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February 20, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0120 A.C. No. 12-02295-397991
v.	:	Docket No. LAKE 2016-0140 A.C. No. 12-02295-400067
PEABODY MIDWEST MINING, LLC, Respondent.	:	Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Emelda Medrano, Esq. and Kevin Wender, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

Arthur Wolfson, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

Before: Judge Moran

These consolidated cases are before the Court upon petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Owensboro, Kentucky on November 7, 2017. For the reasons which follow, the Court upholds each of the Orders and imposes the penalties sought by the Secretary. [1]

[1] On November 2, 2017, the Court approved a partial settlement for three citations involved in Docket No. LAKE 2016-0120; Citation Nos. 9036721, 9036722 and 9036832. Order No. 9036624 was the only remaining violation from that docket for which evidence was presented at hearing. Also, at the hearing the Court announced that it was approving the partial settlement for LAKE 2016-0140 for Order Nos.9036701, 9033599, and 9033600, leaving Order Nos. 9036623 and 9036625 for decision. The Decision approving partial settlement for LAKE 2016-0140 is being issued on the same day as this Decision and Order.

Violations at issue in Docket No. LAKE 2016-0120

At issue in Docket No. LAKE 2016-0120 is one 104(d)(2) order, **Order No. 9036624**, with a proposed penalty of $4,000.00.

Order No. 9036624 alleged a violation of 30 C.F.R. § 75.364(b).[2] The MSHA inspector assessed the gravity reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

> The examination conducted on the entire M.S. primary escapeway (35 crosscuts) and from crosscut #1-26 of the 2nd South West primary escapeway have been found to be inadequate. When inspected, there were at least 7 loose ribs that were pulled down along the primary escapeway in this short distance. The last exam of this area was conducted on 10/28/2015. These loose ribs were gapped from the rib and were obvious to the most casual observer. This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036624.

As a subsequent action, the operator retrained all examiners on 30 C.F.R. 75.202(a), "with an emphasis on loose rib maintenance." *Id.*

Marked as S&S, an unwarrantable failure, and high negligence, it was regularly assessed at $4,000.00.

Violations at issue in Docket No. LAKE 2016-0140

At issue in Docket No. LAKE 2016-0140 are two 104(d)(2) orders, Nos. 9036623 and 9036625. Order No. 9036623 was marked as S&S, an unwarrantable failure, and high negligence and was specially assessed at $15,900. Order No. 9036625 marked as *non*-S&S, but as an unwarrantable failure, and with high negligence was regularly assessed at $4,000.00.

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[2] § 75.364, titled, "Weekly examination," provides at subsection (b), in relevant part: "Hazardous conditions and violations of mandatory health or safety standards. At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations: (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled. (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled. ... (5) In each escapeway so that the entire escapeway is traveled. ... (8) Weekly examinations shall include examinations to identify violations of the standards listed below: (i) §§ 75.202(a) and 75.220(a)(1) - roof control ..."

Order No. 9036625

Order No. 9036625 alleged a violation of 30 C.F.R. § 75.202(a).[3] The MSHA inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as non-S&S, with one person affected. The condition or practice alleged is:

> The ribs along Main South Primary escapeway, crosscut 7-8, entry #6 are not being adequately supported to protect miners from falls of the rib. There are 3 loose ribs in this area. The largest of these ribs was approximately 6 feet in length, and appproximately [sic] 8 inches thick, and gapped from the rib approximately 3 inches. The rib on the off belt side is approximately 4 feet long and up to approximately 6 inches in thickness. This loose rib was gapped away from the rib approximatley [sic] 1 inch. The mine operator immediately pulled these ribs down. Standard 75.202(a) was cited 30 times in two years at mine 1202295 (30 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 9036625.

The operator pulled the ribs down in order to terminate the order. *Id.*

Order No. 9036623:

Order No. 9036623 alleged a violation of 30 C.F.R. § 75.202(a). The MSHA inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

> The Ribs along the 2nd South West primary escapeway are not being adequately supported to protect miners from falls of the rib. The rib between entries number 6-7, crosscut number 13, on the inby side are gapped away from the rib approximately 2 inches in length. There are 2 ribs on the outby side of this entry that are also gapped from the rib. The largest of these ribs measured approximately 10.5 feet in length and up to 10 inches thick. There are also 2 loose ribs at crosscut 25-26, entry #6, in the primary escapeway. The largest of these ribs measures approximately 10 feet long up to 10 inches in thickness. This area had was examined prior to inspection on 10/28/2015. The mine operator immediately pulled these ribs down. Standard 75.202(a) was cited 29 times in two years at mine 1202295 (29 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

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[3] 30 C.F.R. § 75.202, titled, "Protection from falls of roof, face and ribs," provides at subsection (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."

Order No. 9036623.

The operator pulled down the loose ribs to terminate the order. *Id.* The Secretary proposed a civil penalty of $15,900.00.

Findings of Fact [4]

Testimony began with MSHA Inspector Stephen William Tisdale. He was at the Respondent's Francisco Underground Pit on October 28, 2015 for an E01 (aka a "regular quarterly") inspection. With him was MSHA inspector trainee John Hohn. The mine's compliance manager, John Schwartze, accompanied them. Tr. 26. Shown Exhibit P 3, Tisdale identified it as the mine's exam records for that day relating to the mine's primary escapeway. Referring to that exhibit, Tisdale noted that the examiner did not note any hazards, nor any actions for hazards. Tr. 28.

When Tisdale entered the mine that day he "directly entered the primary escapeway in the intake air course and the group proceeded to inspect inby on the main south, and from there then to the second southwest. Tr. 28. Tisdale identified Exhibit P 4 as the Order he issued that day to Schwartze concerning "the ribs along the main south primary escapeway." Tr. 29. Tisdale wrote the order because of "[t]he amount of loose ribs that [he] found on this particular air course and the size of them, and how they fell." Tr. 29. By using the term "how they fell," Tisdale explained that the ribs were pried down while they were present, so he watched them fall. Tr. 30. It was noted that Tisdale's description of the conditions was an approximation of the length and thickness of the ribs. This was because it was too dangerous to take an actual measurement. Tr. 30. Despite his observations, Tisdale informed that he knew the area had been recently examined. This was because he found DTI (date, time, and initial) tags on the intake air course when they entered it. Thus, it was evident that the mine's Mr. Meador had been there that morning. Tr. 31-32. The DTI reflected a time after 12:00 a.m. and Tisdale was then there a short time thereafter, at 7:00 a.m.

Returning to his observations associated with the order, Tisdale informed, he observed "several loose ribs at crosshead 7A and entry 6. There were at [least] three loose ribs in this one area that were obvious. They were gapped from the rib and were not addressed." [5] Tr. 33.

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[4] As noted, portions of these two dockets were settled prior to the hearing's commencement and the Court announced that it was approving those settlements. Remaining for disposition at the hearing from Docket No. LAKE 2016-0140 are Orders Nos. 9036623 and 9036625 and, from Docket No. LAKE 2016-0120, is Order No. 9036624. Tr. 10.

[5] Indicative of the Inspector's reasonableness, Tisdale added that "[t]here were several other ribs as well that were loose, but with the way they fell and everything, I did not put them in the citation." Tr. 33. He did not include those conditions in the order because "[t]he way that they fell, they would have fell in the sloughage, where is not where miners would normally travel ..." *Id.* However, when questioned by the Court about these other conditions which he elected not to include in his order, Tisdale advised that if he had only observed those conditions, they would

Tisdale stated that the ribs identified in Order No. 9036625 were from the floor to the roof, and therefore were about five feet high. *Id.* When Tisdale made his estimates, he used a tape measure and, upon informing Schwartze of his numbers, the latter agreed. Tr. 34. Finding that the conditions presented by the number of loose ribs created a safety hazard, Tisdale cited the Respondent under 30 C.F.R. §75.202(a), a standard speaking to control of ribs.

The inspector listed the gravity as unlikely "because of the way that they fell and the amount that fell in the actual travel way. [He did not] believe that it would have been real likely that someone would have been injured severely with that." Tr. 35. He added, the ribs "fell on the sloughage for the most part. [However] [t]he tops did fall in the primary escapeway underneath of the lifeline, which was the walk route by the examiner and anyone who would have been following the lifeline in the same scenario." Tr. 35-36. The height of the ribs was another factor he considered, affirming the obvious that "the bigger they are, the -- the more room they have to fall. The higher they are, the more they can fall on you. The farther they're going to come out, the more damage they're going to do." Tr. 36. Tisdale listed 1 person as being affected, essentially anyone who would be traveling through the area, or performing functions such as attending to a loose roof bolt, or rock dusting . Not to be overlooked, the cited area was an escapeway. *Id.* In terms of the expected injury, in the Court's view, Tisdale again displayed his reasonableness, listing "contusions, scrapes, slips, trips, falls, and anything associated with the falls of ribs," which would include the potential for broken bones. Tr. 37.

Negligence, however, was another matter, as he marked that as "high," because "the examiner had been through this area nine hours prior to [his] inspection examining this area for exactly these conditions." Tr. 37. He added that the "examiner had been trained on this as required, according to Mr. Schwartze, for this standard [ ] because it's required every quarter. Also this mine had been put on heightened enforcement for this standard due to other citations being issued for exactly this, so another reason for them to have -- be aware that this was something they needed to pay attention to. And by the sheer number and obviousness of them all." *Id.*

The Court inquired of the inspector whether "there [was] any possibility that the conditions that you observed developed in the interval from when the mine examiner was last there and when you appeared during that approximate nine hours." Tisdale answered, "I don't believe so, sir, because [of] how wide the gaps were on these and how big these ribs are. It's not something that's going to happen in nine hours. It typically takes quite a while for it to trade that kind of gap as material falls behind it and pushes it away from a rib." However, he added that "[t]here was nothing showing me anything that there was movement at that time while I was inspecting it." Tr. 38.

In terms of how long the conditions he observed had existed prior to his viewing them, Tisdale responded that "they existed at least three weeks, if not more." Tr. 39. The cited conditions could've been more expansively included, as they were obvious too, but because of

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still have constituted a violation of 75.202(a). Tr. 40. Further, all of the uncited ribs were pried down as the inspection proceeded. Tr. 42.

the way they fell, he didn't include them in the citation. *Id.* As he summed it, these conditions do "not happen in a short period of time." Tr. 39. The Court asked for additional information, inquiring why, for example, his estimate was not two weeks or only two shifts. Tisdale responded that his estimate was based on his experience.[6]

Tisdale also informed that the mine was put on heightened notice in July and August 2015 because MSHA had been finding a lot of 75.202(a) and 75.364(b) violations. Tr. 41. In terms of Tisdale listing the violation as an unwarrantable failure, he reiterated that an examiner for the mine had been in that area about nine hours before his inspection and the conditions were obvious. Tr. 43. Yet no action had been taken and the exam records noted nothing either. Tr. 43. Tisdale considered whether he could just issue 104(a) citations, and *verbally* stated he would do so, but then, upon reflection, given all that he observed, he decided an order was necessary. Tr. 43-44. The conditions were both obvious and not hard to detect. Tr. 46. As noted, several ribs had to be pulled down during the course of inspection that day, and Tisdale observed those actions being taken. Tr. 48-49.

Still referring to Order No. 9036625, involving the main south primary escapeway,[7] Tisdale informed that "These [ribs] specifically fell where miners would be traveling, evidenced by traffic through the area. They also fell underneath of the lifeline or the escapeway, which would be traveled by anyone trying to escape the mine and also where the examiner is normally traveling." Tr. 50. His measurements also factored into his assessment of the conditions, because, "[r]ocks that size hitting you are going to cause an injury." Tr. 50.

Directed to Exhibit P 5, Order No. 9036623, Tisdale identified it as the order he issued on October 28, 2015 for the second southwest primary escapeway. *Id.* As with the order just discussed, this order was issued because of "[t]he number of loose ribs that were found, the size of them, and the -- the obviousness of them." *Id.* The conditions he observed were similar to those he found on the main south primary escapeway, as he advised that the second southwest primary escapeway was "[a] lot of what we seen on the main south primary escapeway, more loose ribs that are not being controlled or being prevented from hurting miners, no indication that any of them had been identified. The examiner had traveled that area also. They put tags about every ten crosscuts and we were able to see that he had been through there at a pretty good pace." Tr. 51. These conditions were examined by the same mine examiner that had examined the main south primary escapeway, resulting in Order No. 9036625 being issued. *Id.* Thus, two separate escapeways had these problems.

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[6] Tisdale added that his estimate of three weeks was derived, because of their size and his] mining experience, informing, "[t]ypically they will grow -- if they're tight, you can try to pry on them and they won't move and you can -- you can almost steadily watch them get bigger and bigger." Tr. 39.

[7] Although the two cited escapeways have separate air courses, they are related as they "are connected to each other ... Once the main south stops, then it continues on as the second southwest air course." Tr. 60.

As with the previous order, Tisdale found for Order No. 9036623 "several loose ribs again that were obvious. Obviously gaps in the rib that were not being controlled." [8] Tr. 52. It is also important to note the inspector's information about where these ribs fell, as he informed, he "believe[d] these fell directly underneath the lifeline. On the second southwest, the mine operator had done some rehab work and had scooped a lot of the second southwest, and this particular area was one of those, so there was not a lot of sloughage. The ribs fell where miners had obviously traveled evidenced by their foot tracks, and it also fell directly underneath the lifeline." Tr. 53. Not to be lost among these findings, and to be plain, the hazard was again loose ribs. Tr. 54. Marking the gravity as "reasonably likely," Tisdale identified the likely injury to be "[w]ith ribs this size, [he]put down bruises, scrapes again, just like on the main south. But with this size, you're going to have broken bones again. We've had fatalities with smaller ribs of the same thing. It's a rules to live by standard [9] just for that reason. There are many, many different injuries that can occur from bad ribs like this." [10] *Id.* Tisdale expressed that the size of the ribs falling on a miner would cause a severe injury. Again, as expressed before, the miners exposed to this hazard would be anyone traveling through the area or working in it or those needing to use it as an escapeway. Tr. 58. The same rationale used for the prior order, applied to this one. The examiner had recently been in the area and the conditions were obvious. *Id.* This reasoning applied to his unwarrantable failure designation as well. As before, Tisdale's estimate was that these conditions had existed for at least three weeks. Tr. 60.

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[8] Referring to his order, Tisdale provided specifics about the locations for these problem ribs, stating, "The rib between entries 6 and 7, crosscuts number 13 on the inby side are gapped away from the rib approximately two inches. There are two ribs on the outby side of this entry that are also gapped from the rib. And the largest of these ribs measured approximately ten and a half feet in length and up to ten inches thick. The ones that were on the outby side of this that are described were where a miner had cut and left notches in the rib, and these were also very large and very thick, but were not quite as long and large as the one that's noted here as far as the measurements." Tr. 52. In this instance, Shwartze again told Tisdale that he agreed with the inspector's measurements. Tr. 53.

[9] Though well known, Tisdale reminded that the "Rules to live by" involve standards that are so identified because there are "so many fatalities for that specific violation -- for that specific hazard in a mine, that we try to raise awareness. ... There are ten of them [i.e. ten rules], and we try to make sure all miners are aware of them." Tr. 54-55.

[10] The Court asked about Tisdale's noting a two inch gap, positing that it did not seem to be a very significant gap and that it would be difficult to spot such a small gap. Tisdale informed, "[m]y best example of that would be just like sitting in this courtroom, ... If you seen a crack in the wall that was approximately two inches wide in a -- in a difference of what you see in this area, would you -- would you notice it? I mean, you -- because it's going to be jagged. It's going to be dark inside of it. Your -- it's going to stand out to you. We were walking the same way as the examiner and your light is going to shine right on that rib and it's going to create a shadow right behind it as well. It's going to stand out just like it would in this room if there was a crack either in the ceiling or if it was on the wall." Tr. 55-56. Tisdale stated that with only a cap lamp, such a two inch gap would still be obvious to detect. Tr. 56.

Tisdale was then directed to Exhibit P 6, Order No. 9036624. This Order, very much associated with the other orders just discussed, was for an inadequate exam. As he expressed it, the order was issued because of "[t]he apparent lack of care to – to specifically check for loose ribs through this whole area just was not finding them, not looking for hazards in this area -- for the -- both the areas that were orders on." Tr. 62. Thus, the mine examiner failed to adequately look for loose ribs, which conditions were obvious, in both the southwest primary escapeway and the main south primary escapeway. Tr.63. Though he could not give an exact number, Tisdale found at least seven hazardous ribs.[11] *Id.*

In determining that the gravity was "reasonably likely," Tisdale explained that was "[b]ecause of what we found with the ribs being that large and falling on someone, and that the sheer number that there are, they're going to cause an injury." Tr. 67. One person was marked as being affected. In the inspector's view, the mine offered no cognizable mitigating factors, as weather and the assertion that this was not a (d) citation or (d) order mine were not persuasive to him. Tr. 69-70.

Under cross-examination, Tisdale agreed that there are two examination records noted within Ex. P 3., October 12th and October 26th. Tr. 72. It was pointed out by the Respondent that the exhibit did not include the exam for the week between those dates.[12] The inspector agreed that for the week of October 26th, a condition was listed at line 5 and for the week of October 12th, a hazard was noted at line 12, the condition being exposed bolts. Tr. 72-73.

Regarding the height of the ribs for Order No. 9036625, Ex. P 4, pertaining to the main south escapeway, the inspector agreed that his order did not list the rib height. Tr. 73. The same was true for Ex. P 7, no rib height was listed. Tr. 74. The inspector also agreed that beyond the primary escapeways he cited, a mine is required to have a secondary escapeway. *Id.* That secondary escapeway is the mine's travel way, meaning the road used in normal mining operations and on which miners drive in and out of the mine using rubber tired vehicles. *Id.* The inspector agreed, and there is no dispute, that the rather obvious idea behind having two escapeways is to deal with the situation if one cannot be used during an emergency. *Given a*

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[11] Though the order was based on the ribs, the examiner's failure to see the obvious conditions made the inspector worry "what else [the examiner is] not identifying." Tr. 65. However, the Court made it explicit that any violations which may be upheld would be based on what the inspector observed, not on speculation about other safety conditions which may have been overlooked. Tr. 67.

[12] The Court later inquired about the missing exam week, because there was at least a hint that perhaps the Secretary did not want it included. As it developed this was not the case; the Secretary *did request* the missing information. The Court noted initially, "[w]e've got the week beginning of 10-26. We've got the week beginning of 10-12, and it was pointed out that there's a missing week. Can either counsel, as officers of the court, explain to me this --." The Secretary informed that it did not believe it had the missing page but that it had been requested. Tr. 160. Respondent's Counsel then informed that it had not provided the missing page to the Secretary. Tr. 161. He then advised that the missing page would be provided during the hearing, as part of a planned exhibit for the Respondent covering two months of such exam records. *Id.*

choice, the inspector also agreed that the roadway escape would be the preferred exit. [13] Tr. 75.

The Court notes that, as to the import of that argument, that an escapeway would rarely be S&S, because there are two of them, and a second escapeway would only be needed if the first escapeway could not be used, little needs to be said. The idea behind the two escapeway requirement is just for such an eventuality. It is noted that even motels, hardly dangerous places, have two stairway exits for escape.

Regarding the inspector's statement that the mine had been put on notice, the inspector agreed that such notice is broad, applying to any type of inadequate examination.[14] Tr. 76. Also, although the inspector knew that the mine had been put on notice regarding 75.202(a) on August 12, 2015, he did not know the circumstances which led to that notice.[15] Tisdale agreed that knowing of that prior notice created an additional factor that might more readily lead him to issue heightened negligence, as it informed him that the mine "had reason to know." Tr. 78. Further the mine is not trapped in purgatory forever by receiving such a notice as, upon not receiving new citations for that specific condition, they would be lifted from the heightened awareness admonition . Tr. 79. While the mine protested that it had been "doing better," Tisdale informed that he didn't know *what* they had been doing better, as there had not been any air course inspections subsequent to that notice. Tr. 79-80.

Turning to Ex. P 5, Tisdale stated that he did not "measure" the ribs referred to in that exhibit as both the inby side in crosscut 13 and the outby side of the crosscut were identified. Instead, as he expressed earlier, he estimated the ribs on the outby side, measuring only the rib on the inby side. Tr. 81-82.

On redirect, Tisdale was asked to read from Ex. P 7, his inspector notes, stating from those notes, "[t]hese ribs were from the mine floor to the mine roof. The largest loose rib at the second southwest was approximately seven feet tall. The top strata fell with it that was measured for thickness. It was measured at what would have been the top when it was standing, ten inches thick." Those notes, he confirmed, reflect what he observed at that time. Tr. 83-84. Though he could not state the exact time when he made the notes, they were written at the site of the observed conditions and while he was still underground. Tr. 85-86.

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[13] Later in the hearing the mine's Schwartze would testify about travel frequency in the escapeways in normal mining operations, as "[a]ll miners are required to travel the escapeways -- the primary escapeway twice a year in practice just so they know how to get out, and they travel the secondary escapeway twice a year. *Actually* (referring to the secondary escapeway) *they travel it all the time*, but it's -- record is kept of it twice a years." Tr. 140 (*italics* added).

[14] The Court does not find this argument persuasive. The fact that there are many types of exams required; pre-shift, belts, weeklies of escapeways and air courses, seals and permissibility exams, is an odd, and ineffective, way to defend the failures identified in these two orders.

[15] Again, the Court does not find this argument persuasive. The fact that the notice pertaining to 75.202(a) applies to roofs, as well as ribs, hardly constitutes any shortcoming of the notice. Following that line of logic would mean that the specific area would need to have been cited before. The "notice" is meant to wake up the mine to be attentive to all roof and rib issues.

In response to a hypothetical question from the Court inquiring if the inspector were to put aside the issue of the mine being "on notice," if he would still have issued these orders as he did, Tisdale answered, he "would have marked the negligence exactly the same as [he] did whether they were put on notice or not because of everything that [he had previously] stated [in his testimony]. They had reason to know. [The] [e]xaminer was there. The -- these are conditions that have lasted for quite a while and they were obvious and extensive. Even if they weren't put on notice, [he believed it would] support the negligence on it regardless of whether they were already on [notice] or not." Tr. 90. Tisdale affirmed that also would be his position regarding the inadequate exam. Tr. 91.

Turning around the question about Tisdale's view that the conditions had existed for three weeks, the Court asked if, based upon his same mining experience, the condition could have lasted for less than a shift. Tisdale informed it would not have existed for less than a shift. Tr. 92.

The Secretary also called MSHA Inspector John N. Hohn. Prior to his employment with MSHA he had a little more than eight years of mining experience, all of it in underground mining. Tr. 97, 121. At the time of the matters in issue in this proceeding he was an MSHA trainee. *Id.* Interestingly, as a trainee, Hohn was instructed *not* to point out anything to the inspector he was accompanying that day. Tr. 98. Directed to Ex. P 3, he identified it as the weekly examiner's records of what they observed that day and whether they took any corrective actions. Tr. 100. Essentially, Hohn confirmed observing the same conditions that Tisdale saw. He stated that there were large gaps in the ribs and "[w]hen Schwartze pried them down, they fell solid, falling across where the walk path would be. They were then measured as they were sitting on the ground." Tr. 103-104. Tisdale then took the measurements and called them out to him and he (i.e. Hohn) then recorded them in his notes. Hohn's notes appear in Exhibit P 8.[16] Tr.104-105. Hohn stated that the problematic ribs were not difficult to see. Tr. 106. It was his estimate that one could detect these conditions from a distance of approximately 40 feet. *Id.*

Asked if Schwartze challenged the accuracy of any of the measurements, Hohn related that Schwartze stated, "How can I argue with the tape measurer?"[17] Tr. 107. The Court would note that it is a fair and accurate summation to state that Hohn's testimony corroborated that of Inspector Tisdale's. Hohn related that Schwartze's expressed grounds for mitigation were that

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[16] Hohn, looking at his notes, remarked that for those ribs he had "one that was six foot long, four foot tall, and eight inches thick. And ... one recorded that was four foot tall, three-and-a-half foot by six inches thick." Tr. 105. During this time Schwartze at times held the freestanding end of the tape measurer and at other times was prying down ribs. Tr. 106.

[17] Tisdale's measurement process was also explained by Hohn: "[o]nce they were pried down, the ones that fell, they were still a big solid piece. He'd – Inspector Tisdale measured the solid piece and said that as far as he saw it, measuring the extra broken around the perimeter was a bit of benefiting, and that would just give the operator something to argue about, so he measured the solid slab of the rib." Tr. 107. Measurements were not taken before the ribs were pried down because of the obvious safety hazard of such an action. *Id.*

"[h]e was asking Inspector Tisdale not to write these as orders. 'Orders are for bad mines. We are not a bad mine. We try hard. We have been fixing things on belt lines and travel roads. We've retrained our engineers and are doing a lot better.'" Tr. 116. These were not mitigating factors, Hohn informed, because "[m]itigating circumstances means that you've done something to prevent this from happening, or you've -- you've got some reason that's valid that it happened. This statement [i.e. Schwartze's]sound[ed] just like begging." Tr. 117.

Hohn then added that Tisdale gave the mine several opportunities to present mitigating circumstances to him, informing, "There were a number of times that Inspector Tisdale was offering Schwartze to provide some kind of mitigating circumstances. And Tisdale stated that with the recent history, past violations, the mine being placed on notice of higher negligence, examiners having been retrained, and that the area being cited had been examined this morning, he couldn't see any way out of writing a D [order] without mitigating circumstances." [18] *Id.*

Under cross-examination, Hohn agreed that he did not know what, specifically, the mine had been put on notice about, other than for section 202(a) roof and rib control. Tr. 123. Respondent's point was that such a notice is broad and covers a number of roof and rib matters, including roof spacing, and roof bolts. Tr. 123-124.

The Respondent's defense began with John Schwartze. He was the mine's compliance manager, at that time of these orders and occupied the same position at the time of the hearing. Tr. 137. He has about 30 years of coal mine experience. Tr. 138. Questioned about the events of October 28, 2015, Schwartze informed that the primary escapeway is traveled by an examiner once a week. Tr. 140. Schwartze stated that the main south escapeway "starts in the pit or the surface area, and extends due south for 34-35 crosscuts" and that "the second southwest escapeway starts at the inby end of the main south." Tr. 140-141. The second southwest starts where the main south ends. Tr. 141. He stated that these areas are subject to changing conditions due to weather, humidity and temperature. *Id.* These areas also function as air courses. These factors, he stated, can have an effect on roof and rib conditions and that those conditions were present in October 2015. Tr. 142.

Regarding the orders in issue, Schwartze was asked about his notes associated with them. Tr. 143. Exhibit R 3. The notes reflect his summary of the day, which he wrote when he returned to the surface. *Id.* The inspection, he related, began with the main south. Focusing on the area at crosscut seven to eight, and whether Tisdale alleged any loose ribs, Schwartze remarked that "Tisdale stated he was going to issue a non S and S citation for loose ribs, crosscut seven to eight, entry six. And he made that decision because if nothing fell onto the walkway, it was unlikely that anyone would be hit." Tr. 144-145. Schwartze advised that he pulled down the rib with his walking stick. He did not "remember anything" about the size of the material that came down. Tr. 145. Schwartze informed that if one does need to apply a lot of pressure when taking down a rib it will "most generally will fall straight to the ground." Tr. 146. To the

[18] In fact, Hohn stated that he overheard Schwartze tell another miner who asked what Tisdale was expecting of the examinations, that " 'These were not small, unnoticeable cracks. These were obvious. We dropped the ball. It is what it is. We have to do better.'" Tr. 119, and Hohn's notes, Exhibit P 6 at p. 38.

Court, rather than diminishing the hazard, Schwartze's testimony indicates how susceptible the rib was to coming down.

Contradicting the earlier testimony of both MSHA inspectors, Schwartze stated that he did not observe either inspector taking measurements. Tr. 146. However, as to whether either inspector related "numerical values related to estimates or measurements of the rib size" to him, Schwartze informed only, "[n]ot -- not that I recall." *Id.* Attempting to support his lack of recollection, he maintained that if such estimates had been stated, he would have entered them in his notes.[19] *Id.*

Schwartze agreed that the inspection then continued to the second southwest primary escapeway. Referred to Ex. P 5 and a reference within that to crosscut number 13, Schwartze acknowledged that the inspector pointed out conditions involving ribs in that area, but he could not recall how many problem ribs were identified, responding, "[n]o, I just know that a citation was issued." Tr. 148. For this too, he pulled the ribs down, but he had no recollection about their size and he didn't take any measurements, nor could he recall how the ribs fell. Tr. 148, 150. As before, he did not remember either inspector taking notes. Tr. 150. Similarly, he asserted that if that had occurred, that would have been in his notes. *Id.* Schwartze added that the inspector made no mention that an order would result. Tr. 151.

Referring to Exhibit E 5, and that exhibit's reference to "two loose ribs at crosscut 25 and 26," Schwartze agreed that ribs were pointed out to him at that location. *Id.* However, he could not remember how many ribs were involved. He was asked to pry them down and informed that in this instance they were hard to pull down, breaking his walking stick in the effort. Tr. 152. He opined that, because of that, the rib was not loose enough to fall on its own. Tr. 153. The Court would comment that there is no suggestion that a walking stick is the equivalent of a rib pry bar.

Schwartze's notes contained no information about the size of that rib, and he did not recall either inspector taking measurements there either and reiterated that had they called any measurements out to him, he would have recorded that in his notes. *Id.* Schwartze disclosed that the inspector then advised that another citation would be issued and still another for an inadequate examination. Tr. 153. No mention was made then that an order would instead be issued. Tr. 154. As discussed below, the Court does not find that an inspector must be wedded to his initial determination. Certainly, an inspector is entitled to further contemplate the appropriate

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[19] The Court did express that it found Schwartze to be honest and candid. However, that said, he had no useful memory of the events at all. As stated during the hearing, the Court remarked it, "appreciate[d] [ ] [Schwartze's] candor, that you're being honest in your answers. I have the impression that in many respects you don't remember the details of these three matters and that you have to rely almost entirely upon your notes as opposed to on your own; is that fair? Is that accurate?" Schwartze responded, " I -- I think it is, sir." Tr. 154. As discussed later, against the credible testimony of Inspector Tisdale, primarily, and as augmented by trainee inspector Hohn, when evaluated upon consideration of Schwartze's testimony and the other witnesses for the Respondent, as set forth below, the Secretary established the violations under the applicable burden of proof.

paper to be issued for a violation. This works both ways; if an order was contemplated first and then the inspector reconsidered his initial view, perhaps upon being provided with mitigating circumstances, it would not make sense to suggest that no reduced violation could be entertained.

Schwartze, still reading from his notes, not on any independent recollection, stated that upon reaching the surface Tisdale was going to issue a citation, not an order, adding that "if things had been any worse, he would be considering a D order, but not -- did not want to do that." Tr. 155. However, he then acknowledged that upon reaching the surface and while then in Schwartze's office, Tisdale told him he was issuing (d) orders. Tr. 156. Thus there was no extended delay associated with Tisdale's ultimate decision. Certainly within that short a time frame an inspector is entitled to contemplate the correct action to take regarding observed violations. Further, Schwartze admitted that Tisdale raised the issue of a (d) order while they were still underground. Tr. 176.

The Respondent elicited from Schwartze that significant distances were involved within the main south and the second southwest escapeways and that Schwartze knew of no reportable injuries resulting from adverse rib conditions. Tr. 158.

Not exactly helping the Respondent's case, when Schwartze was asked about Hohn's statements in Ex. P 8, at pages 37-38, and whether Schwartze actually made the remarks attributed to him, he answered, he "probably would have participated in the pre-shift meeting, but [he did not] remember saying this." Tr. 159. So that the import of his answer was made clear, the Court then inquired, "[s]taying on that page you were just on there, it's -- you know by looking at, particularly on page 38,that this Inspector Hohn has put quotation marks asserting that you said effectively -- or part of it is 'We dropped the ball. It is what it is. We have to do better.' It's my understanding from your testimony just a moment ago that you're not claiming that Inspector Hohn has made this up, it's just that you don't recollect. You might have said it. You might not have said it. You just don't recall; is that fair?" To his credit, Schwartze responded candidly, "That is correct." Tr. 159-160.

Upon cross-examination, Schwartze stated that as the compliance manager he is not ever required to review weekly exams to determine if any hazards are needed to be addressed. Tr. 163. In terms of his earlier testimony, that he didn't see Tisdale take measurements of the ribs, Schwartze undercut his earlier assertion, as he confirmed that he couldn't recall if he saw Tisdale take measurements or not. Tr. 167. Schwartze confirmed that he did recall pulling down a number of ribs during the inspection, but about their size, when asked if some were big and some were small, he could only state, "[s]ome were bigger than others, yes." Tr. 167. The Court inquired further about this and Schwartze's decision not to take measurements, as per his remark the he "didn't think it was necessary." Tr. 169. When then asked why he felt it was not necessary, Schwartze's answer was only he "just didn't." Tr. 169-170.

Asked about his notes, made that day on October 28, 2015, Schwartze stated that he made them because an order had been issued. This is his practice whenever an order is issued and he is involved, as he was for these matters. Tr. 170-171.

Schwartze also agreed that MSHA has told him that the mine is under heightened awareness for 75.202(a). Tr. 177. However, consistent with his general lack of recollection about these matters, except for his notes, he could not recall if the mine was on heightened awareness for inadequate examinations before October 2015. Tr. 178. This is an appropriate point to note again that while the Court found that Mr. Schwartze was candid, that does not mean that his testimony was informative or persuasive on the issues before the Court.

The Court inquired further about the essence of Schwartze's testimony, first referring to the rib issue along the main south primary escapeway and asking if it was fair that his problem was that an order was issued. It asked whether Schwartze essentially agreed that there was a violation, but it never should have warranted an order being issued. Schwartze agreed. Tr. 184. Turning to the next order, and posing the same question, Schwartze agreed there were problems with the ribs along the second southwest primary escapeway, but that a citation, not an order should have resulted. Tr. 185. However, he parsed that response by adding "if that." *Id.* This, he explained, was because "some of the ribs [the mine] pulled down "already had timber set in front of them." *Id.* With that qualification, however, Schwartze agreed that, for the ribs described in Ex. P 5, there were problems for those ribs. *Id.* He then conceded that, just based on that, and apart from the unidentified areas he said were timbered, the remaining areas would be a violation of 75.202(a). Tr. 185-186. Following that exchange, Schwartze then agreed that he did not dispute that the order ending in 625 [Order No. 9036625] was also a violation. Tr. 186.

Though he conceded the first two orders at least reflected violations of 75.202(a), Schwartze did not agree that necessitated a finding that the examination had been inadequate. Tr. 186. His reasoning was that "[w]hen -- when the examiner would have traveled this area, he would have been by himself. Maybe he focused on ribs, maybe he focused on something else. Two sets of eyes, we had six sets, so there was more of us. We had time for a more thorough examination." Tr. 186-187. Pressed about his perspective, the Court inquired if he was contending that "it is reasonable that an examiner would have missed all of the locations identified in those two orders and, therefore, it still would be considered an adequate examination?" Schwartze affirmed that was his view, and that it was based on two considerations; that an examiner has only one set of eyes and that "maybe some of them didn't exist when the examiner was there." Tr. 188. The Court does not buy into the multiple sets of eyes argument, nor the suggestion that *maybe some* of the bad ribs weren't present. This is because of the number of hazardous ribs found as expressed through the credible testimony of Tisdale.

The Respondent then called Bill Sheffer who, in October 2015, was the compliance supervisor at the mine. Tr. 191. He has some 38 years of mining experience. *Id.* On the day in issue, Sheffer was working the second shift, meaning he would be at the mine by 2 p.m. Upon his arrival he was advised of the three orders and was directed to take pictures of the rib rolls. Tr. 193. The locations were identified to him as "[t]he second southwest, the crosscut 13, and I thin[k] 25 to 26. And also in the main south, there was a seven to eight crosscut." Tr. 194. Exhibit R 4 reflects photos Sheffer took that day. Asked if that represented all the pictures he

took that day, he answered, "That's all I can remember."[20] *Id.* Photos 1 – 3 were from the second southwest at crosscut 13.[21] Tr. 195. Asked if he saw any evidence of cleanup, Sheffer stated he didn't remember any cleanup there. Sheffer identified a lifeline in Photo 3, in the top center, which appears as a thin rope or cable. By his estimate, the height of the roof in this area was about six feet. Sheffer maintained that the material that had been pried down did not extend into the area where the lifeline was located. Tr. 197. Photos 4, 5 and 6 were then discussed. Those were taken at the same location, "[o]n the second southwest. The crosscut was 25, 26, 24 or 25 or something." Tr. 198. He could not recall the exact location. *Id.* He also could not recall how many ribs there was evidence of being pried down.[22]

Continuing with his testimony associated with those photos, he identified the lifeline in photo 6, and stated that the material came right to the edge of the lifeline. Tr. 199. The Court questioned Sheffer's description in that regard, stating that it appeared that the material was directly beneath the lifeline cone. The Court offered Sheffer an opportunity to correct the Court's perception of the photo, if it was inaccurate but he only responded, "I'm mis -- this right here, I don't know if that's just part of a bad picture or if that actually is the rib right in the center." Tr. 201. He added that, though from his own photo, he did not recall. Tr. 201. However, Sheffer stated that the majority of pried down material was between the rib and the water line, a point made because he had earlier stated that miners don't usually travel in the space between the rib and the water line. Tr. 199. Again, referring to those photos, Sheffer stated that he did not remember any evidence of cleanup "on the second southwest, crosscuts 25 and 26." Tr. 201. Moving to Photo 7, Sheffer identified it as "on the main south at seven to eight," [and therefore relating to Order No. 9036625, the non-S&S order] stating that there had been evidence of cleanup there. Tr. 202.

Upon cross-examination, Sheffer stated that the photos represented all of the areas listed in the orders. Tr. 203. He admitted that he had not seen any of the cited ribs prior to them being pulled down. *Id.* For the first six photos, he did not know if anyone had been down to those locations after the orders had been issued and the time when he arrived. In contrast, with regard to photo 7, he had been told that someone had been on the main south. *Id.* He took no notes of the locations that he walked, nor of the locations that he photographed and he was by himself when he took the photos. Tr. 204. Regarding the water and power lines displayed within photos 4, 5, and 6, Sheffer stated that there would be no maintenance associated with those lines, unless the water line were to blow or if there was a problem with the power on the line. Tr. 206-207.[23]

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[20] When asked by the Court if he took other photos of the ribs that day, Sheffer again stated that he didn't recall taking other photos, but admitted it was possible other pictures were taken. Tr. 212-213.

[21] All three of those photos are of the same location and the same rib. The arrow depicted pointing right is outby. The rib shown is on the inby side of the crosscut. Tr. 195-196.

[22] Looking at photo 4, he believed there was rib down on the left. For Photo 6 he stated it was both ribs, "more or less the center of the entry," he could not tell if a rib had been recently pried down from that photo. Tr. 198.

[23] When Sheffer was asked whether at that time, he was aware of Peabody being placed on

When compared to the testimony of Inspector Tisdale (and secondarily to trainee Hohn), the Court was not persuaded by Sheffer's testimony. Neither the circumstances of his role and more particularly his testimony regarding the photos aided the Respondent's case.[24]

The Respondent then called Aaron C. Meador, a mine examiner for the Respondent's mine. Tr. 222. He has been an examiner since 2008. Tr. 225. Meador works the third shift, from 11 p.m. to 7 a.m. *Id.* He does pre-shift exams and weekly exams. Tr. 223. The weekly exams involve the air courses. As noted, at this mine there were entries that served both as escapeways and air courses. *Id.* Two separate records were required to be made for those exams. Turning to the Main south escapeway and the second southwest primary escapeway, both also are air courses. Tr. 224. In the course of his exams, Meador will look for "[a]ny and all hazards, specifically loose ribs,exposed bolts, loose roof, slipping and tripping hazards, man door signs not up, lifeline being connected all the way, oxygen deficiency, methane accumulates, ventilation short circuits, adequate rock dust, things like that." Tr. 225. Meador stated that, if he comes upon a loose rib, he will try and pry it down, using his walking stick. If that doesn't accomplish the task, he will "flag it out" using red danger tape and he will also report it. Tr. 226.

Focusing then upon his exam of October 28, 2015, he was asked about Exhibit R 1 at page 9 and R 2. For the former, Meador identified it as the weekly examination of emergency escapeways. Line 7 of R 1 reflects the exam for the main south and the second southwest up to crosscut 84. Tr. 229. R 2 is the "weekly examination for hazards, conditions, violations, including test for methane. It's the regular air course book ." Tr. 229. Line 4 reflects a listing in the air course records that also accounts for this main south and second southwest to the crosscut 84 area. Tr. 229. That line records, "[i]ntake air course, pit to northwest main, crosscut 10." *Id.* Other locations he examined that day are also recorded on the exhibit. Tr. 230.

Asked if he observed any hazards from those exams, Meador affirmed, "Yes, on line 2 in the second southwest right return, I found a hazard of an exposed bolt, entry number 11 to 12, crosscut 86," on the second southwest, right intake. Tr. 231. And that was it, Meador found nothing else in terms of hazards. Tr. 233.

Then, directed to the first eight pages of R 1, Meador stated they reflected the other times he had done escapeway exams. Tr. 233. For the week beginning September 1, 2105, Meador stated that exam reflects hazards he had found. At that time he found, "no double cones for a branch line, and that was entry 6, crosscut 79 ... [and he] found where there was no man door sign, entry 6,crosscut 88." Tr. 234. For the week of September 8th, he found a hazard at the primary escapeway, crosscut 84, second southwest to unit 3, in that there was a walkway needing cleraring. Tr. 235. Meador cleared the walkway. *Id.* For the week of September 14th Meador

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heightened notice or heightened enforcement for 202(a) for rib conditions, he responded that he did not remember. Similarly, when asked if he recalled if the mine was on heightened notice or heightened enforcement for inadequate examinations, he did not remember. Tr. 207.

[24] At the conclusion of his testimony, the Court noted that Sheffer was "a nice gentleman" and wished him well. Those comments, while sincere, did not mean that the Court found his testimony persuasive.

found in the first northeast entry for crosscut 79 that there were no double cones for a branch line and in the first northeast entry 4, crosscut 75, crosscut 82, and crosscut 85, there were no spears on the lifeline. He corrected those deficiencies. Tr. 237. For the week of September 21, 2015, he found that there was a curtain left up. This presented a ventilation issue, which he rectified by taking the curtain down. Tr. 238. For the week of October 12th, at the secondary escapeway from the second southwest crosscut 81 to unit 3, he found some exposed bolts at the southeast entry 4 to 5 to crosscut 57 and entry 4 to 3, crosscut 82. Tr. 238. He corrected that hazard. *Id.* For the week of October 19th, Meador found another exposed bolt and the absence of a man door sign in an entry, and he addressed those hazards. Tr. 239-240.

Meador confirmed to the Court that in reviewing his examinations, as discussed during his testimony, he did not find a single instance of a problem with any rib. Tr. 242. The Court considered that to be notable. Cross-examination continued that theme. Directed to Exhibit R 1, and page 9 and line 7, Meador read that the location was "the primary escapeway from the pit to second southwest crosscut 84," and that he found no conditions or hazards there. Tr. 244. Further, he agreed that he examined the primary escapeway of entries 6 and 7 and that had he pulled any ribs down in that location he would have noted that in his weekly exam log, and that no such notations about ribs were made. Tr. 244-245. Though he could not be specific about a date, Meador conceded that he was told about being more alert for rib problems prior to October 2015. Tr. 248.

Applicable Law

Unwarrantable Failure violations

As the Commission has noted, "The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *see also Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000)." *American Coal,* 39 FMSHRC 8, *9, (Jan. 2017).

Related to that is the subject of negligence, the Commission has noted that it "evaluates the degree of negligence using 'a traditional negligence analysis.' *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). Id. at 1263-64." *Id.* at *14.

"Significant and substantial" violations

As the Commission has stated, [a] violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained: 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. **6 Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, *1899 (Oct. 2017).

Discussion

In addition to determining whether violations were demonstrated for these three matters, something the Court finds was clearly established for each, the other key issues involve whether unwarrantable failures were present for all three orders and, for two of them, whether the violations were significant and substantial. The Court, as noted at the outset of this decision, affirms all three and in all particulars.[25]

The Respondent maintains that no violation of the adequate examination standard, occurred, as alleged in Order No. 9036624. Respondent notes that "[d]etermination of compliance with Section 75.364(b) is an objective inquiry that asks whether the operator acted reasonably prudently and conducted an adequate examination for hazardous conditions and certain violations [and that] [t]he 'reasonably prudent person' test considers whether 'a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have recognized [the condition at issue as a] hazardous condition that the standard seeks to prevent.'" R's Br. at 11. To support its contention, Respondent asserts that Meador checked for "myriad hazards and conditions," and if a loose rib was encountered he would either pry it down or flag the condition. *Id.* at 12.

[25] While the Court read and fully considered the parties post-hearing briefs and the reply briefs, it does not believe it is necessary to discuss with particularity each contention raised.

The problem is Meador's professed diligent examination does not square with the conditions Tisdale found. Though examiner Meador's testimony went through the few hazards he found, they were relatively isolated discoveries and not a one involved loose ribs. Accordingly, the Court finds that Meador's testimony actually supported the Secretary's case. The multiple weeks of his escapeway exams during September and October of 2015 were notable for how little he found wrong over that extended period of time. Though the Respondent argued that gaps in the ribs can be difficult to discern, the inspector's order asserted that the loose ribs "were obvious to the most casual observer." Order No. 9036624. The Court which finds Tisdale's testimony to have been credible overall, finds that the ribs were as described by the inspector. It must be remembered that this was not simply one missed loose rib. The inspector found, credibly in the Court's determination, at least seven loose ribs that day. The violation is therefore affirmed.

Addressing the unwarrantable failure and high negligence determinations in the inspector's evaluation, as supported by his credible testimony, Respondent contends that neither finding was proper. R's Br. at 14. To support these arguments, Respondent contends that the conditions were not extensive. The evidence shows otherwise. Further, that the ribs were pried down in short order does not address either unwarrantable failure or the high negligence determinations made by the inspector. The Court has already addressed the argument that the inspector reconsidered his initial view that a citation, not an order, was appropriate.

Respondent then moves to the issue of examining whether there is a high degree of danger in deciding if a violation constitutes an unwarrantable failure, contending that no such high degree was present in this instance. R's Br. at 17. For this the Respondent points to relatively infrequent travel in the cited areas and because of testimony that some of the rib material did not fall into the walkway. R's Br. at 17-18.

The Respondent also contends that the claim that the conditions existed for an extended time was speculative. R's Br. at 19. Arguing that the conditions were not shown to have been growing over the three week period, Respondent contends that the Secretary's evidence was only the inspector's "testimony in support of [the] point." *Id.* at 21. The Court would comment that the inspector's opinion was derived from his considerable mining experience. It is simply not serious to suggest that the numerous loose ribs the inspector found all developed in the approximate nine hours that elapsed between the mine examiner's examination and the inspector's observations.

It is also contended by the Respondent that the "Secretary's witnesses' bald assertions that Peabody was 'on notice' does not support the unwarrantable failure findings." R's Br. at 21. To support that assertion, the Respondent notes that the notice was nonspecific and that the standard involved, 30 C.F.R. § covers more than ribs as it also addresses roof and face support. *Id.* But, it must be noted that ribs, roof and faces are of the same family of concerns; each address areas where persons work or travel and are aimed at protecting persons from falls from each of the three. Indeed, the standard's title itself informs that it addresses "[p]rotection from falls of roof, face and ribs." Beyond that observation, the inspector testified, credibly, as noted in the findings of fact that, putting aside the prior notice issue, he still would have issued his unwarrantable failure findings, irrespective of that notice. Further, when given the opportunity

to present mitigating factors, the Respondent came up empty.

Respondent's contentions regarding the S&S and "reasonably likely" determinations for Order Nos. 9036623 and 9036624, the rib support and inadequate examination.

Those orders, the reader will recall, relate to the rib conditions found by the inspector along the two cited escapeways and the claim that the ribs were not adequately supported to protect miners from rib falls. However, the Court notes at the outset that, while Inspector Tisdale found that Order No. 9036623 was S&S, he also found that his other order for inadequate support, per Order No. 9036625, was not S&S. In the Court's estimation these speak to the inspector's discernment that the conditions did not present identical risks and it dispels the idea that the inspector simply reflexively designated all such instances as S&S.

In any event, speaking to the third prong of *Mathies*, the Respondent contends that "[i]n the context of a Section 75.202(a) violation, '[t]he likelihood of an injury producing event must be evaluated by considering the likelihood of two specific events occurring simultaneously, a rock or other material falling from the roof [or rib] and the presence of a miner directly underneath it.'" R's Br. at 27. Reduced to its essence, the Respondent has in essence argued that infrequent travel in the cited area negates an S&S finding. R's Br. at 27-28. The Respondent also contends the material which fell "did not substantially extend to the center of the entry, where miners would be expected to travel." *Id.* at 29. Further, the Respondent maintains that the inspector's testimony "does not support that any injury was reasonably likely [as there was no evidence] ... to demonstrate the likelihood that a rib would fall at such a time when someone would be present." *Id* at 29. Thus, Respondent argues that there was "no explanation to support that a fall of rib that would affect a miner would be reasonably likely." *Id* at 30.

Last, the Respondent urges that the penalties sought by the Secretary are excessive, observing that "[t]he Secretary proposed a specially assessed penalty of $15,900 for Order No. 9036623, and penalties of $4,000 each for Order Nos. 9036624 and 9036625, which represented the statutory minimum for a Section 104(d)(2) enforcement action at the time of their issuance." *Id.* at 30. After noting that, when before the Commission, penalties are imposed *de novo* and therefore that it is not bound by the Secretary's proposed penalties, Respondent adds that substantial divergences from the proposed penalties require that the basis for such changes be explained. *Id.* at 30-32.

In each instance, the Respondent notes that the burden remains with the Secretary to establish the appropriateness of the penalties sought and "when the Secretary petitions for penalties above the normal formula or statutory minimum, ... he has the burden of establishing the existence of aggravating factors to justify such an increase." R's Br. at 32. Focusing upon Order No. 9036623, for which the Secretary has sought a special assessment of $15,900.00, instead of the statutory minimum of $4,000.00, the Respondent contends that "[t]he Secretary has offered no evidence that would show the propriety of penalties beyond [the regular, in this instance, statutory minimum, assessment] amounts [and accordingly] [w]hen the Secretary produces no justification for a specially assessed penalty, it should be rejected." *Id.* at 33-34. If the Court were to agree with the Respondent that "the unwarrantable failure and high negligence findings for all three Orders are inappropriate [and consequently that] ... the

unwarrantable failure findings were deleted, [ ] the statutory minimum [would] no longer [be] applied.[26] *Id.* at 34.

The Respondent's arguments in support of lower penalties only apply if the Court agrees that aggravating factors were not demonstrated, and that the unwarrantable failure and high negligence designations are not appropriate. The Court does not agree with the Respondent's perspective.

The Secretary's post-hearing brief

The Secretary asserts that the uncontroverted evidence establishes that five loose ribs were identified during the inspection of the 2nd Southwest Primary escapeway, which were gapped from the rib and that three loose ribs were identified at the Main South Primary escapeway which were gapped from the rib. Sec. Br. at 18-19. Ostensibly, these areas had been examined only 9 hours earlier. Also, as the Secretary notes, no rib hazards were identified by the Respondent in the previous two months of examinations. *Id.* at 19. The Court finds that, rather than helping the Respondent's position, those examination records, with so few problems identified, detract from it.

The Court is in agreement with the Secretary's observation that the Respondent's objection was directed more to the issuance of orders, instead of citations, with the latter being more palatable.

Regarding the S&S finding for the 2nd Southwest Primary escapeway, as the Secretary notes, those ribs, when pulled down, fell under the lifeline. As for the S&S finding for the inadequate examination, the Secretary correctly observes, quoting from *Mach Mining, LLC*, 32 FMSHRC 1375, 1381 (Sept. 2010) (ALJ) ("*Mach*"), "[I]f the condition of the escapeway was itself a significant and substantial violation, then for the same reasons the failure to document and report such conditions constitutes a significant and substantial violation." Sec. Br. at 23. The Court agrees with the reasoning of the administrative law judge in that decision and that these violations go hand in hand.

Continuing with its S&S analysis, the Secretary, and working from the Court's finding that all three violations were established, the second element, the measure of danger to safety – contributed to by the violation, the twin failures – the failure to support the ribs and the failure to note their presence – "resulted in the mine not addressing hazardous conditions and therefore exposing miners to those conditions. By allowing the hazardous rib conditions to continue in an area that had not been adequately examined, Peabody put its miners at risk for harm." *Id.* at 24.

As for the third prong of *Mathies*, a reasonable likelihood that the hazard contributed to will result in an injury, the inspector credibly testified in support of that element. As the Secretary contends, "[t]he failure to identify loose ribs in examinations and the failure to control

[26] The Respondent's contends that if its arguments were adopted, "Order No. 9036623 would have been assessed a penalty of $3,493, Order No. 9036624 would have been assessed a penalty of $2,976 and Order No. 9036625 would have been assessed a penalty of $705." *Id.*

them are reasonably likely to contribute to an injury." *Id.* at 25.

For the fourth *Mathies* element, that there is a reasonable likelihood that the injury in question will be of a reasonably serious nature, the Secretary notes that falling material, or falls and tripping on material on the ground constitute such a reasonably serious injury. *Id.* In the Court's view, applying the *Mathies* analysis, establishes the S&S nature of the two orders which made those assertions. While *Mathies* was met simply based on the limited regular travel along these escapeways, it is also independently satisfied when viewed from the use of these areas should the need for an escape occur. One cannot predict when the need for an escapeway will arise. There is nothing in this record which would suggest that, under continued normal mining operations, the unsupported ribs would have been addressed, especially given that no such problems were noted, even 9 hours earlier. Again, the inspector displayed both reasonableness and discernment in assessing the unsupported ribs by finding that only one of the two unsupported rib violations was S&S.

As for the unwarrantable failure designations, which were applied to each of the matters heard, the Secretary asserts that on the basis of Inspector Tisdale's observations of "obviously gapped ribs across two different escapeways, which had not been discovered and corrected despite Peabody's heightened notice regarding ongoing issues it was having with respect to rib control [and considering that] Inspector Tisdale reviewed Peabody's inspection reports and found the examiner had not identified these hazards a mere nine hours prior to the MSHA inspection [and also that] .... the hazards had not been identified at any time during the previous two months," such confluence of factors requires the Court to affirm the 'unwarrantable failure' classification." Sec. Br. at 26-27. Although the Secretary points to the issuance of "30 citations over the past two years for violations under 75.202(a)," in support of its unwarrantable failure contention, the Court considers that aspect of the analysis to be potentially problematic, as the status of those citations is unclear. Instead, the Court looks to the testimony that the Respondent was put on notice about the issue of roof, face and rib issue, per 30 C.F.R. § 75.202, not long before the orders in this case.

Beyond the history/notice issue, the Secretary points out the importance of examinations in general, as a fundamental for safe mining. The Court agrees, seeing this as an obvious but equally important responsibility, which is important to call out. As the Secretary states, miners "rely on the information recorded in the examination books to ensure that everything is safe for the oncoming shifts. Examiners are charged with a unique and singular responsibility to protect miners from identifiable hazards, and it is paramount that mine examiners report these hazards on the books so that mine management can eliminate the hazards and minimize the potential for accidents." Sec. Br. at 28-29.

Conclusions and Penalty Determinations

The three violations involved here are obviously interrelated. Two involved inadequately supported ribs along connected escapeways, while the other pertained to the concomitant obligation to have the weekly inspections of those areas adequately performed. Because all three were closely so related, it would be logically inconsistent to determine that only one or two were unwarrantable failures. The conditions should have been observed during the examinations, as

they existed for a considerable period of time, certainly over multiple shifts, if not weeks. Such conduct clearly constitutes a serious lack of reasonable care.

The same is true for the two orders involving a failure to adequately support the ribs, as a serious lack of reasonable care occurred. The credible testimony from Inspector Tisdale was clear – there were multiple instances of ribs, at least seven, which had to be taken down. The inspector watched them being pried down and then made reasonable tape-measured estimates of their size. As MSHA trainee inspector Hohn credibly recalled, Schwartze remarked that the mine "dropped the ball" and it had to do better. Later, Schwartze did not fully deny that he made that admission.

Among the seven factors the Commission has identified to determine if conduct is "aggravated," as set forth above, the Court finds that six were present. The lone factor that could be debated was "whether the violation posed a high risk of danger." This factor requires some parsing. Given the critical nature for mine safety that examinations play, the Court finds that, as to the inadequate exam charge, there was a high risk of danger, given the number of inadequately supported ribs and the length of time those conditions existed. As for that factor's application to the inadequate supported ribs themselves, the inspector drew distinctions between the two, finding the ribs along the 2nd South West primary escapeway to be "reasonably likely" to result in an injury, while determining that the ribs along the Main South primary escapeway, was unlikely to result in an injury.

However, there is no suggestion that the Commission has required all seven factors to exist for an unwarrantable failure. Instead, that determination is to be made "by looking at all the facts and circumstances of each case." That is the approach the Court took. The Court found that Inspector Tisdale was knowledgeable, articulate and reasonable in his assessment of the two areas where he found inadequately supported ribs. His testimony was credible on those matters, whereas the evidence presented by the defense was unpersuasive. Given the Court's findings of unwarrantable failure for all three orders, the "high negligence" determinations are similarly sustained.

As for the S&S determinations, applicable to the inadequate examination and the inadequately supported ribs along the 2nd South West primary escapeway, the violations have been established. The discrete safety hazard, a measure of danger to safety, contributed by the violation, inadequate exams being a linchpin to effective safety, provides such a measure when an exam fails to note conditions "obvious to the most casual observer." Regarding the last two factors, the reasonable likelihood that the hazard contributed to will result in an injury; and that the injury in question will be of a reasonably serious nature, the Court finds that Inspector Tisdale's testimony was persuasive on those scores. *Harlan Cumberland* Coal, 20 FMSHRC 1275, 1278 (Dec. 1998). The idea that infrequent travel along the cited escapeways is inconsistent with an S&S finding is rejected.

Summary

Having found that the violations identified in the Orders were each established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure were demonstrated and no cognizable mitigation advanced,[27] the Court therefore finds, that upon application of the statutory criteria, the penalties proposed by the Secretary should be applied.[28]

Order No. 9036623 $15,900.00
Order No. 9036624 $ 4,000.00
Order No. 9036625 $ 4,000.00

Total penalty imposed: $23,900.00

ORDER

It is hereby **ORDERED** that the three Orders in this decision are **AFFIRMED** as written. Respondent is **ORDERED** to pay civil penalties in the total amount of $23,900.00 within 30 days of this decision.[29]

William B. Moran

William B. Moran
Administrative Law Judge

[27] The Secretary proved all elements of the alleged violations by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000)

[28] The other statutory factors were duly considered. From the parties' stipulations, it is noted that the Francisco Underground Pit mine site worked 2,935,577 tons during the period of January 1, 2015 to December 31, 2015 and that the Respondent had 515 previous violations in the 15 month period ending October 28, 2015.. (Stipulations 6 and 7; Sec'y Ex. P-1). 7. The factors of good faith and ability to continue in business did not impact the penalty determination.

[29] 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.

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