FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0269[1] A.C. No. 12-02295-406669
v.	Docket No. LAKE 2016-0232 A.C. No. 12-02295-404287
PEABODY MIDWEST MINING, LLC, Respondent.	Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances:

Daniel J. Colbert, Esq., Anthony Fassano, Esq[2]., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Moran

These consolidated cases are before the Court upon petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Henderson, Kentucky, commencing on August 24, 2017. For the reasons which follow, all of the violations are upheld but, save one, the unwarrantable failure designations are removed, and those are therefore modified to section 104(a) citations, with appropriate modifications to the penalties.

[1] Docket No. LAKE 2016-0268 was consolidated with the other dockets in the caption. On November 18, 2016, the parties submitted a proposed settlement motion for the three 104(a) citations within that docket. That Motion is **HEREBY APPROVED** and the Decision Approving Settlement appears in the Appendix for this decision and is also separately issued today.

[2] Attorney Fassano was the Secretary's trial attorney for Docket Nos. LAKE 2016-0269 and LAKE 2016-0232. Attorney Colbert submitted the Secretary's post-hearing briefs.

Violations at Issue in Docket No. LAKE 2016-0269

At issue in Docket No. LAKE 2016-0269 are two section 104(d)(2) orders: Order No. 9036922 and Order No. 9036663. Order No. 9036922 was specially assessed at $70,000. Had it been regularly assessed, the proposed penalty would have been $44,645. Order No. 9036663 was regularly assessed at $38,503.

Order No. 9036922

Order No. 9036922, issued on December 22, 2015, alleged a violation of 30 C.F.R. § 75.202(a). The cited standard, titled "Protection from falls of roof, face and ribs," provides "[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."

The condition or practice was identified as follows:

> The 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. Loose coal ribs were observed in 10 entries for a distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections measuring approximately 8 inches to 24 inches in thickness by 5 1/2 to 6 feet in height and 30 to 40 feet in length gapped away from the solid pillar approximately 3 to 6 inches with rock dust present behind them. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.220(a)(1) was cited 21 times in two years at mine 1202295 (21 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.202(a) was cited 32 times in two years at mine 1202295 (32 to the operator, 0 to a contractor).

Order No. 9036922.

The inspector assessed the gravity as highly likely, the injury or illness that could reasonably be expected to be permanently disabling, the negligence as high, and the violation as S&S, with 14 persons affected.

Order No. 9036663

Order No. 9036663, issued on February 3, 2016, alleged a violation of 30 C.F.R. § 75.360(a)(1). The cited standard, titled "Preshift examination at fixed intervals," provides, "[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations."

The condition or practice was identified as follows:

> A preshift exam was not conducted on the intake aircourse South West Main seals prior to the afternoon shift miners entering the mine on 2-3-2016. There were not DT&Is at the seals for the oncoming afternoon shift. Inby of this location was Unit #3 Maintenance crew, Unit #2 production crew as well as other miners working inby this location. In order to abate this order, training must be conducted on the importance of examining seals and how to correctly fill out the required books. Standard 75.360(a)(1) was cited 1 time in two years at mine 1202295 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036663.

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be fatal, the negligence as high, and the violation as S&S, with 31 persons affected.

Violations at Issue in Docket No. LAKE 2016-0232

At issue in Docket No. LAKE 2016-0232 are five 104(d)(2) orders, with a total proposed penalty of $86,000.00.

Three of the (d)(2) orders, Order Nos. 9036654, 9036656, and 9036657 invoke the same standard, 30 C.F.R. § 75.1731(a). That standard, titled, "Maintenance of belt conveyors and belt conveyor entries" provides, at subsection (a) "Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced." Each of these three orders proposed a penalty of $4,000.00.

Order No. 9036654

In citing an alleged violation of 30 C.F.R. § 75.1731(a), the inspector listed the condition or practice as:

> The Operating 1C (4th Southeast Mains) Belt is being allowed to operate with damaged rollers. There are two top rollers that are hanging out of the bottom bracket at crosscuts 42-43, causing the rollers to be frozen and allowing the belt to rub them. Also in this area there is a top outside roller that is missing. There is also a frozen top center roller at crosscut 13-14, and a frozen top center roller at crosscut #35. These rollers were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.1731(a) was cited 43 times in two years at mine 1202295 (43 to the operator, 0 to a contractor).

Order No. 9036654.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected. The Secretary proposed a civil penalty of $4,000.00.

Order No. 9036656

The inspector listed the condition or practice as:

> The Operating 1B (2nd Main South) Belt is being allowed to operate with damaged rollers. There is a frozen top center roller at crosscut #14 and a frozen top outside roller at crosscut #10-11. These rollers were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.1731(a) was cited 43 times in two years at mine 1202295 (43 to the operator, 0 to a contractor).

Order No. 9036656.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected.

Order No. 9036657

The inspector listed the condition or practice as:

> The Operating 1A Belt (3rd Southeast Mains) is being allowed to operate with damaged rollers. There are frozen top center rollers at crosscuts # 26,21, and 13. Also there is a frozen top outside roller at crosscut 19-20. There is a top center roller missing at crosscut #8-9 allowing the belt to rub the structure when loaded. These rollers were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.1731(a) was cited 43 times in two years at mine 1202295 (43 to the operator, 0 to a contractor).

Order No. 9036657.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected.

Order No. 9036658

Order No. 9036658 invoked standard 30 C.F.R. § 75.360(b)(11)(vi). That standard, titled, "Preshift examination at fixed intervals," provides, in relevant part, "(b) The person

conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations: … (11) Preshift examinations shall include examinations to identify violations of the standards listed below: … (vi) § 75.1731(a) - maintenance of belt conveyor components."

30 C.F.R. § 75.360(b)(11)(vi)

The inspector listed the condition or practice as:

> The exam conducted on The 1A, 1B, and 1C belts has been found to be inadequate. Upon inspection there are 12 rollers that were damaged or missing on these three belts. This area had been examined prior to inspection by approximately 3.5 hrs. Standard 75.360(a)(1) was cited 1 time in two years at mine 1202295 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036658.

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as S&S, with one person affected.

The proposed a penalty for this Order was $4,000.00.

Order No. 9036924

Order No. 9036924 alleged a violation of 30 C.F.R. § 75.360(a)(1).[3] The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be permanently disabling, the negligence as high, and the violation as S&S, with 14 persons affected. The condition or practice is:

> An inadequate preshift examination was performed on the midnight shift (12/22/2015, 4:00 a.m. to 7:00 a.m.). A hazardous condition (inadequately supported ribs) located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts. This condition was not posted in or recorded in a book maintained for the purpose on the surface at the mine. This hazardous condition was obvious and extensive and condition had existed for a significant period of time. Order #9036922 was issued in conjunction with this 104(d)(2) order. This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036924.

[3] The text of this standard has been set forth above

As a subsequent action, the operator "held an examination training with all mine management and examiners on standard 75.202(a). The main emphases [sic] was on rib control which also included hazards related to the roof and face." *Id*. The Secretary proposed a civil penalty of $70,000.00.

Findings of Fact[4]

MSHA inspector Glenn Fishback is a roof control specialist, a position he has held for the past four years. VI Tr. 26-27. Fishback began working in mines when he was 18 years old. VI Tr. 30. Prior to becoming an MSHA roof control specialist, Fishback was a regular MSHA coal mine inspector for six years. VI Tr. 27. It is noteworthy that Fishback had 28 years of mining experience in the private sector before joining MSHA. VI Tr. 28. Part of that private experience included about six months working at the Francisco Underground, the same mine involved with the matters in these dockets. At the Francisco Underground he was a section foreman. VI Tr. 30.

Fishback affirmed that loose ribs are a relevant consideration for roof control plans. VI Tr. 31. Among other reasons, this is so because "loose ribs have contributed to many fatalities and disabling injuries and should be taken into great consideration just as much as the roof . . ." *Id.* As explained further, below, a noteworthy aspect for these citations is that there was a "mud seam" present. In Unit 2, the split in the seam was in the middle of it and was made up of mud, rock, and coal. VI Tr. 194. The inspector informed that this refers to a seam of mud that's placed within the coal seam itself, which can range from as little as a quarter inch to two or three feet. Fishback has seen such seams, noting that their size can vary depending on the particular strata involved. VI Tr. 31-32. The significance of the presence of mud seams is that "[t]hey [can] deteriorate [roof conditions] very fast, very quickly, and allow for them to slide out without warning." VI Tr. 32. Mud seams can be present both on ribs and roofs. *Id.*

Fishback spoke to the alleged violations as the Francisco Underground Pit, arising from his inspection on December 22, 2015. He was at the mine at that time for a spot inspection.[5] The inspector was aware that the mine has a history of falls and he had investigated prior falls at the mine in his capacity as a roof control specialist. VI Tr. 38. He had issued roof violations at the mine prior to December 22nd and in the summer of that year he had put the mine on notice of the need for greater diligence in controlling roof conditions. VI Tr. 39. Prior to his December 22nd inspection, Fishback spoke with his supervisor, Phillip, "Doug," Herndon. VI Tr. 40. He and Herndon discussed the rib conditions that another MSHA inspector had observed at the mine. Herndon also accompanied Fishback on his December 22nd inspection of the Francisco

[4] The testimony for these dockets was taken over three days. Unfortunately, the transcript pagination began anew for each day. For that reason, transcript cites begin by identifying the volume involved; VI designating the first day, VII the second and VIII the third day of testimony.

[5] Spot inspections are related to inspection for methane liberation and, depending on the amount of such liberation, the inspections can be on five, ten or 15 day intervals. VI Tr. 35. These inspections cover the entire mine. VI Tr. 37.

Underground Pit. VI Tr. 41. When Fishback arrived that day, the mine was on the day shift and he informed that he was there on an E02 spot inspection. *Id*. He inspected the mine's Unit 2 on that day. *Id.*

Fishback identified Gov. Ex. P 6 as the on-shift and pre-shift records for December 22, 2015. VI Tr. 42. Page 2, of Ex. P 6, reflects the pre-shift from the third shift, done for the day shift coming on. *Id*. Thus it was the pre-shift exam that occurred immediately prior to his arriving that day. The inspector stated that the pre-shift did not record that the mine was experiencing any adverse roof conditions. VI Tr. 43.

After examining those records, the inspector went underground with Eric Carter, the mine escort for that day and they proceeded to Unit 2. At that time, Unit 2 had 11 entries and approximately three crosscuts. VI Tr. 44. Upon leaving the mantrip he went to the left side of the section, walked about two crosscuts and then encountered "a very adverse rib." VI Tr. 45-45. Fishback stated that when he found the condition, "it had been rock dusted over." VI Tr. 45. This meant the condition had to have "been there prior to the shift starting." *Id.* He then returned to the mantrip, retrieved his camera, and took pictures of the condition. *Id.*

For context, Fishback informed that in the course of conducting an inspection, each time an inspector enters a working section, he conducts an imminent danger examination, also called an imminent danger run, on each working face. On this occasion, to do this run, Fishback started on the far left entry and then worked his way across the section. On the working section itself, at the stopping line, he would take air readings on each side of the section. VI Tr.46. When Fishback conducted his imminent danger run, he found "[t]he whole section had adverse rib conditions." *Id.* By the "whole section," Fishback stated he found adverse rib conditions in "[e]very entry, every crosscut we encountered." *Id.* By "we" Fishback informed that at that time he was with his supervisor, Herndon, and the mine's Mr. Carter. *Id.* The inspector asserted that all of the adverse rib conditions he found were inby the loading point. *Id.* Fishback then issued a 104(d)(2) order for those rib conditions he had just observed across the whole working section. VI Tr. 47. Gov. Ex. P 1 and Ex. P 2, the inspector's notes relating to that order.

Fishback identified Gov. Ex P 3 as the photographs he took on that date. [6] VI Tr. 48. Some of the photos within that exhibit were taken by Fishback when he arrived on the section and others were taken after he completed his imminent danger run and advised Carter that he was going to issue a closure order. VI Tr. 48-49. All the pictures were taken on the same unit, that is, Unit 2. VI Tr. 49. He was unable to provide exactitude for locations of the photos he took within Unit 2. *Id.* The Court asked additional questions about the locations of the photographs. Fishback confirmed they were all taken "within the entry area of the loading point." VI Tr. 56.

[6] Respondent objected to the introduction of Exhibit P 3 because, in its view, there was insufficient specificity as to the location of the photographs. Regarding this issue, the Court ruled against the Respondent's Motion in Limine prior to the commencement of the hearing. Respondent renewed and preserved the objection at the hearing. VI Tr. 55. The issue is discussed further *infra.*

All the photos were within the same entries.[7] *Id.* The inspector acknowledged that all of the photos have the same "Location/bolter description." VI Tr. 54. This general description was provided, because it was not an isolated area – it "was across the whole room and section entries and cross space." *Id.* Unit 2 had 11 entries.[8] *Id.*

The Court finds it noteworthy that, when the inspector was taking these photos, Eric Carter was the mine's escort with him on that day and Carter was present for nearly each photo the inspector took. [9] VI Tr. 77. In addition, as mentioned earlier, the inspector's supervisor was with him. *Id.* When the Court inquired if any mine official challenged the inspector's observations, the inspector responded no one did so and that, to the contrary, Carter, was concerned about it "and had been trying to address it but hadn't had any luck with it yet." VI Tr. 78.

Several of the photographs taken by Fishback were enlarged to poster board size.[10] Exhibit P 3A, an enlargement of photo 39 from Exhibit P 3, was one of those. VI Tr. 67. The inspector, referring to the enlargement, advised that both ribs were "leaning in, …bent coming down." VI Tr. 58. Ribs, he noted, are supposed to be vertical but these ribs were leaning. By that description, the inspector affirmed that he meant that the ribs were coming into the entry. VI Tr. 59. Some of the ribs had already fallen off. This is evidenced by the presence of dark, shiny,

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[7] An issue of no consequence, the times reflected on the photos are accurate, but they reflect the time zone of the inspector's office, in Vincennes, Indiana, which office was on eastern time. However, the mine was then on central time, an hour earlier. Therefore while the camera recorded the time as 11:21 a.m., it was actually 10:21 at the mine. VI Tr. 50-51.

[8] Also of no consequence, the inspector informed that he had incorrectly listed the number of entries as 10, when it actually had 11. VI Tr. 54.

[9] Respondent's Counsel inquired, generally, to these photographic exhibits, asking what they were being offered to represent. The Court responded that its understanding was that each of these photos were enlargements of the photos which are part of Ex. P 3. The Secretary's Counsel agreed with the Court's description; each photo, both those enlarged and those non-enlarged, represent the conditions the inspector observed during his inspection on December 22. VI Tr. 80.

[10] There was an unfortunate development regarding the poster-board enlargements, as they were never received at the Commission. The Secretary maintained that he sent them to the Commission, but had no tracking information to support that claim. A search of the Commission docket office found no such submissions. The record made it clear that the Secretary was to deliver the photo enlargements to the Commission. They were, after all, the Secretary's admitted exhibits. VI Tr. 67-68. Fortunately, digital copies of the exhibits were made and sent to the Commission via email, to the Court, and by overnight mail to the Commission. Respondent's Counsel, Attorney Arthur M. Wolfson was also very helpful in overcoming this evidentiary deficiency, created by the Secretary of Labor, sending scanned digital copies to the Court and overnighting them to the Commission. The parties agreed that the digital copies would suffice.

coal. VI Tr. 58-59. The roof in this area was about six and a half to seven feet high. VI Tr. 59. Referring again to the enlargement of photo 39, the inspector marked areas[11] on that enlargement showing a dark blackish hue, which he stated reflected areas that had already sloughed off the rib. VI Tr. 62. Those blackish areas revealed that the rib was deteriorating and about to fall off the solid pillar. *Id.* At the bottom of the same photo, the inspector marked another area where the rib had gapped away from the solid pillar. VI Tr. 63, and the number 3 on P 3A. The roof is about 6 ½ to 7 feet high in this area. VI Tr. 65. The inspector asserted that all of the areas of concern with the ribs were above his head level. VI Tr. 65-66. The crack he identified in the photo P 3A extended from the floor all the way to the roof. VI Tr. 66.

The inspector then spoke to page 34 of Ex. P 3 and the enlargement of that exhibit, which was marked as P 3 B.[12] VI Tr. 68. The color in the enlargement reflects that the rock dust there was wet. VI Tr. 69. As with the prior photo enlargement, the inspector identified areas located at the top of the photo where the rib was starting to fall off. He also noted there was no rock dust at those locations, another indicator that the rib was deteriorating and falling off. VI Tr. 70. Marking a separate area on P 3 B with the number 2, the inspector stated it showed the same problem but that it was more adverse, as more rib was falling off. VI Tr. 71. Another similar problem area was identified and marked by the inspector on Exhibit P 3 B with the number 4. VI Tr. 72. The presence of "joints," also described as "gaps," in the ribs informs that there is separation from them. VI Tr. 75-76. The inspector marked the number "6" in an area to the right of the photograph. VI Tr. 76. He informed they were the same as those on the left side, though on the right lower side it was separated more and they were "stacked," an indication that "[t]hey're going to start separating and fall out." *Id.* Another one, marked with the number "7," reflects an area where the gap was going up. *Id.*

Exhibit P 3 C is another photo enlargement from Ex. P 3, photo 4 of 20. On the enlargement the inspector circled the top portion of the photo where there is a bright pink or red area and also marked that with the number 1. VI Tr. 81. The red or pink marking represents the time that someone did a preshift or onshift exam. VI Tr. 81-82. Referring to the bottom left quadrant of the photo, towards the center, the inspector drew an arrow to that area, marking it with the number 2. VI Tr. 83. The top portion of the photo is whitish in color, a feature that the inspector informed is from rock dust. *Id.* Below the white area, he stated that the darker area is "an adverse parting that was in the coal seam across the whole section." VI Tr. 83-84. The area with an arrow to GF 2 reflects that "a previous either initial or time that was there before it was rock dusted last time after it had already fallen off." VI Tr. 84. The red spray painted area, part white and part black, shows that it was dusted and the date and initials were made after it was dusted, or the condition existed prior to the examination. *Id.* At the bottom left quadrant, and the area within that with red paint, the inspector marked that as GF 3. The inspector informed that there were areas where the spray paint was applied after part of the rib had fallen, marking that area as GF 4. *Id.*

[11] The inspector's initials, "GF" coupled with numbers, matched the areas marked on the photographs with his testimony. VI Tr. 64.

[12] In response to the Court's inquiry, the inspector stated that the colors in the enlargement, P 3B, are more accurate than the binder copy of the exhibit, at page 34. VI Tr. 69.

Exhibit P 3, at photo 19 of 20, and the enlargement of that photo, designated as P 3D is another photo taken in the area. The inspector marked the right and middle portion of the enlarged photo including the spray painted number 60, adding the number 1 and his initials to that marked area. VI Tr. 86, 87. The inspector stated that the spray painted numbers had been written right over the adverse rib and that the rib was ready to fall. *Id*. Thus, at the areas marked number 1 and number 60, the inspector stated that the paint had been applied right over the adverse condition. VI Tr. 88 and the number 4 and initials on the exhibit, indicating that area. He also identified that area, reflecting the adverse condition of the ribs, marking it as E F2. VI Tr. 87. That area had portions that had already fallen out and showed cracks that had parted off across the rib. The absence of rock dust meant that it had already starting falling out. *Id.*

For photograph 13 of 20 from Exhibit P 3 and the enlargement of that photo, P 3 E, the inspector identified the roof and circled that area with the number 1. VI Tr. 89-90. That area also reflects screen wiring on the roof, which the inspector marked with an X and the number 2. VI Tr. 90. The area marked with the number 3 on that photo is the portion of the rib that came away from the solid color and Fishback stated that it was on the verge of falling. He added that, in the remainder of the photo, the rib was already falling out underneath. VI Tr. 90-91. The black color in the photo shows that the condition had not lasted long because the rib had not had a chance to absorb the moisture. VI Tr. 91. The area marked with "3" on the photo, was six and a half to seven feet in height. *Id.* The area where the rib had already fallen out was marked with the number 4. *Id*. This was marked on the lower portion of the exhibit by a continuous line across one end of the photo to the other. VI Tr. 91-92.

Upon admission of Gov. Exhibits P 3A through P 3E, the Respondent reasserted its objection, which objection, as noted, was based upon the inspector's inability to precisely identify the location for each photo. VI Tr. 92. The Court noted that it had already ruled upon the Respondent's objection, adding that while the inspector could not be precise about the location of each photo, they were all taken within the same section at Unit 2. VI Tr. 92-93. However, in light of the renewed objection, the Court then asked some follow-up questions of the inspector, inquiring, "And the photographs – the various photographs within [Petitioner's Exhibit 3] would there – by representative, you mean they're typical of what you encounter[ed]?" The inspector confirmed that was true. VI Tr. 94. The Court also asked of the inspector if the admitted photos represented the only areas where he saw a problem within the section. VI Tr. 95. The inspector responded that the photos were not the only areas, expressing, "[e]verywhere I walked had adverse rib conditions. I just did not take a picture of every location." *Id.*

This is an appropriate time to note that the Court finds that, while the particulars identified by the inspector are of note and useful, the more important point to keep in mind, so as not to miss the forest for the trees, so to speak, is that there were multiple areas of concern with the ribs credibly identified by the inspector.

Upon making his observations, as described above, Fishback then issued his Order and informed Carter that he wanted a meeting with the crew about the conditions he found. VI Tr. 95-96. He then met with the section foreman, Zach Hudson, advising that the section was being shut down until the adverse roof conditions were corrected. The purpose of the crew meeting was to advise them of the danger posed by the conditions. VI Tr. 96.

Referring to Gov. Ex. 21, Fishback's Order, and to Section 8 of that Order, which pertains to the condition or practice, the inspector modified the order to note that the MMU was 022, not MMU 12. VI Tr.100, Gov. Ex. P1, at page 4. The condition or practice also records 300 feet, which is the approximate distance from the face outby the affected areas. This figure was derived by the center to the crosscuts. *Id.* The Court observes that this is another factor identifying the location of the ribs in issue. Another measurement, the thickness, is listed as 8 to 24 inches. VI Tr. 101. That figure was derived from the average measurement of the thickness of the ribs that the inspector observed on the ground. *Id.* The inspector did not measure all the problematic ribs he observed. A five and half to six foot measurement, which was an approximation, was also listed as was a measurement of 30 to 40 feet. That figure was derived from the measurements of the height of the walls of the areas. *Id.* This too was an approximation, arrived at by the length to the total. VI Tr. 102. The inspector added that he was looking at areas "gapped away from the solid filler approximately three to six inches." By that, he meant "areas of the ribs that [he] measured being gapped from the solid filler." *Id.*

Testimony then turned to Gov. Ex. P 4, which pertains to the inspector's 104(d)(2) order for an inaccurate pre-shift exam.[13] VI Tr. 103. The inaccurate pre-shift exam order was issued in conjunction with the adverse rib conditions, as just described, next above. *Id*., Gov. Ex. P 5, the inspector's notes associated with these orders. Those notes reflect that the miners were retrained on the cited standard, section 202(a).[14]

An objection was raised when Fishback was asked for his opinion as to the length of time the adverse rib conditions had existed. The Court held that, as the inspector had 39 years of mining experience, he was qualified to offer such an opinion. Fishback stated that the condition had existed for "a substantial amount of time." VI Tr. 109-110. With more particularity, he was then asked for his opinion as to the period of time that the adverse roof conditions he observed on the December 22nd had existed in Unit 2. His response was that "[i]t existed for a substantial amount of time, several shifts." VI Tr. 110. His support for that view was "[b]ecause the condition [he] found and the area that had been rock dusted over with the adverse conditions present, which [the] photographs already represent." VI Tr. 111. The inspector confirmed that the number of problematic ribs he found also informed his view as to how long the conditions had existed. *Id.* This view was "[b]ecause of the condition they were in and -- and how many there was and that the agent of the operator is a pre-shift examiner or the section foreman. Their initials were on the adverse conditions, and they did not occur in that short -- you know, [a] time." *Id.*

[13] Because it is a potential source for confusion for one reviewing the record, if the case is appealed, it is pointed out that Gov. Ex. P 4, which as noted pertains to the inspector's 104(d)(2) order for an inaccurate pre-shift exam, Order No. 9036924, is from Docket No. LAKE 2016-0232. By contrast, the rib violation itself, Order No. 9036922, is within Docket No. LAKE 2016-0269.

[14] Gov. Ex. P 5, at pages N through 12, represents "all these responsible people who are agents of the operator on this section on all three shifts had been previously trained on rib conditions on 10-28 of '15." VI Tr. 106. That retraining occurred two months prior to the cited conditions in this case. *Id.*

There was some unhappiness expressed by the mine foreman about the inspector's determinations, with the inspector stating that the section foreman "was very disgruntled toward me and my supervisor both. He didn't want to talk." *Id.* The section was shut down after the order was issued and work scaling the ribs then began. That work was required in order to have the orders terminated. VI Tr. 113.

Addressing the hazards presented by adverse rib conditions, the inspector stated that the potential injury can range from permanently disabling to a fatality, depending upon the thickness and length of the rib which falls, how tall the rib is, and how far it falls. VI Tr. 113-114. As for the inadequate exam of these ribs, the inspector noted that the examiner is exposed to the same hazards as the crew working in the area. By not reporting the hazard, and taking no action to address it, the section foreman endangered the whole crew. Instead, the crew began mining in the section and they were mining when the inspector arrived. VI Tr. 115. The section foreman was Zach Hudson and the pre-shift examiner was Matt Benjamin. VI Tr. 116.

The inspector marked the injury aspect of gravity for both violations as "highly likely," and it was his view that if an injury were to occur, at a minimum, it would be permanently disabling. VI Tr. 116. The Court notes that in the citation/order form, 7000-3, for gravity, only "occurred" is above "highly likely" and "Reasonably likely" is just below "highly likely." The inspector maintained that all 14 miners on the active section were exposed to the hazard. *Id.* He added that the breadth of the condition increased the exposure, because "the condition existed across the whole section. So everywhere you walked, you were exposed to that." VI Tr. 117. The inspector also considered that the violations were of high negligence and unwarrantable failure, on the grounds that: the agent of the operator was involved; the extensiveness of the condition; and the length of time that it had been allowed to exist, and that many should have known of the conditions' existence. *Id.*

Fishback considered that the mine should have known of the condition, because "the examiner [as] an agent of the operator, [ ] should have reported it in the record book and called it out to the previous section foreman that was coming off shift." VI Tr. 117. The mine's history, with multiple roof rib violations, and its roof fall history, were also factors that should have made them more alert. VI Tr. 117-118. That history included the inspector having called these issues to the mine's attention during the preceding summer, speaking to John Hughes, who is part of upper management, and to others at the mine. VI Tr. 118. The inspector asserted that the conditions supporting his determination of unwarrantable failure and high negligence applied equally to the pre-shift violation. VI Tr. 119. The Court notes that its analysis takes the same approach in evaluating those claims.

Per cross-examination, Inspector Fishback agreed that to have the title of roof control specialist one need not have a degree nor a certification. VI Tr. 120-121. However, annually, the inspector does receive a notification upon completing his annual roof control training. VI Tr. 123.

Fishback agreed that, for a short time, some five or six months, he worked at the Francisco Mine, but he disputed the suggestion that he left the mine because of a disagreement. VI Tr. 124. However, when shown his deposition of January 2017, he agreed that he left

employment with the mine because he did not get along with the mine superintendent. VI Tr. 126. However, he added that he also left because he found a better job. *Id.* Fishback also agreed that during his employment with Air Quality, that mine was acquired by Peabody and that he had issues with mine management at Air Quality as well. VI Tr. 127-128. The Court notes that it is fair to state that Fishback was reluctant to admit his past disagreements with the management at those two Peabody mines. For example, during his testimony at the hearing, he was evasive about the individuals at those mines with whom he had issues. Yet, during his deposition he named the individuals – Maynard and Campbell. Further, in his deposition, Fishback agreed that he liked working at Air Quality better when it was run by Black Beauty than when Peabody took it over. VI Tr. 129. However, the Court also notes that those prior employment issues were in 2000 whereas the citations in this proceeding were issued in late 2015. VI Tr. 130. Nevertheless, when testifying, MSHA inspectors should be direct and not elusive when under cross-examination. Anything less potentially puts their credibility at risk.

Fishback stated that, prior to his December 2015 inspection, another inspector had told him about rib conditions at the mine, but he could not recall which inspector told him that nor could he recall the particular locations named by that inspector. VI Tr. 131-132. However he recalled that the other inspector had mentioned Unit 2 and that was the reason he inspected that area. VI Tr. 132-133.

This mine was on a five day spot inspection because of its methane liberation. Such inspections check violation controls but that is not all that occurs. VI Tr. 134. As part of that spot inspection process, MSHA keeps a log of the areas that have been inspected and that is how MSHA decides to go or not go to a particular area. *Id.* The log is used so that one doesn't return to the same unit again. VI Tr. 135-136. However, contrary to his earlier statement, at his deposition, Fishback stated that Unit 2 was the next up, although he did not contend that it had not been inspected before. VI Tr. 136. Respondent inquired about the inspector's remark during direct that he had previously put the mine on notice. Fishback responded that it was during the summer of 2015. VI Tr. 138. He added that he issued a citation at the time he put them on notice, but was he was unsure if it was for rib conditions, as it could have been for excessive entry widths. VI Tr. 138-139.

The inspector stated that, while he considered the mine's history regarding roof falls violations, per 75.202(a), and that he also considered the mine's roof fall history to be "extensive," he maintained that when he issued the order in this matter, it was based on the conditions he observed the day he was there. VI Tr. 142-143.

Continuing with the subject of the mine's violation history, when shown Exhibit R 8 and directed to the repeat violation points the mine was given for the alleged section 75.202(a) violation, the inspector read that two (2) points had been assigned. VI Tr.146. However Table 8 of 30 C.F.R. section 100.3 allows for a range of zero to 20 points for repeat violations. VI Tr. 146-147. The Court takes note that, obviously, two points is on the low end of repeat violations scale, given that as many as 20 points can be applied. The Court observes that, if a violation is established, it looks at the history of violations, not the Part 100 penalty point system for that category, as penalties are determined by evaluating the evidence against the statutory criteria.

Respondent revisited its issue with the photographs Fishback took in support of his order concerning the condition of the ribs. As before, the inspector could not identify the precise location of any of the photos, other than to say that they were all on that section, Unit 2. VI Tr. 157. Nor could he give the entry and/or crosscut where the photos were taken. *Id.* The Court continues to not think much of limited basis of the Respondent's assault. After all, the inspector was under no obligation to take any photos of the ribs at all. The absence of photos would not be a basis to dismiss such an order. Absent a contention that the photographs were not taken in Unit 2 at all, a claim not made by the Respondent, or worse – that they were fabrications, unrelated to the mine entirely, it would be odd indeed to have photographic evidence of the conditions observed work against an alleged violation, at least on the grounds asserted by the Respondent. Further, as a practical matter, it would be unrealistic to impose exactitude for the photos' locations, beyond the area, identified by the inspector.[15]

The Court asked the inspector to put aside his interest in having the mine do a better job in controlling the roof and rib, and therefore to put aside the mine's future actions, and also to put aside the mine's past conduct, and instead to focus only on what he observed the day he issued the order. With that limited focus in mind, the Court asked if the inspector just looked at what he observed that day and forgot what happened before and ignored what he speculated might happen in the future, would he still have arrived at the same conclusions that he marked in these two matters. Fishback responded he still would have still reached the same conclusions. VI Tr. 190.

Directing Inspector Fishback to Ex. P 3, he was able to identify the first area that he called to Carter's attention that needed abatement, identifying photo 7 of 20 within Exhibit P 3. VI Tr. 159. The inspector could only surmise, reasonably in the Court's view, that the date, time and initials appearing on Exhibit 3D, which he had previously labeled with the number 4, were from that day because otherwise one should not be able to see them, as they would've been rock dusted over. VI Tr. 160.

The inspector informed that, within his mining experience as a section foreman, he has worked on a section that had a mud seam, and also that a mud seam can result in conditions which require one to scale, and that scaling is an acceptable means for controlling ribs. VI Tr. 161. Further, he agreed that if a rib had been rock dusted, and then scaled, the scaled area will then be black. VI Tr. 162. However, he pointed out that it is not simply scaling that is required, but *continuous* scaling that is needed. *Id.*

Fishback agreed that Hudson was unhappy about the order being issued, and that he inquired of Fishback how long the inspector and his supervisor had worked in the mines.

[15] The Court asked about the practicality of measuring or otherwise determining the exact locations of the cited ribs, asking, "[w]as there a practical and reasonable, and by that I mean, not excessively time-consuming way by which you could have more particularly identified the location for each of the photos that you took?" Fishback answered, "With the number of entries and crosscuts, I think it would have been very difficult to do." VI Tr. 186. However, the entry number would have been an additional means of identification. VI Tr. 187.

Fishback also recalled Hudson telling him about the efforts the mine was making to control the ribs. VI Tr. 163.

Regarding Ex. P1, Fishback acknowledged that the measurements listed in that exhibit reflect the average thickness. VI Tr. 165. He affirmed that in Unit 2 the height of the entry was about five and a half to six feet, but as with the rib conditions, he could not precisely identify where he made those measurements. VI Tr. 166. Speaking to Ex. P 4, the inadequate pre-shift examination order, Fishback stated that order referenced crosscuts one to five in all entries, and by that he meant the affected area, with five being the first crosscut inby the last open crosscut. VI Tr. 168-169.

As part of the Secretary's case, the contention was made that the inspector had previously put the mine on notice that they had to exercise greater oversight as a consequence of the adverse rib conditions found in the summer of 2015. The Secretary also contended that the mine had a history of standard 75.202 violations. That standard addresses roof control. During the summer of 2015 Fishback issued a 75.202 violation to the mine. At that time he told the mine they would have to do a better job of controlling the ribs. VI Tr. 173. However, while the inspector asserted that the prior citations he had issued for 75.202(a) violations at the mine were an additional reason for putting the mine on notice, he could not independently recall the details of those prior events. VI Tr. 184. The Court observes that a history of violations may not be necessary to support the seriousness associated a citation or order. That is to say, the special findings in an order or citation can be upheld apart from any prior history of violations.

As noted, Fishback's order, shutting down the section, was issued on December 22nd. Unit 2 was in its second day of mining at that time. VI Tr. 177-178. Fishback stated that at that time the mine was running coal but he saw no signs that scaling had occurred. VI Tr. 178.

Also, informative in the Court's estimation, Fishback stated it is not his common practice to close a section when he encounters loose ribs. VI Tr. 187. Asked what made this instance different, prompting him to shut down the section, the inspector answered, "Because of the extensiveness. It was in every entry, every crosscut I went through. The seam had a split in it itself. The picture illustrated that." VI Tr. 188. Fishback also stated that he saw no "other side" of the story to the conditions he observed and therefore did not approach the pre-shift examiner to hear his views. *Id.*

The Court also addressed the issue of whether Fishback had an animus towards Peabody Midwest, as he had been employed by that entity at one time. The essence of the question was, because of that prior employment, whether the inspector brought a predisposition against the mine. Fishback responded, "No, sir. I don't get any joy out of writing an order. It contains a lot of paperwork for me to write that." VI Tr. 191. The Court continued, "So are you telling me you had no predisposition against Peabody? You didn't go in there with a chip on your shoulder towards them?" The Inspector answered, "No, sir." *Id.* The Court finds that Fishback's testimony was not biased. His observations were based on the conditions he viewed that day, and those observations were also supported by Inspector Herndon's firsthand views of the same areas.

The termination of the order is reflected at Ex. P 1 at page 5. This involved installing supplemental roof support with "tall panels to retain loose coal and rock away from the mine, and it was mechanically dusted before production resumed."[16] VI Tr. 193.

Phillip Douglas Herndon, MSHA inspector, also testified for the Secretary. Herndon is the district roof control supervisor, a position he has held for about three years. VI Tr. 197. His mining experience in private industry began around 1982 and continued until 1989. He stated that his inspectors are to take photos of roof related citations, but that such photos are to be representative of the conditions observed. They are not to take a voluminous amount of photos. VI Tr. 201-202.

Turning to the orders in this litigation, that is, those issued during the December 22, 2015 inspection, Herndon stated that he was aware of the rib conditions at the mine. As noted, Herndon accompanied Fishback during the latter's December 22nd inspection of the Francisco Underground Pit. VI Tr. 206. They were there for an E02 ventilation spot inspection. Part of the reason he accompanied Fishback on that date was that the mine had violations going on for rib-related conditions and he had been informed that such conditions were really bad in one general area. VI Tr. 207. On that date Herndon and Fishback were only at the Unit 2 section. VI Tr. 209. When they arrived on the section that day, it was a new setup, as mining had just moved from a different location. *Id.* At that time Herndon observed that the "ribs were poor in condition, not adhered to each other, rashing[17] in various different sizes basically from the mine floor all the way to the mine roof." *Id.*

Herndon confirmed that he observed Fishback taking pictures of the ribs and that they were in the company of the mine's Eric Carter. VI Tr. 210. Herndon did not claim that the three were next to one another the entire time, but they were all together on the section, as they were close enough to be able to carry on a conversation by raising their voices. *Id.* According to Herndon, Carter agreed "that the roof control plan, you know, needed to be addressed, conditions that was not mentioned in there for this area of mining. ... [and that he] was in safety compliance, I believe, and mentioned stuff about wanting some bigger plates or seam control and stuff like that so he really spoke about stuff he needed." VI Tr. 212.

Herndon also recalled speaking with the foreman on that shift, Hudson, asserting that the foreman "was on the verge of being irate at the time of their conversation. I never met the young man before, and he approached -- or we approached him, I'm not for sure, but whenever we met up, he seemed to be extremely upset with us having to shut down to fix these." VI Tr. 213. As with Fishback's account, Herndon asserted that Hudson was not very professional, questioned how long the inspectors had been experienced with mining and then suggested that the inspectors "ought to know that you have to do what you got to do to run coal or something like that." *Id.*

[16] Another inspector, Keith Dunham, issued the termination order. VI Tr. 193.

[17] "Rashing," Herndon explained is "like, scaling that is falling off, like chunks up in the -- slip off, like sloughing." VI Tr. 210. This exists not because of anything the mine did. Rather it is a consequence of the "geological configuration." *Id.*

Later, after the inspectors required a safety talk with the entire crew, another miner came to them and apologized for Hudson's earlier attitude in the prior conversation. VI Tr. 214.

Herndon made it clear that the decision to shut down the section was Fishback's call, but that he agreed with it. VI Tr. 215. He also confirmed that at the time the order was issued, the mine was producing coal. VI Tr. 216. The Court used the same approach it applied to Fishback, asking that Herndon put aside his "prior knowledge of this mine and the problems or alleged problems with roof control, rib -- roof and rib control. . . . [and it also asked that he] discard any of [his] concerns looking forward, that is beyond December 22, 2015, and [the Court asked him] to focus solely on the conditions that [he] observed along with Inspector Fishback on December 22, 2015." VI Tr. 230.

With that focus in mind, the Court then inquired, "had [he, i.e. Herndon] been the issuing inspector, would [he] have issued – looking at the conditions which were cited by the inspector [Fishback], would [he] have also issued this as a 104(d) order?" VI Tr. 230-231. Herndon responded, "Yes," and affirmed that he had "no doubt at all" about that. VI Tr. 231. So too, Herndon responded that he would have marked the citation's findings the same as Fishback did. Thus, looking at Ex. P 1, when the Court asked, where Inspector Fishback marked on the Order under gravity, that the injury was highly likely, permanently disabling, significant and substantial and with 14 persons affected, and the negligence as high, if Herndon, as one who was there, had been the issuing inspector, would he have marked the evaluation differently, Herndon responded, he would not have. That is, he would have marked the evaluation the same as Fishback. *Id.*

Respondent's defense began with Barry McKinnon. He is a scoop operator at the Francisco Mine. VI Tr. 235. Working on the A crew, occasionally he will fill in as a section foreman. *Id.* The A crew is the idle shift. The other two crews were producing coal. VI Tr. 236-237. On the December date in issue in this litigation, McKinnon was working in Unit 2. While the A and B crews rotate every two weeks, the A continues to be the idle shift. VI Tr. 237. The idle shift does what one might expect; clean, rock dust and perform equipment maintenance. *Id.* Seven to eight miners make up the A crew. By comparison, a production crew has about 15 people. *Id.* McKinnon described the specific jobs the A crew would perform as "scoop operator, which cleaned, dusted the units, cleaned for walls, set them up. You would have two or three guys building walls. One man doing ventilation. We got one guy that washes." VI Tr. 238. McKinnon is usually the scoop operator.

When prompted by Respondent's Counsel, McKinnon then added that prying ribs is a common activity for the A crew. He also asserted that everyone on the A crew pries ribs during their shift. Discerning a conflict with that response, Respondent's Counsel inquired, "[b]ut if you're the section foreman or if you're the scoop man, in the normal course of mining operations, how will the scoop man have an opportunity to pry ribs?" VI Tr. 238. McKinnon responded, "Well, he [i.e. the scoop man] would -- *if he did any prying*, he would basically what he did, he pried them down. If it was something that was out of control for a pry bar, he would use a scoop bucket and take down the excess or whatever." VI Tr. 238-239 (emphasis added). A similar question arose regarding the roof bolters, with Counsel asking, "What about the roof bolters? In what context would they pry ribs?" VI Tr. 239. McKinnon answered, "They would pry ribs down as they advance in, scaling them, normal things like that when they would advance in on

the bolt." *Id.* He informed that there is a pry bar on the roof bolter. *Id.* So too, it was appropriately asked how miners building walls (i.e. stoppings) would have an opportunity to scale ribs. McKinnon answered they would scale ribs around the work area. *Id.* The Court finds that McKinnon's testimony on this subject lacked some credibility. Accordingly, the Court finds that the A crew members' focus was on jobs other than prying ribs.

McKinnon stated that, before his shift began the crew would meet at the command center, which is underground. There they would "get [their] game plan for the day and put out jobs and send them on their way." VI Tr. 240. Only upon prompting did McKinnon assert that rib control would come up as a topic at those meetings. VI Tr. 241. However, when asked how that subject would come up, he answered, "[w]ell it was -- it was everybody's job to pry ribs. Everybody knows it, and that's what -- when you have the meeting at the school, that's just one of the topics that was brought up." *Id.* The Court did not find McKinnon to be completely credible on this topic either.

Turning to the violations alleged in this litigation, McKinnon was asked, "[i]n December 2015, do you think you and your crew were successful in managing the ribs on Unit 2?" VI Tr. 241. McKinnon responded, "[y]es," but his support for that assertion, was that "[b]ecause no one got hurt." *Id.* Later, McKinnon would affirm that his test was whether someone got hurt. VI Tr. 257-258. The Court finds that McKinnon's response was both a revealing and a disappointing standard for safety that he applied.

McKinnon's duties, when acting as a section foreman required him to do examinations. These include an on-shift report and a pre-shift report. As before, when asked what he looks for when doing his pre-shift, McKinnon answered, "are you looking for? "Well, pre-shift you -- you walk the faces, check for gases, air readings, adverse conditions on ribs, top, loose bolts, et cetera." VI Tr. 242. Not picking up from what his responses were lacking in his earlier testimony, he was specifically asked, "[w]hile doing the pre-shift examination, would you -- would you -- would you have pried ribs?" McKinnon responded, with an uninspiring, "[y]eah. As needed." *Id.* The Court finds that McKinnon's response speaks for itself.

McKinnon was directed to Respondent's Ex. R 2 P, which he identified as the on-shift report for second shift, Unit 2, on December 21st. VI Tr. 243. On that day he was acting as the shift foreman. The second page of that exhibit records the pre-shift exam for the same day. *Id.* Activities and corrective actions are listed on the on-shift exam. That report reflects "[p]rying ribs down in by the tail." VI Tr. 244. McKinnon stated that was done by the "whole crew," an indication, in the Court's estimation, that this was a situation needing attention. *Id.*

Next, McKinnon was asked about R 2S, the on-shift report for Unit 2, second shift, on December 22nd. That report pertained to the shift after the order was issued and the unit was still shut down at that time. V I Tr. 244-245. Ribs were pried down, bolts spotted and timbers were set across the unit and these things were done on the 2A roadway too. That roadway is outby the loading point and "technically" is not on the working section. VI Tr. 245. The 2A is also a travelway. Work was being done there because it had been "red flagged" and shut down. The Court observes that the report does not present a picture in conflict with the earlier testimony of MSHA inspectors Fishback and Herndon.

McKinnon stated that most of the rib prying had been done before his crew came in on their shift and that more of the activity involved bolting, and timber setting, a condition that developed after the rib prying resulted in too wide an entry. VI Tr. 246-247. As has been noted, the mining occurring where the orders were issued was on Unit 2, but previously they were on a different panel, which ran parallel to the panel where the miners had been working. VI Tr. 247. McKinnon stated that the previous panel had the same problem with the ribs, requiring that they be pried. VI Tr. 248.

On cross-examination by the Secretary, McKinnon was directed to Ex. P 5, at page 4, and further identified as "examination training," and dated October 28, 2015. VI Tr. 251-252. McKinnon agreed that it reflects that he was among those receiving retraining on standard 75.202(a), regarding loose rib maintenance. VI Tr. 253. McKinnon affirmed his earlier testimony that, when acting as a scoop operator, he would take down loose ribs when encountered and that he could do this without first notifying his foreman of this action. VI Tr. 253-254. However, when asked by the Court, McKinnon qualified his testimony, stating that, prior notification to the foreman about prying a rib would depend on the size of the rib to be pried down. VI Tr. 254. The concern is associated with whether such prying makes the bolt spacing too wide. VI Tr. 255.

McKinnon affirmed that, on December 22nd, the second shift was the shift he was working, *after* the orders in issue had been issued. VI Tr. 258. Therefore, at that time, he was dealing with the conditions that Fishback had cited. *Id.* The crew's action of abating the cited conditions continued the entire shift. VI Tr. 259. McKinnon believed that, by the end of his shift, there was still more work to be done abating the conditions. VI Tr. 260.

McKinnon was also asked about Ex. R 2 S, which pertained to the on-shift exam that he conducted on December 22nd and he agreed that the exhibit reflects that the crew was dealing solely with the conditions cited by the inspector. VI Tr. 260-261. Asked about R 2 I, R 2 F, R 2 C, and R 2 P, McKinnon agreed that each reflect that ribs were pried down.[18] VI Tr. 261-262.

[18] The Secretary inquired why the wording was different for R 2 S. McKinnon agreed that R 2 S reflects that, in addition to prying ribs down in the tail, they also spotted bolts "across unit, spot bolts on 2A, 23 crosscut, 14 crosscut, set timbers nine through 20." VI Tr. 262. The Secretary's Counsel asked why none of the other exams required spot bolting. VI Tr. 263. McKinnon responded only that "[i]t's because they pried all their ribs down." Id. Pressed, he said, they "could have" done some spot bolting but did not record it, though they should have recorded it. *Id*. Directed to Ex. R 2 S, McKinnon agreed that the spot bolting referenced in that exhibit indicates that the mine had been spot bolting for at least nine crosscuts, from 23 to 13. VI Tr. 265. On redirect, Respondent returned to Ex P1, McKinnon affirmed that the area on the 2A travelway is not on the unit, but outby it. VI Tr. 267. The crosscuts 23 to 14, referred to in R2 S, are on two-way travel, outby the working section. *Id.* Distinct from the travelway, the reference in P1, to "MMU- 002 and MMU-012, are at the active working sections, and refer to the unit. Id. McKinnon also stated that not everyone on the crew stayed on the working section to address the conditions, as some were on the roadway spotting bolts. VI Tr. 268. The Court considered this

At the start of the day two of the hearing Matthew Benjamin, who is an underground miner and a mine examiner at Respondent's mine, testified for the Respondent. VII at Tr. 8. Benjamin used to fill in as a section foreman (aka a "face boss") frequently, but does not do that anymore. VII Tr. 9. In his former role as a fill-in, that included filling in on Unit 2. *Id.* He worked the third shift, the "C-crew," which had hours from 11 p.m. to 7 a.m., and was a production shift. VII Tr. 10. Unit 2 was a "split air" unit, a term which refers to air which comes up the intake and then splits to the left and right sides of the unit, allowing both units to run at the same time. VII Tr. 10-11. Under this arrangement there would be a continuous miner, coal haulers and a roof bolter on each side, although typically a single scoop covered both sides. *Id.* The belt entry is at entry five and the travelway was usually at entry four. VII Tr. 11. This was the situation in December 2015. VII Tr. 12.

Benjamin recalled that at that time there was a mud seam or mud vein, which term he also described as a "parting." VII Tr. 13-14. He estimated the mud seam size to be about 4 to 8 inches in width. VII Tr. 14. The mud seam material is softer than coal, it is also wet and a few days after the mine is set up in the area there would be a "slough." *Id.* That is to say, material would come off the rib. This occurred because the seam would dry out and then slough off. VII Tr. 15. However, he did not view it as a "challenge," because they knew of the condition and they would take care of it. VII Tr. 14. The issue was addressed by prying the ribs down. VII Tr. 15. He asserted that, when working in Unit 2, prying the ribs was done frequently and that it was a subject of the crew in safety meetings "to make sure we're taking care of them." VII Tr. 16. Benjamin agreed, when asked, that the miners were encouraged to take steps to control the ribs on Unit 2. VII Tr. 17. Elaborating, Benjamin stated, "The guys that -- like I said, they knew about the conditions. They knew about the ribs. They would pry the ribs. They were encouraged to pry the ribs. A really good crew. You didn't have to encourage them very much at all. They -- they would take it upon themselves to take care of the ribs." VII Tr. 17. Benjamin stated that his continuous miner operator, Nathan Sumner, would use his equipment to "knock down the ribs." VII Tr. 19. He added that Tim Loveless and Stuart Davis, both hauler drivers, also would use their equipment to "hit ribs, pry down ribs, knock any -- pull the slough off or anything like that." *Id.* He considered it safer to use equipment, rather than a pry bar, to pry down the ribs, as one would be farther away from the ribs during that task. *Id.* By "equipment" Benjamin meant coal haulers and continuous mining machines, the latter described in shorthand as "miners". VII Tr. 20. Benjamin stated that he would use a "red bar," which he described as similar to a "big screwdriver," to pry down loose ribs and he affirmed that he would use the red bar on every shift up on Unit 2. VII Tr. 24.

Benjamin was directed to Gov. Ex. P 1, which is Order No. 9036922, issued on December 22, 2015 on the day shift. VII Tr. 24- 25. He informed that he worked the midnight shift immediately preceding the shift for which that order was issued. He was then presented with Ex. R 2, Q which is the on-shift report for that midnight shift. Benjamin described the conditions he encountered for his on shift as "The conditions we had were -- we had the loose material, slough, around the parting that, like I said, I -- I believe the -- we were only there for a -- a day or two. Like I said, that's when we pulled in and those were the conditions that [we]

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testimony to be tangential. It is included only to reflect completeness, regarding McKinnon's testimony.

had." VII Tr. 26. He added that steps were taken to control the ribs on his midnight shift, stating, "We had pried -- pried on ribs that day. We'd used equipment, the continuous miner. We used haulers to also pry on the ribs or to scale the ribs." *Id.* He also stated that Nathan Sumner used the continuous miner to pry the ribs on that midnight shift. VII Tr. 27. When Benjamin arrived for his next shift, the evening of December 22nd, he and Sumner were in disbelief that an order had been issued, given the way they had attended to the control of the ribs. *Id.* His fellow miners, Davis and Loveless, had used a hauler, while he had used his red prying tool to deal with the ribs. He did recall one rib that was loose. That rib was too big for a red bar to handle so Loveless used a hauler to deal with it. VII Tr. 28. Benjamin himself used his red bar to deal with the ribs on the shift that preceded the order. Exhibit R 2 Q documents that he pried down ribs. VII Tr. 29. Benjamin confirmed that he did both a pre-shift and an on-shift exam the night prior to the order's issuance. He added that if rib issues were encountered during those exams he would attend to them. While ribs being pried were noted in those exams, no names were associated with those actions. VII Tr. 32.

Asked whether there were any adverse ribs when he performed his December 22nd pre-shift, Benjamin stated that, according to his report for that shift, per Ex. R2 Q, his answer was "No." VII Tr. 33. Because his answer was qualified, he was then asked what action he would have taken *if* he had found hazardous ribs, and he responded that he would have tried to pry them down. As to the issue *if* he had pried them whether he would still call it out, that is, using the mine's underground phone system, he answered, "sometimes."[19] *Id.*

Upon inquiring if there were any loose ribs uncorrected when he ended his day, Benjamin responded, "We did not leave *any hazardous ribs* uncorrected." VII Tr. 35 (emphasis added). The Court noted that Benjamin seemed to draw a distinction between loose ribs and hazardous ribs. *Id.* Benjamin responded that he did see such a distinction, answering, "A hazardous rib -- a loose rib does not have to be a hazard. A lot of times, a loose rib will just be a -- a small crack that you can knock off. You can take your hand pry -- the -- the prying tool and knock it off. When it does come off, it might come down in little bitty pieces, maybe a inch or two thick." VII Tr. 36. Explaining further, he then added,

> A hazardous rib -- a bigger rib, a rib that would cause injury, a rib that would cause a -- someone to be severely hurt. Lot of times if you do have a -- there's a rib that it's that big, it'd also take -- like I said, there'd be a bigger chunk of rib that would come out to where the bolt spacing would be too wide, to where you actually make other hazards. A loose -- like I said, the -- the loose rib is not a hazardous rib. Like I said, the -- just like slough -- the -- the slough, just a smaller -- smaller piece of the rib that you could -- that you can knock off.

[19] While Benjamin's signature appears on the pre-shift, the report itself reflects another person's writing, which is to reflect Benjamin's oral report using the phone system. VII Tr. 34. In this instance, Benjamin stated, he calls out his report, which he believed was taken by Zach Hudson. Hudson would then sign the report and later Benjamin would review it for accuracy, make any corrections and then he would sign it too. *Id*. The first page of Ex R 2 Q is the on-shift report. VII Tr. 35. The on-shift is not called out ahead, rather it is completed when Benjamin returns to the surface. *Id.*

VII Tr. 37.

Thus, the Court observes that Benjamin distinguished between loose ribs and cracks from a hazardous rib or a large crack or a large piece of the rib, with the latter needing attention "right then." VII Tr. 37. Ultimately, however, Benjamin stated that all loose ribs need to be taken down because they could become a bigger problem. VII Tr. 39.

Respondent's Counsel, following up on that subject, asked if Benjamin would pry down loose ribs and he answered that he would. As to whether there were any loose ribs uncorrected that day when he left the section, he responded, "No. Not that I recall. The -- the loose ribs that we encountered we took care of. We take care of the loose -- loose ribs, loose material, slough that we encountered on that shift." VII Tr. 39-40. The Court then inquired further whether the ribs were in "great shape" when Benjamin ended his shift on December 22nd. He responded, "No. … They were not in good shape -- like I said, you -- you -- you pry down the ribs that you see. You don't necessarily see everything." VII Tr. 40. Uncertain about that answer, the Court asked whether, based on what he saw during that shift, if the ribs were in great shape. Benjamin answered, "From what we seen, yes. From the ribs that we encountered on that shift, we took care of, yes." VII Tr. 40-41. He then added that he did look at every rib in the section. VII Tr. 41.

Upon further questioning by the Respondent, Benjamin stated that the presence of the mud vein made it impossible to pry everything there was to pry, stating, "Because that mud vein, you can dig on the -- the parting/mud vein, you could dig on that thing all day long." VII Tr. 41-42. Nevertheless, Benjamin stated that one could distinguish between parting/mud vein issues that needed to be pried down and those that did not. VII Tr. 42. And, according to Benjamin, conditions could change in a short time, noting "Like I said, you could pry on it -- you could leave there and it had been -- it'd look good. Come back a few hours later and you could see from a different angle where that's not the way you left it." *Id*.

Benjamin confirmed to the Court that the mud vein presented a continuing issue, not one that could be addressed and then solved, "In that area, no. I mean, that was part of the geographic of -- of that area. That mud vein was -- it was -- it was there. You couldn't get rid of that mud vein." VII Tr. 43. However, he then amended that answer, stating that "after a couple days is when it kind of will dry out. Well, that coal below it, like I said, right there at that area of the mud vein or the -- the parting itself, it would get dried out, as well. And so that's when it would kind of separate from the rest of the coal." VII Tr. 43. "Usually," Benjamin then stated, they "didn't have to go back and scale that again." VII Tr. 44.

Benjamin was presented with Ex. R 2 D, his on-shift for December 17, 2015, pertaining to the previous panel, which reflects that he did pry down ribs. VII Tr. 48. Similarly, Ex. R 2 G, Benjamin's on-shift for December 18, 2015, also reflects that ribs were pried down. VII Tr. 49.

Of greater significance, in the Court's estimation, was Benjamin's distinction between a large rib and a hazardous rib, "Like I said, what a hazardous rib is to me is something that can hurt somebody, something that could seriously injure somebody." VII Tr. 54. He added that, usually, a small rib problem is what it appears to be, small. That is, they do not turn out to be

larger than they seem to be. As for large rib issues, he stated that they are usually harder to remove when one starts prying them down. VII Tr. 55.

Benjamin agreed that, for that section on Unit 2, typically he was prying down ribs on each shift. *Id.* However, he could not state how many such ribs he pried down on average each shift. VII Tr. 56. He acknowledged that Exhibits R 2 Q, G, and D all reflect that he and others on that crew pried down ribs. VII Tr. 56-57. He also recalled that miner Sumner pried down a rib on December 22nd using his continuous miner. VII Tr. 57. However, Benjamin did not consider that rib to be a large rib and he informed that it had no effect on the bolt spacing. VII Tr. 58. He watched Sumner scale that rib using a continuous miner. *Id*. Benjamin confirmed that he and Sumner could not believe that an order had been issued for bad ribs. VII Tr. 58-59.

Benjamin also stated that he observed miner Loveless scaling a rib using his hauler and that rib also did not have an effect on the required bolt spacing. VII Tr. 59. He confirmed that rock dusting is typically done after a rib is scaled. *Id.* Though he could not recall just where the ribs which were scaled were located, they were ribs in the entries and crosscuts which were between the faces and the loading point. VII Tr. 60. If rock dusting was done after such scaling, that action would not necessarily be recorded in his corrective actions in his shift exam. VII Tr. 60-61. In his view, whether a scaled rib needs to be rock dusted is a judgment call. VII Tr. 62. Thus, smaller areas do not need dusting, but if "it's a whole entire 80-foot-long rib from top to bottom, well, . . . you go back and dust." *Id.* Generally, Benjamin agreed that the ribs that were pried, per Exhibits R 2, G, D, and Q, did not then require rock dusting. VII Tr. 63.

Benjamin stated that if he came upon a rib that needed attention, that discovery would be recorded in either the pre-shift or on-shift report. VII Tr. 64-65. He added that after a rib comes down it can still be a hazard if one could be seriously hurt, offering as an example, if after a rib is scaled, a wide bolt space is created. VII Tr. 66. As the foreman on a working section, Benjamin affirmed that he is responsible for the whole working section and that it is his call to determine between a loose rib and a hazardous one. VII Tr. 68.

Benjamin believed that he was taking care of all the ribs that needed attention, that is to say, at least all the loose ribs that they encountered. VII Tr. 75-76. He was also asked about the re-training that the miners had to undergo, in October 2015, for loose ribs. Unable to recall when it occurred, upon being shown Exhibit P 5, dated October 29, 2015, Benjamin agreed that exhibit reflects that the mine's C crew had rib examination training at that time. VII Tr. 77. In fact, the exhibit reflects that "Examiners were re-trained on standard 75.202(a), with emphasis on loose rib maintenance" on that date. *Id.* However, Benjamin stated that he recalled nothing about that training, not even how long it lasted. VII Tr. 78.

On the resumption of direct examination, Benjamin agreed that he calls out hazards that are uncorrected on a pre-shift. VII Tr. 78. The Court then inquired, "in your role as the mine examiner, is it part of your responsibility to examine all ribs on the section as part of your pre-shift." VII Tr. 80. Benjamin responded, "Yes." *Id.* He then qualified that response, adding "[y]ou try to check all of them." He then added that, personally, he does not "feel as threatened from the ribs as I do the -- say, the top." VII Tr. 81. The concerns can vary depending on the time of year. For example, during December or January, because they are dry months, one

doesn't have as many rib problems. By contrast, he explained, during the summer, with more humidity, there can be more rib issues. *Id.*

With that response, the Court then asked if it was fair to construe from his [i.e. Benjamin's] answer that "between … the roof and the ribs, [he] provide[s] greater attention to the roof because [he] think[s] that [ ] - presents a greater hazard, personally [he] thinks, than ribs." VII Tr. 81. Benjamin first responded, "Right," but then retracted that answer, stating that he gives "as much attention to the ribs as you do the top." VII Tr. 82. He elaborated, without retreating from his amended answer, that it has been his personal experience that miners have been injured more by roof than ribs. VII Tr. 83.

Benjamin reaffirmed that both he and Sumner were in disbelief that an order was issued. With that answer, the Court then inquired, "would you have had the same reaction if a 104(a) citation was issued instead? Would you see that was fair but an order was too much, or do you feel that neither should've been issued?" VII Tr. 84-85. Benjamin answered, "Honestly, I'd be more upset with an order than a citation, but still in the same -- same time, I would be upset with a citation, as well, just because I thought we were doing the -- the job that needed to be done, taking care of the ribs." VII Tr. 85. Thus, he affirmed that, in his view, there was no hazardous condition from the ribs. VII Tr. 86.

Benjamin also reconfirmed that continuous mining machines and haulers were used to deal with ribs that needed scaling and that in the shift prior to the order being issued, the shift in which he was the foreman, he observed both Sumner and Loveless using, respectively, the miner and the hauler to address ribs there. VII Tr. 87. That response prompted the Court to ask, "is that rather unusual to require not just prying down ribs but using those rather formidable pieces of equipment, haulers, continuous miners, to deal with ribs? Is that unusual or is that not unusual?" *Id.* Benjamin responded that it was not unusual. VII Tr. 87-88.

Benjamin could not recall the number of miners working on his crew on December 22nd, but did inform that typically there would be between 12 to 17 miners on his C crew. As to the number among those miners that were dealing with rib issues on that date, he specifically recalled Sumner, Loveless and Davis doing that work. As to the others on his crew that evening, he couldn't recall what they may have encountered with ribs that evening. VII Tr. 90-91. With it being established that four miners, that is, including Benjamin, were dealing with ribs, he was asked how much of their time during that shift was spent addressing rib issues. He responded that it would be 10 percent or less. VII Tr. 92.

Respondent's Counsel then asked Benjamin if there were any violative conditions concerning ribs, when his shift ended on December 22nd, that he knew of and did not correct. Benjamin responded, "no." VII Tr. 93. As to the use of equipment other than scale bars, Benjamin stated that did not mean that such bars could not have been used, but rather that it was more efficient to use the continuous miner and the hauler. VII Tr. 94. Benjamin agreed that it was common for a continuous miner to scale while tramming from one entry or crosscut to another. VII Tr. 94. He maintained that his crew's use of the miner and hauler was no different on December 22nd than any other day when working on different panels. VII Tr. 95. However,

Benjamin allowed that he did spend more time on ribs on that panel than other panels. VII Tr. 96.

Nathan Ryan Sumner also testified for the Respondent. He is a continuous miner operator at the mine and was acting in that role during December 2015, working the C crew, otherwise called the third shift. VII Tr. 101. In that job he remotely operates the continuous miner. This includes tramming the miner through the last open crosscut where the faces are located. VII Tr. 102. Directed to Order No. 9036922, issued December 22, 2015, Sumner stated that he was working on the shift immediately preceding that order's issuance and that he had been working on Unit 2. VII Tr. 103. He agreed there was a mud vein or as also described, a "parting," in Unit 2. That mud vein, he informed, made the ribs softer and that such material was softer than the coal. VII Tr. 104. Sumner informed that they were all aware of the issue and that they would pry down any loose rib or a rib that needed attention. VII Tr. 105. To do that work, he would use either a pry bar or the continuous miner. *Id*. A pry bar could be used to deal with ribs but he stated that using a miner is more efficient and safer. *Id.*

Hauler[20] operators, i.e. those who haul coal, work in the last open crosscut. VII Tr. 106. They haul coal from the location where the continuous miner operator cuts the coal and transport it to the feeder, which is some three to five breaks from there. VII Tr. 107. When told about the order, Sumner thought that it was prank, especially because, "the panel that [they] came out of beforehand was just like that. The -- the conditions were actually worse in the one we just had." *Id*. They had just moved to the panel for Unit 2, the location of the order. *Id.* In fact, they were not yet ready to produce coal yet. VII Tr. 109-110. Sumner affirmed that they had taken care of the ribs in that previous panel the same way. Thus, he believed that they had done a good job in both panels. VII Tr. 108. It was his view that neither panel's ribs warranted a violation, because they took care of the conditions. VII Tr. 111-112.

Sumner stated that he did not examine the conditions on the left side of the unit as he didn't have occasion to go over there. Primarily, he was working in the last open crosscut. VII Tr. 114. Therefore, he admitted that he rarely had occasion to go to crosscuts outby the last open crosscut, "[o]nly if they needed me to help them with something, but [the] majority of time on my shift, I never leave that -- that miner. That's my area." VII Tr. 114-115. And, he added, he did not have occasion to visit the outby crosscuts on December 22nd. VII Tr. 115.

Zachary Hudson also testified for the Respondent. VII Tr. 119. He is a face boss, also known as a section foreman. In December 2015, he was a section foreman, though he was an hourly employee then and on the B crew. VII Tr. 120. That crew would swap hours every two weeks with the A crew, meaning they alternated working the day and afternoon shifts. *Id.* At the time in issue, he was working in Unit 2, a production shift and he agreed that they were dealing with a mud vein there. *Id.* He informed that the mud would break out but the effect was mostly smaller material would be released. Occasionally larger pieces would come out and these would be attended to by a hauler or a scoop. VII Tr. 121. Hudson asserted that the rib issue was talked about by the crew every day. *Id.* The crew would be told, "watch the ribs." *Id.* Hudson maintained that they were "constantly scaling" things that needed to come down and they took

[20] A hauler is also called a "car." VII Tr. 106

steps such as narrowing the cuts. VII Tr. 122. While cuts were usually 18 or 19 feet, they would be narrowed to 16 or 17. *Id.* This, he said, meant that "your ribs wouldn't pop out as bad." *Id.*

Shown Gov. Ex. P1, which is Order No. 9036922, issued December 22, 2015, Hudson stated that he was the section foreman the day before that order was issued. VII Tr. 124. Presented with Ex. 7 D, Hudson identified it as his section report for December 21, 2015. They ran coal during that shift, doing about 400 feet. *Id.* Shown Ex. 7 C, Hudson identified that as Section Foreman Chris Falls' report for December 21st. That report pertains to the shift *before* Hudson's shift that day. VII Tr. 125. It reflects that Falls' crew was moving the feeder to the setup location at the new panel. *Id.* This meant that Hudson's was the first crew to start mining coal at that new panel. VII Tr. 125-126. Hudson maintained that MSHA inspectors had been present every week when he was working the prior panel and he also asserted that the conditions at that prior panel "were the same," and no MSHA person indicated that their efforts in the prior panel were insufficient. Further, Hudson asserted that there was a mud vein in that prior panel too. VII Tr. 126. Not only did he claim that rib conditions at the prior panel "were the same," he asserted that the mud vein at that prior panel was getting thicker, to the point that they pulled out of that panel and moved to the panel where the order was issued.[21] VII Tr. 127.

Turning his attention to December 22, 2015, Hudson stated that he met MSHA inspectors Fishback and Herndon that day. VII Tr. 127. Hudson asserted that Fishback told him the mine needed "to get people out on the travelway to start prying ribs," and he [Hudson] then "moved three operators out there . . . [and he told his manager] "what was going on so he'd [i.e. Hudson's mine manager would] come up and take a look at [the situation]." VII Tr. 128. Specifically, Hudson agreed that Fishback advised there were some "ribs on the travelway that needed attention." *Id.* That area was outby the working section. *Id.* Hudson sent miners, (he believed he sent three) to address the condition identified by Inspector Fishback. *Id.*

Following that, Hudson then got a call from Carter "about a loose rib in entry two that was between the second-to-last open and last open. By the time [Hudson] got over there, they done moved on and the rib was on the ground." VII Tr. 128-129. Hudson asserted that the rib had been pulled down, but he couldn't tell how big it had been because it was then crumbled coal on the ground. VII Tr. 129. Hudson stated he had never been in that entry two where the rib issue occurred, never having been between the second to last and the last open crosscut in entry two. VII Tr. 130. At that point, Hudson stated he was "pretty sure by that point they done said that the left side would be shut down for loose ribs, and I called on the right side, told them to shut down and back their equipment out, we're going to shut down the unit . . . [b]ecause if they shut the left side down for the loose ribs, more than likely they were going to shut the right side down, so I just shut it down and had people start working on ribs." VII Tr. 131. At that time, Hudson had walked the faces and did air readings through the last open crosscut, but he had not been through the entire unit. *Id.* Hudson's view was that the rib they had just pried down did not present a hazard to anyone, but his attitude was "who's to say they're [i.e. MSHA] not going to go over there and find something like that." VII Tr. 131-132. As implied by his earlier

[21] Though he reaffirmed that in the prior panel extra precautions had to be taken because of the mud vein there, the decision was to leave the panel as it was "too costly" to stay. VII Tr. 141.

comment, Hudson then stated expressly that shutting down the left side "was too excessive." VII Tr. 132. Therefore, his action in shutting down the right side was anticipatory that MSHA would take similar "excessive action." *Id.*

Shown Exhibit R 7 G, the section report for December 22, 2015, Hudson stated it reflects that production for that shift stopped at 10 a.m. *Id.* After he decided to shut down the whole unit, the miners on that shift then "[w]orked on ribs, roof bolters. As we'd pry ribs down, we measured the bolt spacing. If we had to spot bolts, we spotted bolts. I'm sure. And like right here it says we set some timbers down the travelway, so a couple of them were doing that." VII Tr. 133. His miners were then working both on the section and outby. *Id.* Hudson admitted that was another reason for shutting down the unit, "Yeah. I mean, they brought up the ribs on the travelway. I had to send operators out there. They brought up the ribs on the left side - -" *Id.* Nevertheless, Hudson maintained that the decision to shut down the unit was *not* "because of any loose rib that [he] knew hadn't been corrected yet." VII Tr. 134. Hudson stated that the prying was "mainly around the mud vein," and that they were only getting "little chunks of coal," and he did not notice any large ribs being pried down. *Id.*

Hudson agreed that his interaction with Inspector Fishback did not go well, relating that Fishback told him he "was a bad boss for letting [his] workers work in those conditions, which to [Hudson] wasn't a condition, you know. It was something we were working in every day and we dealt with it. We took care of business. He said . . . that the other bosses are bad bosses. He wanted names of who was bossing on the other crews." VII Tr. 135. Hudson maintained that he tried to tell the inspector what they were doing to keep the unit safe, but the inspector simply told him that it wasn't good enough. *Id*. Hudson did not like that the inspector called him a "bad boss." *Id.* He felt that was an unfair label "[b]ecause we were dealing with the problem. We were working safe. Nobody got hurt." *Id.*

Hudson stated that he never saw Inspector Fishback take photographs. Shown Exhibit P 3, government photos, he was directed to photo 39. For that photo, Hudson asserted that it was not taken on a working section, because phone lines and cables are present. Rather, that photo was down the travelway. VII Tr. 136-137. Hudson expressed that phone lines are moved up as mining progresses but they are never inby the loading point. VII Tr. 137. Directed to photo 49, Hudson believed that was a photo of a maintenance ride, which would be used by maintenance opertors. Vehicles such as that, including mantrips, would by parked outby the loading point. VII Tr. 138.

On cross-examination, when asked if he remembered retraining for standard 75.202(a), Hudson stated he did not remember that training. VII Tr. 138. However, upon being shown Ex. P5, dated October 29, 2015, he then admitted that exhibit reflected such retraining, as his signature appears on the exhibit. VII Tr. 139. However, he could not recall anything about the retraining. *Id.*

Regarding the location where a rib did come down, though Hudson couldn't determine how large it was, he did acknowledge that miners could have been in that area on their way to the faces. VII Tr. 146. After the unit was shut down, with the inspector shutting down the left side and Hudson then deciding to shut down the right side, Hudson agreed that "after the unit was

shut down [ ] all of the miners on the shift were either taking care of the ribs in the travelway or taking care of ribs on the section." VII Tr. 148. Those miners then did nothing else but attend to the rib conditions. *Id.* Asked if, when his shift ended, all rib issues had been resolved in that area, Hudson responded, he was "not going to say that, because it's all a matter of opinion." VII Tr. 149. Pressed on the issue, Hudson then stated there were no more ribs in need of being scaled or pried. *Id*. However, he did not walk through the entire unit before leaving at the end of his shift, stating, "[n]ot the entire unit. Last open and where my men were working, travelway. I was taking care of all of the hot spots, mainly the travelway and where we were scaling ribs down, you know. We mainly tried to take care of the run, where the coal haulers and everybody's working." VII Tr. 149-150. As to addressing the other entries and crosscuts, he answered, "[w]ell if they're going to travel them a lot we would take care of them. We would walk through them." VII Tr. 150.

Regarding Hudson's issue with the inspector calling him a "bad boss," he maintained that everyone was working safe. VII Tr. 151. However, Hudson admitted that during his deposition he denied that the inspector had any bias against him. VII Tr. 152. He was then asked about Exhibit P 7, a statement that Hudson drafted on December 22, 2015. In that statement, Hudson remarked that, "[s]ome of these ribs weren't that bad. Some of them we had to use equipment to get them down." VII Tr. 153. Based on that response, Hudson was asked if some of the ribs required equipment to get them down. His response was that MSHA wanted them down, but they had to beat on them to do that and a pry bar wasn't useful. In short, he considered them not ready to come down. *Id.* However, he allowed that some could be brought down with a pry bar. VII Tr. 154.

Based on answers which the Court found to be unclear, it inquired if Hudson was contending that the only ribs that need attention are those for which a pry bar is effective. Hudson denied implying that. Rather, his point was that if one has to use a big piece of equipment to bring a rib down, then the rib was not posing a threat. VII Tr. 155. Hudson explained his view further. His position was that, a rib that is removed by a continuous miner or a hauler, as opposed to a pry bar, does not need attention "at that moment." VII Tr. 156. However, to the Court, the distinction he made was not absolute, as he then allowed that "Now, I'm not saying that if -- here *in a couple hours or something*, you know, when the air gets behind it or whatever, it starts drying out, you know, I'm saying there that it's not going to start popping out more, but that's when you could take a pry bar in there and just pry down what needs to come down." *Id.* (emphasis added). Hudson made his position clear – it was his view that by having to use a piece of equipment, "you're making it more -- you're creating more of a problem using a piece of equipment to sit there and knock on the rib line." VII Tr. 156-157. Just as quickly, however, he allowed that there can be circumstances where using a piece of equipment is preferable to using a pry bar. VII Tr. 157.

Eric Carter then testified for the Respondent. At the time of the hearing Carter was a senior manager of production. In December 2015 his title was "continuous improvement [sic] and a mine manager." VII Tr. 163. In that December 2015 role, he "edited production reports, reviewed all the callouts from the shift, as far as maintenance stuff, and then looked for ways to help us cut costs and produce more efficiently." *Id.* The Court notes that production was Carter's focus, not safety. Consistent with that observation, when asked if he had any specific

knowledge of rib conditions on Unit 2 in December 2015, he stated "[o]nly what would've been in a production report." *Id.*

Despite the above statements, Carter informed that he accompanied inspectors Fishback and Herndon on December 22, 2015. VII Tr. 164. It was unusual for Carter to accompany inspectors but others were on vacation, so the job fell to him. VII Tr. 165. It is of interest that on their way in to the location to be inspected they came upon a timber that needed to be reset. That was done and when Carter inquired if a citation would issue, the inspectors told him there would not be. VII Tr. 166. Next, they "turned onto first northeast going towards Unit 2 and [they] stopped. [The inspector] said -- there was a bad rib. [Carter then] pried it down." *Id.* Again, Carter inquired if a citation would be issued, and again he was told, no, the inspector just "just wanted to see how bad it was." *Id.* This occurred on the travelway. VII Tr. 166. As the reasonableness of the inspector has been raised by the defense, the Court believes that Fishback's responses to the problems they encountered with Carter speak, to a degree, to his reasonableness.

Upon arriving at the location of Unit 2, Carter informed that, again with no citations being issued, "[t]here was a couple items there at the feeder that [the inspector] wanted corrected and [Carter] got ahold of Zach [Hudson] to have those guys correct those items -- accumulations, spillage around the feeder controls, fix some back stock around the feeder …" VII Tr. 166-167. The inspectors just wanted those areas cleaned up. *Id.* Then, still in Unit 2, they moved to the number 4 entry. At the second to last open cross cut, the inspector asked if they were scooping on the unit, and told them they needed to do that. Carter called Hudson who informed that he was "already on it." VII Tr. 169.

From there, they then went to the two entry, where the inspector stated there was a bad rib on the left side. Carter described the bad rib as follows: "The rib itself was probably about six-and-a half feet tall. The coal had a parting in it, so there was a -- like a mud vein in that -- in -- in the coal seam, so there would've been three-and-a-half to four feet of coal at the bottom of the mud vein, and another two feet, probably, 18 inches above the mud vein, and then some rock cut out above that." VII Tr. 170. As far as Carter could tell, just the bottom of the rib seemed loose, stating "just the bottom portion underneath the mud seam looked to -- appeared to be loose." VII Tr. 171. In Carter's view, just one side of the ribs was loose, but the inspector told him he wanted both sides pried down. *Id.* This area was on the sides of the entry. Carter had not seen the right side at that point but he poked his head through the curtain and saw the area identified by the inspector. *Id.* Carter stated that it did not involve the whole length of the rib. VII Tr. 173. This time when Carter asked if a citation would be issued, the inspector affirmed that would occur. *Id.* Carter then informed Hudson that he would be getting a citation for a loose rib in the entry. The inspector told them to pry the loose rib down, but the miners did not have a pry bar, only pinner steels. VII Tr. 174. A pinner steel is not the best tool choice to pry down a loose rib. VII Tr. 175. As they could not pry the rib with the pinner steel, Carter told them to use a scoop. *Id.*

Following that discovery, the inspector advised that he was expanding the scope of his citation, informing that both ribs needed to be scaled. VII Tr. 176. Although the inspector pointed to a rib needing scaling, Carter described it as "just flaking along the rib line. Not giant material, just -- it looked football-size material or something." VII Tr. 178. Carter also stated

that he observed evidence that scaling had occurred. *Id.* From his testimony of the conditions, Carter expressed that the amount of material was minimal, either football or baseball sized. VII Tr. 179. Then, shown Exhibit P 3 D, Carter agreed that was an example of what he was describing. He characterized it as an area "where they picked out something that they thought was suspect." VII Tr. 180. Shown Exhibit P 3 E, Carter stated this was another example, where "they saw a crack, they put something in and -- and they popped out pieces of material that they could get out." *Id.* Shown Exhibit P 3 C and P 3 E, Carter described those as showing flaking or portions that had been scaled out. VII Tr. 181. However, upon questions from the Court, Carter then explained that he was not present when those photos were taken and beyond that, he couldn't "say that I was ever in that -- I don't know where those came from." VII Tr. 182. Instead, his opinions were based only upon his experience as a miner, as he was unable to "tie those photos to a particular area anywhere in the mine." *Id.*

Carter's testimony suggested that the inspector issued his closure order for the right side of the unit, even though neither he, Carter, nor the inspector had been there yet. VII Tr. 183. In any event, Carter then informed Hudson that "the unit was down until the ribs were scaled and properly re-supported, as per [the inspectors'] criteria, and then the whole unit was to start scaling ribs at that point, from the feeder to the face." VII Tr. 184. The Court inquired of Carter whether, when he was with Inspector Fishback on December 22, 2015, there "were there any areas that [Carter] observed when [he was] accompanying [the inspector], when [there was] evidence of more than flaking." VII Tr. 184. Carter responded, "Four to five crosscut, the last open, the pinner was in five and we approached it and [the inspector] said, "Look at that rib." And at that point, it was ten, 15 foot long and probably two-and-a-half to three foot tall. But we didn't know if – [ ] they pried it out or if a miner hit it when it went across there. We didn't know if it sloughed off and fell out itself …" VII Tr. 184-185. Questioned further, Carter maintained that there were no other such areas, as the rest involved only "flaking." VII Tr. 185. Carter's view was that the areas he described as showing only flaking did not require scaling. VII Tr. 186. However, his view was qualified, as by that he meant that the flaking areas did not require "some kind of *immediate* action." VII Tr. 187 (emphasis added).

On cross-examination, Carter stated that if a citation is issued and he disagrees with it, he will express his view to the inspector, but he does not argue about it. VII Tr. 197. Referred to Exhibit P 8, Carter agreed it reflects that he disagreed with Inspector Fishback's view of the condition of the ribs on Unit 2. VII Tr. 199. Those notes, however, do not contain factual information to support his opinion. VII Tr. 199-200. Although Carter maintained that he does not record such information, so as not to be disrespectful, he admitted that, unless a matter goes to hearing, an inspector would never see such remarks. VII Tr. 200. He did assert that he includes what he witnessed in those notes. VII Tr. 200. However, although on direct Carter asserted that there were ribs which Inspector Fishback claimed were loose but which ribs wouldn't move when he used a tool to try on them, Carter's notes did not reflect that claim. VII Tr. 201. It was not included, he said, because it was not part of the citation that was issued. VII Tr. 202. Upon challenging that claim, Carter then conceded that the citation was for the entire unit. VII Tr. 202. Therefore, his explanation for not including his claim was wanting.

Shown Exhibit P 3 at 39, Carter identified the roof as located "[w]here the hog panel is in the top left corner." VII Tr. 202. Carter then marked that location on the photo, with his initials

and the number 6, to show where the rib line meets the roof line. VII Tr. 204, 206. Then, directed to the area on the photo where the inspector marked "6," Carter was asked if he saw any evidence of separation from the rib. Carter answered he saw a crack along the coal seam.[22] Next, directed to his notes, Exhibit P 8, Carter stated that, except for brief intervals, he was with the MSHA inspectors the whole time, that is to say, in close proximity. VII Tr. 209. Carter reaffirmed that inspector Fishback closed parts of the section that the inspector had not yet seen. VII Tr. 210. However, though he asserted it to be a fact, that was not in his notes either. *Id.* His explanation was that he never had an opportunity to complete his notes, as he was "called off to do some other stuff, so [he] never got back to finishing them that day." *Id.* Yet, there were more chronological notes. The Court finds that, as there were subsequent notes, Carter's reason for not finishing his notes regarding his claim that the inspector closed parts of the section he had never seen, was undercut and therefore less credible.

When questioned about his claim upon viewing another photo and his answer that it displayed flaking or that it had been scaled, Carter admitted that it was also possible that the material could have simply fallen on its own. VII Tr. 212. He then conceded that the materials he saw on December 22nd could've fallen on their own. *Id.*

Violations at Issue in Docket No. LAKE 2016-0232

Five orders are involved with this docket

Inspector Testimony of William Tisdale is an MSHA coal mine inspector.[23] VII Tr. 225. Tisdale is a CMI (coal mine inspector). He has experience inspecting beltlines, both as an inspector and in his prior work as a coal miner. VII Tr. 227. Inspecting beltlines involves "looking for bad rollers. You would look for a belt being misaligned. You would look for hazardous rib conditions. You would look for hazardous roof conditions. You would look for adequate rock dusting. You would look for any accumulations of material that could be combustible. You would make sure that there's an adequate walkway." *Id*. Frozen rollers are another issue. If a belt is "contacting [a frozen roller], it will be rubbed or polished. It could eat right through a roller. It'll eat indentions into it, and sometimes even mud will build up behind them, or they'll be piles of dust under them where it's pulling dust off of a belt." VII Tr. 228. A frozen roller creates several hazards, including frictional heat source, accumulations of fine dust under the roller, with the latter being a particular problem if the roller gets hot enough to become an ignition source and the frozen roller can damage the belt itself. *Id*. Broken rollers and out of bracket rollers also present hazards. VII Tr. 230.

It is helpful to determine roller problems when a belt is running but problems can be identified on a belt when it is not running. This is accomplished by "visually inspecting it, looking for obvious signs of where the rollers had been contacted by the belt and the roller itself

[22] However the Court noted that it seemed of questionable value for Carter to mark anything on the exhibit, as Carter admitted he didn't recall that area and therefore his marking was based only on his general experience, not any recollection of it. VII Tr. 206.

[23] MSHA coal mine inspectors are sometimes referred to as "CMIs" VII Tr. 225.

is not moving, flat spots, mud built up or coal dust built up behind them where it's obvious that the roller's not turning, grooves cut into the -- the rollers themselves, rollers not being at a proper angle, and obviously if you see one that's broken, it should be obvious as well because it's going to be a different shape, it's going to be a different angle than what a normal intact roller is." VII Tr. 231-232. The duty of examining belts applies to both sides of the belt. VII Tr. 233.

The mine is required to have seals inspected. VII Tr. 234. Seals are subject to regular inspections; some are weekly and some are done each shift. VII Tr. 234-235. Inspector Tisdale demonstrated that he is knowledgeable, explaining, weekly exams apply "[t]ypically to seals that are in the return air course, where the air is being coursed outside, and … seals that are not -- the air is not being coursed to an operating unit, to a running section." VII Tr. 235. Seals that require pre-shift exams apply "where the air is actually ventilating a working section." *Id.* This is required because "the air going across these seals is at more risk to -- to have bad air in it or a -- have an explosive mixture in it." *Id.* Such air, after passing the seals, goes directly to a working section where miners are working. *Id.* The concern being addressed by seals is methane gas. VII Tr. 236.

Inspector Tisdale inspected the Francisco Underground Pit on January 21, 2016. VII Tr. 237. He examined the 1A, 1B and 1C belts that day. VII Tr. 242. At that time he issued an order on the 1C beltline and also one on the 1B beltline.[24] VII Tr. 238, Exhibits P 9 and P 10. In connection with those orders, Tisdale also issued an order regarding the examination of those belts. VII Tr. 239.

Before going underground that day, the inspector checked the mine's examination book. VII Tr. 241. Exhibit P 14 is the mine's examination record for the two shifts prior to his inspection. *Id.* That exhibit reflects the exam that Randy Hammond conducted for the mine for those belts and the preshift for those belts performed by Kim Moore. *Id.*

Tisdale's inspection began with the 1C belt, then on to the 1 B and the 1A. VII Tr. 243. His direction was from the inby side, and he headed outby, meaning that he was on the left side of the belts. *Id.* The mine's Jeff Brand, accompanied him. *Id.* His first violation was for a misaligned belt on the 1C, citing 30 C.F.R. §75.1731(b). *Id.* He then found damaged rollers on the same belt. Directed to Exhibit P 9, and his Order No. 9036654, it reflects that he found "two top rollers that [were] hanging out of the bottom brackets at crosscut 42 and 43, causing the rollers to be frozen and allowing the belt to rub them." VII Tr. 244. He could tell they were out of their bracket because they had a different angle than the rest of the rollers. *Id.* The belt was then shut down and the rollers were put back in the brackets. Tisdale came upon a number of other rollers with problems, requiring the belt to be shut down. VII Tr. 245. Other roller problems included a top outside roller that was missing, a frozen top center roller at crosscut 35,

[24] Tisdale described the layout of those belts, "operating unit number one, the working section, is dumping on the feeder, which dumps onto the 1-C tail, which then, in turn, dumps onto the 1-B tail, which, in turn, then dumps onto the 1-A tail, which then dumps onto the main south belt, where it exits the mine." VII Tr. 242.

and a top center roller at crosscut 13 and 14 that was not rolling. VII Tr. 246. Another roller issue was at crosscut 20. Tr. 247, Exhibit P 13 at page 12.

There was an issue between the inspector and the mine's Gotroman, in that the inspector did not want the Gotroman to go ahead of him as the inspector examined the belts. The reason for the inspector's objection was over a concern that belt issues could be corrected before he came upon them. VII Tr. 248.

Turning to Exhibit P 14, Tisdale stated that exhibit shows no indication that any rollers had been changed on the 1C belt during those mine shift exams. VII Tr. 249. When Tisdale worked as a miner and he found a bad roller, he would record that in the examination book. VII Tr. 249. In terms of determining how long the belt problem had existed, Tisdale related that he asked "Chris Robinson on this belt if the shift prior to this was a running shift that they were running the belts, and I believe he told me that they were idle." VII Tr. 249. Tisdale estimated that the conditions existed for two to three weeks. VII Tr. 250. This was based upon his inquiring of the mine operator how often they did belt moves. He was told they would move them one to two times per week. VII Tr.250-251. He added that "[t]he two rollers that [he] found that were actually out of their brackets were approximately ten crosscuts from the tail." VII Tr. 251. Given that, "if the mine operator was moving four crosscuts for each belt move, then that would put them at 12 crosscuts," and on that basis he determined the two to three weeks figure. *Id*.

Directed to Exhibit P 10, which pertains to order no. 9036656, and the 1 B belt, Tisdale informed that he "observed a frozen top center roller at crosscut 14 and a frozen top outside roller at crosscut 10 to 11," a condition he noted because the rollers were not rolling when the belt was moving. *Id.* In addition, almost all of the frozen rollers had flat areas on top or polished shiny areas. VII Tr. 252. Those conditions indicate that the rollers had been frozen for a period of time. *Id.*

Regarding Exhibit P 11, order no. 9036657, issued for the 1A belt, Tisdale informed that there "were frozen top center rollers at crosscut 26, 21, and 13[, and the] [t]op outside roller was also frozen at crosscut 19 to 20, and there was a top center roller missing at crosscut 8 to 9." VII Tr. 252-253.

Based on the number of roller issues he found that day, Tisdale stated that he considered it to be an unusually large number. The Court inquired as to the basis for the Inspector's view. He responded, "[b]ecause that many rollers in a short period of time to -- to happen like that would be extremely unlikely. If you had that many bad rollers occurring all the time, you'd never be able to operate. You'd be constantly changing rollers. You'd never have any up time to really produce coal." VII Tr. 253. Tisdale added that the number was also unusual because when he used to examine belts as a miner, he could not recall an instance with so many roller problems, nor had he seen such a situation as an MSHA inspector. VII Tr. 253-254.

Tisdale informed that during his belt inspection he met with miner Lucas Dobbs. He asked Dobbs if he found anything and Dobbs responded that "So far, it looks good." VII Tr. 254. This conflicted with the inspector's observations after Dobbs made that remark as, while Tisdale

proceeded outby, he found "another frozen roller at crosscut 13 and a missing roller at crosscut eight to nine." VII Tr. 254-255. At that time, Dobbs was walking from the outby side, heading inby. VII Tr. 255. Thus, going in opposite directions, they passed one another on the same side of the belt. To state the obvious, Dobbs had walked by the problematic rollers that Tisdale found moments later.[25] *Id.*

Tisdale also interacted with the mine's Chris Robinson, the mine manager/ mine foreman for the afternoon shift on that day, who when the inspector asked if there were any mitigating circumstances, responded, "just give us a chance. Let us prove ourselves." VII Tr. 256. Tisdale was not sympathetic, as he informed Robinson that a previous (d) order had been issued for the same problem with rollers by inspector Josh Gipper. VII Tr. 257. Tisdale considered the three orders he issued to all warrant the same likelihood of injury and persons affected and negligence. *Id.* The hazards created by these roller problems include frictional heat, damage to the belts, and accumulations of combustible material. They present a risk of fire. *Id*. He marked the negligence as high and unwarrantable failures, because "of how many there were in such a short period. … I thought that they were obvious. If -- if you were looking at the belt, if you were to walk up and see that a roller's not turning when the rest of them are, I thought that that would be obvious. As far as the unwarrantable failure, I believe that the mine operator had been already trained on this issue. I believe that they had -- already had many citations issued for this, and they had reason to know about it." VII Tr. 257-258.

Directed to Exhibit P 13, and pages 36-42, retraining is mentioned in Tisdale's notes. They recount, "Subject discussed. Damaged rollers or other damaged belt conveyor components which posed fire hazard must be immediately repaired or replaced. All other damaged rollers or damaged belt conveyor components must be repaired or replaced. … I believe it's the standard straight out of the book." VII Tr. 258. Tisdale then confirmed that when he returned to the surface, he looked at the mine's records and [he] "could not find any rollers being changed for a very long period of time." VII Tr. 259. That record book did not note any bad rollers through January 4, 2016. *Id.* In Tisdale's opinion that was a long period of time to not change rollers. VII Tr. 260.

Moving to Order No. 9036658, Tisdale confirmed that was the order he issued in connection with the three orders on the belts. *Id.* In issuing that order, he had in mind the exam immediately prior to inspecting the belt. This involved Hammond's exam. *Id.* Tisdale rejected the suggestion that the problem rollers he found could've all gone bad after Orr's examination because "of the wear where the operating belt had chewed through on some of these and some of the grooves had -- had cut into some of these, some of the amount of mud that had built up behind them. This is all stuff that doesn't happen in a shift's time, and especially if the belts were idle prior to being inspected." VII Tr. 261. His notes also indicated that they were running coal at that time. *Id.* This conclusion was based upon being told that the belts had been pre-shifted before the unit was idle. From that, Tisdale concluded that the unit was producing coal prior to

[25] Revisiting his earlier testimony regarding coming across Lucas Dobbs, Tisdale reaffirmed that he was traveling outside and Dobbs inside, but both were on the same side of the belt. Tisdale reaffirmed that after passing Dobbs he found some rollers with problems at crosscuts 13 and 89. VIII Tr. 31. Thus, Tisdale affirmed that Dobbs had missed those problem rollers.

the day shift. VII Tr. 262. The hazard, he explained, is that belt examiners are not identifying hazards. *Id.* By not correcting the belt problems, things will only get worse. Therefore Tisdale marked the violation as reasonably likely. VII Tr. 263. He marked that violation as high negligence and unwarrantable failure because he "found so many of them that I would've expected them to find some, and yet, nothing was noted in any of the books. On the unwarrantable failure, they had already been retrained for this previously, and yet still, here we are finding several of them." VII Tr. 264

However, evidencing the inspector's reasonableness, he marked the three belt orders as unlikely because there were no combustible materials around those rollers. Thus he did not find an ignition source at the time of his inspection. Also some of the areas were damp and the area was well rock dusted. *Id.*

Accordingly, while all the violations were serious, Tisdale considered the pre-shift to be more concerning because "[b]y not identifying these, you are allowing … - things to build up. With normal mining practices, we're going to have accumulations. … with normal mining practices, you're going to have … ribs fall out [and] … you're going to have fuel that's going to end up being in the area." VII Tr. 263-264.

Tisdale was then asked about Order No. 9036663,[26] for which the Respondent stipulated to the fact of violation, high negligence and unwarrantable failure. Therefore, the Secretary's inquiry addressed only the reasonably likely, fatal, and number of persons designations. VII Tr. 264-265. That order related to failing to examine the southwest main seals on February 3, 2016. *Id.* Exhibit P 19 reflects the mine's exam records and the inspector's notes for that day. Tisdale took photographs of the DT & I [Date, Time & Initials] boards at the seals. VII Tr. 267, Gov. Exhibits P 18, P 19, and P 20. At that time Tisdale was inspecting the southwest sub-intake air course, but that was not completed because he found the unexamined southwest main seals. VII Tr. 269. The seals are important Tisdale expressed, because they "are on the intake air course, which is putting intake air directly to a working section, and they are adjacent to the primary escapeway." *Id.*

Though perhaps obvious, Tisdale explained that failing to examine seals risks not detecting seals that have deteriorated and could leak bad gas which would then travel to a working section. VII Tr. 270. There is also a risk of an explosive mixture. Problems such an ignition or asphyxiation could occur. *Id.* Those subject to these problems would be "[a]nyone that is inby this area that – that this air is coursed to, which is at least one working section, and if the seals were to blow out, it could -- it could blow out the stocking lines and it can affect the -- the whole air course, which is affecting everyone inby that area." VII Tr. 271. In listing 31 people as affected, Tisdale stated that the mine advised that 31 people would be inby. VII Tr. 271-272. Finding this problem, Tisdale had the mine evacuated. VII Tr. 272. Pre-shift examiners have other responsibilities besides checking the seals. VII Tr. 272-274 and Tisdale's

[26] A separate area of potential confusion is noted here. Order No. 9036663 *is* part of Docket No. LAKE 2016-0269, though logically, in terms of the date of the Order's issuance, it would have made more sense for it to be part of Docket No. LAKE 2016-232. Footnote 12, *supra*, also notes this oddity.

notes at Exhibit P 19A. Referring to the photographs he took, per Ex. P 20, Tisdale took those pictures to show that the seals had not been examined. VII Tr. 275. There were associated problems with this matter, as Tisdale discovered that Matt Walker, for his DT & I, "entered the wrong date, [ ] whenever he was doing his exam the -- the day prior, but he only did half of the seals for that day prior. He did not do both sides." VII Tr. 276-277. Tisdale deduced this from the DT & I boards. VII Tr. 277. The mine operator contacted Walker about the issue and relayed to Tisdale that Walker admitted he had not inspected them. *Id.*

Tisdale, still referring to order number 9036663, Exhibit P 18, marked it as reasonably likely because "without conducting an exam, there's no way to know what hazards may or may not exist in said area, and … in mining, the environments is forever changing, so that's -- that's why we need to make sure they're examined. This particular set of seals is also on a split of air that ventilates a working section. It is upwind of it, which we also recognize that as -- as more of a hazard, and that's why we require it to be examined more often." VII Tr. 278-279. He marked the violation as fatal because "if the seals were to be breached and this air goes inby, … you're putting bad air, low-oxygen air, directly onto a working section, and potentially an explosive mixture, which can also cause an ignition, and -- and you're going to blow out ventilation. … [a]nd without ventilation in a mine, especially with fires, you're going to be in a really bad situation." VII Tr. 279. The Court then inquired, and the inspector confirmed that, in this particular situation, the unexamined seals were determined to be fine. VII Tr. 280.

On cross-examination, Tisdale was asked about the difference between top and bottom rollers. As the names imply, top rollers support the top of the belt while bottoms support the bottom portion. VII Tr. 281. A "cam" refers to an individual roller.[27] *Id.* A top set of rollers will have three cams while the bottom will have one. Tisdale agreed that for his order not all three top rollers had issues; only one of the three was problematic. VII Tr. 281-282. Tisdale agreed that a "frozen" roller refers to a roller that is not turning. VII Tr. 282.

Tisdale acknowledged that his view that the problems with the rollers had existed for two to three weeks was based on the scheduled belt moves and he affirmed that his view of the duration of the problem applied to the out of bracket rollers and the one roller that was completely missing. VII Tr. 285. Tisdale did not believe that the problems he found could have occurred after the belt move. VII Tr. 286.

Referring to Inspector Tisdale's view that he considered the number of problem rollers to be large, Tisdale was asked to consider only the 1 C belt, where he found five problem rollers. He confirmed his view that this was a large number of rollers. VII Tr. 287. He also considered

[27] Although transcribed as a "can," the correct term is "cam." VIII Tr. 57-58. Witness Hammond described a cam as "a component of the belt. There's three top rollers, mainly consists of four components -- or two different components, the frame and then three cams. The cams are -- the best analogy … is very similar to a roll of paper towels, as far as physical size. So there's two of them. One of them in the center is horizontal. And then the two on the 3 outsides, they're at an angle, anywhere from like 25 to 33 degrees." VIII Tr. 58.

the two problem rollers he found on the 1B belt to be a large number because it was a short belt. *Id.* Tisdale could not recall, nor calculate, the length of the shorter belt. VIII Tr. 9. He agreed that when he worked at a mine, prior to becoming an inspector, the mine would use both reclaimed and new belt structures.[28] *Id.*

Questioned about Orr's examination on the third (i.e. night) shift on December 21st and Hammond's exam on the day shift, Respondent pointed out, and the inspector agreed, that Orr's report noted that there were areas along the 1C belt that were dirty or clean. VIII Tr. 11. The inspector also agreed that the report states "Clean 10 to 11, 12 to 14, 16 to 17, 51 to 52," as areas needing to be cleaned and that they were cleaned. VIII Tr. 11-12. As for Hammond's exam dealing with the 1 C belt, the inspector agreed that some areas needing to be broomed were listed. VIII Tr. 12. While the inspector made reference in earlier testimony about a previous 104(d) enforcement for blowers, he could not provide any additional detail about that matter. VIII Tr. 12-13.

The inspector was asked why, for the three roller orders, he listed them as "non-accident likely." His response, as he stated earlier, was the areas were well rock-dusted, no accumulations were present and areas were damp. VIII Tr. 13. Tisdale agreed that the conditions he found on 1A and 1C influenced his decision to make the 1B belt a 104(d). VIII Tr.14. Similarly, the conditions he found on 1C . . . influenced his decision to issue the violation as a 104(d). *Id.*

Asked if, under 30 C.F.R. §75.1731(a)[29], it is true that under certain circumstances, damaged rollers do not need to be replaced immediately, as the standard provides that only where a fire hazard is posed do they need immediate replacement and that all other damaged rollers must be replaced or repaired, Tisdale agreed. VIII Tr. 14-15. Further, he agreed that when he used to work in mines, he replaced rollers on weekends and that such problems had been found by examiners during the week but not replaced until the weekend. *Id.*

Directed to the seals violation, Turner stated that he had an occasion when he observed a 120 PSI seal that had .5 percent methane output in front of the seal. He was the examiner for that circumstance and he agreed that he was not required to take any action for that methane level. VIII Tr. 15-16.

Tisdale confirmed that he considered certain hazards in marking the violation as S&S. One such hazard he identified is when "the seal itself becomes compromised with damage, and starts leaking air if it allows [ ] the air to come out in a large amount." VIII Tr. 17-18.

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[28] Subsequently, when directed to his notes, per Exhibit P 13, Tisdale saw they reflected 56 crosscuts long for the 1C belt. VIII Tr. 29. Those notes also informed that the 1 B belt was approximately 19 crosscuts long and that the total number of crosscuts was 103. VIII Tr. 30-31. That meant the 1A belt was 28 crosscuts. VIII Tr. 31.

[29] The cited subsection provides, "Damaged rollers or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers or other damaged belt conveyor components, must be repaired or replaced. 30 C.F.R. §75.1731(a)

Whether that is reasonably likely to occur, Tisdale could not say. VIII Tr. 18. While the inspector acknowledged that he considered asphyxiation to be another possible related hazard, he admitted to having no way of knowing if that was reasonably likely to occur. *Id.* While that hazard would come about through a lack of oxygen, Tisdale also agreed that oxygen is checked throughout the mine where persons work. *Id.* Asked if there were other hazards from the condition, he stated his view that "it creates an ignition source or an explosive mixture of gases, as well. It is going to be in the working section, and the miners are going to be working. It can also disrupt ventilation if the ignition is large enough where it would blow out any of the ventilation controls for that area where the ignition happens." VIII Tr. 19. He admitted that for that to occur there would need to be an explosive level of methane. *Id.* However, when challenged about the reasonable likelihood that one would encounter the 5 to 15 percent explosive level for methane, Tisdale informed, "Without ventilation controls, [he] ha[s] encountered it." *Id.*

Tisdale stated that there were other hazards considered by him in marking the order as S&S, identifying the roof and ribs as not having been examined. VIII Tr. 21. Although Respondent's Counsel noted that only the examiner would be going to the seals, the Court is of the view that such an observation misses the point of the hazard Tisdale was identifying. VIII Tr. 22. Tisdale's prior mine experience included pre-shift exams of seals, which he described as "inspect[ing] all the seals to make sure that they're intact. I check for gas levels at each of the seals, and the entry that they are being aired by. I check for roof conditions. I check for rib conditions. I check for proper rock dusting, and I look for any other signs of hazards or soon to be hazards that are in the area." *Id.* Asked if he did those things on February 3, 2016 when he was inspecting the southwest seals, he responded, "I believe I did." VIII Tr. 23. In this instance, again in the Court's view, the question from Respondent's Counsel misses the point of conducting the pre-shift exam. Tisdale affirmed that the things he listed as concerns, such as methane, rock dusting, roof and ribs, turned out to not be present in that instance. VIII Tr. 23. Consistent with the Court's conclusion that Tisdale was a credible witness, he acknowledged that the hazards he identified turned out not to be reasonably likely to occur. However, this too, in the Court's estimation, misses the point of the prophylactic purpose behind a preshift exam.

Tisdale's company escort that day was Nathan Courtney, a certified examiner. However, Tisdale informed that Courtney did not do everything that is expected during the seal examination during the inspection because he did not look at all the seals nor did he take gas checks. VIII Tr. 24. While Courtney requested that Tisdale allow him to perform an exam in order to terminate the violation, Tisdale denied the request because Courtney was escorting him. VIII Tr. 25. When Tisdale came to the surface he met Greg North who told him "Sir, I just want to tell you that I did sign the book, but I did not examine those seals. Matt Walker was supposed to examine those seals." VIII Tr. 26. Tisdale's order was terminated after the examiners were retrained in the importance of exams and examining seals. *Id.*

Asked if he considered all examination violations for seals to be S&S, Tisdale responded he did not view them all as S&S, though he was unable to give an example of a non-S&S seal

scenario, adding that he had not yet encountered a non-S&S seal violation in his experience.[30] VIII Tr. 27. The Court understands that the point of the question was to show that the inspector reflexively considered all seal violations to be S&S, but it views the question as a distraction because the issue is whether *this violation was S&S.*

Regarding Tisdale's remark that he had not decided whether to issue an order until after he finished his inspection, he explained that reasoning, "The reason why is because that many rollers, and the different ways of those rollers were oriented could mean a lot of different things, in the way of that we see that they were there or we -- that we just miss this one. There's a lot of different things. But whenever I start looking at the big picture of things, and I see that there's that many rollers that are damaged or missing, it tells me that we just aren't looking for them." VIII Tr. 33.

Tisdale also confirmed that the same person examined all three belts, the 1A, 1B and 1C. VIII Tr. 34. He was then asked about his acknowledgment that the action to be taken for rollers distinguishes between those rollers which create a fire hazard and those that do not. For the latter category, Tisdale agreed that such rollers do not require immediate replacement but they still must be replaced. *Id.* However, it was his view that upon being detected through the examination, such other rollers would need to be noted *by the mine examiner* and then replaced. VIII Tr. 35. In this matter, none of the problem rollers had been noted. *Id.*

Further regarding the seal violation of February 3rd, while Tisdale encountered no methane, he only knew that by using his spotter device to measure the air. VIII Tr. 36. The Court notes that one has to be conducting the seal exam to learn the methane content. Further, as he focused on the absence of the seal *examination*, Tisdale did not issue any violation for the seals themselves. If he had discovered an inadequate seal itself, a separate violation would have been issued. *Id.*

Regarding the roof and rib in the area of the seals, Tisdale confirmed that he factored them into his evaluation of the hazard, noting that the primary escapeway was adjacent to the entry next to the seals. VIII Tr. 37, 43. In Tisdale's view it was possible that adverse roof conditions near the seals could affect people using the escapeway, "[b]ecause if the roof conditions deteriorate in a cross-cut that are in the seal entries where they would have been examined, for instance, if that roof deterioration oftentimes will carry on through other entries. And that is why we, typically, require breaker props[31] to be set around falls that are adjacent to trap walls." VIII Tr. 37-38.

At the conclusion of his testimony on direct and cross-examination, the Court inquired if anyone with the mine challenged his findings, contending that the order was incorrect. Tisdale informed there was no such challenge. VIII Tr. 44.

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[30] However, in Tisdale's deposition he stated that he considered all seal exam violations to be S&S. VII Tr. 28.

[31] Breaker props are props that are set to help prevent more roof failure to keep progressing through entries or cross-cuts, should a roof fall occur. VIII Tr. 38.

Respondent called Randy Hammond. VIII Tr. 45. Hammond is employed at the Francisco Pit. He has had 30 years of coal mining experience. VIII Tr. 47. He is now with service support, which entails the respirable dust sampling program at the mine, but at the time of these matters, he was in compliance as an examiner. *Id.* In January 2016 he performed examinations. Part of his duties at that time included pre-shift examinations. Hammond described the process of examining belts; his description revealed that the task is detailed, thorough and time consuming. VIII Tr. 48-51. He did state that examining the rollers as part of the belt exam is more effective when the belt is running, not only visually, but also by using one's hearing and smell. VIII Tr. 51-52. Similarly, the rollers are easier to evaluate when coal is running on the belts. VIII Tr. 53. When coal is not running, by design of the belt, many rollers are not in contact with the belt. VIII Tr. 54. The MSHA safety standard requires that the pre-shift exam is to be done three hours before the oncoming shift. VIII Tr. 53.

Hammond was asked about his examination of January 21, 2016 for which he examined the 1A, 1B and 1C belts on the day shift. VIII Tr. 55. As noted earlier, the mined coal moves from the 1C to the 1B and then to the 1A belt. Exhibit R 21 is the production report from supervisor Hayden for the day shift on Unit 1 on January 21, 2016. VIII Tr. 58. It reflects that Unit 1 did not produce coal on that shift. VIII Tr. 59. It was on that shift that Hammond performed his exam. Shown Exhibit R 22, Hammond identified it as the production report for the afternoon shift that same day. *Id.* Coal was produced on that shift. VIII Tr. 60. Exhibit R 23 provides data about "the three belts in question, and the length of the belts in feet, and the number of top roller frames, and the number of top roller cams per frame."[32] VIII Tr. 60-61. It reflects that for the three belts there were 8,000 feet in total and 4,782 cams. VIII Tr. 61-62.

Regarding his exam that day, Hammond began with the 1C belt, traveling outby, and on the travelway, the right side, with the belt being on his left. He found no "hazards" on the 1C but he distinguished that from "conditions … that needed to be addressed." VIII Tr. 62-63. Referring to Exhibit P 14, Hammond noticed the following conditions, "four on the 1C, I had that brooming needed to be done in four spots. It was 52 to 56 – or 52 to the tail piece. Then I found stock from 26 to, I think, 32, and 14 to 17 cross-cut. And then I had them -- one at the belt through from … the crown roller or head roller inby to the end of the take up." Tr. 63.

Hammond stated that when doing his exam the belt was only running for a short time and intermittently at that. VIII Tr. 64. Referencing Exhibit P 9, Order No. 9036654, Hammond stated that the belt not running would "negate" his ability to detect the conditions cited. VIII Tr. 65. Next, Hammond was asked about the 1B belt. That belt was running but not transporting coal. However, he added that if the 1C was not running, the 1B would not be running either. VIII Tr. 66. Again, at the time of his exam, he was proceeding outby, as he was when on the 1C. When on the 1B, the belt was to his right. He found no hazards or conditions when he examined that belt. VIII Tr. 67. Directed to Order no. 9036656, Exhibit P 10, in which two frozen top center rollers were discovered by the inspector, Hammond stated that belt was not conveying coal, a situation, as he noted earlier, which impacted his ability to inspect the belt. With no

[32] On redirect, referring to Exhibit R 23, Hammond stated that the reference in that exhibit was to top rollers only, as bottom rollers were not involved. VIII Tr. 96-97.

weight on the belt, "the majority of the belt could be up in the air above the rollers, and not contacting the rollers, so therefore, the rollers are not turning for me to see if they're frozen." *Id.*

Turning to Order No. 9036657, which pertained to the 1A belt, this was the belt for which the inspector found three frozen top side rollers, one frozen top outside roller and a missing top center roller. VIII Tr. 68. Hammond stated that while the belt was running, it was not then transporting coal. At that time he was on the left side of the belt. Again, he found no hazards or conditions on that belt. *Id.* Thus, because the running belt was not carrying coal, he wasn't able to see the frozen rollers. As for the missing roller, Hammond conceded he simply missed it. VIII Tr. 69. Hammond added that it has been his experience that MSHA inspectors do not inspect a belt *unless* it is running. VIII Tr. 70. Part of the reason for that is that, if a belt isn't running, there is no ignition source. *Id.*

On cross-examination by the Secretary, Hammond admitted that the shift when he conducted his exam *was* a production shift, but he explained that the particular unit was not a production shift for that unit. VIII Tr. 72-73. At the time these orders were issued, the midnight shift examiners could walk whichever side of the belt they chose. Now, following the orders which were issued in the wake of this litigation, each shift rotates the side examined. VIII Tr. 74-75. Hammond also stated that the ability to identify a roller out of the bracket can be diminished if belt is not running and by which belt side one is walking on. VIII Tr. 80.

In defending the problematic rollers that he missed, Hammond requested data from the engineering department about the belts' length and learning that, it was calculated that .02 percent of the rollers were missed by him. Asked for the percentage of bad rollers that he found, Hammond admitted that was zero. VIII Tr. 81. The Court notes that there were, undeniably, a lot of rollers along the three belts. As Hammond stated, "[t]he number of top roller frames was 1,594, of which each frame consists of three cams. So, therefore, there's 4,782 cams in these belt systems." VIII Tr. 82. Asked if that meant that the rollers he missed, 12, was excusable, given that large number, Hammond responded that it was not an excuse.[33] VIII Tr. 83.

Although Hammond had stated that one detects frozen rollers by seeing that they are not turning, he agreed that there are other signs of detecting this problem, as the rollers may have a shiny spot on them where the belt has been rubbing the frozen roller. VIII Tr. 87. However, he expressed that such shiny spots are harder to detect than when the belt is running. VIII Tr. 88.

When asked about required retraining, earlier in 2015, for identifying rollers that need to be changed, Hammond agreed that he participated in that training. *Id*. He stated that the retraining "was probably as a result of a citation or something to mandate from MSHA, and we were instructed to basically enhance our inspections, and try to find the bad rollers to make sure we adhere to federal regulations." *Id.* Referred to the Exhibit P 13 and the inspector's notes at

[33] Hammond was also asked about a notation within Ex. P 14, the belt examination for his shift and the one before his, which remarked "Belt rubbing chains." Hammond stated he did not write that in the report, and did not know who did, and further that it was appropriate for someone, other than him, to have written that into the exam report. VIII Tr. 85-87.

page 37, Hammond agreed that exhibit refers to the 2015 retraining. VIII Tr. 89-90. In fact, Hammond had earlier stated that he had taught some of that retraining, but that the trainer was Todd Seilhemer.[34] *Id.*

The Court inquiring of Hammond, just what was involved in the retraining, learned that such training is usually "predicated on the fact that we received a citation."[35] VIII Tr. 92. Hammond maintained throughout his testimony that he did a good job with his belt examinations. *Id.* The Court remarked that it believed Hammond's testimony was candid and complemented him for that. VIII Tr. 92-93, 99. However that Court learned, through Hammond, that the training is quite brief, "normally … two to three minutes." VIII Tr. 93.

As will be discussed in more detail later, the Court notes that, while Hammond offered several reasons for not detecting the belt roller issues, it can't be completely overlooked that the inspector found them.

Miguel Gonterman was also called by the Respondent. VIII Tr. 100. Gonterman is an outby foreman or "lead man." He is therefore in charge of outby activities, and is in charge of the A crew. VIII Tr. 101. Gonterman is "responsible to maintain the roadways, belt lines, the pump. Also the sport units for supplies, anything else they may need, personnel for the A crew." VIII Tr. 102. His experience includes conducting examinations of belt lines. *Id.* If a bad roller is found, at times Gonterman is involved in fixing it. He stated that a frozen roller can develop quickly. VIII Tr. 104. As with Hammond's testimony, Gonterman stated that if a belt is not operating, it impacts his ability to detect roller problems. VIII Tr.105.

Directed to January 21, 2016, Gonterman was called to the 1A, B, and C belts during his shift by Chris, "Bert," Robinson. He was called to deal with a missing or bad roller on the 1C belt. VIII Tr.107. Then, speaking to Exhibit P 9, Order No. 9036654, he agreed he was to attend to the two top rollers that were hanging out of the bottom bracket at cross-cuts 42 and 43. *Id.* He found one end of the roller out of the bracket, adding that, if the belt is not running , it is difficult to see a problem of that nature. VIII Tr. 108. He also stated that such a condition can occur quickly. *Id.* The fix for such a problem, he asserted, takes only seconds to achieve. VIII Tr. 109. Next, he was asked about a missing roller at the top outside and two frozen top rollers. Gonterman believed that he attended to those too, replacing the cams and rollers. VIII Tr. 110.

[34] Post the issuance of the orders in this litigation, Hammond agreed that in addition to changing the mine's procedure for alternating belt sides during exams, that it also posts the time frame, in order to better address the conditions cited by Tisdale. VIII Tr. 90. If the Court were to consider this information at all, perhaps under a broad application of "good faith," such consideration would only be for the benefit of the Respondent, and not, for example as reflecting the Respondent's negligence. This is because it is inappropriate to consider such post-citation actions, as such an approach would discourage improved procedures if they could later be raised against a mine operator.

[35] The Court also inquired how long it took him to walk these belts and Hammond's response was an hour and twenty minutes to an hour and a half, covering 7,970 feet. VIII Tr. 95.

Gonterman was then directed to Order No. 9036656, which pertained to the 1B belt and two frozen rollers there. He repaired these too, changing out the rollers to make the inspector "happy." VIII Tr. 110-111. Changing out is not always necessary, because, he contended, simply by spinning the rollers, they may be fine. When changing out is needed, it is a two-person task. *Id.* Turning to Exhibit P 11, relating to the order on the 1A belt, and the three frozen top center rollers present on the outside, and a missing top center roller, Gonterman stated that he attended to those too. Those were also changed out. VIII Tr.112.

While at the 1A belt Gonterman saw Lucas Dobbs, who was walking down the travelway side, which was the same side he was on. *Id.* Dobbs was going inby, while Gonterman was heading outby. Gonterman was able to see the missing top roller. He contended that it was easier to see that problem when heading outby than if going inby. Thus, he asserted that such a condition is "easily missed." VIII Tr. 113. However, when questioned by the Court, Gonterman acknowledged that one is supposed to "try to look for everything." VIII Tr. 114. This requires bending and looking back. *Id.*

Following the issuance of the Order, Respondent's Counsel inquired if the mine changed its policy regarding the number of belt examinations. Gonterman advised,

> [y]es, sir. Since we had so many rollers on this -- you know, these citations, they had us walk at the beginning of each shift, which every four hours, because we would do it at the beginning of our shift at our pre-shift, and then the next group comes in and it's every four hours to monitor to make sure we were catching all these rollers, because, you know, you would examine this, and you would have nothing. And the next guy would come in, and he could find one, you know. But they were just -- it was a huge structure, and, you know, they would go bad. You know, and in no time. So, yes, we did change that. And we seemed to get a better handle on it.

VIII Tr. 115.

This new practice exceeds MSHA's requirements. VIII Tr. 115-116. Yet, even with that change, Gonterman agreed they were still finding rollers that needed to be changed. VIII Tr. 116. Gonterman believed the problem stemmed from the use of "used structure[s]," though that is a common industry practice. *Id.* Pursuant to their change in practice, rollers were thereafter replaced with new rollers, not with used rollers and this helped. VIII Tr. 117.

Upon cross-examination, Gonterman reaffirmed that it's more difficult to detect problems when the belt is not running. VIII Tr. 118. However, he also conceded that his belt exam responsibilities are the same, regardless of whether a belt is running. *Id.* He also agreed that some of the rollers were out of the bracket, some were frozen and some just missing. *Id.* For missing rollers at least, he conceded that the ability to detect that problem is unaffected by the belt running or not. VIII Tr.119. However, he did not concede that a roller that is out of its bracket is always easy to see. For the cited out of bracket rollers, he could not recall whether they were of the difficult to detect category. *Id.* Gonterman also informed that the first belt he

attended to was the 1C. For that belt, he recalled finding one additional roller in need of replacement beyond those identified by the inspector. VIII Tr. 120-121.

Exhibit P16, an email created by Gonterman on January 22, 2016, was admitted. VIII Tr. 129. Gonterman agreed that he sent his boss the email and that his boss would want to know if there were any facts about the Order that he, Gonterman, was disputing. This was particularly true because his boss wasn't present to see the conditions but Gonterman had such firsthand knowledge. VIII Tr. 131. Yet, Gonterman admitted that he did not include in his email any comment that some rollers did not need to be changed, nor did he contest whether there was a violation. *Id.* Gonterman's excuse for the omission was that he was "pretty new" and there were "a lot of things [he] didn't put in there that [he] should have." *Id.* The Court was not impressed with the excuse, because, he had been an outby foreman for two years and therefore was not really "pretty new." He then essentially conceded that there was no record that he had ever written anything down that reflected his view that at least some of the rollers didn't need to be changed. VIII Tr. 132.

Gonterman was also asked about his interaction with Dobbs. As noted, he stated that they passed one another that day, as Gonterman was walking outby and Dobbs outby. VIII Tr. 132. Shortly after that, Tisdale discovered a missing roller, which Dobbs did not perceive. Gonterman asserted that Dobbs direction of travel made it harder to see the absent roller. VIII Tr. 133. Gonterman acknowledged that, direction of travel or not, it was still Dobbs' job see such problems, even if harder to detect. *Id.*

Asked about his retraining for belt problems, per Exhibit P13, Gonterman agreed that his signature appears on the document for the July 10, 2015 retraining. VIII Tr. 139. However, Gonterman seemed to see the problem as less of an issue than the inspector. When asked, "did the events on January 21st strike [him] as odd given the number of rollers that [he] had to change," he responded, "[t]hat -- I mean, that day -- but there were frozen or missing. They *weren't bad*, you know." VIII Tr. 141-142. (emphasis added). Still, he admitted that frozen, out of bracket or missing rollers require action. *Id.* On redirect, offered to show that rollers with issues can be missed, Gonterman reaffirmed that the MSHA inspection itself had missed one such problem. VIII Tr. 143.

The issue of the seals was then addressed. This involves Order No. 9036663. Respondent stipulated to this violation. VIII Tr. 151. Nathan Courtney was called by the Respondent. Courtney is the outby boss for the B crew. VIII Tr. 145. Thus, his job is the same as Gonterman's, but for the B crew. He has about seven years of coal mine experience. VIII Tr. 146. Courtney has performed pre-shift exams for seals, doing that task well over 100 times. Intake seals are located in the intake air corridors and they are required to be greased. VIII Tr. 146-147. He described what is involved in such an exam,

> [y]ou're mainly looking for -- at the seal face, and any conditions at the seal area, as far as your roof, and your ribs, any timbers that are in that area. You're looking for a way that it could be being taken by the timbers, making sure that the area is adequately rock dusted. And you, actually, look at the face of the seal itself to

make sure there are no changes or any kind of cracks or abrasions in the seal, and then take gas readings to make sure that there are no gases leaking from them.

VIII Tr. 147.

The term "set of seals" refers to the set which seals or isolates a given area. For example, the southwest main seals, the area cited, is one set. There are eight faces associated with that set of seals. VIII Tr. 147-148. A pre-shift exam is to examine each face of the seal. VIII Tr. 148. The time it takes to examine each seal is not long, requiring about two minutes per seal. VIII Tr. 149. Directed to February 3, 2016, Courtney stated he was on the second shift, the afternoon shift, that day, and was accompanying inspector Tisdale at that time. VIII Tr. 150. The cited seal-related violation was located on the intake air course, at its beginning. *Id*. Courtney was quite familiar with that set of seals on the southwest main. VIII Tr. 151. Courtney stated there was not a history of adverse roof or rib conditions at these seals.[36] *Id.*

Upon cross-examination, Courtney stated that his examination of the seals was included among his pre-shift exam duties and that it involved about 20 minutes of his time within the three hours allotted for that exam to occur. VIII Tr. 158. Courtney confirmed that there are tags and in some places chalkboards at the seals, which are for one to put initials, date and time of the seals' examination. *Id.* During the February 3rd inspection, Courtney realized there had not been an exam performed, upon not finding any DTIs anywhere. VIII Tr. 159. Regarding his request of the inspector to allow him to inspect the seals, Courtney's aim was to prevent an evacuation of the mine. *Id.* Courtney admitted that at the time of discovering the seal inspection issue he did not then know how much of a pre-shift had actually been done. VIII Tr. 160. Upon Courtney's returning to the surface, the mine had two examiners go underground to examine the seals and there is no dispute that, in terms of the conditions, nothing adverse was found. That is, no hazards were found. VIII Tr. 161. While that exam had to occur, because it's required, Courtney believed it was likely for one to assume that if a set of seals had been examined 100 times and no hazard found, he would assume that the 101st time would yield the same result – no hazard. VIII Tr. 162.

Richard Reisinger then testified for the Respondent. A professional engineer, he is the engineering manager at the Francisco underground mine. VIII Tr. 164-165. Reisinger testified at length about seals, including the southwest main seals. VIII Tr. 166 – 175. Still, despite all of the above history and information about seals, none of that dispels that weekly exams are

[36] The testimony then veered off on a tangent regarding Courtney's request to then examine the seals so that an evacuation of the mine could be avoided. VIII Tr. 152. Courtney did then examine the seals but the inspector would not allow that to impact the citation's abatement, which required that the mine first be evacuated. *Id.* As noted, upon making the examination, Courtney found nothing adverse. VIII Tr. 153-154. Thus, the Respondent has suggested that the inspector was unreasonable in requiring "that the seals would have to be examined by a certified examiner, and that that examiner would have to come back out of the mine after examination, and sign the books". …and by the inspector's requirement that the books be signed before miners could re-enter the mine. VIII Tr. 155.

required to check for convergence[37] on the seals. VIII Tr. 176. Further, because they are on the intake, the seals cited here are required to be pre-shifted and they also must be examined weekly. *Id.*

Reisinger, directed to Exhibit R 39, identified the exhibit as the process for constructing seals, as well as for certifying that they are installed correctly. VIII Tr. 177. Reisinger opined that the quality specifications were met for the construction of that seal. VIII Tr. 178.

Cross-examination pointed out that this violation involves the *examination of seals*, not their construction or tests, or how seals have performed since they were installed.[38] VIII Tr. 185. Reisinger then admitted that he doesn't do pre-shift exams, though he may do an on-shift exam. VIII Tr. 186. Further, the location evaluation in constructing seals does not affect the types of exams for which a seal will be subject, nor does the PSI level impact the type of required exams. Instead, the type of required exams is determined by the nature of the air going across such seals. VIII Tr. 188.

After Reisinger's lengthy testimony about the seals and seal construction generally, the Court asked if he agreed that it was his view that "these seals that were identified in R39, they were thoughtfully planned, approved by MSHA, and then properly constructed." VIII Tr. 192. Reisinger agreed with that summation. *Id.* He also agreed that all of that construction occurred some four years before the citation in issue in this proceeding. *Id.* Further, Reisinger agreed that, even with all the effort in constructing such seals carefully, it is still important to conduct pre-shift exams. The importance, in his view, is because it is required and also for the safety and health of the miners. VIII Tr. 193. Thus, he was not suggesting that it is unnecessary to continue to monitor the seals by conducting pre-shift exams. *Id.* And, he agreed the importance is because something bad may happen. *Id.* This is because, in Reisinger's words, "[seals] can leak and, typically, they do." *Id.* This results because seals "breathe," so they leak as the atmosphere changes. VIII Tr. 193-194.

In the Court's estimation, Reisinger's testimony bolstered the Secretary's case. Trying to undo the damage, Respondent's Counsel asked Reisinger if seals fluctuate and was told there would be only minor fluctuations and that he would not expect those to affect the seals' integrity. VIII Tr. 196. Further, he opined that, if problems did develop, he would expect them to develop gradually, not quickly. *Id.* Those answers to those questions did assist the Respondent's position.

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[37] "Convergence" is "the allowing of the movement between the roof, and floor at the seal, at each individual seal site." VIII Tr. 175. It is monitored by a measuring stick to evaluate movement between the rib and the floor at each seal site. VIII Tr. 175-176. Convergence levels do not fluctuate quickly. VIII Tr. 176.

[38] Over the Respondent's objection, the Court allowed the Secretary's question, and essentially repeated the question, inquiring if Reisinger understood "that we are not here today to understand about thoughtful process, and the efforts that went into -- were involved in the construction of these various seals [that Mr. Reisinger] just testified about, but rather that we're testifying about the condition of the seals in February of 2016." Tr. 186. Reisinger responded that he did understand that. *Id*.

Peabody employee Chad Barras then testified for the Respondent. VIII Tr. 198. He is the director of safety and compliance for the Respondent. VIII Tr. 199. His responsibility covers all of Peabody's mines "in the Americas." *Id.* Before that, he was employed by MSHA, where he was a ventilation engineer. *Id.* He is familiar with the MSHA standard that requires pre-shift exams of intake seals. VIII Tr. 200. As with the previous witness, Barras provided historical information. In this instance, relating his knowledge of the standard's promulgation in 1996. VIII Tr. 200-201. At that time, according to Barras, MSHA overhauled its ventilation regulations. VIII Tr. 201. In that context, he spoke of the old seals versus the new ones, with of course the new ones being an improvement. Barras then expressed his view that MSHA should've updated the standard for the pre-shift requirement of seals to reflect the advances in seal technology. VIII Tr. 206.

Turning to the matter at hand, Order No. 9036663, Barras stated that he is familiar with the main seals at the mine, as he examined them prior to a settlement conference in connection with this violation. His visit to those seals, however, was in the fall of 2016, that is, at a considerable time after the order had been issued. VIII Tr. 209. He also looked at six months of methane readings for the southwest seals and found little or no methane was present. VIII Tr. 213. Further, he examined barometer data in connection with assessing leakage and determined that over a six month review, there was little or no transfer of gas in either direction, from the inside out or outside in. VIII Tr. 214.

In response to the Court, Barras informed that the mine is on the five day spot inspection for methane, the highest inspection level for methane liberation. VIII Tr. 215. Barras agreed with the Court's characterization that there are some limited circumstances where one could have an S&S violation involving seals at this location but that the only possible source, in his view, for an S&S situation to arise at the southwest main seal would be to have a water issue, and at that, there would have to be a large amount of water. VIII Tr. 217. Asked if water was an issue at the mine, Barras answered that there is water at Francisco Underground Pit, but it's on a separate side of the mine, which is about two miles from this seal. VIII Tr. 217-218.

Moving to Barras' implication, from his testimony, the Court inquired if he believed that there should not be a pre-shift exam for these seals. Barras' answer was only that it be lessened from a pre-shift to a daily exam or perhaps to a weekly exam, as he believed that frequency would be sufficient. VIII Tr. 219. The Court would comment that the difference in opinion as to the appropriate frequency of exams was not extreme, with Barras urging a daily exam as compared with the present requirement for a preshift exam.

On cross-examination Barras agreed that part of his job is ensure compliance with MSHA standards, including those he disagrees with. VIII Tr. 223. Again, the essence of Barras' testimony was that, due to technology advances, the rule which was promulgated in 1996 needs to be modified now. VIII Tr. 223.

The Court notes that it must be observed that revisions to the existing standard are outside of the realm of the issues for this violation. That said, the Court understands that the perspective offered by Barras was for the limited purpose of defeating the S&S designation.

In fact, Barras stated that he was at the mine, albeit long after the citation had been issued, to figure out how the violation could be deemed S&S. VIII Tr. 226. In that regard, he stated he was

> trying to figure out how is the S&S come about on this citation. That's why I went over there, and I'm trying to figure out what could happen here, because I know that if the roof falls, they don't propagate out to the side from where they start. So I'm thinking how can that get over the seal, because the seal is holding the roof up to an extent. It's cementitious foam in them. I'm looking at the ribs to say, how can this rib bust open or fall out? Well, the cement's poured on them. So it can't come out. It's there. So then I'm thinking about the floor, because that's the only way I can come up with this hazard of getting gas to the men inby. And I'm looking at the floor. The floors are dry. I'm not seeing anything coming out of those. I don't see any, you know, I've seen floor heat before, and you can, actually, see the floor crack a little as it -- as a pillar goes down, the floor can move to the inside and up. And it opens up in the middle. That's kind of why we put bigger pillars in there to minimize that effect. I was just trying to come up with a way to say, hey, I can get gas out of here somehow, where is it? And I walked away, still shaking my head, trying to figure out what it is.

Tr. 226.[39]

Significant and Substantial and Unwarrantable Failure Designations

As the citations and orders involved in these dockets allege that the violations were Significant and Substantial and involved Unwarrantable Failures, the basics of those terms are set forth here:

> A significant and substantial ("S&S") violation is described in section 104(d) (1) of the Mine Act as a violation "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) (emphasis added). The four-part test long applied to establish the S&S nature of a violation examines: "(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 will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc*., 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).
>
> In addition to the *Mathies* criteria, the Commission has established that the S&S determination must be based on the particular facts surrounding the violation,

[39] On cross-examination it was then pointed out that the citation was for failure to do the pre-shift. VIII Tr. 227. However, the focus of the Respondent is the S&S designation, as it conceded the violation.

Texasgulf, Inc., 10 FMSHRC 498, 500 (Apr. 1988), and should be made assuming "continued normal mining operations." *McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *U.S. Steel Mining Co*., 1 FMSHRC 1125, 1130 (Aug. 1985)). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984). The Commission has also established that the operator may not rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *Buck Creek Coal, Inc., v. FMSHRC* 52 F.3d 133 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

The Commission has clarified that "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." and "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S" *Cumberland Coal Resources, LP*, 33 FMSHRC 2351 (October 5, 2011), (citing *Musser Engineering, Inc. and PBS Coals, Inc*., 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co*., 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996)).

In 2014 the Seventh Circuit held that "A violation is significant and substantial if it could lead to some discrete hazard, the hazard was reasonably likely to result in injury, and the injury was reasonably likely to be reasonably serious." *Peabody Midwest Mining, LLC v. FMSHRC* 762 F.3d 611, 616 (7th Cir. 2014) (emphasis added). The Circuit Court's use of the term 'could' is the same term embodied in section 104(d) (1) of the Act, set forth above. In *Knox Creek Coal Corp., v. Secretary of Labor*, 811 F.3d 148, 160 (4th Cir. 2016), the Circuit Court recognized that the *Mathies* test had been consistently applied by the Commission and ALJs for decades and adopted *518 by Federal Appellate Courts. However, in analyzing the second *Mathies* element which primarily accounted for the concern with the likelihood that a given violation may cause harm, the Court found "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Id*., at 162 (emphasis added). The Court reasoned that 'the second prong of *Mathies* requires proof that the violation in question contributes to a 'discrete safety hazard,' which implicitly requires a showing that the violation is at least somewhat likely to result in harm.'" *Id*., at 613.

Recently, a majority of three Commissioners revisited the "reasonable likelihood" standard finding that "the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed". *Sec'y of Labor v. Newtown Energy, Inc*., 38 FMSHRC 2033, 2038 (Aug. 2016).22 To establish this element, a clear description of the hazard at issue is required in order to determine whether the violation sufficiently contributed to that hazard. *Id*.

Warrior Coal, 39 FMSHRC 509, 517-518 (March 2017) (ALJ Andrews)

> The unwarrantable failure terminology is taken from section 104(d)(1) of the 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." The term is not defined by the Act, but the Commission has established that "unwarrantable Failure" is "aggravated conduct constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act". *Emery Mining Corp*., 9 FMSHRC 1997, 2004 (Dec. 1987). And further, that unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or the 'serious lack of reasonable care.'" *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 193-94 (Feb. 1991); *see also Buck Creek Coal*, 52 F3d 133, 136 (7th Cir 1995).
>
> The Commission has also established that the aggravating factors to be examined are the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, and the operator's knowledge of the existence of the violation. *Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000). Although all seven of the factors must be considered, some factors may be irrelevant to a particular factual scenario. *Id*, at 353; *Wolf Run Mining Co*., 35 FMSHRC 3512, 3520-21 (Dec. 2013). Further, some factors may be less important than other factors under the factual circumstances. *IO Coal Company, Inc*., 31 FMSHRC 1346, 1351 (Dec. 2009). 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. Id, at 1351; *Eastern Associated Coal Corp*., 32 FMSHRC 1189, 1193 (Oct. 2010). Therefore, it is not necessary to find that all factors are relevant or deserving of equal weight.

Id. at 547

Discussion[40]

Docket No. LAKE 2016-0269

As noted**,** at issue in this docket are two section 104(d)(2) orders: Order No. 9036922 and Order No. 9036663.

[40] The findings of fact have been listed *supra*. The Court read and considered the parties' post-hearing briefs in their entirety.

Order No. 9036922; the alleged rib control violation, issued December 22, 2015.

The cited standard, 30 C.F.R. § 75.202(a), titled "Protection from falls of roof, face and ribs," provides "[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."

Referencing the reasonably prudent person test and the preponderance of the evidence standard, the Secretary contends that the operator failed to support the ribs in the cited area, an area where persons work or travel, and therefore the violation was established. Sec. Br. at 9-10. Regarding the inspector's associated findings, including his unwarrantable failure and S&S determinations, the Secretary contends they are supported based on Fishback's testimony that "the falling ribs were immediately obvious upon entering the mine." *Id.* at 14. Therefore, "only a high degree of negligence could explain Respondent's failure to correct the rib conditions." *Id.* The inspector's "testimony that large sections of the ribs could fall established that it was highly likely that 1 of the 14 miners on the working section could receive a permanently disabling injury." *Id.* Supporting the unwarrantable failure designation was Fishback's testimony that the violation had likely existed for several shifts, that the ribs' condition was poor throughout the mine, that Respondent should have been on notice that the ribs were a concern, and that the ribs' condition was obvious. *Id.*

The S&S finding, the Secretary contends, is also supported. To establish that the violation was S&S, the Secretary acknowledges that he "must prove that any miner on any shift would have been exposed to the hazard created by the unsupported rib if normal mining operations continued, so as to create a reasonable likelihood of injury. *Id.* Fishback's testimony, the Secretary contends, establishes that. The Secretary also notes that "an inspector's judgment is an important element in making S&S findings," and that it should be credited when such testimony "is reasonable, logical, and credible; and specific [,] based on the first-hand observations of the inspector. . ." *Id.* at 14-15. That burden, the Secretary urges, has been met here. The Secretary also asserts that the Respondent's witnesses, all of whom were employees of the Respondent, corroborated parts of Fishback's testimony. As for those elements of their testimony that contradicted Fishback's account, the Secretary describes those as "self-serving to their employer and [such testimony] offered only speculation that the dark areas in [Fishback's] photographs could be evidence of scaling instead of falling ribs." *Id.* at 15. Accordingly, the Secretary contends that the employees' testimony is only "entitled to little weight" and that the violation should be affirmed as issued. *Id.*

Respondent, revisiting its motion in limine on the same issue, contends that "the photographs that Mr. Fishback claims to have taken of the cited area and measurements referenced in Order No. 9036922 should not be admitted because the Secretary is unable to identify the specific entry and crosscut at which each was taken." R's Br. at 13. Noting that the Court rejected its motion, advising that its objections go to the weight, not the admissibility of those photos, Respondent urges that the photos should be "afforded no weight." *Id.* at 14. Apart from its overall objection concerning the lack of location specificity for the 20 photographs Fishback took, it contends that photo P 3(a) could not have been taken on the working section because there are phone lines in it and such lines are never inby the loading

point. Further, that photo includes screen wire, and "[a]s a practice, Peabody only installed screen wire on the roof of Entry Nos. 4 and 5 in a panel." *Id.* From these observations, Respondent contends that "the photo referenced by Mr. Fishback could not have been of the condition he purported to observe in Entry No. 2." *Id.*

The theme of Respondent's objection is that the photos "should be afforded no weight both because Peabody continues to be prejudiced by the Secretary's reliance on them and because they are of no probative value in resolving this matter." *Id.* Respondent adds that "[w]ithout the specific location, it cannot be determined whether anyone was present in these areas, whether scaling or any other measures had been taken in these areas, the scope of the alleged condition relative to the context of the area, or any other important factors to consider."[41] *Id.*

In its Reply Brief, the Secretary states that it did not use Fishback's photos to establish *particular* areas of the mine. Rather, the photos reflect the conditions the inspector found in the mine that day, including the working section, as noted in the order.[42] The Secretary adds that the evidence was not simply about the photos, but included the consistent testimony from Fishback's supervisor, Herndon, and even some of the Respondent's witnesses. Sec. Reply at 1-2. The Secretary essentially makes the same response to the Respondent's objection that the measurements in the order were only estimates. So too, Respondent's focusing on whether there were five crosscuts in Unit 2 or actually three, overlooks the point that adverse rib conditions were present throughout the working section. *Id.* at 3. The Court finds that, by far, the Secretary has the better side of the argument. Accordingly, the Court finds that the photos do support the violation.

The Secretary also challenges the Respondent's claim that the rib violation was based on hindsight.[43] Instead, the Secretary asserts that the order was based on "Fishback's observations

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[41] Apparently, one of those "other important factors" is that "there was conflicting testimony as to whether [the photos] represented areas where ribs had rashed or had been pried [and consequently] [a]bsent information about the specific location of the photographs, that conflict cannot be resolved definitively." R's Br. at 15. The problem with the Respondent's argument is, as mentioned above, that issues such as whether an area had been rashed or pried do not depend exclusively upon the photos. Such matters are for the Court to resolve upon weighing conflicts in the testimony. Further, the focus upon the "trees," so to speak, misses the overall contention of the Secretary that the rib conditions were widespread and required a shutdown of the cited area.

[42] The Court notes that the order stated: "[l]oose coal ribs were observed in 10 entries for a distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections."

[43] In making that challenge, the Secretary takes issue with the cases cited by the Respondent on multiple grounds, but foremost, the Secretary contends that the inspector's order was not based on hindsight. The order was not created in the wake of an accident but rather on the inspector's finding that the rib conditions throughout the section were hazardous. Sec's. Reply at 3-4. The Court agrees that the cases cited by the Respondent, *Jim Walker Resources, Inc.*, 30 FMSHRC

and what a reasonably prudent operator should have done based on what Respondent knew at the time." *Id.* at 4. Last, while the Secretary notes that *Fishback acknowledged that the Respondent may have made some efforts to control the ribs,* he counters that such efforts must be adequate. *Id.* As discussed *infra*, and as noted in the findings of fact, the Court takes into account that the Respondent made some efforts at controlling the ribs.

Respondent's Reply[44] challenges the Secretary's claim that he met the preponderance of the evidence standard, contending that "[t]he Secretary's 'evidence' amounts to nothing more than a naked reliance on the inspectors' unsupported statements." R's Reply at 5. From the Respondent's perspective the Secretary's case relies upon the testimony of the two inspectors but that "testimony was nonspecific, unsupported by any verifiable physical evidence and belied by the facts …" *Id.* at 6. As to the Secretary's assertion that heightened negligence and unwarrantable failure were involved, the Respondent again contends that claim rests upon the inspector's testimony, while the Respondent presented testimony contradicting such testimony. *Id.* at 7. Respondent's overarching point is that the Secretary's case rests upon the inspector's

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872, 879 (ALJ Zielinski Aug. 2008), *Harlan Cumberland Coal Co.*, 22 FMSHRC 672, 681 (ALJ Cetti May 2000); *Energy West Mining Co.*, 18 FMSHRC 1628, 1639 (ALJ Cetti Sept. 1996), are distinguishable and not useful to the resolution of the issues in this matter.

[44] Respondent's Reply also notes that the Secretary inaccurately asserts: that the Order involved two working sections, whereas it was a single section with two MMUs and a split-air arrangement; that the issuing inspector *immediately* observed the rib conditions – but Peabody notes that the observation was not made until the inspector arrived on the section and that the rib conditions were limited to that Unit and that outby areas are of no relevance to the order; that, referring to exhibits P 3c and P 3d, the initials on a rib where material had fallen demonstrate that the examiner saw a violative condition and did nothing about it, but that in fact the initials were painted *after* the rib had fallen; that Respondent's witness Benjamin stated that there would not have been enough time for the mud seam to dry and create separation in the time between the last production shifts in the area that Fishback inspected and the date of the inspection is inaccurate because Benjamin limited that remark to the faces, not the entire unit; that the Secretary's remark that Benjamin's standard for dealing with the ribs is that no one got hurt, is incomplete and therefore an unfair characterization; and that, for one of the photos, that was not on the working section; and finally that Hudson's remark that miners could've entered the area, sidesteps that it was not on a route miners would normally travel. R's Reply at 2-5. The Court would note that, inevitably, there will be aspects of testimony, from both sides, that can be picked apart. The Court's task is not to get bogged down in such details where they do not substantially impact the issues, but rather it is to assess the entirety of the evidence, make credibility determinations when necessary and to then determine whether a given citation or order was established by the preponderance of the evidence. Where a violation has been established, it then applies the same approach to resolve the issues of gravity, negligence, the other statutory criteria and any special findings that may be involved such as whether a violation involved an unwarrantable failure and significant and substantial aspects.

"naked assertion that adverse conditions existed across 'the whole section' because he said so."[45] *Id.* at 8.

The Court's conclusions as to Order No. 9036922

As applied here, the essence of the cited standard requires that ribs be supported or otherwise controlled where persons work or travel to protect them from falls of the ribs. The Order asserts that such loose ribs were observed in multiple entries in the MMU-002 and 012 active working sections. The conditions continued for an approximate distance of 300 feet and approximate measurements of the loose ribs were listed. As set forth below, and in the findings of fact, supra, the Court finds that the violation was clearly established.

There is no genuine dispute that loose ribs can present a risk of disabling injuries and fatalities and therefore must be taken seriously. Another aspect about which there is no genuine dispute is that the mine was dealing with a mud seam in this area. On December 22, 2015, the day of the inspection in issue by Inspector Fishback, in the cited unit, there was a mud seam in the middle of the coal seam. Mud seams are a safety concern because they can deteriorate quickly and cause a rib to slide out without warning. Fishback is a roof control specialist and had 29 years of coal mining experience before becoming an inspector for MSHA. Prior to the issuance of this Order, Fishback had issued roof control violations for this mine and put them on notice of the need for greater diligence in matters of roof control. Fishback was not the only inspector to view the conditions cited in this Order, as his supervisor, Herndon was with him at that time. The preshift exam immediately before the inspector viewed the rib conditions prompting his order did not record any problems with the ribs. Fishback encountered "a very adverse rib" almost immediately upon arriving at the section, and this rib had been rock dusted. That meant that the rib condition had to have existed before the shift of Fishback's inspection. The rib condition was serious enough that it prompted Fishback to return to the mantrip and retrieve his camera. Thus, when he began his inspection, Fishback did not have his camera on his person. That is a strong indication that Fishback had come upon a concerning condition, sufficient enough that he decided photos were in order. Fishback stated, credibly, in the Court's estimation, that upon conducting his imminent danger run at the working section, he found adverse rib conditions in every entry and crosscut. Further, the Court has found that Fishback testified credibly that all of the photos he took that day were within Unit 2 and that the rib problems he found were across the whole room and section entries and cross space. Fishback took nearly all the photos in the company of the mine's Eric Carter. According to Fishback, Carter did not contest his findings. To the contrary, Fishback stated that Carter told him they had been trying to deal with the issue, but had not been successful yet.

Carter testified and, as noted by the Court earlier in this decision, Carter disclosed that Fishback was not trigger happy about issuing citations. It was only upon seeing these rib conditions that Fishback issued paper. Though Carter's and Fishback's estimations of the bad rib they came upon at the two entry differed, even Carter admitted there was a rib issue there and he admitted to the Court that there were other areas with rib issues, though again his estimation

[45] It is noted that the Respondent applies these contentions to Order No. 9036924, the related inadequate preshift claim, as well. R's Reply at 8.

of the degree of the problem differed from Fishback's assessment. In addition, overall, as detailed in the findings of fact, the Court finds that Fishback's testimony was more credible than Carter's. Though Fishback had a prior employment history with Peabody, the Court finds that, at least for this Order, (and for the order involving an inadequate pre-shift) it did not cause him to overstate his view of the rib conditions.

The Court cannot buy into the Respondent's objections to the photos. They are afforded some weight because they support the inspectors' testimony. It makes no sense to suggest that the lack of specificity as to the location should result in *no* weight being given to them. There is also an element of impracticality as to the Respondent's argument that more specificity was essential to its ability to defend against them. It is not as if the inspector merely stated that the photos were taken *somewhere* in the mine. The inspector provided sufficient specificity, though not on a granular level, as Respondent urges is necessary.

In addition to the above considerations, as noted, Inspector Herndon saw the same ribs as Fishback. His testimony supported Fishback's accounting of the conditions. By contrast, overall, the Court did not find McKinnon's testimony to be as credible and his test for compliance with the standard was, in the Court's view, problematic. Further, in the big picture, McKinnon's testimony supports the view that ribs were an issue at Unit 2.

In evaluating the testimony of the witnesses on this issue, a factor which was also considered was the relatively recent retraining on rib maintenance. Listening to the testimony from those who took that retraining did not leave the Court with the impression that it was taken seriously by the miners.

However, not to be discounted was the testimony of Respondent's other witnesses, Benjamin, Sumner and Hudson, each of whom the Court found to be generally credible. Those individuals were not ignoring the ribs but they could have done more. Benjamin's testimony supported the testimony of every other witness in the sense that there was an issue with the ribs, exacerbated by the mud seam, and that time was required to deal with the problem. Sumner's and Hudson's testimony did not dispel that the ribs were a problem requiring attention. Thus, with no one denying that there was a problem with the ribs, the question is whether the mine was doing enough to address it.

The Court finds that the testimony of Fishback and Herndon, the photographic examples of the conditions and, in a very real sense, the Respondent's own witnesses, all establish that, although the mine was making efforts to address the ribs, it was not doing enough to deal with them. One of the themes that came through from the Respondent's witnesses was the perspective that some ribs issues did not require immediate attention, a view which seemed to rest upon the test that if no one was injured, sufficient attention was being made. That perspective is rejected. The Respondent's witnesses seemed to take issue less with whether there was a violation and more with the fact that an order, as opposed to a citation, was issued. Further, it was an ironic defense to effectively assert that the previous section was worse than the area cited.

With the above remarks in mind, though the violation was established, the Court finds that the Respondent was making some good faith efforts to address the ribs. To be fair, the mud seam was a bedeviling situation; the conditions could change as that seam dried out and it was not entirely unreasonable for miners to reach different conclusions about the timing of the need for action to control the ribs. As discussed below, the Court believes that this bears upon the unwarrantable failure claim.

Overview of Penalty Assessments

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria: [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).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601(May 2000)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has noted that the "Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. … If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness. [*The American Coal Co.*, 38 FMSHRC 1987, 1993-1994 (Aug. 2016)], (citing *Sellersburg Stone Co*., 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984))." *Consolidation Coal Co.* 38 FMSHRC 2624, 2643-2644 (Oct. 2016) (ALJ Moran)

Penalty Assessment for Order No. 9036922

Order No. 9036922 was specially assessed at $70,000. As noted, had Order No. 9036922 been regularly assessed, the proposed penalty would have been $44,645. For the following reasons, *upon application of the statutory penalty criteria*, the Court imposes a penalty of

$30,000 for this violation, an amount which the Court considers to be both an appropriate, and significant, penalty under the circumstances.

The Narrative Findings for a Special Assessment shed little additional light in support of the reason for employing that provision of Part 100 beyond the information asserted in the Order itself. Nor did the Secretary, at the hearing, or in the post-hearing briefs present particular reasoning in support of the Special Assessment. Further, the Court does not agree with assertion that "[m]anagement failed to support or otherwise control the coal ribs," as the Court finds that the Respondent made some efforts to address the ribs, albeit insufficient ones. Accordingly, the Court does not agree with the Narrative's statement that "[m]anagement made no attempt to correct the violations."

It is noted that the Special Assessment's point valuation did not differ from the Regular Assessment's points on the criteria of size, good faith, or violation history, including repeat violation points. Pursuant to the parties' stipulations, presented at the hearing, payment of the total proposed penalty in this matter will not affect Respondent's ability to continue in business and the Respondent demonstrated good faith in the abatement of the alleged violations.

Therefore, the negligence and gravity, and the related issues of unwarrantable failure and significant and substantial, remained in issue.

The Court's assessment of the negligence and gravity associated with the violation is not restricted to the boxes in the Mine Citation/Order form, MSHA Form 7000-3. Evidence does not always fit neatly into the choices that form offers. Instead, based on the overall testimony, the Court concludes that the gravity was between reasonably likely and highly likely, that the injuries could include lost workdays or restricted duty and *possibly* permanently disabling ones. While the S&S finding is upheld, the diminished expected injury evaluation impacts the reasonably serious injury aspect of that finding. Similarly, the negligence, in the Court's estimation, falls between moderate and high. While it is a close call, the Court finds that there was not an unwarrantable failure, because there were efforts, insufficient though they were, to address the ribs. It would be inaccurate to characterize the Respondent as having engaged in reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Accordingly, with the unwarrantable failure designation not justified, this order is modified to a section 104(a) citation. *Lodestar Energy, Inc*., 25 FMSHRC 343 (July 2003) *Cyprus Cumberland Res. Corp*., 21 FMSHRC 722, 725 (July 1999).

The remaining statutory criteria were duly considered in arriving at the penalty imposed. The Commission has "recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria. Rather, "[j]udges have discretion to assign different weight to the various factors, according to the circumstances of the case. *Lopke Quarries, Inc*., 23 FMSHRC 705, 713 (July 2001). … Indeed, the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 485 (Mar. 2015)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept. 2016).

Upon consideration of the above, the entire record, as set forth in some detail per the Findings of Fact, the Court's credibility determinations and the statutory criteria, the Court imposes a civil penalty of $30,000 for former Order No. 9036922, now modified to a section 104(a) citation.

Order No. 9036663; the admitted preshift examination violation, issued February 3, 2016, which Order is ***not*** related to Order 9036922.

Given the Respondent's concessions about this order, the Secretary addressed the limited subjects of controversy. However, the Secretary said little that actually supports his view of those subjects.[46]

For the Respondent's part, it acknowledges that an ineffective intake seal, leaking gases, or seal failure, presents the hazard of such contaminated air being carried to the working face. R's Br. at 74. Respondent contends that the S&S determination must be viewed in the context of the failure to conduct *a single* missed preshift exam in this location, the Southwest Main Seals. With that focus, the Respondent asserts "the Secretary has adduced no particular facts to support that the potential for leakage of gases that would affect the working section was reasonably likely to occur. Mr. Tisdale could not establish that the hazards he identified as associated with the hazardous release of gases were reasonably likely …. To the contrary, the Mr. Tisdale agreed that at the time of the subject inspection, there were no hazards present at the Southwest Main Seals that would indicate a leakage of methane was reasonably likely." R's Br. at 74-75. Respondent also notes that "[t]he seals are evaluated weekly for convergence, and have exhibit[ed] levels well within the allowable limits[;] [that] [s]ix months of weekly methane readings prior to the issuance of the Order show no more than de minimis levels of methane[;] [and that] [n]o geologic anomalies have developed." *Id*. at 76. In addition, Respondent observes that its witnesses, Barras and Reisinger, stated that for these seals a change in conditions would not occur quickly, and because the Southwest Main Seals have historically exhibited stable

[46] In its entirety, on these limited issues, the Secretary stated only, "Tisdale's credible testimony that daily preshift examinations are the only way to identify potentially dangerous issues with seals established that a failure to do so was reasonably likely to cause injury and that the violation was S&S. His testimony established that if an intake air course seal were to be breached, it would put bad air directly onto a working section and could cause an explosive gas mixture. These issues could cause death by asphyxiation or explosion. Respondent's argument is that it does not believe the preshift examinations required by MSHA are necessary, because its seals have performed well so far. However, not only are intake air course seals required to be examined, Tisdale's testimony established that without the required examinations, it was impossible to determine how well the seals were performing. He testified that the failure to examine the seals created a reasonable likelihood of explosion or asphyxiation. His reasonable, logical, credible, and specific testimony regarding the S&S assessment is entitled to substantial weight." Sec. Br. at 24. However, little of this actually addresses the S&S considerations and, as explained *infra*, those aspects which do speak to the issue are found to be unpersuasive considering the evidence as a whole.

convergence levels, it is exceedingly unlikely that their condition would have changed in the time covered by a single preshift examination.[47] *Id.*

The Court's conclusions as to Order No. 9036663, the admitted preshift violation

As noted, the Respondent stipulated to the fact of violation, to high negligence and to unwarrantable failure. Therefore, the Secretary had only to deal with the gravity designations of reasonably likely, and fatal, and number of persons affected designation. The standard violated requires preshift examinations. Involved in this instance was the failure to preshift the intake aircourse South West Main seals prior to the afternoon shift miners entering the mine on February 3, 2016. The violation was regularly assessed under Part 100 at $38,503.00. For the reasons which follow, **the Court finds that the appropriate penalty is $10,000.00 and it imposes that sum.**

No one disputes the importance of this admitted violation. After all, the southwest main seal, which was not preshifted, was on the intake air course, and delivered air directly to a working section, which was adjacent to the primary escapeway. However, having taken into account the admitted violation, that it involved high negligence and an unwarrantable failure in the penalty determination, the analysis must then focus on the likelihood, the fatal designation and the accuracy of the number of persons affected, listed at 31 in the Order. Once those determinations are made, they are folded into the admitted aspects, to arrive at the penalty.

Therefore, while the admitted hazard is that a leaking seal could allow bad gas to a working section, the likelihood of that occurring under continued normal mining operations must be determined. Inspector Tisdale stated that without performing the preshift exam, one cannot know what hazards may or may not exist in that area. Though Tisdale addressed his S&S finding, and the underlying hazard, he could not speak to the reasonable likelihood that air leaking from a seal will come out in a large amount, nor could he speak to the reasonable likelihood of asphyxiation occurring. He also conceded that while asphyxiation would come about through lack of oxygen, oxygen is checked throughout the mine. As to the likelihood that an explosive mixture of methane could occur, the inspector stated that, without ventilation controls, seals being one of those controls, he has encountered it. While the Court acknowledges that Tisdale viewed the failure to preshift the seals as just one element of that exam, which is to include the roof and ribs and gas levels, he admitted that those concerns turned out not to be present in this instance. He then conceded that the hazards he identified turned out not to be reasonably likely to occur. It is also fair to conclude that Tisdale effectively viewed all such failures to preshift a seal as S&S.

Addressing the aspects of the inspector's evaluation with which it took issue, Respondent's witness Courtney stated, without contradiction, that there was not a history of adverse roof or rib conditions at these seals. Respondent's witness Reisinger also testified on the seal issue. In many respects he did not advance the Respondent's defense, but as to the issues

[47] Although the Court read and considered the parties' reply briefs, it has determined that no additional comments were needed regarding the issues surrounding the preshift violation for the seals.

that Respondent was challenging, he did state that seal fluctuations would only be minor, that he would not expect that those fluctuations would affect the seals' integrity, and that if problems did develop, they would likely develop gradually, not quickly.

Respondent's witness Barras also testified about the seals.[48] Barras reviewed methane and barometer readings for a six month period, finding little or no methane present at the seals in issue and little or no gas transfer in either direction. A significant and substantial scenario could develop, in his view, only if there was a significant water issue, an unlikely occurrence because there is no nearby water issue to those seals. Barras gave the S&S issue some serious thought and, as his testimony revealed, it is not reasonably likely that an injury would occur. The Court found Barras' reasoning to be sound and persuasive on the likelihood issue. This finding does not directly impact the fatal nor number of persons affected designations but, with the occurrence not being reasonably likely, it has an indirect effect on them. **Accordingly, upon consideration of all the evidence on this matter, it imposes the above-stated penalty of $10,000, an amount the Court still considers to be a significant, and warranted, civil penalty assessment**.

Docket No. LAKE 2016-0232

Violations at Issue in Docket No. LAKE 2016-0232

Order Numbers 9036654, 9036656, and 9036657 each alleged a violation of 30 C.F.R. § 75.1731(a). That standard, titled, "Maintenance of belt conveyors and belt conveyor entries" provides, at subsection (a) "Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced." The Secretary proposed a penalty of $4,000.00 for each of these alleged violations (i.e. $12,000.00 in total for the three). **The conditions prompting the issuance of all three orders were found on the same day, January 21, 2016.**

Because many aspects of the testimony for these three violations spoke of common problems, the parties dealt with them collectively. The Court takes the same approach.

Order No. 9036654; alleged damaged rollers violation

The conditions found by the inspector have been set forth in the findings of fact but, in sum, for the 1C belt the inspector found two top rollers out of bracket, allowing the belt to rub them, a missing top outside roller and two frozen top center rollers. Based on his calculations of belt move frequency, the inspector believed the conditions had existed for two to three weeks.

[48] Mr. Barras's expressed view that the cited standard needs to be updated in order to catch up with advances in seal construction is beside the point, as the standard is enforced as written until amended. However, one can compartmentalize his remarks as informative on the likelihood factor and that is the approach the Court took here.

The inspector stated that these conditions were "obvious to the most casual observer." He marked the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, the violation as non-S&S, and as an unwarrantable failure, with one person affected.

Order No. 9036656; alleged damaged rollers violation

For this Order, applying to the 1B belt, the inspector found a frozen top center roller and a frozen top outside roller. As with Order No. 9036654, the inspector stated that the problems were "obvious to the most casual observer." He marked the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, the violation as non-S&S, and as an unwarrantable failure, with one person affected. Stating that almost all of the frozen rollers had flat areas on top or polished shiny areas, the inspector opined that the rollers had been frozen for a period of time.

Order No. 9036657; alleged damaged rollers violation

For this Order, applying to the 1A belt, the inspector found frozen top center rollers at three locations, a single frozen top outside roller, and a missing top center roller, allowing the belt to rub when loaded. As with Order Nos. 9036654 and 9036656 the inspector marked the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, the violation as non-S&S, and as an unwarrantable failure, with one person affected. Again, he stated that the problems were "obvious to the most casual observer."

Taken together, the inspector believed that the number of problem rollers he found was an unusually large number. It was perplexing to the inspector and indicative of the inadequate belt examination for these three belts that he met the belt examiner as they passed one another, traveling in opposite directions along the belt line. The problem was that, shortly after their meeting, the inspector came upon a frozen and a missing roller in the direction that the belt examiner had just traveled but without observing the twin problems. The inspector, upon checking the mine records, found that no bad rollers had been noted through January 4, 2016. He considered that an unusual length of time to not discover rollers needing attention. Another issue of concern for the inspector was that the miners had already been trained on this issue.

Speaking to the three damaged roller orders, Order Nos. 9036654, 9036656, and 9036657, the Secretary notes that rollers, as part of the belt haulage system, can present an ignition hazard. However, implicitly, the Secretary concedes that the task is daunting as "[t]here are thousands of rollers along the belt" and, as any number of them can malfunction, such problems "are not uncommon." Sec. Br. at 17. The Secretary points out the even rollers that don't present a fire hazard must still be replaced under the standard and argues that the "Respondent did not change out bad rollers as often as would be expected and had left the bad rollers in place for a long period of time." *Id.* at 20. The Respondent's failure to identify the bad rollers supports the inspector's high negligence finding. *Id.*

For its part, the Respondent, also addressing the three conveyor belts/roller issues collectively, notes that "the 1A, 1B and 1C belts consisted of 7,970 feet of belt line, and had 4,782 top roller cans." R's Br. at 47. Respondent further states that the belt examiner has several other tasks to perform while examining the belts in addition to the rollers. Beyond that, there was testimony that it is more challenging to detect roller issues when the belt is not running, which was the case in large measure, at least for the 1C belt. *Id* at 48.

The Respondent challenges the unwarrantable failure and high negligence findings for each of the three orders; No. 9036654, 9036656, and 9036657. If the Respondent's perspective were to be upheld for either of those findings, obviously it would impact the penalty assessment. Respondent contends that there were mitigating circumstances. For the 1C belt, the rollers were not readily observable, as Hammond had walked the opposite side of the belt than the inspector, the belt was running when the inspector detected two frozen rollers, but Hammond's exam occurred when coal was not running. For the 1B belt, involving two frozen rollers, the inspector observed the condition when the belt was running. Similarly, the belt was not running coal when Hammond did his exam. While conceding that a single missing roller was not detected by Hammond, Respondent notes that this must be viewed in the context of 7,970 feet of belt line. R's Br. at 59-60.

As for the unwarrantable designation, Respondent notes that the words used to describe that term – words like aggravated conduct, reckless disregard, intentional misconduct, indifference and a serious lack of reasonable care – simply do not apply to the facts involved with these three orders. Respondent points to the conditions not being "extensive," under any reasonable interpretation of that word. The Respondent also asks if it is fair for the inspector to have issued three separate orders, one for each belt, when his determination of unwarrantability was based on his collective view of all three belts. The Court believes that the Respondent's arguments have merit.

Recognizing that there is a $4,000 statutory minimum for 104(d)(2) orders, Respondent contends that the elements needed to sustain such an order were absent for Order Nos. 9036654, 9036656, and 9036657.[49]

The Court finds that the Respondent's arguments carry the day and accordingly that none of these three orders were unwarrantable failures. Further, it does not adopt the characterization that all of the roller issues were obvious to the most casual observer. Consequently, it modifies each of the orders to section 104(a) citations. *Lodestar Energy*, 25 FMSHRC 343 (July 2003).

Based on the foregoing, and each of the statutory factors, the Court imposes a civil penalty of $1,000 for now modified Citations 9036654 and 9036657 and $500.00 for now modified Citation 9036656.

[49] As discussed below, the Respondent makes a similar claim for Order No. 9036658

Order No. 9036658; alleged inadequate belt exam

For this Order, No. 9036658, alleging a violation of 30 C.F.R. § 75.360(b)(11)(vi), and the attendant duty to preshift for violations involving belt conveyor components,[50] the inspector stated that "[t]he exam conducted on [t]he 1A, 1B, and 1C belts has been found to be inadequate. Upon inspection there are 12 rollers that were damaged or missing on these three belts. This area had been examined prior to inspection by approximately 3.5 hrs."

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, constituting an unwarrantable failure to comply with a mandatory standard, and S&S, with one person affected. As with the orders for the belt issues, Order Nos. 9036654, 9036656 and 9036657, this belt-related violation had a proposed penalty of $4,000.00.

Respondent challenges the fact of violation, whether it was S&S, and whether it was properly deemed an unwarrantable failure.

Given the Court's findings and conclusions for former Order Nos. 9036654, 9036656, and 9036657, each modified to section 104(a) citations, a similar result obtains for Order No. 9036658. Accordingly, that Order is also modified to a 104(a) citation. However, because that former Order applied collectively to all three belts, as identified in now Citations Nos. 9036654, 9036656, and 9036657, **a penalty of $2,500.00 is imposed for now-Citation No. 9036658**.

Order No. 9036924; alleged inadequate preshift exam

Order No. 9036924, issued December 23, 2015, alleged a violation of 30 C.F.R. § 75.360(a)(1). As noted, it is actually associated with former Order, now section 104(a) citation, No. 9036922 which is part of Docket No. LAKE 2016-0269. The Secretary specially assessed this alleged violation, proposing a civil penalty of $70,000.00. Accordingly, though it would be understandable to think of this Order as related, time-wise, to the other four orders in this docket, all issued on January 21, 2016, this alleged violation was cited nearly a month earlier.

As previously stated, the cited standard, titled Preshift examination at fixed intervals, as applicable here, provides at (a)(1): "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations."

[50] The text of the relevant portions of the cited standard provides: "The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:… (11) Preshift examinations shall include examinations to identify violations of the standards listed below: … (vi) § 75.1731(a) - maintenance of belt conveyor components."

Because of the special assessment, the text of the (d) order is repeated here. The inspector described the condition or practice as follows:

> An inadequate preshift examination was performed on the midnight shift (12/22/2015, 4:00 a.m. to 7:00 a.m.). A hazardous condition (inadequately supported ribs) located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts. This condition was not posted in or recorded in a book maintained for the purpose on the surface at the mine. This hazardous condition was obvious and extensive and condition had existed for a significant period of time. Order #9036922 was issued in conjunction with this 104(d)(2) order. This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036924.

The inspector assessed the gravity of the injury or illness as highly likely to occur, the injury or illness that could reasonably be expected to be permanently disabling, the negligence as high, and an unwarrantable failure and as S&S, with 14 persons affected.

The Secretary's post-hearing brief notes that the inspector found nothing in the preshift exam reflecting issues with the ribs. Further, the inspector believed that the rib problems existed for several shifts. Sec. Br. at 15. The Secretary states that the violation was established because the preshift exam did not note that the ribs presented a hazardous condition. *Id.* at 16. An adequate preshift exam would have noted the obvious rib conditions. The Secretary also looks to the inspector's testimony for support of the gravity, negligence, unwarrantability and the other designations made in the order, including the S&S determination. That last gravity finding, S&S, is supported, the Secretary states through the inspector's credible testimony "that the hazard caused by Respondent's failure to recognize and correct the poor condition of the ribs exposed all of the miners on the working section to the hazard caused by the violation." *Id.* at 17.

One simply cannot reconcile a finding upholding the violation alleged in Order No. 9036922, that the ribs were not supported or otherwise controlled, as the Court has done, with a finding that the preshift exam requirement was somehow met in Order No. 9036924. Although both violations are upheld, the Court has a similar take on the negligence and gravity elements. Accordingly, it is similarly found that the gravity was between reasonably likely and highly likely, that any injuries would, most likely, involve lost workdays or restricted duty and, less likely, permanently disabling ones. While the S&S finding is upheld, the diminished expected injury evaluation impacts the reasonably serious injury aspect of that finding. Similarly, the negligence, in the Court's estimation, falls between moderate and high. Applying the analysis used in former order No. 9036922, and the Court's conclusion that Benjamin was credible, the Court finds that there was not an unwarrantable failure regarding this Order and therefore it is modified to a section 104(a) citation.

The Court considers this Order, No. 9036924, to be inextricably related with associated Order No. 9036922. These two violations took the majority of the time during the three days of

hearing testimony. As set forth above, the Court concluded that the preshift exam should have noted some of the conditions, and some of the ribs which were not scaled should have been, but the mud seam's presence complicated both the exam and the scaling because a rib might not need attention at a given time, but would need scaling later, as the seam dried out. There was also an honest difference of opinion about the rib conditions. No doubt some ribs should've been acted upon without delay but other conditions, based upon the credible testimony of several of the Respondent's witnesses, involved flaking and small amounts of material, baseball or football sized, and therefore it was questionable whether there was a failure to control the ribs in those instances. At least it may be said that there was enough credible testimony to question whether the unwarrantable failure allegations were established and the Court so finds those designations were not demonstrated under the required burden of proof.

Accordingly, the Court, applying the statutory criteria, finds a civil penalty of $30,000.00 to be appropriate and it therefore imposes that sum for the violation.

It is noted that the two related Orders total $60,000.00 and therefore represent a considerable, but appropriate, penalty.

Summary

Docket No. LAKE 2016-0269

Order No. 9036922 is assessed a civil penalty of $30,000.00 and the unwarrantable failure designation is removed. Accordingly, the section 104(d)(2) order is modified to a section 104(a) citation.

Order No. 9036663 is assessed a civil penalty of $10,000.00

Total penalty assessed for Docket No. LAKE 2016-0269: $40,000.00

Docket No. LAKE 2016-0232

Order No. 9036654 is assessed a civil penalty of $1,000.00

Order No. 9036656 is assessed a civil penalty of $500.00

Order No. 9036657 is assessed a civil penalty of $1,000.00

Order No. 9036658 is assessed a civil penalty of $2,500.00

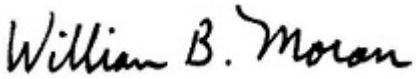
Order No. 9036924 is assessed a civil penalty of $30,000.00

Total penalty assessed for Docket No. LAKE 2016-0232: $35,000.00

It is ORDERED that, as they lack unwarrantability, Order Nos. 9036654, 9036656, 9036657, 9036658 and 9036924 each be modified to Section 104(a) citations.

It is further ORDERED that, within 30 days of this order: for Docket No. LAKE 2016-0269, Respondent pay a penalty of $40,000.00 and, for Docket No. LAKE 2016-0232, Respondent pay a penalty of $35,000.00.

Upon receipt of the total payment in the sum of $75,000.00 for these two dockets, this case is DISMISSED.



William B. Moran
Administrative Law Judge

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APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 434-9933 | Fax: (202) 434-9949

January 26, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2016-0268
Petitioner,	:	A.C. No. 12-02295-406669
v.	:	
	:	
PEABODY MIDWEST MINING, LLC,	:	Mine: Francisco Underground Pit
Respondent.	:	

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement. The originally assessed amount was $37,420.00, and the proposed settlement is for $20,000.00. The parties also request that Citation Nos. 9036190 and 9036926 be modified, as indicated below.

The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement Amount
9036184	$1,111.00	$1,111.00
9036190	$1,657.00	$1,200.00
9036926	$34,652.00	$17,689.00
TOTAL:	**$37,420.00**	**$20,000.00**

The parties present the following bases for the proposed reductions and modifications in this case:

Regarding Citation No. 9036190, which alleged a violation of 30 C.F.R. § 75.601-1:

> At hearing, Respondent would present evidence that the inspector over evaluated the gravity associated with this violation. Respondent contends that this was a

shielded cable. The shielded cable lessens the likelihood of a phase to phase short circuit. Furthermore, the condition was only found on one machine. It is unlikely that six people would be injured by this one trailing cable. Therefore, Respondent requests that the Secretary change the likelihood to unlikely, remove the significant and substantial designation, lower the number of persons affected to 2, and reduce the civil penalty.

The Secretary, in reply to the Respondent's statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary is willing to agree to modify the number of persons affected to 2 and to accept a reduced penalty.

Regarding Citation No. 9036926, which alleged a violation of 30 C.F.R. § 75.223(a)(1):

At hearing, Respondent would present evidence that the violation should be vacated. The operator was following the procedures to address roof plan inadequacies provided in the MSHA Policy Handbook. On April 9, 2014, the operator updated the roof plan and this plan was approved by the District Manager. On May 7, 2014, the District approved the operator's plan revision to address changes in the red zone. On September 15, 2014, the District approved the operator's new portal development as a supplement to the plan. On May 1, 2015, the District approved an action plan to recover a battery and charger. On June 3, 2015, the District approved a plan revision to address additional support in sandstone areas. On July 31, 2015, the District approved a plan supplement to address 3SE Main Portal development. On August 3, 2015, the District approved an action plan for a roof fall. On December 22, 2014, the District approved a plan revision in response to a roof fall and 103(k) requirements. This revision included language for encountering adverse roof conditions. The mine's history of updating the plan demonstrates that it actively proposed revisions when conditions changed underground in the mine. Therefore, Respondent requests that the Secretary vacate this violation.

The Secretary, in reply to the Respondent's statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary is willing to agree to modify the citation to “reasonably likely,” to modify the citation to “moderate negligence,” and to accept a reduced penalty.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 9036190 be **MODIFIED** from six to two persons affected.

It is **ORDERED** that Citation No. 9036926 be **MODIFIED** from "highly likely" "reasonably likely" and from high to moderate negligence.

It is further **ORDERED** that Respondent pay a penalty of $20,000.00 within 30 days of this order.[51] Upon receipt of payment, this case is **DISMISSED**.

William B. Moran
Administrative Law Judge

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Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor 211 7th Avenue North, Suite 420, Nashville, Tennessee 37219-1823

[51] 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