# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 2024

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner<br><br>v.<br><br>PEABODY GATEWAY NORTH<br>MINING, LLC,<br>Respondent | CIVIL PENALTY PROCEEDING<br><br>Docket No. LAKE 2023-0139<br>A.C. No. 11-03235-572532<br><br><br><br>Mine: Gateway North Mine |

## DECISION AND ORDER

Appearances: Emelda Medrano, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner,

Arthur Wolfson, Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for the Respondent,

Before: Judge Sullivan

## I. INTRODUCTION

This case is before me upon a petition for the assessment of civil penalty filed by the Secretary of Labor through her Mine Safety and Health Administration ("MSHA") against Peabody Gateway North Mining, LLC ("Peabody" or "Respondent"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(d). The Secretary seeks civil penalties totaling $37,479 for an order and a citation issued following separate roof fall incidents that occurred in December 2022 at Peabody's Gateway North Mine.

After an investigation into the first incident, in which a piece of roof fell and struck a miner, MSHA issued an order alleging that Peabody had failed to comply with its approved roof control plan, in violation of 30 U.S.C. § 75.220(a)(1).[1] The violation was designated as both

[1] Section 75.220(a)(1) provides that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

significant and substantial ("S&S") and attributable to Peabody's unwarrantable failure.[2] In connection with the second incident, MSHA issued a citation charging Peabody with an S&S violation of 30 U.S.C. § 75.202(a),[3] on the basis that Peabody had failed to support or otherwise control a portion of mine roof before it fell and struck a miner.

The parties presented testimony and documentary evidence at a hearing on April 30, 2024, in Benton, Illinois. MSHA roof control specialist Jeffrey Williams, and MSHA inspector Brandon Lampley testified on behalf of the Secretary, who also called Terry Ward, Peabody's safety manager at the time of the incidents. Chad Barras, a Peabody mining safety engineer contractor, Mikel White, Peabody's outby boss, Cadin Peterson, Peabody's lead man, and Ray Hood, a Peabody compliance officer, all testified for Respondent.

Both parties filed their post-hearing briefs on July 2, 2024. For the reasons below, I affirm the order and uphold MSHA's proposed penalty for it and modify the citation and MSHA's proposed penalty for it.

## II. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

Peabody's Gateway North Mine is an underground coal mine located in Coulterville, Illinois. The two December 2022 roof fall incidents there prompted MSHA to conduct separate E07 investigations. An E07 investigation involves a qualified MSHA representative investigating the circumstances surrounding a non-fatal accident or injury, including by inspecting the area of the mine where the event occurred. Tr. 10, 21, 131-32.[4]

### A. December 17 Roof Fall

The first roof fall occurred during the December 17, 2022, midnight shift on Unit 2 of the mine. At the right outby corner of the entry no. 7 intersection of crosscut no. 47, a rock fell from the roof on a miner while he was kneeling working on a map, resulting in an injury to the miner's leg. Tr. 22, 26, 31-32,198; Ex. P-4(b) at 007 (photo of roof).

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[2] MSHA is authorized to allege a violation to be S&S by section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The conclusion that a violation is attributable to the operator's unwarrantable failure is based on the same section of the Mine Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[3] Section 75.202(a) provides that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

[4] In this decision, the transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as follows: "Tr.," "Ex. P-#," and "Ex. R-#."

Jeffrey Williams was assigned the resulting E07 investigation the first week of January 2023. As a roof control specialist with MSHA since 2015, Williams' job duties include roof control plan reviews, assisting field offices that need help on inspections, and conducting accident investigations related to roof control or incidents in which miners are struck by falling roof. Annually, he spends between 150 and 200 days inspecting underground mines. Tr. 18-21.

Williams traveled to the mine and spoke with Terry Ward, Peabody's safety manager. Ward informed him of preliminary details, including whether the injured miner, Corey Parkinson, was still in the hospital, what his injuries were, and a brief run-down of what occurred. Williams then reviewed the mine file, along with the mine's investigative report, before the two men proceeded underground to the accident site at Unit 2. Tr. 21-22, 198.

Following his investigation, Williams issued Order No. 9541627, alleging a violation of section 75.220(a)(1) because of more than one failure by Peabody to follow its approved roof control plan for Unit 2 (MMU's 002 and 022). Tr. 23-26; Ex. P-2 (order), P-4(a) at 012 & P-6, at 002 (excerpts of roof control plan). The failures alleged were Peabody's mining in excess of the plan's limit on the width of entry no. 7, as well as exceeding the plan's limits on the width, as measured diagonally, of the intersection located at entry no. 7's cross-cut no. 47, where the miner was struck by the falling rock. Tr. 26-27, 28.

Williams further cited the presence of numerous, visible slickensided slips in the roof of both the intersection and the entry, indicating to him the presence of adverse roof conditions. The roof control plan required a reduction in the width of the entry under such circumstances, or the erection of additional support, but Peabody had taken neither measure. Tr. 27, 34, 35, 37-38; Ex. P-2, P-4(b) (investigative notes and photographs of roof fall area).

Williams designated the violation as "reasonably likely" to result in a fatal injury (and thus S&S) and attributable to Peabody's high negligence and unwarrantable failure. Ex. P-2. As far as abatement of the roof control plan violations, cribs had already been constructed in the intersection after the roof fall there to bring the intersection into compliance with the plan. Tr. 27. The citation was not terminated, however, until Peabody installed four timbers in the too-wide entry. Ex. P-2. MSHA later proposed a penalty of $15,270 for the violation that Peabody contested.

## B. December 19 Roof Fall

On December 19, 2022, scoop operator Tyrone Charles was on the right side of Room 2 on Unit 1 to conduct rock dusting when he was struck by a rock that fell from between two rows of bolts that had been installed that morning. It fractured his arm and wrist. Tr. 131-33, 220-23, 239; Ex. P-3, at 001.

On January 3, 2023, Brandon Lampley, who had been hired as an MSHA mine inspector in 2015, was assigned to conduct the E07 investigation into the fall as part of his E01 quarterly inspection of the mine. Tr. 128, 130-32. Before working at MSHA, Lampley had various mine-related jobs, including roof bolter, section foreman, mine foreman, mine manager, and safety manager. Tr. 127-128.

Before conducting the roof fall investigation, Lampley reviewed the mine file, examination records, and preliminary accident report. Tr. 131-132, 133. Lampley also spoke with Terry Ward who informed him of what occurred. Tr. 132. Then Lampley and the mine's superintendent, John Templeton, went underground to investigate Unit 1's right-side room, the accident site. Tr. 133; Ex. P-5(a) at 002 (inspector's notes and photographs). Upon arriving, Lampley noticed that the area had been scooped and determined that "a lot of mining" had occurred since the accident, which explained why the rock that fell was no longer there. Tr. 135. During the investigation, Lampley concluded that black shale, located between a row of roof bolts, had fallen and struck the miner. Tr. 142.

As a result of his investigation, on January 11, 2023, Lampley issued Citation No. 9546404 alleging a violation of section 75.202(a) for a failure on Peabody's part to adequately support or otherwise control the roof to protect the miner from a resulting roof fall hazard. Ex. P-3, at 001 (citation). The inspector designated the violation as having occurred and likely to result in lost workdays or restricted duty for the miner, and thus S&S. He also alleged high negligence on the part of Peabody. *Id*.

A few days later, Peabody terminated the citation by amending its roof control plan to require additional roof bolts whenever a room is cut over twenty feet wide. Tr. 160; Ex. P-3, at 002. MSHA subsequently proposed a penalty of $22,209.00 for Citation No. 9546404, which Peabody contested.

## III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Secretary must prove a cited violation and any special findings by a preponderance of the credited, relevant evidence. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006). The Secretary's burden of proof requires her to demonstrate that the "existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

### A. Order No. 9541627

#### 1. Finding of Violation

Order No. 9541627 states in pertinent part that:

> The operator was not complying with the mines approved roof control plan on the #2 Unit (MMU's 002 and 022) in two locations: 1) The intersection located at SS 28+55 (#47), entry #7 was mined 38 feet by 34 feet for a diagonal sum of 72 feet where the plan requires intersection diagonals to be mined no more than 68 feet, 2) Entry #7 was mined 20 feet 3 inches to 20 feet 8 inches for a linear distance of 17 feet starting just inby the crosscut at SS 28+55 and extending inby. The plan requires entry widths to be reduced to no more than 18 feet when in adverse roof

conditions. There were multiple slips and slickensided slips located in the wide area. The slips were obvious and extensive.

Ex. P-2. Peabody does not contest the roof control plan violations alleged in the order.

The Commission has explained that to establish a roof control plan violation, the Secretary must prove that (1) the provision allegedly violated is part of the approved and adopted plan; and (2) the cited condition or practice violated that provision. *Jim Walter Res. Inc.*, 9 FMSHRC 903, 907 (May 1987); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280-82 (Dec. 1998). I find that the Secretary has shown both with respect to the two roof control plan violations alleged in the order.

Regarding the first alleged plan violation, involving the intersection located at SS 28+55 (no. 47) and of the Entry no. 7, where the miner was struck by the falling rock, the Secretary submitted into evidence Peabody's approved roof control plan. It requires that "[t]he maximum sum of diagonals for 4-way turned intersections be limited to 68 feet." Ex. P-4(a) at 012.

During his investigation of the roof fall, Williams noticed that the width of the intersection appeared to be too wide. Tr. 24, 25. This prompted him and Terry Ward, to measure the diagonals of the intersection. They determined that at the time of the roof fall the diagonals were 34 x 38 feet, for a sum of 72 feet, or four feet more than permitted. Tr. 27, 80, 96; Ex. P-4(a) at 011, P-8, at 001-02.

There is no dispute that the intersection diagonals exceeded the plan limits at the time of the roof fall. Peabody's outby boss Mikel White testified that, the morning after the roof fall, he and his supervisor, mine manager Nathan Genesio, determined that the intersection "from corner to corner" was "too wide," and thus "out of compliance" with the mine's roof control plan. Tr. 199. Consequently, a crib was built that day in the corner of the intersection diagonal from where the roof fall occurred to bring the intersection back in compliance. Tr. 199-201; Ex. P-8, at 001.

The evidence thus establishes the first alleged plan violation.

The second alleged roof control plan violation, involving the width of Entry no. 7 for a 17-foot stretch inby, starting from just inby the crosscut at SS 28+55, was also established by the Secretary. Williams testified that, immediately upon arrival at the accident site, "it was obvious there were adverse roof conditions. There were numerous visible slips—slickensided slips in the roof" in the area. Tr. 26-27, 34, 36-38, 41, 46; Ex. P-4(b) at 001-004, P-7, at 005 (photos of slips). He explained that "[t]he slickenside is indicative that there was some movement in the roof at some time . . . where that slid between two rock masses . . . and had rubbed that down to where it's slick . . . ." Tr. 35. He described slickensides as often "a common feature in poor roof." Tr. 35.

As Mr. Williams explained (Tr. 38, 46), this is relevant because Peabody's roof control plan requires that "[w]hen adverse roof conditions . . . are visibly encountered[, m]ining will be reduced to a maximum of 18ft wide." Ex. P-6, at 002. The width of the entry almost immediately

inby the intersection appeared to Mr. Williams to be wider than that, and indeed he and Ward measured the width to range, over a 17-foot linear distance of the entry inby, between 20'3" and 20'8". Tr. 28, 96, 103; Ex. P-8, at 002-03.

In addition, the roof control plan requires the installation of standing support when mining widths are exceeded by more than two feet, and Peabody had not done so at that location at the time of the roof fall. Tr. 28, 104. Mr. Williams explained that Mr. Ward stated to him that Peabody constructed standing support or cribs in connection with an existing notch in the rib in the entry following the accident. Tr. 42. The notch cribs were built the same day as the crib in the intersection. Tr. 201-02.

The depth of that notch, however, was not included in the width measurements taken by Williams, and the previously constructed cribs were for the notch alone. Tr. 81; Ex. P-8, at 001. Consequently, Peabody had to install four timbers to bring the entry into compliance with the roof control plan and fully terminate the violation. Tr. 82.

**2. Significant and Substantial**

A violation is properly designated as significant and substantial ("S&S") if, "based upon 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." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)); *see also Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 500 (Apr. 1988); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The Commission requires affirmative findings on the following elements to uphold an S&S finding:

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

*Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)). It is the contribution of a violation to the cause and effect of a hazard that might be "significant and substantial." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985).

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)) ("A determination of 'significant and

substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease."). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (*citing Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014)).

The Commission has further observed that the opinions of an experienced MSHA inspector testifying that a violation is S&S are entitled to substantial weight. *Harlan Cumberland*, 20 FMSHRC at 1278-79. There is ample Commission precedent on finding a violation of an approved roof control plan to be S&S. *See e.g., Consol Pa.*, 43 FMSHRC at 149 (affirming Judge's determination that roof control plan violation was S&S); *Halfway Inc.*, 8 FMSHRC 8, 12-13 (Jan. 1986) (affirming S&S for failing to comply with a roof control plan where miners could have worked or traveled in areas with inadequately supported roofs).

Here, Peabody contests the S&S designation, arguing that the Secretary's evidence failed to satisfy the third *Mathies* element. Peabody Br. at 7. The Secretary maintains that all four *Mathies* elements were met. Sec'y Br. at 22-24. For the reasons below, I agree with the Secretary.

**a. Mandatory Safety Hazard**

Here, the operator does not contest this element. Additionally, as discussed above, the Secretary established a violation of 30 C.F.R. § 75.220(a)(1) in two respects. This element is thus satisfied.

**b. Reasonably Likely to Cause the Defined Hazard**

The Secretary must also show that the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed. *Mathies*, 6 FMSHRC at 3. This first requires that the particular hazard to which the violation allegedly contributes—that is, the prospective danger the cited safety standard is intended to prevent—be defined. *Newtown*, 38 FMSHRC at 2037-40.

Requiring that the maximum dimensions set forth in a mine's plan for entries and intersections where persons work or travel not be exceeded, particularly where there are adverse roof conditions, is intended to minimize the discrete hazard of a roof fall or falling draw rock in such areas. Tr. 50. Other Commission Judges have defined the hazard in like fashion. For instance, in *Kenneth D. Bowles, emp. by New River Mining Co.*, the Judge found that the failure to follow the roof control plan posed a discrete safety hazard of miners being subjected to the danger of falling rock due to unstable and inadequately supported roof. 29 FMSHRC 1055, 1059 (Nov. 2007) (ALJ); *see also Cyprus Cumberland Res. Corp.*, 17 FMSHRC 1969, 1977 (Nov. 1995) (ALJ) (explaining that failure to follow an approved roof control plan that is suitable to the specific conditions of the mine at issue contributes to the danger of a roof fall that can injure a nearby miner).

Having defined the hazard, I turn to determining whether the Secretary, based on the facts surrounding the violation, established that there exists a reasonable likelihood of the occurrence of the hazard. *Mathies*, 6 FMSHRC at 3. Mr. Williams credibly testified regarding the danger posed by both an intersection that was wider than permitted by the roof control plan, and an entry that was also too wide under that plan. He first stated that that intersection was too wide under even normal mining conditions, and then went on to point out the conditions were anything but normal, given the "visible slips running through the roof and roof rashing out between the bolts." Tr. 48.[5]

Williams further explained that roof bolting is intended to provide a "beam of support" for mine roof, and that the maximum on widths and other dimensions are set forth in the roof plan because such a beam weakens the "longer" in size the roof it supports gets, as the beam is consequently supporting more material above. He specified that this was particularly the case with respect to the corners of the intersection. Tr. 48-49.

Peabody does not dispute this testimony. In fact, its witness, outbuy boss Mikel White, in testifying about Peabody's roof control plan, agreed that "anything too wide can be dangerous . . . . Tr. 205-06. Given the testimony, the second *Mathies* element was satisfied in this case.

**c. Reasonably Likely to Cause Injury**

Third, the Secretary must show that the occurrence of the hazard is reasonably likely to cause injury. *Mathies*, 6 FMSHRC at 3. This step involves assuming the occurrence of the hazard—not the violation—and determining whether, based on the facts surrounding the violation, the hazard is reasonably likely to cause an injury. *Newtown Energy, Inc.*, 38 FMSHRC at 2037-40; *Texasgulf*, 10 FMSHRC at 501. A further assumption is made of "continued normal mining operations, absent any assumptions of abatement or inference that the violative condition will cease." *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

Peabody contends that "the Secretary offered no evidence to establish that the cited dimensions posed a reasonable likelihood of an injury," arguing that while "Mr. Williams recounted the cited condition," he "did not explain why this condition was reasonably likely to result in an injury. Notably, the Secretary adduced no evidence to show that the dimensions of the intersection played any role in the [miner's] injury." Peabody Br. at 7 (citing Tr. 48-49).

I do not read Mr. Williams' testimony as narrowly as Peabody does. Williams explained how, over time, it would be expected that roof in a too-wide intersection or entry (and here there was both) would further rash out, resulting in an increasingly weakened roof, if not complete failure of the intersection. He also detailed how the intersection and entry, as part of an active section, would have up to eight miners present and working at a time. Tr. 48-50. Given these

[5] "Rashing" is defined as "… c. In Illinois, the sloughing off of coal from ribs and faces. Many accidents are caused from such pieces falling on workmen." U.S. Dept. of the Interior, Bureau of Mines, A Dictionary of Mining, Mineral and Related Terms 897 (1st ed. 1968).

circumstances, I agree with Mr. Williams that it was thus reasonably likely that some amount of material would fall out of the roof and strike a miner.

Further, Williams estimated that the rock that fell and struck the miner as he knelt in the corner of the intersection weighed between 600 and 1000 pounds. He based this estimate on Peabody's post-accident investigative findings on the size of the rock. Tr. 22, 51-52. That amount of roof falling more than establishes the reasonable likelihood of injury in a working area of a mine such as the one where the roof fell in this case.

**d. Reasonably Serious Injury**

For this final step, the Secretary must prove that there would be a reasonable likelihood that the potential injury in question would be of a "reasonably serious nature." *Mathies*, 6 FMSHRC at 3. The Secretary's burden of proof does not require establishing the injury to require hospitalization, surgery, or a long period for recovery. *S&S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013). In fact, muscle strains, sprained ligaments, and fractured bones qualify as injuries of a reasonably serious nature. *Id.* The primary focus of this element is therefore on the risk of injury created by the safety violation itself. *Sec'y v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018); *see e.g., Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313-1314 (June 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

Commission precedent is clear that mine roofs are inherently dangerous and that roof falls have been the leading cause of death in underground mines for years. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *see also Independence Coal Co., Inc.*, 26 FMSHRC 520, 526 (June 2004) (ALJ) (concluding that the Commission's recognition in 1984 "is just as true today."). This suggests that the injury caused by a roof fall is likely of a "reasonably serious nature" as even good roofs can fall and cause death or serious bodily harm. *Consolidation Coal*, 6 FMSHRC at 37: *see also Eastover Mining Co.,* 4 FMSHRC 1207, 1211 & n.8 (July 1982) (explaining that one of Congress's main concerns involving the 1969 Coal Act was to lessen the high fatality and injury rate caused by roof falls and that the legislative history references such falls as the prime cause of fatalities in underground mines).

Specifically, the evidence in this case reveals that the rock that actually fell was estimated to be between 600 and 1000 pounds. Tr. 22, 51. Given the size and estimated weight of this rock and the concern for roof falls causing death, a resulting injury would likely be fatal or reasonably serious. Because he heard a pop in the roof, the miner here was able to at least start getting out of the way. Tr. 22. Nevertheless, he was struck by the rock on his left leg and mid-calf and suffered serious injuries and fractures. Ex. P-4(b) at 005. This element is thus satisfied.

Because all four elements of *Mathies* are met, I affirm the S&S designation.

### 3. Unwarrantable Failure

The Commission has summarized its unwarrantable failure jurisprudence as follows:

> In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).
>
> The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors 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 were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261(Aug.1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988).
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> All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. The Commission has made clear that it is necessary for a judge to consider all relevant factors. *Windsor Coal Co.*, 21FMSHRC997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31(Mar.2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

*Coal River Mining, LLC*, 32 FMSHRC 82, 88-89 (Feb. 2010).

At hearing, Mr. Williams pointed to three factors in particular that prompted him to attribute the roof control plan violations to Peabody's unwarrantable failure: (1) the duration of the plan violations; (2) that previous section 75.220(a)(1) citations and instances of miner's being struck by falling rock had put Peabody on notice that greater compliance efforts on its part were

necessary; and (3) that Peabody knew or should have known that the cited conditions violated the plan provisions. Tr 52-53, 61-62. In her brief, the Secretary argues that there is record evidence to support findings with respect to all seven factors on the unwarrantability of the roof control plan violations. Sec'y Br. at 26-31.

In its brief, Peabody addresses most of the factors in contending that the record does not support attributing the roof control plan violations to Peabody's unwarrantable failure. Peabody maintains that consideration of the factors demonstrates that no aggravated conduct existed in connection with the violations. Peabody Br. at 9-13.

**a. Duration of the Violative Conditions**

In deciding whether a violation should be attributed to an operator's unwarrantable failure, the Commission looks at the length of time that the violative condition existed. The Commission accepts direct and circumstantial evidence to establish duration. *Windsor*, 21 FMSHRC at 1003; *Coal River*, 32 FMSHRC at 93; *see also Peabody Coal*, 14 FMSHRC at 1261 (affirming judge's duration finding based on inspector's observation of the cited area).

The Secretary argues that there were significant durations to both roof control plan violations included in the order: the oversized dimensions of the intersection and the too-wide entry. Sec'y Br. at 27-28. Peabody does not address the duration factor.

With respect to the violative width of the entry in its first nearly 20 feet inby, Mr. Williams credibly testified that condition had lasted at least one week, and perhaps as many as two weeks, going back to the date of the roof fall. Tr. 53-54, 61; Ex. P-4(b) at 014. His conclusion was based on the DTI's ("Date, Time, Initials") that he found spraypainted on the ribs. These revealed that the too-wide entry had been examined for at least one week with no correction made. Tr. 63-64; Ex, P-4(b) at 014. I also note that Mr. Williams considered the face had advanced 80 feet before the roof fall occurred. Tr. 54.

It was a shorter—but still significant—period of time that the intersection was in violation of the roof control plan. Mr. Williams estimated that before the roof fall and subsequent installation of cribs to bring the too-wide intersection into compliance with the plan, "I would say at least 3 to 5 shifts that the intersection was mined too wide and hadn't been corrected, and it didn't get corrected until the guy was hit by the rock." Tr. 54; Ex, P-4(b) at 015.

Both the longer and shorter durations to the roof control plan violation weigh in favor of an unwarrantable failure finding. *See generally Windsor*, 21 FMSHRC at 1001-04 (finding that a duration lasting more than one shift weighs in favor of finding an unwarrantable failure); *CAM Mining*, 38 FMSHRC 1903, 1909 (Aug. 2016) (upholding an unwarrantable failure finding where the operator's failure to abate the hazard exposed at least two shifts of miners to highly dangerous conditions). The Commission has also affirmed a judge's duration finding based on the judge crediting "the inspector's testimony that the accumulations had existed for more than one shift." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 6 (Jan. 1997).

I find the duration factor particularly important with respect to the roof control plan violation established in this case. The longer the violations went unaddressed, the greater the likelihood that a roof fall would occur. Indeed, one did occur in the intersection, which was the location of the shorter duration violation. *Cf. Coal River*, 32 FMSHRC at 92 (longer duration of violation led to increase in danger to miners).

**b. Knowledge of the Conditions**

In assessing this factor, the Commission considers whether the operator knew or should have known of the existence of violation, which includes reviewing reports and complaints from miners regarding the violation. *See Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (actual knowledge is not a necessary element to establish aggravated conduct for an unwarrantable failure finding); *Consol*, 22 FMSHRC at 353; *Cyprus Emerald*, 20 FMSHRC at 813; *Midwest Material*, 19 FMSHRC at 34; *Mullins & Sons*, 16 FMSHRC at 195; *Peabody*, 14 FMSHRC at 1261; *Beth Energy*, 14 FMSHRC at 1243-44; *Quinland Coals*, 10 FMSHRC at 709.

The Secretary focuses on the evidence that Peabody knew or should have known of at least the excessive width of the entry. *See* Sec'y Br. at 31. Peabody only addresses this factor in the context of its abatement efforts. *See* Peabody Br. at 12 n.10.

I agree with the Secretary that this factor weighs in favor of finding that violation of the plan unwarrantable. Williams testified that "[Peabody] knew or should have known that the entry was too wide. There were several examinations that would have been performed in the area. So operator knowledge of the condition, I felt weighted toward aggravated conduct." Tr. 61-62.

This is consistent with Williams' testimony on the one-to-two-week period that the excessive width of the entry existed, and all the shift examinations that had to have taken place during that time. Tr. 29, 63-65. Consequently, I credit his conclusion with respect to this factor.[6]

**c. Obviousness of the Conditions**

The Secretary stresses that the slips in the roof were obvious adverse roof conditions. Sec'y Br. at 30-31. Peabody does not address this issue. Instead, citing only the too-wide entry, it argues that "[a]t the time of the subject inspection, the area that required correction was sandwiched between two locations where cribs had been installed." Peabody Br. at 9 n.7.

I credit Williams' testimony that the slips were obvious. Tr. 27, 53, 63; Ex. P-4(b) at 014. This should have alerted Peabody to the need for greater awareness of the requirements of its roof control plan, but it apparently did not.

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[6] Unlike the Secretary (Sec'y Br. at 31), I do not read Mr. White's testimony agreeing with the statement that he knew the entry "was too wide just by looking at it" to apply to the width of the entry later charged in the violation. Tr. 210. Rather, I read his statement as referring to the width of the entry when taking into account the notch, where White and Genesio built the second set of cribs after the roof fall. Tr. 201-02.

Peabody's argument regarding the two sets of cribs obscuring the violative width of the entry only goes so far. It does not cover the time prior to when the cribs were installed. Tr. 52-54. It also does not cover the second part of the cited plan violation, the width of the intersection.

**d. Extent of the Violative Conditions**

In determining whether a violation is attributable to an operator's unwarrantable failure, the Commission considers the extent of the violative condition. This involves evaluating the magnitude and scope of the violation, the number of affected persons, and the size of the affected area. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014); *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010); *Watkins Eng'rs & Constructors*, 24 FMSRHC 669, 681 (July 2002).

In arguing for a finding that Peabody's violation was extensive in this instance, the Secretary points to the fact that Peabody violated two separate roof control plan provisions. The Secretary also contends that the violation of the plan with respect to the width of the entry was particularly extensive, as it resulted in overmining for a distance of 17 linear feet. Sec'y Br. at 28.

Peabody focuses on the extent of the cited condition at the time the order issued. It argues "[t]he only portion of cited condition that existed at the time of the inspection was an area in between the cribs at the intersection and cribs at the notch." Peabody Br. at 9.

The Secretary is correct that Peabody was cited for violating more than one provision of its roof control plan. Moreover, while the width of the intersection may have exceeded the plan's limit by a matter of a few feet, that distance cannot be minimized in light of the size of the piece of the roof that fell there and struck and injured the miner.

As for violation of the plan by the too-wide entry, I reject Peabody's attempt to minimize its extent. Again, the referenced crib sets were not constructed until after the roof fall in the intersection. Tr. 27. And the crib set in the entry was only designed to support the roof where the notch had been cut. Because of the cribs there, the width of the notch was not included in the measurement of the violative width of the entry. Tr. 81.

In addition, there were several people that were exposed to the hazard posed by the violative roof conditions. Given the work and travel in that area of the mine, Mr. Williams concluded that the miner operator, roof bolter operators, car drivers, scoop operators and others had been exposed at one time or another. Tr. 49-50. Considering all of the foregoing, this factor also weighs in favor of finding an unwarrantable failure here.

**e. Degree of Danger Posed by the Conditions**

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area);

*Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous").

The parties rely on their S&S arguments with respect to the danger posed to miners by the roof control plan violations. As I have found, each of the plan violations posed a reasonable likelihood of causing a reasonably serious injury, and in fact one such injury occurred to the miner struck by the roof fall in the intersection.

As previously mentioned, the Commission has recognized that mine roofs are inherently dangerous and that roof falls are a leading cause of death in underground mines. In this matter, the rock that fell was approximately 600 to 1000 pounds. So, given the size and estimated weight of the rock fall and the evidence of adverse roof conditions, I find that there was a high degree of danger posed by the violative condition. As further support, I credit Peabody's Mikel White's comment that "anything too wide can be dangerous as you can imagine, I guess." Tr. 205-206. This factor thus weighs in favor of finding an unwarrantable failure.

**f. Notice of Need for Greater Compliance Efforts**

In *IO* Coal the Commission summarized this factor as follows:

> Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citation omitted); *see also Consolidation Coal Co.*, 23 FMSHRC 588,595 (June 2001) ("a high number of past violations of section 75.400 serve to place an operator on notice that it has a recurring safety problem in need of correction.") (citations omitted). 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*, 29 FMSHRC at 131 (quoting *Consolidation Coal*, 23 FMSHRC at 595).

31 FMSHRC at 1353.

At hearing, Mr. Williams discussed a semi-annual roof control plan review he had conducted for the Gateway North Mine before the December 2022 roof fall, during the first half of 2022, and the closeout conference he subsequently held with representatives of Peabody. He told of pointing out during the conference that the mine's roof incident history was twice the national average, that there had been miners struck by falling roof, and that greater operator

emphasis needed to be placed on roof and rib control. Ward in his testimony did not dispute this. Tr. 104-05.

Williams also attributed to the operator's indifference that he had been discovering "a lot" of areas in the mine where entry widths slightly exceeded the 20-foot maximum. In all instances but two, however, the entries were not so wide under applicable MSHA policy to cite a violation. Tr. 56-60; Ex. P-4(a).

In her brief, the Secretary cites Mr. Williams' testimony as establishing that Peabody had been put on notice of the need to put a greater effort into complying with its roof control plan. The Secretary also points to Peabody having been cited 19 times over the course of two years for violations of section 75.2020(a)(1) (Ex. P-2), as well as the operator's admission, through Ward, that it needed to "do better" protecting miners from being struck by falling roof. Tr. 104-05; Sec'y Br. at 28-29.

Peabody puts up little argument regarding this background. Instead, it looks forward in time from the semi-annual review, contending that the evidence establishes that it did do better with respect to section 75.220(a)(1) violations during the last quarter of 2022, and that I should consider this evidence as a mitigating factor. Peabody Br. at 10-11 & n.9; Tr. 117 (Ward's testimony that the mine "went for a little stretch without an incident").

The record evidence suggests, to a small extent, an improved roof control plan compliance record at the mine (Tr. 75-76), but there is not nearly enough evidence to consider that improvement a mitigating factor in this case. Moreover, Peabody's focus on the last quarter of 2022 ignores that the violation issued in January 2023 was for the admitted intersection conditions at the time the miner was struck and injured by falling roof in December 2022. Tr. 199.

This factor thus weighs in favor of an unwarrantable failure finding, though perhaps not quite as much as the Secretary maintains it does.

**g. Abatement Efforts**

The Commission has stated that:

> An operator's effort in abating the violative condition is one of the factors established by the Commission as determinative of whether a violation is unwarrantable. Where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. Previous repeated violations and warnings from MSHA should place on operator on "heightened alert" that more is needed to rectify the problem. *New Warwick Mining Co.*, 18·FMSHRC 1568,1574 (Sept. 1996). The focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.*

*IO Coal*, 31 FMSHRC at 1356.

Peabody argues that its installation of cribbing at the left inby corner of the intersection and at the notch inby the intersection should be considered a mitigating factor with respect to the unwarrantability of the violations, because it occurred before the issuance of the order for the roof control plan violations. Peabody Br. at 11-12. The Secretary contends that because Peabody took these actions only after the roof fall in the intersection, it is not the type of abatement efforts that should be considered mitigating. Sec'y Br. at 29-30.

I agree with the Secretary. There is no evidence that Peabody was addressing the roof plan provision violation in the intersection prior to the roof fall.

Rather, the record is clear that Terry Ward told Williams that it was only once the roof fall occurred in the intersection that Peabody installed the cribs in the corner of the intersection to better support the roof. Tr. 27, 41-43, 79-80. Peabody's own witness admitted that as well. Tr. 198-200. At that point Peabody had no choice. The alternative was to permit roof to remain out of compliance with the roof control plan and perhaps continue to fall in a well-traveled area of the mine. Tr. 49-50, 86, 199-200.

I accord little weight to the fact that the cribs in the intersection were built prior to the issuance of the order for the roof control plan violation there. Once a piece of roof fell and struck and injured the miner, at that point Peabody had to know that it would be cited for a roof control violation, if not under the section 75.220(a)(1) plan provisions then under the more general section 75.202(a) roof control provision. Tr. 86.

As for the installation of the cribs in connection with the notch inby the entry, that is of little consequence. The record is clear on the fact that the depth of the notch was excluded by Williams from his determination of the extent to which the width of the entry exceeded the applicable limit on that width under the plan. Tr. 80-82.

Because most of the factors weigh in favor of finding an unwarrantable failure, I conclude that the Secretary properly designated Order No. 9541627 as resulting from the operator's unwarrantable failure.

**4. Gravity**

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially affected. The Commission has recognized that an

assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Williams designated the roof control plan violation as "reasonably likely" to cause an injury or illness. As it did with the third *Mathies* element, Peabody contests this finding and argues that the Secretary failed to offer any evidence to establish that the cited excessive width of the intersection and entry posed a reasonable likelihood of injury. Peabody contends Williams did not explain why the condition was reasonably likely to result in an injury and that the Secretary failed to show the dimensions of the roof in the intersection played any role in the miner's injury while there. Peabody Br. at 7.

This argument is unpersuasive, for the reasons I detailed earlier in affirming the S&S finding. The evidence establishes that the Secretary met her burden with respect to "reasonably likely to cause injury or illness." Williams explained that the greater the expanse of a mine roof, the more stress is put on it, increasing the potential for pieces of it to fall. Tr. 48-49. That basic, logical concept, undisputed by Peabody, is why roof control plans place specific limits on the dimensions of intersections and the width of entries.

Williams also detailed the number of miners who were exposed to the violative conditions in the intersection and entry. Further, as discussed earlier, he also adequately explained why it was reasonably likely that a fatality would result from a roof fall in this instance. The rock fell from a distance of seven and a half to eight feet and weighed between 600 and 1000 pounds. Tr. 49. The record indicates that the miner who was struck was able to move and avoid taking on the full weight of the rock. Otherwise, the injury in this case very well could have been an "occurred" fatality, and not just a reasonably likely one.

Given the foregoing, I affirm the assessed likelihood, severity of injury, and number of persons likely to be affected.

**5. Negligence**

Negligence is not defined in the Mine Act. The Commission has found "[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) (internal citations omitted).

The Commission's negligence analysis asks whether an operator has met "the requisite standard of care—a standard of care that is high under the Mine Act." *Brody Mining*, 37 FMSHRC at 1702. To determine whether an operator met its duty of care, Commission ALJs consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Id.* (citations omitted); *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984)*; see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).. An ALJ, however, "is not

limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.* at 1702-1703. Lastly, the Commission has recognized that an "operator's knowledge (actual or constructive) is a key component of a negligence determination." *Ohio Cty. Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018).

The Secretary separately addresses Mr. Williams' determination that Peabody's negligence was high with respect to the roof control plan violations detailed in the order. *See* Sec'y Br. at 24-25. In his testimony explaining his conclusion that Peabody's level of negligence was high in this instance, Williams cited his affirmative findings with respect to many of the unwarrantable failure factors. Specifically, he relied upon (1) the previous instances of section 75.220(a)(1) violations and miners being struck by falling rock at the mine; (2) the length of time the intersection and particularly the too-wide entry were not in compliance with the roof control plan; (3) the obviousness of the adverse roof conditions; and (4) that examinations of the area were conducted that, given the roof conditions, should have prompted measurements of the noncompliant intersection and entry, but did not. Tr. 52-53.

The record evidence supports Williams' findings. Williams explained that high negligence was appropriate because Peabody had been issued numerous citations for section 75.220(a)(1) violations in the preceding two years. Tr. 52; Ex. P-1 (listing 19 section 75.220(a)(1) violations). He also detailed how he had determined that the width of the entry had exceeded the roof control plan limit for at least two weeks. Tr. 53-54.

Peabody subsumes its argument that a high negligence finding is not appropriate here within its arguments that, under many of the seven factors, the record establishes the violations of the roof control plan were *not* unwarrantable. *See* Peabody Br. at 9. I have rejected those arguments in affirming the inspector's unwarrantable failure finding and incorporate that analysis in concluding that the Secretary has established Peabody's negligence to be high in this instance.

I also find Peabody's negligence to be high in this instance because of the evidence that, in the aftermath of the roof fall that struck the miner, Peabody's representatives determined that the intersection was too wide, and needed to be brought into compliance with the roof control plan. Tr 199-201. While Peabody immediately did so, there is no evidence that the Peabody supervisors used the opportunity to completely examine and address the area almost immediately inby the intersection (Tr. 211), as the entry was also too wide and thus not in compliance with the plan. Peabody only built cribs to address the notch, but not the remainder of the too-wide entry. Tr. 201-02.

I put weight on this failure for a couple of reasons. First, the evidence is that the condition of the roof was poor both in the intersection and the entry, yet Peabody's remedial measures were limited to the intersection and notch. Tr. 27, 34-38. Secondly, on a percentage basis, the width of the entry exceeded the applicable plan limit to a greater degree than the width of the intersection exceeded its applicable plan limit.

## B. Citation No. 9546404

### 1. Finding of Violation

Citation No. 9546404 states:

> The roof where persons work or travel was not supported or otherwise controlled to protect persons from hazards related to falls of the roof in Unit #1, MMU-011, right-side room set-up, 50 feet inby survey station 2+40, room #2. A lost time injury occurred on 12/19/2022 where a contract miner was rock dusting at the face when a rock measuring 2.5 feet wide by 3 feet in length by 4 inches thick fell from between the pattern roof bolts striking him on the left forearm and wrist fracturing both.

Ex. P-3, at 001.

At hearing, Inspector Lampley testified as to his observations during the E07 inspection. Before the inspection, Lampley met with Mr. Ward who briefly explained the details of the accident. Tr. 132-33; Ex. P-5(a) at 003. Mr. Ward explained that a contract employee was grabbing a bag of rock dust off a scoop vehicle when a rock fell from between the roof bolts. Tr. 132-33. That rock measured 3 feet long by 2.5 feet wide and 4 inches thick. Ex. P-5(a) at 3. The rock struck the miner's "hard hat then bounced off and hit his left forearm and wrist," resulting in fractures to both. Tr. 133; Ex. P-5(a) at 003, 07-8, P-8, at 002. The injury occurred at Unit 1, right-side Room 2, 50 inby 2 + 40, where the entry width varied from 20.25 to 23.5 feet. Ex. P-5(a) at 005-06.

John Templeton, the mine superintendent, accompanied Lampley underground in January 2023. Tr. 133; Ex. P-5(a) at 002. Inspector Lampley testified that during the inspection he found "the area had been scooped . . . the injury happened in December, so a lot of mining had taken place there. So of course the rock wasn't there." Tr. 135. Based on his visual observations and Mr. Ward's previous description of the accident, he concluded that black shale rock likely fell from between the roof bolts. Tr. 142.

Peabody's MSHA-approved roof control plan allows the operator to install four-foot roof bolts in areas where limestone extends at least 18 inches in the roof. Tr. 218-19. When there is a lesser depth of limestone or other geological abnormalities exist, then the plan requires six-foot bolts. Tr. 120. Roof bolters will drill test holes to determine whether such abnormalities exist and can hear from the roof during drilling whether 18 inches of limestone is present. Tr. 119, 219.

Miners can also "sound" a bolted roof to determine if hollow spots or cracks are present in it, by tapping on the plates. Tr. 225-26. In this instance, Cadin Patterson, the lead man at the Gateway North Mine, testified that he and his roof bolters generally sounded the roof in Room 2 but not exactly at where the roof later fell. Tr. 226-27.

Raymond Lee Hood, a Peabody compliance officer, explained that Peabody exceeds the requirements of the roof control plan by installing five bolts across in rows instead of four to

provide extra control of any loose top, or "skin." Tr. 245-46. Mr. Hood and Mr. Patterson also testified that, on the day of the fall and the next, the roof was relatively flat and appeared to be in a good condition upon visual inspection. Tr. 217, 240. Patterson sounded the roof of the area during an on-shift examination and testified that the area was bolted in compliance with the roof control plan. Tr. 222, 224. Following the incident, Patterson observed the area at issue and found nothing out of compliance. Tr. 223.

Under 30 C.F.R. § 75.202(a), "[t]he roof, face and ribs where persons work or travel shall be supported or otherwise controlled to protect persons from the hazards related to falls of the roof, face or ribs, and coal or rock bursts." The Commission has explained that, to establish a violation of section 75.202(a), the Secretary must prove: (1) that the roof fall occurred in an area where persons work or travel; and (2) that the roof was not supported to protect persons from hazards related to falls. *Jim Walter Res., Inc.*, 37 FMSHRC 493, 495 (Mar. 2015) ("*JWR*"). The Secretary argues that Peabody violated section 75.202(a) when, despite having been put on notice of roof problems at the mine, the rock fell from between the pattern roof bolts and struck a miner. Sec'y Br. at 32-33.

In contrast, Peabody maintains that, "historically," a different legal test is applied by the Commission to determine whether section 75.202(a) was violated. According to Peabody, "the reasonably prudent person test" governs, and requires that the "adequacy of particular roof support or other control . . . be measured against . . . whether the support or control is what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided . . . to meet the protection intended by the standard." Peabody Br. at 17 (citing *Harlan Cumberland*, 20 FMSRHC at 1277; *Canon Coal Co.*, 9 FMSHRC 667, 668(Apr. 1987)).

While *JWR* rejected the notion that a roof fall is a per se violation of section 75.202(a) (37 FMSHRC at 495), a fall that results in an injury to a miner is generally considered sufficient evidence that the operator failed to comply with the standard. *See*, *e.g., JWR*, 37 FMSHRC at 496 (("The roof fall that pinned [miner] under a piece of rock, resulting in his death, amply demonstrates that the roof was not supported in a manner to protect him from hazards relate to falls."); *Canyon Fuel Co., LLC*, 45 FMSHRC 328, 340-41 (May 2023) (ALJ) (applying *JWR* in an instance in which a rib burst injured a miner). Given the injury to the miner in this case, I will apply the *JWR* test.[7]

Here, the facts show that a miner was in the process of rock dusting in Unit #1 right-side room when rock fell from the roof. Tr. 132-33; Ex. P-5(a), P-5(b). It is thus indisputable that the miner was in an area where persons work or travel.

[7] The issue of which test to apply under section 75.202(a) is presently before the Commission on review in *Canyon Fuel*, so the Commission decision in that case may further explain the circumstances in which the *JWR* test applies versus the circumstances in which the reasonably prudent person test applies to an alleged section 75.202(a) violation.

It is also not disputed that the miner was struck by the rock and suffered two fractures to his arm as a result. Tr. 131-32, 154. Ex. P-5(a), P-5(b). Under *JWR*, a violation of section 75.202(a) has been established.[8]

### 2. Significant and Substantial

Peabody does not separately contest that, if the citation is affirmed, the violation was S&S. In any event, the record establishes the four *Mathies* elements with respect to the violation.

#### a. Mandatory Safety Hazard

The first element is satisfied. 30 C.F.R. § 75.202(a) is a mandatory safety standard, and both prongs of the *JWR* test for determining whether it was violated were met.

#### b. Reasonably Likely to Cause Defined Hazard

As discussed with respect to the roof control plan violation, this element proceeds in two parts. Section 75.202(a) requires that roof in areas where miners work or travel be supported or controlled to protect miners working below it from roof falls. The hazard the standard aims to prevent is falling material striking a miner. The issue is therefore whether a reasonable likelihood exists that falling material from the roof would strike a miner.

Here, a rock 3 feet long by 2.5 feet wide and 4 inches thick fell from the mine's roof. Ex. P-5(a) at 003. The rock not only struck a miner, but he suffered wrist and forearm fractures. Tr. 133; Ex. P-5(a) at 003, 007-08, P-8, at 002. The fact of occurrence is sufficient to find that the violation was reasonably likely to cause the occurrence of the contemplated hazard.

#### c. Reasonably Likely to Cause Injury

Assuming the occurrence of the hazard, that is, a roof fall, it is reasonably likely that a rock or debris would strike a miner in the working area. In this specific case, a rock fall occurred and struck a miner while that miner was cleaning and rock dusting the roof. Tr. 154-55, 223, 239. This prompted Lampley to identify the injury as one that had "occurred." Tr. 155. I agree with the Secretary that a roof fall in an area where miners are working or travelling is reasonably likely to strike a miner and cause an injury. The third *Mathies* element is thus met.

#### d. Reasonably Serious Injury

As stated earlier, the Commission has recognized that mine roofs are inherently dangerous and that roof falls are a leading cause of death in underground mines. The case law focusing on fatalities suggests that the injury caused by a roof fall is likely to be of a "reasonably serious nature."

[8] The Secretary also cites further evidence to establish a violation of the standard, which I will address in deciding the level of negligence of the violation. *See* Sec'y Br. at 32-33.

Here, Lampley testified the hazard was reasonably likely to cause an injury which was serious. Tr. 155. An inspector's conclusion that a possible injury is of a reasonably serious nature has been held sufficient for *Mathies* Step 4. *See Consol Pa. Coal Co.*, 43 FMSHRC at 149 (finding it sufficient that the inspector characterized the potential injury as "serious" and noted potential injuries). The record also shows that the miner was transported to the hospital (Tr. 239), which, while not dispositive of the seriousness of an injury, is an important consideration.

Moreover, the injuries that the miner here actually suffered were fractures to his wrist and arm, which led to him losing time from work. Tr. 154-55. S*ee S&S Dredging Co.*, 35 FMSHRC at 1981-82 (explaining that fractured bones can constitute a reasonably serious injury). It is unclear from the record of exactly how much time the miner lost or whether the miner ever returned to work. However, Lampley's notes reveal that the miner was off work for at least 29 days from December 19, 2022, until January 17, 2023. Ex. P-5(a) at 017.

The focus is on the risk of injury created by the safety violation here, which is the uncontrolled roof that led to a rock falling and injuring a miner. Tr. 154-155. I find that there is great risk of a serious injury in cases where there is a roof fall or a rock of significant size striking a miner. Peabody's incident report reveals that the rock striking the miner in this instance measured 3 feet long, 2 feet wide, and 4 inches thick. Ex. P-5(a) at 003, 008. Given the size of the rock, inherent dangerousness of a roof fall, lost work time of the miner, and the need for the miner's transport to a hospital, I find this element satisfied.

Because all four elements of *Mathies* are met, I uphold the S&S designation as proper. As before, I also credit the inspector's testimony and expertise and find them credible, reasonable, and logical.

**3. Gravity**

In his gravity evaluation, Inspector Lampley designated the likelihood of injury as "occurred" to "1" miner and the injury to be reasonably expected to result in "lost workdays or restricted duty." Ex. P-3, at 001; P-5(a) at 016. Peabody does not contest the inspector's findings.

With respect to this citation, the hazard—inadequately supported roof falling and contacting a miner—in fact occurred, as a single miner was struck by a falling rock. I therefore affirm the inspector's likelihood determination and that one person was affected.

The likelihood contemplated is that of the expected resulting injury. The severity evaluation assumes the occurrence of the hazard. *See Consolidation Coal*, 18 FMSHRC at 1550 (comparing S&S inquiry, which focuses on "the reasonable likelihood of serious injury," with gravity inquiry, which focuses on "the effect of the hazard *if* it occurs") (emphasis added).

The Secretary asserts the severity of the contemplated injury is lost workdays or restricted duty. In support, Lampley testified that "[i]t was a lost-time injury. He didn't come back to work." Tr. 155. Lampley's notes also detailed that the miner had been off work for at least 29 days with two fractures to one of his arms. Ex. P-5(a) at 017. Consequently, I affirm the inspector's findings as to the severity of injury.

In summary, I find that there are sufficient facts and testimony to uphold each of Inspector Lampley's gravity findings.

**4. Negligence**

Inspector Lampley designated the operator's negligence as "high." In support of his finding, he referred to a conversation he had with an inspector who had inspected the mine the previous quarter. According to that inspector, the mine was on heightened awareness for section 75.202(a) violations and roof-related incidents, including ones that had resulted in miners struck by falling roof during the previous six months. Tr. 157-58, 169-170; Ex. P-5(a) at 018-19. The Secretary adds that high negligence is also established here by Peabody's failure to take additional roof control measures at the mine, despite its history of roof problems. Sec'y Br. at 35.

Peabody disputes that it had been put on heightened awareness for roof conditions at the mine. Instead, it documents from MSHA's records that the heightened awareness designation at the mine was limited to poor rib conditions. Peabody Br. at 20-22; Ex. R-1. Peabody also maintains that if a violation is found, the negligence level should be reduced in light of the safety measures it took before the incident occurred, and the fact that no additional roof control measures were required to terminate the citation. *Id*. at 22.

This is the closest issue in this case. I do not put great weight on the fact that the MSHA heightened awareness documentation only refers to rib conditions. Section 75.202(a) is not limited to roof control but also covers rib and face control, and Lampley referred to section 75.202(a) generally in his testimony. Tr. 157. I agree with Peabody, however, that the documentation should have been produced prior to trial. *See* Peabody Br. at 22 n.14.

As for the Secretary's argument that Peabody failed to take additional measures to protect miners from falling roof, I note that she misstates the record by asserting that Peabody had not placed additional bolts in the roof. *See* Sec'y Br. at 35. The mine's roof control plan required four bolts in a row of bolts (Tr. 243-45; Ex. R-3), and the Secretary argues that additional bolts should have been placed in the roof. Sec'y Br. at 35; Tr. 158.

However, the record shows that Peabody routinely exceeded the requirement by "put[ting] up five bolts across for additional support." Tr. 245. Five bolts per row were apparently so prevalent in roof at the mine that Lampley thought it was required by the roof control plan (Tr. 162), and thus failed to recognize it as evidence that mitigated Peabody's negligence in this instance.

Lampley also based his finding of high negligence on Peabody's purported failure to "sound" the roof, which the Secretary cites as support for upholding his finding. Sec'y Br. at 35; Tr. 158. Again, the record is to the contrary on this subject. Tr. 112-13, 225-27 (lead man Caden Patterson's testimony that sounding was routinely conducted both in connection with the drilling of bolts and during onshift examinations). It appears that Lampley limited the scope of his investigation to only those roof control measures that he could observe. Tr. 158-59 ("the only thing I seen, that would have been extra, . . . .").

In light of these evidentiary discrepancies, I cannot find that the Secretary carried her burden of proving a high level of negligence on Peabody's part. Rather, Peabody's negligence was only established to be moderate in this instance.

## IV. PENALTY

Commission administrative law judges have the authority to assess civil penalties *de novo* for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that the ALJ consider six statutory penalty criteria in assessing civil monetary penalties:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Peabody is a large operator, and it has been stipulated that payment of the proposed penalties would not affect its ability to continue in business. Ex. Jt-1, ¶j.

### A. Order No. 9541627

In the fifteen months preceding the issuance of Order No. 9541627, MSHA issued eighteen citations or orders charging violations of section 75.220(a)(1) to Peabody Gateway North Mining, LLC. See MSHA, Mine Data Retrieval System, https://www.msha.gov/mine-data-retrieval-system (last visited September 23, 2024).

For Order No. 9541627, the Secretary proposed a penalty of $15,270.00. I determined Peabody's negligence to be high, and the violation in this instance to be attributable to its unwarrantable failure. Regarding the gravity of the violation, I also determined that it would affect one person and was likely to result in a fatal injury or illness. Moreover, Peabody demonstrated good faith by promptly installing four timbers through the wide entry and two cribs on the left inby corner of the wide intersection effectively reducing both location's widths. Ex. P-2, at 001. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I agree with the Secretary's proposed penalty and hereby assess a penalty of $15,270.00.

### B. Citation No. 9546404

In the fifteen months preceding the issuance of Citation No. 9546404, MSHA issued twenty-six citations or orders charging violations of section 75.202(a) to Peabody Gateway North Mining, LLC's Gateway North Mine. *See* MSHA, Mine Data Retrieval System, https://www.msha.gov/mine-data-retrieval-system (last visited October 1, 2024).

For Citation No. 9546404, the Secretary proposed a penalty of $22,209.00. I determined Peabody's negligence to be moderate. Regarding the gravity, I found that the violation occurred,

affected one person, and resulted in a lost-work injury. Moreover, Peabody demonstrated good faith by terminating the citation through a change to its roof control plan, specifically when the room is cut over 20 feet, Peabody must now put additional bolts in the roof. Ex. P-3 at 002. This would help "tighten the[] spacing between the rows." Tr. 160. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, including that I reduced Peabody's negligence level from "high" to "moderate," I hereby assess a penalty of $18,500.00.

## V. CONCLUSION AND ORDER

It is hereby **ORDERED** that Order No. 9541627 is **AFFIRMED.** It is further **ORDERED that for** Citation No. 9546404 the negligence be **MODIFIED from "High" to "Moderate."** Finally, it is **ORDERED** that the Respondent pay a total penalty of **$33,770.00** within 30 days of the date of this Decision.[9]

John T. Sullivan
Administrative Law Judge

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