FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-0889 A.C. No. 46-09093-384746
v.	Docket No. WEVA 2015-0890 A.C. No. 46-09093-384746
ROCK N ROLL COAL COMPANY, INC., Respondent	Docket No. WEVA 2016-0084 A.C. No. 46-09093-394900 Mine: Mine No. 7

DECISION AND ORDER

Appearances: Brian Krier, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner

Thomas McLoughlin, Tri-State Geologic & Mining Services, LLC, Norton, Virginia for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

These consolidated cases are before me upon Petitions for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act"). Docket No. WEVA 2015-0889 involves one 104(d)(1) citation and one 104(d)(1) order charging Respondent, Rock N Roll Coal, Inc. ("Respondent"), with unwarrantable failures to comply with the Secretary of Labor's ("the Secretary's") mandatory safety standards. Docket No. WEVA 2016-0890 involves three 104(a) citations alleging violations of the Secretary's mandatory standards. Docket No. WEVA 2016-0084 involves one specially-assessed 104(d)(1) order charging Respondent with an unwarrantable failure to comply with a mandatory safety safety standard.

A hearing was held in Bluefield, West Virginia on June 7-8, 2016. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered. Prior to

[1] In this decision, "Tr. I-#" and "Tr. II-# refer to the first and second volumes of the hearing transcript, respectively; "Jt. Ex. #" refers to joint exhibits; "P. Ex. #" refers to the Petitioner's

hearing, I granted the Secretary's Motion to Amend the Petition to include the narrative findings for the special assessment proposed for Order No. 9061162 in Docket No. WEVA 2016-0084. Tr. I-8. At the hearing, after oral arguments, I issued a bench decision affirming all of the citations and orders, as written, and assessing the penalties, as proposed, essentially for the reasons set forth by the Secretary in closing argument. Tr. II-229-45. Having carefully reviewed the record, I affirm my bench decision, as set forth below.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury… but rather on the effect of the hazard if it occurs"). Alternatively, a violation is S&S if, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard–that is, a measure of danger to safety–contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984). [2] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel*

---

exhibits; and "R. Ex. #" refers to the Respondent's exhibits. Jt. Ex. 1, P. Exs. 1-30, and R. Exs. 2 and 3 were received into evidence.

[2] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

Mining Co., 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[3]

Once the fact of the violation has been established, step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has recently clarified that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (*citing Knox Creek Coal Corp.*, 811 F.3d at 163). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy,* 38 FMSHRC at 2038.

The third step of the *Mathies* analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Id.* at 2037 (internal citations omitted). The third step's inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Knox Creek*, 811 F.3d at 161-65. The question in applying the third step of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014). The Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (*citing Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies*' factors are often combined in a single showing. *Id.*

---

[3] *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.[4]

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard,"

[4] Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

"intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal,* 52 F.3d at 136.

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors. The Commission examines seven aggravating factors, which include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator's efforts in abating the violative condition, whether the violation is obvious, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission and its judges must take into account all of the factors, but may determine, when exercising discretion, that some factors are not relevant, or are much more or less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC at 1351; *Excel Mining, LLC*, 497 F. App'x 78, 79 (D.C. Cir. 2013); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (2001).

D. Penalty Criteria

Under the Mine Act's bifurcated penalty assessment process, the Secretary initially proposes a penalty. 30 U.S.C. § 815(a). The operator has the right to challenge the Secretary's proposed penalty assessment. *Id.* This contest results in a penalty proceeding before the Commission. There is no requirement in the Mine Act mandating that the Secretary explain the basis for his proposed penalty when he makes the discretionary decision to specially assess a penalty. 30 C.F.R. § 100.5.

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider six statutory criteria set forth in Section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g.*, *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criteria *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are neither bound by the Secretary's proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (*citing Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) (MSHA Part 100 regulations are not in any way binding in Commission proceedings)). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citation omitted).

My independent penalty assessment for each citation or order at issue is set forth herein.

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

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Respondent was an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine at which the citations and order at issue in this proceeding were issued.

2. Operations of the Respondent at the mine at which the citation and orders were issued are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

4. The individuals whose names appear in Block 22 of the citations and orders were acting in their official capacities and as authorized representatives of the Secretary of Labor when the citations were issued.

5. True, authentic copies of the citations and orders were served on the Respondent or its agent as required by the Mine Act.

6. The proposed penalty for the citations and order at issue in this proceeding will not affect Respondent's ability to stay in business.

7. The citations and order contained in Exhibit "A" attached to the Secretary's Petitions are authentic copies with all appropriate modifications or abatements, if any.

8. MSHA's Data Retrieval System publicly available at http:www.msha.gov/drs/drshome.htm, accurately sets forth:
    a. The size of Respondent in production tons or hours worked per years;
    b. The size, in production tons or hours worked per year, of the mine;
    c. The total number of assessed violations for the time period listed; and
    d. The total number of inspection days for the time period listed therein.

9. Exhibit "A" of the Secretary's Petitions for the Assessment of Civil Penalty accurately sets forth:
    a. The size of Respondent in production tons or hours worked per years;
    b. The size, in production tons or hours worked per year, of the mine;
    c. The total number of assessed violations for the time period listed; and
    d. The total number of inspection days for the time period listed therein.

10. Fact of violation is established for each violation in each of the above-captioned dockets.

11. With respect to Citation No. 9061132, the distance between the #5 seal and the first row of bolts closest to the seal was 13 feet, 6 inches on the date the citation was issued.

12. With respect to Citation No. 9061132, the distance between the #3 seal and the first row of bolts closest to the seal was approximately 8 feet on the date the citation was issued.

13. With respect to Citation No. 9061132 and Order No. 9061133, Chauncy Easterling was an agent of the operator on the date the citation and order were issued.

14. With respect to Citation No. 9051132 and Order No. 9061133, Chauncy Easterling conducted a weekly examination of the #1 to #7 seals on April 19, 2015.

15. With respect to Citation No. 9061479, the lifeline in the secondary escapeway of the #8 mains section had only one cone leading to the branch line leading to the refuge alternative at the time the citation was issued.

16. With respect to Citation No. 9061120, the closest CO monitor to the section load point was located five crosscuts outby the load point at the time the citation was issued.

17. With respect to Citation No. 9061120, the section was mining coal at the time the citation was issued.

18. With respect to Citation No. 9061131, the operator could not produce training records for any of the certified persons who conduct exams of the mine seal at the time the citation was issued.

19. The Certified Assessed Violation History Report (P. Ex. 1) is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

Jt. Ex. 1. The following stipulations were admitted into the record at hearing:

20. With respect to Order No. 9061133, none of the roof conditions the inspector described in Section 8 "Condition or Practice" of Citation No. 9061132 and the corresponding inspection notes were listed or otherwise described in the most recent weekly examination records that covered the #1 to #7 seals in the right return on the date the order was issued. P. Ex. 22 at 12; Tr. I-27.

21. The weekly examination records for the mine seals that Inspector Daniel Morgan reviewed prior to going underground as part of his E01 inspection of the mine on April 30, 2015 did not list any hazards, violations, or unsafe conditions in the areas of the #1 to #7 seals. P. Ex. 22 at 12; Tr. I-28.

B. The April 14, 2015 Inspection

On April 14, 2015, MSHA Inspector Herman Morgan arrived at Rock N Roll Coal's Mine No. 7 at 6:30 a.m. to conduct a regular E01 inspection.[5] Tr. I-86, 89. Morgan was accompanied by MSHA trainee Shawn Tichnell. Tr. I-92. Prior to April 2015, Mine No. 7, a slope mine, had been idle, and had been actively producing coal for only about six weeks. Tr. I-85. The mine had one active continuous mining section, and used a mobile bridge hauling system to transport coal out of the mine. Tr. I-75. The mine had a low-ceiling with an average height of 40 inches. Respondent employed about 12 miners on the working section, and two on the surface named Josh and Caleb Cline, the owner's sons. Tr. I-104, 80.

After a pre-inspection conference, Morgan reviewed the weekly exam books. He noticed that the weekly exam records did not contain exam records of several of the measuring points ("MPs") in the left return airway. Tr. I-94, 96. Morgan consulted with Chauncy Easterling, the fire boss and weekly examiner. Morgan asked whether Easterling had performed the weekly examinations at the left return airway MPs. Easterling told Morgan that he had completed the examinations, but had forgotten to record the results. Tr. I-97.

Easterling and Morgan then used a permissible vehicle to travel to the left return airway. Easterling pointed out the dates, times, and initials ("DTI") board and showed Morgan a notebook, which indicated that Easterling had examined the required MPs during his prior weekly examination. Tr. I-97-98.[6]

1. Lifeline Violation, Citation No. 9061479

After traveling the left return airway, Morgan and Easterling returned to the surface, and then took a different permissible vehicle down the secondary escapeway toward the working section. Tr. I-99. Morgan saw that the lifeline was missing one of the two directional cones that indicate a branch line juncture. Morgan issued Citation No. 9061479 alleging a violation of 30 C.F.R. § 75.380(d)(7),[7] based on the following condition:

---

[5] Morgan had been employed with the Mine Safety and Health Administration ("MSHA") as a coal mine and accident inspector for four years. Tr. I-56. Before joining MSHA, he worked for sixteen years in both underground and surface coal mines, and received his West Virginia mine foreman certification in 2008. Tr. 61-62.

[6] Morgan issued Citation No. 9061477 under 30 C.F.R. §75.364(h) for Easterling's failure to record the results of his left return airway exam. MSHA records indicate that the proposed assessment for that citation has been paid in full and the citation has been closed. *See* P. Ex. 4 at 6-7; *see also* Mine Safety and Health Administration, *Mine Data Retrieval System*, http://arlweb.msha.gov/drs/drshome.htm (last accessed Oct. 21, 2016).

[7] 30 C.F.R. § 75.380(d)(7)(vii) provides:

> Each escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [e]quipped with two securely

> The operator failed to securely attach 2 consecutive cones, to signify a branch line leading to the outby refuge alternative, located in the secondary escapeway. When checked, the secondary escapeway life line was observed having only one cone leading to the refuge alternative. In the event of a mine emergency, the proper markings would not be found on the secondary escapeway life line to properly signal the proper escapeways.

P. Ex. 2. Morgan designated the citation as S&S, reasonably likely to result in fatal injuries to eight people, and the result of Respondent's moderate negligence. *Id.* The Secretary proposed a penalty of $4,689.

a. The Violation in Citation No. 9061479 was S&S

Respondent stipulated to the fact of the violation. Stip. Fact No. 10, Jt. Ex. 1. Accordingly, the missing directional cone on the lifeline constitutes a violation of 30 C.F.R. § 75.380(d). P. Ex. 2.

I next identify the hazard in the first part of step two of the clarified *Mathies* test. *Newtown Energy,* 38 FMSHRC at 2038. As the Commission explained, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id.*

Section 75.380(d)(7)(vii) requires the installation of two, consecutive, tapered cones on the lifeline to indicate an upcoming branch line juncture. This two-cone marking requirement indicates to miners,who are following the lifeline, that eight to twelve inches ahead, there is a branch juncture, which will lead them to either a refuge alternative ("RAs") or a cache of self-contained self-rescue devices ("SCSRs"). Tr. I-105, 107-109.[8] I find that the hazard contributed to by the missing cone is that miners following the lifeline during an emergency evacuation might fail to recognize the branch line junction and thereby bypass potentially life-saving equipment. Tr. I-112.

Having determined that the missing lifeline cone presents a hazard to evacuating miners, I now consider whether "there exists a reasonable likelihood of the occurrence of the hazard

---

> attached cones, installed consecutively with the tapered section pointing inby, to signify an attached branch line is immediately ahead.

[8] Branch lines lead to either RAs or caches of SCSRs. Tr. I-107. RAs are marked by spirals, while caches of SCSRs are indicated by four cones, which are placed wide end to wide end and then narrow end to narrow end. These indicators are installed on the actual branch of the lifeline leading to the RA or SCSRs, rather than on the main lifeline as in the case of branch line junction cones. Tr. I-105, 107-08, 119.

against which the [standard] is directed," i.e., whether, in an emergency situation, the missing come is reasonably likely to cause miners exiting through the escapeway to bypass the branch line junction.[9] *Newton Energy*, 38 FMSHRC at 2037.

I find that there is a reasonable likelihood that miners using the lifeline to evacuate during an emergency could bypass potentially life-saving equipment due to the missing branch line identification cone. Lifelines are used in all types of mine emergencies, including smoke incidents, fires, and water inundations. Tr. I-108. As Morgan testified,

> We get down to 42 inches high, the smoke is more compressed now so I'm probably going to have to belly-crawl, maybe and get under [the smoke] if I can get under it then. Now, I can't do that because to reach the lifeline I'm going to have to be on my knees crawling. If the markings aren't right on that lifeline, I'm liable to miss a very important lifesaving device that is installed in that mine to save my life.

Tr. I-112, 114. I credit Morgan's testimony that even miners familiar with the locations of rescue equipment could become confused or panic during an emergency, and bypass the branch junction without the aid of the cone to alert them to the location of such equipment. Tr. I-113-14.

I also find that the hazard presented by the missing cone is reasonably likely to result in an injury of a reasonably serious nature, thereby satisfying the third and fourth *Mathies* factors. *See Mathies*, 6 FMSHRC at 4. In an emergency situation, the particularly low seam height in Mine No. 7 would require miners to crawl as they follow the lifeline, slowing their evacuation. Tr. I-112; 115.[10] I credit Morgan's testimony that the low seam height and the missing branch line cone could lead to a fatality if an evacuating miner inadvertently bypassed lifesaving equipment:

> [I]n an emergency situation, minutes make all the difference. A marking missing off a lifeline could cost you minutes, could cause your SCSR to run out of power.

---

[9] In the context of escapeway violations, the Commission's administrative law judges "routinely assume[] the occurrence of the contemplated emergency in evaluating the significant and substantial nature of violations that only come into play in the event of an emergency." *Cumberland Coal Res., LP v. Fed. Mine Safety & Health Rev. Comm'n*, 717 F.3d 1020, 1027 (D.C. Cir. 2013), *aff'g sub nom. Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011) (internal citations omitted). This is appropriate because "evacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs." *Cumberland Coal Res. LP*, 33 FMSHRC at 2367.

[10] MSHA acknowledges that "the height of the travelway affects the speed of travel" in underground coal mines, and recognizes a direct relationship between the height of the travelway and the speed at which miners can travel. *See* MSHA, PROGRAM POLICY MANUAL, Vol. V, § 75.1714-2, *Self-Rescue Devices; Use and Locations Requirements* (2003). According to MSHA's calculation, miners traveling the secondary escapeway in Mine No. 7 would only be able to travel between roughly 120 and 140 feet per minute. *Id.*

I mean, it might make you hesitate just long enough to where you don't reach the next SCSR cachet. You know, if it stops you for two minutes, that might be the two minutes that you fall short of reaching the next available rescue option.

Tr. I-115.

Although Morgan credibly testified that he believed a fatality was likely to result from miners bypassing lifesaving equipment in the event of an emergency, smoke inhalation and burns also constitute serious injuries for purposes of the *Mathies* analysis. *Amax Coal*, 19 FMSHRC 846, 847 (May 1997) (upholding judge's finding of S&S based on evidence of smoke inhalation and burns that would result in serious injuries). In addition, Morgan testified that mine rescue teams traveling into the mine rely on the proper placement of lifeline cones to navigate underground during emergency situations, and the missing cones could delay or confuse the team's rescue efforts, making it more likely that miners would suffer from serious and potentially fatal injuries due to a delay in rescue efforts. Tr. I-113.

I conclude that the lack of one of two required branch cones on the lifeline was reasonably likely to contribute to the hazard of miners bypassing life-saving equipment when attempting to escape the mine via the lifeline during an emergency, which was reasonably likely to result in an injury of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. I therefore affirm the Secretary's S&S designation for Citation No. 9061479.

b. Citation No. 9061479 was the Result of Respondent's High Negligence

In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Morgan testified that he designated Citation No. 9061470 as moderate negligence because the missing cone should have been noticed and replaced during the pre-shift examination. Tr. I-116-17. Pre-shift examinations are required where miners are expected to work or travel during a shift, including RAs. Tr. I-116. Since miners typically travel the secondary travel way to access the working section, the lifeline should have been included during the pre-shift examination. Tr. I-117. Morgan did not observe the missing cone lying on the ground in proximity to the branch line, and concluded that the cone had not "just fallen off" and had likely "been missing for awhile." Tr. I- 116. Morgan testified that Easterling offered no mitigating circumstances or explanation. Tr. I-117. In these circumstances, I affirm the Secretary's moderate negligence designation for Citation No. 9061470.

c. Penalty Assessment

The Secretary proposed a penalty of $4,689 for this violation after considering the six penalty criteria. 30 C.F.R. Pt. 100; *see* Ex. A, *Petition for the Assessment of Civil Penalties,* Docket No. WEVA 2015-0890. The parties have stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061479. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment*

of Civil Penalties, Docket No. WEVA 2015-0890. The parties have also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $4,689.

2. CO Monitor Violation, Citation No. 9061120

After issuing Citation No. 9061479, Morgan and Easterling continued down the secondary escapeway toward the working face and approached the belt's section loading point. Morgan observed that the section loading point of the secondary escapeway's main belt was missing a carbon monoxide ("CO") monitor in violation of 30 C.F.R. § 75.351(e)(1)(i).[11] Based on that observation, Morgan issued Citation No. 9061120, alleging the following condition:

> The operator failed to provide a CO monitor at a required location. When observed the CO Monitor located at the section loading point was located 250' outby the section loading point. The last CO monitor located on the company #5 beltline was five breaks outby the section loading point. There was no CO monitor coverage anywhere inby this point on the beltline. The violation is an unwarrantable failure to comply with a mandatory standard.

After issuing the citation, Morgan then traveled outby the section loading point to determine the location of the nearest CO monitor, and discovered it about 250' away from the required location, lying with the sensors face down on a wooden spool. He did not observe anyone else in the belt line area. Morgan later decided to modify Citation No. 9061120 from a 104(d)(1) order to a 104(a) citation, based on the following conditions:

> After further review, the citation will be dropped from a D-1 citation S&S, to a 104-a citation non-S&S due to the following reasons. After further thought the affected area was found to have 1. No CH4 was found in the area. 2. The beltline airstream travels outby and not toward the section. 3. No other hazards such as stuck rollers, belt rubs, or accumulations were found in the area.

---

[11] 30 C.F.R. § 75.351(e)(1)(i) provides that:

> In addition to the requirements of paragraph (d) of this section, any [atmospheric monitoring system] used to monitor air belt courses under 75.350(b) must have approved sensors to monitor for carbon monoxide at the following locations: (i) At or near the working section belt tailpiece in the air stream ventilating the belt entry. In longwall mining systems the sensor must be located upwind in the belt entry at a distance no greater than 150 feet from the mixing point where intake air is mixed with the belt air at or near the tailpiece.

The Secretary alleges that the violation was non-S&S, unlikely to cause permanently disabling injuries to eight persons, and the result of Respondent's high negligence. P. Ex. 3. The Secretary proposed a penalty of $1,412.

a. The Gravity of Citation No. 9061120 was Properly Designated as Unlikely to Cause Permanently Disabling Injuries to Eight Miners

Respondent stipulated to the fact of the violation. Stip. Fact No. 10, Jt. Ex. 1. I next identify the discrete safety hazard contributed to by the violation. *Mathies*, 6 FMSHRC at 3-4. Mines generate CO in a number of ways, i.e., through fires, belt rubs, coal accumulations, and electrical equipment. Tr. I-128. CO monitors detect carbon monoxide and provide early warning of smoke and fire inside the mine. Tr. I-127. Morgan testified that the CO monitors installed at required places in the mine form a continuous line to the surface, where the system terminal is usually located in the mine office. Tr. I-128. When a monitor detects carbon monoxide, the terminal in the mine office sounds an alarm. Tr. I-129. The person in the office responsible for monitoring the system then notifies the underground miners that a monitor at a particular location has been triggered, and an underground miner investigates the CO sensor at that location to determine the source of carbon monoxide. Tr. I-139.

I find that the hazard presented by the misplaced CO monitor is that miners would not receive an early warning alarm regarding the potential for a smoke or fire incident near the secondary escapeway belt tailpiece. Tr. I-133. Morgan testified that the section loading point is particularly prone to accumulations, spillage, and belt alignment problems, which augment the likelihood of smoke inhalation and an actual ignition incident due to the delayed warning, although Morgan found no belt rubs, bad rollers, or accumulations in the area. Tr. I-129-30; P. Ex. 4 at 15.

While Morgan recognized that the violation contributed to a hazard that could cause permanently disabling injuries to eight miners as a result of potential smoke inhalation and burns from a smoke or fire incident, he found that such injuries would be unlikely to occur. The miners were working inby the section loading point, while the air on the secondary escapeway flows outby the belt line, thus carrying any potential smoke towards the mine exit, rather than towards the working section. Tr. I-135. Morgan also recognized that the primary escapeway was an available route of evacuation in the event of a smoke or ignition incident in the secondary escapeway. Further, Morgan determined that injuries would be unlikely because of the firefighting equipment located at the section loading point, and the miners' training in firefighting techniques and participation in quarterly firefighting training drills. Tr. I-136. Finally, Morgan determined that all eight miners working the section would have assigned tasks during a firefighting incident and the designated hazard would affect eight miners. Tr. I-137.

The Commission has concluded that its administrative law judges may not make *sua sponte* S&S determinations that usurp the Secretary's enforcement authority. *Mechanicsville Concrete*, 18 FMSHRC 877, 879-80 (June 1996). Accordingly, I affirm the Secretary's gravity and non-S&S designations.

b. Citation No. 9061120 was the Result of Respondent's High Negligence

Morgan found that the violation in Citation No. 9061162 was the result of Respondent's high negligence because Respondent offered no mitigating circumstances. Tr. I-139.

Ralph Steele, Respondent's chief electrician, admitted that mine management had been aware of the misplaced monitor for at least a week while the section was actively mining, but that Respondent did not fix the problem because it did not have adequate cable to place the monitor closer to the section loading point. Tr. I-139, 141; II-220-21. The violation was abated that same day, when Steele installed new cable from one of the mine owner's other mines, and moved the misplaced CO monitor to the section loading point. Tr. II-216. Based on Respondent's admitted knowledge of the violation and the fact that Respondent could have immediately corrected the violation by obtaining cable from a sister mine, I find that Respondent's actions were not consistent with what a reasonably prudent operator would have done under the circumstances, that is, immediately correct the condition. I therefore affirm the high negligence designation for Citation No. 9061162.

c. Penalty Assessment

The Secretary proposed a penalty of $1,412 for this violation. The parties have stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061120. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890. The parties have also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $1,412.

C. The April 30, 2015 Inspection

On April 30, 2015, Morgan arrived at the mine at 7:45 a.m. to continue his E01 inspection. Tr. I-151-52. He reviewed the examination record books in the mine office and found that examinations had not been recorded for some MPs and mine seals. Tr. I-153. Morgan was concerned that the examinations for seal No. 8 had never been recorded in the exam books. Tr. I-168.[12] Morgan discussed the lack of seal No. 8 exam records with Easterling, who indicated that seal No. 8 had "[fallen] through the cracks, [and] nobody had remembered to go examine it." Tr. I-168.

[12] Morgan issued Citation No. 9061134 alleging a violation of the approved ventilation plan for the failure to examine the No. 8 seal. P. Ex. 8 at 7-10. MSHA's records indicate the proposed assessment has been paid in full and the citation is closed. *See* Mine Safety and Health Administration, *Mine Data Retrieval System*, http://arlweb.msha.gov/drs/drshome.htm (last accessed Oct. 21, 2016).

After that discussion, Morgan and Easterling traveled to the No. 8 seal. They had difficulty locating the seal monitor tube because it was covered by leaves. Tr. I-169. Morgan instructed Easterling to conduct a regular seal exam. According to Morgan's testimony, Easterling showed "no knowledge of being able to use the pump." Tr. I-169. Morgan testified that Easterling "turned [the pump] on, but [Easterling] waved it in front of the tube like a spotter . . . he didn't, actually, hook it up to the tube and try to pump it at that time." Tr. I-169.[13] Morgan then halted Easterling's examination and gave Easterling on-the-spot training on how to properly conduct seal examinations. Tr. I-174; 225.

After witnessing Easterling's inability to properly conduct a seal examination, Morgan returned to the mine office and asked mine foreman Ricky McGuire whether anyone at the mine was certified to conduct seal examinations. Tr. I-175. McGuire indicated that he had received seal examination training when MSHA originally approved the use of Omega block seals back in 2006, but McGuire could not produce training certificates for anyone at the mine. Tr. I-170, II-106. After further questioning, Morgan determined that McGuire knew how to conduct proper seal examinations, and allowed McGuire to train other miners in proper seal examination procedures. Tr. I-170.

1. Failure to Provide Certified Training Records for Persons Conducting Mine Seal Sampling, Citation No. 9061131

Based on Easterling's demonstrated lack of knowledge regarding proper seal examinations, Morgan issued Citation No. 9061131, alleging a violation of 30 C.F.R. § 75.338(a) due to the following practice:

> The operator failed to provide certification that the persons conducting seal sampling/exams has been trained in proper methods for taking samples or the use of sampling equipment. When asked to produce the training records for the examiners at this mine the operator could not produce records for any of the certified people who conducts [sic] exams on the seals.[14]

---

[13] Mr. McLoughlin, the Respondent's representative, informed the undersigned that Respondent was unable to locate Easterling to call him as a witness. Tr. I-174.

[14] 30 C.F.R. § 75.338(a) provides:

> Certified persons conducting sampling shall be trained in the use of appropriate sampling equipment, procedures, location of sampling points, frequency of sampling, size and condition of the sealed area, and the use of continuous monitoring systems if applicable before they conduct sampling, and annually thereafter. The mine operator shall certify the date of training provided to certified persons and retain each certification for two years.

P. Ex. 5. The Secretary alleges that the citation was non-S&S, unlikely to cause fatal injuries to fourteen miners, and the result of Respondent's moderate negligence. *Id.* The Secretary proposed a penalty of $807.

a. The Gravity of Citation No. 9061131 was Properly Designated as Unlikely to Cause Fatal Injuries to Fourteen Miners

The parties stipulated to the fact of the violation and agreed that Respondent could not produce certified training records for anyone who had been conducting mine seal examinations at the time the citation was issued. Stip. Fact Nos. 10, 18; Jt. Ex. 1; P. Ex. 5.

Respondent's failure to provide certified training records for seal examiners presents the possibility that the miner(s) conducting the seal exams did not have the requisite knowledge of sampling methods and the use of sampling equipment that is required to conduct adequate seal examinations. By failing to provide records to ensure that a properly trained and certified miner was examining the seals, Respondent created a risk that an uncertified miner was conducting seal examinations which contributed to the hazard that problems with the seals would not be detected and addressed. When Morgan requested Easterling to demonstrate a proper seal examination on seal No. 8, Easterling was unable to do so. Tr. I-169. Although McGuire later demonstrated to Morgan that he knew how to conduct a proper seal examination, the record establishes that it was Easterling, not McGuire, who conducted the weekly examinations of the seals in the No. 5 entry. Tr. I-170

Morgan credibly testified that failure to properly inspect the seals could lead to seal failures in the form of explosions, flooding, or black damp. Tr. I-172-73. Morgan also determined that the low ceiling height in Mine No. 7 would slow miners' evacuation in the event of an emergency, increasing the likelihood that a seal failure would cause a fatality. Morgan testified that a flood would drown miners caught underground in the event of a seal failure. Tr. I-178-79. In addition, the No. 5 entry where the seals were located is but one entry away from the No. 4 entry used by miners to enter and exit the mine on a daily basis, making it more likely that any explosion or flood resulting from a seal failure would affect all fourteen miners working the section. Tr. I-179. I find that the failure to provide records that a certified examiner was conducting seal sampling contributed to the hazard of potential seal failures. While in the first instance, I might find that the record supports an S&S designation for Citation No. 9061131, as noted above, the Commission's administrative law judges do not have authority to designate violations S&S where the Secretary has not made such an allegation. *Mechanicsville Concrete*, 18 FMSHRC at 879-80 (June 1996). In these circumstances, I affirm the Secretary's gravity designation for Citation No. 9061131.

b. Citation No. 9061131 was the Result of Respondent's Moderate Negligence

Considering the totality of circumstances, I find that Citation No. 9061131 was the result of Respondent's moderate negligence. Although McGuire demonstrated that he knew how to properly conduct seal exams, and testified that he received training on proper seal examination procedures from an MSHA inspector-at-large immediately after the installation of the mine seals, McGuire never filled out a training certification form, although he continued inspecting the seals

for 11 years without training certification. Tr. II-107. Easterling demonstrated during Morgan's inspection that he did not know how to properly examine mine seals. Tr. I-169-70; II-106. Moreover, Easterling had been conducting the examinations since the mine had reopened six weeks before Morgan's E01 inspection began, and McGuire had been signing off on Easterling's seal inspections. P. Ex. 9. A reasonable operator familiar with the industry would have established that its examiners had the proper certifications in order to complete their assigned tasks. McGuire in fact admitted that he knew that underground miners must be "task-trained" and that the mine is required to produce training records at the request of MSHA inspectors. Tr. II-110. I therefore affirm the Secretary's moderate negligence designation for Citation No. 9061131.

c. Penalty Assessment

The Secretary proposed a penalty of $807 for this violation after considering the six penalty criteria. The parties have stipulated that Respondent produced 598 tons of coal in 2015. Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061131. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890. The parties also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. I find that Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $807.

2. Hazardous Roof Conditions Violation, Citation No. 9061132

Morgan and Easterling went into the mine to inspect the underground seals, located in the crosscuts near the right return air course at the No. 5 entry. Tr. I-176; P. Ex. 19. The crosscuts were on average twenty feet wide and the seals were set back from the roadway at distances of between four and thirteen-and-a-half feet. Tr. I-179-80; *see also* P. Ex. 17 at 2. The mine height in the area was between 48 and 50 inches. Tr. I-180.

As they advanced down the return, Morgan noticed hazardous conditions involving roof support cribs that were installed in 2005 to support the mine roof in front of seals Nos. 1 through 7. Tr. I-176. The cribs blocks were eight-inch-by-eight-inch blocks of solid wood stacked two by two in alternating directions to form a square. The blocks were stacked as close as possible to the mine roof, with wooden, wedge-shaped half-headers inserted between the blocks and the roof to tighten the entire structure against the roof surface. Tr. I-184, II-95. Although Morgan did not actually enter any of the crosscuts to measure the spacing between the cribs due to the conditions, the roof control plan required that the cribs be installed at four-foot by four-foot intervals. P. Ex. 17 at 4, 6.

Morgan estimated that the seal entries contained about 50 cribs. Tr. I-185. Morgan estimated that sixty to seventy percent of the cribs were ineffective, and described them as "deteriorated," "rotting," or "falling over." He specifically noted that some of the cribs had shrunken or collapsed and fallen away from the roof, while some of the standing cribs were no

longer flush against the mine roof. Tr. I-176, 181, 185-86. He also observed that a large section of roof, twelve feet long, four feet wide, and three or four inches thick, had fallen and was crushing the cribs inside the No. 5 seal entry. Tr. I-182, 188. Morgan did not observe any roof bolts in the sections of roof between the roadway and the seals, and he concluded that roof bolts had not been in use when those areas of the mine were sealed off. Tr. I-181, 187.

Easterling attempted to access one of the seals to demonstrate to Morgan that he could conduct a seal exam and to draw Morgan's attention to the dates, times and initials ("DTIs") boards for prior exams conducted at each seal, but Morgan prevented Easterling from traveling underneath the hazardous roof conditions in between the roadway and the seals. Tr. I-177, 183. Although Morgan stayed in the roadway as he observed the seals and the surrounding roof conditions in the crosscuts, he was able to see the DTI boards for some of the seals. Morgan specifically asked Easterling whether he had traveled under the hazardous unsupported roof conditions to conduct his seal exams, and Easterling answered in the affirmative. Tr. 183. Morgan also asked Easterling how long the conditions had existed, and Easterling replied that the conditions had been that way since Easterling started working at the mine about six weeks earlier. Tr. I-196.

Based on his observations of the deteriorated roof cribs and unsupported roof in the seal crosscuts, Morgan issued Citation No. 9061132 under section 104(d)(1) of the Mine Act. The citation alleged a violation of 30 C.F.R. § 75.364(d) for failure to immediately correct the hazardous roof conditions, as follows:

> The operator failed to correct hazardous conditions encountered during a weekly examination immediately. The #1-#7 50 PSI seals located in the right return was [sic] found to have areas that was not roof bolted when mined and the cribs that were built in the area to supplement the roof control were allowed to deteriorate to the condition of rotting and falling out, being crushed out, and not providing any support for the mine roof. The examiner was crawling between these cribs to conduct his exam and was not correcting the condition or recording it in the exam book. At seal #5 the distance from the first row of installed roof bolts to the seal was measured to be 13' 6". The cribs in this area was [sic] rotted and on they [sic] inby end the mine roof had fallen on top of the cribs crushing them down approximately 8". This violation is an unwarrantable failure to comply with a mandatory standard.[15]

P. Ex. 6. Morgan designated the violation as S&S, reasonably likely to contribute to a hazard that would cause fatal injuries to fourteen miners, and the result of Respondent's high

[15] 30 C.F.R. § 75.364(d) provides:

> [H]azardous conditions shall be corrected immediately. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Any violation of the nine mandatory health or safety standards found during a weekly examination shall be corrected.

negligence. As noted, Morgan also designated the alleged violation as an unwarrantable failure to comply with the Secretary's mandatory safety standard. *Id.* The Secretary proposed a penalty of $3,405.

a. The Violation in Citation No. 9061132 was S&S

Respondent stipulated to the fact of the violation. Stip. Fact. No 10; Jt. Ex. 1.

I turn next to the first part of step two of the *Mathies* test as clarified in *Newtown Energy*, i.e., identifying the discrete safety hazard that was contributed to by the failure to immediately correct the adverse roof conditions. *Mathies*, 6 FMSHRC at 6; *Newtown Energy, Inc.*, 38 FMSHRC at 2037. I find that the hazard presented by the failure to immediately correct the hazardous roof conditions was another roof fall.[16]

Having identified the hazard, I now turn to "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the [roof fall] hazard." *Id.* Although Morgan did not approach the cribs due to the unsupported roof, he estimated that 30-35 out of the 50 cribs that he observed were hazardous. Tr. I-185. McGuire testified that 26 cribs were installed in the seal area to abate Citation No. 9061132. Tr. II-92. Some cribs had partially collapsed or fallen over, some were rotted, and others were no longer in contact with the roof to provide support. Tr. I-181. The roof inside the crosscuts housing the seals had not been roof bolted. *Id.* The parties stipulated that the distance between the No. 3 seal and the first row of roof bolt closest to the seal was approximately eight feet. Stip. Fact No. 12; Jt. Ex. 1. The parties also stipulated that the distance between the No. 5 seal and the first row of roof bolts closest to the seal was thirteen feet and six inches. Stip. Fact No. 11; Jt. Ex. 1.

In addition, Morgan observed that a large section of roof, a rock measuring twelve feet long, four feet wide, and three or four inches thick, had fallen and was crushing the cribs inside the No. 5 entry. Tr. I-182, 188. Morgan determined that the hazardous conditions would have been obvious even to a miner trainee with little to no experience, much less to an experienced underground miner. Tr. I-181-82. Easterling told Morgan that the condition had lasted for six weeks, i.e., ever since the mine had reopened and Easterling had begun conducting the seal examinations. Tr. I-196.

Based on the particular facts surrounding the violation, I find that the Secretary established a reasonable likelihood that a roof fall would occur.

[16] In addition to actually observing a section of fallen roof in the No. 5 seal entry, Morgan testified that Mine No. 7 had a history of roof falls, and there had been at least four roof falls previously. Tr. I-182, 188, 204. Two roof falls occurred while Morgan was at the mine conducting his E01 inspection, although they occurred on June 9 and July 15, 2015, after the issuance of Citation No. 9061132. Tr. I-204-05. On June 9, a roof fall occurred in the left return about ten breaks off the working section. On July 15, a section of roof on the working section fell and struck a piece of equipment. *Id.*

The third step in the *Mathies* analysis requires a determination of whether the hazard identified in the second step, a roof fall, was reasonably likely to cause injury. *See Knox Creek*, 811 F.3d at 161-65. Easterling was regularly traveling underneath the unsupported roof near the seals in the No. 5 entry, and a large section of roof had already fallen on the deteriorated cribs. Tr. I-182-83, 188. I find that the Secretary established a reasonable likelihood that an injury would result from a roof fall in the No. 5 entry.

Regarding the fourth *Mathies* factor, I find that the Secretary established a reasonable likelihood that any injury resulting from a roof fall would be of a reasonably serious nature. Morgan designated the injury likely to occur as fatal, and I affirm that designation. As demonstrated by the size of the roof fall that had already occurred in the No. 5 seal entry, and by the damage to the crib on which it had landed, any roof fall would be reasonably likely to result in a fatality. Tr. I-183-84, 188. Furthermore, the Commission has long acknowledged that roof falls are a leading cause of death in underground coal mines. *See Halfway, Inc.*, 8 FMSHRC 8, 13 (Jan. 1986) ("Our decisions have stressed the fact that roof falls remain the leading cause of death in underground coal mines.").

Based on the foregoing, I find that the violation of 30 C.F.R. § 75.362(d) in Citation No. 9061132 was S&S and reasonably likely to contribute to a roof fall hazard that would cause fatal injuries to one miner.

b. Citation No. 9061132 was the Result of Respondent's High Negligence

Morgan designated Citation No. 9061132 as the result of Respondent's high negligence because examiner Easterling, an agent of the operator, had personal knowledge of the hazardous conditions for about six weeks and took no action to correct them. Tr. I-200. Morgan credibly testified that the conditions he observed were so obvious that even an inexperienced miner would have known not to enter the area. Tr. I-182. Morgan also asked Easterling whether he had taken any steps to correct the hazardous conditions, and Easterling told Morgan that he was "one man responsible for all of the outby area and [he] was working on it when [he] can get to it." Tr. I-195. Easterling also told Morgan that he had not made any efforts to correct the hazardous conditions in the No. 5 entry because he had been working in the other return air course. Morgan observed no evidence indicating that corrective action had been taken. Tr. I-194. I find that Respondent failed to take any corrective action to abate an extremely dangerous roof fall hazard for six weeks, and that such actions constitute high negligence because a reasonably prudent operator would have acted immediately to correct the hazard.

c. Citation No. 9061132 was an Unwarrantable Failure to Comply with 30 C.F.R. § 75.364(d)

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. The Commission specifically considers seven aggravating factors: the length of time that the violation has existed; the extensiveness of the violation; the duration of the violation; whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard; the operator's efforts in abating the violative condition; whether the violation is obvious; whether the violation posed a high degree of danger; and the operator's

knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

i. The Extent of the Violative Condition

The extent of a violative condition is an important element in the unwarrantable failure analysis. *IO Coal* Co., 31 FMSHRC at 1351-52. This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal Corp.,* 32 FMSHRC 1189, 1195 (Oct. 2010), *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). Extensiveness often concerns the degree of the violation and is a question of fact regarding the material increase in the degree of risk posed to miners as a result of the violation. *Eastern Associated* Coal, 32 FMSHRC at 1195. In some situations, extensiveness depends on the number of people affected by the violation. *See Watkins Eng'rs & Constructors,* 24 FMSHRC 669, 681 (July 2002).

Morgan estimated that 30-35 out of the 50 roof cribs that he observed in the No. 5 entry had deteriorated to the point that they were not providing roof support in the seal area. Tr. I-176, 181, 185-86. None of the area around the seals, including the roof between the roadway and the crosscuts in which the seal were located, had been roof bolted. Tr. I-181, 87. I find that the hazardous roof conditions at issue in Citation No. 9061132 were extensive, and this factor supports a finding of unwarrantable failure.

ii. The Duration of the Violation

The duration of the violative condition is a necessary consideration in the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence regarding cited conditions). The duration or length of time that the violation exists is particularly critical, because the longer a violative condition or practice exists, the more likely miners will be injured. *Coal River Mining, LLC,* 32 FMSHRC 82, 92 (Feb. 2010); *see also Buck Creek Coal,* 53 F. 3d at 136 (7th Cir. 1995) (violation that lasted more than one shift was properly designated as unwarrantable failure); *Consol Coal Co.*, 23 FMSHRC 588, 594 (June 2001) (violation was unwarrantable failure where the violation existed over several shifts).

The violation in Order No. 9061162 lasted at least six weeks, since the mine had reopened after an idle period. Tr. I-196. I find that the duration of the violation weighs in favor of an unwarrantable failure finding.

iii. Whether Respondent was Placed on Notice that Greater Efforts were Necessary for Compliance with 30 C.F.R. § 75.362(d)

The Commission has stated that repeated, similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with the cited standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23FMSHRC 588, 595 (June 2001). The purpose of evaluating the number of past violations is to

determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that "past discussions with MSHA" about a 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, *citing Consolidation Coal*, 23 FMSHRC at 595.

The Secretary failed to establish that the Respondent was placed on notice that greater efforts were necessary to comply with 30 C.F.R. § 75.362(d). There is no prior violation of this standard in Mine No. 7's Assessed Violation History Report. P. Ex. 1. Moreover, Mine No. 7 had only recently re-opened, and Morgan was conducting the first E01 inspection since the re-opening. In these circumstances, I find that the operator was not placed on notice that greater efforts were necessary for compliance with 30 C.F.R. § 75.362(d). Accordingly, this factor weighs against a finding of unwarrantable failure.

iv. Respondent's Knowledge of the Existence of the Violation

The Commission has held that knowledge is established by showing "the failure of an operator to abate a violation [that] he knew or *should have known* existed." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-03 (Dec. 1987); *see also* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975). In the absence of past violations, an operator's knowledge may be established "where an operator reasonably should have known of a violative condition." *IO Coal Company, Inc.* 31 FMSHRC at 1356-57; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991), *quoting Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). Further, the Commission has held that the extent of the involvement of supervisory personnel in a violation should be taken into account in determining whether an unwarrantable failure occurred, because supervisors are held to a higher standard of care. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). A section foreman is held to a "demanding standard of care in safety matters." *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (*quoting Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)). A mine superintendent is also held to a heightened standard of care. *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

As noted above, Morgan asked Easterling how long the adverse roof conditions had exited, and Easterling told Morgan that the conditions had existed ever since he had begun working at the mine six weeks earlier. Tr. I-196. Morgan also asked Easterling whether he had taken any steps to correct the hazardous conditions, and Easterling told Morgan that he was "one man responsible for all of the outby area and [he] was working on it when [he] can get to it." Tr. I-195. Easterling also told Morgan that he had been working in the other return air course, and had not made any efforts to correct the hazardous conditions in the No. 5 entry. Morgan observed no evidence indicating that corrective action had been taken. Tr. I-194. Although Easterling was not a section foreman, he was the designated examiner at Mine No. 7, and the designated agent responsible for examining and maintaining all of the area outby the working section. Tr. I-91, 195. Accordingly, his knowledge of the violative conditions is imputable to

Respondent. Indeed, the parties have stipulated that Easterling was an agent of Rock N Roll for the purposes of Citation No. 9061132. Stip. Fact. No. 13, Jt. Ex. 1. I find that the Respondent had knowledge of the violation and demonstrated indifference or a serious lack of reasonable care by allowing the violation to continue unaddressed for six weeks. I find that this factor strongly weighs in favor of find an unwarrantable failure.

v. Whether the Violation was Obvious

Morgan credibly testified that the hazardous conditions were obvious, and even a newly trained miner with no underground experience would have recognized the danger. Tr. I-181-82. Respondent offered no probative evidence to the contrary. I find that the obviousness of the violation weighs in favor of an unwarrantable failure finding.

vi. Whether the Violation Posed a High Degree of Danger

A high degree of danger posed by a violation may also support an unwarrantable failure finding. *See e.g., BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, 10 FMSHRC 705, 709 (June 1988). The degree of danger is a relevant factor, but not a threshold requirement for determining whether a violation is unwarrantable. *Manalapan Mining Company, Inc.*, 35 FMSHRC 289, 294 (2013), *citing Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999) (Commission recognizes a number of factors relevant to determining whether a violation is the result of an operator's unwarrantable failure). The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure, but the converse is not true, i.e., that the absence of danger precludes a finding of unwarrantable failure. *Manalapan,* 35 FMSHRC at 294. Further, a violation may be aggravated and unwarrantable based on "common knowledge that certain equipment, such as power lines, are hazardous and that precautions are required." *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). For purposes of evaluating whether violative conditions pose a high degree of danger, it may be appropriate to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal*, 29 FMSHRC at 125, 132-33 (remand for failure to apply S&S findings to danger factor in unwarrantable failure analysis).

I find that the violation posed a high degree of danger. A section of roof in the No. 5 seal area had already separated from the mine roof and was crushing the crib underneath. Easterling was regularly traveling under the crushed crib to inspect the seals. Tr. I-182, 188, 199. As Morgan testified, a rock that large falling on someone would likely result in a fatality. Tr. I-199. Accordingly, I find that the violation posed a high degree of danger and this factor weighs in favor of finding an unwarrantable failure.

vii. Respondent's Efforts to Abate the Violative Condition

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, *supra*, 31 FMSHRC at 1356, *citing Enlow Fork Mining*, 19 FMSHRC at 17. The focus is on abatement efforts made prior to issuance of the citation or order. *Id.* An operator's efforts to abate a

violation before a citation or order issues, even during an inspection, may be a mitigating factor in an unwarrantable failure analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989). Here, although Respondent was not on notice regarding the violation, Easterling admitted that he made no effort to abate or mitigate the obviously hazardous roof conditions. Tr. I-181-82, 195. I find that this factor tips in favor of an unwarrantable failure finding.

Having considered all the relevant factors, I find that the extent of the violation, the duration of the violation, the operator's knowledge of the violation, the obviousness of the violation, the failure to abate the obvious violation, and the high degree of danger posed by the violation, all weigh in favor of finding an unwarrantable failure. I therefore find that Citation No. 9061132 was the result of Respondent's unwarrantable failure to comply with 30 C.F.R. § 75.3643(d).

d. Penalty Assessment

The Secretary proposed a penalty of $3,405 for this violation. The parties stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061132. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0889. The parties e also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations, and note that Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0889 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $3,405.

3. Recordkeeping Violation, Order No. 9061133

After inspecting the right return, Morgan returned to the mine office with Easterling, where Morgan again reviewed the seal examination records that had been conducted by Easterling the day before, on April 29, 2015. Tr. I-209. Easterling's entry for the April 29 examination of the Nos. 1 through 7 seals includes the notation "Seal- 1-7 ok at time of exam." The notations for March 26, April 2, and April 22, 2015 also state that seals Nos. 1 through 7 were "ok at time of exam." The notation for April 9 states "none observed" underneath the heading "Examination of pillar falls, seals, idle workings, abandoned areas." The April 15 notation under the same heading reads "none," although the right-return examination entry for April 29 noted "loosse rock" [sic]. P. Ex. 9. Each of the examinations was countersigned by McGuire. None of the seal examination entries referenced the hazardous roof conditions that Morgan observed during his inspection of the right return. *See id.*

Based on his observations underground in the right return and his review of the seal inspection records, Morgan issued Order No. 9061133 under section 104(d)(1) of the Mine Act, alleging a violation of 30 C.F.R. § 75.364(h), as follows:

> The operator failed to conduct a proper examination of return air courses that pass by seals for hazardous conditions and record these conditions in the record book. The examiner was at #1-#7 seals in the right return on 4/29/2015 and did not list

> any hazardous conditions in the exam book. When the examiner and myself traveled to this area on 4/30/2015 the area was found to have large areas of unsupported roof, and insufficient supplemental roof control installed. The cribs built in the area were rooted, [sic] falling, loose and crushing out. The examiner is required to crawl between these cribs and no mention of the conditions was recorded in the exam book. One area at the #5 seal was measured to be 13'6" from the roof bolts installed in the roadway to the seal. The mine roof has fallen on the cribs located at the inby end of this seal. A large rock, more than 12' long, 4' wide, and 3" thick has fallen on these cribs. This violation is an unwarrantable failure to comply with a mandatory standard.[17]

Morgan designated the violation as non-S&S, unlikely to contribute to a hazard that would cause fatal injuries to one miner, and the result of Respondent's high negligence and unwarrantable failure. P. Ex. 7. The Secretary proposed a penalty of $2,000.

a. Order No. 9061133 was Unlikely to Result in a Fatal Injury to One Miner

Recording hazardous conditions discovered in examinations is crucial to the health and safety of miners. *Mach Mining,* LLC, 39 FMSHRC__, Docket No. LAKE 2014-0746, slip op. at 23 (Sept. 23, 2016) (ALJ) (*citing American Coal Co.*, 34 FMSHRC 2058, 2082 (Aug. 2012) (ALJ) (when evaluating the gravity of recordkeeping violations, the Commission must determine whether the failure to record contributed to a hazard that could cause an injury)). Having determined that the hazardous roof conditions cited in Citation No. 9061132 were reasonably likely to cause fatal injuries to one miner, I now turn to whether the failure to record those same hazardous conditions under Order No. 9061133 was likely to contribute to an injury.

As noted above, although the roof conditions Morgan observed in the No. 5 entry (and cited in Citation No. 9061132) were reasonably likely to result in a serious injury, I affirm Morgan's gravity designation that the failure to record those violations was unlikely to result in a

[17] 30 C.F.R. § 75.364(h) provides:

> At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the person making the examination or a person designated by the operator. If made by a person other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. The record shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

fatality for one miner. Morgan testified that Easterling's failure to record the hazardous roof conditions was unlikely to affect other miners working under normal, continuous mining operations. The No. 5 entry was not regularly traveled by miners, and Easterling was, in fact, the only miner who regularly traveled in the No 5 entry to conduct seal exams. Tr. I-216. While in the first instance, I might find that the record supports an S&S designation for Order No.9061133, as noted above, the Commission's administrative law judges do not have authority to designate violations S&S where the Secretary has not made such an allegation. *Mechanicsville Concrete*, 18 FMSHRC at 879-80 (June 1996). In these circumstances, I affirm the Secretary's gravity designation for Citation No. 9061133.

b. Order No. 9031133 was the Result of Respondent's High Negligence

Morgan designated Order No 9061133 as high negligence because Easterling, Respondent's examiner and agent, had direct knowledge of the hazardous conditions, knew that the conditions needed to be corrected, and still failed to either record the conditions or take action to correct them. Tr. I-216. A reasonably prudent operator would have recorded and corrected the hazardous roof conditions immediately. Accordingly, I affirm Morgan's negligence designation and find that Order No. 9061133 resulted from Respondent's high negligence.

c. Order No. 9061133 was an Unwarrantable Failure to Comply with 30 C.F.R. § 75.364(h)

Based on the aggravating facts and circumstances surrounding Respondent's failure to record the hazardous roof conditions in the No. 5 entry, I find that the violation was an unwarrantable failure to comply with the Secretary's mandatory safety standard. Morgan testified that 30 to 35 out of 50 roof support cribs were not providing roof support in the seal area. McGuire testified that 26 cribs were installed in the seal area over the next two days in order to abate Citation No. 9061132. Tr. II-92; 100-101. Thus, the hazardous roof conditions that Easterling failed to record were both obvious and extensive. *See Mach Mining, LLC*, 35 FMSHRC 2937, 2942 (Sept. 2013) (relying on ALJ's determinations regarding the extent and obviousness of the underlying hazardous conditions for a citation alleging an unwarrantable failure to comply with § 75.364(h)). Easterling had also been conducting the seal examinations since the mine's reopening, and he admitted to Morgan that the hazardous roof conditions in the No. 5 entry had existed for as long as he had been conducting the examinations. Despite Easterling's direct knowledge of the hazardous conditions, none of the recorded seal examinations noted the obviously hazardous roof conditions, thus establishing that the failure to record continued for at least the six weeks since the mine reopened. P. Ex. 9; Stip. Fact. Nos. 20, 21; P. Ex. 22 at 12. Thus, examiner Easterling, the responsible agent of the Respondent, knew that Respondent had not been recording or correcting the obviously hazardous roof conditions for six weeks. Moreover, the underlying hazardous conditions that were not recorded posed a high degree of danger, as evidenced by both the large section of roof that had already fallen in the No. 5 seal crosscut and Morgan's testimony that the majority of roof falls are fatal. Tr. I-215. *Cf.*, *Mach Mining*, 35 FMSHRC at 2942 (failure to record hazardous conditions that posed a high degree of danger would frustrate the purpose of § 75.354(h) and supports an unwarrantable failure finding). As noted above, Easterling's failure to record the

hazardous roof conditions contributed to the likelihood that miners traveling in the No. 5 entry would be exposed to a roof fall hazard. I therefore find that the failure-to-record violation was obvious, extensive, posed a high degree of danger, and was of long duration. In addition, Easterling, as examiner and agent of the operator, had knowledge that he was not recording the hazardous roof conditions and had failed to make any attempt to abate them. Although the violation history and recent reopening of the mine support a finding that the Secretary failed to establish that the operator was on notice that greater efforts were necessary to comply with 30 C.F.R. § 75.364(h), the remaining factors strongly weigh in favor of an unwarrantable favor determination and outweigh any contrary analysis. I therefore affirm the Secretary's unwarrantable failure designation.

c. Penalty Assessment

The Secretary proposed a penalty of $2,000 for this violation. The parties stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061133. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0889. The parties also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6; Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. I find that the violation was abated by the installation of additional roof support cribs over the two days subsequent to the issuance of Citation No. 9061133. Tr. II-100-01. Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $2,000.

C. The June 15, 2015 Inspection: The Tracking System Violation, Order No. 9061162

On June 15, 2015, Morgan arrived at Mine No. 7 at 10:05 a.m. to continue his E01 inspection. Tr. I-227-28. McGuire informed Morgan that he had discovered a roof fall in the mine earlier that morning and production had been shut down. Tr. I-228; *see also* P. Ex. 29 at 1. Morgan immediately required McGuire to contact MSHA to report the fall, and McGuire did so. Tr. I-232; *see also* P. Ex. 29 at 1.

The roof fall occurred in the No. 1 entry of the left air course return. The fallen roof section was about twenty feet long, twenty feet wide, and 34 feet high. P. Ex. 29 at 1.

Shortly after McGuire notified MSHA of the reportable fall, one of MSHA's roof control specialists called the mine to issue a verbal 103(j) order.[18] Thereafter, Morgan spoke with the MSHA representative, and modified the 103(j) order to a 103(k) order.[19]

[18] Section 103(j) of the Mine Act allows the Secretary's authorized representatives, in the event of an accident "where rescue and recovery work is necessary," to "take whatever action [they] deem[] appropriate . . . [to] supervise and direct the rescue and recovery activities." 30 U.S.C. § 813(j).

[19] Section 103(k) allows the Secretary's authorized representatives who are physically present at coal mines to issue "such orders as [they] deem[] appropriate to insure the safety of any person" in the event of an accident. 30 U.S.C. § 813(k).

While Morgan was in the mine office, he noticed that the interface terminal display for the electronic underground tracking system indicated that approximately fifty percent of the tag readers were out of service. Tr. I-249, 252; P. Ex. 15 at 28; *see also* P. Ex. 16 at B-1. The tracking system interface terminal, installed in the mine office, displays a mine map showing the corresponding locations of the tag readers and any miners in the immediate area of a reader. Tr. I-243-44, 252. The indicator lights on the display are green when the tag readers are working properly and gray when the tag readers are out of service. Tr. II-174. The lights flash red when miners activate an emergency button on their individual identifying tags. Tr. II-174.

The tracking system consists of underground radio frequency identification tag readers placed at intervals within the mine. Tr. I-242-43; *see also* P. Ex. 16 at B-1. Although Morgan did not count the precise number of tag readers at Mine No. 7, he testified that a mine of that size would likely have three readers on the working section inby the section loading point, where miners must be tracked within 200 feet, and two to three tag readers outby the section loading point, where miners are required to be tracked within 2,000 feet. Tr. I-248-49; P. Ex. 16 at B-1. Miners wear identifying tags that are scanned by each tag reader as they travel throughout the mine. A tracking system interface terminal installed in the mine office displays a mine map showing the corresponding locations of the tag readers and any miners in the immediate area of a reader. Tr. I-243-44, 252. The data gathered by the tag readers should be accessible at any time to determine the current location of any miner wearing a tag. The system also stores the tracking data history for each miner for the past two weeks. Tr. I-243-44; P. Ex. 16 at B-2.

After Morgan noticed the gray tag readers on the interface terminal, he asked Caleb Cline, the tracking system operator, if there was a problem with the tracking system. Cline replied that a problem with the electronic tracking system had started the night before. Tr. I-243. Morgan then asked if Cline was keeping a manual log, as required by the ERP in the event of a tracking system failure. Tr. I-243; P. Ex. 16.[20] In response, Cline showed Morgan the manual

---

[20] Mine No. 7's ERP provides, in relevant part:

> Tracking systems will be maintained in a functional manner when miners are underground. To continue mining operations, the mine will establish and follow a procedure to provide tracking *(written log)* during system or component failures in the event that an accident occurs before the failure can be corrected.
>
> . . .
>
> The infrastructure will be examined to verify on a weekly basis that the electronic tracking system is maintained in proper operating condition. A record of the examination will be kept and made available to an authorized representative of the Secretary and miners.
>
> . . .

log that he had begun that morning, which contained the following single entry: "Ricky McGuire and section crew traveled underground." Tr. I-243; P. Ex. 15 at 17. Morgan informed Cline that his log was inadequate because it did not contain specific notations indicating the names of the underground miners, the precise time they entered the mine, when they arrived at the working sections, when they left the section, where they were going, and what time they returned to the section. Tr. I-243, 250, 256. Cline's manual log also did not contain any entries that reflected McGuire's entry into or exit from the mine when he traveled underground to conduct work related to the roof fall that had occurred that morning. Tr. I-243, 251; *see also* P. Ex. 15 at 14-15.

Morgan asked Cline to pull up several days' worth of system tracking logs for section foreman Jason Darnell. For the prior ten days, from June 5 through June 15, the system indicated that Darnell's tag had been picked up only by a single outby tag reader at the No. 4 belt, as he entered the mine at the beginning of his shift and exited the mine at the end of his shift. Consequently, Morgan determined that all but one of the tracking system's underground tag readers, including all of the readers on the working section, had not been functioning since June 4, 2015. Tr. I-244-45; P. Ex. 15 at 19. The last section tag reader to record Darnell on the section was at 1:30 p.m. on June 4, 2015. P. Ex. 15 at 20.

In an effort to double check the system's failure, Morgan asked Cline to pull the system's logs for Marty Davis, the continuous miner operator, who would have been traveling from the surface to the working face each day. Tr. I-246. Davis' log, like Darnell's, showed only the same No. 4 belt reader entries. Tr. I-247; P. Ex. 15 at 20. Morgan asked Cline to print out the tracking system history, but Cline was unable to do so because the printer was out of paper. Tr. I-264.[21]

If the tracking system or a component of the system fails, appropriate corrective actions will begin immediately and continue until it is repaired, and the back-up tracking system will be instituted immediately in the affected area. Tracking system failures or component system failures will be recorded in a record book for MSHA's inspection along with other examinations conducted. The record book will, at minimum, identify the date and time of system failure, the date and time the system was restored to full operational capacity, the nature of the failure, the extent of the system affected by the failure, and the manner in which the failure was corrected.

The MSHA Hotline will be notified of system failures that extend longer than 12 consecutive hours. A system failure is not a failure of one individual node or reader but is when an entire entry or section is without tracking.

P. Ex. 16 at B-3 (emphasis in original). In addition, the ERP requires that the mine maintain a printer that "can be immediately connected to the tracking system to provide a printed record of the location of all miners underground in the event of an emergency." P. Ex. 16 at B-1.

[21] McGuire testified that he had printed out the electronic tracking log that Morgan had requested from Cline, but that he declined to turn over the tracking logs to Morgan without proof that the Secretary's regulations required operators to produce records to authorized representatives, upon demand. Tr. II-163-65. At the time of the hearing, Respondent was unable to produce copies of

Morgan also inspected the tracking system examination records for Ralph Steele, the chief electrician, who conducted an exam on June 10, 2015, and purportedly found no problems with the system. When Morgan reviewed the electronic tracking records for June 10, 2015, he discovered that only the single outby tag reader at the No. 4 belt had recorded any data. Tr. I-256-58; *see also* P. Ex. 14. Morgan then spoke with Steele, who told Morgan that he conducted his examination of the tracking system by riding by the underground tag readers and ensuring that their power lights were on. Steele's examination procedures did not include checking the interface terminal display in the mine office. Tr. I-258; P. Ex. 15 at 22; *see also* Ex. P-16 at B-3.

After Morgan's review of the tracking system examination records, Cline and Steele told Morgan that they had worked on the tracking system several times during the preceding week. P. Ex. 15 at 23. Cline had worked on the terminal interface computer in the office. Tr. II-176. Steele had worked underground with the individual components, such as the tag readers. Tr. II-185. In addition, two different contractors also performed work on the tracking system. Tr. II-184, 219.

Morgan required Cline to update the manual tracking log by radioing into the mine to determine the location of each miner underground. Tr. I-249. Morgan also required Cline to call in the tracking system outage to MSHA, as required by the ERP. P. Ex. 29 at 2.

Morgan then issued 104(d)(1) Order No. 9061162 alleging a violation of section 316(b) of the Mine Act for failure to follow the MSHA-approved ERP for Mine No. 7. The Order alleges:

> The operator has failed to follow the approved ERP [emergency response plan] plan for the tracking system. When checked the tracking system had not been operating properly. The readers located in the outby areas and on the section were not working. None of the readers had been reading on the section since 6/4/2015. The operated failed to manually track the miners while underground and failed to report it to the MSHA hotline in the required time. Page # B-3 of the approved plan under the Maintenance header states: #1, Tracking systems will be maintained in a functional manner when miners are underground. To continue mining operations, the mine will establish and follow a procedure to provide tracking (written log) during system or component failures in the event that an accident occurs before the failure can be corrected. #2, If the tracking system or a component fails, appropriate corrective actions will begin immediately and continue until it is repaired, and the back-up tracking system will be initiated immediately in the affected area. #3, The MSHA hotline will be notified of system failures that extend longer than 12 consecutive hours. A system failure is

---

the electronic tracking logs. Tr. I-36, II-202. Accordingly, I decline to credit McGuire's testimony. I also note that Section 103(h) of the Mine Act provides that "every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare, may reasonably require from time to time to enable him to perform his functions under the Act." 30 U.S.C. § 813(h).

not a failure of one individual node or reader but is when an entire entry or section is without tracking. This violation is an unwarrantable failure to comply with a mandatory standard.

P. Ex. 14.

Later that same day, Morgan modified the Order to include the following:

The electrician that conducted and recorded the exam of the tracking system on 6-10-2015 recorded that the system was working and no problems found. When the history for 6-10-2015 was checked the system was not working as recorded. No readers were working on the section and numerous readers were not working outby.

P. Ex. 14.

The Secretary alleges that the violation was S&S, reasonably likely to contribute to a hazard that would result in fatal injuries to eight miners, and the result of Respondent's high negligence and unwarrantable failure. *Id.* The Secretary has proposed a specially-assessed penalty of $17,300.

Morgan based his unwarrantable failure designation in part on citations issued earlier in his E01 inspection. Tr. I-278. For example, Citation No. 9061125, issued on April 22, 2015, alleged that all three section readers were not functioning and that Respondent had failed to initiate manual tracking of underground miners. The violation was designated as S&S and the result of Respondent's moderate negligence. Citation No. 9061125 was abated when the tracking system's functionality was restored. P. Ex. 26. The citation was contested and assigned to Docket No. WEVA 2015-0888. I issued a Decision Approving Settlement disposing of that citation on March 31, 2016. In addition, Citation No. 9061128, which issued on April 23, 2015, alleged that Respondent failed to notify MSHA when the tracking system had gone down for more than 12 hours. The citation was abated when Respondent notified MSHA of the system failure and began tracking miners with a manual log. P. Ex. 27. Per MSHA's records, Respondent did not contest Citation No. 9061128. *See* Mine Safety and Health Administration, *Mine Data Retrieval System*, http://arlweb.msha.gov/drs/drshome.htm (last accessed Oct. 21, 2016).

1. The Violation in Order No 9061162 was S&S

Respondent stipulated to the fact of the violation. Stip. Fact No. 10, Jt. Ex. 1.

I next identify the discrete safety hazard contributed to by the violation. *Newtown Energy,* 38 FMSHRC at 2037. Without a functioning tracking system or an accurate manual log, miners could not be located underground in the event of an emergency or accident. Tr. I-266. Based on Morgan's review of Cline's inadequate manual log, which was required under Respondent's ERP, I find that this hazard was more than just reasonably likely to occur; the hazard did occur on June 15, 2015, when Cline failed to record McGuire's additional trip into the mine to perform work related to the roof fall that morning. Respondent, therefore, had no

reliable record documenting the identity or location of miners working underground. Tr. I-243, 251.

The hazard of not being able to locate miners underground in the event of an emergency is reasonably likely to result in a serious injury. In the event of an emergency, lack of information regarding the location of the miners underground will impede rescue efforts. Tr. I-266-67. Minutes can make the difference between life or death in a mine emergency rescue effort. Morgan credibly testified that lack of tracking would put every miner underground at risk during an emergency. Tr. I-271. I therefore find that Order No. 9061162 was appropriately designated as S&S because the violation contributed to an inability to track miners during an emergency, such as a fire, explosion, or water inundation, which is reasonably likely to result in fatal injuries for the eight miners working underground.

2. Order No. 9061162 was the Result of Respondent's High Negligence

Considering the totality of circumstances regarding the tracking system failure, I find that Order No. 9061162 was the result of Respondent's high negligence. Although Steele indicated in his June 10 examination records that the tracking system was properly functioning, both Steele and Cline told Morgan on June 15 that they were aware of the system failure and had been working on the system for about a week. P. Ex. 30; P. Ex. 15 at 23. Despite the work that Steele and Cline had performed, the system was still not functioning properly at the time of Morgan's inspection, and the tracking system's electronic records indicated that the system had been out for eleven days. Tr. I-244-45; P. Ex. 15 at 19. Respondent continued active mining operations during this period. A reasonably prudent operator with knowledge that the tracking system could not accurately track miners underground should not have continued active mining operations until the system was fixed or an accurate manual log was maintained. I therefore affirm the Secretary's high negligence designation for Order No. 9061162.

3. Order No. 9061162 was an Unwarrantable Failure to Comply with Section 316(b) of the Act

Unwarrantable failure designations, like S&S designations, may only be applied to alleged violations of the Secretary's mandatory health and safety standards. *See* 30 U.S.C. § 814(d)(1); *see also Wolf Run Mining Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 659 F.3d 1197 (D.C. Cir. 2011). *Wolf Run* addressed the issue of whether a violation of a safeguard promulgated under Section 314(b) of the Mine Act was a violation of the Secretary's mandatory safety standards, and consequently eligible for designation as S&S. The D.C. Circuit, relying on a plain language review of the Mine Act's statutory text, noted that the Act defines "mandatory health or safety standards" as "the interim mandatory health or safety standards established by titles II and III of this Act, and standards promulgated pursuant to title I of this Act." 30 U.S.C. § 802(l). The court determined that since Section 314(b) was an interim mandatory health and safety standard established by Title III, it fell squarely within the Act's plain language definition of a mandatory health and safety standard. *Wolf Run*, 659 F.3d at 1232-33.

Like Section 314(b), Section 316(b) was also promulgated pursuant to title III, and is likewise an interim mandatory health and safety standard. Section 316(b), which requires each mine to follow an approved ERP, therefore also falls clearly within the Act's definition of "mandatory health and safety standards." Alleged violations of Section 316(b) may thus properly be designated as unwarrantable failures. *See* 30 U.S.C. §316(b).

Based on the aggravating facts and circumstances surrounding Respondent's failure to comply with its MSHA-approved ERP, I find that the violation is an unwarrantable failure to comply with Section 316(b) of the Act. The ERP requires Respondent to report tracking system failures that exist for longer than 12 hours. Morgan determined that the failure leading to the issuance of Order No. 9061162 lasted for a duration of 11 days. Tr. I-244-45. In addition, the failure was extensive, as the unrebutted record evidence indicates that all of the section tags readers, and all but one of the outby tag readers, were not working during that outage. Tr. I-244-45.

I find that Citations Nos. 9061125 and 9061128, issued less than a month prior to Order No. 9061162, put Respondent on notice that greater efforts were necessary in order to comply with the ERP. P. Ex. 26, 27. Both of those citations directly involved violations of the same provisions of the ERP at issue in Order No. 9061162. Morgan issued Citation No. 9061125 for Respondent's failure to manually track miners during a system failure of the tag readers on the working section. Similarly, Citation No. 9061128 was issued for Respondent's failure to notify MSHA of a tracking system failure lasting more than 12 hours, and it was abated when Respondent notified MSHA of the failure and began keeping a manual log of the underground movements of miners. I therefore find that the particular violations in Citation Nos. 9061125 and 9061128 put Respondent on notice that greater efforts were necessary to comply with the ERP.

I also find that Respondent had knowledge of the violation and demonstrated high negligence and a serious lack of care for the safety of its underground miners should an emergency occur underground while the violation was left unabated. Both Steele, Respondent's chief electrician, and Cline, one of the owner's sons, knew that the tracking system had not been functioning properly, as indicated by their attempts to resolve the problem in the week prior to the issuance of Order No. 9061162. P. Ex. 15 at 23. The 11-day duration of the violation, combined with Respondent's inadequate efforts to manually track the miners underground, indicates that despite Respondent's knowledge of the violation, Respondent failed to take adequate steps to fix the tracking system so that miners could be located in the event of an emergency. Tr. I-244-45. In fact, examination records indicated that the tracking system and its components were functioning properly, while in actuality, they were not. I find that the failure to record the problems with the tracking system and its components was a deliberate omission that would mislead miners and MSHA.

The violation appeared to be obvious, even to the inspector. The system's terminal interface was equipped with lights that change to gray to indicate problems with individual underground tag readers. It was these gray lights that Morgan noticed shortly after arriving in the mine office on June 15, 2015. Tr. I-249, 252, II-174. In addition, had Cline chosen to check

the electronic system log, it would have been immediately apparent that the system had not been working for the past 11 days.

The tracking system failure posed a high degree of danger. As noted above, lack of information regarding the location of the miners underground would impede rescue efforts during an emergency where minutes can mean the difference between life or death. Tr. I-266-67, 270, 272.

Based on the above analysis of the aggravating facts and circumstances surrounding Respondent's failure to comply with its ERP, I affirm the unwarrantable failure designation for Order No. 9061162.

d. Penalty Assessment

The Secretary proposed a specially assessed penalty of $17,300 for Order No. 9061162. In its recent *American Coal* decision, the Commission majority (Commissioners Young, Cohen and Althen) observed that

> [f]or either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently, and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record.

38 FMSHRC 1987, 1995 (Aug. 2016). In *American Coal*, MSHA issued a special assessment without explaining the basis in its Narrative Findings. *Id.* at 1996. The majority noted that the Secretary bears the burden of "providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria." *Id.* at 1993. "When a violation is specially assessed, that obligation may be considerable." *Id.* While the Secretary may provide an explanatory narrative to support the special assessment sought, Judges must "be attentive to the rationale and facts and circumstances supporting the decision to seek a special assessment, so that the ultimate assessed penalty conforms to the Judge's findings and conclusions." *Id.*

I consider the specially assessed penalty of $17,300 as a proposal. Because the Secretary has proposed a penalty substantially higher than would have been proposed under the regular assessment system, I look to the record to determine whether the Secretary introduced evidence to support an elevated assessment under the Secretary's regulations. I then assess the penalty independently based on the record evidence of Section 110(i) criteria and the deterrent purposes of the Act.

According to the Secretary's narrative findings for the special assessment of Order No. 9061162, the operator's unwarrantable failure to comply with the Secretary's mandatory health and safety standards, combined with the operator's high negligence, indicate "the need for greater deterrence than the regular assessment can provide." Narrative Findings for a Special Assessment, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2016-0084. The gravity of the violation was "serious" because "at least eight underground miners were not being tracked." *Id.* The narrative findings also note that the violation resulted from the operator's high

negligence, and indicate that Respondent's practice of failing to comply with the ERP "could be the result of intentional conduct on the part of management:"

> [M]anagement was aware of the requirements to maintain fully functional communication and tracking systems where miners are underground. The operator knew that the system was inoperative but failed to track the employees manually. The obvious tracking system failure existed for an extended period of time. Examination records indicated that the tracking system was functioning properly, while in actuality, it was not. Management failed to ensure a safe work place was provided to the miners.

Id.

I have affirmed the Secretary's gravity and negligence findings, and find that the Secretary's special assessment rationale, as contained in the narrative findings, is consistent with record and the evidence introduced at hearing. In addition, I have affirmed that the violation in Order No. 9061162 was the result of Respondent's unwarrantable failure to comply with Section 316(b). Although the examination records indicated no issues with the tracking system, both Cline and Steele knew that system components were not, in fact, properly functioning, and I have found that the failure to record the problems with the tracking system and its components was a deliberate omission that would mislead MSHA and miners actively working underground. The parties have stipulated that Respondent produced 598 tons of coal in 2015. Although Respondent had a total of only 10 violations in the 15 months preceding the issuance of Order No. 9061162, *see* Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2016-0084, two of those violations involved the same standard, indicating that Respondent was not getting the message that it needed to comply with the tracking system provisions of its ERP. Specifically, Citations Nos. 9061125 and 9061128, issued less than a month prior to Order No. 9061162, put Respondent on notice that greater efforts were necessary in order to comply with the ERP. P. Exs. 26, 27. Both of those citations directly involved violations of the same provisions of the ERP at issue in Order No. 9061162. Morgan issued Citation No. 9061125 for Respondent's failure to manually track miners during a system failure of the tag readers on the working section. Similarly, Citation No. 9061128 was issued for Respondent's failure to notify MSHA of a tracking system failure lasting more than 12 hours. The parties stipulated that the proposed, specially assessed penalty will not affect Respondent's ability to remain in business. Stip. Fact. No. 6, Jt. Ex. 1. According to MSHA's Mine Data Retrieval System, Order No. 9061162 has not been terminated and is still in effect. MSHA Mine Data Retrieval System, http://arlweb.msha.gov/drs/ASP/MineAction.asp (last accessed Nov. 17, 2016); *see also* Stip. Fact No. 8, Jt. Ex. 1. Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $17,300.

IV. ORDER

For the reasons set forth above,

Citation No. 9061132 is **AFFIRMED**, as written;

Order No. 9061133 is **AFFIRMED**, as written;

Citation No. 9061479 is **AFFIRMED**, as written;

Citation No. 9061120 is **AFFIRMED**, as written;

Citation No. 9061131 is **AFFIRMED**, as written; and

Order No. 9061162 is **AFFIRMED**, as written.

Respondent, Rock N Roll, is **ORDERED** to pay a total civil penalty of $29,613 within thirty days of the date of this Decision and Order.[22]

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Thomas F. McLoughlin, Tri-State Geologic & Mining Service, LLC, 741 Park Avenue NE, Norton, VA 24273

Brian P. Krier, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106

/ccc

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