FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 20, 2020

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2019-0075
Petitioner	:	A.C. No. 01-02901-481428
	:	
v.	:	Docket No. SE 2019-0146
	:	A.C. No. 01-02901-487211
PEABODY SOUTHEAST MINING, LLC,	:	
Respondent	:	Shoal Creek Mine

DECISION

Appearances: Emily Roberts, Esq., and Christopher Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

Arthur Wolfson, Esq., Fisher & Phillips, LLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Peabody Southeast Mining, LLC ("Peabody"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a total civil penalty of $76,061.00 for three violations of his mandatory safety standards.

A hearing was held in Birmingham, Alabama. The following issues are before me: (1) whether Peabody violated the standards; (2) whether the violations were attributable to the level of gravity alleged; (3) whether the violations were attributable to the degree of negligence alleged; (4) whether the violations were attributable to unwarrantable failures to comply with the standards; and (5) the appropriate penalties. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** one citation and two orders, as issued, and assess penalties against Respondent.

I. Joint Stipulations

The parties have stipulated as follows:

1. Peabody Southeast Mining, LLC, is an operator, as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, hereinafter, the Mine Act, 30 U.S.C. § 802(d), at the mine at which the citation and orders at issue in this proceeding were issued.

2. Shoal Creek Mine, Mine ID: 01-02901, is a mine, as defined in section 3(h) of the Mine Act. 30 U.S.C. § 802(h).

3. Operations of Peabody, at the mine at which the citation and orders were issued, are subject to the jurisdiction of the Mine Act.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to sections 105 and 113 of the Mine Act.

5. Shoal Creek Mine is operated by Respondent.

6. Payment of the total proposed penalty in this matter will not affect Peabody's ability to continue in business.

7. The individuals whose names appear in Block 22 of the citation and orders were acting in an official capacity, as authorized representatives of the Secretary of Labor, when the citation and orders were issued.

8. The citation and orders were issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Peabody at the date, time, and place stated in the citation and orders, as required by the Act.

9. Exhibit A, attached to the Secretary's Petition in Docket Numbers SE 2019-0075 and SE 2019-0146, contains authentic copies of the citation and orders, with all modifications or abatements, if any.

Tr. 18-20.

II. Factual Background

Peabody operates the Shoal Creek Mine ("mine"), an underground coal mine in Adger, Jefferson County, Alabama.[1] The mine runs two continuous miner sections and two longwall

[1] Drummond Company, Incorporated, ("Drummond") owned and operated Shoal Creek Mine until December 4, 2018, when Peabody Energy took over ownership, and Peabody Southeast Mining, LLC, took over operations. Ex. P–16 at 1, 19.

sections over three shifts a day: owl from 11:00 p.m. to 7:00 a.m.; day from 7:00 a.m. to 3:00 p.m.; and evening from 3:00 p.m. to 11:00 p.m. Tr. 280, 289. Mining at Shoal Creek is a wet process, the mine is located near a river, which further contributes to the wet conditions, and it is a gassy mine subject to five-day spot inspections. Tr. 37-38, 150, 176, 192-93.

On December 11, 2018, at 1:05 p.m., as the H-2 longwall section was actively mining, a sizable tear occurred in the H-2 belt, causing coal to spill and belt strings to wrap around belt rollers. Tr. 208-09, 213-16. The belt was shut down, the accumulations were cleared from underneath the belt and moved to the walkway, and the belt was running coal again by 5:15 p.m. Tr. 217-24. At some time after the belt had torn, an anonymous hazard complaint was called in to MSHA, reporting "gobbed out" rollers turning in coal in the H-2 belt entry takeup area. Tr. 37-38. Consequently, on the morning of December 12, MSHA Birmingham field office supervisor Thomas Chatham arrived at the mine to conduct an inspection of the H-2 belt, in addition to the regularly scheduled five-day spot inspection. Tr. 30-31, 37-38. The inspection party included safety supervisor Matt Selman and UMWA representative Steve Miller and, when it reached the takeup area of the H-2 belt entry, the belt was running, accumulations were observed around the takeup, and the belt was shut down and the take up guarding removed. Tr. 48-55, 72, 109; Ex. P–1. Thereafter, when Chatham observed that the accumulations were in contact with the belt and rollers, and that belt strings were wrapped around rollers, bearings, and the takeup frame, he issued an unwarrantable failure citation to Peabody for accumulations of combustible materials. Tr. 49-56, 72-76. Miners were immediately assigned to clean the area and, ultimately, the accumulations were removed from the mine by December 17. Tr. 235-238, Ex. P–1.

On February 19, 2019, MSHA Inspector Darryl Allen conducted an E01 inspection at Shoal Creek. Tr. 277, 284. Before entering the mine, he reviewed the examination books and identified potential hazards in the West Main No. 4 belt entry, the alternate escapeway for the H-2 and H-3 longwall sections. Tr. 286-93, 300-01. The inspection party included Allen's supervisor Thomas Chatham, safety supervisors Brett Clements and Matt Selman, and miners' representative Tim Wise. Tr. 312-13, 459-60. At the beginning of the inspection, Clements drove the mantrip to the West Main No. 4 entry and dropped off the inspection party at crosscut 84, then entered the escapeway at crosscut 81 where he had parked. Tr. 460-62. The others, walking outby crosscut 84, came upon holes, filled with muck and water, between crosscuts 83 and 82 and met Clements around crosscut 83, and Allen issued a withdrawal order to Peabody for failure to maintain the alternate escapeway in passable condition. Tr. 315-19, 345, 461-63, 480-82; Ex. P–6. The crew was removed immediately from the affected area, miners were assigned to scoop the muck and fill the holes with road mix and gravel, and the order was terminated at 12:35 p.m. that afternoon. Tr. 341-43, 466, 490-91; Ex. P–6.

On March 11, 2019, Inspector Allen returned to Shoal Creek to continue his quarterly inspection and, upon arrival, reviewed the examination books and identified accumulations in the North Main No. 1 belt entry. Tr. 511-13, 518-39; Ex. P–11 at 1. The inspection party included Allen's supervisor Thomas Chatham, foreman Mike Earl, and miners' representative Morris Studdard. Tr. 545; Ex. P–11 at 1. At the start of the inspection, Allen observed a seized roller near crosscut 10, Earl shut down the belt, Allen observed seven more seized rollers while continuing inby and issued a citation for the eight seized rollers between crosscuts 10 and 22 ½,

and he issued another citation for two nonfunctional fire hose outlets. Tr. 541-47, 664-65; Ex. P–14(a), (b). Thereafter, upon observing accumulations in the tail area, Allen issued a withdrawal order to Peabody for accumulations of combustible materials. Tr. 548-51, 672-73; Ex. P–10. The crew was withdrawn immediately from the affected area, miners were assigned to remove the coal fines and coal muck from under the tailpiece, walkway, and full width of the entry, and the order was terminated the next day. Tr. 587-92; Ex. P–10.

III. Findings of Fact and Conclusions of Law

1. Citation No. 9136082

Inspector Thomas Chatham issued 104(d)(1) Citation No. 9136082 on December 12, 2018, alleging an "S&S" violation of section 75.400 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Peabody's "high" negligence and unwarrantable failure to comply with the standard.[2] The "Condition or Practice" is described as follows:

> Accumulations of combustible material in the form of loose coal and coal fines were allowed to accumulate in the H-2 belt entry. Upon inspection of the H-2 belt, accumulations of loose coal and coal fines were observed in the belt take up. The coal accumulation measured up to 30 inches deep in the take up. The accumulations were in contact with turning rollers and the moving H-2 belt. The accumulations were also observed in the walkways on the walkway and off-walkway side of the belt for the length of the take up. The accumulations measured approximately 120 feet long, 21 feet wide, and up to 30 inches in depth. Also numerous rollers in the take up had accumulations of belt string around the end of the roller. The belt string had accumulations of loose coal, coal fines, and float coal dust in and on the strings. The strings were tightly wrapped around the bearing and the belt roller frame. It is reasonably likely that miners would receive injuries from smoke inhalation that would result in lost work days or restricted duty. The air in the H-2 belt entry is used to ventilate the active H-2 longwall face. The H-2 belt entry is also the alternate escape way for the active H-2 long wall. Standard 75.400 was cited 121 times in two years at mine 0102901 (121 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

[2] 30 C.F.R. § 75.400 provides that "[c]oal 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."

Ex. P–1. The citation was terminated on December 17, after the operator had removed the accumulations from the mine, and rock dusted the area. Ex. P–1.

A. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152) (Nov. 1989)).

The Secretary maintains that Peabody violated section 75.400, and that longwall outby supervisor Joe Bell and fire boss Lee Esch admitted that the cited accumulations created a fire hazard. Sec'y Br. at 14. Peabody argues that the cited material was spillage, and that it had a "reasonable time" to clean it up. Resp't Br. at 6-8.

1. Summary of Testimony

a. Thomas Chatham

Inspector Thomas Chatham testified for the Secretary that early on December 12, 2018, he was notified of an anonymous hazard complaint that rollers were "gobbed out" and turning in coal in the H-2 belt entry takeup area at Shoal Creek, that he expanded his spot inspection to include that area, and that the mine was on a five-day spot inspection cycle for methane. Tr. 36-38. Chatham explained that the H-2 belt entry served as an alternate escapeway for the active H-2 longwall, that it ventilated the H-2 longwall working face and that, if a fire were to occur, miners at the face or utilizing the escapeway would be exposed to smoke. Tr. 70-71, 75-76, 100. He testified that he reviewed three consecutive pre-shift reports after the belt tear had occurred, and that none noted accumulations or cleanup in the H-2 belt takeup area. Tr. 76, 81-83; Ex. P–5 at 2-5.[3] Chatham stated that when he arrived at the takeup area, he smelled burning rubber, observed accumulations of loose coal and coal fines on the walkway and off-walkway sides of the H-2 belt, and that no one was working in the area. Tr. 49-55, 71-72, 109. He stated that the belt was turned off and the takeup guards removed, that he observed under the takeup accumulations in contact with every takeup roller and the belt, and that belt strings, covered with loose coal, coal fines and coal dust, were wrapped around a number of rollers, bearings, and the takeup frame. Tr. 49-55, 73, 85-87. By his measurements, the accumulations approximated 120 feet long, 21 feet wide, and 12 to 30 inches deep. Tr. 71-72. He explained that the belt is coated with fire resistant material, that when it is unaligned, the coating can wear off and expose fabric strings, and that they gather around rollers and collect coal dust. Tr. 85-86. He also explained that non-permissible belt drive motors in the area could cause internal sparks, but acknowledged that he did not inspect the motors' cables, and that methane was only produced outby the cited area. Tr. 54, 92, 97. While he noted that a lot of water was present, he stated that the accumulations felt dry in a few places and that, based on his observations, he thought that a fire

[3] Chatham cited Peabody for an inadequate pre-shift examination of the H-2 belt takeup area on December 12, and Peabody subsequently withdrew its contest of that citation. Tr. 80-82; Ex. P–2.

was likely to occur. Tr. 58-61, 74. He stated that he spoke to longwall outby supervisor Joe Bell and longwall coordinator Randy Deavours about the belt tear, and ascertained that cleaning had begun on December 11, but neither mentioned that any cleaning had taken place on December 12. Tr. 77, 100-06, 111-12; Ex. P–3. He also described the depictions in the photographs that he had taken of the H-2 belt takeup area before and after termination of the citation. Tr. 57-68; Ex. P–4. In his opinion, spraying is a common cleaning method at Shoal Creek, but not effective, and he admitted that he had no personal experience with it or knowledge of whether it had been employed to address this condition. Tr. 78-79, 88-89, 103, 106, 113. Additionally, he stated that if cleaning had been scheduled beyond December 11, the belt should have been stopped and the takeup guards removed, although he acknowledged that the mine was not required to shut the belt down to clean. Tr. 106, 113. He explained that based on the condition and his conversation with management about its cleaning efforts, he issued an unwarrantable failure citation, noting that the accumulations were the most extensive that he had cited at Shoal Creek during that quarter. Tr. 104, 107.

b. Lee Esch

Owl shift fire boss Lee Esch testified for the Secretary that the H-2 belt entry was the secondary escapeway for the H-2 longwall, that it provided clean air to the working face and that, during owl shift on December 12, he conducted his pre-shift examination of the H-2 belt takeup area specifically looking for combustible materials in contact with frictional heating sources that can dry out wet materials, noting that, previously, he had seen fires in the mine. Tr. 117-19, 139. He stated that he finished his examination between 5:30 and 6 a.m., and that the takeup area was examined around 4 a.m. Tr. 127-29, 138. He explained that he examined the takeup from the walkway side, with the guards in place obstructing his view, and that he did not record any hazards in the H-2 belt entry; customarily, according to him, examiners did not record hazards if they were being worked on, but this practice was scrapped after the inspection. Tr. 123-26, 140-41. Esch admitted that he had no independent memory of examining the area beyond reviewing his notes, that he was not present when Chatham took photographs nor did he dispute their authenticity, and that the conditions depicted in them needed to be addressed because they could cause a fire. Tr. 124, 135-36.

c. Joe Bell

Day shift longwall outby supervisor Joe Bell testified for Peabody that he had worked at Shoal Creek for about 10 years, and that his team was responsible for cleaning areas outby the longwall face, including the H-2 belt takeup area. Tr. 145-49. He explained that longwall mining at Shoal Creek is a wet process, and that the H-2 belt takeup is particularly wet due to its location in the mine and the belt shortening as the longwall advances, all of which make the area prone to accumulations. Tr. 150, 191-92, 224. According to Bell, the belt tear on December 11 created "[a] mess . . . the pieces got wound up in a lot of rollers . . . . So there was a lot of things wrapped around stuff and then on top of that, the material," and it took "all hands on deck" to clean and repair the belt, with the "mindset . . . to get [the belt] running," because accumulations cannot be pumped onto the belt when it is shut down. Tr. 154-58, 217. He stated that in order to clean the spill and get the belt running, the takeup guarding was removed, seven to eight miners shoveled the accumulations from under the belt onto the walkway, and the belt was repaired;

most of the accumulations had been moved onto the walkway by the time that he left, around 4 p.m. Tr. 157-61. He estimated that, given the extensiveness of the spill and the slow cleaning process, it would have taken a few shifts to finish the job. Tr. 196-202.

By Bell's account, on December 12, between 7:30 and 8:30 a.m., the H-2 belt was running and, with the takeup guards in place obstructing his view while he was working, he did not have an opportunity to inspect the takeup, and he observed material and a piece of discarded belt in the walkway. Tr. 163-65, 187-89. He stated that his crew washed the takeup area for approximately a half hour, explaining that when the guards are up, shoveling can clear some of the accumulations and hosing cleans the rest, and that his crew had planned to pump the material onto the belt. Tr. 163-66, 189-91. Thereafter, he stated, longwall coordinator Randy Deavours called, assigning him and two miners to attend to a fuel cell hazard elsewhere and, before leaving the area, the belt was still running, and he turned off the pump because there was no one to run it. Tr. 166-68, 193-94. Bell testified that when he returned to resume cleaning in about an hour, the inspection party was there, and he observed the condition at the takeup for the first time; he qualified his testimony by stating that he had not looked closely at it earlier because he had been focused on clearing material from the walkway, but then admitted that, generally, he had seen it earlier in the shift. Tr. 168-74, 193-96. In his opinion, the material on the walkway had washed back under the takeup due to the wetness of the area. Tr. 176. Bell agreed with Chatham's narrative of the condition on the face of the citation, and testified to the accuracy of Chatham's photographs, noting that it would be dangerous to run the belt in that condition. Tr. 177-88. His testimony as to the photographs of the belt strings was inconsistent, however; he acknowledged the depictions as what he had seen upon his departure on December 11 and arrival on December 12, then denied having seen them at all on December 11, and not until he was with Chatham on December 12. Tr. 182-84, 187, 194-96.

d. Randy Deavours

Day shift longwall coordinator Randy Deavours testified for Peabody that he oversees production and outby supervisors, and that he had worked at Shoal Creek for two years and four months. Tr. 204-05. He stated that air from the H-2 belt entry and the primary escapeway combined to ventilate the longwall face, and that the primary escapeway provided the majority of the fresh air. Tr. 206-08. By his account, the H-2 belt tore at 1:05 p.m., and he immediately went to the belt takeup, finding a tear of approximately 30 feet, and an extensive spill of wet coal. Tr. 209, 213-16. He explained that accumulations cannot be pumped when the belt is off because it is needed to carry them out of the mine. Tr. 216-19. He stated that after the belt tore, approximately six miners shoveled the accumulations from under the belt onto the walkway, finishing around 5:00 p.m., and that the belt was repaired. Tr. 216-19. Deavours testified that the belt was restarted at 5:15 p.m., that the longwall made 4 ½ passes during evening shift and 2 during owl shift, and that production continued into the morning. Tr. 220-24, 238-40; Ex. P–5 at 22-24, 36. He also testified that cleaning continued from day into evening and owl shifts and that, once the belt was running, accumulations were pumped onto it, as well as loaded onto wheelbarrows and skid steers and dumped onto it. Tr. 218-24; Ex. P–5 at 22-24, 36. According to Deavours, at the beginning of December 12 day shift, he had instructed Bell's crew to continue cleaning the walkway at the belt takeup and that, shortly thereafter, he reassigned them to move a fuel cell located too close to a high voltage cable in another area. Tr. 225-29. He

explained that by the time that Bell's men arrived at the fuel cell, he had also found accumulations in contact with a roller around crosscuts 8 to 10, and that he had assigned another outby man to address it. Tr. 227-31. He continued, testifying that he then received a call that MSHA had shut down the H-2 belt because of accumulations at the takeup, and that he traveled there and observed extensive wet accumulations, acknowledging that he did not touch them. Tr. 230-34, 241, 243-46. He explained that the area was prone to accumulations, that cleaning in that area occurred almost every day and that, based on his experience, he believed that the cited condition was caused by the material left in the walkway washing back under the belt and takeup. Tr. 231-34, 241. He opined that the belt should not have been running in that condition, and explained that in order to terminate the citation, 10 to 13 man crews, over at least three shifts, used wheelbarrows and skid steers to load the belt, that the belt was "bumped" so that it could be loaded, and that pumping was not possible because the belt was not running. Tr. 235-40.

e. James Barnett

Evening shift utility miner connection and certified examiner James Barnett testified for Peabody that he performed examinations once or twice a week and that, on December 11, he conducted a pre-shift examination of the H-2 belt entry around 8 p.m., and that the guards were in place and the belt, carrying a lot of water, was conveying coal. Tr. 249-54. He asserted that he observed miner Ricky Shubert standing in the walkway hosing coal from under the belt takeup, and that he did not make note of accumulations in the H-2 takeup area because cleaning was underway. Tr. 252-59; Ex. P–5 at 3. He also stated that he did not observe any contact between the accumulations and the rollers or the belt, that he would have stopped the belt had that been the case because contact can cause fires, and that he had previously seen mine fires due to bearing failure and belt strings. Tr. 252-57.

2. Analysis

A violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) ("Old Ben II") (footnote omitted). This judgment is viewed through the objective standard of whether a "reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff'd* 951 F.2d 292 (10th Cir. 1992).

Peabody launches its challenge to the violation by focusing on the cause of the accumulation, i.e., the extensive belt tear, and arguing that given the size of the spill, it had a reasonable amount of time to clean it up. Resp't Br. at 6-8 (citing *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) ("Old Ben I") (noting that "some spillage of combustible materials may be inevitable in mining operations"); *Utah Power & Light Co.*, 951 F.2d 292, 295 n.11 (10th Cir. 1991) (stating that "loose coal . . . . must be cleaned up with reasonable promptness, with all convenient speed"); *but see Black Beauty Coal Co.*, 703 F.3d 553, 559 n.6 (D.C. Cir. 2012) (rejecting the argument that operators have a "reasonable time" for cleaning

before a section 75.400 citation can be issued)). While the Commission has stated that "[w]hether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount," (*Old Ben I*, 1 FMSHRC at 1958) the D.C. Circuit has explained that, although spills can occur quickly, accumulations of combustible materials substantial enough to cause or propagate a fire are prohibited, even if recent. *Black Beauty*, 703 F.3d at 558-59, 559 n.6; *see Utah Power*, 951 F.2d at 295 n.11; *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of a spill). Moreover, the D.C. Circuit has explained that the discussion of "reasonable promptness" in *Utah Power* is dicta that has not been followed by the 10th Circuit in subsequent cases, and that operators are not afforded a reasonable time to clean accumulations before a violation of section 75.400 can be found. *Black Beauty*, 703 F.3d at 558-59, 559 n.6. Here, the evidence clearly establishes that there were substantial accumulations of coal in the H-2 belt takeup area. Chatham's account of the condition is largely corroborated by his contemporaneous notes and photographs, and even Bell and Esch admitted that it would have been dangerous to run the belt in the condition documented by Chatham's photographs. Ex. P–3 at 3-4. While the accumulations were the result of a substantial belt tear, they were significant enough to require major cleanup efforts before resuming operation of the belt to run coal.

Peabody also argues that it had cleared the accumulations from underneath the H-2 belt in the takeup area, that the material must have washed back, and that cleaning would have continued but for the inspection and Bell's crew being called away. Resp't Br. at 7-8. While I credit that after the belt tear on December 11 at 1:05 p.m., Peabody had moved the accumulations under the belt onto the walkway before restarting the belt later that evening, and that cleaning had continued during the subsequent evening, owl, and day shifts, the accumulations were never completely removed from the belt takeup area and taken out of the mine. Notably, on December 12 day shift, Deavours assigned Bell's men to continue the cleanup of the belt takeup area, but then diverted them to another hazard elsewhere. Bell turned off the pumps when he left the area, and the belt continued to run. However, even if the outby crew's cleaning had not been subordinated to another task that morning, its efforts would have constituted a mere fraction of the 10 to 13 miner crew, working over the course of three shifts, to clean up the "mess" and terminate the citation.

While the record establishes that the H-2 belt takeup area was very wet, the evidence that the accumulations were dry in several spots was unrebutted. The Commission has long explained that "wet coal accumulations pose a significant danger in underground coal mines" because they can dry out through frictional contact with the belt or rollers, and propagate a fire or explosion. *Mach Mining, LLC*, 40 FMSHRC 1, 3-6 (Jan. 2018) (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985)).

Based on the evidence in its entirety, I find that the accumulations of loose coal and coal fines, measuring 120 feet long, 21 feet wide, and up to 30 inches deep, were substantial and extensive, that they were contacting the H-2 belt and rollers, that belt strings coated in loose coal, coal fines, and float coal dust were wrapped around rollers, bearings, and the takeup frame, and that the accumulations had dried out in places from frictional contact and, therefore, were combustible. Accordingly, I conclude that Peabody violated section 75.400.

B. Gravity

The Secretary argues that there was a realistic potential for fire to occur. Sec'y Br. at 14-16. Conversely, Peabody maintains that an ignition was unlikely because of the wet conditions in the mine, the absence of methane in the area, and the unlikelihood of belt drive motor cables sparking. Resp't Br. at 8-10. Peabody also argues that the accumulations would have been cleaned up in the context of "continued normal mining operations" and, accordingly, would not have been reasonably likely to cause injury had the inspector not intervened. Resp't Br. at 8-10 (citing *U.S. Steel*, 7 FMSHRC 1125, 1130 (Aug. 1985) (explaining that when considering whether a violation is S&S, the evaluation of the reasonable likelihood of injury should be made in the context of "continued normal mining operations")). Finally, Peabody contends that Chatham's claim that he smelled burning rubber should be discounted. Resp't Br. at 10.

The Commission has recently restated the four *Mathies* criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC___, slip. op. at 5 (June 2, 2020); *see ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The fact of violation has been established, satisfying the first *Mathies* criterion, and the discrete safety hazard against which section 75.400 is directed is fire or explosion contributed to by accumulations of combustible materials.

The S&S determination must be made at the time that a citation is issued "without any assumptions as to abatement;" however, if active abatement is underway at the time of citation issuance, the sufficiency of the abatement measures must be considered when determining whether a violation contributes to the hazard. *See generally Knox Creek Coal Corp.*, 811 F.3d 148, 165-66 (4th Cir. 2016); *Mach Mining*, 40 FMSHRC at 1, 5-6; *Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015); *U.S. Steel*, 7 FMSHRC at 1130; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). In this case, active abatement was not underway at the time of inspection. Bell's crew's cleaning of the takeup area had been interrupted before Chatham came upon the condition, and those efforts were marginal, at best, in light of the significant

accumulations. Accordingly, based on the cleanup deficiency from belt tear to inspection, I find that, in the context of continued normal mining, the accumulations would have existed.

In cases involving combustible accumulations, the Commission has clarified that when considering the second and third steps of the *Mathies* analysis, "the likelihood of an injury resulting depends on the existence of a 'confluence of factors' that could trigger the ignition or explosion. Factors include any potential ignition sources, the presence or potential for presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area." *Mach Mining*, 40 FMSHRC at 3-4 (citations omitted) (citing *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014)); *see also Utah Power*, 12 FMSHRC at 971; *Texasgulf*, 10 FMSHRC at 501-03. Belts and belt rollers contacting accumulations can be ignition sources, even absent defects. *Mach Mining*, 40 FMSHRC at 4-6; *Buck Creek*, 52 F.3d at 135; *see Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1139-42 (May 2014). Finally, it is well established that a fire in an underground coal mine poses a significant risk of injury to miners. *Buck Creek*, 52 F.3d at 135-36; *Black Diamond*, 7 FMSHRC at 1120.

Despite Shoal Creek's gassy nature, there is no evidence that methane was liberated in the H-2 belt takeup area. However, the possibility of sparks emanating from the non-permissible belt drive motors was unchallenged, as was the smell of burning rubber, which was consistent with the condition observed in the takeup area. Furthermore, the numerous points of frictional contact between the accumulations and the belt and several rollers, along with the belt strings wrapped tightly around several rollers, bearings, and the frame, had begun to dry out the accumulations. Accordingly, I find it reasonably likely that the coal accumulations contributed to the occurrence of a fire in the mine, and that the second *Mathies* criterion has been satisfied.

Moving on to the third and fourth *Mathies* criteria, evidence establishing that intake air from the primary escapeway, combined with intake air from the H-2 belt entry, would dilute any smoke or contaminants reaching the longwall face, does not eradicate the danger of exposing the section crew to toxic air at the face and in the alternate escapeway, no matter how minimal the contamination. As the Seventh Circuit has expressed in *Buck Creek*, a finding that "a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation" is a common sense conclusion. 52 F.3d at 135-36; *see also Black Diamond*, 7 FMSHRC at 1120 (recognizing that "ignitions and explosions are major causes of death and injury to miners"). Therefore, based on the evidence established in this case and the relevant precedent, I find that a mine fire would be reasonably likely to cause an injury, and a reasonable likelihood that the resultant injury would be of a reasonably serious nature, satisfying the *Mathies* test. Accordingly, this violation was S&S.

C. Unwarrantable Failure and Negligence

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence, characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *CAM Mining, LLC*, 38 FMSHRC 1903, 1908-09 (Aug. 2016); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is

"aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high risk of danger, whether the violation was obvious, the operator's knowledge of the existence of the violation, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See McCoy Elkhorn*, 36 FMSHRC at 1993 (citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consolidation Coal*, 22 FMSHRC 340, 353 (Mar. 2000)). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC at 1351).

The Secretary contends that, given the time that it took to clean up the accumulations, the condition was extensive. Sec'y Br. at 16-20 (citing *McCoy Elkhorn*, 36 FMSHRC at 1993 (upholding a finding of extensiveness where it took an entire crew four hours to clean up accumulations)). Peabody makes the counter argument against extensiveness, in that the accumulations were confined mostly to the belt takeup area. Resp't Br. at 15. In this regard, the Commission has explained that extensiveness of the violative condition has traditionally been determined by examining the magnitude of the violation as it existed at the time that the citation was issued. *See Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). The accumulations observed by Chatham were 120 feet long, 21 feet wide, and up to 30 inches deep, in contact with the belt and numerous rollers, and drying out in places, and belt strings were wrapped around rollers, bearings, and the takeup frame. Furthermore, it took 10 to 13 miners, over at least three shifts, to clean up the accumulations. Accordingly, this violation was extensive and clearly obvious, both aggravating factors.

The Secretary asserts that accumulations existing for more than a shift, as in this case, constitute aggravated conduct. Sec'y Br. at 17 (citing *Buck Creek*, 52 F.3d at 136 (upholding a finding of unwarrantable failure where the accumulations existed for more than one shift after identification during a pre-shift examination)). Peabody argues that the condition existed for less than 24 hours, and that the accumulations washed back under the belt at some point after they had been moved onto the walkway. Resp't Br. at 14-15. The record establishes that the belt tear occurred on December 11 day shift around 1 p.m., and that Peabody cleared the coal from under the belt onto the walkway before the belt was restarted on evening shift around 5:15 p.m., but that the accumulations were never completely removed from the walkway and taken out of the mine until after the citation was issued. Crediting that washback from the walkway occurred at some point after the initial cleanup of the spill, it is clear that the accumulations remained in the belt takeup area over a period spanning four shifts, from mid-day shifts December 11 to December 12. Accordingly, the violation existed for a significant length of time, an aggravating factor.

The Secretary argues that the S&S designation indicates that this condition was highly dangerous. Sec'y Br. at 17-19 (citing *San Juan Coal*, 29 FMSHRC 125, 132-33, 134-35 (Mar. 2007) (finding that the judge failed to relate facts considered in finding that a violation was S&S

to the "degree of danger" prong of the unwarrantable failure analysis)). On the other hand, Peabody minimizes the danger by contending that the accumulations were wet. Resp't Br. at 14-15. The evidence establishes that the accumulations were extensive, drying out due to frictional contact with the belt and rollers, and that belt strings, coated with loose coal, coal fines and float coal dust, were wrapped around rollers, bearings, and the frame, posing a serious risk of ignition; additionally, this belt entry was an alternate escapeway, an essential component of the evacuation scheme for the active H-2 longwall in the event of an emergency. Accordingly, I find that this condition posed a high risk of danger, also an aggravating factor.

The Secretary contends that Peabody had knowledge of the condition because Barnett and Esch had examined the area, and Bell's crew was cleaning there on the day of inspection. Sec'y Br. at 16-20. Peabody counters that it was aware of the condition at the time of the belt tear and took remedial action, but makes no representation as to its awareness of the intervening washback prior to Chatham's inspection. See Resp't Br. at 11-14. It is well settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition. *See Drummond Co., Inc*., 13 FMSHRC 1362, 1367-69 (Sept. 1991); *Emery*, 9 FMSHRC at 2002-04. The record establishes that the belt was repaired and the accumulations moved from under it onto the walkway prior to resumption of production during the evening shift, and that cleaning continued during the succeeding owl and day shifts. Peabody's general knowledge, that washback occurred in the wet takeup area and that the accumulations were never completely removed from the walkway and taken out of the mine, has also been established. While Peabody's washback contention has been credited, it has failed to establish when it occurred during the course of events. However, Barnett's observation of hosing under the belt takeup during his evening pre-shift examination on December 11 should have put Peabody on notice that accumulations were back under the belt, notwithstanding the customary non-recording of hazards actively being addressed. Likewise, lack of notation of the hazard in the December 12 owl pre-shift report raises speculation as to whether the washback under the belt was overlooked or simply not recorded because of active spraying. See Ex. P–5 at 2-5. In any case, by day shift on the morning of inspection, the dispatchment of Bell's crew to clean in the takeup area clearly establishes Peabody's knowledge of the "mess" that Chatham would encounter a short while thereafter. Accordingly, there are several indicators that lead to a finding that Peabody knew or should have known of the ongoing condition, an aggravating factor.

The Secretary maintains that Peabody's cleaning efforts were insufficient, given the condition. Sec'y Br. at 18-19 (citing *San Juan Coal*, 29 FMSHRC at 134-35 (explaining that "subordination of cleanup efforts to other work may support an unwarrantable failure finding"); *Peabody Coal* Co., 14 FMSHRC 1258, 1260-63 (Aug. 1992) (affirming an unwarrantable failure where one miner had been assigned to clean the cited area, but it took five miners four hours to abate the violative condition)). Peabody responds that its cleanup efforts were reasonable in light of its knowledge of the condition after the spill, the fact that cleanup would have continued, and because Chatham's opinions about the condition and cleanup efforts were erroneous. Resp't Br. at 12-15 (citing *Peabody Midwest Mining, LLC*, 41 FMSHRC 340, 352 (June 2019) (ALJ) (finding that the violation was not unwarrantable based, in part, on the mine's determination that its planned cleanup would eliminate the condition before it became hazardous)). Peabody also contends that "good faith" cleanup efforts can mitigate a finding of unwarrantable failure.

Resp't Br. at 11-13 (citing *Cannelton Industries, Inc*., 20 FMSHRC 726, 734 (July 1998); *see also Peabody Midwest Mining, LLC*, 41 FMSHRC 279, 303 (May 2019) (ALJ); *Peabody Midwest Mining, LLC*, 40 FMSHRC 87, 141 (Jan. 2018) (ALJ)). The Commission has stated that when an operator has been placed on notice of a problem, the level of priority that it places on abatement is relevant, and that the focus is on the operator's abatement efforts prior to being cited. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 13-19 (Jan. 1997). Additionally, good faith cleanup efforts, even if based on a mistaken belief, can be a mitigating factor; however, the belief must be reasonable under the circumstances. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Cannelton*, 20 FMSHRC at 734. Obviously, the cleanup efforts after the belt was restarted did not eliminate the condition, and Deavours' reassignment of Bell's crew, on the morning of December 12, to address another problem, indicates that Peabody failed to appreciate the seriousness of the accumulations and prioritize abatement. This is especially so in light of its general knowledge that washback occurred regularly in the H-2 belt takeup area, and given the extensiveness of the accumulations left in the walkway. Finally, Peabody raises legitimate questions as to Chatham's understanding of belt operation during cleanup, its use of hoses for cleaning, and its cleanup efforts during December 12 owl and day shifts. However, any misconceptions that Chatham held about running the belt or hosing as essential components of its cleaning process, as well as Peabody's actual efforts on December 12, have no bearing on Peabody's overall inattention to the magnitude and seriousness of the accumulations, an aggravating factor.

Repeated similar violations may also be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal*, 19 FMSHRC at 851; *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). The Commission has rejected the argument that only past violations, involving the same regulation and occurring in the same area, may be properly considered when determining whether a violation is unwarrantable. *Peabody Coal*, 14 FMSHRC at 1263. Shoal Creek was cited 121 times for violations of section 75.400 in the two years preceding this citation, and 25 times in the quarter. Peabody took control of Shoal Creek from Drummond on December 4, 2018 and, at the time of inspection, one section 75.400 citation had been issued directly to Peabody. Ex. P–16 at 10, 19, 21. Notably, management employees Bell and Deavours retained employment with Peabody at Shoal Creek after having worked for Drummond. Moreover, it was well known that the area was prone to accumulations and washback. Taken together, the evidence establishes that Peabody was on notice that greater efforts for compliance were necessary, particularly in the cited area, another aggravating factor.

After considering all the aggravating factors, I conclude that Peabody was highly negligent, and that this violation was the result of its unwarrantable failure to comply with the standard.

2. Order No. 9136320

Inspector Darryl Allen issued 104(d)(1) Order No. 9136320 on February 19, 2019, alleging an "S&S" violation of section 75.380(d)(1) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Peabody's "high"

negligence and unwarrantable failure to comply with the standard.[4] The "Condition or Practice" is described as follows:

> The alternate escapeway leading from H-3 and H-2 longwall sections, to the west service shaft, is not maintained in safe condition to always assure passage of anyone, including disabled persons. Thick muddy water, containing coal fines, and covering thick coal muck, has been allowed to accumulate in the West Main 4 belt entry, (A.E.) from cross cut 82 to 83. The muddy water and muck, covering tire ruts, rocks, coal, and other stumbling hazards, exists in three low areas of the belt entry between cross cuts 82 and 83, each measuring approximately 20 ft. in length x the full width of the walkway side of the belt entry, and ranging from 12 to 18 inches deep. A 13 hp. pump is observed suspended in the water at cross cut 82, but is not in operation, and will not pump most of the thick mud and coal fine material. No pumps or pump lines are currently located at the other two low areas. This condition was reported to management on 2/18/19 following the 8:00 p.m. to 11:00 p.m. pre-shift examination, and was entered in the outby pre-shift records under Hazardous Conditions, or Violation of a Mandatory Safety Standard, and was countersigned by the Owl Shift Mine Foreman. No corrective actions appear to have been taken. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.380(d)(1) was cited 17 times in two years at mine 0102901 (17 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P–6. The order was terminated on February 19, after the operator had removed water, coal fines, and coal muck from the holes, filled them with road mix and gravel, and cleared a six-foot-wide travelway in the alternate escapeway. Ex. P–6.

A. Fact of Violation

The Secretary contends that Peabody violated the standard because the alternate escapeway did not satisfy the "functional passability" test in *Utah Power*. Sec'y Br. at 33-34 (citing 11 FMSHRC 1926, 1930 (Oct. 1989)).[5] Conversely, Peabody seeks vacation of the order, maintaining that the cited area in the West Main No. 4 belt entry was safe to travel, that three miners traveled the area without any problem and, challenging Allen's account of the condition

[4] 30 C.F.R. § 75.380(d)(1) provides that "[e]ach escapeway shall be . . . [m]aintained in a safe condition to always assure passage of anyone, including disabled persons."

[5] The "functional passability" test in *Utah Power* predated section 75.380(d)(1) but, nonetheless, includes consideration of disabled miners' ability to safely utilize escapeways.

as uncorroborated, that establishment of a violation is largely a factual determination. Resp't Br. at 21-22.

1. Summary of Testimony

a. Darryl Allen

Inspector Darryl Allen testified for the Secretary that, upon arrival at Shoal Creek in the early morning of February 19 to conduct a quarterly E01 inspection, he found in the February 18 evening pre-shift report, "water and muck deep 82 to 83 and 82" in the West Main No. 4 belt entry, and that men were assigned to address the issue, but that the work was not completed. Tr. 277, 284, 286-87, 292-93, 300-01, 305, 309-10; Ex. P–9(a), (b). He explained that the West Main No. 4 belt entry is the alternate escapeway for the H-2 and H-3 working faces, and that it is subject to examination every shift. Tr. 296-98, 358-59. He stated that Peabody safety supervisor Brett Clements transported the inspection party to crosscut 84, where it crossed over to the West Main No. 4 belt entry, and that he encountered thick "boot-sucking" muck and water, measuring 12 to 18 inches, in holes located between crosscuts 82 and 83, each hole stretching the width of the walkway for a distance of approximately 20 feet, with tire ruts, coal fines, and rocks throughout the area. Tr. 312-13, 316-19, 338-39, 373. He testified that the first hole was filled with about 12 inches of water and muck, that the second hole, in which he almost fell, was filled with muck higher than the top of his boots, and that the third hole, filled with water and soupy muck, was approximately 18 inches deep. Tr. 316-24. He stated that there was a pump in the hole by crosscut 82 that was not running, and explained that it was not designed to handle muck. Tr. 324, 327-29. By his account, there were no indications that any cleaning had been underway, and he speculated that the muck could have accumulated over a period of weeks. Tr. 328-33. Consequently, he explained, he issued a withdrawal order because he was concerned about miners being impeded or losing balance and falling if they needed to use the escapeway and that, because the travelway was too narrow for vehicles, miners would have to travel on foot through this condition and then another 1 ⅓ miles in order to reach the exit. Tr. 297, 311-12, 316-17, 326, 331-34. Allen also expressed concern about the ability of disabled miners to escape in an emergency, noting that navigating the area in the cited condition with a stretcher would be dangerous. Tr. 375-77.

b. Clarence Whitt

Owl shift pump supervisor Clarence Whitt testified for Peabody that he had worked at Shoal Creek for about 16 years, that he typically reviews the fire boss book between 10:20 and 10:30 p.m., that he records his cleaning assignments on the pre-shift report, and that he is directly notified of high priority issues by radio. Tr. 388-98, 400-01. He asserted that he reviewed the February 19 evening pre-shift report, that it identified water and muck at crosscut 82 and between crosscuts 82 and 83 in the West Main No. 4 belt entry, and that he went directly to that area with a pumper and found a hole at crosscut 82, approximately 20 feet long, 8 to 10 feet wide, and 8 to 10 inches deep, filled with water and muck, noting that he could not see the bottom of the hole. Tr. 396-97, 402-03, 411-15; Ex. P–9(a). As he continued inby, he stated, he found a second hole filled with muck, and that he did not walk the length of the hole or over to crosscut 83. Tr. 405, 416, 421-22. He stated that thick muck filled both holes, but that he did

not identify any tripping hazard between crosscuts 82 and 83, and he admitted that he was focusing on cleanup when assessing the condition rather than escaping in an emergency. Tr. 416-18, 421, 428, 432. Whitt also equivocated as to whether the muck was "boot sucking;" having testified that it was not, he was referred to his contradictory deposition testimony that it was, then was not, admitting that the change in his prior testimony had occurred after conferring with counsel. Tr. 406, 420, 425, 430, 431. He explained that the pump cannot remove muck, and that it is located at crosscut 82 because the area is low lying and anything uphill drains down to it. Tr. 402-06, 409, 415-16, 419. He admitted that he did not know the depth of the muck after pumping water off the hole at crosscut 82 and acknowledged that, based on his experience, muck takes time to build up. Tr. 420, 425, 430-31. He testified that after pumping the water, he was called away to service the main sump, that he never called for anyone to clean up the muck, and that he asked Joe Kennedy to check whether the water had built back up in the hole at crosscut 82. Tr. 403, 418-22. Finally, he explained that mobile equipment, such as skidsteers, was necessary to remove muck and, while no equipment was there when he left, he heard over the radio that it was on the way. Tr. 418-24.

c. Joe Kennedy

Owl shift pump supervisor Joe Kennedy testified for Peabody that he had worked at Shoal Creek for over six years. Tr. 433-34. He explained that he and Whitt would review the examination records at the beginning of the shift and divide the work, noting that the records are important for passing information between shifts. Tr. 434, 443-44, 450. He testified that at the beginning of February 19 owl shift, he was working in an area without radio communication, that he left there between 4:30 and 5:30 a.m., and that he received a call about the West Main No. 4 belt entry. Tr. 436-39. He stated that he proceeded to crosscut 82 and found a little water and a lot of muck and that, as he walked the area, he did not need waders and encountered no tripping hazards. Tr. 439-41. He testified that he pumped water at crosscut 82 for 15 to 30 minutes at 6 a.m., then called for someone to scoop the muck because the pumps can only handle water, and that he expected it to take place during day shift because there was no mobile equipment in the area at the time. Tr. 441-43, 456-57.

d. Brett Clements

Brett Clements testified for Peabody that he had been working as a safety supervisor at Shoal Creek since 2013. Tr. 458. He stated that he dropped off the inspection party at crosscut 84, parked the mantrip at crosscut 81 and entered the West Main No. 4 belt entry there, that he met the inspection party around crosscut 83, and that he called mine foreman Doug Altizer about missing lifeline cones and muck that Allen had identified in the belt entry. Tr. 460-63, 487-89, 500-01. Explaining that the entry slopes down from crosscut 81 to 82 and that water and muck were known to accumulate at that low point, he stated that he encountered a hole filled with muck and water at crosscut 82 and another filled with soupy muck between crosscuts 82 and 83, approximating both holes at 15 to 20 feet long, about walkway width, and 12 to 13 inches deep. Tr. 462, 480-83, 486, 490-91. He asserted that he had no trouble walking through the holes, that no water came up over his 16-inch boots, and that he did not encounter any trip and fall hazards, noting that he did not recall Allen stumbling. Tr. 462-64. In his opinion, withdrawing the miners was unnecessary because the material did not obstruct his travel in the escapeway.

Tr. 465. He testified about the photographs that he had taken, indicating how high the muck had come up on his boots in the holes at crosscut 82 and between crosscuts 82 and 83, and identifying the inactive pump in the hole at crosscut 82. Tr. 466-67, 472-76, 496-98; Ex. R–1(a)-(c). He explained that soupy muck would need cleaning with a skid steer because it was too thick to pump, and stated that he was not present when the order was terminated by scooping with a skid steer and filling the holes with road mix and gravel, enabling water to flow down to the pump. Tr. 477, 480-486, 490-91, 500**.**

2. Analysis

Section 75.380(d)(1) requires underground coal mine operators to maintain each escapeway in safe condition to assure passage of anyone, including injured miners. *Maple Creek Mining, Inc*., 27 FMSHRC 555, 556-59 (Aug, 2005). Operators must also keep escapeways clear for miners to quickly exit the mines in the event of emergencies. *Mach Mining, LLC*, 35 FMSHRC 2937, 2942-43 (Sep. 2013) (citing *Am. Coal Co.*, 29 FMSHRC 941, 948, 953-54 (Dec. 2007)). The Commission has also explained that the proper consideration "is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners' ability to expeditiously escape a dangerous underground environment in an emergency." *Am. Coal*, 29 FMSHRC at 950 (citations omitted). Moreover, the Commission has noted that "[o]f particular importance in determining whether an escapeway is adequate under section 75.380 is the ability of miners to transport an injured miner on a stretcher through it." *Maple Creek*, 27 FMSHRC at 560.

While Peabody correctly contends that the question of whether an escapeway is passable is largely a factual one, its arguments - - that because Whitt, Kennedy, and Clements walked the area between crosscuts 82 and 83 eight times, collectively, without difficultly, escaping miners would not be impeded, and that Allen overstated the seriousness of the condition - - are not persuasive. *See* Resp't Br. at 21-22 (citing *Am. Coal*, 29 FMSHRC at 948; *Maple Creek*, 27 FMSHRC at 559-61; *Big Laurel Mining Corp.*, 37 FMSHRC 2001, 2032 (Sept. 2015) (ALJ)). The plain wording of section 75.380(d)(1) makes clear that it contemplates consideration of whether **disabled miners** would be able to pass safely, and is not restricted to able-bodied miners who, in this case, were already aware of the condition and not acting in response to an emergency.[6] *See Maple Creek*, 27 FMSHRC at 556-57, 560 n.5 (addressing the fact that use of an escapeway during an emergency is significantly more dangerous than using the same entry as a travelway in a non-emergency situation).

The evidence clearly establishes that there were three holes spanning the width of the walkway, filled with either water standing atop muck or a mixture of water and thick muck, i.e., soup, and that there were ruts and rocks throughout the area. While witnesses reported having encountered different depths of material in the holes, given the size and irregularities of the depressions, in conjunction with evidence lacking in exactitude as to where Allen and each miner

[6] Peabody's cite to *American Coal*, involving a violation of section 75.380**(b)**(1) and providing guidance on escapeways generally, does not address safe passability of disabled miners and, consequently, is not instructive on this point. *See* Resp't Br. at 21 (citing 29 FMSHRC at 948).

was standing within them, I credit all testimony on this point, and find that water and muck in these holes ranged from 8 to 18 inches deep. Likewise, I credit Allen that one of the holes contained deep, boot-sucking muck, simply because the other witnesses may not have walked through the exact area in which he barely avoided falling. Regarding the inconsistent testimony as to the number of holes in the entry, I credit Allen's testimony that there were three based on his detailed description, supported by his contemporaneous notes, and the fact that neither Clements nor Whitt traveled the full length of the cited area. *See* Ex. P–8 at 2-5. Therefore, based on the evidence in its entirety, I find that the conditions in the West Main No. 4 alternate escapeway would impede miners' safe passage under emergency conditions, particularly miners carrying a stretcher or assisting an injured miner, and that Peabody violated section 75.380(d)(1).

B. Gravity

The Secretary contends that this violation was S&S because in an emergency, miners were reasonably likely to be delayed, and delay could cause serious injury. Sec'y Br. at 34-36. On the contrary, Peabody contends that *Cumberland Coal* requires consideration of the facts and circumstances surrounding an alleged violation of an emergency standard when determining whether it is S&S, and that delay was unlikely. Resp't Br. at 23-24 (citing *ICG Illinois*, 38 FMSHRC at 2483 (Althen, dissenting); *Mach Mining*, 36 FMSHRC at 1530 (Cohen, concurring)). Peabody also argues that the muck, water, and holes would have been eradicated in the context of continued normal mining and, accordingly, would not have been reasonably likely to cause injury had the inspector not intervened. Resp't Br. at 25-26 (citing *U.S. Steel*, 7 FMSHRC at 1130) (explaining that evaluation of the reasonable likelihood of injury should be made in the context of "continued normal mining operations").

The fact of violation has been established, satisfying the first *Mathies* criterion, and the discrete safety hazard that section 75.380(d)(1) is intended to prevent is impeding or delaying miners, including those disabled, in exiting the mine should usage of the escapeway become necessary in an emergency.

The Commission has explained that it is crucial to identify the hazard in the context of the occurrence of the envisioned emergency and that, "[b]ecause the particular facts in a case may not establish that a violation of an [emergency] standard contributes to a hazard which is reasonably likely to result in an injury, not every violation of an [emergency] standard will be S&S." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013); *see also Peabody Midwest*, 42 FMSHRC___, slip. op. at 4-6; *ICG Illinois*, 38 FMSHRC at 2483 (Althen, dissenting) ("[A]ssuming the existence of an emergency is not the same thing as assuming that the violation is S&S . . . . [T]he particular facts surrounding the violation must be considered.").

The evidence establishes that pump supervisors Whitt and Kennedy pumped water from the hole at crosscut 82 on February 19 owl shift. However, at the time of inspection, no action had been taken to remove the water or soupy mixtures from the other two holes, much less fill them. Accordingly, based on the inadequate remedial efforts leading up to inspection, I find that the condition would have existed in the context of continued normal mining. Peabody's position that safe travel in the alternate escapeway would not have been impeded, as evidenced by the

three miners' uneventful travel through the cited area, is unavailing. The evidence clearly establishes that the water and muck-filled holes in the rutted, and rock strewn terrain, posed trip and fall hazards that would be reasonably likely to impede escaping miners, particularly in the case of disabled miners being assisted in exiting the mine safely, satisfying, the second *Mathies* criterion.

Regarding the third and fourth *Mathies* criteria, any trip and fall hazards impeding and delaying safe passage through the alternate escapeway during an emergency would be reasonably likely to prolong miners' exposure to adverse atmospheric conditions, resulting in, but not limited to, respiratory and musculoskeletal injuries of a reasonably serious nature, satisfying both criteria. Accordingly, I find that this violation was S&S.

C. Unwarrantable Failure and Negligence

In support of the unwarrantable failure charge, the Secretary asserts that the water and muck-filled holes in the alternate escapeway were extensive, obvious, and highly dangerous, that they had existed since, at least, February 18, that Peabody was aware of the condition, that its abatement efforts were inadequate, and that it was on notice that greater efforts were necessary for compliance. Sec'y Br. at 36-41.

Peabody counters that it knew about the condition, that reasonable efforts were made to address it in the short time that it had existed, and that further cleaning would have continued. Resp't Br. at 26-27. Peabody also contends that the cited area was traveled numerous times by its miners, without incident, indicating that the condition was not as dangerous or extensive as Allen believed, and that it was not on notice to expend greater effort to be compliant. Resp't Br. at 27-28.

The evidence establishes that there were three sizable holes, walkway-wide, filled with water atop muck or soupy muck, about 20 feet long and 8 to 18 inches deep, in a rutted, rocky area of the escapeway, and that the condition was first recorded in the February 18 evening pre-shift report. This condition was reasonably likely to impede safe passage of miners responding to an emergency, and more so miners disabled and in need of assistance, notwithstanding the fact that two pump supervisors walked, without incident, through a portion of the area during owl shift. Accordingly, I find that the condition was extensive and obvious, and that it had existed for at least three shifts, a significant timespan given the highly dangerous nature of unexpected trip and fall hazards in the escapeway, and the mandate that it **always** be maintained to assure safe passage of **everyone**. These are aggravating factors.

It is clear that Peabody was aware of the hazardous condition since February 18 evening shift, and also of the area's susceptibility to accumulations of water and muck. Moreover, the owl shift pump supervisors, having observed the targeted area on February 19, took no action to ensure that mobile scooping equipment was delivered to the area on their watch rather than relying on the next shift. While Peabody correctly points out that Allen mistakenly believed that no cleaning, whatsoever, had occurred before he issued the withdrawal order, it is clear that pumping at crosscut 82 was only the initial action necessary to abate the condition. Furthermore, termination of the order not only involved removal of the water and muck, but filling the holes, a

remedial step that it is reasonable to conclude would not have occurred, but for issuance of the order. Accordingly, I find that Peabody had knowledge of the condition, and that its abatement efforts were insufficient, both aggravating factors.

Shoal Creek was cited 17 times for violations of section 75.380(d)(1) in the two years preceding this order. Peabody took control of the mine on December 4, 2018 and, at the time of this order, two section 75.380(d)(1) citations had been issued directly to Peabody at the mine. Ex. P–16 at 6-7, 21. Notably, when ownership changed hands, pump supervisors Whitt and Kennedy, and safety supervisor Clements were retained by Peabody and, based on this violation history and the importance of maintaining passable escapeways in underground mines, Peabody should have appreciated the urgency in abating the condition. Accordingly, I find that Peabody was on notice that greater efforts for compliance with this emergency standard were necessary, also an aggravating factor.

After considering all the aggravating factors, I conclude that Peabody was highly negligent, and that this violation was the result of Peabody's unwarrantable failure to comply with the standard.

3. Order No. 9136341

Inspector Darryl Allen issued 104(d)(1) Order No. 9136341 on March 11, 2019, alleging an "S&S" violation of section 75.400 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Peabody's "high" negligence and unwarrantable failure to comply with the standard. *See supra* at 4 n.2. The "Condition or Practice" is described as follows:

> Combustible material in the form of wet and dry coal fines and coal muck, have been allowed to accumulate in the North Main 1 belt entry, and are observed in contact with the belt surface and belt rollers. The accumulation exists from cross cut 20, inby to the belt tail pulley at cross cut 22.5, a distance of approximately 400 ft. in length, x 20 ft. wide, and ranging from 6 to 24 inches deep. Coal fines are under the belt tailpiece, in contact with the bottom belt, and belt tail pulley. The belt has been shut off by the mine foreman, due to 8 seized belt rollers being rubbed by the moving belt, currently cited between cross cut 10 and the belt tail. Two bottom belt rollers are observed buried in packed coal, with only the top of the rollers visible on the off walkway side of the belt. Two of the seized belt rollers are observed near the tail piece at structure nos. 432 and 441. The bottom belt has been running on top of packed damp to dry coal fines from the tail pulley to cross cut 22, a distance of approximately 100 ft. in length. Coal accumulation at the North Main 1 belt tail has been reported by belt examiners and entered in the examination records for 8 consecutive shifts, from 3/8/19 during the 12:00 to 2:00 p.m. exam to 3/10/19 during the 8:00 to 10:00 p.m. exam. During the most

> recent pre-shift examination conducted this morning, 3/11/19 between 4:00 and 7:00 a.m., the examiner reported 3 frozen rollers including one roller that was broken. During today's inspection at approximately 11:00 a.m., these damaged rollers, and others, are still observed being rubbed by the moving belt. No miners are observed in the area at the time of inspection, and no corrective actions of reported conditions have been taken. The mine foreman has shut the belt off and called for a belt crew to begin corrective actions. Standard 75.400 was cited 131 times in two years at mine 0102901 (131 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P–10. The order was terminated on March 12, after Peabody removed the coal fines and coal muck from under the tailpiece and walkway. Ex. P–10.

A. Fact of Violation

The Secretary maintains that Peabody mine foreman Mike Earl, by and large, confirmed Allen's account of the condition. Sec'y Br. at 23. Peabody argues that because the material noted in the records had been cleaned recently, it was spillage rather than prohibited accumulations and that, given its wetness, it was not combustible. Resp't Br. at 34-35 (citing *Utah Power*, 951 F.2d at 295 n.11 (noting that operators must clean "loose coal" with "reasonable promptness"); *Consolidation Coal Co.*, 33 FMSHRC 385, 395-96 (Feb. 2011) (ALJ) (stating that cited material must be combustible in order to establish a violation of section 75.400.)).

1. Summary of Testimony

a. Darryl Allen

Inspector Darryl Allen testified for the Secretary that he continued the quarterly E01 inspection of Shoal Creek on March 11 around 7:00 a.m., and that he believed that accumulations in the North Main No. 1 tail area, identified in 11 consecutive pre-shift and on-shift reports, had not been fully addressed since March 7, noting that the condition had been recorded inconsistently as "hazardous" and "non-hazardous." Tr. 511, 518-539, 600-05; Exs. P–11 at 1, P–12 at 36-56. He testified that, upon arrival at the North Main No. 1 belt entry, he identified a seized roller near crosscut 10, that foreman Mike Earl stopped the belt, that continuing inby, he identified seven more seized rollers and issued a citation for eight seized rollers between crosscuts 10 and 22 ½, and that he also issued a citation for two nonfunctional fire hose outlets. Tr. 541-48. He stated that around crosscut 20 until around crosscut 22 ½, he found rib-to-rib accumulations of coal fines and coal muck, 6 to 24 inches deep, that the belt was in contact with coal accumulations in two places in the tail area for approximately 20 feet and 100 feet, respectively, and that two rollers were completely impacted by coal in the tail area. Tr. 541, 548-55, 557, 561, 572, 612; Exs. P–11, P–13(c)-(k). Allen described his photographs of the conditions, acknowledging that the exact locations depicted were unclear. Tr. 559-76, 617; Exs. P–13 (a)-(k), P–14 (a), (b). He asserted that he had touched the accumulations, and that

they were drying out at points of contact with the belt and rollers. Tr. 555-56, 565-67. By his account, no cleaning was occurring when the inspection party reached the affected areas, and no mobile cleaning equipment was present. Tr. 557. He estimated that cleaning would have required a crew of miners using shovels and mobile equipment, but acknowledged that MSHA has no specific requirements as to cleaning methods. Tr. 557-58, 590, 615. Based on the extensiveness of the accumulations, he opined that they could have existed for multiple weeks, and that the mine was aware of them from the records. Tr. 588-90. He acknowledged that when he returned to the cited area on March 12, four to five feet of material had been cleared from underneath the belt, and that some of it could have been noncombustible, such as fire clay. Tr. 591-94. Allen also testified about previous accumulations violations at Shoal Creek, stating that he had "tried to work with the mine" to prevent them, but that "they just didn't seem to improve any." Tr. 576-84, 595-96, 616; Ex. P–15(a)-(f).

b. Chris Robertson

Owl shift foreman Chris Robertson testified for Peabody that he had worked at the mine for about 10 years, that his schedule included alternate weekends, that weekends are used typically for maintenance, although the mine runs coal on Saturday sometimes, that the belts do not operate when the mine is not producing, and that the belt is not examined in its entirety during shifts when it is not running. Tr. 622-24, 626-28. He stated that he reviews the records at the beginning of his shift to identify hazards and assign workers, and explained that Peabody's examiners designate hazardous conditions either ("HC") for high priority, or ("HS") for lower priority non-hazardous health and safety conditions, and that the records reflect when a shift refers unaddressed issues to the next shift. Tr. 624, 626-28; Ex. P–12. He explained that the tail area was prone to accumulations, and that a full-time miner was stationed there to monitor accumulations. Tr. 658-62. Robertson reviewed the records from March 7 evening shift through March 11 owl shift, and testified that the belt was not running from Saturday, March 9 owl shift until Monday, March 11 owl shift, that the accumulations noted were not hazardous because there was no friction when the belt was not running, and that accumulations cannot be removed from the mine when the belt is shut down. Tr. 630-41; Ex. P–12 at 37-54. He stated that the belt was restarted between 3:00 and 5:00 a.m. on March 11, that the accumulations were cleaned at his direction during that shift, and that his account was based on his review of the records rather than his memory. Tr. 625, 629-39, 643-45; Ex. P–12 at 37-55. He noted that the accumulations identified in the March 11 owl pre-shift report were at crosscuts 23 and 24, not 22 where the tailpiece is located, that a sump, catching water and coal fines from the tail area near crosscuts 22 and 23, can be clogged by muck and coal, and that accumulations must be washed from under the belt when it is running, then scooped onto it to be taken out of the mine. Tr. 639-41, 647-53; Ex. P–12 at 56. He noted that when the belt is shut down, it can be "bumped," i.e., intermittently started and stopped quickly, for loading, but that it needs to run in order to take accumulations out of the mine. Tr. 645-50. Finally, he acknowledged that accumulations in contact with turning rollers can dry out, but opined that because the tail area is always wet, that would not happen. Tr. 642-43, 651.

c. Mike Earl

Day shift mine foreman Mike Earl testified for Peabody that he worked at Shoal Creek from 2003 to 2006 and, currently, since 2009. Tr. 656. He explained that all coal transported out of the mine travels on the North Main No. 1 belt, that the sump helps control accumulations around the tail area, and that a full-time employee is stationed there because the belt entry is susceptible to water and accumulations, which can occur quickly. Tr. 657-62. He testified that on March 8, he reviewed the owl pre-shift report for that day, noted the hazardous accumulations at crosscut 22 in the North Main No. 1 belt entry, and that he countersigned the report which indicated that men had been assigned. Tr. 675-76; Ex. P–12 at 38. Earl stated that at the beginning of his shift on March 11, he reviewed the record and delegated work assignments, then joined the inspection party. Tr. 655, 662, 669, 675-77. According to him, the inspection party entered the North Main No. 1 belt entry at crosscut 6 and, walking inby, found the seized roller around crosscut 10, which had been noted in the examination record, and he turned off the belt and called Johnathan Aaron to fix it. Tr. 663-69. He stated that as the inspection party approached the tailpiece, beltline attendant Aaron Thrasher was washing material from under the belt between crosscuts 22 and 23, that he told Thrasher to turn off the water, and that he did not recall any mobile equipment in the area. Tr. 664-66, 670. His testimony was inconsistent as to where the cited accumulations began and, ultimately, he stated that he could not remember, but that they could have started anywhere between crosscuts 20 and 22 ½, that they stretched 80 to 100 feet, and that there were coal fines on rollers and accumulations in contact with the belt. Tr. 664, 667-68, 671-73. He acknowledged that cleaning would require spraying by more than one miner, and that the belt would have continued running if he had not shut it down when the inspection party reached crosscut 10. Tr. 674, 678. He also testified that the order was terminated by cleaning that continued from day shift through evening and owl shifts. Tr. 678-79.

d. Johnathan Aaron

Day shift dewater supervisor Johnathan Aaron testified for Peabody that he supervised the tail area of the North Main No. 1 belt and delivered equipment, explaining that he would review examination records and delegate work, and that on March 11 day shift, he assigned Aaron Thrasher to change rollers at crosscuts 20 and 21 and clean accumulations in the tail area, noting that he would need to spray and use a skid steer. Tr. 682-87, 700; Ex. P–12 at 56. He testified that the skid steer was down, that while he and Thrasher were repairing it, Mike Earl called him about a seized roller at crosscut 10, that he left Thrasher working on the skid steer and that, subsequently, Thrasher went to clean the tail area. Tr. 688-91, 696-700, 713-14; Ex. R–2. According to Aaron, he did not become aware of the extensiveness of the accumulations at the tailpiece until Allen found them. Tr. 691, 699, 713-14. He explained that the belt department has 10 skid steers, 7 Lo Tracs,[7] and 2 loaders, that not all mobile equipment is available at any given time and that, immediately after the order was issued, 10 miners terminated the order using loaders, skid steers, and Lo Tracs. Tr. 701-04, 711-15; Ex. R–2.

[7] Lo Tracs are mobile equipment used by Peabody to remove material from underneath the belts. Tr. 702.

2. Analysis

Restated, a violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben II*, 2 FMSHRC at 2808.

Although Shoal Creek is a wet mine and the tail area in the North Main No. 1 belt entry is particularly wet, the unrebutted evidence that the accumulations were drying out in several places belies Peabody's contention that the accumulations were non-combustible. Furthermore, its contention, that the accumulations were spillage because of recent occurrence, is also unavailing. *See Black Beauty*, 703 F.3d at 558-59, 559 n.6 (explaining that operators are not afforded a reasonable time to clean accumulations before a violation of section 75.400 can be found, and that accumulations of combustible materials substantial enough to propagate a fire are prohibited, even if recent). Accordingly, based on the evidence in its entirety, I find that there were accumulations of coal fines and coal muck, from around crosscut 20 to 22 ½, entry-wide, that there were several points of contact between the accumulations and the belt, that two rollers were completely impacted by coal, that eight rollers, some in the tail area, were seized, and that some accumulations had dried out due to frictional contact and, therefore, were combustible. Accordingly, I conclude that Peabody violated section 75.400.

B. Gravity

The Secretary argues that, given the realistic potential for fire to occur, the violation was S&S. Sec'y Br. at 23-25. Peabody maintains that an ignition was unlikely to occur because of the wet conditions in the mine and absence of methane, and further, that its active cleanup was interrupted by Allen. Resp't Br. at 36-37.

The fact of violation has been established, satisfying the first *Mathies* criterion, and the discrete safety hazard against which section 75.400 is directed is fire or explosion contributed to by accumulations of combustible materials.

The evidence establishes that beltline attendant Aaron Thrasher was assigned to clean the tail area at the beginning of March 11 day shift, but was delayed because the skid steer was down, and that he was repairing it with dewater supervisor Johnathan Aaron when the inspection started. Ultimately, Thrasher went to the tail area to clean without a functioning skid steer. While Allen did not see any cleaning underway in the tail area, I credit that Thrasher was spraying under the belt when the inspection party reached the area, and that he stopped cleaning at Earl's direction. Notably, it took 10 miners, cleaning with hoses and mobile equipment through the day, evening, and owl shifts, to remove the accumulations. Accordingly, based on Peabody's scanty allocation of manpower and mobile equipment for cleanup prior to issuance of the order, I find that the accumulations would have existed in the context of continued normal mining. Despite Shoal Creek's gassy nature, there is no evidence that methane was liberated in the cited area. However, based on the evidence of extensive accumulations in contact with the belt and rollers, multiple seized and impacted rollers, and accumulations drying out due to frictional contact, I find that the coal accumulations contributed to the reasonable likelihood of a fire in the mine, and that the second *Mathies* criterion has been satisfied.

The evidence also establishes that in the event of a mine fire, at the very least, the full-time miner stationed at the tail area would be exposed to smoke-filled air. Moreover, fire burning in the underground coal mine would present a serious risk of smoke and gas inhalation, resulting in injuries of a reasonably serious nature, satisfying the third and fourth *Mathies* criteria. *See Buck Creek*, 52 F.3d at 135-36; *see also Black Diamond*, 7 FMSHRC at 1120. Accordingly, I find that this violation was S&S.

C. Unwarrantable Failure and Negligence

In support of the unwarrantable failure designation, the Secretary asserts that the accumulations were extensive, obvious, and highly dangerous, that they had existed for at least 11 shifts preceding inspection, that Peabody had knowledge of the condition, that its efforts to abate it were inadequate, and that it was on notice that greater efforts were necessary for compliance. Sec'y Br. at 25-29.

Peabody contends that the unwarrantable failure designation is inappropriate because the accumulations in the North Main No. 1 belt entry, noted in the March 8 owl pre-shift report, were cleaned during the next evening shift and recorded as non-hazardous in the pre-shift report, then partially cleaned during March 9 owl shift, and fully cleaned during March 11 owl shift. Resp't Br. at 38-41. Peabody also maintains that the cited accumulations were new, having existed for less than a shift, that they were not extensive, and that it was not on notice that greater efforts for compliance were required. Resp't Br. at 40-42.

The evidence establishes that coal accumulations, rib-to-rib, spanning an area from around crosscut 20 to crosscut 22 ½, were in contact with the belt and rollers, that two rollers were completely impacted by them, that multiple rollers, some in the tail area, were seized, and that some of the accumulations had dried out. This extensive and obvious condition created a serious risk of ignition, and was highly dangerous. These are aggravating factors.

Examination records indicate that the accumulations in the North Main No. 1 belt entry tail area began on Thursday, March 7 evening shift and continued throughout the weekend, and that some cleaning in the tail area had occurred during March 8 evening, and March 9 and 11 owl shifts. Foreman Chris Robertson's testimony that the tail area was completely cleaned on March 11 owl shift is undercut by the extensiveness of the coal accumulations in contact with the belt and rollers, the rollers completely impacted with coal, and the seized rollers that the inspection party encountered later that morning, a condition reasonably likely to have developed over several shifts. Moreover, if accumulations are commonplace in the tail area, as Peabody contends, one full-time miner stationed there would seem reasonable to monitor them, but would constitute insufficient manpower to keep them in check. In light of the credible observations of the accumulations and the evidence as a whole, I find that the area was not completely cleaned during March 11 owl shift, and that what did occur did not even put a dent in the condition. Nevertheless, crediting Peabody's assertion - - that the condition was not hazardous for the better part of the weekend when the belt was not running - - does not negate that it became hazardous when it was not fully abated before production resumed on March 11 owl shift. Accordingly, I

find that the accumulations existed, to varying degrees, since March 7 evening shift until the inspection on March 11 day shift, and that Peabody was aware of it, both aggravating factors.

The evidence indicates that some cleaning in the North Main No. 1 belt entry had occurred during multiple shifts on March 8, March 9, and March 11, and that Thrasher had been spraying under the tail without any mobile equipment when the area got inspected. Notably, it ultimately took 10 miners, cleaning with hoses and mobile equipment over a period of three shifts, to terminate the order, a sizeable work crew compared to the lone miner hosing the area. Accordingly, I find that Peabody's efforts fell far short of what was required to abate the hazardous condition, and this is an aggravating factor.

The Commission has emphasized that "past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal*, 29 FMSHRC at 131 (quoting *Consolidation Coal*, 23 FMSHRC at 595); *see also Amax Coal*, 19 FMSHRC at 851. Shoal Creek Mine had 131 section 75.400 violations in the past two years and, although Peabody took control of the mine on December 4, 2018, at the time of this order, 20 section 75.400 violations had been issued directly to Peabody. Exs. P–10, P–16 at 6-7, 21. Additionally, Allen had tried to assist management in preventing coal accumulations during prior inspections, and the record establishes that shift foremen Chris Robertson and Mike Earl had also worked at Shoal Creek under the prior ownership. Accordingly, I find that Peabody was on notice that greater efforts for compliance with this standard were necessary, another aggravating factor.

After considering these aggravating factors, I conclude that Peabody exhibited a high degree of negligence, and that this violation was the result of its unwarrantable failure to comply with the standard.

IV. Penalties

While the Secretary has proposed a total civil penalty of $76,061.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act:

> (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation.

30 U.S.C. § 820(i); *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Additionally, the Commission has recognized the difference between regularly and specially assessed proposed penalties, requiring that judges explain divergences from regularly assessed penalties but not those specially assessed, and avoid using special assessments as anchoring points in setting penalties. *Solar Sources Mining, LLC*, 42 FMSHRC 181, 190-202, 198 n.25 (Mar. 2020); *see also American Coal Co.*, 933 F.3d 723, 727 (D.C. Cir.

2019) (explaining that the Secretary is under no obligation to "prove" his decision to propose a special assessment rather than a regular assessment).

Two of the three charges in this proceeding involve serious accumulations violations. While the Secretary has based his proposed penalty for the violation in the H-2 belt entry on application of his Part 100 penalty points, the proposed penalty for the arguably similar violation in the North Main No. 1 belt entry has been specially assessed. One plausible explanation for this difference in approach is that the 104(d)(1) citation in the H-2 belt takeup area preceded the 104(d)(1) order in the North Main No. 1 tail area by a mere three months, clearly placing Peabody under heightened scrutiny to prevent recurrent violations.

Applying the *Sellersburg* penalty criteria, and based on a review of MSHA's online records, I find that Peabody is a large operator. The record also indicates that Peabody demonstrated good faith in achieving rapid compliance after notice of the violations, and consideration of the Assessed Violation History Reports follows for the one citation and two orders. The parties have stipulated that imposition of the proposed penalties will not adversely affect Peabody's ability to remain in business. Jt. Stip. 6. The remaining criteria involve consideration of the gravity of the violations, and Peabody's negligence in committing them, factors that have already been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

1. Citation No. 9136082 (SE 2019-0075)

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, and that it was caused by Peabody's high negligence and unwarrantable failure to comply with the standard. In the fifteen-month period preceding issuance of this citation, 87 violations of section 75.400 issued to Shoal Creek became final orders of the Commission. Ex. P–16 at 10, 19, 21. Because of the overlap in Drummond and Peabody management when Shoal Creek ownership changed hands, as well as evidence that accumulations violations were problematic at the mine and the cited area was prone to accumulations, I find the violation history aggravating. The Secretary has proposed a regularly assessed penalty of $3,161.00 for this serious violation. Applying the civil penalty criteria, I find that a penalty of $7,500.00 is appropriate.

2. Order No. 9136320 (SE 2019-0146)

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in a fatality, and that it was caused by Peabody's high negligence and unwarrantable failure to comply with the standard. In the fifteen-month period preceding issuance of this order, 12 violations of section 75.380(d)(1) issued to Shoal Creek became final orders of the Commission. Ex. P–16 at 6-7, 21. Because of the overlap in Drummond and Peabody management when Shoal Creek ownership changed hands, I find the violation history aggravating. The Secretary has specially assessed a penalty of $57,700.00 for this serious violation. Applying the civil penalty criteria, I find that a penalty of $38,500.00 is appropriate.

3. Order No. 9136341 (SE 2019-0146)

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, and that it was caused by Peabody's high negligence and unwarrantable failure to comply with the standard. In the fifteen-month period preceding issuance of this order, 88 violations of section 75.400 became final orders of the Commission. Ex. P–16 at 10, 19, 21. Because of the overlap in Drummond and Peabody management when Shoal Creek ownership changed hands, along with the recent, serious accumulations violation in the H-2 belt entry and MSHA's emphasis on accumulations prevention at the mine, I find the violation history aggravating. The Secretary has specially assessed a penalty of $15,200.00 for this serious violation. Applying the civil penalty criteria, I find that a penalty of $15,000.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 9136082, and Order Nos. 9136320 and 9136341 are **AFFIRMED**, as issued, and that Peabody Southeast Mining, LLC, **PAY** a civil penalty of $61,000.00 within 30 days of the date of this Decision.[8] **ACCORDINGLY**, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

[8] Payment should be made electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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