had put us on notice and he [was] tired of seeing this condition, you know, in our mine. So he was -- like I said, he was a little irritated." Tr. 603.

Upon cross-examination, Savasta agreed that *he helped the inspector take the measurements* and that he didn't make any measurements of his own. Tr. 609-10. Nor did Savasta take any notes that day, explaining that he was "new" to the safety department. Tr. 610. As to his doubts about the accuracy of the inspector's measurements, Savasta conceded that the tailpiece and the entire belt sits on the same fire clay, soft bottom, and that equipment was not sinking in mud or anything similar. Tr. 610. *Savasta also admitted that his primary objection was that an order was issued* and less so on the question of whether it was a violation, stating, "you know, *it could have been maybe a valid citation*." Tr. 612 (emphasis added). Savasta also agreed that the coal was in front of the tailpiece, inby the guarding, that it was on both sides of

the tailpiece and underneath it to, *and that at least some of it was in contact with the moving tailpiece roller*. Tr. 613. To his mind, Savasta distinguished an accumulation from spillage in that an accumulation exists when material is left there and mining continues without addressing it. Tr. 615. He believed that, in this instance, it had not just been left there and mining was not occurring when they arrived at the site of the condition. Tr. 615. Savasta agreed that no one was cleaning up the material when they arrived at the scene of the violation. Tr. 617.

Shown Exhibits 22A through 22G, photographs, Savasta agreed that he took those photos on October 21, 2014. Tr. 618. Savasta agreed that photo 22A shows the accumulation cited by the inspector at the overcast and he agreed that the accumulation along the inby rib was dry. Tr. 619. However, he added that it had rock dust on it and that the condition could have come from rib sloughage. Tr. 619. Shown 22B, a picture of the cited tailpiece, Savasta stated it depicts the area but *after* it had been shoveled. Tr. 620. This occurred as part of the required abatement. As with Tinney's memory lapses, he could not remember how many men were involved with the clean-up, nor how long it took. Tr. 621. Photo 22D shows the "spillage" that was then shoveled onto the belt. Tr. 622. For photo 22F, he agreed that it depicts the tailpiece roller in contact with the coal, but Savasta again added that rock and mud were in that mix as well. Tr. 623. Exhibit 22G, similarly shows two rounded mounds of material that consisted of coal and rock. Tr. 624. In the face of all those photos, Savasta still maintained that they depicted only spillage. Tr. 625.

Discussion

Both Orders 8061991 and 8061992 are affirmed. The violations were established and they were the result of unwarrantable failures.

Unlike the single order discussed in WEVA 2015-651, No. 8061842, the two orders involved with this docket, WEVA 2015-762, list the alleged violations as "significant and substantial." As recently reiterated by the Commission,

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

Sec'y of Labor v. Cam Mining, LLC, 2016 WL 5594251, *4-5 (FMSHRC) (Aug. 12, 2016) (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995), *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988)).

As set forth in the findings of fact, Tinney called out his preshift at 7:10 a.m. When the inspector was first alerted to the condition by the sounds he heard, Savasta and Cabo agreed they heard the sounds too. When they came upon the accumulations, the conveyor belt was running. Savasta then turned the belt off and the inspector took photos of the condition he found; the tailpiece was gobbed out with the tail roller and conveyor belt turning in accumulations. The extent of the accumulations was photographed and measured by the inspector and those accumulations near the tailpiece roller informed him that it was generating heat from the friction

where the tailpiece roller and conveyor belt were turning in those accumulations.[33] Thus, there was combustible material, and the friction heat source present. Because it was drying out, and there was an ignition source, the "fire triangle" was present, with the hazard created being fire and smoke.

Tinney saw the accumulations while doing his preshift exam, but that he did not call it out in his preshift report, nor did he shut the belt off. Tinney was part of management; his failures were twofold and both were significant. He did not record DTIs and then fabricated his preshift report after the fact. The accumulation violation was appropriately marked as high negligence, because there were no mitigating circumstances and there had been several 75.400 violations at the mine, with Postalwait having previously verbally warned the mine about this and issuing 75.400 violations.

The semantic jostling about whether the piles of coal should be tabbed as spillage or accumulations is a misdirection.[34] Clearly, there were piles of coal found and documented and,

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[33] Although Postalwait also found a second accumulation in the belt entry, the Court's determination rests primarily on the first area cited at the tailpiece, although the inspector's measurements at the second accumulation show that it was anything but insignificant. Both sites constituted accumulations. The second accumulation was not due to rib sloughage, but was more likely attributable to material left behind by not initially cleaning up after the area was mined. Regardless of the origin, it was an accumulation for which corrective action was required.

[34] The Court is aware that some cases have drawn a distinction between spillage and an accumulation. "Section 75.400 prohibits accumulations, not mere spillages. *See Old Ben Coal Co.* (*Old Ben II*), 2 FMSHRC 2806, 2808 (Oct. 1980). The Commission stated in *Old Ben* that "we accept that some spillage of combustible materials may be inevitable in mining operations. No bright line differentiates the two terms. Whether a spillage constitutes an accumulation under [30 C.F.R § 75.400] is a question, at least in part, of size and amount." *Id*. An accumulation exists if "a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (1990), *aff'd, Utah Power & Light Co. v. Sec'y of Labor*, 951 F.2d 292 (10th Cir. 1991); *see also Old Ben II, supra*, at 2808 ("[T] hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe."); *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012). The Commission has expressly rejected the argument that "accumulations of combustible materials may be tolerated for a 'reasonable time.'" *Old Ben Coal Co.* (*Old Ben I*), 1 FMSHRC 1954, 1957-58 (Dec. 1979); *see also Utah Power, supra*, 12 FMSHRC at 968 (Section 75.400 "was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated") (internal citation omitted); *Black Beauty, supra*, 703 F.3d at 558-59; *Big Ridge*, 35 FMSHRC ___, slip op. at 13, No. LAKE 2009-377 et al. (June 4, 2013). The Tenth Circuit in *Utah Power* similarly stated, "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power* 951 F.2d at 295, n. 11." *Sec. v. Big Ridge, Inc.*, 35 FMSHRC 3168, 3175-76 (Sept. 2013) (ALJ) (as in *Big Ridge*, both orders in this decision involved accumulations, not mere spillage).

for one of the two, that coal was turning in tailpiece roller and conveyor belt. As no coal was running past 5:00 a.m. on that shift, the inspector properly concluded that the same conditions he found were there at the time Tinney's preshift exam was made. Thus, the production reports and Tinney's admission to him about the presence of the accumulation also supported the inspector's findings. Further, the conditions cited in the order were obvious because they could be viewed on either side of the belt and the condition generated sound.

A reasonably prudent person familiar with the mining industry and the protective purpose of Section 75.400 would have recognized that the extensive size and amount of float coal dust and loose coal at the tail roller and feeder were accumulations and not mere spillage. Therefore, the Court finds that Section 75.400 was violated.

Postalwait's conclusion that it was an S&S violation, based as it was on the condition and the failure to deal with it properly, made a fire reasonably likely, with smoke inhalation and burns as the expected injuries from a fire.

As for the inspector's unwarrantable failure designation, Postalwait based that on the aggravating conduct involved and the associated indifference to the condition, which he based upon the presence of the condition, and its obviousness. The Court finds Tinney to be less credible than the inspector, both by his words and his deeds. That the inspector was upset by the condition he found demonstrates the reliability of his recounting. People do not often act upset without reason; the inspector's behavior and reaction were consistent with the conditions listed in his order.

Penalty assessments for Orders No. 8061991 and 8061992.

As noted at the outset of this decision, Order No. 8061991, a Section 75.400 accumulations violation, was specially assessed at $30,200, as compared to the $6,115 a regular proposed penalty assessment would have yielded. This is virtually a five-fold increase over the regular assessment figure. Order No. 8061992, in a sense the more serious of the two violations for this docket because of the action altering the preshift report, was specially assessed at $15,900, while a regular assessment would have been $4,000. The Court independently concludes that a penalty of $15,900 is fully warranted as to the latter, pre-shift violation because of the serious misconduct involved.

The accumulations violation, however, is a different matter. The Secretary's post-hearing brief urges that the $30,200 specially assessed penalty is justified because the Respondent's high negligence and unwarrantable failure "indicated the need for greater deterrence." Sec'y's Br. 28 (citing Jt. Ex. 2). However, the Court notes that unwarrantable failure and high negligence are contemplated within the regular Part 100 penalty process. In large measure, the special assessment narrative may fairly be described as an echo of the words employed in the inspector's order. Implicitly recognizing this, the Secretary's post-hearing argument was left with the need for "greater deterrence," a claim made without elaboration. *Id*. Upon independently considering the statutory penalty, with a focus, albeit not exclusively, on the gravity and negligence, and upon considering the prior 75.400 violation affirmed in this decision as a part of the mine's violation history, the Court concludes that a penalty of $18,345, a three-fold increase over the regular assessment figure, is warranted. The Court adds that, while the penalties imposed are less than the special assessment amounts sought by the Secretary, there can be no doubt that these constitute significant civil penalties for these violations.

Wherefore, it is **ORDERED** that Consolidation Coal Company pay the Secretary of Labor a civil penalty in the total amount of $43,865.00.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution

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