FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. BRODY MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2009-1000 A.C. No. 46-09086-178774-01 Docket No. WEVA 2009-1306 A.C. No. 46-09086-181457-01 Mine: Brody Mine No. 1

DECISION ON REMAND

Appearances: J. Matthew McCracken, Esq., and Amos H. Presler, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;

Jason M. Nutzman, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia, for Respondent.

Before: Judge L. Zane Gill

This case is before me on remand from the Commission. 37 FMSHRC 1687 (Aug. 2015). On May 23, 2011, I issued a decision after hearing for the eight section 104(d)(2) orders contained in these two dockets. 33 FMSHRC 1329 (May 2011) (ALJ). On appeal, the Commission remanded determinations made for seven of these orders.[1] 37 FMSHRC at 1707.

I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

The seven orders at issue were written by MSHA Inspectors Charles H. Ward and James Jackson on five different dates between January 15 and March 3, 2009, at Brody Mine No. 1. A hearing was held on December 16 and 17, 2010, in Beckley, West Virginia. In my May 23, 2011 decision, I found a violation in each instance and made various findings and determinations. On August 25, 2015, the Commission remanded one or more determinations for each of the seven orders. Specifically, the Commission concluded that I erred in finding certain facts mitigating and I failed to consider certain arguments and facts in my analyses.

[1] Neither party appealed the determinations made regarding the section 104(d)(2) Order No. 8068033.

Regarding the tail piece accumulations violation, I determined it was not significant and substantial ("S&S")[2] or an unwarrantable failure[3] and concluded that moderate negligence was appropriate. The Commission remanded both the S&S and unwarrantable determinations. With regard to the two ventilation related violations, I determined that neither was unwarrantable and reduced the level of negligence assessed. For the inadequate pre-shift examination violation, I determined it was not unwarrantable and reduced the gravity assessed. The Commission remanded the unwarrantable determinations in these three orders, along with the gravity determination for the pre-shift examination violation and the negligence determinations for the other two. The remaining three violations I determined were unwarrantable and concluded moderate negligence was appropriate for each. The Commission remanded the negligence determinations for all three. The Secretary[4] proposed a total penalty of $218,354 for the seven orders. I concluded that a total penalty amount of $32,500 was appropriate. On appeal, the Commission remanded penalty determinations as necessary.

Consequently, the issues before me on remand are: (1) whether the tail piece accumulations violation in Order No. 8079179 was S&S and unwarrantable; (2) whether the ventilation plan violations in Order Nos. 8075863 and 8075874 were unwarrantable and the appropriate level of negligence of the operator; (3) whether the pre-shift examination violation in Order No. 8075864 was unwarrantable and the appropriate gravity; (4) what are the appropriate degrees of negligence for the escapeway (Order No. 8079178), missing guard plate (Order No. 8075906), and feeder accumulations violations (Order No. 8079224); and, (5) whether the proposed penalty assessments are appropriate where my earlier determinations are modified.

II. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a

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

[3] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with [. . .] mandatory health or safety standards."

[4] At the time of the petition and original decision, the Secretary of Labor was Hilda L. Solis. The current Secretary of Labor is R. Alexander Acosta.

reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103–04 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). The Commission has further found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence

Negligence is not defined in the Mine Act. The Commission determines negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining*, 37 FMSHRC at 1702). Each mandatory regulation carries a requisite duty of care. *Id.* In making a negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id.* In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically" and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining*, 37 FMSHRC at 1703). Because Commission Judges are not bound by the negligence definitions in Part 100, a Judge may find "high negligence" in spite of mitigating circumstances or may find "moderate" negligence without identifying mitigating circumstances. *Id.* In this respect, the Commission has recognized that the gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).

C. Unwarrantable Failure

The Commission has held that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). It is characterized by "indifference," a "serious lack of reasonable care," or "reckless disregard." *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (approving the

Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

III. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Brody Mine No. 1 is located in Boone County, West Virginia. At the time the orders were issued, it had nine working faces and extracted 2,250,965 tons of coal per year. (Tr.308:15–17; Pet., Ex. A) The mine is classified as "gassy," as it emits approximately 1.5 million cubic feet of methane per day. (Tr.28:20–29:10) Gassy mines are inherently dangerous due to the higher risk of an explosion from rapid methane build up. (Tr.34:5–15, 96:16–97:6) The Mine Act requires that MSHA conduct spot inspections at least every five working days at irregular intervals for mines liberating more than 1 million cubic feet of methane. 30 U.S.C. § 813(i).

A. Order No. 8079179 – Tail Piece Accumulations Violation

Inspector Jackson issued Order No. 8079179 on January 22, 2009, for a violation of 30 C.F.R. § 75.400, which provides that "[c]oal dust [. . .] shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." He estimated the accumulations to be 31 feet long, 4 feet wide, and 6 to 17 inches deep. (Ex. S–10) They were located on the offside[5] of a belt line tail piece, in contact with the belt and tail piece rollers. *Id.*

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated reckless disregard. (Ex. S–10) She proposed a penalty of $70,000. I held that the violation was not S&S based on the presence of redundant fire safety measures. 33 FMSHRC at 1356–57. I held it was not an unwarrantable failure based on finding that the coal spillage had not accumulated in the hours between the pre-shift exam and MSHA inspection. *Id.* at 1354–55. I concluded that the operator demonstrated only moderate negligence because I found the wetness of the mine to be mitigating and did not credit the inspector's testimony regarding the accumulations drying out on the roller. *Id.* at 1355. On appeal, the Commission faulted my decision for failing to clearly and consistently explain my

[5] The offside of a belt is the side miners do not travel on. (Tr.143:4–17) The offside of a vehicle is the side opposite the driver. (Tr.52:20–24, 100:17–21)

findings (1) for the second *Mathies* step of the S&S analysis; (2) on whether rock dust was present on the accumulations; (3) on the duration of the violation; and, (4) on the operator's history of accumulations violations. 37 FMSHRC at 1690–94. The Commission also faulted the decision for failing to consider or note all relevant factors—including danger, extent, knowledge, and obviousness—and for failing to discuss certain evidence—including the notation in the pre-shift exam that the tailpiece needed spot cleaning. *Id.* at 1691–94. The Commission further held that I erred by finding that redundant safety measures mitigated the likelihood of an injury in my S&S determination. *Id.* at 1691. The Commission therefore remanded to me the S&S and unwarrantable determinations.[6]

1. Further Findings of Fact

Inspector Jackson described the accumulations as compacted, dry, and in contact with the front and rear rollers of the belt. (Ex. S–10; Tr.119:2–15) He also noted that the coal at the front roller had turned gray to white in color, indicating significant heat that could lead to a fire, despite the wet conditions in that area of the mine. (Tr.119:16–120:15) Glenn Fields, superintendent at Brody, suggested it was possible that rock dust could account for the white color of the coal accumulations at the roller.[7] (Tr.210:4–10) However, Fields also acknowledged that Brody avoids spreading rock dust onto mined coal and conveyor belts. (Tr.219:7–21) Furthermore, Jackson testified that the rest of the coal accumulations were black, indicating they were untouched by rock dusting. (Tr.142:19–24) Upon re-examination of the record, I credit Jackson's testimony that heat from the roller accounted for the lighter color of the coal accumulation contacting it. (Tr.119:2–120:15) Though Jackson did not touch the accumulations to confirm they were dry and hot, I credit his testimony over the alternative Brody presented—that miners accidentally spread rock dust only at the exact location where the belt roller contacts the accumulations. (*See* Tr.142:19–24) On that basis, I further find that there was no rock dust on the accumulations to mitigate the danger of a fire.

2. Significant and Substantial

I previously found a violation of 30 C.F.R. § 75.400, satisfying the first *Mathies* element. 33 FMSHRC at 1354. The second *Mathies* element requires the Secretary to show that the violation created a reasonable likelihood that the hazard section 75.400 aims to prevent would occur. Section 75.400 mandates that an operator prevent coal dust and other combustible materials from accumulating in active areas of the mine. Its purpose is to prevent the specific hazard of an explosion or an ignition, causing a mine fire. *Old Ben Coal Co.*, 1 FMSHRC 1954, 1956–57 (Dec. 1979) (noting that Congress included standards in the Mine Act aimed at eliminating ignition and fuel sources for explosions and fires when discussing 30 C.F.R.

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[6] The Secretary did not appeal the moderate negligence determination and it was not reviewed by the Commission. 37 FMSHRC at 1692 n.7.

[7] Rock dust is a non-combustible powder used to suppress coal dust and reduce its combustibility. (Tr.209:3–14) Though Inspector Jackson stated that rock dust is black in his testimony, I find the Commission's suggested explanation that he simply misspoke persuasive. 37 FMSHRC at 1690 n.6.

§ 75.400) Though this area of the mine was very wet, the coal accumulations at issue were in contact with a roller and were drying out due to friction. (Tr.119:2–15) I previously noted that there is "an articulable and credible danger that even wet coal accumulations can be heated by belt friction to the point of ignition." 33 FMSHRC at 1356. I also previously credited Jackson's testimony that the roller could act as an ignition source. (Tr.119:19–120:11) Furthermore, I concluded above that the white color of the coal accumulations, where they contacted the roller, was not due to rock dust but from the coal heating up and drying out.

Brody suggests using *Cumberland Coal*, an ALJ case, as a guiding precedent, but that case is not controlling and the circumstances at issue here are markedly different. *Cumberland Coal Res., LP*, 31 FMSHRC 137 (Jan. 2009) (ALJ). The accumulations in that case were widespread but were only one-half to four inches deep and were not near the belt rollers, nor was there a likely ignition source present. *Id.* at 144–52. I also reject Brody's argument that the temporary absence of methane provides any significant mitigation against the likelihood of a fire. I note that the likelihood of a hazard occurring is analyzed assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574. I therefore find it reasonably likely that, under continued normal mining operations, friction from the belt roller would ignite the dried out coal accumulations, starting a fire.

With regard to the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the hazard contributed to will result in an injury. As noted by the Commission, the likelihood of injury is not mitigated by redundant safety measures. *Buck Creek Coal*, 52 F.3d at 136. A belt fire would generate significant smoke, requiring evacuation of the mine and necessitating firefighting activities by miners. (Tr.120:12–15) Thus, the consequences of a fire pose additional significant risks of injury to miners. Discounting the safety measures in place, I find it reasonably likely that a belt fire would result in an injury. Finally, under the fourth *Mathies* element, there must be a reasonable likelihood that the resulting injury will be of a reasonably serious nature. The most likely resulting injuries would be smoke inhalation or asphyxiation, which are reasonably serious injuries and would minimally result in lost workdays or restricted duty. *See, e.g., Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1140–41 (May 2014) (affirming the ALJ's finding that smoke inhalation or asphyxiation constitute a serious injury)

The Secretary has satisfied all four elements of the *Mathies* test. I hold that Order No. 8079179 was appropriately designated as S&S. For the same reasons, I conclude the violation was reasonably likely to result in lost workdays or restricted duty for eight miners.

3. Unwarrantable Failure

An unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC at 2004. Here, the Secretary did not appeal, and the Commission did not review, the determination that Brody demonstrated only moderate negligence. 37 FMSHRC at 1692 n.7. The D.C. Circuit Court has suggested that a moderate negligence determination "does not foreclose a finding of an 'unwarrantable failure'" when that conclusion is based upon MSHA's section 100.3(d) definitions of negligence. *Excel Mining, LLC v. Dep't of Labor*, 497 Fed. Appx. 78, 79–80 (D.C. Cir. 2013). In my original decision, I cited 30 C.F.R. § 100.3 extensively and concluded that, based upon those definitions, "[a]

finding of high negligence requires a finding of no mitigating circumstances." 33 FMSHRC at 1355. On appeal, the Commission has clarified that under the Mine Act, a traditional negligence analysis is required that examines the requisite duty of care imposed by a standard and reaches a conclusion based on the totality of circumstances holistically. 37 FMSHRC at 1701–03.

In my decision, I reached the conclusion of moderate negligence based upon the wetness of the mine and by discounting the inspector's testimony as to whether the accumulations in contact with the roller were white from drying out or due to rock dust. On re-examination of the evidence, I credited the inspector's description of the accumulations as drying out due to the heat caused by the friction of the belt roller and concluded there was no rock dust present. Though this area of the mine was very wet, potentially reducing the effect of a fire, the wetness does not significantly reduce Brody's required standard of care when complying with MSHA safety standards. If the issue were before me now, under a traditional negligence analysis, I would conclude that Brody's negligence is toward the low-end of "high negligence." However, as the negligence issue is not before me, I will proceed in light of the D.C. Circuit Court's suggestion that an unwarrantable failure determination is not precluded by moderate negligence. An unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission's unwarrantable factors. *See* discussion *supra* Section II.C.

The degree of danger posed by a violation is determined by an examination of the relevant facts and circumstances. I concluded above that the violation was S&S and reasonably likely to result in lost workdays or restricted duty. Brody alleges that this was a very wet area of the mine and the coal accumulations were "completely saturated [and] muddy." (Tr.200:22–201:8, 210:9–10) In contrast, Jackson described Section No. 3, where the accumulations violation occurred, as "fairly wet." (Tr.123:2) However, he also cited Brody for flooding 175 feet of the Section No. 3 primary escapeway with 12–20 inches of water. (Tr.122:20–23, 132:3–6, 138:4–15) Nevertheless, the coal accumulations were drying out from contact with the roller and turning white, indicating heat was being generated, and "even wet coal accumulations can be heated by belt friction to the point of ignition." (Tr.119:2–120:11); 33 FMSHRC at 1356. I therefore find that the violation posed a high degree of danger and that danger is an aggravating factor.

In terms of the duration, the Secretary alleges that the accumulations were present for more than one shift. Inspector Jackson testified that, based on the amount of coal accumulations and the fact only 30 feet of coal had been mined up to that point in the shift, there would have been "some accumulations" present when the shift started. (Tr.121:10–122:1) Indeed, the pre-shift exam conducted between 4:00 a.m. and 7:00 a.m. noted that the tail piece needed to be "spot cleaned." (Ex. R–4, at 20; Tr.206:7–12) While Fields dismissed this notation as not indicative of a hazard, on remand I credit Jackson's testimony and infer from this record that some small quantity of coal accumulations was present for the pre-shift exam. (Tr.121:22–122:1, 206:7–18) I therefore find that the violation existed for at least seven hours based on Jackson issuing the order at 11:30 a.m., approximately seven hours after the pre-shift examination began. (Exs. S–10, R–4) I find the length of time the violation existed aggravating. *See, e.g.*, *Buck Creek Coal*, 52 F.3d at 136 (finding unwarrantable failure where cited accumulation must have been present since at least previous shift); *Old Ben Coal Co.*, 1

FMSHRC at 1959 (holding unwarrantable failure where accumulation had existed for less than one shift).

Regarding the extent element, the accumulations were 31 feet long, 4 feet wide, and 6 to 17 inches deep, and located alongside the belt, and in contact with the belt rollers. (Ex. S–10; Tr.118:7–119:15) I therefore find the extent of the violation to be an aggravating factor. Due to the extent of the accumulations, they should have been obvious to an examiner even though they may not have been obvious to miners passing by as they were on the off-side of the belt. (Tr.207:18–208:4; *see* Tr.139:13–15) Furthermore, the pre-shift exam noted that the tailpiece was dirty, suggesting the examiner saw the accumulations. I therefore find that obviousness was an aggravating factor. I find further that the pre-shift exam provided Brody with a sufficient basis to know of the violation at 7:00 a.m. Its knowledge was an aggravating factor.

Brody was cited 29 times in the previous four months for violations of 30 C.F.R. § 75.400. (Tr.122:2–9; Ex. S–10) In accord with my previous determination under Order No. 8079224, I reiterate that Brody was on notice that greater efforts were required for compliance, as Brody had shown that it was "generally indifferent" towards accumulations violations. 33 FMSHRC at 1385. I therefore find notice to be an aggravating factor and accord it significant weight in my determination. Although Brody had noted the dirty condition of the tail piece in its pre-shift report, it had not begun to address it. I conclude that the lack of abatement was an aggravating factor.

On remand, I find Brody's notice the most significant aggravating factor. Due to the facts and circumstances of this violation, I find the danger, duration, obviousness, knowledge, extent, and abatement factors to be aggravating but accord them less weight in my determination. After weighing all the evidence as a whole, I conclude that the violation was an unwarrantable failure.

B. Order No. 8075863 – Flypad Ventilation Violation

Inspector Ward issued Order No. 8075863 on January 15, 2009, for a violation of 30 C.F.R. § 75.370(a)(1), which provides, in part, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager." Ward observed that the flypads[8] in the last crosscut before the working faces were held up horizontally by the air current. He measured the air flow at 1,974 cubic feet per minute ("CFM") at the nearby No. 6 working face and 1,462 CFM at the nearby No. 5 working face. (Tr.27:1–8; Ex. S–2) Brody's ventilation plan required 3,000 CFM at both locations. (*Id.*)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S–2) She proposed a penalty of $5,211. (Pet., Ex. A) Prior to hearing, the Secretary stipulated that the violation was not S&S. (Tr.12:2–10) I held that the violation was not an unwarrantable failure based on the absence of methane at

[8] Flypads are wide, flat, semi-clear plastic strips hung vertically in an overlapping pattern to act as a curtain that allows equipment and personnel to pass through while still controlling airflow. (Tr.34:21–35:10, 291:2–18)

the face and the inspector's focus on the airflow rather than the methane present. 33 FMSHRC at 1338–39. I concluded that the operator showed only moderate negligence based on the absence of methane. *Id.* at 1337. On appeal, the Commission faulted my decision for failing to address certain evidence, including the inspector's meeting with mine management, the gassy status of the mine, the prior ventilation plans, the Secretary's stipulation that the violation was not S&S, and the reduction in gravity, which was not appealed. 37 FMSHRC at 1697–704. The Commission also faulted the decision for failing to consider or note all relevant unwarrantable factors, including duration and obviousness. *Id.* at 1697–700. It faulted the decision for failing to clearly and consistently explain findings for duration and knowledge. *Id.* at 1698–99. It also held that I erred by discounting the operator's history of prior violations and by finding the absence of methane mitigating in my unwarrantable failure and negligence analyses. *Id.* at 1699–700. The Commission therefore remanded to me the unwarrantable failure and negligence determinations.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. Here, 30 C.F.R. § 75.370(a)(1) requires the operator to adhere to its approved ventilation plan. In particular, Brody's plan required 3,000 CFM of air flow at all idle working faces. (Tr.27:1–8) Importantly, this mine is classified as "gassy," as it emits 1.5 million cubic feet of methane per day. (Tr.28:20–29:10) Compliance with the ventilation plan is critical in gassy mines to prevent the buildup of methane, raising the standard of care expected of Brody. (Tr.34:5–15) Brody therefore had a high standard of care to meet in adhering to its ventilation plan.

Brody failed to meet the requirements of its ventilation plan, falling short by roughly 50% at the No. 5 face and 33% at the No. 6 face. (Tr.27:1–8; Ex. S–2) This violation would have been obvious to anyone who saw the flypads blown up into a horizontal position, as their position would suggest that the air flow to nearby faces was being short-circuited. (Tr.35:4–24, 42:24–43:6) Nevertheless, the condition was not reported in the pre-shift examination conducted two hours prior to the MSHA inspection. (Tr.43:12–24, 69:3–11; *see* Exs. R–2, S–4) Brody argues that the condition could have been created by a passing scoop, sometime after the examination was finished but before the MSHA inspection. (Tr.301:4–15, 313:18–314:6) However, properly installed flypads should fall back into place after being pushed aside by machinery. (Tr.73:6–16, 81:10–24; *see* Tr.315:1–13, 316:7–24) Furthermore, to abate the violation and reinforce the flypads, one or two additional layers of material had to be added to provide enough weight to control the air flow. (Tr.73:17–22, 316:7–10) Brody did not offer a credible explanation as to why such significant measures were required to abate the violation. I conclude that the conditions claimed by Ward were present, at a minimum, for the entire previous shift, which was idle for maintenance. As the conditions were present for the pre-shift exam, Brody should have known that the air flow to nearby faces was being short circuited, violating its ventilation plan.

Brody argues that there were mitigating circumstances. It first points to the lack of methane detected at the time of the inspection, which the Commission held is irrelevant to a

negligence analysis. 37 FMSHRC at 1703. Brody next points to the lack of activity at the mine faces as a factor that mitigates the level of danger present. However, because the previous shift still had miners conducting maintenance tasks, and the miners on the shift after the inspection were actively mining, any mitigation is minimal. Finally, Brody points to the absence of any violations recorded by the pre-shift examiner as evidence that this violation occurred after the exam and was therefore short-lived. However, Inspector Ward concluded from this omission that the pre-shift exam was inadequate, and cited Brody for it. Based on the previously discussed evidence that the violation was present at the time of the pre-shift exam, I credit Ward on this point.

Further elevating Brody's negligence is its failure to better supervise and train miners to report and abate ventilation violations despite considerable prior notice that it was failing to abide by its ventilation plan. *See Consolidated Coal Co.*, 35 FMSHRC 2326, 2345–46 (Aug. 2013) (finding the operator's failure to properly train and supervise miners after repeated ventilation plan violations, in a gassy mine, relevant to negligence). Brody was cited 31 times for the same standard in the 10 weeks prior to the order, and an explicit warning was given to mine management. (Tr.30:16–31:2, 32:3–19, 33:5–14) Based on the high standard of care required for a gassy mine, the obviousness of the violation, Brody's implied knowledge, and its failure to better train miners after extensive prior notice, I conclude that Brody demonstrated high negligence.

2. Unwarrantable Failure

Brody demonstrated high negligence through its failure to abide by the requirements of its ventilation plan. The Commission has "recognized that a finding of high negligence suggests unwarrantable failure." *Eagle Energy, Inc.*, 23 FMSHRC 829, 839 (Aug. 2001). As previously discussed, an unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission's unwarrantable factors. *See* discussion *supra* Section II.C.

The Commission noted in its decision that "significant weight" should be placed on a mine's gassy status in determining the degree of danger posed by a violation. 37 FMSHRC at 1697. It further noted that an absence of methane at the time of the inspection does not mitigate the danger posed by a gassy mine, as methane can accumulate quickly. *Id.* As previously discussed, Brody Mine No. 1 is a gassy mine. (Tr.28:20–29:10) I credit Inspector Ward's testimony regarding the potential dangers of a rapid buildup of methane under low airflow conditions leading to an explosion. (Tr.34:5–15, 96:16–97:6) Thus, a violation of the ventilation plan in a gassy mine suggests a higher level of danger.

Brody argued that the level of danger was mitigated by several factors. First, Brody argues that the purpose of the ventilation plan was to flush out methane, so its absence at working faces suggests a properly functioning system. (Tr.76:20–77:14, 359:13–21) In support, Brody points to Ward's testimony that he would not cite the same conditions under the new ventilation plan that was in place at the time of the hearing. (Tr.85:15–86:13, 359:9–12) However, Brody's ventilation plan in place at the time of the order is controlling. There is insufficient evidence before me to evaluate how an alternative airflow requirement that was adopted under potentially dissimilar circumstances might reflect on the level of danger posed by

the circumstances at issue. Though the 3,000 CFM air flow requirement was removed for idle working faces, other changes in the plan may have compensated for that reduction.

Second, Brody suggests *Consolidation Coal*, an ALJ case, as a guiding precedent. *Consolidation Coal Co.*, 23 FMSHRC 270 (Mar. 2001) (ALJ). However, the case is not controlling. Furthermore, in *Consolidation Coal* the air flow was 12% lower than was required by the operator's ventilation plan. *Id.* at 271. Here, by contrast, Brody's air flow was 33% and 50% lower than was required. Finally, Brody argues that the lack of miners or equipment at the face is a mitigating factor. I find it somewhat mitigating. I note that the Secretary conceded the S&S designation before trial and did not appeal the gravity determination that the violation was unlikely to result in lost workdays for five miners. Furthermore, though this was a gassy mine, Brody has no history of methane ignitions. (Tr.102:16–103:5) Considering all of the foregoing, I conclude the level of danger neither aggravating nor mitigating.

I next consider the obviousness and knowledge factors. The position of the flypads made it obvious that the air flow to the working faces was being short-circuited. (*See* Tr.35:4–24, 81:14–24; Ex. S–2, at 4) Though Brody's safety foreman Blankenship argued that the flypads were not an "indication" that the faces were not getting enough air, he acknowledged that the condition suggested that "possibility." (Tr.385:3–86:2) I conclude the violation was obvious to any miner passing by and therefore its obviousness is an aggravating factor of significant weight. Above, I found that the violation lasted for at least the duration of the previous maintenance shift. I therefore conclude that time was an aggravating factor and, due to the obviousness of the violation, accord it significant weight. Furthermore, due to the obviousness of the violation, the length of time it existed, the underlying improper setup of the flypads, and the pre-shift exam, I concluded above that Brody should have known that the violation existed. I find that Brody's implied knowledge of the violation was an aggravating factor and accord it significant weight as well.

The extent of the violation was evident in a decrease in air flow of 33% at one face and 50% at another. (Tr.27:1–8; Ex. S–2) I find that the extent of the violation was an aggravating factor based on the significant deviations from Brody's ventilation plan at two working faces for at least one shift. Brody's failure to abate the violation for an extended period of time was an additional aggravating factor. Finally, Brody was cited 31 times for violations of the same standard in the ten weeks before this order and Brody's management had been issued an explicit warning by Inspector Ward. (Tr.30:16–31:2, 32:3–33:14) As the Commission noted on appeal, previous citations for a violation do not need to involve identical circumstances to put an operator on notice. *IO Coal*, 31 FMSHRC at 1353–54. I therefore find Brody's notice to be an aggravating factor and give it significant weight.

On remand, I find that the obviousness, time, knowledge, and notice factors were all significant aggravating factors. Extent and abatement are also aggravating factors that I accord moderate weight. As noted above, I do not accord the danger factor any weight in my determination. After weighing the evidence as a whole, I conclude that the violation of section 75.370(a)(1) was an unwarrantable failure to comply with a mandatory safety standard.

C. Order No. 8075864 – Pre-shift Examination Violation

Inspector Ward issued Order No. 8075864 on January 15, 2009, for a violation of 30 C.F.R. § 75.360(b)(3), which requires that pre-shift examinations of working sections include the ventilation controls. Based on the obvious condition of the flypads in Order No. 8075863 and Brody's failure to record the violation in its pre-shift report, Ward concluded that the pre-shift examination was inadequate. (Tr.41:18–43:24; *see* Ex. S–4)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S–4) She proposed a penalty of $7,774. (Pet., Ex. A) Prior to hearing, the Secretary stipulated that the violation was not S&S. (Tr.12:2–10) Based on treating this violation as derivative of the flypad violation, I concluded it was not an unwarrantable failure and was unlikely to result in an injury. 33 FMSHRC at 1344. I also concluded that the operator had demonstrated high negligence based on the lack of any mitigation. *Id.* On appeal, the Commission faulted my decision for basing the analyses of unwarrantable failure and gravity solely on the associated flypad ventilation violation (Order No. 8075863). 37 FMSHRC at 1700. The Commission therefore remanded to me the unwarrantable failure and gravity determinations.

1. Gravity

Inspector Ward noted that 14 miners worked in the section and alleged that the violation was reasonably likely to cause an injury resulting in lost workdays or restricted duty. (Ex. S–4, at 4) I held that the violation was unlikely to result in an injury. On appeal, the Commission remanded the issue of gravity due to my reliance upon the associated flypad violation for the determination. The Commission held that "[t]he seriousness of a pre-shift violation is evaluated apart from any seriousness of any hazard that may have been detected by an adequate pre-shift examination." 37 FMSHRC at 1700 (citing *JWR Res. Inc.*, 28 FMSHRC 579, 603–04 (Aug. 2006)).

Section 75.360(b)(3) requires pre-shift examinations of working sections for ventilation, accumulations, maintenance, and roof control violations, among others. 30 C.F.R. § 75.360(b). Here, the inspector determined that the pre-shift examination missed an obvious violation of Brody's ventilation plan. He did not find any additional violations. Importantly, the Secretary stipulated before hearing that the violation was not S&S, suggesting the violation was unlikely to result in a serious injury. I therefore again conclude that the inadequate pre-shift exam was unlikely to cause injuries resulting in lost workdays or restricted duty for 14 miners.

2. Unwarrantable Failure

I previously concluded that Brody demonstrated high negligence by conducting an inadequate pre-shift examination of its ventilation controls. 33 FMSHRC at 1343. The Commission has "recognized that a finding of high negligence suggests unwarrantable failure." *Eagle Energy*, 23 FMSHRC at 839. As previously discussed, an unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission's unwarrantable factors. *See* discussion *supra* Section II.C. On appeal, the Commission noted that

the unwarrantable analysis for this inadequate pre-shift exam violation is not derivative of, and must be considered separately from, the associated flypad violation. 37 FMSHRC at 1700.

The degree of danger posed by a violation depends on the facts and circumstances of the violation. Here, the inspector has alleged that one violation was missed by Brody's examiner. Above, I concluded the violation was unlikely to result in lost work days or restricted duty. In light of the foregoing, I conclude that the violation did not pose a high degree of danger and was not aggravating.

The obviousness of an inadequate examination can be established by the circumstances of unreported violations. The short-circuiting of the air flow to working faces was made obvious by the condition of the flypads. (Tr.42:24–43:6) The horizontal position of the flypads should have alerted the examiner, and passing miners, that the pre-shift examination of the area had been inadequate. I therefore determine the obviousness of the violation to be an aggravating factor. Based on the obviousness of the violation, the examiner should have known that his examination was inadequate. As an agent of Brody, the examiner's knowledge can be imputed to Brody. *Pocahontas Fuel Co.*, 8 IBMA 136, 146–48 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (holding that the knowledge of a pre-shift examiner was imputable to the mine operator). Brody therefore should have known of the inadequate pre-shift exam upon its completion. I conclude its knowledge an aggravating factor.

Though Brody argues it was not on notice with regard to examinations, it had been warned that more effort was required in order to comply with its ventilation plan requirements. (Tr.30:16–31:2, 32:3–13, 33:5–14) As the Commission noted, this warning should have increased Brody's "overall vigilance" with respect to all related activities, including pre-shift examinations of the ventilation controls. 37 FMSHRC at 1700 n.14. I therefore find that notice was an aggravating factor.

The extent of the violation included two faces with insufficient air flow and the displaced flypads. This factor is neither aggravating nor mitigating. I find the duration of the violation to be a mitigating factor, as the inadequate pre-shift exam was discovered by the inspector approximately one hour after it was conducted. Furthermore, I also find that abatement was of minimal relevance because of Brody's limited opportunity to address the violation.

On remand, I find that notice, knowledge, and the obviousness of the violation are aggravating factors and accord them moderate weight. I also accord the danger, extent, and abatement elements minimal weight. Though I find the duration mitigating, it is significantly outweighed by the aggravating factors. I therefore conclude that the violation of section 75.360(b)(3) was an unwarrantable failure to comply with a mandatory safety standard.

D. Order No. 8075874 – Ventilation Obstruction Violation

Inspector Ward issued Order No. 8075874 on February 11, 2009, for a violation of 30 C.F.R. § 75.370(a)(1), which provides, in part, that "[t]he operator shall develop and follow a ventilation plan approved by the district manager." Ward found a debris pile pushed up against an idle working face, behind a ventilation curtain, which he suspected was obstructing air flow.

(Tr.46:4–8) He measured 1,050 CFM of air flow at the face, where the ventilation plan requires 3,000 CFM. (Tr.46:9–12; Ex. S–6)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S–6) She proposed a penalty of $4,440. (Pet., Ex. A) Prior to hearing, the Secretary stipulated that the violation was not S&S. (Tr.12:2–10) I held that the violation was not an unwarrantable failure based on: my finding that Brody had no knowledge of the violation; a finding of high danger was impossible to infer without methane present; the limited relevance of prior citations under the same standard; and, the violation's short duration. 33 FMSHRC at 1367–68. I found that the operator demonstrated no negligence based on: the absence of methane at the face; Brody's lack of knowledge of the violation; and by discounting the relevance of previous citations. *Id.* On appeal, the Commission faulted my decision for failing to address certain evidence, including the inspector's meeting with mine management, the gassy status of the mine, the operator's argument regarding the other ventilation plans, the Secretary's stipulation that the violation was not S&S, and the reduction in gravity, which was not appealed. 37 FMSHRC at 1697–704. The Commission also faulted the decision for failing to consider or note obviousness and to clearly explain the findings relating to knowledge. *Id.* at 1698–99. It also held that I erred by discounting the operator's history of prior violations and by determining the absence of methane mitigating in my unwarrantable failure and negligence determinations. *Id.* at 1699–700. The Commission therefore remanded the unwarrantable failure and negligence determinations.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.370(a)(1), requires the operator to abide by the mine's approved ventilation plan. In particular, the plan requires 3,000 CFM of air flow at idle working faces. (Ex. S–6) Importantly, this mine is classified as "gassy," as it emits 1.5 million cubic feet of methane per day. (Tr.34:8–15) Compliance with the ventilation plan is critical in gassy mines to prevent the buildup of methane, raising the standard of care expected of Brody. (Tr.34:5–15, 48:20–49:10) Brody therefore had a high standard of care to meet in adhering to its ventilation plan.

Brody fell short of its ventilation plan's air flow requirements by roughly 66% at the No. 4 working face. (Tr.46:9–12; Ex. S–6) The parties generally agreed that the violation did not exist for long: Inspector Ward testified that the foreman on site told him that Brody had scooped the debris pile against the face shortly before Ward arrived. (Tr.47:15–21) Ward pointed to the presence of loose debris next to the face as an indication that the air flow behind the curtain was obstructed and did not meet the requirements of Brody's ventilation plan. (Tr.46:4–12) I conclude that the responsible Brody foreman should have known of the air flow obstruction based on the positioning of the ventilation curtain in relation to the pile of debris as well as the significant reduction in air flow. Upon re-examination of the evidence, I therefore conclude that because the foreman's knowledge is imputed to it, Brody should have known the violation existed.

Brody argued the same mitigating factors as with the previous section 75.370(a)(1) ventilation violation. *See* discussion *supra* Section III.B.1. Brody points to the lack of methane detected at the time of the inspection, the lack of activity at the mine face, and the lack of hazards recorded by the pre-shift exam as mitigating. *Id.* As previously discussed, the lack of methane is not mitigating. 37 FMSHRC at 1703. I determine the lack of activity at the No. 4 face to be only slightly mitigating. The pre-shift reports support the conclusion that the violation did not exist for long, which is somewhat mitigating. (*See* Tr.84:2–4)

In accord with the previous section 75.370(a)(1) violation, Brody was on notice that it was failing to properly follow its ventilation plan. Brody was cited 31 times for the same standard between October 28, 2008, and January 15, 2009, and an explicit warning was given to mine management that more needed to be done. (Tr.32:3–13, 33:5–7, 46:13–18, 48:1–12; Ex. S–3, at 4) Brody's failure to better supervise and train its miners to prevent ventilation plan violations after explicit warnings warrants a higher level of negligence. *See Consolidated Coal*, 35 FMSHRC at 2345–46. Based on the high standard of care required for a gassy mine, Brody's implied knowledge, and its extensive prior notice of ventilation plan issues, I conclude that Brody demonstrated high negligence.

2. Unwarrantable Failure

Brody demonstrated high negligence through its failure to abide by the requirements of its ventilation plan. The Commission has "recognized that a finding of high negligence suggests unwarrantable failure." *Eagle Energy*, 23 FMSHRC at 839. As previously discussed, an unwarrantable failure analysis must examine all relevant facts and circumstances and consider all of the Commission's unwarrantable factors. *See* discussion *supra* Section II.C.

As previously discussed, Brody Mine No. 1 is a gassy mine, increasing the level of danger, and the absence of methane at the time of the MSHA inspection is not mitigating. 37 FMSHRC at 1697. I credit Inspector Ward's testimony regarding the potential danger of a rapid buildup of methane under low airflow conditions leading to an explosion. (Tr.34:5–15, 96:16–97:6) I again dismiss alternative ventilation plans that are not before me with regard to mitigating the level of danger and also discount the relevance of *Consolidation Coal*, 23 FMSHRC 270, for the previously discussed reasons. *See* discussion *supra* Section III.B.2. The low level of activity in the area provides some mitigation. I note that the Secretary conceded the S&S designation for this violation before trial and did not appeal the gravity of the violation that there was no likelihood of injury resulting in any loss of workdays for zero miners. In light of the foregoing, I find that the violation posed some degree of danger but was neither aggravating nor mitigating.

I found above that the violation existed for a relatively brief period of time, as the debris had been moved against the face only shortly before the inspector arrived.[9] (Tr.47:15–21) The duration of the violation is therefore a mitigating factor. The extent of the violation was a 66% decrease in the air flow at one working face. (Tr.46:9–12; Ex. S–6) Brody argues that the scope

[9] To clarify, I note that the amount of time required for Brody to abate the violation is not relevant to how long the violation existed. *See* 37 FMSHRC at 1698.

of the violation was minimal, pointing to the fact it took only six minutes to abate the violation. (Tr.362:13–16, 363:1–5) I find that the extent of the violation is a mitigating factor based on the limited area affected, the brief existence of the violation, and the minimal effort required to abate it. Brody was on notice that greater efforts were required to comply with its ventilation plan. It was cited 31 times for the same standard between October 28, 2008, and January 15, 2009, and an explicit warning was given to mine management. (Tr.32:3–13, 33:5–7, 46:13–18, 48:1–12; Ex. S–3, at 4) I find that the extensive prior notice provided to Brody was an aggravating factor and accord it significant weight.

On remand, I find that the violation should have been obvious to Brody, based on the pile of debris obstructing air flow, the position of the ventilation curtain, and the significant decrease in air flow. The violation's obviousness is an aggravating factor that I accord moderate weight. Furthermore, given that it was the foreman responsible for the area who informed Inspector Ward as to when the violation was created (Tr.47:15–21), I find that Brody should have known of the violation. Brody's knowledge is an aggravating factor that I give moderate weight. Finally, I do not find abatement a relevant factor here, due to the short time the violation existed and lack of abatement efforts by Brody.

I conclude that notice is the most significant aggravating factor. Knowledge and obviousness are also aggravating factors that I accord moderate weight. The degree of danger is neither mitigating nor aggravating. I accord it no weight in my determination. Though duration and extent are mitigating factors, they are significantly outweighed by the numerous aggravating factors present. Furthermore, without the intervention of the inspector, Brody would have begun mining at that face shortly after the inspection. Weighing the evidence as a whole, I conclude that the violation of section 75.370(a)(1) was an unwarrantable failure to comply with a mandatory safety standard.

E. Order No. 8079178 – Water in Escapeway

Inspector Jackson issued Order No. 8079178 on January 22, 2009, for a violation of 30 C.F.R. § 75.380(d)(1), which provides that "[e]ach escapeway shall be [. . .] [m]aintained in a safe condition to always assure passage of anyone, including disabled persons." Inspector Jackson discovered that Brody's examination reports indicated water at Break 7 for the No. 3 section. (Tr.108:12–14; Ex. S–9) On reaching the area, he found the primary escapeway was not passable, as it was flooded with water approximately 12 to 20 inches deep, from rib to rib, for 175 feet. (Tr.109:23–110:3; Ex. S–8)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated reckless disregard. (Ex. S–8) She proposed a penalty of $56,929. (Pet., Ex. A) I held that the violation was S&S and an unwarrantable failure, but concluded that the operator demonstrated moderate negligence based on the existence of a second escapeway and Brody's prompt abatement of the violation. 33 FMSHRC at 1350–51. On appeal, the Commission faulted my decision for basing the negligence analysis upon 30 C.F.R. § 100.3(d) definitions, which do not govern Commission proceedings. 37 FMSHRC at 1706. It further held that I erred by finding that an alternative escapeway mitigated Brody's negligence. *Id.* The Commission therefore remanded to me the negligence determination.

1. Further Findings of Fact

The presence of water in the escapeway was first recorded on January 21, 2009, in a weekly examination and was listed under "Hazards Noted." (Exs. R–3, at 4, S–9; *see* Tr.108:12–14, 177:9–178:3) The subsequent pre-shift and on-shift reports on January 22, 2009, failed to note any water in the escapeway, though Brody alleges it was in the process of pumping the water out. (Ex. R–3, at 5–7; Tr.159:1–11, 167:5–16) Nevertheless, Inspector Jackson discovered an idle pump in the flooded escapeway, without a power cable or drain line attached. (Tr.113:4–13, 151:2–13, 215:23–216:4) Brody alleges that the power to the pump was disconnected because it had just moved the rest of the mining equipment forward and the pump's power cable was not long enough. (Tr.161:18–162:5, 178:16–179:14) However, Brody did not explain why the drain line, necessary to remove water, was detached from the pump if it had been operating earlier. In fact, Brody Superintendent Fields testified that he "took it for granted" that the drain line was still attached. (Tr.216:1–4) Furthermore, after the order was issued, Brody was unable to abate the violation using a pump due to the amount of sediment in the water—it had to build a bridge over the area. (Tr.112:5–16) Based on the foregoing facts, particularly the absence of a drain line and Brody's inability to abate the violation using a pump, I find that Brody had not started pumping water out of the escapeway prior to being issued an order.

2. Negligence

The Secretary alleges that Brody showed more than ordinary negligence and demonstrated reckless disregard by its actions.[10] A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.380(d)(1), requires the operator to maintain the mine's escapeways in a passable and safe condition. Here, Brody could have met the required standard of care by abating the escapeway violation as soon as it was discovered.

Brody first reported water in the escapeway on January 21, 2009, in its weekly report and subsequently left an unpowered pump at that location. (Exs. R–3, at 4, S–9) Brody did not start pumping water out until it was issued an order by the inspector on January 22, 2009. The weekly report and the presence of the idle pump establish that Brody knew of the hazard no later than January 21, 2009. (*See* Tr.159:1–11, 195:3–12) Though Brody disputes whether the escapeway was traversable, as well as the depth of the water, the 175 foot length and rib-to-rib width of the flooded escapeway was not disputed. (Tr.211:13–22) The water was 12–20 inches deep, opaque, and concealed an uneven surface that made passage challenging, even for an uninjured

[10] As Judge Paez noted in *Stillhouse Mining*, "[a]s a legal term, "reckless" has been described as conduct—[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash . . . . Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do." *Stillhouse Mining, LLC*, 33 FMSHRC 778, 803 (Mar. 2011) (ALJ) (citing *Reckless*, *Black's Law Dictionary* (8th ed. 2004)).

person under normal conditions. (Tr.109:21–110:8, 150:10–151:1) I reiterate my previous finding that the flooded escapeway impeded travel for disabled miners and for those assisting disabled miners. 33 FMSHRC at 1349. Escapeway violations are particularly significant as there may be an increased risk of serious injury or fatality during emergency evacuations. *See, e.g.*, *Big Ridge, Inc.*, 36 FMSHRC 1115, 1119 (May 2014) ("The hazard of a delayed escape or no escape at all [. . .] in an emergency is reasonably likely to result in serious or fatal injuries."); *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563–64, 64 n.5 (Aug. 2005) (noting that the potential for slips and falls would be greater during a mine evacuation). In the event of an emergency, incapacitated miners on a stretcher could not be set down, even momentarily, for the length of the flooded escapeway without the risk of drowning them in 12–20 inches of water. (*See* Tr.113:19–114:3) Furthermore, miners are tethered together during evacuations, which would create additional difficulties for them in navigating the uneven surface of this flooded escapeway. (Tr.114:4–10)

As the Commission noted on appeal, the existence of a second escapeway does not mitigate Brody's negligence. 37 FMSHRC at 1706. In an emergency, miners would attempt to use the nearest escapeway and may not be aware of the flooding. Brody also argued, as a mitigating factor, that this area was mined primarily for the purpose of reaching a borehole[11] in order to address the mine's water removal and ventilation issues. (Tr.159:12–24, 214:19–215:11) However, Brody's general safety-promoting purpose of removing water and increasing ventilation did not absolve it from its duty to maintain safe, passable escapeways while it advanced this section of the mine. Furthermore, restoring power to every other piece of mining equipment at the nearby face, without properly setting up the pump, clearly indicated Brody's priority. (Tr.151:14–152:1, 179:2–23)

Brody could have met its duty of care by setting up an energized pump with a drain line connected as soon as a significant amount of water was detected in this escapeway. In contrast, Brody placed an unenergized pump at the location, indicating it was aware of the problem, but nevertheless failed to begin pumping water out of the escapeway until cited by MSHA. Brody's conduct displayed disregard for the substantial risk of harm created by the flooded escapeway and was a gross deviation from what a reasonable miner would do. After re-examination of the foregoing evidence and discounting the alternative escapeway, I conclude that Brody demonstrated reckless disregard by failing to address this known, extensive, obvious, and egregious safety violation.

F. Order No. 8075906 – Missing Guard Plate

Inspector Ward issued Order No. 8075906 on March 3, 2009, for a violation of 30 C.F.R. § 75.1722(a), which provides, in part, that "exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." Ward noticed that a shuttle car was missing a guard plate over a one-foot-by-one-foot opening, which left moving machine parts exposed. (Tr.53:1–13; Ex. S–7) Ward's subsequent discussions with Brody employees revealed that the plate had been missing for two weeks. (Tr.53:19–21, 54:6–24, 400:13–18)

[11] A borehole is a shaft drilled down vertically from the surface.

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated high negligence. (Ex. S–7) She proposed a penalty of $4,000. (Pet., Ex. A) I held that the violation was S&S and an unwarrantable failure but concluded that the operator demonstrated moderate negligence based on mitigation provided by the company "offside" policy and the impossibility of contact by the shuttle operator. 33 FMSHRC at 1374–78. On appeal, the Commission faulted my decision for basing the negligence analysis upon 30 C.F.R. § 100.3(d) definitions, which do not govern Commission proceedings, and for failing to properly weigh the two week duration of the violation. 37 FMSHRC at 1706. It further noted that Brody's company policies did not mitigate its negligence when it had knowledge of the violation. *Id.* at 1706–07. The Commission therefore remanded to me the negligence determination.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.1722(a), requires the operator to provide guards over moving machine parts that could be contacted by miners. Here, Brody could have met the required standard of care by repairing the missing guard plate when it was first discovered two weeks prior, or by pulling the shuttle car from service until repairs could be made.

The opening for the missing guard plate was located on the offside of a shuttle car at about waist height. (Tr.55:1–21) The shuttle car was about 18–20 feet long, 12 feet wide, and was used every working shift to haul coal from the continuous miner to the feeder. (Tr.326:17–24, 330:18–23) Brody's records did not note the hazard during the two weeks before the order was issued, though the shuttle car was subject to pre-shift inspections and examined several times. (Tr.94:10–14, 342:20–343:6, 411:13–412:11) I previously discounted Brody's examination records and found that the totality of the evidence supports the conclusion that the guard plate had been missing for two weeks. 33 FMSHRC at 1377–78. I also found that Brody had ample reason to know about the violation. *Id.* at 1378. The Commission noted on appeal that the two week period when Brody management knew of the violation was an aggravating circumstance and that the company's safety policies were not relevant to its negligence in the face of this knowledge. 37 FMSHRC at 1706–07. I reiterate my previous determination that "[t]he weight of mitigation here is quite low" and, under a traditional negligence analysis, find that Brody demonstrated high negligence. 33 FMSHRC at 1375.

G. Order No. 8079224 – Feeder Accumulations

Inspector Jackson issued Order No. 8079224 on February 26, 2009, for a violation of 30 C.F.R. § 75.400, which provides that "[c]oal dust [. . .] shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." Jackson discovered an accumulations violation consisting of loose coal and coal dust

that was 12 feet long, 2 to 3 feet wide, and 18 inches deep, located on top of a feeder.[12] (Ex. S–11; Tr.125:8–11, 274:9–19) Jackson alleged that the accumulations were saturated with hydraulic oil and that some parts of the machinery were "extremely hot to the touch." (Tr.125:2–19)

The Secretary designated the violation as S&S and an unwarrantable failure, and alleged that the operator demonstrated reckless disregard. (Ex. S–11) She proposed a penalty of $70,000. (Pet., Ex. A) I held that the violation was not S&S but was an unwarrantable failure. 33 FMSHRC at 1385. I concluded that the operator demonstrated moderate negligence based on mitigation provided by the wetness of the coal and after discounting the Inspector's testimony that the accumulation existed for more than one shift. *Id.* at 1383–84. On appeal, the Commission faulted my decision for basing the negligence analysis upon 30 C.F.R. § 100.3(d) definitions, which do not govern Commission proceedings. 37 FMSHRC at 1706. The Commission therefore remanded to me the negligence determination.

1. Negligence

A negligence analysis under the Mine Act involves an evaluation of the relevant facts in light of a regulation's requisite duty of care in order to reach a conclusion based on the totality of circumstances. *See Mach Mining*, 809 F.3d at 1264. The standard at issue, 30 C.F.R. § 75.400, requires the operator to prevent the accumulation of coal and other combustible materials.

Inspector Jackson found coal accumulations on the oil tank, oil filters, valve chest, hydraulic hoses, and electrical components of an energized feeder, with the oil tank and oil filters hot to the touch. (Tr.125:2–19) He believed the coal accumulations were saturated with hydraulic fluid due to their appearance and location on the feeder, but did not take any affirmative steps to confirm this. (Tr.125:2–7, 145:13–146:3) The Secretary alleged reckless disregard based on Inspector Jackson's belief that the accumulations were saturated with hydraulic oil, which one could reasonably assume to be flammable. Ultimately, however, I concluded that the accumulations were wet with water, based on the totality of the evidence. 33 FMSHRC at 1382–83. Nevertheless, wet coal is still dangerous. As the Commission has long held, even "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite." *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1230 (June 1994) *citing Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 969 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120–21 (Aug. 1985).

I further found that the hot, energized feeder machine, as well as an electrical cable splice[13] located on the feeder, could both act as ignition sources, though the presence of water mitigated against ignition. 33 FMSHRC at 1383. Based on the absence of any hazards in its pre-shift examination reports, Brody argues that the accumulations developed after its pre-shift exam

[12] A feeder is a large piece of stationary equipment where shuttle cars dump loads of coal to be crushed and fed onto a conveyor belt. (Tr.254:10–22)

[13] Citation No. 8079225 was issued for a cable splice made without suitable connectors that was located on the feeder. (Ex. S–12; Tr.127:22–128:8)

and before the MSHA inspection. (Tr.261:6–262:14; Ex. R–7, at 2–5) On remand, I credit Jackson's testimony that the accumulations were present for approximately one shift, based on the presence of a cover on the feeder over some of the accumulations that would slow the rate at which coal spillage built up. (Tr.128:24–129:12) Accordingly, Brody should have discovered the accumulation during its pre-shift examination and cleaned it immediately. Furthermore, as mentioned above, Brody was cited 29 times in the previous four months for violations of 30 C.F.R. § 75.400 (Tr.122:2–9; Ex. S–10) and was on notice that greater efforts were required for compliance. 33 FMSHRC at 1385. Brody's failure to discover and subsequently clear the coal accumulations while on heightened notice suggests that it was highly negligent in this instance. *See, e.g.*, *Mach Mining*, 809 F.3d at 1264–65, 1268 (holding that substantial evidence supported ALJ's determination of "high negligence" where operator had history of section 75.400 violations and coal accumulations were wet).

Brody argues that the redundant fire safety measures near the feeder mitigate its negligence. (Tr.256:9–257:2) It also points to the regular inspections and daily cleaning, which failed to prevent the accumulations in this instance. (Tr.257:3–16) The CO detector, water hose, and fire extinguisher, all required by MSHA regulations, would not prevent a fire from occurring but could be used to reduce the severity of any resulting fire. The nature of the feeder machine's "fire suppressants" was not made clear. I find that the redundant safety features provided no mitigation, as they did not prevent this accumulations violation from arising and could not prevent a fire from starting. Finally, though I found the accumulations wet with water and not hydraulic oil, I determine the general wetness of the mine only slightly mitigating, as this section of the mine was not nearly as wet as Section No. 3.

Had the coal accumulation been saturated with hydraulic oil, as Inspector Jackson believed, I may have concluded that Brody acted with reckless disregard. *See* discussion *supra* Section III.E.2. However, based on the record before me, I conclude that Brody's failure to clean the coal accumulation displays high negligence.

IV. PENALTY

When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

I credit the Secretary's records pertaining to the operator's history of previous violations as accurate for each order. Brody Mining, LLC, was a large business, mining 2,250,965 tons at the time of the orders. (Pet., Ex. A) Brody did not allege that the proposed penalties would adversely affect its ability to continue in business. The Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (citing *Buffalo Mining Co.*, 2

IBMA 226, 247–48 (Sept. 1973)). I further find, and the Secretary did not dispute, that Brody acted in good faith to rapidly abate each order.

For Order No. 8079179, my previous holding that Brody demonstrated moderate negligence stands. 33 FMSHRC at 1356–57. On remand, I have further determined that the violation was reasonably likely to cause an injury resulting in lost workdays or restricted duty for eight miners and was S&S. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of $4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that a penalty of $5,500 is appropriate.

For Order No. 8075863, my previous holding that the violation was unlikely to result in lost workdays or restricted duty for five miners stands. 33 FMSHRC at 1339. The Secretary stipulated that the violation was not S&S before trial. (Tr.12:2–10) On remand, I have further determined that Brody demonstrated high negligence. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of $4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that the statutory minimum penalty of $4,000 is appropriate.

For Order No. 8075864, my previous holding that Brody demonstrated high negligence stands. 33 FMSHRC at 1344. The Secretary stipulated that the violation was not S&S before trial. (Tr.12:2–10) On remand, I have reweighed the evidence and determined that the violation was unlikely to result in lost workdays or restricted duty for 14 miners. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of $4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that a penalty of $6,500 is appropriate.

For Order No. 8075874, my previous gravity determination that reduced the number of miners affected to zero, the likelihood of occurrence to "no likelihood," and the severity of injury to "no lost workdays" stands. 33 FMSHRC at 1368. The Secretary stipulated that the violation was not S&S before trial. (Tr.12:2–10) On remand, I have further determined that Brody demonstrated high negligence. I also determined on remand that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of $4,000. 30 U.S.C. § 820(a)(3)(B). In light of the foregoing, I conclude that the statutory minimum penalty of $4,000 is appropriate.

For Order No. 8079178, my previous holding that the violation was reasonably likely to result in fatal injuries to eight miners and was S&S stands. 33 FMSHRC at 1351. I also previously determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of $4,000. 30 U.S.C. § 820(a)(3)(B). On remand, I have further determined that Brody demonstrated reckless disregard. In light of the foregoing, I conclude that

a penalty of $50,000 is appropriate, particularly considering that the Secretary's proposed penalty failed to discount the raw penalty point assessment by 10% for good faith abatement.

For Order No. 8075906, my previous holding that the violation was reasonably likely to result in a permanently disabling injury to one miner and was S&S stands. 33 FMSHRC at 1378. I also previously determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of $4,000. 30 U.S.C. § 820(a)(3)(B). On remand, I have further determined that Brody demonstrated high negligence. In light of the foregoing, I conclude that the statutory minimum penalty of $4,000 is appropriate.

For Order No. 8079224, my previous holding that the violation was unlikely to result in lost workdays or restricted duty for 14 miners and was not S&S stands. 33 FMSHRC at 1385. I also previously determined that the violation was an unwarrantable failure to comply with a mandatory health or safety standard under 30 U.S.C. § 814(d)(2), for which the Mine Act mandates a minimum penalty of $4,000. 30 U.S.C. § 820(a)(3)(B). On remand, I further determined that Brody demonstrated high negligence. In light of the foregoing, I conclude that a penalty of $11,000 is appropriate.

V. ORDER

The Commission decision states:

> [W]e vacate and remand the following issues in Docket No. WEVA 2009-1000: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075863; (2) the unwarrantability and gravity of the violation in Order No. 8075864; (3) the negligence in connection with the violation in Order No. 8079178; and (4) whether the violation in Order No. 8079179 was S&S and unwarrantable . . . . [W]e also vacate and remand the following issues in Docket No. WEVA 2009-1306: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075874; (2) the negligence in connection with the violation in Order No. 8075906; and (3) the negligence in connection with the violation in Order No. 8079224.

37 FMSHRC at 1707.

In conformance with the Commission's remand instructions, I hereby enter the following orders:

It is **ORDERED** that Order No. 8079179 be **MODIFIED** to reduce the level of injury expected from "Fatal" to "Lost Workdays or Restricted Duty."

It is **ORDERED** that Order No. 8075864 be **MODIFIED** to reduce the likelihood from "Reasonably Likely" to "Unlikely."

It is **ORDERED** that Order No. 8079224 be **MODIFIED** to reduce the level of negligence from "Reckless Disregard" to "High."

It is **ORDERED** that Order Nos. 8079178 and 8075906 be **AFFIRMED** as written.

In its decision, the Commission did not reach the following modifications I ordered in my original decision to Order Nos. 8079179, 8075863, 8075864, 8075874, and 8079224, which are reiterated as follows:

It is **ORDERED** that Order No. 8079179 be **MODIFIED** to reduce the level of negligence from "Reckless Disregard" to "Moderate."

It is **ORDERED** that Order No. 8075863 be **MODIFIED** to reduce the likelihood from "Reasonably Likely" to "Unlikely" and to remove the "S&S" designation.

It is **ORDERED** that Order No. 8075864 be **MODIFIED** to remove the "S&S" designation.

It is **ORDERED** that Order No. 8075874 be **MODIFIED** to reduce the likelihood from "Reasonably Likely" to "No Likelihood," to reduce the level of injury expected from "Lost Workdays Or Restricted Duty" to "No Lost Workdays," to reduce the number of miners affected from "5" to "0," and to remove the "S&S" designation.

It is **ORDERED** that Order No. 8079224 be **MODIFIED** to reduce the likelihood from "Reasonably Likely" to "Unlikely," to reduce the level of injury expected from "Fatal" to "Lost Workdays or Restricted Duty," and to remove the S&S designation.

WHEREFORE, it is further **ORDERED** that Brody Mining **PAY** a total penalty of $85,000.00 within forty (40) days of the date of this Decision on Remand.[14]

L. Zane Gill
Administrative Law Judge

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

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