FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

JAN 27 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2013-112 A.C. No. 15-02709-303146 Docket No. KENT 2013-480 A.C. No. 15-02709-311244-02
v.	
HIGHLAND MINING CO., LLC, Respondent.	Mine: Highland No. 9 Mine

DECISION AND ORDER

Appearances: Paige I. Bernick, Esq., & Angele Gregory, Esq., U.S Department of Labor, Office of the Solicitor, Nashville, TN for the Secretary

Jeffrey K. Phillips, Esq. and Candace Smith, Esq., Steptoe & Johnson, Lexington, KY for Respondent

Before: Judge Andrews

STATEMENT OF THE CASE

This case is before the undersigned Administrative Law Judge on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Highland Mining Co., LLC ("Respondent" or "Highland") pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in Henderson, KY on May 19-20, 2014 at which the parties submitted testimony and documentary evidence. After the hearing, the each party submitted two post-hearing briefs, and the Secretary submitted a reply brief.

PROCEDURAL HISTORY

Between March 27, 2012 and November 27, 2012, MSHA Inspectors conducted several inspections at Respondent's Highland No. 9 Mine and issued citations and orders for alleged violations of the Mine Act. Respondent filed timely contests to several of those citations and orders.

Docket No. KENT 2013-112 contained six citations and was assessed a total civil penalty of $16,657.00. At the start of the hearing, the parties informed me that they had settled four of

the six citations, leaving only Citation Nos. 8508532 and 8508512 for hearing. A Decision Approving Partial Settlement was issued on September 2, 2014.

Docket No. KENT 2013-479 contained one citation and was assessed a total civil penalty of $11, 597.00. Although Citation No. 8511143 was heard, the parties informed me after the hearing that they had reached a settlement in this docket. A Decision Approving Settlement was issued on October 10, 2014.

Docket No. KENT 2013-480 contained sixteen citations and was assessed a total civil penalty of $31,876.00. Prior to hearing, the parties settled fourteen of the sixteen citations, leaving only Citation Nos. 8511144 and 8511145 for hearing. A Decision Approving Partial Settlement was issued on August 15, 2013.

KENT 2013-112

I. Stipulations

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.[1] Those stipulations include the following:

1. Highland Mining Company, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

3. Highland Mining Company, LLC has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.

4. Highland Mining Company, LLC operated Highland No. 9 Mine, Mine Identification Number 1502709.

5. Citation number 8508512 is complete, authentic, and admissible.

6. The inspector notes for the citation identified in paragraph 5 are complete, authentic, and admissible.

7. Citation number 8508232 is complete, authentic, and admissible.

8. The inspector notes for the citation identified in paragraph 7 are complete, authentic, and admissible.

[1] Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits for KENT 2013-112 will be referred as "GX" and Respondent's Exhibits will be referred to as "RX." Secretary's Exhibits for KENT 2013-480 will be referred to as "SX" and Respondent's Exhibits will be referred to as "HX."

9. Government Exhibit 5, the R-17 violation history for Highland No. 9 Mine, is complete, authentic, and admissible.

10. The Highland No. 9 Mine produced 3,950,732 tons of coal in 2012, and had 1,079,470 hours worked in 2012.

11. The proposed penalty will not affect Highland Mining Company, LLC's ability to remain in business.

12. Respondent, Highland Mining Company, LLC, abated the citations involved herein in a timely manner and in good faith.

(JX-1) (*see also* Transcript at 9-10).[2]

II. Citation No. 8508232

A. Summary of Testimony

Inspector Paul Hargrove[3] was at Highland No. 9 on April 1, 2012 in order to conduct an EO1 inspection.[4] (Tr. 61). On April 10, he arrived at 7:30 a.m., during the production day shift, to inspect outby equipment and travel belt lines. (Tr. 62). Upon arrival, he told Travis Little, the safety director, and Bryan Branson, that he was there for an inspection, distributed Miners' Rights documents, and told the company he needed a miners' representative.[5] (Tr. 62-63, 89).

---

[2] Hereinafter the transcript will be cited as "Tr." followed by the page number.

[3] MSHA Coal Mine Inspector Paul Raymond Hargrove was present and testified for the Secretary. (Tr. 58-59). Hargrove graduated from high school in 1966, received an associate degree in 1972, and started in the mines in March 1975. (Tr. 59, 61). He worked for several companies on various equipment. (Tr. 59-60). He held current surface and underground high and low electric and mine foreman certifications in Kentucky and Illinois. (Tr. 60). Hargrove began at MSHA in February 2006. (Tr. 60). He received 21 weeks of training in three to four week sessions punctuated with two to three months of on-the-job training with an authorized representative. (Tr. 60). He received refresher training at the Academy one week each year (or two weeks every two years), regularly online, and quarterly at the district. (Tr. 61).

[4] An EO1 inspection is a regular inspection of the mine in its entirety, including the belt line, air, equipment, rock dust, respirable dust, and noise. (Tr. 62).

[5] Bryan Keith Branson appeared at hearing and testified for Respondent. (Tr. 105). He started in the mines on November 2, 1993 and worked for several companies running various equipment and conducting examinations. (Tr. 105-106). Two years before the hearing, he moved to the Safety Department as a safety supervisor. (Tr. 106-107). Branson's duties as safety supervisor included traveling with the inspectors, correcting hazards, and making sure miners wore their personal protective equipment. (Tr. 108-109). He had mine foreman papers, an electrical card, MET and MET instructor certification, a surface card, a mine rescue trainer certification, an

He also reviewed the pre-shift books for the No. 1, 2, 3, 4, 5, and 6 units, the outby areas, and the belt. (Tr. 63, 99). No hazards, including loose ribs, were listed. (Tr. 63, 99). He then went underground with Branson and met Allen Thomas, the miners' representative. (Tr. 89, 63, 108). Hargrove first inspected the mantrip and then traveled the 6-B belt line. (Tr. 64). Branson remembered checking the 6-A belt line while walking outby on the travel side. (Tr. 109).

At 10:09, Hargrove found a loose roof and rib in violation of §75.202(a) in the belt travelway (an area 33-36 inches wide area with a roof measuring 7 feet, 2 inches). (Tr. 54, 64, 71-72, 80). The loose rib was 16 feet long, 2-3 feet high, 7 to 10 inches thick, and a 1-inch gap existed between the rib and the solid coal about 52 inches above the mine floor. (Tr. 64-65, 88-89, 120). The rib was made of coal and rock and weighed a couple of hundred pounds. (Tr. 98-99). The rib was also undercut, meaning the lower support was removed for 7 inches. (Tr. 64). Some of the rib was already on the ground. (Tr. 71). Hargrove informed Respondent that he was going to write a citation. (Tr. 72). He then issued the citation and wrote his notes while there. (Tr. 72).

Hargrove found another loose coal rib 15 feet in length, 5 feet high, and 14 inches thick five or six crosscuts from the first on the same belt line. (Tr. 67). He noticed this loose rib after he had written the notes for the initial condition and then added the new one. (Tr. 67). The area was not flagged off and he ordered Respondent to do so. (Tr. 68).

As a result of these conditions, Hargrove issued Citation No. 8508232 (GX-3) under §75.202(a). (Tr. 72-73). That regulation required support or control to be provided in areas where miners work or travel to protect miners from loose coal or rock falls. (Tr. 73). The method of control, whether bolts or timbers, was not important. (Tr. 73). In Hargrove's opinion, this area was not adequately supported because the ribs gapped and were going to fall. (Tr. 73).

Citation No. 8508232 was marked as "Reasonably Likely" to occur because the cited gap in the first rib was large and pulling farther apart, meaning the rib was going to fall. (Tr. 65, 73-74, 94-96, 101-102). Further, the area was undercut and lacked support, which increased the chances that the rib would fall. (Tr. 65, 73-74). The tight entry (33-36 inches wide) increased the likelihood of injury. (Tr. 66-67, 100, 111). Also, the primary support in the area, the coal pillars, faced increased pressure as parts of the pillar began to break off, creating the risk of further falls. (Tr. 73-74). Hargrove could not definitively say when the ribs would fall, but it could have been at any time. (Tr. 103).

Branson did not believe that the first rib was loose. (Tr. 109). Examiners carried pry bars and if one and saw a loose rib, he would have pulled it down. (Tr. 82-84, 111-112, 117). Branson carried a 3-foot pry bar and testified that he pulled loose ribs during Hargrove's inspection but, despite his efforts for several minutes, could not pull the cited rib. (Tr. 111-113, 116, 119). He did not believe it was loose rib because he could not pull it down. (Tr. 113, 115). Branson did not believe the length of the pry bar was important because examiners begin to pry from the side and if the rib was loose, any pry bar would pull it. (Tr. 120-121, 124-125).

---

underground instructor certification (state and federal), and a shot fire card. (Tr. 107). Branson did not take any notes but did record conditions when he reached the surface. (Tr. 124). Branson was confident he could remember details from two years earlier. (Tr. 124-125).

Hargrove told Branson to flag off the area and have someone else remove it or timber it. (Tr. 113). Branson hung danger ribbon from pin plates inby and outby to block the area. (Tr. 114). Hargrove conceded that the cited area was flagged rather than corrected and believed that Branson attempted, and failed, to pull down the rib. (Tr. 89-90, 103).

Hargrove also believed the second rib was loose and that someone from the safety department quickly pulled it with a 4-foot pry bar. (Tr. 79, 102, 116). The general rule is the larger the gap the looser the rib, but in this situation the first condition (with a gap) was not pulled while the second condition (with no gap) was pulled. (Tr. 91, 96, 102). Branson did not believe this rib was loose either. (Tr. 116). It took him 2 to 3 minutes to pull it. (Tr. 116). He believed loose ribs would fall in a matter of seconds when pressure was added. (Tr. 116-117).

The citation was marked for lost workdays/restricted duty type injuries because Hargrove wanted to give the benefit of the doubt that no one would be seriously injured. (Tr. 74). However, he was familiar with incidents where miners were permanently disabled or killed by roof falls causing spinal injuries. (Tr. 70, 74-75). Such injuries would occur when a rib fell on a miner and pinned a miner to the floor or belt structure or when a rib burst and hit a miner. (Tr. 66, 70, 75). Injury would be caused by unstable roof and loose footing. (Tr. 70).

The cited condition was marked as affecting one person: the belt examiner, belt mechanic, or belt cleaner, or anyone else sent to work on the belt. (Tr. 68, 75, 80-81-82). The most likely person to be injured would be the mine examiners who regularly traveled the belt. (Tr. 75). The belt cleaner did not regularly travel this area to clean or adjust belts. (Tr. 68, 81-82). There might be more than one person in the area during a production shift. (Tr. 82).

The citation was marked as S&S because Hargrove believed it was reasonably likely to cause a serious injury as a result of the large area, the size of the rib, and the location in an area where miners normally worked or traveled. (Tr. 75-76). Hargrove believed that if he had not pointed out the condition, it would have eventually injured a miner. (Tr. 76). Branson disagreed with the S&S designation because he could not pull down the first rib and the chances of someone being hit by the second rib were slim. (Tr. 112, 117). An examiner would only be in the area twice a day and would only be exposed to the conditions for a few minutes. (Tr. 81, 117). Hargrove believed exposure would occur in two places. (Tr. 82). Branson testified that this rib could have fallen in a few hours, weeks or months or it might never fall. (Tr. 117-118, 123). But he did not think it was ready to fall on April 10. (Tr. 117-118, 123-125).

This condition was marked as "moderate negligence," because that was what Hargrove observed and told the operator. (Tr. 76). However, when Hargrove arrived at the 6-C header, he found the initials "BM" dated 4/10 at 9:44 a.m., indicating an examination.[6] (Tr. 71, 77-78). An examiner would have to travel past the cited area to get to the 6-C header. (Tr. 72, 100). Given the initials and the examination, Hargrove would cite Respondent for high negligence. (Tr. 76-79). Further, when miners worked in this area a pre-shift and on-shift exam would be conducted. (Tr. 67-68, 78, 81). The condition would be obvious to someone in the area because part of the rib had already fallen across the belt entry and the gap was large. (Tr. 66, 77). Without the gap,

[6] The belt examiners were union, non-management employees. (Tr. 45). However, when belt examiners are conducting an examination, they are agents of the operator. (Tr. 54, 99, 121, 144).

a rib, like the second one, may have been difficult to see. (Tr. 66, 96-97). When the citation was issued, no mitigating circumstances were offered. (Tr. 78).

Branson disagreed with the inspector's negligence designation and believed that belt examiners traveling through the area would try to pull any hazardous loose ribs. (Tr. 114, 122). While there was enough rib material to fill a wheelbarrow on the ground when they arrived, Branson could not tell how long the material had been there. (Tr. 109-110). Further, Branson did not believe it was possible to tell from looking whether it had been pulled or fallen down. (Tr. 109-110, 114-115). He believed it was likely pulled down by an examiner, which meant someone was taking care of roof and rib conditions. (Tr. 114-115, 122). Branson opined that if an examiner attempted to pull down the rib but failed, then was no hazard. (Tr. 122). However, he conceded the examiner should have tried a larger bar or noted and flagged the rib so it could be monitored. (Tr. 122-123). Hargrove did not believe that this coal had been pulled down by examiners. (Tr. 83). He did not see the rib fall, but based this belief on experience. (Tr. 83). Hargrove's notes showed that he told Respondent to clean up pulled coal ribs in the area, but he was referring to clean up after abatement, not previously pulled ribs. (Tr. 94-95).

Branson also disagreed with the negligence designation because the condition could have arisen after the examiner passed. (Tr. 118). The examiner may also have been examining the top or the belt line at the time causing him to miss the rib. (Tr. 118, 121). If an examiner had seen it, he would have pulled it because that was what he was trained to do early in the job. (Tr. 118). Hargrove conceded that he was walking outby, while an examiner would be traveling inby and thus might see different things. (Tr. 86-88). However, he noted that Respondent was supposed to inspect the belt in its entirety and that the first rib was visible from both directions. (Tr. 87-88, 99-100). Further, there was material was blocking the direction of travel. (Tr. 100).

Hargrove believed the condition existed for a few shifts because of the dull, oxidized condition of the coal and the coal and rock dust present. (Tr. 66, 68, 77, 92). Fresh coal and dust would be shiny. (Tr. 68, 77, 92). Further, the existence of the gap showed that the condition had been present for a while. (Tr. 65). In his notes, Hargrove wrote the first condition existed for an "unknown" length of time and did not list a time for the second condition. (Tr. 93, 95, 101). However, he also stated the condition appeared recent, meaning within a few shifts (though he did not make that explicit in the notes). (Tr. 66, 68, 91-94, 101). Branson believed that the condition looked fresh, though he could not say how recent. (Tr. 115-116). It did not appear to him to be full of rock dust and was black in color. (Tr. 115).

This mine had rib conditions in the past, including falls in the intake, travelways, and supply road. (Tr. 68-69, 71). In the cited area, Respondent had to drop off two entries because of bad top and water. (Tr. 70-71). Hargrove testified that he warned Branson on April 3 that Respondent needed to better monitor loose roof and ribs in the belt entries, travelways, and on the units. (Tr. 69, 84-85). This comment was not part of the initial preconference, it was a specific note, but they would discuss the ribs at the preconference also. (Tr. 85-86).

The condition was abated when the loose ribs were pulled, though Respondent could have controlled the ribs with bolts or timbers. (Tr. 71-72, 78, 103). The first condition was not abated for 24 hours but the belt continued to run and be examined. (Tr. 97, 102). Hargrove did

not stay to view the termination. (Tr. 102). He was not sure how they pulled down the first rib, but the second was pulled down with a 4-foot pry bar. (Tr. 78-79, 102-103).

B. Contentions of the Parties Regarding Citation No. 8508232

With respect to Citation No. 8508232, the Secretary asserts that Respondent violated 30 C.F.R. §75.202(a), that this violation was reasonable likely to result in a Lost Workday/Restricted Duty injury to one miner, that the violation was S&S, and that it resulted from moderate negligence. (GX-3)(*Secretary's KENT 2013-112 Post-Hearing Brief* at 16-20). The Secretary presumably believes that the proposed penalty of $1,530.00 is appropriate.

Respondent argues that Citation No. 8508232 was not valid and should be vacated. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 27-32). It further argues that, in the event the citation is found to be valid, that a Lost Workday/Restricted Duty injury was unlikely to occur and that the violation was not S&S. (*Id.* at 36-37). It also believed that its actions would be better characterized as showing no negligence. (*Id.* at 32-35). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

C. Findings of Fact and Conclusions of Law Regarding Citation No. 8508232

The findings of fact in this, and other sections, are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the ALJ's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.202(a).

On April 10, 2012, Inspector Hargrove issued a 104(a) Citation, No. 8508232, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The coal ribs along the 6-B belt line are not being supported or controlled to protect miners from fall of coal ribs. A loose coal rib located between crosscut #45 and crosscut #46 on the 6-B belt line, that measure 16 feet in length, 3 feet in height, and 7 inches to 10 inches thick is gapped open 1 inch. Also the loose coal rib has been undercut, bottom support removed for a depth of 7 inches along the 16 feet of loose coal rib. Also between crosscut #39 and crosscut #40 a loose coal rib that measured 15 feet in length, 5 feet in height and 4 inches to 13 inches thick. The 6-B belt line is travel by miners two times a day.

> Standard 75.202(a) was cited 47 times in two years at mine 1502709 (47 to the operator, 0 to a contractor).

(GX-3).

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

> (a) 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 and coal or rock bursts.

30 C.F.R. §75.202(a). As Judge Lewis noted in *Emerald Coal Resources, LP*, "[t]he comments accompanying the final rule recognize the high death toll caused by inadequate roof support and the need for mandatory roof controls. 53 FR 2354-01, 2354 (Jan. 27, 1988); *see also United Mine Workers of America, Int'l. Union v. Dole*, 870 F.2d 662, 664 (D.C. Cir.1989) (recognizing that roof falls are among the most serious hazards to miners)." 2013 WL 6529526, *30-31 (Sept. 23, 2013)(ALJ Lewis).

In order to prove a violation of 30 C.F.R. §75.202(a), well settled Commission case law holds that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998). According to Judge Manning, the objective standard formulated by the Commission must be used to evaluate three requirements of §75.202(a): (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls or bursts of rib. *Oxbow Mining, LLC*, 2013 WL 1856627, *13 (April 11, 2013)(ALJ Manning); *see also Emerald Coal Resources, LP*, *supra* at 31.

At hearing, Secretary's counsel presented credible evidence to support the issuance of Citation No. 8508232. Specifically, Inspector Hargrove testified that many people worked in the cited area from time to time, including belt mechanics and cleaners. (Tr. 68, 75, 80-81-82). Most importantly, an examiner traveled the area on a regular basis. (Tr. 75). Therefore, this was an area where miners worked or traveled. Further, Secretary's counsel presented evidence that two large, loose ribs existed within 6 crosscuts of one another. (Tr. 54, 64, 67, 71-72, 80, 88-89, 98-99, 116, 120). The first rib was 16 feet long, 2-3 feet in height, 7 to 10 inches thick, and gapped open 1 inch about 52 inches above the mine floor. (Tr. 64, 88-89, 120). The rib weighed a couple of hundred pounds and was undercut. (Tr. 64, 98-99). The Secretary argued that this rib was essentially hanging off the solid rib and about to fall. (*Secretary's KENT 2013-112 Post-Hearing Brief* at 16). The second rib was 15 feet in length, 5 feet high, and 14 inches thick. (Tr. 67). At hearing Hargrove credibly testified that the conditions he observed indicated that the area was not adequately supported and that a rib fall hazard was present. (Tr. 73). This means that a reasonably prudent person familiar with the protective purpose of the cited standard would

believe that the support provided would be inadequate to protect persons from falls or rib bursts; these ribs were loose and would fall. Therefore, I find that the Secretary met his burden, showing by a preponderance of the evidence that Respondent violated 30 C.F.R. §75.202(a).

In its brief, Respondent argued that this violation was invalid. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 27-32). However, Respondent's argument was not compelling.

Specifically, Respondent argued that a violation of 30 C.F.R. §75.202(a) only occurs where there is a "hazard" and that neither rib here constituted a hazard. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 27-28). Respondent claimed that the only evidence supporting the existence of a hazard was Hargrove's testimony. (*Id.* at 28). Respondent believed that the objective evidence supported a finding that neither the first nor the second rib was in danger of falling. (*Id.*). As to the first rib, Respondent contended that not every unbolted, gapped open rib would constitute a hazard and that there was no evidence to suggest that this rib would not stand for a hundred years. (*Id.* at 29). In support, Respondent cited Branson's testimony that he could not pull the rib with a yard-long pry bar, despite his best efforts. (*Id.* at 29-30, Tr. 90, 112-113). It argued that despite Hargrove's initial belief about the rib, once Branson proved unable to pull it down, it was clear no hazard was present. (*Id.* at 31). As to the second rib, Respondent noted that Branson testified that it would not fall without help. (*Id.* at 31-32). Further, Hargrove testified that that the rib was not gapped open and Respondent argued this meant it was not a hazard. (*Id.*). At worst, Respondent argued, the evidence regarding these two ribs was in equipoise; with Hargrove arguing that a hazard existed and Branson arguing that it did not. (*Id.* at 29). In light of the Secretary's burden, Respondent argues that this establishes grounds to vacate the citation.

Respondent's argument essentially boils down to an assertion that Inspector Hargrove's testimony, including the conclusions he drew from the conditions observed, was insufficient evidence to support a 30 C.F.R. §75.202(a) violation. However, Respondent's specific assertions about the insufficiency of evidence are not supported by the record. Respondent's claim that no evidence was presented to suggest that the first rib was a hazard or would not stand for another hundred years was belied by the fact that Hargrove credibly testified that both ribs would fall given continued, normal mining operations. (Tr. 65, 73-74, 76, 103). Similarly, Respondent's contention that the second rib was not hazardous because Hargrove testified it was not gapped was contradicted by further testimony from Hargrove that, despite the lack of a gap, this rib was a hazard. (Tr. 116).

Respondent's discomfort with this citation appears to stem from the fact that it is supported primarily with testimony from Inspector Hargrove. (*See Respondent's KENT 2013-112 Post-Hearing Brief* at 28). However, no further evidence, beyond the testimony of an inspector, is necessary to support the citation. *See Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995); *see also Martin County Coal Corp.*, 2014 WL 2154273, *9 (April 29, 2014)(ALJ Feldman) (holding that an inspector's testimony is given substantial weight in determining whether a violation of 30 C.F.R. §75.202(a) has occurred). As noted *supra*, I credited the testimony of Hargrove that the cited rib conditions constituted a hazard to miners working or traveling in the area. (Tr. 73). Despite Respondent's doubts, this testimony is

evidence and, in this case, it is supported by the Hargrove's observations at the time of the citation and the other record evidence. Therefore, it is sufficient to support this citation.

Finally, it is true that Branson also presented evidence regarding these ribs and that this evidence contradicted Hargrove's observations. Most notably, Branson observed that the ribs were difficult, or even impossible, to pull down. (Tr. 112-113). However, that does not necessarily mean that the evidence is in equipoise or that the citation should be vacated. As the Administrative Law Judge, I am not required to grant all testimony evidence equal weight; I am entitled to make credibility determinations. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981); and *Twentymile Coal Co.*, 2014 WL 2920576, FN 7 (June13, 2014). Those determinations are entitled to substantial deference. *Id.* I credited Hargrove's testimony over Branson's testimony both because of their respective demeanors at hearing and because Hargrove's testimony provided a more reasonable interpretation of the conditions observed. Specifically, Hargrove credibly testified that, under continued, normal mining operations that the rib would eventually fall. (Tr. 65, 73-74, 76, 103). Hargrove also credibly reported that the pillars in the mine, or any mine, were under great pressure and that conditions could change quickly. (Tr. 73-74).

On the other hand, Branson's testimony that a rib that was gapping open an inch or another rib that was pulled down with a 3-foot pry bar were likely to remain in those positions indefinitely was incredible. (Tr. 117-118, 123). Properly supported ribs do not gap (as the first rib did) and they cannot be pulled down after a few minutes with a short pry bar (as the second rib was). There is no reason to believe these improperly supported ribs would simply stay in place indefinitely. Mines are dynamic places and these ribs are under enormous pressure. Further, workers and golf carts move through this narrow entry, possibly bumping the ribs. That is the reason support is mandated. Under Respondent's assessment, as colored by Branson's testimony, a rib would not be hazardous until it fell to the ground because, until that time, no one could say for sure when it would fall. It might be an hour or it might be a hundred years. Branson's testimony was self-serving and did not comport with the evidence, the history of mining, or common sense. Therefore, I find that Hargrove's testimony on this point was more credible and supports a finding that the citation was valid.[7]

2. The Violation Was Unlikely to Result in a Lost Workday/Restricted Duty Injury And Was Not Significant And Substantial In Nature.

Inspector Hargrove marked the gravity of the cited danger in Citation No. 8508232 as being "Reasonably Likely" to result in a "Lost Workday/Restricted Duty" Injury to one person.

[7] Respondent provided several arguments to prove that Inspector Hargrove's testimony, in general, was not credible. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 37-40). Specifically, it argued that Hargrove was cagey when answering questions about pry bars, the he made mistakes in his notes, that he exaggerated his ability and simply guessed at the time the condition existed and the weight of materials, and that he stated different heights for the coal ribs at different times. I decline the opportunity to determine that Inspector Hargrove, as a rule, was not credible at hearing. As noted *supra*, Hargrove was credible on the issue the validity this citation. However, I considered Respondent's objections to Hargrove's testimony, where relevant, when considering each of these specific issues.

(GX-3). With the exception of the likelihood, these determinations are supported by a preponderance of the evidence. Hargrove also determined that the violation was S&S. (GX-3). This determination was not supported by the preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984).

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. § 75.202(a).

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Inspector Hargrove credibly testified that, under continued normal mining operations, these ribs would eventually fall and that they would be a hazard to miners in the area. (Tr. 65, 73-74, 76, 103). It was a matter of when, not if, those unsupported ribs would fall and expose miners in the area to a safety hazard.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was not met. The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS"). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Id.* at 1281. Importantly, it stated that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.* The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The likelihood of the hazard being realized must be considered assuming normal continued mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (Jun. 1986).

Analysis under the third prong of *Mathies* hinges on whether a miner would be injured, assuming that the hazard is realized. In this instance, the hazard contributed to was a rib fall in a belt entry area. However, having determined that the rib would fall does not necessarily make an

injury likely. The question is not just whether the rib would fall but whether it would expose miners to a hazard. In this instance, in order for a miner to be injured, he/she would have to be next to the rib at the instant that hazard was realized, meaning when the rib fell. Here, the uncontested evidence is that, on an average day, only examiners would travel through the cited area. (Tr. 68, 75, 80-82). Further, Hargrove testified that the examiners only traveled the entry during production shifts and would only spend a few minutes near these ribs during the day. (Tr. 81, 117). That means during the 24 hours a day the mine was operating in some capacity, a miner would only be injured by the rib if it happened to fall during the handful of minutes when the miner were present. While it is certain that the ribs here would fall and also that miners would travel in the area, it would take an improbable coincidence for these two events to occur simultaneously. I do not believe that the Secretary carried his burden of showing that it was reasonably likely a miner would be injured by a rib fall in this area. Therefore, I find, even assuming the rib fall, that the likelihood of an injury was "Unlikely" rather than "Reasonably Likely and that the third prong of Mathies was not met. This violation was not S&S.

I stress here that this holding is limited to the specific factual circumstances present here. I do not hold that a violation of 30 C.F.R. §75.202(a), or a loose rib in general, can never be S&S. In fact, given the immense danger presented by roof and rib falls, it is probable that most loose ribs in working areas of the mine would give rise to S&S violations. However, given the isolated nature of the area at issue here, the Secretary was unable to carry the burden with respect to the third prong of *Mathies*.

In its brief, the Secretary argued that this violation was reasonably likely to occur and therefore S&S. (*Secretary's KENT 2013-112 Post-Hearing Brief* at 17-18). However, The Secretary's argument was not compelling.

The Secretary's points regarding gravity in its brief primarily deal with the likelihood that the rib would fall. (*Secretary's KENT 2013-112 Post-Hearing Brief* at 17-18). As noted *supra*, I have found that a rib fall was a virtual certainty barring abatement, but that a rib fall was not enough to meet the Secretary's burden. The Secretary's only argument with respect to the likelihood that miners would face the hazard of a rib fall was that the two separate ribs increased the time of exposure. (*Id.* at 17). However, Hargrove and Branson's testimony that exposure would last no more than a few minutes was made in light of the fact that there were two loose ribs. (Tr. 81-82). Therefore, there is no reason to believe that exposure to a rib fall was reasonably likely. The designation of "Unlikely" is the most reasonable and, as a result, Citation No. 8508232 is not S&S.

Having determined that this situation does not meet the third prong of the *Mathies* test and is therefore not S&S, it is not necessary to consider the fourth prong. However, for the purpose of determining the gravity of this violation, it is still necessary to consider the severity of the injury that would result if a miner were affected. The testimony that if a miner were struck by a falling rib the injuries would be, at the very least, severe enough to cause lost workdays/restricted duty was essentially uncontested. (Tr. 74). Also, only one miner would be affected by this condition at a time. (Tr. 68, 75, 80-82).

Therefore, I find that the cited violation was not S&S, was unlikely to occur, that if it did occur it would result in lost workday/restricted duty injuries to one miner.

3. Respondent's Conduct Displayed "Moderate" Negligence.

In the citation at issue, Inspector Hargrove found that the operator's conduct was moderately negligent in character. (GX-3).

Standard 30 C.F.R. §100.3(d) provides the following:

> (d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is reserved for situations where there are "considerable" mitigating circumstances.

I find that Respondent should have known about the violation and that there were some mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) *see also* 30 U.S.C. §802(e) (an agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine."). In this matter, all of the witnesses agreed that the belt examiners, while hourly union workers, were agents of Respondent. (Tr. 45, 54, 99, 121, 144).

With respect to the instant violation, the evidence shows that Respondent's belt examiners should have known the ribs were not properly supported. Inspector Hargrove credibly testified that the gapping rib was obvious. (Tr. 66, 77). Further, he noted that some material had

already fallen across the travel way, meaning that the examiner would have to pass over it while walking the area. (Tr. 66, 77). Hargrove also testified about the large size of the loose ribs, which also support a finding that the conditions were obvious. (Tr. 64, 67, 88-89, 98-99, 120). He also credibly testified that the condition had existed for several shifts. (Tr. 66, 68, 77, 92). He supported this claim by noting that the coal had oxidized and become dull, a condition that would take some time to occur. (Tr. 68, 77, 92). Perhaps most importantly, Hargrove explained that the condition would not have had to existed for very long to be observed by Respondent; an examiner had passed through the area and left his date, time, and initials at 9:44 a.m. on the day of the citation, while Hargrove had issued the citation at 10:09 a.m. (Tr. 71-72, 77-78, 100). The condition would only have to have existed a few minutes for it to be present when the examiner entered the area. It is extremely unlikely that two independent loose ribs spontaneously occurred in the minutes between the examination and inspection. I find that a preponderance of the evidence supports a finding that the condition was present when the examiner traveled through the area before 9:44 a.m. and that, as a result, Respondent knew or, at the very least, should have known the condition was present.

Respondent presented several arguments to support a claim that it was not negligent. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 32-35). However, Respondent's arguments are not compelling.

First, Respondent contests the Secretary's definition of the term "obvious" and argues that the condition was not obvious and therefore, it neither knew nor should have known about the condition. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 32). Respondent characterizes the Secretary's argument regarding negligence thusly: "the condition existed for several shifts; the condition was thus there when Highland's examiner went through the area; Hargrove saw it, so it was obvious, so Highland's examiner should have seen it; but he didn't, so he was negligent." (*Id.*). Respondent argues that the Secretary's position is untenable because under that standard, any condition would be negligent. (*Id.* at 9). Respondent characterizes the Secretary's position as follows: in order to be cited the condition must be observed by the inspector, if he observes it must be obvious, if it is obvious then there is negligence. (*Id.* at 9).

It seems that Respondent has attempted to extrapolate a broad principle from the Secretary's allegations, namely that something that is found by the inspector is *ipso facto* obvious. However, there is no basis for Respondent's assertions and it is unnecessary to reach any supposed broad principle in this case. The Secretary never made a general statement that any condition that was found by the Inspector was obvious or that all violations inherently result from an operator's negligence. Instead, Inspector Hargrove credibly testified that this particular condition was obvious for the reasons described *supra*. It is not necessary to determine whether Respondent would be held responsible for other, less obvious conditions simply because the inspector found it. The facts in the present case show that both ribs were large and loose and that one of them was gapping an inch from the solid rib. (Tr. 64, 67, 88-89, 98-99, 120). Therefore, Respondent should have known about them.

Second, Respondent contends that even assuming, *arguendo*, that the condition would have been obvious at the time of the citation, there is no evidence on record that the condition actually existed during the last examination. (*Respondent's KENT 2013-112 Post-Hearing Brief*

at 32). Respondent further contends that in his notes, Inspector Hargrove wrote that the condition was "recent" and that a finding of recent "does not support characterizing the citation with any level of negligence." (*Id.* at 32-33). Respondent also argued that the notes said that the length of time the condition existed was "unknown." (*Id.* at 34-35). Similarly, it noted that at various times during the hearing, Hargrove testified that the condition had existed "a while," that it "appeared recent" and that it had been present "a couple of shifts." (*Id.* at 33). Respondent argued that these phrases were too vague to serve as a basis for determining the length of time the condition existed. (*Id.*).

The length of time a condition existed is not, in and of itself, a factor in determining negligence. Instead, the length of time a condition existed is used to determine how much notice an operator had of the cited condition. If a condition existed for a considerable time, then presumably someone knew or should have known about the condition. In the instant case, even if we ignore the evidence that the condition existed for a couple of shifts (though, as noted *supra*, I credited the evidence showing that it had), Respondent still knew or should have known about the condition. Date, time, and initials for an examiner ("BM") were found at the end of the 6-C belt entry indicating that an examiner had traveled through the cited area (the 6-B belt entry) and signed at 9:44 a.m. (Tr. 71-72, 77-78, 100). The cited condition was found and then cited at 10:09 a.m., just minutes after the examiner had traveled through the area. (Tr. 64). It is extremely unlikely that, in the short period of time after the examination occurred, but before the inspector reached the area, not one, but two massive rib sections became loose. Even if it is impossible to say for certain when the condition occurred, it must have been present in some form at the time the last examiner traveled the area. Therefore, Respondent should have been aware of the loose ribs and, at the very least, recorded the condition and flagged the area. [8] (Tr. 123).

More specifically, Respondent argued that Hargrove's determination that the condition had existed for a couple of shifts because of the dull, oxidized color was unreliable because he "had already testified that the way to tell whether a gapped crack has existed for any period of time is whether, '[i]f you look at it, you can see light specks of local dust and rock dust on it.'" (*Respondent's KENT 2013-112 Post-Hearing Brief* at 33). Respondent then argued that Hargrove testified that no rock or coal dust was present. (*Id.* at 33-34). Presumably, Respondent meant that Hargrove's testimony indicated that the only way to determine the age of a gap was the existence of dust and that observation of the dull, oxidized coal was not helpful in determining the age.

Respondent's characterization of the Inspector Hargrove's testimony is deeply flawed. The Inspector's actual testimony on this point was, "Coal, when it first breaks loose is really shiny. After it begins to oxidize, the air gets to it and it gets a duller color to it. If you look at it, you can see light specks of local dust and rock dust on it. This one wasn't shiny. It had already started to oxidize, so it had fell [sic] a couple of shifts prior." (Tr. 68). While it is true that Hargrove later testified that he did not see dust behind the gap, the existence of dust is not dispositive here. (Tr. 91-92). As Hargrove's actual testimony shows, he did not imply, as Respondent asserts, that the existence of dust is the definitive evidence used to determine the

[8] The fact that there were no flags or notations further indicated that the material had fallen, rather than been pulled down.

time a gap existed. Instead, he carefully explained the process by which oxygen slowly turns shiny, fresh coal into dull coal over time. (Tr. 68). He also testified that the coal here was not shiny, indicating that this process had occurred and that the gap in the coal was not fresh. (Tr. 68). Based on the color of the coal he determined it had been present for a couple of shifts, which he explained at hearing, was what he meant by "recent." (Tr. 68, 91-92). Nothing in Hargrove's statement indicates that the existence or non-existence of dust in any way affects the process of oxidization or that the absence of dust somehow negates the dull color of the coal. Therefore, I reiterate that I credit Hargrove's testimony that the condition existed for at least a couple of shifts.

Having determined that Respondent was negligent, I also find this negligence was mitigated to some degree by the fact that the second condition was slightly less obvious and the ribs were somewhat difficult to pull. Unlike the first rib, the second rib was not gapped, making it less obvious. (Tr. 66, 96-97). An examiner may have passed the area without noticing it. While the examiner should have found the condition, the failure to do so in this instance is understandable. Both ribs, but in particular the first one, were somewhat difficult to pull down. (Tr. 112-113, 116). An examiner may have observed the condition and wrongfully, but not unreasonable, believed it was not a hazard. While this would not excuse Respondent's failure to at least flag and record the loose ribs, it does slightly mitigate the negligence. (Tr. 123). Therefore, a finding of "moderate" negligence is appropriate.

In addition to the mitigating circumstances outlined above, Respondent argued that there were further, considerable mitigating circumstances, necessitating a lower negligence finding. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). However, Respondent's arguments are not compelling.

First, Respondent argued that people traveling from different directions would see different things. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). Both Hargrove and Branson testified that this was the case. (Tr. 86-88). However, this is not material to the issue. If Respondent's examiners cannot see hazardous conditions in the mine because of their direction of travel, it is Respondent that is responsible for the blind spots. Ignorance, willful or otherwise, is not rewarded by the Act. As discussed *supra*, the conditions present here *were* obvious and Respondent should have known about them.

Second, Respondent argued that it abated both rib conditions as quickly as possible. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). This point is uncontested. (JX-1, 12). However, abatement after the citation has already been issued is not a mitigating factor. Abatement efforts before a citation is issued indicate that an operator was aware of a problem and was attempting to correct it. After the citation, abatement simply means that the operator can follow direction and justifiably wishes to avoid a future 104(b) Order.

Finally, Respondent argued that the Secretary did not prove that it should have been aware of the cited condition. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 35). The issue of knowledge has been discussed at length, *supra*. Respondent should have known about the condition, this is not a mitigating factor.

4. Penalty

In this matter, the Secretary proposed a penalty of $1,530.00 for Citation No. 8508532. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). The Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – in the two years preceding this violation the Plant was cited 47 times for this condition. (GX-3).

(2) The appropriateness of the penalty compared to the size of the Operator's business - The Highland No. 9 Mine produced 3,950,732 tons of coal in 2012, and had 1,079,470 hours worked in 2012. (JX-1, 10). According to MSHA's penalty assessment guidelines this gives the Highland No. 9 Mine 15 "mine size points" out of a possible 15. See 30 CFR §100.3(b). Further, even if Respondent controlled no other mines, 3,950,732 tons of coal produced would give it 9 "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1, 11)

(5) The gravity of the violation – As previously shown, this violation was unlikely to result in Lost Workday/Restricted Duty injuries to one miner, it was not S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was abated rapidly and in good faith after the citation was issued.

In light of the Administrative Law Judge's decision to modify the gravity from "Reasonably Likely" and "S&S" to "Unlikely" and "Non-S&S," a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $750.00.

III. CITATION NO. 8508512

A. Summary of Testimony

Archie Lewis Coburn, Jr.[9] was at Highland No. 9 Mine on September 5, 2012 to do a spot inspection for methane liberation. (Tr. 13-14). Coburn arrived at the mine at around 2:45 p.m. and worked through the second shift. (Tr. 15). Upon arrival, he met Little, and the miner's representative, Bernie Alvey, to review the mine files and pre-shift examination books. (Tr. 15).

Coburn, Matt Birkenstock, and Alvey traveled underground to the No. 5 unit, checking the roof and ribs on the way. (Tr. 16). When at the unit, Coburn conducted an "imminent danger" run, where he checked all the faces and took air readings. (Tr. 16-17). He issued a citation for failure to record dust parameter checks on the power station date board. (Tr. 17).

Afterwards, Coburn traveled up the belt entry to leave, but at Crosscut 91 he felt air moving in the wrong direction, outby instead of inby. (Tr. 17). Coburn broke his smoke tube and then told Birkenstock and Alvey about the condition. (Tr. 18). Birkenstock went to tell the foreman while Coburn and Alvey followed the smoke down the beltline. (Tr. 18). The smoke traveled from Crosscut 91 to 15, about 300 feet. (Tr. 18, 27). While walking, Coburn found two places where the belt was out of alignment and continuously rubbing the travel-side of the belt frames. (Tr. 18-19, 27-28, 41). He inspected a total of 500 belt frames and these two were separated by seven to ten belt frames (seven to ten feet). (Tr. 41-42, 45-46). The area between them was not rubbing. (Tr. 41, 139). The belt was on and running continuously in half-inch grooves. (Tr. 19, 24, 28, 42, 53). Coburn did not know if the frames and the grooves were old and could not check for rust because the belt was moving. (Tr. 24, 42-43, 53). Regardless, he did not consider the frame's age important, the belt in the groove was a hazard. (Tr. 53). There were belt ravelings wrapped around the bottom rollers, next to the frame and sitting in the groove and there were belt shavings on the ground. (Tr. 19-20, 27-28, 38, 52-53). Ravelings occur when the edge of a belt is shredded by the frame while shavings are pieces of rubber sliced from the belt by grooves cut into the frames by the belt. (Tr. 19-20, 22, 53). As a result of these conditions, Coburn issued a citation issued under Section 75.1731(b), requiring all belts to be aligned and maintained and for damaged rollers to be replaced. (Tr. 27).

According to Coburn, the cited condition was reasonable likely to result in injury because, under continued mining conditions without abatement, there was a possibility of a belt fire and smoke. (Tr. 23, 28, 47-48). To have a fire there must be oxygen, fuel, and a heat source. (Tr. 47). Here, there was oxygen, fuel from the shavings, and heat from the rubbing belt. (Tr. 49-50). The reversed air also indicated danger. (Tr. 25).

---

[9]Coal Mine Inspector Coburn was present at the hearing and testified for the Secretary. (Tr. 11). Coburn graduated from high school in 1969 and served four years in the military. (Tr. 12-13). He worked for several companies running various equipment and conducting examinations. (Tr. 11-12). In 1989 he went to MSHA and received extensive training and has since received refresher training. (Tr. 12). Coburn was certified as an electrician and mine foreman. (Tr. 12). Coburn made notes contemporaneously while underground. (Tr. 39, GX-2).

With respect to fuel, the area had accumulations, coal dust, and deteriorating belts (including shavings and ravelings) that could heat up from the friction caused by the belt rubbing and cutting the frame, resulting in a fire. (Tr. 23-24, 28-29, 53). However, there was no float coal dust on the belt. (Tr. 48-49). There was coal on the belt, but it was wet, minimizing the likelihood of a fire, though not eliminating it. (Tr. 55-57). Coburn believed coal fines and float coal dust could accumulate on the belt during from normal mining operations. (Tr. 55-56). No methane or carbon monoxide was present during the inspection. (Tr. 48).

With respect to heat, this mine had created hot spots in the past. (Tr. 25). Specifically, Coburn had seen smoking misaligned belts and shavings on fire or smoking. (Tr. 25). Here, the bottom belt was rubbing the frame and the frame warmed his hands through a leather glove. (Tr. 20, 28, 51). He believed it would eventually get hot under normal mining conditions but was not yet hot enough to ignite. (Tr. 49, 51). It was not smoking or smoldering. (Tr. 46). There was a smell from the rubbing belt, but Coburn could not say how long it existed. (Tr. 46-47). Coburn did not know the temperature of the belt because MSHA no longer allowed him to use a heat measuring device. (Tr. 34-37). The belt was designed to be flame resistant, but only as a singular unit; once the belt began to deteriorate from heat or shredding it could catch fire. (Tr. 25, 37, 52). The rollers turning in the ravelings were another heat source, however they were not touching the part of the frame that was being rubbed. (Tr. 53, 57). The shavings on the ground were 12-inches away from the warm area but could have caught fire. (Tr. 38, 49-50). Coburn did not know the ignition temperature of the belt or the shavings and ravelings. (Tr. 25, 37-38).

Coburn believed the most likely injuries were lost workday/restricted duty because personnel inby or traveling the area would be affected by smoke inhalation and anyone fighting the fire could be burned. (Tr. 26, 29). He believed this level of injury was likely because the belt examiner had already passed, and the next examiner would not return until 2-2:30 a.m., 8-12 hours later. (Tr. 31, 50). The condition would worsen as the shift went on. (Tr. 31).

The citation was marked as affecting five persons because there were five people in the unit shack 43 crosscuts from the rubbing belt. (Tr. 29-30). Once the air flow was corrected, the smoke would have been moving inby, the direction of the shack. (Tr. 30-31). Also, anyone traveling the supply road or coming into the unit would be exposed. Including examiners and cleaners. (Tr. 25, 30). Coburn believed 16 people would be exposed during an evacuation because the supply road adjacent to the belt entry would be the first escape route. (Tr. 30).

This condition was marked S&S because, if the condition continued and injury occurred, it would be a lost workday/restricted duty injury from smoke inhalation or burns. (Tr. 31). Coburn believed that if the belt remained misaligned it would continue to heat up. (Tr. 56).

The condition was marked high negligence because Coburn passed the belt examiner, Guy Scisney, doing his on-shift 10 minutes prior to his discovery of the condition.[10] (Tr. 21, 26,

[10] Guy G. Scisney, Jr. was present at the hearing and testified for Respondent. (Tr. 127). He had worked continuously in the mining industry since December 1, 1970. (Tr. 128). At the time of the hearing Scisney was employed as a mine examiner at Highland Mine and had been since 2003 or 2004. (Tr. 127, 129). Scisney received foreman papers in 1977 and filled in as an extra examiner for 14 years for three companies. (Tr. 129-130). As an examiner, he would examine

31-32, 45). Coburn was walking on the travel side of the belt moving outby when he met Scisney driving inby in a golf cart at Crosscut 75. (Tr. 21-22, 26, 43, 131-133, 145-146). This belt was likely the last one that Scisney examined that night. (Tr. 132). He was supposed to examine the entirety of the belt twice a day for conditions with the ribs, the roof, the beltline (including alignment), shavings, ravelings, the rollers, float coal dust, rock dusting, and worn out bearings. (Tr. 26, 32, 54-55, 133-134, 139, 142-145). Examiners place date, times, and initials when examining faces, the outby installations, and air courses every 15 breaks. (Tr. 146-147).

Coburn believed Scisney would have seen the condition because it was on the travel side and was obvious. (Tr. 26, 32, 55). Coburn did not believe that Scisney had conducted an adequate exam because the air was reversed, there were two places where the belt was rubbing, and there was a loose rib. (Tr. 33). Coburn conceded that it was possible to see different things coming from one direction instead of another or while on foot instead of a cart. (Tr. 44). However, examiners are trained to identify hazards regardless of the direction of travel. (Tr. 54).

In addition to conducting exams, examiners were required to memorialize hazards in the belt book so the foreman could see them and non-production shifts could fix them (Tr. 132-134, 135, 139-140). Before the inspection, Coburn found no hazards listed in the book. (Tr. 20-21). Scisney countered that he had listed hazards. (Tr. 138). He reviewed the belt books that he filled out on September 4, 2012 (RX-1) and September 5, 2012 (RX-2). (Tr. 135-137, 147). In RX-1, Scinsey wrote, "[h]eader to takeup at Crosscut 5 to 14 and 17 to 22 and 37 to 40 and 48 to 60 dirty." (Tr. 137-138). This meant that he had observed accumulations, including ravelings that needed to be cleaned. (Tr. 137-138). RX-1 also included the notation "TR8," meaning that a top roller needed to be changed but that the belt did not need to be turned off. (Tr. 138-139). He did not see any misaligned belts that day or he would have reported them to the foreman. (Tr. 139-142). In RX-2, Scinsey wrote, "violation, header, tandem, and takeup," meaning the belt equipment was dirty. (Tr. 140). Crosscuts 3 to 5, 45 to 48, and the tailpiece were also dirty. (Tr. 140). He also saw three bottom rollers and two top rollers that needed to be replaced. (Tr. 142-143). That day, Scinsey would have passed Crosscuts 65 to 67, where Coburn issued the citation for misaligned belt. (Tr. 141). Scisney did not believe the belt was misaligned that day and that he would have noticed it, even if it was a single spot. (Tr. 141-142).

In addition to the exam, Coburn believed the shavings and ravelings indicated that the condition had existed for some time. (Tr. 22). The condition was present when he arrived. (Tr. 22-23). While Coburn was not sure how long the belt was rubbing, it would take 16 to 24 hours for the belt to cut a groove and days to cut half an inch. (Tr. 22, 24, 32, 36-37). Coburn believed it had been running for while despite the fact that it was only warm. (Tr. 36-37, 49).

---

belts, pre-shift units, pre-shift outby installations, check for hazards, look out of the welfare of miners, and try to comply with state and federal law. (Tr. 127). Scisney was a union rep, not management. (Tr. 127-128). He was certified as a mine emergency technician and received the Joseph Holmes Award for working 43 years without an injury or unexcused absence. (Tr. 128). Scisney's threw his actual notes out after transferring them to the record book. (Tr. 147-148).

At the time the citation was issued Coburn did not see, and Respondent did not raise, mitigation. (Tr. 33). Scinsey testified that he did not agree with the negligence designation because if the belt had been out of line he would have known and told the foreman. (Tr. 143).

The condition was abated when Alvey adjusted the belt and rollers. (Tr. 18, 26, 33, 40). This took less than 30 seconds. (Tr. 33, 40). The belt was not shut down. (Tr. 40). After the inspection, Coburn told management about the citation and held meetings with them about ensuring proper air direction and proper recording of conditions in the belt book. (Tr. 27).

B. Contentions of the Parties Regarding Citation No. 8508512

With respect to Citation No. 8508512, the Secretary asserts that Respondent violated 30 C.F.R. §75.1731(b), that this violation was reasonably likely to result in Lost Workday/Restricted Duty injuries to five miners, that the violation was S&S, and that it resulted from high negligence. (GX-1). (*Secretary's KENT 2013-112 Post-Hearing Brief* at 6-12). The Secretary presumably believes that the proposed penalty of $10,437.00 is appropriate.

Respondent concedes that Citation No. 8508512 was validly issued. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 6). However, it argues that a Lost Workday/Restricted Duty injury was unlikely to occur and that the violation was not S&S. (*Id.*). It also believes that its actions would be better characterized as showing no negligence. (*Id.*). Finally, Respondent presumably believes that the penalty should be reduced pursuant to its proffered gravity and negligence determinations.

C. Findings of Fact and Conclusions of Law Regarding Citation No. 8508512

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.1731(b).

On September 5, 2012, Inspector Coburn issued a 104(a) Citation, No. 8508512, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The 2nd. South belt line was not being maintained in safe operating condition or properly aligned. The bottom belt was rubbing two belt stands that were warm to the touch. One was between crosscut 66-67, one was between crosscut 65-66. Belt raveling's [sic] were present around the bottom belt rollers and on the mine floor. The belt had cut into the belt frames 1/2 inch.
>
> Section 75.1731(b) was cited 45 times in two years at mine 1502709 (45 to the operator, 0 to a contractor).

(GX-1).

The cited standard, 30 C.F.R. §75.1731(b). ("Maintenance of belt conveyors and belt conveyor entries."), provides the following:

(b) Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.

30 C.F.R. §75.1731(b).

At hearing, Secretary's counsel presented credible evidence to show that the 2nd South belt was rubbing against the belt structure in two places, roughly ten feet apart. (Tr. 18-19, 27-28, 41, 45-46). This condition was caused by a misalignment of the belt. (Tr. 139). Nothing was presented to undermine this evidence.

In its brief, Respondent conceded that, based on the evidence provided at hearing, the violation was validly issued. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 6). In light of this fact, and the evidence presented, I find that Respondent violated 30 C.F.R. §75.1731(b).

2. The Violation Was Reasonably Likely to Result in Lost Workday/Restricted Duty Injury To Five Miners And Was Significant And Substantial In Nature.

Inspector Coburn marked the gravity of the cited danger in Citation No. 8508512 as being "Reasonably Likely" to result in "Lost Workday/Restricted Duty Injury" to five miners. (GX-1). The inspector also found this violation was S&S. (GX-1). These determinations are supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard – it has already been established that Respondent violated 30 C.F.R. §75.1731(b).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation was also met. As discussed *supra*, the Secretary presented credible evidence that, as a result of misalignment, the 2nd South Belt was rubbing belt structure in two locations. (Tr. 18-19, 27-28, 41, 45-46, 139). The Secretary presented further credible evidence that the belt had cut into the belt structure half an inch. (Tr. 19, 24, 28, 42, 53). As a result of this rubbing and cutting, there were belt ravelings wrapped around the bottom roller, belt shavings collecting on the floor, and friction. (Tr. 19-20, 23-24, 27-29, 52-53). Inspector Coburn credibly testified that the belt structure warmed his hand through his leather gloves, meaning the chance for fire and smoke was already increasing because of this condition. (Tr. 20, 28, 51). Coburn believed that, with continued normal mining conditions, the belt would continue to heat up to the point that it would catch on fire. (Tr. 51). Coal particles on the belt, broken pieces of the belt, and the shavings on the floor would likely be the fuel. (Tr. 23-24, 28-29, 53). In the past Coburn had found smoldering and smoking shavings at this mine. (Tr. 25). Therefore, the rubbing belt clearly contributed to a discrete safety hazard, miners being injured by fire or smoke. (Tr. 26, 29).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. It is reasonably likely that, in the event of a fire, the five miners in the unit shack, would be affected by the smoke or by the fire, resulting in injuries. (Tr. 29). Miners sent to fight the fire would also be affected and injured. (Tr. 26, 29). In this

matter, the hazard contributed to was realized and an injury would occur as a result. Therefore, I find this an injury was reasonably likely and that the third prong of *Mathies* was met.

Under *Mathies,* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). In the event of a fire, the Secretary presented credible evidence that miners would suffer lost workday/restricted duty injuries from smoke inhalation. (Tr. 26, 29). Further, miners would face similarly severe burn and smoke inhalation injuries when fighting the fire. (Tr. 26, 29). These types of injuries are sufficiently serious to support an S&S designation. *See Amax Coal Co.*, 19 FMSHRC 846 (May 1997)(upholding judge's S&S finding based on evidence of smoke inhalation or burns, which would constitute serious injury). In fact, Respondent conceded that, in the event of a fire, serious injury would occur. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 13). Therefore, the fourth prong of *Mathies* is met.

Further, I note that an inspector's opinion that a violation is S&S is accorded substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d at 135-36. In this matter, Inspector Coburn credibly testified that the condition was S&S. (Tr. 31). As a result of the inspector's opinion and, more importantly, the factors discussed above, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

Respondent presented several arguments for the proposition that this citation was not reasonably likely to result in injury and not S&S. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 12-25). However, none of these arguments were compelling.

First, Respondent argued that the Secretary used the wrong standard in establishing the likelihood of a fire. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 13-14). While Respondent concedes that "Reasonably Likely" does not mean "more likely than not," it asserts that a "mere possibility" or a claim that a fire "could" happen is insufficient to sustain an S&S violation. (*Id. citing U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-868 (1996); *Oxbow Min. LLC*, 2013 WL 1856627, *25 (Apr. 11, 2013)(ALJ); *Energy Fuels Coal Inc.*, 14 FMSHRC 1804, 1812 (Nov. 1992)(ALJ); *Brown v. Payton*, 544 U.S. 133, 151 (2005)(Souter, J. dissenting); *Johnson v. Texas*, 509 U.S. 350, 367-368 (1993). Respondent cites to testimony from Inspector Coburn wherein he is asked why be believed the condition was reasonably likely to result in injury and he stated, "[b]ecause if normal mining were to continue and this condition were to be allowed to stay present, then the possibility of a mine fire was there." (*Id.* at 13 *citing* Tr. 28-29).

It is true that Inspector Coburn said on two occasions at hearing the he was concerned about the possibility of a mine fire. (Tr. 23, 28-29). However, these statements, taken out of the overall context of the Inspector's testimony, fail to convey the actual content of Coburn's testimony. For instance, Coburn stated, when specifically asked why he believed the condition was S&S, that "if the conditions were to continue and an injury were to occur, it would result in a lost workday or restricted duty injury." (Tr. 31). Further, when asked if the conditions present could cause a fire stated, "Yes ma'am. If the conditions continued and the belt stayed out of alignment, it's just going to worsen. You are going to deteriorate the belt, there are going to be

more shavings, the heat's going to build up." (Tr. 56). Perhaps most persuasively, Coburn stated, "[i]f it continued, normal mining continued, it would continue to rub. All it was going to do was get hotter." (Tr. 51). Taken as a whole and considering specific instances in which he was asked about the condition, Inspector Coburn's testimony indicates that he believed under normal mining conditions, that a fire was going to occur. Inspector Coburn's use of the word "possibility" might have been somewhat confusing, but the overall meaning of his testimony is clear: this belt would continue to heat up until smoke or a fire occurred.

It is instructive that Judge Moran faced a nearly identical situation, an alleged S&S violation of 30 C.F.R. §75.1731(b) issued by Inspector Coburn at Highland No. 9 Mine, and found the same thing. Moran found:

> The Respondent has referred to the Inspector's statement of the *possibility* that a belt fire could ensue if the condition remained uncorrected, and that such a statement does not satisfy the S&S standard, as that description means a fire was not "reasonably likely to occur." R's Br. at 8. The Court views that as an inaccurate characterization of the law and the Inspector's expression...The Court adopts Inspector Coburn's recounting of the events, including the circumstances leading up to the discovery of the problem. It also takes into account, the Inspector's view as to whether the condition was S&S. Even if it declines to find that the belt had been out of line for "at least 48 hours," the condition was S&S. Inspector Coburn was not contending that there was a likely ignition at the time he found the violation. However, he added that "*if normal mining would have continued* [with] the belt being out of alignment, the temperature would increase along with the possibility of a fire." Tr. 185.

Highland Mining Company, LLC, 35 FMSHRC 221, 236 (Jan. 2013)(ALJ Moran) (emphasis in original)(footnotes omitted). Like Judge Moran, I find that the weight of the Inspector's testimony indicates that a fire or smoke was reasonably likely under continued normal mining conditions and I credit that testimony.

Furthermore, even without considering Coburn's specific answers to questions, the evidence supports a finding that a fire or smoke was likely. The belt was traveling 700 to 750 feet per minute. (Tr. 23). It was rubbing against a frame and actually cutting into the metal. (Tr. 18-19, 24, 27-28, 41-42, 53). This condition was causing heat that would continue to increase if the belt continued to rub. (Tr. 51). The mine was full of combustible material including coal and belt material. (Tr. 23-24, 28-29, 53). Under these conditions, I would find a fire was likely even if Inspector Coburn had not been asked his opinion.

Respondent's second argument was that the necessary elements for the "fire triangle" (oxygen, fuel source, and ignition source) were not present at the mine, meaning no fire was possible. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 14). Respondent argued that there was not a confluence of factors present to create a fire. (*Id.* at 19 *citing Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (1997)). Specifically, Respondent asserts that there was neither a fuel source nor an ignition source with respect to this rubbing belt. (*Id.* at 14-23). I will consider each argument in turn.

With respect to the fuel source, Respondent argues that several possible combustible materials proffered by the Secretary (and some that are not) would not actually serve as a fuel source. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 14). For example, Respondent argued that no methane was present at the cited location. (*Id.* at 14, citing Tr. 48). Respondent was correct that no methane was found at the time of the citation, as Coburn testified that his gas detector did not go off. (Tr. 48). However, nowhere in Coburn's testimony or in the Secretary's briefs does the Secretary assert that methane was a fuel source. The Secretary cites accumulations of coal and belt material, not methane. (Tr. 23-24, 28-29, 53). The S&S finding in this matter does not stand or fall based on whether methane was present. With that noted, I am not wholly convinced that methane is not a potential fuel source. While no methane was detected, this mine was on a 15-day spot for methane, meaning that it liberated 250,000 cubic feet of methane in a 24-hour period. (Tr. 16). Even though no methane was present at the time, the Commission has consistently recognized that a sudden buildup of methane in a gassy mine can reasonably be expected. *Twentymile Coal Co.*, supra at *3 (*citing U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985)). Simply because no methane was found at the time of the inspection does not mean that, under continued normal mining operations, that methane could not be present later.

Respondent also argued that no factual testimony was presented to support the Secretary's assertion that pieces of the belt could act as a fuel source. (*Id.* at 14-15). Respondent noted that the belt is flame retardant and that while the Secretary asserts it can become combustible when it breaks down, it provides no evidence beyond Coburn's testimony. (*Id.*). Relatedly, Respondent noted that Coburn was unsure how hot the belt would need to get in order to catch on fire. (*Id.* at 15 *citing* 37-38). Further, the broken belt material was not near the place where the belt was rubbing the stand, so Respondent did not believe that those materials would get any warmer. (*Id.* at 16-17, *citing* Tr. 38, 49, 59).

As Judge Steele noted, a fire retardant belt is not a fire proof belt; it still produces friction and can still ignite fuel sources. *Raw Coal Mining Co., Inc.*, 2013 WL 3865340, *12-13 (June 4, 2013)(ALJ Steele); *see also Aracoma Coal Company, Inc.*,32 FMSHRC 1639, 1642 (describing a fire that resulted from frictional heat caused by a misaligned, fire-resistant belt). For purposes of analyzing whether a violation is S&S, a "hazard continues to exist regardless of whether caution is exercised." *Amax Coal Co.*,19 FMSHRC at 850 *citing Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Fire retardant belts reduce, rather than eliminate, the risk of fire. The existence of a flame retardant belt does not excuse Respondent from its obligation to maintain the belts. If the drafters of the regulations believed that a fire retardant belt was sufficient to prevent the risk of fire and smoke, 30 C.F.R. §75.1731(b) would require that belts be either aligned to prevent rubbing or be flame retardant. It does not. It requires all belts, even fire retardant belts, to be aligned to avoid rubbing to prevent the risk of fire and smoke. It is significant that Inspector Coburn had found smoldering material caused by belt friction at this very mine in the past. (Tr. 25, *Highland Mining Company, LLC*, 35 FMSHRC at 227). I credit the testimony of Inspector Coburn that, under continued normal mining conditions, this belt would continue to deteriorate and the heat would continue to increase. (Tr. 25, 37, 51-52). These two factors, working in concert, would result in a smoke or a fire. The flame retardant belt may slow the process, but it would not eliminate the risk.

Coburn's inability to say the exact temperature at which the belt would ignite was immaterial. He credibly testified that the belt would continue to heat up until it smoked or caught on fire. (Tr. 51). The fact that Coburn had seen belts at this mine smoldering before indicates first-hand knowledge of the necessary conditions for a fire. (Tr. 25). One does not need to know the combustion point for the head of a match to know that it can catch fire.

Similarly, the fact that the broken material was 12 inches from the warming belt stands is immaterial. While those particular pieces of belt were not close enough to the belt frame to maintain heat, they were still a fuel source. (Tr. 38, 49, 57). As the belt continued to run in the grooves cut into the belt frames, more pieces of the belt would be deposited on the floor. When the belt grew warmer some of these pieces and fibers, or perhaps coal dust, would ignite. When these ignited and fibers fell to the bottom, they could land on top of the accumulation of combustible material and ignite them as well. Therefore, the currently existing belt pieces, as well as the future pieces of belt in the area, would constitute a fuel source.

The final fuel source disputed by Respondent was coal accumulation. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 17-18). Respondent argued that Inspector Coburn did not know how hot coal would have to be to catch on fire. (*Id.* at 17 *citing* 49). It further argued that the coal present was not float coal dust and that the area was wet. (*Id. citing* 48-49). It stated that the only thing that the Secretary had proven was that dry coal could catch fire. (*Id. citing* 24, 55-56).

Settled Commission precedent supports the proposition that wet coal will eventually dry out. *See Utah Power & Light*, 12 FMSHRC 965, 969 (May 1990) (*citing Black Diamond Coal Company*, 7 FMSHRC 1117, 1120-21 (Aug. 1985) (dampness in coal does not render it incombustible and wet coal can eventually dry out in a mine fire and ignite); *see also Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1230 (Jun. 1994) and *Amax Coal Co.*, 19 FMSHRC at 849. While the coal present at the cited area was wet, any coal will eventually dry and serve as a fuel source. Further, if a fire started from some other source, the coal would be rapidly dried and immediately be added as a fuel source. I find no reason to discount coal as a fuel source at the cited location.

Having considered Respondent's arguments regarding the fuel sources, I turn now to consider the claim that the area lacked an ignition source. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 19-23). Respondent noted that Coburn made no observations that determined how long the belt had rubbed the frame and that he did not look for rust on the frames. (*Id.* at 19 *citing* Tr. 43). Respondent pointed out Coburn conjectured it lasted 16 hours, 16-24 hours, or days but that it was only warm to the touch. (*Id. citing* 20, 22-24, 32, 36). According to Respondent, Coburn's only argument was that under normal mining conditions it would catch on fire. (*Id.* at 20 *citing* 23, 28-29, 51). But, it opined that Coburn could not explain how it would not get hot enough to burn in a day of rubbing but would get hot enough in a few hours. (*Id.* at 21 *citing* Tr. 19). Instead, Respondent alleged that heat from the rubbing would be lost to the surrounding area and reach an equilibrium at simply warm. (*Id.* at 21 *citing Highland Min. Co.*, 34 FMSHRC 2612 (2012)).

I find that Inspector Coburn's testimony on the length of time the condition existed was credible. The belt had cut half an inch into the belt frame. (Tr. 19, 24, 28, 42, 53). This amount of cutting would take time occur and Coburn's estimate of 16-24 hours was reasonable and based on his experience. (Tr. 22, 24, 32, 36-37). While it is true that Coburn was unable to check the belt frame for rust (presumably to determine if the grooves cut in the belt frame were old) this was because the belt was actually moving in the groove. (Tr. 42-43, 53). While Coburn acknowledged that it was possible that these cuts were old, I find that it is highly unlikely that this belt happened to go out of alignment in two separate places and that those two separate places just happened to be at locations where old frames had already been cut half an inch deep by belts in the past.[11] Therefore, I find that the belt was rubbing and cutting for 16-24 hours and that the friction caused by this rubbing was an ignition source.

I also find that the fact that the belt frame was only warm to the touch at the time of the inspection does not undermine the fact that it is an ignition source. Coburn credibly testified that the belt frame felt warm to the touch even through his leather gloves. (Tr. 20, 28. 51). That would require a considerable amount of heat. (Tr. 20, 28, 51). Respondent was correct that the Secretary did not prove that the belt would get hot enough to burn in the next few hours or that the inspector had caught the condition "just in the nick of time." (*Respondent's KENT 2013-112 Post-Hearing Brief* at 21 & 24). But, the Secretary was not required to prove those things. As noted earlier when considering the gravity of a violation, the likelihood of that hazard being realized must be considered assuming normal continued mining operations without abatement. *Consolidation Coal Co.*, 8 FMSHRC at 899. The same is true when that consideration occurs in an S&S analysis. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (Jul. 1984), *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1221-1222 (Jun. 1994) (*citing U.S. Steel Mining Co. Inc.*, 7 FMSHRC at 1130): *see also Highland Mining Company, LLC*, 35 FMSHRC at 236. While the belt was not hot enough to ignite at the time of the citation, Coburn credibly testified that if the condition continued, it would eventually get hot enough to cause a fire. (Tr. 51). Finally, there is no evidence on the record to support a claim that the heat from the belt would reach equilibrium and stay warm, rather than become hot. The only evidence on point is Coburn's credible testimony that it would continue to heat up. As a result, I believe the rubbing belt was an ignition source.

Therefore, the preponderance of the evidence supports the Secretary's determination with respect to the likelihood of injury, the severity of that injury, and the S&S designation.

With respect to the number of persons affected, the Secretary presented credible evidence that if smoking or a fire were to occur, five miners were located in a unit shack near the cited condition and would be affected. (Tr. 29). In fact, this condition was in a belt entry directly adjacent to an escapeway, meaning miners evacuating the area would also be affected by the fire and smoke. (Tr. 30).

---

[11] Of course, it was also possible that Respondent's frames were riddled with grooves cut by misaligned belts and that any place where the belts went out of alignment would necessarily come in contact with old grooves. However, if that were the case, it would not speak well of Respondent's care and attention to its belt. Regardless, there is no evidence on record to support a claim either that these frames were old or that the frames were in general disrepair.

In short, the preponderance of the evidence shows that Citation No. 8508512 was reasonably likely to result in lost workday/restricted duty injuries to five persons and was S&S.

3. Respondent's Conduct Displayed "Moderate" Negligence Rather Than "High" Negligence.

In the citation at issue, Inspector Coburn found that the operator's conduct was highly negligent in character. (GX-1). While substantial evidence supports a finding of negligence, that negligence is better characterized as "moderate' in light of the existence of some mitigating factors.

With respect to knowledge, the factual situation presented here is substantially similar to that in Citation No. 8508232. Specifically, a mine examiner passed through the cited area just minutes before the Inspector discovered and cited the violative condition. (Tr. 21, 26, 31-32, 45). The examiner was walking along the entry where the belts were rubbing and did not correct, record, or flag the cited condition as he should have. (Tr. 123). As discussed *supra*, the cited condition had existed for 16-24 hours and, therefore, was present when the examiner passed it. (Tr. 22, 24, 32, 36-37). As with the previous citation, the examiner was an agent of Respondent and his actions were imputable to the operator. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*. As a result, Respondent knew or should have known about the cited condition but took no action. Therefore, Respondent was negligent.

Respondent argued that it did not have knowledge of the cited condition and therefore, cannot be negligent. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 6-11). However, Respondent's arguments are not compelling.

First, Respondent argues that it did not have actual knowledge of the condition. (*Respondent's KENT 2013-112 Post-Hearing Briefs* at 6). Respondent's briefing on the issue of negligence in general indicates an uneasiness with the "knew or should have known" standard used in evaluating negligence. As Respondent notes with respect to Citation No. 8508512, "the Secretary does not allege that Highland *actually* knew...but only that Highland *should have*." (*Id.* at 9, emphasis in original).

While Respondent is correct that the Secretary did not allege that Respondent actually knew of the cited condition, he does not have to prove actual knowledge. As Respondent noted in its own brief, the definition of the various degrees of negligence are found at 30 C.F.R. §103(d), Table X and those definition include the phrase "knew or should have known." (*See Respondent's KENT 2013-112 Post-Hearing Brief* at 9). Respondent's discomfort with being held responsible for conditions it "should have known" about is noted, but that is the standard under the rules (and under every legal standard of basic negligence with which I am familiar).

Second, Respondent once again contends that the condition was not obvious and challenges the Secretary's definition of that term. (*Respondent's KENT 2012-112 Post-Hearing Brief* at 6-11). As with Citation No. 8508232, Respondent characterizes the Secretary's definition of negligence as being self-serving: the issuance of the citation necessarily implies that

it is obvious. (*Id.*). It further argues that Scisney was the best possible examiner to check the area and that, despite his diligence; he did not notice the condition. (*Id.* at 11).

For the same reasons noted regarding Citation No. 8508232 *supra*, I do not find this argument to be persuasive. Inspector Coburn was not elucidating a general proposition for what is or is not obvious. Instead, he clearly testified that in his opinion this particular condition was obvious. (Tr. 26, 32, 55). There were two separate areas where the belt was rubbing the belt frame. (Tr. 18-19, 27-28, 41). This condition was clearly visible from the travelway. (Tr. 26, 32, 55). Respondent had had problems with hot spots in the past, meaning that it had notice to look for conditions that might be less obvious on the belt lines. (Tr. 25). Further, Inspector Coburn testified that he had specifically addressed this problem with Respondent just a few days earlier, meaning it knew that it was supposed to take special care with the belts. (Tr. 69, 84-85).

Relatedly, Respondent's claim that the condition was not obvious simply because Scisney did not see it goes too far. It essentially makes the mirror argument that Respondent found so offensive when it alleged the Secretary was making it; namely that if Scisney did not see the condition then it could not be obvious. If such a broad, general principle will not work for the Secretary, it will not work for Respondent either. Such a definition would reward willful ignorance. Based on the evidence on record, I find that the condition was obvious and that Respondent knew or should have known about it.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. The evidence showed that Respondent placed their most qualified belt examiner in the area. (Tr. 127-130). Among his other credentials, Scisney had never missed a day of work as a result of injury. (Tr. 128). Respondent reasonably believed that Scisney was the most competent person to inspect the area. Further, Scisney was not a member of management and therefore had less incentive to ignore conditions. (Tr. 127-128). The evidence shows that Scinsey had not been shy about correcting conditions in the past. (Tr. 135-147). This shows that Respondent was putting some emphasis on ensuring the safety of the belts. While in this particular case Scisney made a mistake and failed to notice two pieces of belt rubbing the belt frame, that does not wholly negate the impulse that led to his appointment. I find no other mitigating factors in this case. However, in light of this mitigating circumstance, a finding of high negligence is not appropriate; with respect to Citation No. 8508512, Respondent was moderately negligent.

The Secretary argues that there are no mitigating circumstances and that the "High" negligence designation is appropriate. (*Secretary's KENT 2013-112 Post-Hearing Brief* at 12 and *Secretary's KENT 2013-112 Reply Brief* at 1). Specifically, the Secretary notes that the examiner traveling through the area should have been checking the belts and the fact that he was zipping through the area on his golf cart was no excuse for failure to find the condition. (*Id.*).

As I found *supra*, Scisney's examination was clearly deficient. It is entirely possible that earlier examinations before Scinsey's were also deficient. The condition was present and obvious and should have been noticed. However, Respondent made some good-faith effort to ensure the safety of the belts and reasonably relied on Scinsey to find the conditions. That does

not change the fact that the condition existed or that Respondent was responsible for it, but I find that it somewhat mitigates Respondent's negligence.

In addition to placing the most experienced examiner in this belt area, Respondent claims that several other mitigating factors indicate a finding of "Low" is more appropriate. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11-12). However, these arguments are not compelling.

First, Respondent argued that Scisney's inability to find the condition was the result of different point of views for the examiner and opposed to the inspector. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11). As I discussed with respect to Citation No. 8508232, the direction of travel is immaterial; Respondent's examiners are required to find hazardous conditions regardless of the method or direction of travel.

Second, Respondent argued that the Secretary did not contend that Respondent had actual knowledge, only that it should have known. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11). The issue of knowledge and the legal basis for the "knew or should have known" standard have been discussed at length, *supra*. Respondent's lack of actual knowledge is in no way a mitigating circumstance as it should have known about the condition.

Third, Respondent argued that the Secretary alleged no history of belt problems. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11). That is simply false. The Secretary presented uncontested evidence that Respondent had been cited 45 times at Highland Mine No. 9 in the two years prior to this citation. (GX-1). Further, one of the cases cited above, *Highland Mining Company, LLC*, shows that Respondent was held liable for an S&S violation of the standard cited here. 35 FMSHRC at 236.

Fourth, Respondent argued that Coburn's testimony about how long the condition existed was speculative and contradicted by the physical evidence. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 11-12). As discussed *supra*, Coburn credibly testified that the condition had existed 16-24 hours and the physical evidence supported this testimony. (Tr. 22, 24, 32, 36-37). There is nothing speculative or unreliable about this evidence and Respondent presented no evidence to counter it.

Fifth, Respondent argued that no one suggested the firefighting equipment was inadequate. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 12). Respondent is correct; there is no reason to believe that the firefighting equipment would be insufficient to stop a fire. However, by the time a fire occurs, it is far too late. Miners are already in danger. *See Buck Creek Coal, Inc. v. MSHA*, 52 F.3d at 136 ("The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires"); *see also Amax Coal Co.*, 19 FMSHRC at, 850. Further, compliance with some MSHA regulations does not excuse non-compliance of others. This is not mitigation.

Sixth, Respondent argued that there were no damaged, stuck, or broken rollers. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 12). This is not entirely true; Inspector Coburn did not allege any broken or damaged rollers that day, but Scisney did. (Tr. 142-143). With that noted, it is true that none of these conditions were in the direct vicinity of the rubbing belt. (Tr. 142-143). Regardless, the fact that Respondent did not violate other standards in the cited area in no way mitigates its violation of the current standard.

Finally, Respondent argued that the condition was abated in 30 seconds. (*Respondent's KENT 2013-112 Post-Hearing Brief* at 12). To the extent that this shows that Respondent was not actually aware of the cited condition (because if they had, correcting it was simple and inexpensive), I consider it relevant. However, as already repeatedly held, Respondent should have known about the condition and was therefore negligent. To the extent that Respondent wishes to have credit for correcting a condition after it was cited, I refer to my reasoning with regarding to Citation No. 8508232. This is not a mitigating factor.

In light of the finding that there were mitigating circumstances here, but that they were not substantial, I find that Respondent was moderately negligent.

4. Penalty

In this matter, the Secretary proposed a penalty of $10,437.00 for Citation No. 8508512. I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – in the two years preceding this violation the Plant was cited 45 times for this condition. (GX-1).

(2) The appropriateness of the penalty compared to the size of the Operator's business - The Highland No. 9 Mine produced 3,950,732 tons of coal in 2012, and had 1,079,470 hours worked in 2012. (JX-1, 10). According to MSHA's penalty assessment guidelines this gives Highland No. 9 Mine 15 "mine size points" out of a possible 15. See 30 CFR §100.3(b). Further, even if Respondent controlled no other mines, 3,950,732 tons of coal produced would give it 9 "controller size points" out of a possible 10. *See* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than high negligence.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1, 11)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in Lost Workday/Restricted Duty injuries to five miners and was S&S in nature.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was abated rapidly and in good faith after the citation was issued.

In light of the Administrative Law Judge's decision to modify the negligence of the citation from "High" to "Moderate," a reduction in the penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $9,000.00.

KENT 2013-480

I. Stipulations

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 2. Those stipulations include the following:

1. Highland Mining Company, LLC is subject to the Federal Mine Safety and Health Act of 1977, as amended ("The Mine Act")and to the jurisdiction of the Federal Mine Safety and Health Review Commission;

2. At all relevant times, Highland Mining Company, LLC, and the mine, Highland 9 Mine (Mine ID 15-02709), mined and produced coal, which entered commerce, or had operations or products which affected commerce, within the meaning of the Mine Act;

3. Highland Mining Company, LLC, is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the administrative law judge has the authority to hear this case and issue a decision;

4. Highland Mining Company, LLC, was an "operator," as defined in the Mine Act, at the mine, Highland 9 Mine, (Mine ID 15-02709), when the citations and order at issue in this proceeding were issued;

5. The mine, Highland 9 Mine, (Mine ID 15-2709), is a "coal or other mine" within the meaning of the Mine Act.

6. Highland Mining Company, LLC, is a larger operator;

7. Imposition of a reasonable penalty will not affect the ability of Highland Mining Company, LLC, to remain in business.

8. Each of the citation and orders at issue in these proceedings was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Highland Mining Company, LLC.

(JX-2) (*see also* Tr. 157).

II. Citation Nos. Nos. 8511144 and 8511145

A. Summary of Testimony

On November 8, 2012, Kirby Smith[12] and Joe Pollard[13] inspected Highland No. 9 Mine. (Tr. 163, 165). They, along with Little and miners' rep Larry Baker, Jr., were together the entire time.[14] (Tr. 165, 186-187, 218, 264-265, 336). Pollard was assigned to conduct a quarterly inspection of the mine. (Tr. 215). Smith's was present for a monthly supervisory mine visit. (Tr. 166, 218). Smith asked Pollard which belts had not been inspected and Pollard identified the first main north belt. (Tr. 166). Pollard chose this belt because the record book indicated that the area "needs dusting" three straight days and he wanted to check it out. (Tr. 216-217).

The inspection group traveled to the first main north belt. (Tr. 263-264, 337). When they reached the farthest inby point and entered the entry they found mine examiner Terry Doss checking the belt.[15] (Tr. 167, 218, 264, 312, 337-338, 347). Doss told Pollard that he had just

---

[12] Kirby Grant Smith was present at the hearing and testified for the Secretary. (Tr. 159). He was a senior special investigator at MSHA. (Tr. 159). Before joining MSHA in 1978 he worked in the mining industry for six years running various equipment. (Tr. 160-161). He was a certified Alabama mine foreman and electrician and conducted various kinds of exams. (Tr. 161-162). Smith had held several specialized positions. (Tr. 160). As a senior special investigator, he investigated 105(c) complaints, accidents, and hazards. (Tr. 160). Smith took photos during the inspection before abatement. (Tr. 167-168, 175, 187-190, 196, 223). He relied on them to refresh his memory. (Tr. 175, 200). His photos did not state the location, so he could not tell where they were taken. (Tr. 187). Smith did not coordinate his photos with Pollard, but Pollard stated they accurately confirmed some of the conditions he saw. (Tr. 223-224).

[13] Sammy Joe Pollard, Jr. was present at the hearing and testified for the Secretary. (Tr. 212). Pollard had been a coal mine inspector for MSHA since March 2009. (Tr. 212, 276). Before that, Pollard worked in the mining industry on various equipment. (Tr. 212-214). Pollard was a certified foreman in Illinois and Kentucky. (Tr. 213). He worked as a foreman for about two years and conducted pre-shift exams (including exams of ribs and belts). (Tr. 213-214). When inspecting belt, he would look for obvious hazards including loose roof, ribs, coal dust, bad rollers, belt rubbing, and air conditions. (Tr. 213-214). Pollard took 40 pages of notes, which included arrival time, enforcement actions, and actions taken. (Tr. 228-229, SX-2).

[14] Travis Little was present at the hearing and testified for Respondent. (Tr. 334). Little was employed in Respondent's Safety Department. (Tr. 335). Little had worked in the industry for 19 years working on various equipment and working in mine rescue. (Tr. 335-336). He was certified as an underground and surface miner and foreman in Kentucky, he was an MET, an EMT, an MET instructor, an underground instructor, and a CPR instructor. (Tr. 336). Little took notes, but they were in his desk and he did not give them to Respondent's attorney. (Tr. 360).

[15] Terry Edwin Doss was present at the hearing and testified for Respondent. (Tr. 294). He spent 17 years in the mining industry running various kinds of equipment. (Tr. 295-296). Doss was a certified miner and foreman in Kentucky but he was a union member, not management. (Tr. 295-297). At the time of the hearing, he was laid off but at the time of the citations he

finished a normal examination from the head drive to the takeup. (Tr. 219, 301, 304, 318-320). Doss reported that there was some material accumulated under the belt and in the walkway, but that there were no other conditions. (Tr. 219, 279-280, 312, 338, 351). He had shut down the belt to clear the hazard, but had not removed all the material. (Tr. 308). He also called and texted the manager (to create a record) to report the cleanup. (Tr. 309). Doss testified that Pollard was unhappy with the buildup and said he was going to inspect it. (Tr. 312).

The inspection group then began at the tailpiece and traveled to the header. (Tr. 220, 260). Smith and Pollard looked at the belt alignment, the frictional points of the belt, the rollers, the ribs, the direction of the air, and the roof. (Tr. 167-168). Pollard issued four citations along the beltline. (Tr. 186, 221). He cited them for float coal dust, accumulation of extraneous material, loose ribs, and belt rubbing rollers creating strings and cords. (Tr. 167-168, 220-221). He spoke with Little about each condition. (Tr. 174-175, 224, 257). Little testified that they did not see any hazardous conditions before Crosscut 18. (Tr. 338). During the inspection, Pollard did not see any accumulations that matched Doss' description. (Tr. 219-220).

Pollard issued a 104(d) order for float coal dust under 30 C.F.R. §75.400, an accumulation of combustible material. (Tr. 221, SX-1). Pollard believed the standard was violated because there was float coal dust on the manifold, the belt structure, the framing, the waterline, and the floor. (Tr. 171, 177-178, 201, 208-210, 220-223, 290-291). The accumulations started about two crosscuts outby the tailpiece and stretched uniformly across the 2,000 foot length of the belt entry, except for the ribs. (Tr. 208, 222-223, 233-234, 259-261, 281, 289). Pollard determined the citation was necessary based on a visual examination of the coal buildup on the mine floor, belt frames, and ribs. (Tr. 272, 305). Visual determinations can vary from person to person (even between inspectors). (Tr. 272-273). Doss believed the belt needed to be dusted again, but not to the extent that immediate action was needed. (Tr. 310).

The citation was marked as reasonably likely to result in injury or illness. (Tr. 228). Pollard believed that a fire or explosion was highly likely, or at least possible, as a result of the float coal dust. (Tr. 225, 227, 244-245). An explosion or fire requires fuel, oxygen, and an ignition source. (Tr. 225, 244-245). The ignition source was the rubbing belt. (Tr. 178, 226, 244-245). The fuel source would be the explosive and volatile float coal dust and extraneous materials. (Tr. 178, 224-225, 244-245). Coal dust would act to increase the magnitude of an explosion. (Tr. 209). Many mine disasters occur because of coal dust. (Tr. 224).

There was roughly 3-4 inches of rock dust throughout belt area and, in Pollard's opinion, Respondent was doing alright with rock dusting. (Tr. 262-263, 271). He did not know when the area had last been rock dusted or when it was scheduled to be dusted again. (Tr. 273-274). However, Pollard found coal dust sitting on top of the rock dust. (Tr. 220). Rock dust is normally white, but here it was gray to black, indicating float coal dust. (Tr. 172, 177-178, 209, 222, 261, 305). Doss often requested that this area be dusted because it got dark quickly. (Tr. 297-298, 311). However, there was no float coal dust in the area where the belt was rubbing. (Tr. 210-211, 281). Pollard did not take a sample of the dust for testing and had never used an

---

worked as a belt examiner for Respondent and conducted various examinations. (Tr. 298-299). At hearing, Doss did not review his notes because, thinking the issue was over, he had thrown them out six months earlier, saving only the inspection books. (Tr. 321-322).

on-the spot dusting device. (Tr. 262, 271-272). Under MSHA standards, an accumulation that is 80% rock dust will not propagate or cause ignition. (Tr. 262). Little and Doss believed that the bottom of the mine was gray in color because the rock below the coal seam was gray and because it was wet, he did not see float coal dust or combustion hazard. (Tr. 261-262, 305-306, 311, 349). Doss conceded that even wet areas needed to be rock dusted. (Tr. 331).

With respect to water, the entry alternated between high, dry areas and low, damp areas, including the wettest area around the tailpiece (Pollard estimated about 40 percent of the entry was wet from rib to rib). (Tr. 200, 210, 220, 232-233, 260, 274, 280, 320, 361). Little testified that no area in the entry was dry, but that some areas had standing water and others did not. (Tr. 361). Doss testified that some areas were dry but that the whole entry was damp. (Tr. 320). Pollard believed the water came from the water sprays and from the mine floor. (Tr. 220, 232, 280). Doss believed the water came from the top and the bottom and was related to poor roof conditions. (Tr. 302). He and Little testified that the hangers and belt line were wet. (Tr. 302, 306, 310-311, 349). Pollard testified that if the water had come from the roof, it would have washed the coal dust off the structure but did not. (Tr. 233, 361-362). Pollard testified that the wet areas still had float coal dust. (Tr. 233, 280). Doss testified wet coal dust would not burn and, in fact, would stop an explosion. (Tr. 306, 330-331). Pollard testified that wet areas could make an ignition less likely but might not stop one. (Tr. 260-261). However, the water in the area did not affect his decision regarding the likelihood because there was still float dust on the belt structure in the wet areas. (Tr. 234). He also believed wet or dry float coal dust would be picked up and act as fuel during an explosion. (Tr. 234).

Pollard was equipped with a gas detector, but it never sounded for CO. (Tr. 282). Respondent's belt line also had gas sensors that would shut down if it sensed CO before there was a fire. (Tr. 282). Pollard did not check if the system was working properly. (Tr. 282).

Pollard marked the citation as causing, at a minimum, lost workdays/restricted duty injuries from burns or smoke inhalation. (Tr. 234). He marked the condition as affecting two people because there was a belt examiner and belt cleaner in the area. (Tr. 234-235). Also, an explosion would affect anyone on the adjacent supply road. (Tr. 235).

Pollard marked the condition as being the result of high negligence because Doss was at the tailpiece but observed only the shoveled material. (Tr. 235). A person with a cap lamp should have seen this condition. (Tr. 289). Also, there was no coal dust in the air, indicating that the dust had been present for some time. (Tr. 274, 283, 289). Similarly, Doss had listed that the "belts need dusting" in the belt book for three consecutive days, countersigned by management, showing an obvious dust condition that needed corrected. (Tr. 217, 227-231, 235-238, 283, 306-307, 329, SX-2 p. 43, 48, and 53). No corrections were listed, and there was no indication of recent rock dusting.[16] (Tr. 238, 258, 274-275, 330). If Doss saw the condition for three days he should have seen it on the fourth day, but he did not list it. (Tr. 227, 289). Pollard believed the

[16] The foreman, having signed, was responsible for corrections. (Tr. 238-239). MSHA had spoken with Respondent many times about not listing conditions in their books and failing to make or record corrections. (Tr. 242-243, 259, 275). Pollard did not believe that Respondent had simply forgotten to record corrections here, there was no recent rock dust. (Tr. 283).

belt would have continued to worsen until the next exam. (Tr. 227, 245). Doss testified his notes referred to water, mud, and coal flakes and that he did not know if the material was combustible. (Tr. 307). He explained that a condition might be in the book five days before correction but that if there was an immediate hazard, he would have acted immediately. (Tr. 329-330).

Pollard marked the condition as an "unwarrantable failure," meaning he deemed it "aggravated conduct constituting more than ordinary negligence" because the examiner listed it in the book as needing dusting for three days and no corrective action was taken. (Tr. 239). In fact, Doss examined the area on the fourth day when the citation was issued and said everything was good. (Tr. 239). This was the first 104(d) action that Pollard had ever issued. (Tr. 239-240). While Pollard told Little underground that he was going to issue the citations he did not mention the (d) Order until an hour or two later. (Tr. 240-241, 257, 270). Pollard did not recall Little saying much in response, but Little did not recall being told of the citations at all. (Tr. 258, 338-339). Pollard did not mention the (d) Order because he wanted to confirm his beliefs with his supervisor first and eventually did so. (Tr. 240-241, 339-241). He had been trained to tell operators about Orders underground, and his failure here was an error. (Tr. 270). Little believed a supervisor told Pollard to issue the Order. (Tr. 339). He was surprised at the Order because he believed hazards should be removed immediately. (Tr. 339, 350). Doss did not find out about the (d) Order until after his shift. (Tr. 328). The next day he told Pollard the Order was a good lesson on documenting conditions; the (d) Order helped him learn. (Tr. 328-329).

Generally, belts are immediately taken out of service after a (d) order is issued. (Tr. 352-353). Neither Pollard nor Smith gave Respondent any orders or instructions on whether to shut down the belt. (Tr. 184-185, 243-244, 280, 339). Pollard's failure to do so before he left the area or issued the Order was a mistake because he had all of the criteria necessary. (Tr. 244, 270-271). In Smith's experience, a belt is only shut down when an imminent danger exists and must be secured but did not believe here that there was such a danger. (Tr. 184-185). Pollard believed there was no imminent danger after abatement. (Tr. 244). Little and Doss testified that Little spoke with Pollard and Smith about shutting down the belt, but they said they wanted to continue to run the belt. (Tr. 313, 338). Little testified that he would have shut the belt down if he had been informed there was a (d) Order. (Tr. 350-351). However, he conceded that once he received the Order he did not shut the belt down. (Tr. 352, 354-355).

To abate this condition, Respondent rock dusted the area and belt structure. (Tr. 241, 243). Pollard returned to the belt and terminated the Order at 10:40 the next day. (Tr. 241-242).

Pollard issued another citation for belt rubbing under 30 C.F.R. §75.1731(b). (Tr. 245-246, SX-5). That standard required belts to be aligned to prevent them from rubbing against the structure or components. (Tr. 246). Here, Pollard and Smith observed frictional contact between a misaligned belt and the metal frame of a bottom roller, causing heat.[17] (Tr. 168-169, 221, 246, SX-7). The belt was operating and rubbing during the inspection. (Tr. 169-170, 196, 198, SX-7, HX-3(1-U)). The belt was drifting from the left hanger and making intermittent contact with the

[17] Smith did not recall stating in his deposition that the photographs did not show physical contact with the belt conveyors. (Tr. 198-199).

structure. (Tr. 170-171, 199, 226, 278, 286, SX-8). It was rubbing more often than not and had had created a pile of filings and rubber shavings beneath the roller. (Tr. 226-227).

Pollard marked this citation as "Reasonably Likely" because, along with the float coal dust, it would have caused an ignition or explosion. (Tr. 246-247). The structure was already hot; Pollard could not hold it with his bare hand. (Tr. 170, 226, 247). It was hot enough to cut metal if left unabated. (Tr. 169-170). The belt and surrounding area were dry and there was float coal dust on top of the rock dust present. (Tr. 286-288, 320, SX-8). Pollard did not touch the rail with the rock dust and there was no combustible material in contact with the point of contact. (Tr. 200, 281, 292-293, SX-8). There was no smoke or smell of smoke. (Tr. 278). Pollard did not have a heat stick or heat pencil. (Tr. 282-283). Pollard marked this citation as likely to result in "Lost Workdays or Restricted Duty" injuries from burning or smoke inhalation. (Tr. 247). Pollard marked this citation as likely to affect 2 people because there was a belt examiner and belt cleaner in the area. (Tr. 248). Further, the belt entry was parallel to the travelway and anyone in that area would also be affected. (Tr. 248).

Pollard marked this citation as resulting from "moderate negligence" because the belt was intermittently rubbing the structure. (Tr. 248, 278). It was possible that the belt was not rubbing when Doss observed it, if it were rubbing all the time he would have made it high negligence. (Tr. 248, 278). Nonetheless, Pollard was able to notice the condition because it was rubbing and there was a pile of shavings underneath. (Tr. 248). Doss saw shavings, but did not see belt rubbing. (Tr. 323). The heat indicated that the belt had been rubbing for a while. (Tr. 226). Doss had experience with misaligned belts and testified that they can occur quickly from rollers failing from heat. (Tr. 298). He testified that he did not see the belt rubbing in the cited area during his exam. (Tr. 317, 320-321). He had aligned other belts before the inspection. (Tr. 309, 317-318, 321). If he had seen the belt rubbing here he would have corrected it. (Tr. 318, 322).

Pollard testified that the condition was abated when Little adjusted the rollers and trained the belt at 10:40. (Tr. 243, 248-249). Little did not recall aligning any belts. (Tr. 350, 357).

Smith also observed cords and fibers filling roller bearings on a return idler and on a support bracket. (Tr. 173, 176, 315, SX-9, SX-10). Cords and fibers can be created when misaligned belts rub and fray on the frame structure. (Tr. 173). However, Smith believed this condition came from the centerline spans that stream down from the center of the entry, because they were thicker than belt fiber. (Tr. 173-174). Smith knew from experience that this condition could cause mine fires; it had caused CO monitors to go off in the past. (Tr. 173). The material would tighten on the rollers and bearings causing friction and hot embers to fall to the floor. (Tr. 173-174, 176). Even if the material came from the flame resistant belt, the inner webbing was flammable, according to MSHA tech support. (Tr. 173). Doss had seen some of this material during his exam. (Tr. 314). The ripped string material was always present but Doss did not believe it was a hazard here because it was not a large wad. (Tr. 314-315). Little saw the material and discussed with Pollard and Smith whether it was a hazard. (Tr. 357-358).

Pollard also wrote Citation No. 8511141 because there was extraneous material (buckets, timbers, old belt rollers, and other items) in the entry. (Tr. 220, 251, 277, 333, SX-15). These items were a danger as a source of friction; belts would produce heat from rubbing

accumulations of material. (Tr. 252). However, none of the material was touching moving structure at that time so it was only a potential ignition source and a fuel source if a fire started elsewhere. (Tr. 277-278). All of this material should have been removed but there was no indication this was being done. (Tr. 252). Pollard believed one person conducting an exam with a cap lamp should have seen this material. (Tr. 288-289). Doss testified that he usually wrote up and removed the material but did not do so here. (Tr. 333-334). He asserted that federal inspectors have never considered the material a problem before. (Tr. 333).

Pollard also issued Citation No. 8511142 for loose roof, broken, and unsupported ribs that failed to meet the roof and rib control plans, including two ribs that had fallen on either side of the belt in the header area. (Tr. 168, 180, 220, 250-252, SX-16). Pollard did not list the location in this citation because there were so many ribs. (Tr. 194-195, 280-281, 285). Smith observed one loose, unsupported rib that had separated 12 inches from the top as well as another loose, overhanging rib. (Tr. 178-179, 181-183, SX-12, SX-13). The bottom of the first rib looked intact, but had stress fractures. (Tr. 179, 355-356, SX-12, SX-13).

During the inspection, Smith advised Respondent about MSHA policy requiring loose ribs to be, flagged (to notice the hazard), pulled, or supported while Pollard issued the citation. (Tr. 163, 168, 179-182, 325-326). Doss did not recall this conversation, but Little may have. (Tr. 324, 327-328, 356). If flagged, the condition should have been reported to management. (Tr. 181-182). Doss conceded that the ribs were not flagged. (Tr. 326-327). Smith and Pollard recalled Little and Baker pulling ribs during the inspection and recording others that were too tight for future correction but Little did not. (Tr. 168, 179, 194-195, 220, 276-277, 284, 350, 355). Doss and Little agreed that the cited ribs should have been pulled if possible, but did not believe they could be. (Tr. 325, 332, 356). Doss pulled a rib at the tailpiece before encountering Pollard, Little recalled seeing it. (Tr. 309-312, 321, 349-350). Doss tried to pull other cracked ribs, but they would not fall. (Tr. 316, 325). He tried to pull one loose rib three times before. (Tr. 325, 327). Smith and Pollard noticed some ribs down, but could not tell if they were pulled or fell before the inspection. (Tr. 194, 275).

In addition to flagging or pulling, there were other measures that could be used to secure ribs, including truss bolting and timbers wedged between the roof and the floor. (Tr. 191, 276, 303, 333). Truss bolting involved anchoring 6-8 angled bolts to a stable top which allowed the top to hold more weight and provided a fall warning. (Tr. 303). Truss bolting may not help the ribs. (Tr. 303). Here, there were some truss bolts from Crosscut 18 to the tail, but only as needed. (Tr. 303-304). Further, Respondent was not bolting the area at the time of the citations but increased their use after the citation. (Tr. 333). In addition to bolts, there were heavy-duty, round, (usually dry) crosscutter timbers wedged along the entire entry. (Tr. 302-303). Pollard and Smith believed that timbers could be used to support ribs when used properly, but that they were inadequate for large, loose ribs and would be knocked out in a fall. (Tr. 190-192, 276). In Smith's opinion, the timbers present were a mere "token effort" to support the ribs. (Tr. 193). Some loose ribs had no timbers (though Pollard could not say how many there were). (Tr. 193, 284-285). Also, Smith believed that simply wedging timbers without a crossbar and leg support was insufficient. (Tr. 191). Doss testified that MSHA had previously stopped him from using timbers, but that he had started using them again after the instant citations. (Tr. 317, 326).

Pollard believed the ribs were dangerous; they could fall and crush a miner or pin a miner against the belt. (Tr. 179-180). Rib conditions, including rolls and bursts, were a leading cause of injury in coal mines. (Tr. 180, 297). The fact that some ribs could not be pulled was not important to Pollard because they could fall at any time. (Tr. 284). Little agreed that all ribs, not just loose ribs, were a hazard. (Tr. 326). The ribs were located where examiners and mechanics walked. (Tr. 179). A bit box hung from one rib, indicating exposure to workers. (Tr. 181).

Pollard testified that a single person with a cap lamp should have found the obvious. (Tr. 288). One of the ribs was cracked top to bottom and white rock dust was visible. (Tr. 182). Miners, particularly examiners, must always be aware of ribs and should see any conditions that the inspector noticed at a glance. (Tr. 253, 288, 297). In Pollard's view, the conditions did not occur after Doss' exam. (Tr. 253). Some of the loose ribs had rock dust behind them, indicating they had been loose for a while. (Tr. 283-284). Other ribs had missing plates that were in other areas, indicating they had been missing for a while and moved after they fell. (Tr. 284).

Pollard wrote another citation, No. 8511145, for an inadequate on-shift examination under 30 C.F.R. §75.362(b). (Tr. 249, 273, SX-6). He testified that this standard required operating belts to be examined by a certified person for hazards and violations on production shifts. (Tr. 249-250). Here, Pollard found that the other cited conditions indicated the exam was inadequate. (Tr. 250). He believed these conditions had existed during Doss' exam because he had just finished and they could not have arisen in so short a time. (Tr. 250, 273).

This citation was marked "Reasonably Likely" because miners were required to work in the area and, as a result of the poor exam, the conditions would continue. (Tr. 255). The citation was marked for "Lost Workdays or Restricted Duty" because miners could suffer burns, smoke inhalation, broken bones, and cuts or lacerations. (Tr. 255). Two people, the belt examiner twice a day and the belt cleaner, would travel this area. (Tr. 255). Also, the supply road was in constant use and miners using it would be affected by an explosion. (Tr. 255).

This citation was marked as the result of "high negligence" because Pollard did not believe that Doss could travel the belt line and not see the conditions. (Tr. 256). Doss should have seen the extraneous materials. (Tr. 251-252). Further, Doss had listed the dust in the book for three days (it was possible those exams were adequate). (Tr. 256, 273). Pollard conceded that he traveled the entry moving outby, while Doss traveled inby and that it was possible to see different things from different directions. (Tr. 266-267, 288). Further, it was dark and there were four members in the inspection group with lamps while belt exams were conducted by one examiner. (Tr. 265-266). Pollard agreed that four lamps illuminated more than one, but believed one lamp would light the area. (Tr. 267). Doss testified he shut down belts when needed, including that day. (Tr. 316). Smith told Doss that he needed to do a better job of examining the area, but every inspector says that. (Tr. 323). However, he agreed that he could have done a better job that day; he was always learning ways to improve. (Tr. 324).

To abate the citation, a meeting with on-shift examiners was held on recognizing and recording hazards. (Tr. 257). Little worked with management on ribs and rock dust. (Tr. 256).

B. Timing Issue

Before discussing the specifics of both of the citations at issue with respect to the testimony summarized above, I would like to first address an argument Respondent made regarding the timing of both of these citations. In short, Respondent argues that the time each citation was issued, according to the time listed on the Inspector's citation forms, does not match the location shown on Respondent's tracking system.[18] (*Respondent's KENT 2013-480 Post-Hearing Brief* at 37-40, Tr. 340, 345, 360, SX-5). For instance, Respondent noted that at 9:40 when the citation for extraneous material from the tailpiece to the header was issued, the tracking system indicated that the inspection group was closer to the tailpiece than the header, meaning the examination had just started. (*Id.* at 39-40, Tr. 346-348, SX-5, p. 9). Similarly, Citation No. 8511143 for float coal dust across the entire entry was issued at 10:15 a.m., before Little reached the header. (Tr. 348). Respondent asserts that similar discrepancies exist with respect to the other citations. (*Id.* at 40). As a result, it argues that Inspector Pollard did not actually see the conditions and that he only decided to write the citations after speaking with his boss. (*Id.*).

I credit the testimony of Inspector Pollard that he wrote his citations when he believed that he had enough evidence to justify the citations. (Tr. 268-270). He sometimes knew he was going to issue a citation, but not the extent of the condition until he finished the inspection. (Tr. 268-269). For instance, Pollard testified he had seen a citable condition for extraneous material at 9:40, but finished the inspection and saw it spanned the whole entry. (Tr. 269-270). He often cited in this manner. (Tr. 269-270). While he wrote citations that covered the entire entry, I find that it was reasonable that he not wait until he saw the entire entry, if what he saw in a small area of the entry was sufficient to justify a citation.

Further, I am not convinced that using the tracking system to line up the inspector's notes with the location of the examination group is accurate. The entry at issue here was a mere 2,000 feet long. According to Little, the system monitored 500 feet inby and outby each tracker. (Tr. 362-363). While no one testified as to how many trackers were in the area, according to these facts two trackers could cover the entire area of the belt entry. Further, if a miner was picked up on a tracker at the far end of its range and then walked towards the tracker, passed it, and then was picked up on the other, far end of its range, that miner would travel 1,000 feet (or half the entry) while still being shown as standing in the same area. (*See* Tr. 359, 362-363). The wide area between the trackers, and the problems that this could cause, was demonstrated by the fact that, at one point, the tracker showed Little moved 12 crosscuts in 9 seconds. (Tr. 359). I find that the tracker data, for the purpose of determining the location of the inspection group at the exact moment of each citation, is not accurate and will not be considered.

Finally, I decline to find, in the absence of any other evidence, that MSHA inspectors and investigators fabricated conditions at the Highland No. 9 Mine. If Respondent wanted to make a claim that a conspiracy existed to frame the operator for some nefarious purpose, it would need to produce some actual evidence showing the existence of such a plot. For now, we will stick to the more prosaic pursuit of dealing with the facts on the record.

---

[18] Respondent's tracking system had sensors every 500 feet that would record a miner's location. (Tr. 340-342). Little was always within 500 feet of Smith and Pollard. (Tr. 359).

C. Contentions of the Parties Regarding Citation No. 8511144

With respect to Citation No. 8511144, the Secretary asserts that Respondent violated 30 C.F.R. §75.1731(b), that this violation was reasonably likely to result in a Lost Workday/Restricted Duty injury to two miners, that the violation was S&S, and that it resulted from moderate negligence. (SX-5)(*Secretary's KENT 2013-480 Post-Hearing Brief* at 9-13). The Secretary also believes that the proposed penalty of $1,657.00 is appropriate.

Respondent argues that Citation No. 8511144 was not valid and should be vacated. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 10-13). It further argues that, in the event the citation is found to be valid, that the violation was not S&S. (*Id.* at 17-22). It also believed that its actions would be better characterized as showing no negligence. (*Id.* at 13-17). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

D. Findings of Fact and Conclusions of Law Regarding Citation No. 8511144

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.1731(b).

On November 8, 2012, Inspector Pollard issued a 104(a) Citation, No. 8511144, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> Conveyor belts must be properly aligned to prevent the moving belt form rubbing against the structure or components. The 1st Main North conveyor belt is rubbing a bottom roller hanger between the #11 and #12 crosscuts. The hanger was hot to the touch
>
> The Beltline was in operation at the time of inspection
>
> Section 75.1731(b) was cited 46 times in two years at mine 1502709 (46 to the operator, 0 to a contractor).
>
> (SX-5).

The cited standard, 30 C.F.R. §75.1731(b). ("Maintenance of belt conveyors and belt conveyor entries."), provides the following:

> (b) Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.
>
> 30 C.F.R. §75.1731(b).

At hearing, Secretary's counsel presented credible evidence to show that, at the time of the inspection, the 1st Main North conveyor belt was operating and rubbing a bottom roller hanger between the #11 and #12 crosscuts. (Tr. 168-170, 196, 198, 221, 246). The contact with the structure was intermittent (though the belt rubbing more often than not) and drifting from the

left hanger. (Tr. 170-171, 199, 226-227, 278, 286). The rubbing had created a pile of filings and rubber shavings beneath the roller. (Tr. 226-227). Therefore, I find that the Secretary met his burden, showing by a preponderance of the evidence that Respondent violated 30 C.F.R. §75.1731(b).

In its brief, Respondent argued that this violation was invalid. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 10-13). However, Respondent's argument was not compelling.

Specifically, Respondent argues that the photographs introduced by the Secretary to prove the existence of this violation do not show the belt rubbing the structure. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 11). It notes that Smith admitted that SX-7 was not clear right after stating that it showed the belt making contact. (*Id. citing* Tr. 169-170). With respect to SX-8, Respondent argues that Smith conceded that the belt in SX-8 is shown moving away from the left hanger, but tried to say that this meant the belt was drifting. (*Id. citing* Tr. 170-171). Respondent also argues that Smith admitted that he testified that the pictures did not show physical contact between the belt and structure. (*Id.* at 11-12 *citing* Tr. 198-199). Respondent instead pointed to Doss' testimony that, after he corrected one misaligned belt, the belt was not rubbing, as shown in the pictures. (*Id.* at 12 *citing* Tr. 317-323).

Upon review, I found the photographs SX-7 and SX-8 to be extremely dark and difficult to discern. I cannot tell from the photographs whether the belt was rubbing or not. However, Respondent was not cited for being photographed with rubbing belts. In fact, the person who issued the citation (Inspector Pollard) was not the person who took the photographs (Investigator Smith) and his determinations regarding the cited condition were made wholly independent of the photographs. As noted *supra*, I credit Inspector Pollard's testimony that the belt was rubbing the structure in the cited area. (Tr. 221, 245-246). Whether the photographs depict the cited condition is only material if I believe that Inspector Pollard lied about the rubbing belts in order to frame Respondent and that the Secretary chose to expose its own fraud by submitting photographs that undermined the plot. I see no reason to believe such a bizarre series of events transpired here. Instead, I find that the photographs are of little probative value but that the testimony of Inspector Pollard and Investigator Smith clearly establishes the existence of a violation.

Respondent also argued that the Secretary presented no physical evidence of the cited condition. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 12). It noted that the Smith's photographs did not show rubbing, that Pollard did not take the photographs, and that the inspector did not use a heat pencil to substantiate the heat of the rubbing belt. (*Id.* at 12-13). It argues that the evidence MSHA could have provided, but did not, would have been exculpatory. (*Id.* at 13).

As noted with respect to the other citations discussed *supra*, testimony is evidence. Inspector Pollard and Investigator Smith credibly testified that the belt was rubbing. (Tr. 221, 245-246). Even in the absence of photographs, the testimony credibly established that the belt was rubbing. The testimony to the effect that the belt structure was hot to the touch, that there were belt shavings on the floor, and that there were belt ravelings on the rollers further confirms that a condition existed. I see no reason to disbelieve the two inspectors.

With respect to the heat pencil, the fact that the structure was hot is important in considering the likelihood or negligence. The evidence regarding the heat of the belt will be discussed in the sections concerning gravity and negligence *infra*. However nothing in the cited standard requires that the rubbing belt caused heat. Heat may indicate that the condition exists, but the absence of heat does not mean that it definitely did not. Even if the belt had become misaligned and started rubbing just minutes before the inspection and had not yet caused any increase in heat, there would still be a violation. The validity of this citation does not hinge on the heat of the rubbing belt and even if the Secretary's failed to provide any evidence as to the temperature of the belt (which is not the case here, as the inspector testified about the heat), a citation can be appropriate. Therefore, I find that the citation was validly issued.

2. The Violation Was Reasonably Likely to Result in Lost Workday/Restricted Duty Injury To Two Miners And Was Significant And Substantial In Nature.

Inspector Pollard marked the gravity of the cited danger in Citation No. 8511144 as being "Reasonably Likely" to result in "Lost Workday/Restricted Duty Injury" to two miners. (SX-5). Pollard also determined that the violation was S&S. (SX-5). These determinations are supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard – it has already been established that Respondent violated 30 C.F.R. §75.1731(b).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. As discussed *supra*, the Secretary presented credible evidence that the belt was rubbing the structure in a dry area between crosscuts 11 and 12 in the 1st Main North belt entry. (Tr. 221, 245-246, 286-288). The Secretary presented further credible evidence that this rubbing had caused a pile of belt shavings to accumulate under the structure. (Tr. 226-227, 323). Friction from the belt rubbing had warmed the area to the degree that Pollard could not keep his hand on the structure, making a fire or smoke more likely. (Tr. 170, 221, 226, 247). It was hot enough to cut metal if left unabated. (Tr. 169-170). Float coal dust in the entry, coal particles on the belt, accumulations of material on the floor, and the belt shavings would act as a fuel source for a fire or explosion. (Tr. 225, 227, 244-247, 278, 286-288, SX-8). The cited condition clearly contributed to the danger of a fire, inundation of smoke, or explosion in the entry. (Tr. 221, 246-247).

Respondent presented several arguments for the proposition that there was no confluence of factors that could result in a fire, smoke, or explosion. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 17-21). However, none of these arguments are compelling.

Respondent argued that the necessary elements for the "fire triangle" (oxygen, fuel source, and ignition source) were not present meaning that no fire was possible. (*Respondent's KENT 2013 Post-Hearing Brief* at 17). Respondent argued that there was not a confluence of factors present to create a fire. (*Id.* at 17-18, *citing Enlow Fork Mining Co.*, 19 FMSHRC at 9). Respondent makes several points related to this argument and I will consider each in turn.

First, Respondent argued that there was no explanation for how something that was merely too hot to hold would cause an ignition. (*Respondent's KENT 2013 Post-Hearing Brief* at 18). It cited *Highland Min. Co.*, for the proposition that holding a structure and feeling the heat was not enough to support a finding that a fire was likely. (*Id.* at 19, *citing* 34 FMSHRC 2612 (2012)). According to Respondent, without objective measurements of temperature, Inspector Pollard's testimony was mere conjecture. (*Id.*) Relatedly, it argued that because the belt was rubbing only intermittently that it would lose heat and reach an equilibrium before it could become hot enough to serve as an ignition source. (*Id.* at 18-19).

I credit the testimony of Inspector Pollard for the proposition that the hot belt structure indicated that the frictional contact was causing heat and that this heat would have grown into an ignition source if left unabated. The exact temperature of the belt structure and Inspector Pollard's failure to use a heat pen were far less important than the observed facts: the belt structure was so hot that Pollard could not keep his hand on it and it would continue to get hotter. (Tr. 221, 226, 247). Eventually, it would get hot enough to produce smoke or even cause ignition. There is no basis, whether in the record or in common sense, for Respondent's assertion that the heat from the frictional forces here would "top out" at a level below which the hazard would be realized.

Furthermore, Judge Rae's decision in *Highland Min. Co.*, 34 FMSHRC 2612 does not in any way imply that the heat observed by touching a structure is insufficient as proof of the likelihood of a fire. There, Judge Rae found:

> With regard to the heat source present, Yates could not say how long it would take for the roller hangers to become sufficiently hot to cause a belt fire, or even if a belt fire would occur. (Tr. 286, 313.) On the other hand, Cowan who was with Yates during the inspection, testified at his deposition that after Yates felt the roller hanger, Cowan removed his glove to feel the roller hanger as well. He found it to be warm to the touch but not warm enough to raise a concern. He also observed the belt running over the hanger and found the belt was only occasionally rubbing on the hanger. Cowan also scaled the rock that concerned Yates and had a difficult time prying it loose. (Cowan dep. at pp. 17-20.) There was no evidence of methane or electrical equipment in the entry. This evidence is not sufficiently convincing to support the proposition that it was reasonably likely that the misaligned belt would result in an ignition, should coal or other accumulations fall on the belt, under continued normal mining conditions.

Id. at 2620.

Judge Rae's reasoning clearly relies on the fact that the inspector did not know if a belt fire would occur. In the instant matter, Inspector Pollard credibly testified that a fire, smoke, or explosion was reasonably likely. (Tr. 246-247). Further, In Judge Rae's case the testimony from the operator's ventilation coordinator that he touched the structure and found it warm, but not enough to raise concern, was additional support for the Judge's ruling. But the Judge in no way held that the observed heat is not enough evidence to support a finding. Contrast the ventilation coordinator's testimony that the structure was warm, but not a concern, with Inspector Pollard

testimony in the instant matter that he could not keep his hand on the material because of the intense heat. The situations are clearly different. Finally, Judge Rae noted that there were no accumulations or belt shavings in the area. 34 FMSHRC at 2619. That indicates that the situation was less serious than here, where float coal dust, extraneous material, and belt shavings were found. (Tr. 246-247, 278). In short, Judge Rae considered the observed temperature as part of all the circumstances present and found that, in that situation, a fire was not likely. I have considered all the present circumstances with respect to the instant matter and found that a fire was reasonably likely.

Respondent also argued that a fire was not likely to occur because the belt rubbing and the float coal dust were not in the same place at the same time. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 19-20 citing Tr. 200, 211, 281).

It is true that Inspector Pollard testified that the float coal dust was not directly on the belt structure where he found the frictional heat. (Tr. 200, 281, 292-293). However, he also credibly testified that there was float coal dust on the manifold, the belt structure (including the rails holding the rollers and roller frames), the framing, the waterline, and the mine floor. (Tr. 201, 208, 220-223). He credibly testified that the accumulations started about two crosscuts outby the tailpiece and stretched most of the 2,000 feet length of the belt entry. (Tr. 222-223, 233). Most importantly, the dust was largely uniform throughout the area. (Tr. 261, 281). While one location directly next to the warm area was devoid of float coal dust, the dust was all over the area.[19] A piece of belt shaving, a piece of coal on the belt, or ravelings on the belt could have been ignited from the cited condition and fallen to the mine floor, where coal dust and other extraneous material was accumulated. While the fuel source was not located at the exact spot where the belt was rubbing, the area was essentially surrounded by fuel sources. As a result, smoke, fire, or explosion was reasonably likely.

Respondent also argued that the belt was wet and therefore unlikely to combust, there were water sprays, and CO monitors. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 20). For the reasons discussed with respect Citation No. 8508512, this argument fails. Wet coal will eventually dry out and additional precautionary measures do not eliminate the risk of hazard. Smoke, fire, or explosion was still reasonably likely.

Respondent also argued that the inspectors were not seriously concerned about a mine fire because, even though they were asked by Respondent's employees, they chose not to shut down the belt that day. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 20-21). It notes that Pollard and Smith's explanations for this failure (that it was a mistake and that belts are only shut down for imminent dangers, respectively) are post-hoc rationalizations covering up the fact that there was no danger. (*Id.* at 21).

Regardless of what the inspectors thought, at the time, an objective analysis of the observed conditions indicated that there was a reasonably likelihood of a hazard. There was a belt rubbing against the belt structure creating heat, there were belt shavings and ravelings, and

[19] As will be discussed *infra* with respect to Citation No. 8511145, Respondent has essentially conceded that the Inspector's observations with respect to the location and amount of float coal dust were accurate.

there was float coal dust and other accumulations. This was a dangerous situation that could have resulted in smoke, a fire, or an explosion. Whether the inspectors recognized the danger at the time is not important. However, with that noted, I see no reason to disbelieve Inspector Pollard's explanation that he made a mistake in delaying the issuance of his first 104(d) Order and should have shut down the belt at the time. I decline the opportunity to teach Inspector Pollard a lesson on being decisive and communicating clearly at the expense of the health and safety of miners.

In light of the fact that smoke, fire, or explosion was reasonably likely, I find that the second prong of *Mathies* is met.

The third element of the Mathies test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. It is reasonably likely that, in the event of a fire, the two miners in the entry would be affected by the smoke or by the fire directly, resulting in injuries. (Tr. 248). Miners sent to fight the fire would also be affected and receive injuries. In the event of an explosion, miners in the entry, or even in the adjacent travelway, would be affected and could suffer injury. (Tr. 248). Therefore, I find this an injury was reasonably likely and that the third prong of *Mathies* was met.

Respondent argued for the proposition that no injury was reasonably likely. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 21-22). However, that argument was not compelling.

Respondent argued that even if the belt rubbing could cause a fire, that was merely a possibility and too remote and speculative to sustain an S&S designation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 21-22). It argued that the Secretary's interpretation was so broad as to encompass all citations. (*Id.* at 22). It cited *U.S. Steele Min. Co., Inc.*, for the proposition that the hazard contributed must result in an event in which there is an injury. 7 FMSHRC 1135, 1129 (1985). It argued that an injury must be more than just possible.

Respondent suffers the same confusion about the nature of the *Mathies* test post-*Musser* as many other operators. I will attempt to clarify the issue here. The question of whether smoke, fire, or an explosion would be likely in this situation is not properly considered under the third prong of *Mathies*. That issue, whether the violation contributed to the hazard of smoke, fire, or explosion, was considered at length in the discussion of the second prong of *Mathies infra*. For purposes of the third prong of *Mathies*, it does not matter if the violation itself would cause an injury. *Musser*, 32 FMSHRC 32 at 1281. After the second prong, the violation is no longer under consideration; the hazard contributed to is the issue. Specifically, the question with respect to the third prong of *Mathies* is whether the hazard contributed to would be reasonably likely to result in injury. Here, the hazard contributed to (smoke, fire, or explosion) would be extremely dangerous in the mine and an injury would be very likely. Therefore, the third prong of *Mathies* is met.

The fourth and final prong of *Mathies* – a reasonably likelihood that the injury in question will be of a reasonably serious nature – was also met. Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the

injury in question will be of a reasonably serious nature." *Mathies* Coal Co., 6 FMSHRC at 3-4; U.S. Steel, 6 FMSHRC 1573, 1574 (July 1984). In the event of a fire or explosion, the Secretary presented credible evidence that miners would suffer lost workday/restricted duty injuries from burning or smoke inhalation. (Tr. 247). Further, miners in the adjacent travelway would be affected in the event of any explosion. (Tr. 248). As with Citation No. 8508512 *supra*, miners fighting any fires would also be affected by burns and smoke inhalation. (Tr. 26, 29). These injuries would be sufficiently serious to result in an S&S designation. Therefore, the fourth prong of *Mathies* is met.

Once again, I note that an inspector's opinion regarding S&S is accorded substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC at 1278-79, *Buck Creek Coal, Inc.*, 52 F.3d at 135-36. Here, Pollard credibly testified that the citation was S&S. As a result of the inspector's opinion and, more importantly, the factors discussed above, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

Therefore, the preponderance of the evidence supports the Secretary's determination with respect to the likelihood of injury, the severity of that injury, and the S&S designation.

With respect to the number of persons affected, the Secretary presented credible evidence that if smoke, fire, or explosion were to occur that the belt examiner and belt cleaner would be affected. (Tr. 248). Further, the miners in the belt entry would also face injury. (Tr. 248). Pollard marked this citation as likely to affect 2 people because there was a belt examiner and belt cleaner in the area. (Tr. 248). Further, the belt entry was parallel to the travelway and anyone in that area would also be affected. (Tr. 248).

In short, the preponderance of the evidence shows that Citation No. 8511144 was reasonably likely to result in lost workday/restricted duty injuries to two persons and was S&S.

3. Respondent's Conduct Displayed "Moderate" Negligence.

In the citation at issue, Inspector Pollard found that the operator's conduct was moderately negligent in character. (SX-5). The substantial evidence supports this designation.

With respect to knowledge, the factual situation presented here is substantially similar to that in Citation Nos. 8508232 and 8508512. A mine examiner had passed through the area just minutes before the inspector discovered and cited the violative condition. (Tr. 219, 301, 304, 319-320). In fact, the inspector found the examiner, Doss, just as he was completing his examination. The examiner had traveled the belt entry and past the area where the rubbing belts had been discovered but did not correct, record, or flag the cited condition as he should have. (Tr. 250). The heat indicated that the belt had been rubbing from a while. (Tr. 226). As with the previous citation, the examiner was an agent of Respondent and his actions were imputable to the operator. *Whayne Supply Co., supra*; *Rochester & Pittsburgh Coal Co., supra*; and *Southern Ohio Coal Co., supra*. As a result, Respondent knew or should have known about the cited condition but took no action. Therefore, Respondent was negligent.

I credit Pollard's testimony that he marked this citation "moderate negligence" because the belt was intermittently rubbing the structure in one place. (Tr. 248, 278). It was possible that the belt was not rubbing when Doss observed it. (Tr. 248, 278). If it had been rubbing all of the time, he would have made it high negligence. (Tr. 248). Nonetheless, Pollard was able to notice the condition because it was rubbing and there was a pile of shavings underneath. (Tr. 248). Also, the heat indicated that the belt had been rubbing for a while. (Tr. 226).

Respondent argued that it did not have knowledge of the cited condition and therefore, cannot be negligent. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 15-17). However, Respondent's arguments are not compelling.

First, Respondent argues that the condition was not present at the time of the examination. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 15-16). It noted that even Pollard said that the belt might not have been rubbing when he looked at it. (*Id. citing* Tr. 248). Doss confirmed that the belt was not rubbing in the location. (*Id.*). Respondent argued that if the condition did not exist at the time of an examination, but then cropped up later, it cannot be negligent because it neither knew nor should have known. (*Id.*).

It is true that Inspector Pollard testified that the belt may not have been rubbing at the time of the examination and that Doss testified that it was not. However, that does not negate the fact that Respondent should have known about the cited condition. While the intermittent rubbing made the condition slightly less obvious, there were still indicators that Doss should have noticed. Most importantly, Pollard testified that there was a pile of shavings underneath the belt that were obvious to him and should have been an indicator to Doss that the belt was rubbing. (Tr. 248). Doss should have seen these belt shavings and known that the belts were misaligned. The heat of the belt was also an indicator that a condition existed. (Tr. 248). While the heat of the belt structure would only be obvious if Doss felt the frame, he should have been particularly diligent for ignition sources in light of the fact, as noted *supra*, that the entire entry was covered in float coal dust. (Tr. 201 208, 220-223,233-234, 259-260, 272). Therefore, I find that Respondent should have known about the cited condition and, as a result, it was negligent.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. As discussed *supra*, Pollard conceded that the belt might not have been rubbing when Doss was in the area. (Tr. 248). Doss credibly testified that he did not notice the condition during his examination. (Tr. 317, 320-321). The belt was only rubbing the structure intermittently. (Tr. 170-171, 199, 226, 248, 278). In light of these facts, I find that the condition was only somewhat obvious and that, while he should have found the condition, Doss likely believed there was no rubbing belt. In light of this mitigating circumstance, I find that Respondent was only moderately negligent.

Respondent argued that it should be found to have exhibited "Low" or "No" negligence as a result of this condition. However, none of its arguments are compelling.

First, it argued that the fact that Doss conducted a timely examination and had no "actual subjective knowledge" of the condition was a considerable mitigating factor. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 16). I found that the fact that the condition was not

particularly obvious to be a mitigating factor. However, as discussed at length *supra*, whether Respondent had actual subjective knowledge is immaterial to a negligence finding. While the condition was somewhat hidden, Doss still should have known about it. As a result, I do not believe this to be a "considerably" mitigating factor.

Second, Respondent also asserted that the examination was properly conducted, citing to its argument with respect to Citation No. 8511145. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 16.). For the reasons discussed in the section regarding that citation *infra*, the examination was not adequate. As a result, the examination cannot be considered a mitigating circumstance.

Third, Respondent argued that the Secretary alleged no history of belt problems. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 16-17). It further argues that it was not on notice that this condition was a concern. (*Id.* at 17). As with Citation No. 8508512, that assertion is simply false. The Secretary presented uncontested evidence that Respondent had been cited 46 times at Highland Mine No. 9 in the two years prior to this citation. (SX-5). Further, this condition was cited after Citation No. 8508512 above, where Respondent was cited for a rubbing belt and the condition discussed in *Highland Mining Company, LLC*, 35 FMSHRC at 236. Further, as noted *supra*, the area was covered in float coal dust, so Doss should have been very aware of any possible ignition source. Therefore, Respondent had been cited extensively for rubbing belts and should have known to pay special attention to that condition.

Finally, Respondent argued that Pollard's testimony about how long the condition existed was speculative. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 17). I do not find this to be the case. Pollard testified that the condition had existed for some time because of the heat of the structure and the amount of shavings. (Tr. 226, 248). Pollard in fact, does not speculate as the exact amount of time the condition existed. However, as Doss had just passed through the area, it would not need to have existed long for it to have been present during the last examination.

4. Penalty

In this matter, the Secretary proposed a penalty of $1,657.00 for Citation No. 8511144. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $1,657.00.

E. Contentions of the Parties Regarding Citation No. 8511145

With respect to Citation No. 8511145, the Secretary asserts that Respondent violated 30 C.F.R. §75.362(b), that this violation was reasonably likely to result in a Lost Workday/Restricted Duty injury to two miners, that the violation was S&S, and that it resulted from high negligence. (SX-6)(*Secretary's KENT 2013-480 Post-Hearing Brief* at 13-18). The Secretary also believes that the proposed penalty of $3,689.00 is appropriate.

Respondent argues that Citation No. 8511145 was not valid and should be vacated. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 23-35). It further argues that, in the event the citation is found to be valid, that the violation was not S&S. (*Id.* at 36-37). It also believed that its actions would be better characterized as showing no negligence. (*Id.* at 35-36). Finally, Respondent presumably believes that there should be no penalty or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

F. Findings of Fact and Conclusions of Law Regarding Citation No. 8511145

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.362(b).

On November 8, 2012, Inspector Pollard issued a 104(a) Citation, No. 8511145, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> An inadequate on-shift exam was conducted on the 1st Main North beltline on 11/08/2012 on the day shift, the following hazards were found during an MSHA inspection;
>
> 1] Loose unconsolidated ribs.
> 2] Accumulations of float coal dust.
> 3] Belt rubbing bottom roller hanger.
> 4] Extraneous Materials located in belt entry.
>
> Citation #'s [sic] 8511141, 8511142, 8511143, and 8511144 were issued in conjunction with this citation. In order to abate this citation, the Operator is required to conduct a meeting with all personnel required to conduct an on-shift examination and discuss recognizing, reporting, and recording hazards, also the importance of making adequate on-shift exams.
>
> Section 75.362(b) was cited 2 times in two years at mine 1502709 (2 to the operator, 0 to a contractor).
>
> (SX-6).

The cited standard, 30 C.F.R. §75.362(b). ("On-shift examination."), provides the following:

> (b) During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. §75.362(b).

In short, the standard requires an adequate examination of active belt entries during each shift. This includes a requirement that any hazardous conditions found be recorded. *See e.g.*, *Excel Mining LLC*, 2013 WL 8540990, *19-20 (Aug. 15, 2013)(ALJ Biro)("the duty to record hazardous conditions observed by an examiner during an onshift examination is implicit in 30 C.F.R. § 75.362(b)"); *TRC Mining Corp.*, 2013 WL 1856600, *9 (Mar. 7, 2013) (ALJ Zielinski) (internal citations omitted) ("The Commission has held that the preshift standard requires a preshift examiner to find and record a hazardous condition in a preshift examination book. Section 75.362(b) imposes a virtually identical requirement."); *Bledsoe Coal Corp.*, 2012 WL 5178246, *30-31 (Oct. 2, 2012) (ALJMoran)(holding that the standard requires operators to conduct adequate exams and that an exam is not adequate if it does not report hazards). Judge Barbour succinctly explained the way in which the standard should be applied:

> It is beyond doubt that the requirement of section 75.362(b) to conduct an on shift examination during each shift when coal is produced, carries with it the obligation that the examination be sufficient to detect existing hazardous conditions. In other words, subsumed in the standard is the obligation that the examination be adequate. Among the ways of proving that an operator has not met this requirement is to show that a hazardous condition existed in an area that was subject to an on-shift examination, that the hazardous condition continued to exist after the examination and that the hazardous condition was not recorded in the surface examination book.

Twentymile Coal Co., 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ Barbour) *rev'd on other grounds,* 2014 WL 4387695 (Aug. 25, 2014). Further, Judge Feldman suggested that adequacy of an on-shift examination should be analyzed based on what a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have done in the situation. *Martin County Coal Corp.*, 2014 WL 2154273, *14 (Apr. 29, 2014)(ALJ Feldman)(citations omitted).

In the instant matter, Inspector Pollard and Investigator Smith credibly testified about 4 conditions along the 2,000 foot expanse of the First Main North belt entry. They included rib violations, accumulations of float coal dust along the entry, belt friction, and extraneous material.

With respect to the ribs, Pollard and Smith presented evidence that there were loose, unconsolidated ribs along the length of the entire entry. (Tr. 168, 220 252, 285, SX-16). At least two of the ribs that Pollard observed were obvious. (Tr. 250-251). Smith saw a rib that had separated leaving a 12-inch gap. (Tr. 178-179, 181, SX-12). This particular rib was loose and unsupported. (Tr. 179). Smith saw another rib that was separated, loose, and overhanging. (Tr. 181-183, SX-13). This was a hazardous condition because loose ribs could fall and strike a miner. (Tr. 179-180). The miner could be pinned to the belt structure. (Tr. 179-180). Injuries from rib conditions were very common in the mining industry. (Tr. 180, 297). Injuries from such a hazard could include broken bones, cuts and lacerations, or other lost workday/restricted duty type injuries. (Tr. 255). Examiners and mechanics traveled in the area with the broken ribs. (Tr. 179). No rib conditions were recorded in the examination book.

With respect to the accumulations, there was float coal dust located on the manifold, the belt structure, the framing, the waterline, and the mine floor. (Tr. 201, 208, 220-223). The accumulations started two crosscuts outby the tailpiece and stretched across the entry belt entry. (Tr. 222-223, 233). The dust the inspectors observed was largely uniform throughout the area and therefore obvious. (Tr. 261, 281). Doss had listed that the area needed to be dusted for three days prior to the subject inspection. (Tr. 227-231, 235-238, 283, 306-307, 329, SX-3 p. 43, 48, and 53). The float coal dust contributed to the hazard of smoke, fire, and explosion. (Tr. 225, 227, 244-245). Injuries could include smoke inhalation, burns, or even death in the event of an explosion. (Tr. 234). Examiners and mechanics worked in the area while other miners traveled on the adjacent travelway. (Tr. 234-235). No accumulations of this kind were recorded in the examination book. (Tr. 310).

The issue with belt rubbing has been discussed at length with respect to Citation No. 8511144, *supra*. I incorporate the findings made with respect to that citation here. This condition was not recorded in the examination book.

Finally, with respect to the extraneous material, Pollard testified that he found buckets, timber, old belt rollers, and other items accumulated in the entry. (Tr. 220, 251, 277, 333, SX-15). He credibly testified that these items were a danger as a source of friction; they were allowed to accumulate under the belts and produce heat from the belt rubbing against them. (Tr. 252). They could also serve as fuel in the event of a fire starting elsewhere. (Tr. 252, 278). They may have also served as a tripping hazard. Pollard believed one person conducting an exam with a cap lamp should have seen this material. (Tr. 288-289). Doss conceded that the material was present at the time of the examination and that it was not recorded. (Tr. 334).

In light of the existence of these hazardous conditions, most of which were obvious, and the fact that these conditions were not recorded or corrected, I find that Respondent violated 30 C.F.R. §75.362(b)

In its brief, Respondent argued that this violation was invalid. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 23-35). Essentially, in its argument the Respondent seeks to undermine Citation No. 8511145 by showing that the underlying conditions were not hazardous and therefore cannot form the basis of an inadequate examination citation. Essentially, Respondent argues that the conditions with the ribs, float coal dust, and rubbing belt either did not exist or were not sufficient to support this citation. However, Respondent's argument was not compelling. I will first make a general point about Respondent's position and then consider each of Respondent's arguments as to each issue in turn.

Put broadly, Respondent's argument with respect to this citation is that the underlying citations were invalid and therefore the examination was adequate. However, Respondent's actions, both before and after the hearing, effectively bar it from taking this position.
On October 10, 2014, I issued a Decision Approving Settlement with respect to KENT 2013-479. This decision formalized a settlement agreement file by the parties in this matter. As part of that agreement, Respondent agreed to pay a penalty of Citation No. 8511143 (for float coal dust). The citation was modified from a 104(d)(1) Order to a 104(d)(1) citation and the penalty was reduced. However, the body of the citation containing the condition observed, as well as the

gravity and negligence cited, remained unchanged. Similarly, Judge McCarthy issued a Decision Approving Settlement with respect to KENT 2013-984 on September 17, 2014. In that decision, the Citation No. 8511142 (for loose ribs) was modified from an 104(d)(1) citation to a 104(a) citation. However, other than the removal of the unwarrantable failure designation, this citation remained unchanged as it relates to the condition observed, gravity, and negligence.

While an operator is free to admit or deny the existence of a violation for purposes of settlement, agreement to pay a civil penalty necessarily establishes that, for proceedings under the Act, the alleged violation is conceded by the operator. *AMAX Lead Company of Missouri*, 4 FMSHRC 975, 978-919 (June 1982). Further, a settlement agreement that binds a party to pay a civil penalty is permitted to serve as a basis for the implementation of the entire enforcement and compliance scheme of the Act. *Id.* As the Commission held in *Old Ben Coal Co.*,

> [A] penalty under the Mine Act is predicated upon the existence of a violation. *See, e.g., Tazco, Inc., supra*, 3 FMSHRC at 1896–98; *Co-op Mining Co.*, 2 FMSHRC 3475, 3475–76 (December 1980). Therefore, an operator cannot deny the existence of a violation for purposes connected with the Mine Act and at the same time pay a civil penalty. For purposes of the Act, paid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true."

7 FMSHRC 205, 209 (Feb. 1985) *citing AMAX, supra.* In short, agreement to pay a civil penalty necessarily establishes, for any future purpose under the Act, that the citation was valid (even if it is not expressly admitted or even denied). Respondent cannot claim that citations that it has already agreed to pay are invalid.

This is consequential for our purposes here. Respondent has agreed to pay civil penalties with respect to Citation Nos. 8511142 and 8511143. As a result, these citations are final orders reflecting violations of the Act and, most importantly, the assertion of violation contained in the citations are regarded as true. That means, with respect to Citation No. 8511142, Respondent has conceded:

> The Operator failed to support or otherwise control the roof, face and ribs of areas where persons are required to work or travel in that there is a loose, unconsolidated coal rib located at x-cut 26 1/2 on the 1st Main North Beltline. The Coal Rib measured 15 ft. Long, 54 inches high, and was from 1 to 10 inches thick. Also loose, unconsolidated coal ribs were observed along the walkway through out the entire 1st Main North Beltline entry and adjoining cross-cuts. In addition there is 2 areas along the beltline, 1 x-cut outby the tandem drives which are unsupported in that the corners have rolled off leaving 1 area measuring 6ft. By 6 ft and 1 area measuring 6ft. By 7 ft. unsupported. There is also an area measuring 8ft. By 11 ft and is 25 ft. from the 1st Main North Belt Head Roller which is not being supported in that there is 2 roof bolts with no plates...
>
> Standard 75.202(a) was cited 47 times in two years at mine 1502709 (47 to the operator, 0 to a contractor)...

(SX-16). Further, Respondent has conceded that the citation was reasonably likely to result in lost workday/restricted duty injury to two miners and that the violation was S&S. (*Id.*). Finally, Respondent conceded that its negligence was high (though not an unwarrantable failure). (*Id*).

With respect to Citation 8511143, in agreeing to pay a settlement, Respondent has conceded:

> Float Coal Dust has been allowed to accumulate on the rock dusted surfaces of the mine floor, belt structure, and water line on the 1st Main North Beltline from the tailpiece to the header, which is a distance of 2000 ft. The Accumulations on the mine floor were from rib to rib and includes the adjoining x-cuts.
>
> This Beltline was in operation at the time of inspection.
>
> Management engaged in aggravated conduct constituting more than ordinary negligence by allowing this condition to exist.
>
> This violation is an unwarrantable failure to comply with a mandatory standard.
>
> Standard 75.400 was cited 159 times in two years at mine 1502709 (159 to the operator, 0 to a contractor).

(SX-1). Further, Respondent has conceded that the citation was reasonably likely to result in lost workday/restricted duty injury to two miners and that the violation was S&S. (*Id.*). Finally, Respondent conceded that its negligence was high and that the violation was an unwarrantable failure. (*Id.*).

In light of the settlement agreements described above and the final orders created as a result of those agreements, Respondent can no longer maintain that Citation Nos. 8511142 and 8511143 are not hazardous. In making a settlement agreement, Respondent has conceded the validity of those citations and the gravity and negligence determinations therein. Those citations clearly establish clear hazards as it relates to rib conditions and the float coal dust condition. Therefore, my consideration of whether the on-shift examination was adequate must be made with those hazards established as facts. Given those hazards, I reiterate my finding that Citation No. 8511145 was valid and that the instant on-shift was inadequate.

Respondent's specific arguments about the conditions cited on the day of the examination all seek to establish that no hazard existed. I will address each of these arguments because I believe that the record establishes that hazards, in fact, existed. However, given Respondent's concession that the underlying citations were valid (as well as my own findings with respect to Citation No. 8511144) this consideration is not really necessary. Respondent has already agreed that these violations (and the hazards that flowed from them) existed for purposes of the Act. All of its arguments to the contrary are therefore barred.

With respect to ribs, Respondent argued that the rib conditions were not hazardous. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 23-28). It noted that Doss testified that he

saw the cracked ribs, attempted to pull them down, but found that they were not loose. (*Id.* at 23). It essentially argues that there was no fall hazard here because, while the rib was cracked, there was no chance of an imminent fall. (*Id.*). It argues that a cracked rib is different from a loose rib. (*Id.* at 26). Respondent noted that Pollard admitted that the rib had been in the cracked condition for some time, and thereby conceded that it had done so without causing a fall or danger. (*Id.*). Respondent summarized by saying that the Secretary had only proven a cracked rib, not a violation of §75.202(a) at the time of the examination or that the exam was inadequate. (*Id.* at 27-28).

I credit the testimony of investigator Smith and Inspector Pollard that the ribs in this entry were in fact hazardous. (Tr. 179-180). I further credit Pollard's testimony that while some of the ribs could not be pulled, they were still hazardous because they could still fall at any time. (Tr. 284). Even Little testified that ribs are hazardous. (Tr. 326). Despite these hazards, the ribs were not recorded or flagged in any way. (Tr. 326-327). Pollard's concerns over rib conditions were justified by the fact that they were a leading cause of injury in coal mines. (Tr. 180, 297). The large gap observed by Inspector Smith was not merely a "crack," it was an indication that these ribs were not fully secured. (Tr. 284). I see no reason to find, as a matter of law, that a rib was not hazardous because a miner with a 3-foot pry bar could not pull it down after a few moments of effort. The intense weight of the coal as well as the various stresses that the mining environment placed on the rib were far greater than the miner's leverage. Even if the examiner could not pull the rib, the rib could still have fallen at any time. Further, even if Doss attempted to pull the ribs and found that he could not, that does not excuse his failure to flag the ribs or record their existence so that miner would be aware that the rib could fall in the future.

In a related argument, Respondent asserted that Pollard could only discuss one loose rib in particular and did not know how many loose ribs were present. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 24-25). As Respondent sees it, "[h]e excused his failure by saying that he simply could not be bothered to fill out a 'bunch of continuation pages' in his notebook. (*Id.* at 25). Similarly, Smith had a camera but only took a photograph of one rib. (*Id*). Respondent claims that, other than the one rib discussed at length, all other alleged rib conditions should not be considered. (*Id.*).

The Secretary provided credible testimony that there were loose ribs throughout to entry. (Tr. 168, 220, 252, 285). I see no reason to believe that Pollard fabricated the existence of other loose ribs in order to frame Respondent. Pollard further discussed one of the loose ribs at great length which provided valuable, general information about the hazards posed by the ribs. The same is true of Smith's photograph. I do not believe the Secretary's failure to document, at length, each of the instances in which Respondent did not meet the requirements of the Act should be held against the Secretary from an evidentiary standpoint. In depth testimony about each rib would have been needlessly cumulative.[20] The record clearly establishes several loose, hazardous ribs.

---

[20] It should further be noted that in light of the discussion regarding the settlements *supra*, the Secretary may have chosen to present less evidence regarding the number of loose ribs and their exact nature because he was relying on the fact that Respondent had already admitted to the existence of these conditions.

Respondent also argued that Doss had found one loose rib during his examination and he had corrected it. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 25). All of the other ribs found by MSHA were not loose enough to pull. (*Id.*). According to Respondent, this showed that Doss was diligently addressing rib problems and that the examination was adequate. (*Id.*).

Doss testified that he saw and pulled a single loose rib during his examination. (Tr. 309-312). He also testified that he tried, and failed, to pull other ribs at other times. (Tr. 316, 325). However, as Pollard explained, the inability to pull a rib does not mean that those ribs were not hazardous. (Tr. 284). Further, even if Doss could not pull the ribs that does not excuse his failure to record or flag the ribs as potential hazards in the future.

Next, Respondent argued that every violation does not give rise to an inadequate examination and that an on-shift should be considered in light of what a reasonably prudent person would do in the same circumstances. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 26). It asserted that even if there was a valid rib citation, that does not necessarily prove the examination was inadequate. (*Id.*). Respondent argued that the standard is for an adequate examination, not a perfect examination, and that the Secretary does not merely need to prove Doss "could have done a better job." (*Id.* at 26-27).

Respondent is correct that not every violation should give rise to a citation for inadequate examination. Perhaps an entry with a single loose rib and no other conditions would be a poor candidate for such a citation. A perfect examination is not required. Of course, no one has argued that a single rib condition would be sufficient to form the basis for the instant citation. Doss' examination was a far cry from "just shy of perfect." There were rib conditions throughout the entire entry. (Tr. 168, 220, 252, 285). There was dry float coal dust spread evenly throughout the entry. (Tr. 201, 208, 220-223, 233-234, 259-260, 272). There was a belt rubbing the belt structure. (Tr. 221, 245-246). And there was extraneous material strewn around the entry. (Tr. 220, 251, 277, 333). All of these conditions were, to varying degrees, obvious. They were simultaneously found by two MSHA officials who were not coordinating their efforts. Given the sheer number of hazardous conditions that were not recorded or corrected, the examination was clearly inadequate.

Respondent also argued that it had taken other precautions to ensure the safety of the ribs in the area. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 27). In particular, Respondent noted that it set timbers in the correct manner and installed truss bolts. (*Id.*).

With respect to timbers, I credit the testimony of Smith that the timbering here was a mere "token effort" and that they were not supporting the ribs. (Tr. 193). Specifically, he noted that they were not installed properly. (Tr. 191). I also credit Pollard's testimony that the timbers were not placed everywhere; some places had loose ribs with no timbers. (Tr. 193, 284-285). I also note that Doss conceded that truss bolting did not occur in all areas of the entry and that Respondent was not truss bolting the area at the time of the citation. (Tr. 303-304).

More important than this testimony, as it pertains to safety precautions, the proof is in the pudding. If Respondent was taking meaningful efforts to ensure the safety of the ribs there might have still been some loose or cracked areas. However, the entire entry would not have

been full of broken ribs, as Pollard testified it was. The fact that Respondent's efforts were insufficient is confirmed by the fact that Doss conceded that Respondent became more aggressive in securing the ribs after the citation. (Tr. 333). If Respondent was taking proper precautions, this would not have been necessary.

Once again Respondent argued the examiner was traveling in the opposite direction of the inspection group and that people traveling in different directions can see different things. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 27). Similarly, it noted that the examination team had four head lamps instead of one. (*Id.*). This argument is rejected here for the same reasons as with the other citations at issue here; Respondent is tasked with finding conditions regardless of the direction or the number of people involved in the examination. If examiners cannot find all of the hazardous conditions present given the direction of travel and the amount of light, Respondent should use more examiners or give the examiners more lights.

In light of the foregoing, I reiterate my finding that the ribs in the entry were hazardous, obvious, and not reported. Therefore, they are perfectly appropriate as one basis for an inadequate examination citation.

As with the rib conditions, Respondent presented several arguments for the proposition that the float coal dust condition could not form the basis of an inadequate examination citation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 28-34). First, Respondent noted that while Smith testified that his photograph (SX-11) clearly showed float coal dust on top of the rock dust, the photograph showed no float coal dust. (*Id.* at 28). It argued that Smith's photographs were practically useless and that distinguishing between the float coal dust and rock dust (which looked dark because of water) was difficult. (*Id.* at 29-30 *citing* Tr. 201-202, 261, 311, 349). This problem was especially important because Smith had no memory of the condition beyond the photograph. (*Id.* at 28 *citing* Tr. 200-201).

As with photographs SX-7 and SX-8 *supra*, I found the photograph to be dark and difficult to discern. I cannot tell what dark material is float coal dust and what is simply the darkness surrounding the flash. But, once again, Respondent was not cited for being photographed with float coal dust. Inspector Smith and Investigator Pollard credibly testified that they observed float coal dust in the area and that the float coal dust was dry and uniformly spread throughout the entry. (Tr. 261, 281). I do not believe that Inspector Smith and Investigator Pollard lied about the existence along the entry. Further, even if the photographs were clearer and I could see the black material on the structure, I would not be able to tell if it was float coal dust or some other material (like wet rock dust). I would still rely on the testimony of the witnesses I found to be most credible. In this instance, that would be Inspector Pollard and Investigator Smith.

In a related argument, Respondent asserts that Smith also says that some photographs show adequate rock dust, but tries to "dodge' and say that the rock dust was not the point of the photographs. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 30, *citing* Tr. 203-207). It further notes that Smith admitted that at other times he would not have cited the area for the float coal dust in the photographs. (*Id.* at 30-31). While Respondent admits that Smith also stated he

even though he may not have cited the condition it may still have been a violation, this was a contradiction of the inspector's oath and the law. (*Id.* at 31).

Smith credibly testified that he took photographs of various areas of the mine entry based on conditions that he observed. He observed float coal dust, but also many other conditions. (Tr. 169-182, 208). As a result, most of his photographs were designed to show other conditions, not the float coal dust. It is entirely reasonable that some of these photographs would show varying levels of float coal dust. While there was float coal dust uniformly throughout the entry, that does not mean that every area would necessarily have visible float coal dust. Beyond that, Smith did not write the citation for float coal dust. Pollard did. Pollard's credible observations are the primary basis for believing that float coal dust existed in this area. Smith's observations, because they did not form the basis for the citation, simply support those observations.

Smith's statement that the condition (as shown in the photographs) may have been a violation but that he may not have written a citation hinges on the concept of prosecutorial discretion. Perhaps Smith believed that the photographs showed a marginal case and that, in his opinion, a citation would not have been issued. It seems odd that Respondent would argue with the idea that all minor violations need not be prosecuted as though they are major violations.

Further, these photographs do not capture the entire entry. While the photographs might not have shown conditions sufficient to support a citation that does not mean that the entry as a whole did not have sufficient float coal dust to support a citation.

Finally, this is all theoretical, as Pollard, not Smith, was the actual MSHA official who issued the citation. His observation, that there was uniform float coal dust throughout the entry, was the primary basis for finding the hazard existed.

Respondent further argued that evidence regarding the alleged condition was available, but not collected and asserts that this should raise an inference that the evidence would have disproved the citation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 31). Specifically, it notes that no sample was taken of the alleged float coal dust. (*Id. citing* Tr. 362). As a result, the citation rests on Pollard's word, though even Pollard admitted that different inspectors might disagree. (*Id.* at 32 *citing* 272-273).

Respondent cites no authority for the proposition that an inspector's observations about conditions is insufficient to serve as the basis for a citation. I reiterate that I credited Pollard's testimony as it related to float coal dust. In fact, as noted earlier, nothing beyond the testimony of an inspector is necessary to support a citation. *See Buck Creek Coal, Inc.*, 52 F.3d at 135-36. In the absence of any legal authority to the contrary, I see no reason to disbelieve the inspector's actual observations because he could have made additional observations.

Respondent also argued that Doss and Little testified that they saw no float coal dust. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 32 *citing* Tr. 349). It argues that Doss' request for additional rock dusting in the area was a "dangerous red herring." (*Id.* at 33). Respondent argues that Doss' earlier notations were an example of a conscientious examiner who wanted to take care of issues before action was required. (*Id.*). It noted that there was no

evidence that the previous examinations were inadequate. (*Id.*). In fact, Doss' request is evidence that his examinations were adequate; Respondent's failure to follow up on those earlier requests does not mean that the examination was inadequate. (*Id.*). Respondent asserted that Pollard admitted the previous examinations were adequate. (*Id.* at 34). Respondent fears that a citation for Doss' proactive attitude towards enforcement will create a chilling effect on operators, preventing them from getting ahead of violations. (*Id.*).

The citation was issued because, *inter alia*, Pollard observed float coal dust in the entry just minutes after Doss had completed his examination and that float coal dust was not recorded. (Tr. 219, 301, 304, 319-320). Whether the previous examinations were adequate or not is completely immaterial to whether a hazard existed at the time the citation was issued. One adequate examination in the past does not inoculate against future inadequate examination, especially when the previous examination is not followed up with corrective action.

Further, the fact that Doss saw that the entry needed cleaned for three days prior to the instant citation, noted the condition, saw no change in it after his recordings, and then failed to record the condition on the fourth day does not show that Doss was a conscientious examiner or that Respondent was trying to "get ahead" of violations. It shows that conditions existed at the mine, that they were not corrected, and that if they were not corrected there were no consequences. Eventually, the examiner would stop noting the hazardous conditions at all. If the inspector had not noticed the float coal dust, there is no guarantee it would have ever been cleaned. If Doss would like to note that conditions exist before they become hazardous, that impulse is admirable. But if Respondent wishes to benefit from that admirable impulse, it must then also take action before a hazard occurs.

Once again, I reiterate my finding that the float coal dust in the entry was hazardous, obvious, and not reported. Therefore, that is perfectly appropriate as one basis for an inadequate examination citation.

As with the other conditions, Respondent presented several arguments for the proposition that the belt rubbing could not form the basis of an inadequate examination citation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 34-35).

First, Respondent argues that the citation should be vacated and, as a result, cannot form the basis for an inadequate examination violation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 34). For the reasons given *supra* with respect to Citation No. 8511144, this argument is rejected. The allegations in that citation are supported by a preponderance of the evidence.

Respondent also argued that even if the belt was rubbing, it may not have been rubbing while Doss conducted his examination. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 34-35 *citing* Tr. 348). It pointed to the fact that Doss testified that the belt was not rubbing at the time of the examination. (*Id.* at 35). It asserted that only a reasonable examination is needed, MSHA conceded that he may have missed the belt. (*Id.* at 35). As discussed *supra*, while the belt might not have been rubbing at the time of the inspection, the violation still occurred. Further, there were other indications (the warm belt and the belt shavings) that should have indicated to Doss that a problem had occurred. (Tr. 226, 248).

2. The Violation Was Reasonably Likely to Result in Lost Workday/Restricted Duty Injury To Two Miners And Was Significant And Substantial In Nature.

Inspector Pollard marked the gravity of the cited danger in Citation No. 8511145 as being Reasonably Likely to result in Lost Workday/Restricted Duty Injury to two miners. (SX-6). Pollard also determined that the violation was S&S. (SX-6). These determinations are supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard – it has already been established that Respondent violated 30 C.F.R. §75.362(b).

With respect to the second element of Mathies, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. The Commission has recognized examinations as "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995); *see also Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). MSHA requires several layers of examinations, including on-shift, preshift, and weekly examinations, in order to ensure miner safety. "These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine." *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ). The Secretary presented credible evidence that there were four different hazardous conditions located in the 1st Main North belt entry, including float coal dust, rubbing belts, extraneous material, and loose ribs the. The rubbing belt created friction that made a fire or smoke more likely. The belt and the area near the rubbing belt were dry and there was float coal dust on the structure. (Tr. 286-288, SX-8) The float coal dust would similarly have helped cause an ignition or explosion. (Tr. 246-247). The extraneous materials would serve as an additional fuel source in a fire. (Tr. 278). Further, the loose ribs were in danger of falling across the entry where miners worked and traveled. (Tr. 179-180, 255). Clearly, the failure to recognize and correct these conditions with an adequate examination contributed to the danger of a fire, inundation of smoke, explosion, or crushing injury. (Tr. 255).

The third element of the Mathies test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. As discussed *supra*, it is likely that in the event of a fire that two miners in the entry would be affected by smoke or by the fire directly, resulting in injuries. (Tr. 255). Miners sent to fight the fire would also be affected and receive injuries. In the event of an explosion, miners in the entry, or even in the adjacent travelway, would be affected and could suffer injury. (Tr. 255). In the event of a rib fall, mine examiners or mechanics in the area would be affected. Therefore, the third prong of *Mathies* is met.

The fourth and final prong of *Mathies* – a reasonably likelihood that the injury in question will be of a reasonably serious nature – was also met. Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies* Coal Co., 6 FMSHRC at 3-4; U.S. Steel, 6 FMSHRC 1573, 1574 (July 1984). The lost workday/restricted duty injuries that would be most likely to occur, specifically smoke inhalation and burns, would be sufficiently

serious to result in an S&S designation. Broken bones or lacerations would similarly meet this standard. Therefore, the fourth prong of *Mathies* is met.

In the event of a fire or explosion, the Secretary presented credible evidence that miners would suffer lost workday/restricted duty injuries from burning or smoke inhalation. (Tr. 247). Further, miners in the adjacent travelway would be affected in the event of any explosion. (Tr. 248). As with Citation No. 8508512 *supra*, miners fighting fires would also be affected by burns and smoke inhalation. (Tr. 26, 29). The Secretary also provided credible evidence that a fallen rib could cause lost workday/restricted duty injuries like broken bones or lacerations. (Tr. 255).

Respondent presented several arguments for the proposition that the inadequate examination was not S&S. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 36). However, none of these arguments are compelling.

First, Respondent stated that "the Secretary did not put on any evidence specific to citation No. 8511145 that Doss's alleged inadequate examination was reasonably likely to cause an injury." (*Respondent's KENT 2013-480 Post-Hearing Brief* at 36). Respondent included several arguments as to why the specific conditions could not have resulted in injuries. (*Id.* at 36-37). Regardless of the merits of this claim, it is wholly irrelevant here. Respondent conflates the second and third prong of *Mathies*. As discussed at length, the Secretary does not need to prove that the violation (Doss' examination) would result in an injury. *Musser Engineering, Inc.*, 32 FMSHRC at 1281. The Secretary need only prove that the hazard contributed to by Doss' examination would result in an injury. *Id.* Here Doss' examination gave rise to smoke, fire, explosion, and rib collapse hazards. Undoubtedly those hazards would cause injury.

Respondent also argued that Citation No. 8511141 (for the extraneous material) was marked as "unlikely" and further asserted that it had proven that Citation Nos. 8511142 and 8511143 were unlikely. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 36). It further argued that it had demonstrated that Citation No. 8511144 was not S&S. (*Id.*). However, as discussed length *supra*, by agreeing to settle Citation Nos. 8511142 and 8511143, Respondent has conceded the content of those citations. *Old Ben Coal Co.*, *supra*. Both citations are therefore reasonably likely and S&S. Also, Citation No. 8511144 was found S&S *supra*. As these citations form the basis for this citation, it would be reasonable that the inadequate examination that failed to catch them would also be S&S.

Once again, I note that an inspector's opinion regarding S&S is accorded substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC at 1278-79, *Buck Creek Coal, Inc.*, 52 F.3d at 135-36. Here, Pollard credibly testified that the citation was S&S. As a result of the inspector's opinion and, more importantly, the factors discussed above, I find that the Secretary proved the likelihood of injury, the severity of that injury, and the S&S designation by a preponderance of the evidence.

With respect to the number of persons affected, the Secretary presented credible evidence that if smoke, fire, or explosion were to occur the belt examiner and belt cleaner would be affected. (Tr. 248). Further, the miners in the belt entry would also face injury. (Tr. 248). Pollard marked this citation as likely to affect 2 people because there was a belt examiner and

belt cleaner in the area. (Tr. 248). Further, the belt entry was parallel to the travelway and anyone in that area would also be affected. (Tr. 248). The loose ribs would affect the examiners and mechanics in the area. (Tr. 255).

In short, the preponderance of the evidence shows that Citation No. 8511145 was reasonably likely to result in lost workday/restricted duty injuries to two persons and was S&S.

3. Respondent's Conduct Displayed "High" Negligence.

In the citation at issue, Inspector Pollard found that the operator's conduct was highly negligent in character. (SX-6). The substantial evidence supports this designation.

With respect to knowledge, the factual situation presented here is substantially similar to the other citations discussed herein. A mine examiner had passed through the area just minutes before the inspector discovered and cited the violative condition. (Tr. 219, 301, 304, 319-320). In fact, the inspector found the examiner, Doss, just as he was completing his examination. The examiner had traveled the belt entry and past the area where all four conditions were found and did not record them. I credit Pollard's testimony that this violation exhibited "high negligence' because he did not believe that Doss could travel the belt line and not see the conditions. (Tr. 251-252, 256). Further, Doss had listed the dust condition in the book for three days. (Tr. 256, 273). As with the previous citation, the examiner was an agent of Respondent and his actions were imputable to the operator. *Whayne Supply Co., supra*; *Rochester & Pittsburgh Coal Co., supra*; and *Southern Ohio Coal Co., supra*. Furthermore, the underlying citations were the result of high levels of negligence. Citation No. 8511141 was the result of moderate negligence, Citation No. 8511142 was the result of high negligence, Citation No. 8511143 was the result of high negligence and an unwarrantable failure, and Citation No. 8511144 was the result of moderate negligence.[21] As a result, Respondent knew or should have known about the cited condition but took no action. Therefore, Respondent was negligent.

Respondent argued that it did not have knowledge of the cited condition and therefore, cannot be negligent. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 35-36). However, Respondent's arguments are not compelling.

Respondent first argued that the fact that Doss listed that the area needed to be cleaned for three days before the instant citation should not be considered knowledge because of the same chilling effect on "getting ahead of the violations" that was discussed *supra*, in the section regarding the validity of this citation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 35). For the same reasons discussed there, this argument is rejected.

Respondent next argued that a condition is not obvious just because the Inspector sees it and the examiner does not. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 35). It argued that if this were the case, any citation would be high negligence because they always involve conditions that an inspector sees but an examiner does not. (*Id.*). This is essentially the same

[21] Once again, these are final designations based (with respect to Citation Nos. 8511141, 8511142, and 8511143) on previous settlements and (with respect to Citation No. 8511144) my findings above.

argument Respondent made with respect to Citation Nos. 8508232 and 8508512 and is rejected for the same reason. The issue is this particular citation and what the examiner knew or should have known.

Next, it argued that the fact that Doss conducted a timely exam and had no actual subjective knowledge of the condition was a considerable mitigating factor. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 36). As discussed at length *supra*, whether Respondent had actual subjective knowledge is immaterial to a negligence finding. The issues is whether he should have known. In this case, with all of the various hazardous conditions, Doss should have known, regardless of his subjective level of knowledge.

Finally, Respondent argues that Pollard admitted that the condition cited in Citation No. 8511144 may not have been present during the examination. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 36). While Pollard admitted that the belt might not have been rubbing during the examination, he explained that other conditions (specifically, the belt shavings and heat) should have alerted Doss that something was wrong. (Tr. 226, 248). Further, the other conditions, especially the float coal dust and the loose ribs, were far more obvious and should have been recorded.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I do not find any conditions existed that in any way mitigates this citation. There were several obvious and very hazardous conditions in the entry, Doss conducted an examination of the area, and nothing was recorded.

Respondent argued that there were considerable mitigating circumstances with respect to this citation. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 36). However, the record does not support Respondent's assertions.

Specifically Respondent argued that the Secretary alleged no history of violations or reason to believe that Respondent was on notice for this condition. (*Respondent's KENT 2013-480 Post-Hearing Brief* at 16-17). While it is true that Respondent did not have a large number of citations for inadequate examinations in the recent past, it was no notice. Doss testified that Smith told him during the inspection that he should do a better job examining the area. (Tr. 323). At hearing, Doss dismissed this advice stating "[e]very inspector tells us that." (Tr. 323). This is a very troubling statement. Respondent apparently does not take the MSHA inspectors at their word and work to improve the way examinations are conducted. Instead, as Doss demonstrates here, they assume the inspectors are just speaking to hear themselves talk. Respondent was clearly on notice and unfortunately chose not to take that advice. As stated previously, willful ignorance is not mitigation.

4. Penalty

In this matter, the Secretary proposed a penalty of $3,689.00 for Citation No. 8511145. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $3,689.00.

ORDER

It is hereby **ORDERED** that Citation Nos. 8508232, 8508512, 8511144, and 8511145 are **AFFIRMED** as amended.

Respondent is **ORDERED** to pay civil penalties in the total amount of $15,096.00 within 30 days of the date of this decision.[22]

Kenneth R. Andrews
Administrative Law Judge

Distribution:

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

Angele Gregory, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Jeffrey K. Phillips, Esq. and Candace Smith, Esq., Steptoe & Johnson PLLC, 2525 Harrodsburg Road, Suite 300, Lexington, KY 40504

/tjb

[22] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390