# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

February 21, 2017

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. VA 2014-236<br>A.C. No. 44-06199-345299-01 |
| v. | Docket No. VA 2014-237<br>A.C. No. 44-06199-345299-02 |
| | Docket No. VA 2014-239<br>A.C. No. 44-06199-346250 |
| RED RIVER COAL COMPANY, INC.,<br>Respondent | Mine: No. 1 Prep Plant |

## DECISION

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Petitioner;
William J. Sturgill, Esq., Sturgill Law Office, P.C., Wise, Virginia, on behalf of the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings are before me based on petitions for assessment of civil penalties filed by the Secretary of Labor ("Secretary") under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 815(d), against the Respondent, Red River Coal Company, Inc. ("Red River"). A hearing was held on June 16 through June 17, 2016, in Pikeville, Kentucky.

These consolidated dockets concern, in part, three orders in Docket No. VA 2014-237, all of which have now settled. The parties' settlement terms with respect to Docket No. VA 2014-237 that impose a total civil penalty of $5,000.00 shall be approved herein. Adjudicated in this matter are the citations and orders at issue in Docket Nos. VA 2014-236 and VA 2014-239. In disposing of these matters, the parties' post-hearing briefs, filed on September 30 and October 3, 2016, have been considered.

## I. Violations at Issue

The single 104(d)(2) order at issue in Docket No. VA 2014-236, and the six 104(d)(2) orders and one 104(a) citation at issue in Docket No. VA 2014-239, have been adjudicated in this proceeding. The seven contested orders that are attributable to unwarrantable failures consist of four orders alleging impermissible coal dust accumulations in Red River's loadout facilities, one order concerning an allegedly inadequate on-shift examination, one order alleging the failure

to provide a safe means of access along an elevated walkway, and one order alleging Red River's failure to report the occurrence of an accident. The remaining 104(a) citation concerns Red River's alleged alteration of an accident scene.

In satisfaction of these eight contested orders and citations, the Secretary proposes a total civil penalty of $63,200.00. As a result of this adjudication, two orders and one citation shall be affirmed, and five orders shall be modified from section 104(d)(2) orders to section 104(a) citations, thus removing the unwarrantable failure charges. Given these modifications, a total civil penalty of $21,600.00 shall be assessed for the eight orders and citations adjudicated in this proceeding.

## II. Evidentiary Framework

The issues to be resolved are whether the cited violations in fact occurred, whether or not the cited conditions were properly designated as significant and substantial ("S&S") and/or attributable to unwarrantable failures, and the appropriate civil penalties to be assessed. The criteria for resolving these issues are as follows:

### a. Fact of the Violation

To find a violation of a mandatory standard, the Secretary has the burden of proving each element of a citation by the preponderance of the evidence, based on direct evidence or adequate circumstantial evidence. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989) (citations omitted). The Commission has noted that the burden of showing something by a preponderance of the evidence standard requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *Rag Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

### b. S&S

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is [S&S] under *National Gypsum*, the Secretary of Labor must prove:
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> > (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 [by the violation] will result in an injury; and

(4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Id.* at 3-4; *see also Austin Powder Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

Once the fact of a violation has been established under step one of *Mathies*, the second *Mathies* step addresses the extent to which the violation contributes to a particular hazard. In a change to the Commission's long-standing interpretation of the *Mathies* criteria, the Commission has recently opined that the second step analysis is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (*citing Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016)). Thus, step two of the *Mathies* test now involves a two-part analysis: first, identification of the hazard created by the subject violation of the safety standard; and second, "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy,* 38 FMSHRC at 2038. Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Under the Commission's analysis in *Newtown Energy*, when evaluating the third *Mathies* criterion, the analysis assumes that the hazard identified in step two has been realized, and then considers whether the hazard would be reasonably likely to result in injury, again in the context of "continued normal mining operations." *Newtown Energy*, 38 FMSHRC at 2038 (*citing Knox Creek Coal Corp.*, 811 F.3d at 161-62); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133 at 135; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). In sum, while the methodology for analyzing S&S under the long-standing *Mathies* criteria has been modified by *Newtown Energy*, the Commission acknowledged that "the ultimate inquiry has not changed." *Id.* at 2038, n.8.

**c. Unwarrantable Failure**

As a general proposition, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). An unwarrantable failure is characterized by "indifference," a "serious lack of reasonable care," "reckless disregard," or "intentional misconduct." *Id.* at 2003-04; *see also Buck Creek Coal*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of an unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *See IO Coal Co.,* 31 FMSHRC 1346, 1350-51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and whether the operator knew or should

have known of the existence of the violation. *Id.* These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether a mine operator's conduct is aggravated or if mitigating circumstances exist. *Id.*

**d. Civil Penalty Criteria**

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
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> > [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). The Commission has noted that the *de novo* consideration of the appropriate civil penalties to be assessed does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Mine Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

## III. Description of Loadout Facilities

The No. 1 Prep Plant is a coal preparation and distribution facility in Wise County, Virginia, owned and operated by Red River. The No. 1 Prep Plant is subject to the provisions of 30 C.F.R. Part 77 of the Secretary's mandatory safety standards, which govern surface coal mines. As a general matter, the coal that is processed at the No. 1 Prep Plant is extracted from

local surface mines and hauled to the plant via haulage trucks. Tr. at 67.[1] After the coal is processed, it is discharged via chutes from the prep plant into freight trains passing below the facility. Tr. at 68-69, 74-75.

Central to this proceeding is a train that was loaded on September 16, 2013, one day prior to the issuance of the subject violations. The next train was scheduled to be loaded on September 20. Tr. 314; *Resp. Br.* at 2, 15-16. Processed coal is loaded onto freight trains through a distribution building that is fed by two underground conveyor belt tunnels. Tr. at 68-69, 74-75. Three of the four alleged accumulation violations occurred in these two conveyor belt tunnels and a narrow vent pipe, and the fourth allegedly occurred in the distribution building.

Specifically, various grades of processed coal are stockpiled on the surface and fed through a series of chutes onto two underground loadout conveyor belts. These underground conveyor belts are located in a "top loadout tunnel" and a "bottom loadout tunnel." Tr. at 74-75. These tunnels are designed to convey and transfer coal through an L-shaped system of belts. *See, e.g.*, Gov. Ex. 18; Tr. at 74-75. Coal deposited onto the top loadout tunnel belt is transferred onto the perpendicular bottom loadout tunnel belt. *Id.* Coal can also be fed directly onto the bottom loadout belt. *Id.* The bottom loadout tunnel belt conveys the coal uphill, from underground onto the surface, above a state highway, and into the loadout distribution building. *Id.*; Tr. at 84.

The loadout distribution building is an eight story facility located above the train tracks from which freight trains are loaded with processed coal. Tr. 119. The loadout distribution building is comprised primarily of a surge bin, a weigh bin, and associated equipment. Tr. 303-04. Coal is fed into the distribution building's surge bin from the bottom loadout tunnel belt, then into the weigh bin where it is measured and distributed via chutes as trains pass slowly on the tracks situated below. *Id.* In the interim period between the arrival of trains, the loadout facilities are idle; no miners, with the exception of the miner tasked with cleaning and maintenance, are assigned to work there. Tr. at 314-15, 320; Tr.2 at 69-70.

Miners enter and exit the loadout tunnels at the mouth of the bottom loadout tunnel where the belt exits from underground to the surface. Tr. at 70, 96. If the mouth of the bottom loadout tunnel became inaccessible in an emergency, pursuant to 30 C.F.R § 77.213, an exhaust vent pipe located at the far end of the top loadout tunnel can serve as an escapeway.[2] *Id.* This vent pipe is 36 inches in diameter. *Id.* Air courses through the two loadout tunnels and vent pipe from the mouth of the bottom loadout tunnel by means of a ventilation fan located at the mouth of the vent pipe. Tr. at 80. Thus, during loadout operations, the ventilation system causes coal dust to be blown from the mouth of the bottom loadout tunnel, through the bottom belt tunnel into the top belt tunnel, ultimately exiting through the exhaust vent pipe.

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[1] As used herein, citation "Tr." refers to the June 16, 2016, hearing transcript. Citation "Tr.2" refers to the June 17, 2016, hearing transcript.

[2] Section 77.213 provides, in pertinent part, that an escapeway of not less than 30 inches in diameter must be provided when a tunnel is closed at one end. 30 C.F.R. § 77.213.

## IV. Disposition of Violations at Issue

### a. Order No. 8202324 (Ventilation Pipe Accumulations)

#### i. Findings of Fact

On September 17, 2013, Mine Safety and Health Administration ("MSHA") Inspectors Stonewall Eldridge and Scott Beverly conducted an E16 spot inspection of the No. 1 Prep Plant loadout facilities. Tr. at 62. Eldridge and Beverly began their inspection by crawling down the 36 inch diameter exhaust vent pipe (in the opposite direction of airflow design) for the purpose of accessing the top loadout tunnel. Tr. at 70, 173-74. Eldridge and Beverly testified that they observed a coating of dry black coal dust accumulated on the vent pipe's inner surface. Tr. at 89, 96, 105, 173-74. Eldridge described these accumulations as "a thick coating" such that "when you run your finger through it, you can see where it pulls the coal away, and you can see the coal on each side of it, on the side of the mark that you make with your finger." *Id.* The act of crawling through the tunnel caused the black coating of coal dust to become suspended in the air. Tr. at 93. Eldridge also observed similar accumulations in an adjacent 24 inch diameter vent pipe that is used solely for ventilation purposes. Tr. at 96-97.

Based on the inspectors' observations, Eldridge issued 104(d)(2) Order No. 8202324, which alleges impermissible coal dust accumulations in surface installations in violation of section 77.202.[3] Specifically, Order No. 8202324 provides:

> The 36 inch diameter loadout tunnel escapeway has accumulations of coal dust in dangerous amounts inside. A thick coating of coal dust has accumulated all around the inside of the escapeway. A separate 24 inch diameter ventilation pipe, which connects to the 36 inch escapeway on one end and to the loadout tunnel also has a heavy coating of coal dust inside. The ventilation fan for the draw off tunnel pulls air through the escapeway so a coal dust explosion inside the tunnel would suspend the coal dust inside the escapeway intensifying the explosion. The foreman is required to travel this area at least once each working shift and the condition was obvious. The foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing the condition to exist. This is a [sic] violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 1. Eldridge was concerned that the cited coal dust created an explosion and fire hazard. Tr. at 100. Consequently, Eldridge characterized the cited violation as S&S and attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $9,100.00 civil penalty for Order No. 8202324. The record reflects that the accumulations were reported as abated on September 19, 2013, by washing the cited accumulations in the pipe with a hose. Gov. Ex. 1; Tr. at 187.

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[3] 30 C.F.R. § 77.202 provides: "Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

ii. Fact of the Violation

Section 77.202, the cited mandatory standard, requires that an operator of a surface facility should not allow *the existence or accumulation* of coal dust in dangerous amounts. 30 C.F.R. § 77.202. Unlike the primary escapeway requirements in 30 C.F.R. § 75.380 that require intake air to be used in escapeways in underground mines, the vent pipe escapeway at the surface loadout facility is ventilated with what, in essence, is return air. *See* Tr. at 70. In this regard, the loadout facility is designed to direct the suspended coal dust that is generated by the dumping of as much as 100,000 tons of coal through chutes and onto beltlines in the loadout tunnels, into the escapeway vent pipe. *Id.*; Tr. at 41, 74-75. Yes, indeed, there is gambling in the casino. Yet the Secretary seeks to hold Red River liable for vent pipe accumulations that the loadout facility is designed to create.

Nevertheless, while I have reservations about the propriety of citing Red River for such accumulations, Red River has acknowledged that section 77.202, the cited mandatory safety standard, obligates it to clean these unavoidable accumulations following each train loading activity. *See* Tr. at 319. Here, it is undisputed that Red River failed to timely clean the cited accumulations following the train loading on September 16, 2013, as the coal dust that accumulated during that load was still present during the September 17 inspection. In this regard, although the next train was due to arrive on September 20, the cited accumulations must be viewed in the context of their continued existence during the course of future loading operations. When Red River failed to expeditiously clean the subject accumulations, it did so at its own risk. Having concluded that section 77.202 is applicable to the cited accumulations, the Secretary has demonstrated the fact that Red River "allowed" coal dust accumulations in the exhaust vent pipe in violation of the cited mandatory standard.

iii. S&S

In view of the above, the requirement of the first step of *Mathies* to identify an underlying violation of section 77.202 has been satisfied. Under the Commission's *Newtown Energy* modification of step two of the *Mathies* criteria, the focus shifts to analyzing the "likelihood of the occurrence of the hazard" against which section 77.202 is directed. *Newtown Energy*, 38 FMSHRC at 2038. Here, as there are no ignition sources in the cited vent pipe, the relevant hazard is the propagation of a fire or explosion that begins in the loadout tunnels. Based on the design of the airflow, any explosion that occurs in one of tunnels will be funneled toward the vent pipe where the cited accumulations were located. Should such an explosion occur, the cited coal dust accumulations are reasonably likely to further propagate the explosion.

Turning to *Mathies* steps three and four, however, the focus shifts to whether such propagation is reasonably likely to result in a reasonably serious injury. *Id.* It is highly unlikely, if not impossible, that the cited condition will contribute to injury to miners *working in the tunnels* for, given the direction of airflow and the lack of ignition sources in the vent pipe, the accumulations in the vent pipe cannot propagate an explosion that will be directed *into* the loadout tunnels. Thus, the cited condition cannot properly be designated as S&S with respect to the propagation hazard as it relates to the loadout tunnels.

However, regarding the issue of the propagation hazard posed to miners *using the vent pipe as an escapeway*, it is readily apparent that any propagation hazard in the escapeway is illusory, as the full force of any explosion in the loadout tunnels, where there are potential sources of ignition, would be directed into, and magnified by, the 36 inch vent pipe. In this regard, Order No. 8202324 states: "The ventilation fan for the draw off tunnel pulls air through the escapeway so a coal dust explosion inside the tunnel would suspend the coal dust inside the escapeway *intensifying the explosion*." Gov. Ex. 1 (emphasis added). Thus, propagation confined within the exhaust vent pipe does not create a discrete hazard to miners, as this hazard cannot be disassociated from the hazardous effects created by the force of an explosion originating in the loadout tunnels. Simply put, the risk of injury to miners in the vent pipe from an explosion exists regardless of the presence of the cited accumulations. Thus, the cited condition cannot be properly designated as S&S with respect to the propagation hazard as it relates to the accumulations in the vent pipe.

iv. Unwarrantable Failure

As previously noted, the classic hallmark of an unwarrantable failure is conduct characterized by "indifference," a "serious lack of reasonable care," "reckless disregard," or "intentional misconduct." *Emery Mining*, 9 FMSHRC at 2001. As the loadout tunnel system is designed to deposit accumulations in the vent pipe, it is significant that MSHA does not assert that the loadout tunnel design is impermissible. Consequently, there is no basis for concluding that the occurrence of the cited accumulations is attributable to more than ordinary negligence. With respect to the issue of duration, the fact that the accumulations, cited on September 17, 2013, were located in a loadout facility that would remain idle until September 20, during which time the accumulations could have been cleaned, is a mitigating factor. Thus, the unwarrantable failure designation shall be deleted and Order No. 8202324 shall be modified to a 104(a) citation, as the evidence reflects that the cited condition was attributable to no more than a "low" degree of negligence.

v. Civil Penalty

The Secretary proposes a $9,100.00 civil penalty for Order No. 8202324, which has been modified to a 104(a) citation in this proceeding. I view the reduction in negligence and gravity, the problematical ventilation design that made the cited accumulations unavoidable, and the idle nature of the loadout facility, as overriding mitigating circumstances. Consequently, applying the penalty criteria in section 110(i), **a civil penalty of $100.00 shall be assessed for Citation No. 8202324.**

### b. Order Nos. 8202325, 8202326 and 8202327 (Loadout Tunnels and Distribution Building Accumulations)

#### i. Findings of Fact

These orders allege that Red River violated 30 C.F.R. § 77.202, for allowing dangerous amounts of coal dust to accumulate in the top loadout tunnel, bottom loadout tunnel, and the loadout distribution building, following the loading of a freight train on September 16, 2013. The cited accumulations were observed by MSHA Inspectors Eldridge and Beverly the following day, on September 17. Red River asserts that the loadout facilities were scheduled to remain idle until September 20, when the next freight train was anticipated to arrive. Tr. 314; *Resp. Br.* at 2, 15-16.

After exiting the vent pipe on September 17, 2013, Inspectors Eldridge and Beverly inspected the top loadout tunnel beltline. Tr. at 123. Eldridge observed accumulations of black coal dust on the backside of the belt structure and on the floor beneath the belt. Tr. at 123-24. Eldridge testified that these accumulations measured three inches in depth along the beltline, and one inch deep around the guards at the tail drive roller. Tr. at 124. Eldridge further testified that there was evidence that the tail roller shaft had been turning in the loose coal during the September 16 loading operation, creating frictional heat and a potential ignition source. Tr. at 125-29, 131. Red River Prep Plant Foreman Randy Morgan, who observed the subject conditions shortly after the issuance of the orders, conceded that the accumulations along the top and bottom loadout tunnel beltlines were the result of spillage from the belt. Tr.2 at 58. As a result of the inspectors' observations, Eldridge issued 104(d)(2) Order No. 8202325, alleging impermissible coal dust accumulations in surface installations in violation of section 77.202. Specifically, Order No. 8202325 provides:

> The top clean coal loadout reclaim tunnel has accumulations of coal dust, in dangerous amounts, on the backside of the belt structure and on the floor underneath the belt. The coal underneath the belt and on the backside measures up to 3 inches deep. The coal dust measures up to 1 inch deep around the guards at the tail drive roller and on the belt structure. The tail drive roller shaft is turning in the loose coal, which creates an ignition source. *This area is required to be traveled* during the required on shift examination at least once *during each working shift. The belt and tunnel are idle at this time* but were used on 9-16-2013 and are available for use at any time. The foreman has engaged in aggravated conduct constituting more than ordinary negligence by allowing the coal accumulations to exist. This violation is an unwarrantable failure to comply with a mandatory standard. *Standard 77.202 was cited 1 time in two years* at mine 4406199 (1 to the operator, 0 to the contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 2 (emphasis added). Eldridge characterized the cited violation as S&S. Despite the fact that the loadout tunnels would remain idle for several shifts, and a lack of a significant history of relevant violations, Eldridge characterized the cited condition as attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $9,100.00 civil

penalty for Order No. 8202325. The violation was abated on September 19, 2013, after the accumulations were washed down the tunnel into a sump pump that is located at the junction between the top and bottom loadout tunnels. Gov. Ex. 2; Tr. at 187.

Continuing their inspection along the bottom loadout tunnel, Eldridge observed 14 inches of coal accumulations around the tail roller, near the transfer point between the top and bottom loadout tunnel beltlines. Tr. at 133. Morgan (Prep Plant Foreman) and Red River Maintenance Supervisor Allen Wingler testified that coal accumulations near the transfer point and adjacent sump pump are generally wet from accumulations of groundwater and water from recently-washed coal. Tr. at 309-11. Eldridge further observed two inches of coal dust accumulations on the roller guards and belt structure along the beltline. Tr. at 133. At the tail roller, Eldridge testified that there was evidence that the belt itself was running in the accumulations, presenting a risk of frictional heat and an ignition source. Tr. at 133-35. Based on these observations, Eldridge issued 104(d)(2) Order No. 8202326, alleging impermissible coal dust accumulations in surface installations in violation of section 77.202. Specifically, Order No. 8202326 provides:

> The bottom clean coal loadout reclaim tunnel has accumulations of coal dust, in dangerous amounts, present. Coal dust measuring up to 14 inches deep is all around the tail roller of the tunnel belt. The belt has been running in the loose coal, which creates an ignition source. The guards and belt structure have a thick coating of dust measuring up to two inches deep. This area is required to be traveled at least once each working shift by a certified foreman doing the required on shift examination. The foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing this obvious condition to exist. This is an unwarrantable failure to comply with a mandatory standard. Standard 77.202 was cited two times in two years at mine 4406199 (2 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 3. Eldridge characterized the violation as S&S. Once again, despite the mitigating circumstances noted above, Eldridge characterized the cited condition as attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $9,100.00 civil penalty for Order No. 8202326. The violation was abated on September 19, 2013, after the accumulations were washed down the tunnel into the sump pump located at the junction between the top and bottom loadout tunnels. Gov. Ex. 2; Tr. at 187.

After inspecting the loadout tunnels, Eldridge and Beverly proceeded to the loadout distribution building. Tr. at 147. As previously noted, the loadout distribution building is an eight story facility situated above the railroad track where freight cars are loaded with processed coal. Tr. at 119. Eldridge and Beverly inspected the distribution building from the roof down, first identifying "a thick coating of coal dust" on the belts, wall structures, floors, and all equipment throughout the building. Tr. at 147-55. Eldridge testified to dry coal dust accumulations, as much as four inches deep, on electrical equipment such as conduits and connections, wiring, control boxes, motors, hydraulics, heaters, air compressors, and welders, including accumulations within the motor control center. *Id.*

Thus, Eldridge issued 104(d)(2) Order No. 8202327, alleging impermissible coal dust accumulations in surface installations in violation of section 77.202. Specifically, Order No. 8202327 provides:

> The loadout building has accumulations of coal dust, in dangerous amounts, present. The walls, floors, electrical conduit and all the equipment on all floors, including the 2nd floor MCC room, have a thick coating of coal dust present, measuring up to 4 ½ inches deep in areas. The loadout building is idle at this time but was used on 9-16-2013 and is available for use if needed. The foreman is required to do an on shift examination of this building at least once each working shift. The foreman has engaged in aggravated conduct constituting more than ordinary negligence by allowing the accumulations to exist. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 77.202 was cited 3 times in two years at mine 4406199 (3 to the operator, 0 to a contractor).

Gov. Ex. 4. Eldridge characterized the violation as S&S. Despite mitigating circumstances previously discussed, Eldridge characterized the cited condition as attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $9,100.00 civil penalty for Order No. 8202327. On September 19, 2013, the accumulations were abated by pressure washing, vacuuming, and hand wiping away the coal dust. Gov. Ex. 4.

ii. Fact of the Violations

Inspectors Eldridge and Beverly speculate that all of the cited accumulations likely built up over "several train loads." Tr. at 104, 112, 162, 182. In contrast, Red River employees Wingler, Morgan, and Boyd testified that the cited accumulations in the escapeway exhaust vent pipe, the two loadout tunnels, and the distribution building, were solely the by-product of the September 16 train loading. Tr.2 at 47, 55-57, 60, 84-85. To support this assertion, Red River estimates that the total tonnage of coal loaded on September 16 was between 60,000 and 100,000 tons. Tr. at 41. Moreover, Morgan testified that he had been in the loadout facilities prior to the September 16 train loading and that the facilities were clean. Tr.2 at 63.

Thus, Red River asserts that the cited accumulations in the vent pipe, the loadout tunnels, and the distribution building, occurred as a result of normal loadout operations when the facilities were last utilized on September 16, one day before the subject inspection. Tr.2 at 44, 47, 55-57, 84-85. The next loading operation was scheduled to occur four days later, on September 20. Tr. 314; *Resp. Br.* at 2, 15-16. When trains are not being loaded, the loadout facilities are idle and unstaffed, with the exception of the miner who is assigned to clean and maintain the facilities in between train loads. Tr. at 314-15, 320; Tr.2 at 69-70. While idle, the only energized equipment in the loadout facilities is a permissible sump pump at the junction of the top and bottom loadout tunnels, the ventilation fan, and lights illuminating the distribution building. Tr. at 335-337. Contrary to the Secretary's assertion, Red River argues that this energized equipment does not present a likely source of ignition. Tr. at 194, 335-337. Consequently, Red River asserts that the cited coal accumulations were not hazardous when the facilities were idle. Tr. at 320, 335-337.

Notwithstanding the question of whether the cited accumulations were hazardous while the loadout facilities were idle, Red River maintains that the residual accumulations that occurred during the September 16 train loading would have been cleaned during the morning shift immediately following the loading operations (in this case, the morning of September 17). Tr. at 319; Tr.2 at 51, 61, 90. Thus, Red River contends that the cited accumulations would normally have been cleaned prior to the late afternoon inspection by Eldridge and Beverly. Tr. at 319; Tr.2 at 61, 90. However, cleaning was reportedly delayed as Dwayne Caroll, the miner in charge of cleaning the loadout facilities, called in sick on September 17. Tr. at 318-19; Tr.2 at 61. Red River argues that a miner would have been assigned to clean the loadout facilities in place of Caroll had the facilities been scheduled to operate sooner than September 20, the date of the next scheduled loading operation. Tr. at 315, 320, 342; Tr.2 at 69-70.

In addressing the issue of liability, the question is whether the Secretary is alleging that Red River allowed the accumulations to occur, or alleging that Red River failed to timely clean the subject accumulations. The record, when viewed in its entirety, clearly reflects that significant accumulations in the loadout tunnels and distribution building are a normal by-product of loading trains with as much as 60,000 to 100,000 tons of coal. Consequently, it is unreasonable to expect that significant coal can be prevented from accumulating during the train loading process. *See* Tr. at 153. One must question the propriety of requiring miners to be present in the loadout tunnels for the purpose of monitoring conditions during loading, exposing them to dust inhalation and explosion or propagation hazards.

Significantly, Inspector Beverly testified:

> . . . [T]here was a lot of float coal dust. There was just too much float coal dust. It was just everywhere, and *it hadn't been cleaned.* It hadn't been — it hadn't been addressed, so — and it shouldn't have been allowed to accumulate like that. It should've been taken care of. And it was black, most of it.

Tr. 181 (emphasis added). Thus, it is obvious that the Secretary premises Red River's liability on its alleged failure to timely clean the cited accumulations, as the cited conditions are an inevitable by-product of the loading process.

With regard to timeliness, Red River relies on the alleged absence to due illness of Caroll, the miner regularly tasked with cleaning the loadout facilities on the morning shift of September 17. The purported absence of Caroll is not a mitigating, or otherwise relevant, circumstance. Mine operators are responsible for providing substitute personnel to ensure the safety of ongoing mining operations.

We now turn to whether the cited accumulations can be properly characterized as "dangerous" accumulations prohibited by section 77.202. The Commission has recognized that the degree of hazard posed by a cited condition must be evaluated as if the condition were permitted to exist unabated. *See S&H Mining*, 15 FMSHRC 956, 957 (June 1993); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1140-41 (May 2014) (holding that consideration of accumulations violations cannot take into consideration future planned abatement efforts). Thus,

while the fact that cited accumulations were observed during a period when the loadout facilities were idle may mitigate the degree of negligence, it does not obviate the fact of the cited violations. As previously stated, when Red River failed to immediately clean the subject accumulations during the morning shift on September 17, it did so at its own risk. Red River's self-serving assertion that these accumulations would have been cleaned prior to the next train loading on September 20 is insufficient to shelter it from liability.

Having assumed the cited accumulations would continue to exist until the next train was loaded on September 20, heat generated by defects in running conveyor belt systems at that time, and the potential arcing of energized electrical systems, were ever-present sources of ignition. The presence of the cited accumulations in proximity of these potential ignition sources created a fire or explosion hazard. Consequently, the Secretary has satisfied his burden of demonstrating the fact that the cited accumulations in the loadout tunnels and distribution building constituted "dangerous" conditions in violation of section 77.202.

1. Duplicity of Violations

Having determined that the violations cited in Order Nos. 8202325, 8202326 and 8202327 occurred, we now address Red River's assertion that these orders are duplicative and should be combined into a single violation. *Resp. Br.* at 19-20. Section 110(a) of the Mine Act provides that "[e]ach occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. § 820(a). In asserting that these orders are duplicative, Red River relies on the fact that the loadout tunnels "are [both] interconnected and the ventilation system for the tunnels all have one fan that pulls air throughout the whole system and blows air toward the transfer point." *Resp. Br.* at 19.

At hearing, Inspector Eldridge explained that he issued separate orders for the two tunnels as the conveyor belts therein "can be run independently of each other." Tr. at 114-15, 120. Eldridge testified that he did not issue eight different citations for each of the eight floors of the loadout distribution building where he found accumulations of coal dust, as the entire building "runs in unison" and "functions like one piece of equipment." Tr. at 119.

The Commission has held that "citations or orders are not duplicative as long as the standards allegedly violated impose separate and distinct duties." *Kentucky Fuel Corp.*, 38 FMSHRC 1614 (July 2016), citing *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997). Separate citations for similar conditions are justified as such citations serve the purpose of guiding and motivating discrete abatement efforts needed to eliminate discrete hazards. *Port Costa Materials, Inc.*, 15 FMSHRC 1516, 1519-20 (July 1994) (ALJ). Each conveyor belt, from head pulley to tail pulley, presents discrete safety hazards with regard accumulations in proximity to potential sources of ignition created by misaligned belts or defective rollers. Operators are obliged to ensure that each "separate and distinct" conveyor belt is operating safely. As discussed below, while similarity of violations may be a relevant consideration regarding a multiplier effect relevant to the civil penalty to be imposed, such similarity is not a bar to the issuance of multiple citations. Consequently, the fact of the accumulation violations in the loadout tunnels and distribution building shall be affirmed.

iii. S&S

On first blush, the idle nature of the loadout facilities would appear to be a mitigating circumstance with regard to the issue of S&S. However, Red River's self-serving assurances that the cited accumulations would have been cleaned prior to the scheduled September 20 train loading operation are not dispositive, as violative conditions must be presumed to have remained unabated during the course of continued mining operations. *See Knox Creek*, 36 FMSHRC at 1140-41.

Applying the Commission's S&S criteria, step one of *Mathies* is satisfied as the Secretary has demonstrated violations of section 77.202. Turning to *Mathies* step two, as modified by the Commission's recent holding in *Newtown Energy*, the record reflects that the hazard contemplated by section 77.202 is a potential fire or explosion. The record further reflects that it is reasonably likely that the cited accumulations will be a fuel or propagation source that will reasonably likely cause or contribute to a fire or explosion. Regarding *Mathies* steps three and four, in the event of a fire or explosion in the loadout tunnels or distribution building, it is reasonably likely to result in reasonably serious, if not fatal, injuries to miners who may be working in the loadout facilities. Consequently, the cited accumulation conditions in the loadout tunnels and distribution building are properly designated as S&S.

iv. Unwarrantable Failures

In determining whether violations are attributable to more than ordinary negligence justifying unwarrantable failure designations, the Commission looks to such factors as whether the violation posed a high degree of danger, the length of time a violation has existed, and the operator's knowledge of the existence of a violation. *IO Coal Co.,* 31 FMSHRC at 1350-51. Significantly, the Commission has expressed that all relevant facts and circumstances of each case must be considered to determine if a mine operator's conduct is aggravated, or if mitigating circumstances are present. *Consolidation Coal Co.*, 22 FMSHRC at 353.

With respect to mitigating circumstances, the orders acknowledge that the top and bottom loadout tunnel conveyor belts, as well as the loadout building, were idle at the time the cited accumulations were observed by the MSHA inspectors. Regarding the hazard posed to mine examiners, despite the fact that the orders specified that the loadout tunnels and distribution building require an examiner to travel these areas at least once during *each working shift*, the operative daily inspection provisions of section 77.1713(a) only require inspections in *each active working area*. *Compare* Gov. Exs. 2, 3, 4, *with* 30 C.F.R. § 77.1713(a).

Thus, examiners were not required to be in the loadout facilities each shift during the interim period between September 16 and September 20, when the facilities were scheduled to be idle. Upon entering the loadout area to conduct an inspection, the cited accumulations do not pose a fire or propagation hazard to mine examiners during the interim idle period. As such, the

Secretary has failed to demonstrate that the cited accumulations posed a high degree of danger.[4] Moreover, Red River's failure to identify the cited accumulations during a period when the loadout facilities were idle and examinations were not required is not an aggravating factor.

Although the cited accumulations were obvious, the specific facts of this case reflect that, as noted, the accumulations were not in an active area when observed on September 17, 2013. Thus, the obviousness of the conditions is likewise not an aggravating factor. Nor is the continued existence of the accumulations in an idle area of the mine an aggravating consideration with respect to duration. Finally, the cited orders reflect that there is no history of relevant violations.

In apparent recognition that the unusual circumstances in this case present significant mitigating factors, the Secretary seeks to elevate the seriousness of the violations by asserting that the cited accumulations were the result of "several train loads," in addition to the accumulations that occurred on September 16. Tr. 24-25, 104, 112-13, 162, 182-84. It is axiomatic that the Secretary bears the burden of proving every element of a violation. *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2152-53. Given the fact that chutes were repeatedly utilized to load the train with as much as 100,000 tons of coal on September 16, the Secretary's assertion is based on speculation that falls far short of satisfying the Secretary's burden of proof. *See* Tr. at 41. Thus, the Secretary has failed to adequately demonstrate that the cited accumulations had been present for more than one day.

Consequently, the Secretary has failed to establish that the cited accumulations are attributable to more than ordinary negligence. Accordingly, Order Nos. 8202325, 8202326 and 8202327 shall be modified to section 104(a) citations to reflect that the cited conditions were not attributable to unwarrantable failures.

v. Civil Penalties

While it has not been contended that the proposed penalties are inappropriate to the size of Red River's business, or that they would otherwise interfere with its ability to continue in business, there are significant mitigating factors. For example, the absence of any significant history of relevant recent violations is a mitigating consideration. Moreover, the negligence attributable to Red River's conduct has been reduced from aggravated to no more than "moderate" negligence given the idle status of the loadout facilities. This idle condition is an additional mitigating factor with respect to the gravity of the violations. Red River demonstrated good faith in rapidly achieving compliance after the orders were issued. Finally, the interrelated

[4] With respect to the distribution building, Inspector Beverly's testimony that accumulations on non-sealed electrical equipment are dangerous, is belied by the fact that ordinary electrical equipment is not required to be sealed and dust proof even though combustible coal dust routinely accumulates in the loadout distribution building during regular loading operations. Tr. at 197-98. The electrical equipment in the distribution building that was required to be sealed to prevent the entry of coal dust was properly sealed. Tr. at 334. Thus, the degree of danger posed by the cited accumulations in the distribution building during a period when trains are being loaded is not an aggravating factor.

nature of the violations results in a multiplier effect that is an additional factor warranting a reduction in each civil penalty.

In view of these considerable mitigating circumstances brought about by the rather unusual circumstances of this case, **a civil penalty of $1,400.00 each shall be issued for Citation Nos. 8202325, 8202326 and 8202327, resulting in a total civil penalty of $4,200.00 for these three citations.**

**c. Order No. 8207981 (Walkway)**

i. Findings of Fact

On September 17, 2013, MSHA Inspector Larkin Clevinger inspected the area surrounding the strip coal sampler building at the prep plant. Tr.2 at 99. Along the backside of the sampler building, Clevinger inspected a walkway that was constructed with a combination of metal grating, concrete, and dirt. Tr.2 at 100; Gov. Ex. 8, p. 29-34. The walkway was elevated above a steep loose coal slope that culminated in an approximately 40 foot drop to the ground below. Tr.2 at 115. To prevent injuries from a fall, a handrail was installed extending the full length of the walkway. Gov. Ex. 8, p. 29-34. The walkway provides exterior access for cleaning and maintenance of a ring gate chute. Tr.2 at 100. This chute is used to discharge extraneous coal from the sample building. *Id.* As an alternative to using the walkway, personnel could access the ring gate chute area from inside the sampler building via a door located at the end of the walkway. *Id.*

Clevinger observed two areas of significant erosion along this elevated walkway that were located at junctions of metal grating and dirt. *Id.* The first hole was triangular, measuring approximately 13 inches, by 20 inches, by 28 inches. *Id.* The second hole was also triangular, measuring approximately 12 inches, by 48 inches, by 30 inches. Tr.2 at 100. At the hearing, the Secretary proffered photographic evidence of the conditions observed by Clevinger. *See* Gov. Ex. 8, p. 29-34.

Based on his observations, Clevinger issued 104(d)(2) Order No. 8207981, alleging a violation of 30 C.F.R. § 77.205(a). This mandatory standard provides that a "[s]afe means of access shall be provided and maintained to all working places." Order No. 8207981 provides:

> A safe means of access was not provided for the walkway behind the L2 Strip Coal Sampler Building. Two areas had eroded on each end of the metal walkway creating holes where workers could easily fall. The first area was triangular in shape and 13 inches by 20 inches by 28 inches. The second area was triangular in shape and measured 12 inches by 48 inches by 30 inches. These areas have occurred over time due to rain/runoff. These areas were obvious and easily seen. Workers are required to travel this area for cleaning and maintenance. The highwall at this walkway consisted of an approximate slope of 30 percent for 15 feet then a vertical drop of approximately 40 feet to the stockpile below. A handrail was provided for this walkway. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is

an unwarrantable failure to comply with a mandatory standard. Standard 77.205(a) was cited 9 times in two years at mine 4406199 (6 to the operator, 3 to a contractor).

Gov. Ex. 7.

Clevinger testified that he was not concerned about the structural integrity of the walkway, but rather the possibility that a miner utilizing the walkway could fall through one of the eroded holes. Tr.2 at 104. In such event, the miner could suffer serious injuries to his extremities, or fatal injuries by sliding down the slope and falling 40 feet to the ground below. Tr.2 at 111. In support of the high negligence and unwarrantable failure designations, Clevinger believed that the holes resulted from erosion over a significant period of time, and that previous on-shift examinations clearly had repeatedly overlooked the conditions despite their obviousness. Tr.2 at 117, 128. Clevinger estimated that approximately three to six people traversed this walkway daily. Tr.2 at 129.

Clevinger characterized the cited violation as S&S and attributable to "high" negligence constituting an unwarrantable failure. Red River does not dispute the fact of the violation or the S&S designation. *Resp. Br.* at 21. However, as discussed below, Red River disputes that the cited condition was attributable to an unwarrantable failure. The Secretary has proposed a $9,100.00 penalty for Order No. 8207981. Order No. 8207981 was timely abated on September 19, 2013, by taking the necessary remedial actions to alleviate the hazard. Gov. Ex. 7; Resp. Ex. 10-14.

ii. Unwarrantable Failure

In support of the unwarrantable failure designation, Clevinger attributed this violation to a "high" degree of negligence based on the obviousness and hazardous nature of the cited conditions. Tr.2 at 117, 128. In disputing this negligence designation, Red River argues that the walkway was not an active working area since it is only used periodically for maintenance purposes, and that the ring gate chute was accessible by miners without using the subject walkway. *Resp. Br.* at 23.

As previously noted, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC at 2001. The Commission has identified the indicia of an unwarrantable failure: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and whether the operator knew or should have known of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC at 1350-51. Significantly, it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that a violation is unwarrantable. *Id.*; *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010).

The photographic evidence depicts a handrail that delineates the perimeter of the walkway. Gov. Ex. 8, p. 29-34. The fall hazard posed to miners is evidenced by Red River's installation of this handrail, as required by 30 C.F.R. § 77.205(e). Significantly, the two large holes that concerned Clevinger were located at the base of the handrail that defines the area where miners would likely work or travel. *Id.* These two holes were obvious, in that they were large and posed a significant drop-off hazard. With respect to duration, the photographs reflect that the erosion undoubtedly occurred over a significant period of time. *Id.* Additionally, Red River's argument that the cited walkway was not frequently utilized does not diminish the risk posed to miners who periodically used the walkway during the course of continued mining operations.

As noted, the propriety of an unwarrantable failure designation must be viewed in the context of the circumstances surrounding the violation. The indicia applied in unwarrantable failure determinations are not necessarily given equal weight. Here, the obviousness and extended duration of the cited condition, given its hazardous nature, adequately supports that the cited walkway defects were attributable to a "high" degree of negligence. Consequently, the unwarrantable failure designation in Order No. 8207981 shall be affirmed.

iii. Civil Penalty

Applying the criteria in section 110(i) of the Mine Act, I view the history of violations to be neither an aggravating nor mitigating circumstance. Given the high degree of negligence and gravity associated with the cited condition, the **Secretary's proposed civil penalty of $9,100.00 shall be assessed for Order No. 8207981.**

**d. Order No. 8189011 (On-Shift Examination)**

i. Fact of the Violation

MSHA's September 17, 2013, inspection of Red River's No. 1 Prep Plant resulted in the issuance of a total of approximately 22 citations and orders, none of which were noted in the relevant on-shift examination books. Consequently, MSHA Inspector Herbert Skeens issued Order No. 8189011, which alleges a violation of the on-shift examination provisions of 30 C.F.R. § 77.1713(a). This mandatory standard provides:

> At least once during each working shift, or more often if necessary for safety, *each active working area and each active surface installation* shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a) (emphasis added). Skeens characterized the cited failure to conduct adequate on-shift examinations as S&S and attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $10,700.00 civil penalty for Order No. 8189011.

Of the 22 citations and orders relied on by Skeens to support the allegedly inadequate on-shift examination violation, only five have been adjudicated in this proceeding. Namely: the four accumulation violations in the loadout facilities (Citation Nos. 8202324, 8202325, 8202326 and 8202327) and the defective walkway violation (Order No. 8207981).

With respect to the Secretary's assertion that the failure to note the loadout accumulations in the September 17 on-shift examination book evidences a violation of section 77.1713(a), we must focus on the operative terms in the cited provision. By its terms, section 77.1713(a) *only* requires an on-shift examination in active workings or active surface installations. *Black Castle Mining Co.*, 36 FMSHRC 323, 325 (Feb. 2014). It is undisputed that the loadout facilities were idle on September 17. Tr. at 95. Further, the Secretary does not dispute that loadout operations were not scheduled to resume until September 20. Tr. at 314; *Resp. Br.* at 2, 15-16. Consequently, consistent with the provisions of section 77.1713(a), Red River was not required to perform an on-shift examination of the loadout facilities as alleged by the Secretary. Thus, Red River's failure to note the conditions in the on-shift examination book during a shift in which the loadout facilities were scheduled to remain idle is not a proper consideration in determining whether an on-shift examination was adequate.[5]

Turning to the defective walkway violation cited in Order No. 8207981 and adjudicated in this matter, as previously discussed, it is apparent that the cited erosion in the walkway posed a significant hazard, and was both obvious and significant in duration. However, the issue is whether the on-shift examination was adequate. For not every failure to note a violative condition in an on-shift examination book evidences, in and of itself, an inadequate on-shift examination. In this regard, the unnoted hazardous walkway, located in an area not heavily travelled, alone, does not evidence sufficient malfeasance to support a finding that the on-shift examination was inadequate.

In addition to the defective walkway, the Secretary relies on an additional 17 citations and orders issued during the course of the September 17 inspection that were not adjudicated in this proceeding. All 17 of these citations or orders have either been settled or vacated by the

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[5] The Secretary asserts that an on-shift examination of the loadout facilities was performed by miner Steve Gillam on September 17, which transformed the area into a working place. Tr. at 138-40. At that time, Gillam made a note of his loadout examination in the prep plant book, but did not identify the accumulation conditions in the loadout facilities. *Id.* The Secretary did not proffer this examination book as evidence. Red River asserts that Gillam's examination concerned the strip dump above the loadout tunnels, rather than the loadout facilities themselves. Tr.2 at 71-73; *Resp. Br.* at 16. Section 77.1713(a) only required Red River to conduct an on-shift examination prior to the anticipated activation of the loadout facilities on September 20. Thus, an examiner's unnecessary on-shift examination in an idle area of the mine that is not anticipated to be activated for several days does not transform this area, otherwise idle, to an active working place. Significantly, accumulations that are permitted to remain in the idle areas of the self-contained loadout facilities do not pose a propagation hazard to other active areas of this surface mine site.

Secretary. (The disposition and agreed upon civil penalties are noted below.) Specifically, Order No. 8189011 identifies:

- Citation No. 8199079: Spillage on the 2nd floor of the refuse bin. (Settled; $162)
- Citation No. 8199080: Exposed drive shafts on unit 15 transfer conveyor belt. (Settled; $243)
- Citation No. 8199081: Exposed slip switch drive shaft and roller on unit 32 conveyor belt. (Settled; $243)
- Citation No. 8199082: Dry grass within 11 inches of the top lube and diesel storage tanks. (Settled; $100)
- Citation No. 8199084: No illumination in the refuse bin headhouse. (Settled; $100)
- Citation No. 8199085: Oil accumulations on the refuse bin gate hydraulic pump. (Settled; $100)
- 104(d)(2) Order No. 8189007: Shrubs against electrical equipment in the raw coal dump area. (Settled; $2,900)
- 104(d)(2) Order No. 8189008: Weeds, leaves, and other combustible material against or around the bulk diesel storage tank in the raw coal dump area. (Settlement approved in this proceeding; $1,200)
- 104(d)(2) Order No. 8189009: Portable fire extinguisher in the raw coal area not examined within 6 months. (Settled; $2,400)
- 104(d)(2) Order No. 8189010: Portable fire extinguisher in the raw coal area not examined within 6 months. (Vacated)
- Citation No. 8207976: The catch screen under the #17 clean coal conveyor does not extend over the roadway below. (Settled; $100)
- Citation No. 8207977: The catch screen under the #32 refuse conveyor does not extend over the roadway below. (Settled; $162)
- Citation No. 8207978: A ladder located on the top floor of the refuse bin adjacent to the prep plant was not maintained in good condition. (Settled; $162)
- Citation No. 8207979: A Rhino 375 step ladder on the 3rd floor of the prep plant was not maintained in good condition. (Settled; $162)
- 104(d)(2) Order No. 8207980: Two guards on the L2 sample feed conveyor were not secured in place. (Settled; $2,800)
- Citation No. 8207982: The guard for the drive shaft/barrel shaft on the #342 pump located on the bottom floor of the prep plant is not adequate. (Settled; $162)
- 104(d)(2) Order No. 8202323: The 36 inch diameter escapeway for the clean coal tunnel is not maintained in good repair. (Settlement approved in this proceeding; $2,000)

Gov. Ex. 9.

By way of summary of the above, of these 17 cited conditions, one citation was vacated and eight of the remaining 16 citations were designated as non-S&S. *Resp. Br.* at 25-26. The agreed-upon civil penalty for eleven of the 16 citations ranged from $100.00 to $243.00. *Id.* The civil penalty for the remaining five citations ranged from $1,200.00 to $2,900.00. *Id.*

Thus, while not the subject of this proceeding, it is apparent that twelve of the 17 additional citations relied upon by the Secretary were either vacated or assessed a nominal penalty. Consequently, the failure to note these twelve conditions in the relevant on-shift examination books, in addition to the unnoted defective walkway condition, is not sufficient to warrant the conclusion that Red River's September 17 on-shift examinations were inadequate.

Having addressed the immaterial loadout accumulation violations and the citations that were vacated or settled with nominal penalties, the operative question is whether the remaining five conditions, three of which are designated as non-S&S, for which the Secretary agreed to penalties ranging from $1,200.00 to $2,900.00, in addition to the unnoted obvious defective walkway violation, constitute an inadequate examination under section 77.1713(a). Although I have misgivings regarding the lack of evidence presented concerning the circumstances surrounding these five conditions, Red River has agreed to pay the moderate civil penalties agreed upon by the parties. Consequently, although the evidence does not reflect that the relevant on-shift examinations were perfunctory, I will give the Secretary the benefit of the doubt that these five unnoted violative conditions, in conjunction with the unnoted defective walkway condition, constitute an inadequate examination. As such, the Secretary has demonstrated a violation of section 77.1713(a).[6]

ii. S&S

Turning to the issue of S&S, the Secretary has established a violation of section 77.1713(a). The second element of the Commission's recent *Newtown Energy* modification to the *Mathies* criteria requires, first, identification of the hazard contemplated by section 77.1713(a), and second, an analysis of whether, based on the particular facts of the case, it is reasonably likely that this hazard will occur. In the context of an inadequate examination violation, these considerations are synonymous; for by definition, the hazard contemplated by section 77.1713(a) that hazardous conditions will continue to go unaddressed, cannot be disassociated from the likelihood of the hazard occurring. In other words, if there is a failure to note hazardous conditions in violation of section 77.1713(a), the hazard has occurred. In this regard, the Commission has recognized the indispensable role of pre-shift and on-shift examinations, describing them as "fundamental in assuring a safe work environment for the miners." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995).[7] Given the unsafe working environment created by inadequate on-shift examinations, it is reasonably likely that the hazard posed to miners will result in a reasonably serious injury. Consequently, the evidence adequately reflects that the cited violation of section 77.1713(a) is properly designated at S&S.

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[6] While I have given the Secretary the benefit of the doubt with respect to the fact of the violation, I am not unmindful that the Secretary has failed to proffer the relevant on-shift examination books to demonstrate the sufficiency, or lack thereof, of the subject examinations.

[7] Although *Enlow Fork* and *Buck Creek* concerned pre-shift examinations, the same considerations with regard to ensuring a safe working environment also apply to on-shift examinations.

iii. Unwarrantable Failure

An unwarrantable failure is characterized by more than ordinary negligence, evidenced by a serious lack of reasonable care. Here, the Secretary has relied, in significant part, on the fact that Red River failed to note in the on-shift examination book the four accumulation conditions in the loadout facilities. However, the Secretary was not required to note these conditions in the on-shift examination book, as the loadout facilities were not active working areas or active surface installations.

Notwithstanding the accumulation conditions in the loadout facilities, the unwarrantable failure designations originally in Citation Nos. 8189008 and 8202323, also relied upon by the Secretary as evidence of an inadequate examination, were deleted pursuant to the parties' settlement terms, which have been approved of in this proceeding. The only remaining condition attributable to an unwarrantable failure is the unsafe walkway condition cited in Order No. 8207981.

The defective walkway, in addition to the other non-loadout facility citations relied upon by the Secretary, are insufficient to demonstrate that the on-shift examinations were attributable to more than moderate negligence. In this regard, the majority of the remaining unaddressed conditions were either vacated or attributable to low degrees of negligence and gravity by virtue of the imposition of nominal civil penalties. Consequently, the Secretary has failed to demonstrate that Red River engaged in more than ordinary negligence, thus requiring modification of 104(d)(2) Order No. 8189011 to a 104(a) citation, reflecting that the cited violation was not attributable to an unwarrantable failure.

iv. Civil Penalty

The Secretary has proposed a civil penalty of $10,700.00. However, in support of the inadequate on-shift examination violation, the Secretary's civil penalty proposal was based, *inter alia*, on one citation that was vacated, two citations wherein the Secretary has agreed to delete the unwarrantable failure designations, and four cited loadout facility conditions for which an on-shift examination was not required by section 77.1713(a). In the final analysis, the on-shift examination violation it is attributable to no more than a "moderate" degree of negligence. As such, the subject violation is significantly less egregious than alleged by the Secretary. Consequently, **a civil penalty of $1,200.00 shall be assessed for Citation No. 8189011.**

**e. Order No. 8199116 (Accident Reporting Violation)**

i. Findings of Fact

During the evening shift on November 1, 2013, miners Wayne Powers and Rick Boyd were performing repairs to a magnetic separator machine at the Red River No. 1 Prep Plant. Tr.2 at 211. As part of these repairs, Boyd removed the bolts from the drive shaft end cap in preparation for cutting the bearing off the magnetic separator drive shaft with an acetylene torch in an effort to access the inside of the separator drum. Tr.2 at 211-13. As Boyd cut through the bearing, the pressurized end cap became a projectile that ricocheted off a water pipe and struck

Powers in the head. Tr. at 213. The end cap was described as an approximately 50 pound metal disc that is 30 inches in diameter. Tr.2 at 214-15; Gov. Ex. 14, p. 31. When Powers was struck, he was standing about six to eight feet from the magnetic separator machine. Tr.2 at 217.

Immediately following the incident, Red River maintenance shop foreman Billy Mays, a certified EMT, was called to the scene. Tr.2 at 239. Mays performed an assessment of Powers' condition by checking his vital signs and evaluating the extent of his injuries. Tr.2 at 241. Mays applied a dressing to a laceration on Powers' forehead. *Id.* The laceration resulted in a "minor blood loss." Tr.2 at 248. However, Mays concluded that the injuries to Powers' face required immediate surgery. *Id.* Mays further concluded that there was no evidence of internal bleeding. Tr.2 at 242. While Mays testified that Powers never lost consciousness, hospital records do report "an apparent loss of consciousness." *Compare* Tr.2 at 240, *with* Gov. Ex. 16, p. 2.

Following Mays' evaluation of Powers' condition, Mays telephoned Red River Safety Director Eddie Clapp, who was not present at the mine site, to convey that he did not believe Powers' injuries were "immediately reportable" under 30 C.F.R. § 50.10(b),[8] as Powers' vital signs were stable. Tr.2 at 255-56. Nevertheless, as a result of Mays' concern about potential facial fractures, Powers was transported via Medivac helicopter to a trauma center in Kingsport, Tennessee. Tr.2 at 249. Mays opined that facial fractures can often lead to a permanent loss of sight if not immediately addressed. *Id.*

Powers was hospitalized for five days. Gov. Ex. 16, p. 2. He was diagnosed as having suffered "subtle" subarachnoid hemorrhaging and multiple facial fractures. *Id.* Following surgery to repair his nasal cavity, Powers was discharged on November 6, 2013. *Id.* Powers subsequently missed approximately three months of work and returned to work under six months of restricted activity due to ongoing vertigo. Tr.2 at 259.

On November 8, 2013, the Norton, Virginia, MSHA field office was notified that an accident had occurred at the Red River facility the previous week. Tr.2 at 210. Shortly thereafter, MSHA Inspector Thomas Bower was immediately dispatched to the Red River No. 1 Prep Plant to investigate the circumstances of Powers' accident. *Id.* Bower determined that Red River had failed to report the November 1 accident to MSHA. After interviewing Mays and Clapp, Bower issued 104(d)(2) Order No. 8199116, which alleges a failure to report an accident to MSHA within 15 minutes, in violation of 30 C.F.R.§ 50.10.

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[8] 30 C.F.R. § 50.10 provides, in pertinent part:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death ....

Specifically, Order No. 8199116 provides:

> The Operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll free number 1-800-746-1553 once the operator knows or should know that an accident has occurred involving an injury of an individual at the mine which has a reasonable potential to cause death. The miner received blunt force injuries to the face and forehead at this Preparation Plant on 11/01/2013 at approximately 10:45 p.m. The miner was struck in the face and forehead by an end cap off of a magnetic separator. The miner was standing in the area of the Magnetic Separator while a bearing was being cut off in order to remove the End Cap in order to make repairs. The miner was Med-Flighted via helicopter to Holson Valley Medical Center in Kingsport, TN for treatment. The Mine Operator has engaged in aggravated conduct constituting more than ordinary negligence by not reporting this accident which had a reasonable potential to cause death. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 12. Bower characterized the cited violation as non-S&S and attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $5,000.00 civil penalty Order No. 8199116, the statutory minimum for violations of section 50.10. *See* 30 U.S.C. § 110(a)(2). Red River reported the accident following the issuance of the order, thus abating the violation.

ii. Fact of the Violation

Section 50.10 requires an operator to "immediately contact MSHA at once without delay and within 15 minutes … once the operator knows or should know that an accident has occurred involving … an injury … which has a reasonable potential to cause death." 30 C.F.R. § 50.10(b). Prompt reporting is essential to the purpose of the reporting requirement in section 50.10, and requires a prompt determination as to whether an accident has occurred. *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Given the demands in section 50.10 for a prompt determination that an injury has "the reasonable potential to cause death," the Commission has held that "readily available information, such as the nature of the accident, is highly relevant in determining whether an injury is reportable, while permitting operators to wait for a medical or clinical opinion would 'frustrate the immediate reporting of near fatal accidents.'" *Signal Peak Energy*, 37 FMSHRC 470, 476 (Mar. 2015) (quoting *Cougar Coal Co.*, 25 FMSHRC 513, 520-21 (Sept. 2003)). The Commission declined to further define the operative term "reasonable potential to cause death" in *Signal Peak*, apparently concluding that a common sense approach was adequate.

As discussed below, in situations as in the current case where rescue efforts are not a concern, the timely reporting requirement in section 50.10 acts as a condition precedent to preservation of an accident scene. Preservation of an accident scene "facilitate[s] MSHA's ability to investigate and remedy the cause of the accident" to ensure that similar accidents to not occur. *Id.* at 480. Thus, the Commission has unequivocally held that operators "must resolve any reasonable doubt in favor of notification." *Id.* at 477.

During the operative 15 minutes, Powers' condition was evaluated by Red River's on-site EMT, Mays, who reported the victim's vital signs as stable. Tr.2 at 241. Red River nevertheless acknowledged the potential severity of the blunt force trauma Powers sustained to the head and face by arranging for Powers to be transported to a local trauma center by helicopter. Tr.2 at 249. While Mays expressed concern that Powers' facial fractures potentially jeopardized his eyesight if not immediately treated, Mays did not believe that his injuries were potentially fatal. Tr.2 at 241, 249.

It is undisputed that Powers sustained a severe blow to the head when he was struck by the bearing cap — essentially a 50 pound projectile. Blunt force trauma to the head, even in circumstances where a miner demonstrates stable vital signs and minimal blood loss, must be considered potentially fatal. For it is common knowledge that potential swelling or bleeding in the cranial cavity poses a significant risk of death. Notably, the preamble to the final rule for section 50.10 includes concussions and major upper body blunt force trauma as types of injuries that must be immediately reported. 71 Fed. Reg. 71,430, 71,434 (Dec. 8, 2006). Accordingly, Red River's failure to timely report the November 1, 2013, accident within 15 minutes, constitutes a violation of section 50.10.

iii. S&S

The Secretary has designated the failure to timely report Powers' accident cited in Order No. 8199116 as non-S&S. As an initial matter, the Commission, consistent with a remand from the D.C. Circuit Court of Appeals, had determined that, unlike violations of mandatory safety standards, Part 50 reporting requirements were regulations not subject to S&S designations. *Cyprus Emerald Res. Corp.*, 22 FMSHRC 285 (Mar. 2000), *on remand from*, *Cyprus Emerald Res. Corp.*, 195 F.3d 42, 44 (D.C. Cir. 1999). The requirements in section 50.10 were subsequently modified by rulemaking in 2006, elevating the status of reporting requirements to mandatory standards. *Signal Peak*, 37 FMSHRC at 479 (citations omitted). Consequently, the Commission has determined that S&S designations for violations of section 50.10 are now applicable. *Id.*

It is clear, absent extraordinary circumstances not present here, that the failure to report potentially fatal accidents constitutes an S&S violation, as it precludes MSHA's investigatory role. *Id.* at 479-81. Thus, I would ordinarily be inclined to modify Order No. 8199116 to reflect that Red River's failure to report Powers' accident was S&S in nature. However, I am precluded from doing so. *See Mechanicsville Concrete Inc. t/a Materials Delivery*, 18 FMSHRC 877 (June 1996) (holding that an ALJ lacks the authority to charge an operator with violations and is thus precluded from raising a designation from non-S&S to S&S on his own initiative). Consequently, the Secretary's non-S&S designation of the reporting violation shall be affirmed.

iv. Unwarrantable Failure

Inspector Bower concluded that Red River's failure to timely report the accident to MSHA was an unwarrantable failure to comply with section 50.10. As a general proposition, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). The focus of this analysis is on whether a reasonably prudent person familiar with the purpose of the reporting requirements of section 50.10 should have concluded that immediate notification was necessary.

Section 50.10 requires a mine operator to notify MSHA within 15 minutes of an accident that has a reasonable potential to cause death. While it is true that Mays was an EMT, the decision whether or not to immediately notify MSHA cannot be made within a matter of minutes after a serious accident "upon the basis of clinical or hyper-technical opinions as to a miner's chance of survival." *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003). This is particularly true in this instance where Red River knew that Powers had sustained blunt force trauma to the head, resulting in serious facial injuries. I do not doubt the sincerity of Mays' initial conclusions that Powers' injuries were survivable. However, hasty conclusions that minimize the degree of severity of head injuries, without the benefit of an MRI, x-ray, or other diagnostic studies, constitute an abuse of discretion.

Clapp credibly testified that given the benefit of hindsight, he regretted his reliance on the information provided to him via telephone by Mays regarding Powers' condition and the circumstances of the accident. Tr.2 at 260-61. However, in the final analysis, Clapp's misplaced reliance on this information interfered with any meaningful MSHA investigation aimed at preventing the reoccurrence of a similar accident. Thus, Clapp's misplaced reliance cannot be considered a mitigating factor. Consequently, the reporting violation is attributable to "high" negligence, which supports the unwarrantable failure designation.

v. Civil Penalty

The Secretary proposes the statutory minimum of $5,000.00, provided in 30 U.S.C. § 110(a)(2) for violations of section 50.10. Clapp's reliance on Mays' medical opinion as a certified EMT is understandable and is a mitigating factor that precludes increasing the civil penalty in excess of the statutory minimum. Consequently, **a civil penalty of $5,000.00 shall be imposed for Order No. 8199116.**

### f. Citation No. 8199117 (Preservation of Accident Scene)

#### i. Finding of Facts

During his November 6, 2013, inspection, it was clear to Bower that Red River had resumed mining activities following Powers' November 1, 2013, accident, which prevented MSHA from exercising its investigative authority. Tr.2 at 231. Consequently, Bower issued 104(a) Citation No. 8199117, alleging a violation of 30 C.F.R. § 50.12.[9] Specifically, Citation No. 8199117 provides:

> The mine operator failed to report the accident that occurred at this Facility on 11/01/2013 at approximately 10:45 p.m. A miner received blunt force injuries to the face and forehead. The Mine Operator repaired the Magnetic Separator that was involved with the accident and put it back into service. This action altered the accident site and prevented an accident investigation to begin promptly.

Gov. Ex. 13. Bower characterized the cited violation as non-S&S. Although Bower characterized Red River's degree of negligence as "high," he did not attribute the violation to an unwarrantable failure. The Secretary has proposed a $2,000.00 civil penalty for Citation No. 8199117. This violation was abated by Red River on November 11, 2013, by providing relevant personnel with refresher training on sections 50.10 and 50.12

#### ii. Fact of Violation and Negligence

As discussed above, the November 1 incident at issue is properly characterized as an "accident" under Part 50. *See* 30 C.F.R. § 50.2(h)(2). Section 50.12 prohibits operators from altering an accident site until all investigations pertaining to the accident are completed by MSHA. 30 C.F.R. § 50.12.

Red River's failure to timely report the subject accident precluded MSHA's investigation. In its defense, Red River argues that section 50.12 is inapplicable because it presupposes that a report has been made and that MSHA has designated the area as an accident scene. *Resp. Br.* at 28. Thus, in an attempt to place the proverbial cart before the horse, Red River posits that no violation of section 50.12 occurred as no "accident scene" was established by MSHA. *Id.*

However, the Commission has held that "it is the *occurrence* of an accident that is the condition precedent to the application of section 50.12, not the *reporting* of one." *Black Beauty Coal Co.*, 37 FMSHRC 687, 690 (Apr. 2015) (emphasis in original). As such, despite Red

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[9] 30 C.F.R. § 50.12 provides:

> Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

River's failure to report the accident, it is the accident that prohibited Red River from resuming normal mining operations at the scene prior to the initiation of MSHA's relevant investigation. Consequently, it is clear that Red River's disturbance of the accident scene constituted a violation of section 50.12, as well as an interference with MSHA's investigative responsibility. Such conduct is reflective of a "high" degree of negligence, as asserted by the Secretary.

iii. S&S

As previously noted, I lack the authority to disturb the Secretary's non-S&S designation. *See Mechanicsville Concrete*, 18 FMSHRC 877.

iv. Civil Penalty.

The Secretary proposes a $2,000.00 civil penalty. Although I have affirmed the Secretary's characterization of Red River's conduct as "high" negligence, it is significant that the Secretary has not attributed the violation to an unwarrantable failure. As discussed above, although not exculpatory, Clapp's failure to ensure the integrity of the accident scene was based on his reliance, albeit misplaced, on a certified EMT. I view this as a mitigating circumstance. However, this mitigation does not provide an adequate basis for reducing the Secretary's proposed $2,000.00 civil penalty. Consequently, **a civil penalty of $2,000.00 shall be imposed for Citation No. 8199117.**

## V. Settlement of Docket No. VA 2014-237

Prior to the hearing, the parties advised that the three orders at issue in Docket No. VA 2014-237 had settled. The record at the hearing was left open for the parties to submit their written settlement terms, which were filed on October 13, 2016.

Regarding the three settled orders in Docket No. VA 2014-237, the parties' settlement terms include reducing the total civil penalty from $12,000.00 to $5,000.00. Specifically, the settlement terms provide for modifying Order No. 8199078, which cites an alleged failure to perform an adequate on-shift examination in violation of 30 C.F.R. § 77.1713(c), from a 104(d)(2) order to a 104(a) citation, thus removing the unwarrantable failure designation, with a corresponding penalty reduction from $4,000.00 to $1,800.00. In support of this modification and penalty reduction, the Respondent represents that while the day-shift foreman failed to record the results of the subject on-shift examination, the examination did occur and the results of the examination were verbally presented to the shift foreman.

Regarding Order No. 8202323, which cites a violation of 30 C.F.R. § 77.200 that requires all mine structures to be maintained in good repair to prevent injuries to miners, the parties agree to modify the violation from a 104(d)(2) order to a 104(d)(1) citation, with a corresponding penalty reduction from $4,000.00 to $2,000.00. In support of this modification and penalty reduction, the Respondent represents that the cited rusted and sharp edges on an escapeway tunnel were not severe enough to have caused lacerations or bruises to someone crawling through the tunnel. Furthermore, the Secretary represents that the underlying 104(d)(1) order that supported this 104(d)(2) order was modified to a 104(a) citation in a separate proceeding.

Additionally, regarding Order No. 8189008, which cites dry weeds, leaves, and underbrush in close proximity to a fuel storage tank in violation of 30 C.F.R. § 77.1103(d), the parties agree to modify the violation from a 104(d)(2) order to a 104(a) citation, thus removing the unwarrantable failure designation, and to reduce the degree of negligence attributable to the cited condition from "high" to "moderate," with a corresponding penalty reduction from $4,000.00 to $1,200.00. In support of these modifications and penalty reduction, the Respondent represents that the cited fuel tank was storing diesel fuel, rather than gasoline, and thus presented less of a combustion hazard.

I have considered the representations submitted in this matter and I conclude that the proffered settlement agreement is appropriate under the criteria set forth in section 110(i) of the Mine Act. The settlement terms reduce the total civil penalty from $12,000.00 to $5,000.00 for the three settled orders in Docket No. VA 2014-237, two of which have been modified to section 104(a) citations.

## ORDER

In view of the above, with respect to Docket No. VA 2014-236, **IT IS ORDERED** that Order No. 8199116 (accident report) **IS AFFIRMED**. Accordingly, **IT IS ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a penalty of $5,000.00 in satisfaction of Order No. 8199116, the single order at issue in Docket No. VA 2014-236.

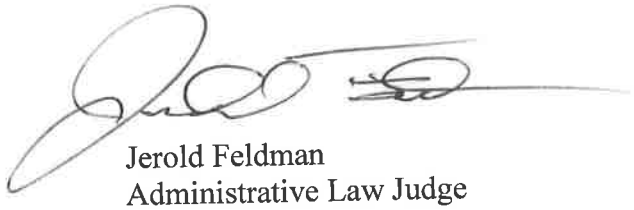
With respect to Docket No. VA 2014-239, **IT IS FURTHER ORDERED** that Order No. 8207981 (walkway) and Citation No. 8199117 (accident scene) **ARE AFFIRMED**. Accordingly, **IT IS ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a penalty of $9,100.00 in satisfaction of Order No. 8207981 and $2,000.00 in satisfaction of Citation No. 8199117.

With respect to Docket No. VA 2014-239, **IT IS FURTHER ORDERED** that Order Nos. 8189011 (on-shift examination), 8202324 (vent pipe), 8202325 (top loadout tunnel), 8202326 (bottom loadout tunnel), and 8202327 (distribution building) **ARE MODIFIED** from section 104(d)(2) orders to section 104(a) citations, thus deleting the unwarrantable failure designations. **IT IS FURTHER ORDERED** that Citation No. 8202324 **IS MODIFIED** to non-S&S. Accordingly, **IT IS FURTHER ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a penalty of $1,400.00 each in satisfaction of Citation Nos. 8202325, 8202326, and 8202327, $1,200.00 in satisfaction of Citation No. 8189011, and $100.00 in satisfaction of Citation No. 8202324. In sum, **IT IS ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a total civil penalty of $16,600.00 in satisfaction of the seven citations and orders in Docket No. VA 2014-239.

With respect to Docket No. VA 2014-237, **IT IS FURTHER ORDERED** that consistent with the parties' settlement terms approved of in this Decision, Red River Coal Co., Inc. **SHALL PAY** a total civil penalty of $5,000.00 in satisfaction of Order Nos. 8199078, 8202323, and 8189008.

In view of the above, **IT IS ORDERED** that Red River Coal Co., Inc., pay, within 40 days of the date of this Decision, **a total civil penalty of $26,600.00**, consisting of a total civil penalty of $21,600.00 for the eight citations and orders adjudicated in this proceeding, in addition to $5,000.00 for the three settled orders.[10]

**IT IS FURTHER ORDERED** that upon timely receipt of the total $26,600.00 payment, the civil penalty proceedings in Docket Nos. VA 2014-236, VA 2014-237, and VA 2014-239 **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/acp

[10] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.