

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

March 9, 2016

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2013-187
Petitioner,	:	A.C. No. 11-03193-296240
v.	:	
	:	
PRAIRIE STATE GENERATING	:	Mine: Lively Grove
COMPANY, LLC,	:	
Respondent.	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2015-130
Petitioner,	:	A.C. No. 11-03193-366707A
v.	:	
	:	
STEVEN B. REES, employed by PRAIRIE	:	Mine: Lively Grove
STATE GENERATING COMPANY, LLC,	:	
Respondent.	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2015-144
Petitioner,	:	A.C. No. 11-03193-366708A
v.	:	
	:	
MICHAEL WELCH, employed by PRAIRIE	:	Mine: Lively Grove
STATE GENERATING COMPANY, LLC,	:	
Respondent.	:	

DECISION

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

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

Before: Judge Paez

This case is before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820(c). In dispute are one section 104(d)(1)

order issued to Prairie State Generating Company, LLC (“Prairie State”) and two companion section 110(c) penalty assessments issued to Steven B. Rees (“Rees”) and Michael Welch (“Welch”), alleging their personal liability as agents of Prairie State. To prevail, the Secretary must prove any cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001). To establish a violation under section 110(c), the Secretary must prove that (1) an agent knew or had reason to know of a violative condition, and (2) failed to act to correct the condition. *See* 30 U.S.C. § 820(c); *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff’d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned to me Docket No. LAKE 2013-187, which I stayed on January 31, 2014, pending MSHA’s completion of a related section 110(c) investigation. In separate orders, Chief Judge Lesnick assigned to me Docket Nos. LAKE 2015-130 and LAKE 2015-144, which contain the Secretary’s petitions for the assessment of civil penalty under section 110(c), and I consolidated them with Docket No. LAKE 2013-187 for hearing and disposition. Docket No. LAKE 2013-187 involved two violations. The parties settled one of these violations, Citation No. 8440270, and I disposed of it in a separate Decision Approving Partial Settlement on September 21, 2015.

The remaining alleged violation in Docket No. LAKE 2013-187 was issued at Lively Grove Mine on June 26, 2012. Order No. 8440269 charges Prairie State with a violation of 30 C.F.R. § 75.360(a) for failing to conduct a pre-shift examination before sending miners to work underground.¹ The Secretary designated the order as significant and substantial (“S&S”)² and characterized Prairie State’s negligence as high. The Secretary also determined that the violation resulted from Prairie State’s unwarrantable failure to comply with a mandatory health

¹ Section 75.360(a) provides, in relevant part: “[A] certified person designated by the operator must make a pre-shift examination within [three] hours preceding the beginning of any [eight]-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a pre-shift examination has been completed for the established [eight]-hour interval.” 30 C.F.R. § 75.360(a).

² The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

or safety standard.³ The Secretary proposes that Prairie State pay a penalty of \$2,000.00. Additionally, in Docket Nos. LAKE 2015-130 and LAKE 2015-144, the Secretary proposes that Rees and Welch each pay a penalty of \$1,500.00 under section 110(c) of the Mine Act in connection with Order No. 8440269. Thereafter, I held a hearing on September 23, 2015, in St. Louis, Missouri.

At the hearing, the parties stipulated to the following:

1. Prairie State is engaged in mine operations in the United States, and its mining operations affected interstate commerce.
2. Rees was the afternoon shift mine manager at the times relevant to this matter.
3. Welch was the midnight shift mine manager at the times relevant to this matter.
4. Prairie State is the owner and operator of the subject mine, Mine ID No. 11-03193.
5. Prairie State, Rees, and Welch are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
6. The administrative law judge has jurisdiction in this matter.
7. Order No. 8440269 was properly served by a duly authorized representative of the Secretary upon an agent of Prairie State on the date and place stated therein and may be admitted into evidence for the purposes of establishing its issuance.
8. The assessed penalties, if affirmed, will not impair Prairie State's ability to remain in business.

(Ex. S-1.)⁴ The Secretary then presented testimony from MSHA inspector Robert Hatcher and MSHA special investigator Robert Bretzman, as well as Prairie State mine examiner Daniel Bertelsman. Prairie State presented testimony from shift managers Rees and Welch. The parties each filed post-hearing briefs and reply briefs.

II. ISSUES

For Order No. 8440269, the Secretary asserts that Respondents failed to fulfill the duty imposed by 30 C.F.R. § 75.360(a) by not examining an area of the mine for hazardous conditions

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

⁴ In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. S-#," and "Ex. R-#," respectively.

before miners were sent to work there. (Sec’y Br. at 7.) Testimony at the hearing established that Prairie State did not record a pre-shift or supplemental examination of this area in any of its logs. (Exs. S-3, R-10 at 7 [20]; Tr. 42:17-43:4.) The Secretary also contends that his section 110(c) allegations and his proposed penalties against Rees and Welch are valid and appropriate. (Sec’y Br. at 20-23.)

In response, Prairie State does not contest its failure to conduct the required examination but challenges the Secretary’s gravity and negligence determinations, specifically the S&S and unwarrantable failure designations. (Resp’t Br. at 7-17.) Rees and Welch deny the section 110(c) allegations against them. (*Id.* at 17-22.) Specifically, Rees argues that he did not know he needed to conduct a pre-shift examination of the area because his supervisor never told him when and where miners would be sent to work. (*Id.* at 18-19.) Additionally, Welch asserts that due to his limited experience as a mine manager, he reasonably believed the required pre-shift examination had occurred based on his reading of the mine’s examination book. (*Id.* 20-22.)

Accordingly, the following issues are before me: (1) whether Order No. 8440269 issued for a violation of 30 C.F.R. § 75.360(a) is S&S; (2) whether Prairie State’s negligence in committing the violation is “high” and constitutes an unwarrantable failure; (3) whether Rees is liable under section 110(c); (4) whether Welch is liable under section 110(c); and (5) whether the Secretary’s proposed penalties against Prairie State, Rees, and Welch are appropriate.

For the reasons set forth below, Order No. 8440269 is **AFFIRMED**. Additionally, the section 110(c) liability of Steven B. Rees is **AFFIRMED**, and the section 110(c) liability of Michael Welch is **AFFIRMED**.

III. FINDINGS OF FACT

A. Operations at Lively Grove Mine

Lively Grove Mine is an underground bituminous coal mine located in Marissa, Illinois. (Sec’y Pet.; Tr. 11:5-6.) The mine contains long, corridor-like entries and perpendicular crosscuts driven through the coal seam, with rectangular pillars of coal remaining in place to support the mine’s roof and keep it from collapsing. (*See* Ex. S-4.) The distance between each crosscut measures approximately 100 feet. (Tr. 48:10-49:15.) Together, the entries and crosscuts form a grid if viewed from above. (Exs. S-4, R-3(b).) The entry and crosscut walls, which are called ribs, may over time loosen or separate from the pillars that support the mine roof, creating a hazard of falling rock to miners working in those areas. (Tr. 46:19-21, 54:18-25.) Pre-shift examinations help to identify such hazards before miners are sent into areas to work. (Tr. 54:23-55:3.)

During the time at issue, Lively Grove Mine operated on three overlapping 10-hour shifts. (Tr. 157:3-18.) During the time at issue, the first shift operated from 6:30 a.m. to 4:30 p.m. (Tr. 139:18-19, 157:10-14.) The second, or afternoon, shift operated from 3:30 p.m. to 1:30 a.m. (Tr. 139:19, 157:18.) The third, or midnight, shift operated from 10:30 p.m. to 8:30 a.m. (Tr. 156:19-20, 157:4-9, 189:23-24.) The third shift was a maintenance shift that did not produce coal. (Tr. 170:21-22, 188:14-24.) Each shift had a manager responsible for executing

the work orders received from Superintendent Aaron Jackson. (Tr. 160:12–23, 161:10–22, 189:6–10, 189:24–190:10.) On the dates of the inspection in this case, Rees was the shift manager for the second shift from 3:30 p.m. to 1:30 a.m., and Welch was the shift manager for the third shift from 10:30 p.m. to 8:30 a.m. (Ex. S–1.)

Whenever Prairie State has planned work for an upcoming shift, its examiners must perform a pre-shift examination of the work area to ensure the area is safe for miners. (Tr. 27:13–17, 36:8–10, 121:4–15.) Miners are not permitted to work or travel underground unless an examiner has conducted a pre-shift examination of that area within three hours prior to the shift’s start. (Tr. 27:13–17, 28:1–2, 36:8–10.) If, during a shift, miners must enter an area that has not undergone a pre-shift examination, the mine operator must conduct a supplemental examination before miners enter that area. (Tr. 181:9–14, 220:24–221:3.) Each shift’s manager is responsible for assigning pre-shift and supplemental examinations and ensuring work areas have been properly examined. (Tr. 105:3–13.)

Additionally, mine operators must maintain records of pre-shift examinations. 30 C.F.R. § 75.360(g). Prairie State’s examiners recorded examinations in a book kept in the mine’s office aboveground. (Tr. 25:13–16, 168:10–15; Exs. S–3, R–2(a), R–2(b).) A shift manager must sign the examination book every shift. (Tr. 168:10–18, 190:22–25.) Moreover, mine examiners must record dates, times, and initials (“DTIs”) throughout the mine to certify that an area has been examined. 30 C.F.R. § 75.360(f). At Lively Grove, examiners listed their DTIs on date boards located underground throughout the mine. (Tr. 41:3–43:14.)

Federal and state laws also require Prairie State to conduct routine examinations of the mine’s escapeways. (Tr. 29:15–23, 124:14–15, 125:18–24.) In the mine’s Main North Intake section, Prairie State maintained a primary escapeway to provide miners a safe pathway to exit in the event of an emergency. (Ex. R–4; Tr. 137:3–11.) Along the escapeway, the mine installed a lifeline, a cable hung from the mine’s roof to guide miners out of the mine. (Tr. 137:12–138:3.) In this section, the escapeway route began at a mechanical escape hoist called the Avro. (Ex. R–4(a); Tr. 42:11–16.) Escapeway examinations must be performed once every 24 hours under state law and once a week under federal law. (*Id.*) During an escapeway examination, examiners at Lively Grove follow the escapeway’s lifeline, inspecting for hazards. (Tr. 135:12–20; Ex. S–4(a).)

B. Hatcher’s Inspection of the Lively Grove Mine

Inspector Robert Hatcher arrived at Lively Grove for a routine quarterly inspection at approximately 8:25 p.m. on June 25, 2012. (Ex. R–10 at 1 [1]; Tr. 22:1–5.) Upon his arrival, Inspector Hatcher visited the mine’s office to review the mine’s examination books for hazards and violations that had been reported by the mine’s pre-shift and on-shift examiners. (Tr. 25:13–16.) Inspector Hatcher found no hazards listed in the books. (Tr. 32:6–10.)

Hatcher then went underground to inspect the mine with Kim Morgan, a safety technician at Prairie State. (Tr. 36:15–24.) During the inspection at around 1:05 a.m., a group of miners complained to Hatcher about rockdust coming into the area where they were working. (Tr. 93:24–94:14, 37:9–13; Ex. R–10 at 5–6 [14–15].) By this time, the third shift that began at

10:30 p.m. was well under way, so Hatcher asked third shift manager Welch where rockdusting was taking place. (Tr. 38:1–8.) Welch informed Hatcher that miners were rockdusting in the Main North Intake area. (Tr. 38:4–8; 199:13–19.) Indeed, by 10:00 p.m. Welch had received written orders from Jackson to rockdust an area of the Main North Intake, consisting of Entry Nos. 7, 8, 9, 10, and 11 from crosscut No. 6 to the Avro, or an area of at least 5,200 feet. (Exs. S–4(a), S–11, R–8(b); Tr. 48:10–49:15, 192:21–193:6, 212:7–14.)

Hatcher then traveled a few thousand feet to the Main North Intake area, where he found three miners rockdusting.⁵ (Tr. 39:5–18, 40:15–16, 198:17–200:22; Ex. R–3(b).) This area being rockdusted was not an area normally traveled. (Tr. 203:23–204:5.) As Hatcher approached the three miners, he came across an area of loose, unsupported rib. (Ex. S–4(a), Tr. 39:19–21, 40:8–10.) The loose rib was large, measuring 15 feet in length, seven feet in height, and one to 12 inches in thickness after being scaled down. (Exs. S–5, S–6.) Hatcher issued Citation No. 8440268 for failing to support the loose rib. (Ex. S–6.) Hatcher designated the violation as S&S and characterized Prairie State’s negligence as high.⁶ (*Id.*)

Hatcher then checked whether an examiner had conducted a pre-shift examination of the area being rockdusted. (Tr. 40:23–41:6.) Hatcher started searching for DTIs at the Avro located at the end of the Main North Intake escapeway. (Ex. S–4(a); Tr. 42:6–20.) Inspector Hatcher weaved throughout an area that appeared to be freshly rockdusted, covering Entry Nos. 8, 9, and 10 and Crosscut Nos. 3, 4, 5, 6, and 7. (Tr. 44:7–16; Ex. S–4(a).) He found DTIs at only two locations along the Main North Intake escapeway but none outside the escapeway. (Tr. 42:17–21, 43:2–4; Ex. R–10 at 7 [20].) Although DTIs were absent outside the escapeway, the entire area, including areas outside the escapeway, appeared to have a fresh coating of rockdust. (Tr. 45:8–13; Ex. S–4(a).)

Hatcher learned that earlier during the second shift, Superintendent Aaron Jackson instructed Rees to send equipment for rockdusting to the Main North Intake section. (Tr. 67:8–14; Exs. R–10 at 6 [17], R–8(a), S–10 at 1.) When Hatcher later summoned Welch and asked him whether a pre-shift examination had been conducted, Welch could not confirm that an examiner had conducted one of the area. (Tr. 46:22–25, 94:18–21, 199:21–22; Ex. R–10 at 6 [16].) Hatcher then asked Welch whether he had conducted a supplemental examination, and Welch replied he had not. (Tr. 47:1–2, 222:17–20.)

Hatcher subsequently issued Order No. 8440269 for the failure to conduct a pre-shift examination in the area miners were rockdusting. (Tr. 47:3–4; Ex. S–8.) Hatcher wrote:

⁵ Hatcher learned that these three miners had relatively little experience. Two of the miners had approximately one year of experience working in an underground mine, and the third miner had only five months of experience. (Tr. 45:24–10.) None of these miners were certified to examine for hazards. (Tr. 46:12–13.)

⁶ Citation No. 8440268, originally issued as a section 104(d)(1) citation, was modified to a section 104(a) citation as part of a later settlement. *Prairie State Gen. Co., LLC*, FMSHRC Docket No. LAKE 2012-900 (Mar. 20, 2013) (ALJ) (order approving settlement). The citation retains its S&S designation but is no longer designated as an unwarrantable failure. *Id.*

Three miners were observed working in the intake air course and had been rockdusting from cross cut #6 in entries #7 through #11 to the intake air shaft. A pre-shift examination for hazardous conditions had not been conducted in this area as required on the previous shift. Also the shift manager failed to conduct a supplemental examination for hazardous conditions for the miners. Citation #8440268 has been issued in conjunction with this order. This violation is an unwarrantable failure to comply with a mandatory standard constituting more than ordinary negligence.

(Ex. S-8.) Hatcher designated the order as an S&S violation that was reasonably likely to result in lost work days or restricted duty for three affected miners. (Ex. S-8; Tr. 62:11-24.) He also characterized Prairie State's level of negligence as high. (Ex. S-8; Tr. 62:25-63:4.)

When back on the surface, Hatcher reviewed the mine's examination book once more. (Tr. 60:19-25.) This time, Hatcher noted an entry under the pre-shift side of the mine's examination book, indicating that the Main North Intake escapeway had been examined during the afternoon shift. (Ex. S-3 at 1; Tr. 26:4-8, 60:22-25.) However, Hatcher did not find any entries indicating that the area where rockdusting took place had been examined. (Tr. 83:22-84:3.)

To abate Order No. 8440269, Prairie State examined the affected area and removed all hazards. (Tr. 60:11-18; Ex. S-8 at 2.) Large loose ribs were found and scaled down in nine different locations. (Exs. S-8 at 2, S-4(a); Tr. 69:7-74:4.) Each of the three entryways and five of the six crosscuts that Prairie State's miners rockdusted contained these loose ribs. (Exs. S-4(a), S-8 at 2.) After Prairie State removed the hazards, Hatcher re-inspected the affected area and terminated the order. (Tr. 84:7-12; Ex. S-8 at 2.)

Hatcher's issuance of the section 104(d)(1) violation triggered an investigation of Rees and Welch under section 110(c) conducted by MSHA special investigator Bretzman. (Tr. 102:24-103:12.) Bretzman interviewed Rees and Welch, as well as superintendent Jackson and Prairie State's staff and mine examiners, including Bertelsman. (Tr. 103:13-22.) Bretzman reported his findings and recommendations on liability, resulting in the decision by MSHA to file civil penalties against the two shift managers, Rees and Welch. (Tr. 128:10-129:16.)

IV. PRINCIPLES OF LAW

A. Pre-Shift Examinations under 30 C.F.R. § 75.360(a)

Section 75.360(a) requires operators to conduct a pre-shift examination in the three hours preceding the beginning of any shift during which any person is scheduled to work or travel underground. 30 C.F.R. § 75.360(a)(1). The person conducting the pre-shift examination shall examine for hazardous conditions in all areas where work or travel during the oncoming shift is scheduled. 30 C.F.R. § 75.360(b). If an operator has not conducted a pre-shift examination of an area, the operator must perform a supplemental examination for hazardous conditions before any miner may enter that area. 30 C.F.R. § 75.361(a). The pre-shift examination is intended "to

prevent hazardous conditions from developing” in a mine. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997). The pre-shift examination requirement “is of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995).

B. Significant and Substantial (S&S)

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

In providing guidance for the application of the *Mathies* test, the Commission has observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation – i.e. that the violation present a *measure* of danger.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission also has indicated that “[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742-43 & n.13 (Aug. 2012). The Commission further has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

The S&S designation of a pre-shift violation must be evaluated apart from an associated violation that led to its issuance. *Brody Mining, LLC*, 37 FMSHRC 1687, 1700 (Aug. 2015) (vacating and remanding ALJ’s decision that removed pre-shift violation’s S&S and unwarrantability designations solely because underlying violation had neither designation). However, factors associated with an underlying condition are relevant to whether an inadequate examination that failed to detect that condition was S&S. *Id.* Additionally, unknown hazards that “may have existed at the time the area should have been examined” may be relevant to a pre-shift violation’s S&S determination. *See Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) (affirming ALJ’s S&S designation for pre-shift violation despite no hazards discovered during supplemental exam performed on next shift).

C. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). It 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 at 136 (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of 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 the operator’s knowledge of the existence of the violation. *See 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 an actor’s conduct is aggravated or if mitigating circumstances exist. *Id.*

In applying these factors to a pre-shift violation, the Commission analyzes the pre-shift violation in context with any associated violation that led to the pre-shift violation’s issuance. *Brody Mining, LLC*, 37 FMSHRC at 1700. However, the unwarrantability of a pre-shift violation is not entirely dependent on the unwarrantability of an underlying violation. *Id.*

D. Section 110(c) of the Mine Act – Agent Liability

Section 110(c) liability “is generally predicated on aggravated conduct constituting more than ordinary negligence.” *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012). Under section 110(c), a violation committed “knowingly” constitutes aggravated conduct. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). “Knowing” in the context of section 110(c) does not require specific intent, and includes both actual and constructive knowledge. *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363 (D.C. Cir. 1997).

Thus, corporate directors, officers, or agents are liable under section 110(c) when they know or had reason to know of a violative condition, and fail to act to correct the condition. *See* 30 U.S.C. § 820(c); *Kenny Richardson*, 3 FMSHRC at 16 (Jan. 1981). Agents of an LLC may also be held liable under section 110(c). *Sumpter v. Sec’y of Labor*, 763 F.3d 1292, 1298 (11th Cir. 2014). An unreasonable belief that a practice is safe does not serve as a defense to section 110(c) liability, even if held in good faith. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1150 (Oct. 1998).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Order No. 8440269 – Failure to Conduct Pre-Shift Examination

Prairie State violated section 75.360(a) by not conducting a pre-shift examination of the Main North Intake section that Prairie State assigned miners to rockdust on June 25, 2012. Prairie State did not record a pre-shift or supplemental examination of this area in either its examination book or by DTIs on its date boards underground. (Exs. S-3, R-10 at 7 [20]; Tr. 42:17-43:4.) Prairie State does not deny that it failed to conduct the required examination but disputes the violation's S&S and unwarrantable failure designations. (See Resp't Br. at 1-6.)

1. Gravity and S&S

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Prairie State's violation of section 75.360(a) establishes the first element of an S&S violation.

As for the second *Mathies* element, the Secretary must show that the violation contributed to a discrete safety hazard. Prairie State exposed miners to dangerous conditions by failing to identify safety hazards in the working area through a pre-shift examination. (Tr. 85:13-18) These hazards included multiple instances of loose rib that could fall and strike a miner. (Ex. S-8 at 2.) Sending miners into the unexamined area contributed to these safety hazards, thus satisfying the second element of the *Mathies* test.

With regard to the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood the hazard will result in an injury. Prairie State claims the Secretary has not proven that the loose rib material would be reasonably likely to injure a miner.⁷ (Resp't Br. at 9-10.) Additionally, Prairie State asserts that the area was not a regular travelway, and the work assignment required the miners to pass through the area only once. (*Id.*)

The miners assigned to rockdust in the Main North Intake covered an area spanning multiple entries and crosscuts. (Ex. S-4(a).) Within this area, Prairie State found nine different locations where loose rib had to be scaled down. (Exs. S-4(a), S-8 at 2.) The numerous locations of loose rib greatly increased the likelihood of rib material striking miners as they traversed the section. Indeed, at one location, the scaled rib covered over half an entry and measured 15 feet in length, seven feet in height, and one to 12 inches in thickness. (Tr. 54:8-9; Exs. S-5, S-6.)

⁷ Contrary to Prairie State's assertion that the loose rib conditions do not warrant the pre-shift violation's S&S designation, the underlying violation—Citation No. 9440268—retained its S&S designation as part of a settlement. *Prairie State Gen. Co., LLC*, FMSHRC Docket No. LAKE 2012-900 (Mar. 20, 2013) (ALJ) (order approving settlement). Moreover, the loose rib was just one of nine problematic locations Hatcher identified in his inspection. (Ex. S-4(a); Tr. 69:7-74:4.)

Moreover, certain mine conditions are transitory in nature; thus, a later examination of an area is not sufficiently indicative of the hazards that may have existed at the time the area should have been examined. *Jim Walter Res., Inc.*, 28 FMSHRC at 604 (citing *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996)). An operator's failure to conduct a pre-shift examination allows various hazardous conditions in a mine to develop without notice. These hazards include poor roof conditions, low oxygen, and high methane concentrations. (Tr. 85:13–18.) Because Prairie State did not perform an examination, its miners did not know of all the potential hazards that might have existed in the area at the time the miners were sent down to work. Furthermore, the miners assigned to rockdust were relatively inexperienced and were not certified to perform examinations to identify hazards on their own. (Tr. 45:20–46:18.)

Consequently, I determine that the hazard of loose ribs falling and striking a miner, in conjunction with exposing miners to unknown hazards, was reasonably likely to result in injury, thus satisfying the third element of the *Mathies* test.

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood the resulting injury will be of a reasonably serious nature. With regard to this element, Prairie State asserts that any injury caused by the loose ribs would not be serious because the miners traveled in a ram car equipped with a steel canopy and side panels. (Resp't Br. at 9–10.)

If loose rib falls and strikes a miner, the resulting injuries may include lacerations, fractures, and contusions. (Tr. 62:20–24.) Although the miners traveled in a semi-protected ram car, the car still left the miners exposed along the front and sides of the vehicle. (Exs. R–5(a), R–5(b); Tr. 55:14–56:15.) Moreover, additional preventive safety measures do not eliminate the S&S nature of a violation. See *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013) (rejecting operator's argument that other equipment safety measures reduced the degree of danger and rendered an accumulations violation non-S&S).

Given the magnitude and numerous locations of loose rib Prairie State had failed to identify before sending miners into the area for rockdusting, I determine that the injuries which could have resulted from these hazards would have been reasonably serious, thus satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I therefore conclude that Order No. 8440269 was appropriately designated as S&S.

2. Unwarrantable Failure and Negligence

The Secretary asserts that Prairie State's conduct amounted to high negligence and was an unwarrantable failure. (Sec'y Br. at 10–20.) The Secretary states that the violation was highly negligent because prior incidents where examinations had not been conducted placed Prairie State on notice that it needed to be more careful in conducting pre-shift examinations before sending miners underground. (*Id.* at 10.) Additionally, the Secretary asserts Prairie State's actions were highly negligent and an unwarrantable failure particularly because two

supervisors engaged in violative conduct, the violation was obvious, the supervisors should have known of the violation, and the violative condition posed a high degree of danger. (*Id.* at 13.)

In contrast, Prairie State asserts that the negligence and unwarrantable failure designations are inappropriate because Rees did not know to perform a pre-shift examination, and Welch believed, in good faith, that an examiner had checked the area prior to the third shift. (Resp't Br. at 10–17.) Specifically, Prairie State argues that the violation was not extensive, did not last an extended length of time, was not obvious, and did not pose a high degree of danger. (*Id.* at 12–14.) Additionally, Prairie State asserts it was not on notice and had no knowledge of the violation. (*Id.* at 13–17.)

In analyzing an unwarrantable failure, I must consider the Commission's factors for determining aggravated conduct. *See IO Coal Co.*, 31 FMSHRC at 1350–51. When applying these factors to a pre-shift violation, the Commission considers the pre-shift violation's unwarrantable failure designation in context with any underlying violative conditions the operator failed to identify as a result of its insufficient examination. *See Brody Mining, LLC*, 37 FMSHRC at 1700; *Consolidation Coal Co.*, 23 FMSHRC 588, 597–98 (June 2001) (remanding for consideration of the extent, duration, and obviousness of an underlying accumulations violation when assessing unwarrantable failure of an inadequate pre-shift examination).

Prior to the June 25 inspection, MSHA twice told Prairie State that it needed to make better efforts to comply with the pre-shift examination requirement. On May 30, 2012, Inspector Hatcher cited Prairie State for failing to conduct a pre-shift examination of a work area for two shifts. (Ex. S–7.) A week later, on June 4, 2012, Hatcher again discovered that Prairie State had failed to record a pre-shift examination prior to sending miners into a work area. (Tr. 63:9–25, 66:6–7.) Although an examiner had performed a supplemental examination of the area in this June instance, Hatcher warned Superintendent Jackson that the operator needed to do a better job of performing and recording its pre-shift examinations. (Tr. 63:9–64:9.) Specifically, Hatcher warned Jackson that a superintendent should have a contingency plan for mine examinations, even for work assignments he had not anticipated. (Tr. 66:14–21.) Hatcher told Jackson that if the superintendent knows he has work planned in an area not normally examined, then the area needed to be pre-shifted. (Tr. 64:1–3.) Past violations and discussions with an MSHA inspector regarding a safety standard may demonstrate that an operator had notice of its need for greater compliance efforts. *Enlow Fork Mining Co.*, 19 FMSHRC at 11–12. Based on the facts here, I determine that Prairie State had notice of the need for greater compliance efforts with the pre-shift examination requirement.

In terms of the extent and danger of the violation, examiners identified loose ribs in nine different locations. (Ex. S–8.) Prairie State's miners actually completed rockdusting in an area that spanned three entryways (Entry Nos. 8, 9, 10) and six crosscuts (Crosscut Nos. 2 through 7), an area somewhat different from Jackson's written instructions. (Exs. S–4(a), R–8(b).) The area actually rockdusted covered approximately 3,000 feet. (*See* Tr. 192:23–193:6; Exs. S–4(a), S–9, S–10 at 2, R–8(b).) Jackson's written orders instructed Welch to rockdust an even larger area covering at least 5,200 feet across five entryways (Entry Nos. 7 through 11) and seven crosscuts (Crosscut No. 6 to the Avro). (Ex. R–8(b); *see* Tr. 48:10–49:7; Exs. S–4(a), R–8(b).) Yet Prairie

State's examination of the primary escapeway at 4:30 p.m. covered only 800 feet, or about 15 percent of the assigned work area. (See Tr. 48:10–49:7; Exs. S–4(a), R–8(b).) Significantly, the Main North Intake's escapeway examination cannot be credited as a pre-shift because it took place outside the three-hour window prior to the start of the third shift at 10:30 p.m. (Tr. 42:17–43:4, 142:24–143:1; 149:6–8, 17:2–3; 148:19–149:1; see Ex. R–10 at 7 [20].) As a result, Prairie State failed to identify loose ribs located in each of the three entryways and five of the six crosscuts that its miners had rockdusted. (Exs. S–4(a), S–8 at 2.) In sum, loose ribs posing a high degree of danger to miners were located in numerous places those miners were required to work and travel. See discussion *supra* Part V.A.2.

Regarding the obviousness of the violation, upon entering the Main North Intake area, Inspector Hatcher found before him a significant unsupported rib that, when scaled down, covered half the entryway. (Tr. 38:19–41:2, 54:3–17.) The unsupported piece of rib Hatcher discovered was 15 feet long, seven feet high, and up to a foot thick. (Exs. S–5, S–6.) The operator's subsequent examination uncovered nine roof and rib hazards that required scaling. (Tr. 69:7–75:4, 120:19–121:3.) Given the number and size of the discovered hazards, these underlying conditions were obvious to a reasonably prudent miner in the area. Similarly, these obvious hazards make Prairie State's failure to conduct a pre-shift examination obvious. The date boards in the Main North Intake section compounded the obviousness of the missing pre-shift examination, as all but two date boards contained no DTIs whatsoever. (Tr. 77:14–78:24, 111:17–112:9.)

Nevertheless, Prairie State asserts that its failure to perform a pre-shift examination was not obvious because the escapeway entry in the examination book suggested a pre-shift examination had been completed for the entire area. (Resp't Br. at 2–3, 10–14.) In support, Prairie State points to Welch's testimony, asserting that he believed in good faith a pre-shift examination had been performed. (*Id.* at 2–3, 13–14.) Prairie State further argues that because the violation was not obvious, the operator did not know and did not have reason to know that it had failed to conduct a pre-shift examination. (*Id.* at 13–14.)

Welch testified that he mistakenly believed the escapeway examination entry in the aboveground examination book showed a full pre-shift examination had been performed for the Main North Intake area. (Tr. 194:4–198:1.) Although Rees did not specifically recall his June 25 shift, he stated that he would have reviewed the recorded escapeway examination. (Tr. 168:10–169:16.) Rees suggested that based on the escapeway exam book entry he would not have believed a pre-shift examination of the North Main Intake area was necessary. (Tr. 170:23–171:10.) In contrast, however, MSHA Investigator Bretzman and Prairie State's Bertelsman, who conducted the Main North Intake escapeway examination, testified that any reasonable miner would have understood from the entry that a full pre-shift examination had not been completed for the Main North Intake area. (Tr. 116:13–20, 142:15–144:22.) I credit the testimony of Bretzman and Bertelsman and determine that a reasonable shift manager should have known that the escapeway examination in the examination book did not mean the mine examiner had conducted a full pre-shift of the section. See also discussion, *infra*, Part V.B. Accordingly, both Welch and Rees's readings of the escapeway examination entry were unreasonable.

Furthermore, any confusion created by the escapeway examination's listing was created by Prairie State's insufficient policy. At the time of the violation, Prairie State kept its pre-shift examination records in the same column as its on-shift escapeway examination records. (Tr. 17:2-3, 148:19-149:1; Ex. S-3.) The Commission has recognized that a lack of obviousness does not mitigate an operator's negligence when the operator's actions caused the violation to be less obvious. *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1200 (Oct. 2010) (rejecting operator's argument that violative condition was not obvious because operator had clear control over an obstruction's removal). Here, Prairie State had clear control over its procedures for recording pre-shift and on-shift examinations. The operator chose to keep these records in the same column, despite the risk of confusing the mine's supervisors and thus endangering the lives of miners working in unexamined areas. Indeed, Prairie State's new manager, Welch, sent three miners with minimal experience to work in an area with significant unidentified hazards. If I am to believe any actual confusion occurred due to the escapeway exam book entry, Prairie State does not merit sympathy for maintaining poor recordkeeping that allowed such a mistake to happen. The missing pre-shift examination was obvious, and Prairie State reasonably should have known that it needed to conduct a full examination of the Main North Intake area prior to sending miners there to rockdust. *See San Juan Coal Co.*, 29 FMSHRC 125, 134 (Mar. 2007) (considering whether an operator "reasonably" should have known of a violation when analyzing the operator's knowledge of the violation).

With regard to the violation's duration, any amount of time a miner spends in an unexamined portion of a mine is prohibited, unless the miner is a certified examiner. 30 C.F.R. § 75.360(a). Here, an examination was only conducted after the violation was discovered and an order issued by Inspector Hatcher. However, the pre-shift violation lasted for less than one shift.⁸ Accordingly, I determine that the duration of the violation is neither a mitigating nor aggravating factor.

In considering the abatement factor, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 17. Here, the record provides no evidence of any abatement efforts made prior to the order's issuance. In terms of being a mitigating factor, therefore, I afford it no weight.

Prairie State exposed miners to dangerous mine conditions by failing to conduct the required pre-shift examination. The unexamined area was extensive, covering over a 5,200-foot area, and posed risks to miners at each entryway they traveled. Prairie State's examination records in the aboveground book made it obvious that no pre-shift examination occurred, and thus Prairie State should have known of the violation. Despite prior warnings, Prairie State again

⁸ The violation began when Prairie State failed to conduct the required pre-shift examination. *See Jim Walter Res., Inc.*, 28 FMSHRC at 602. Prairie State should have conducted the pre-shift examination by the start of the third shift at 10:30 p.m. (*See* Tr. 156:4-24.) Inspector Hatcher issued Order No. 8440269 at 3:15 a.m., nearly five hours into the third shift, and withdrew the miners from the area until Prairie State examined the area. (Ex. S-8 at 1; Tr. 47:4-6.) The violation, therefore, lasted at least four hours and 45 minutes. *See Old Ben Coal Co.*, 1 FMSHRC 1954, 1959 (Dec. 1979) (finding unwarrantable failure where violative accumulations had existed for less than one shift).

failed to comply with the pre-shift requirement, leading the inspector to issue this withdrawal order. Although the duration of the violation and the operator's abatement efforts do not necessarily weigh in favor of either party, the notice that greater efforts were required, the operator's knowledge of the violation, the extent, danger and obviousness of the violation, and all the facts and circumstances considered as a whole support a finding of aggravated conduct.

Accordingly, for Order No. 8440269 I conclude that Prairie State's violation of section 75.360(a) was an unwarrantable failure to comply with a mandatory health or safety regulation. For the same reasons explained above, I also conclude that Prairie State was highly negligent in failing to conduct a pre-shift examination.

B. Section 110(c) Liability

The Secretary seeks separate civil penalties against shift managers Rees and Welch for their conduct in connection with Order No. 8440269.⁹ To hold either Rees or Welch liable under section 110(c) of the Mine Act, the Secretary must prove that each miner (1) knew or had reason to know that Prairie State needed to conduct a pre-shift examination; and (2) failed to have the required examination performed before sending miners into the area. *See Kenny Richardson*, 3 FMSHRC at 16.

1. Rees – Section 110(c) Liability

The Secretary argues that Rees had reason to know an examination needed to be performed in the area. (Sec'y Br. at 21.) In support, the Secretary asserts that Rees's belief that the escapeway examination listed in the mine's aboveground book showed the entire work area had been pre-shifted was unreasonable. (*Id.* at 21–22.) The Secretary further asserts that Rees failed to act by neither ordering the pre-shift examination during his shift nor alerting Welch to perform a supplemental examination before workers were sent down to perform rockdusting. (*Id.* at 21–22.) The Secretary notes that Rees normally had the opportunity to speak to Welch prior to the midnight shift about conditions in the mine and any needed examinations. (*Id.* at 21.) The Secretary asserts that Rees's behavior resulted in exposing miners to danger and therefore amounts to reckless disregard. (*Id.* at 22.)

Rees claims he was not in a position to know that a pre-shift examination of the area was needed. (Resp't Br. at 18.) Rees asserts he should not be held liable under section 110(c) because he did not know when or where the rockdusting would occur. (*Id.*) Rees also implied

⁹ In their post-hearing brief, Respondents Rees and Welch again assert that the 110(c) civil penalties in this case should be dismissed because of MSHA's delay in completing its section 110(c) investigation. (Resp't Br. at 18–19.) On August 26, 2015, I issued an Order Denying Respondents' Motion to Dismiss 110(c) Dockets based on the same argument. Docket Nos. LAKE 2015-130 and LAKE 2015-144, unpub. order at 1–4 (Aug. 26, 2015) (ALJ). Given the Secretary's non-frivolous explanation for his delayed investigation and Respondents' failure to show they were prejudiced by the delay, I determined that the 110(c) dockets should not be dismissed. (*Id.*) Because Respondents have not presented any new evidence regarding this issue, my prior determination stands.

the escapeway examination recorded in the mine's examination book meant that the area had undergone the required pre-shift examination. (Tr. 170:23–171:3.)

Prairie State superintendent Jackson left the authority to order examinations and assign examiners solely to the mine's shift managers. (Tr. 104:5–10, 105:2–7, 167:14–168:5.) Rees, the second shift mine manager, has 31 years of mining experience and is considered a very knowledgeable mine manager. (Tr. 172:14–15; 122:13–17.) On June 25, 2012, Jackson instructed Rees in a written note to haul dust to the Main North Intake during the second shift. (Ex. R–8(a).) Jackson's instructions directed Rees to a map but did not specifically indicate when miners would rockdust.¹⁰ (*Id.*; Tr. 173:8–14.) However, rockdusting typically occurred during the third shift, which was a maintenance shift. (Tr. 193:14–17.) Rees directed his miners to set up the equipment in the Main North Intake area. (Tr. 105:18–25, 177:7–11, 212:15–213:1; Exs. S–4 at 1, R–10 at 6 [17].)

A reasonable miner with Rees's experience would be familiar with the mine's normal work routine and would have known that the rockdusting equipment would likely be used in the area where it was set up. Inspector Hatcher learned from Welch that Jackson at 10:00 p.m. instructed him to rockdust in the Main North Intake area where Rees had set up the rockdusting equipment. (Ex. R–10 at 6 [15–17].) Rees ended his shift at 1:30 a.m. (Tr. 190:5–7, 139:19.) Rees therefore had the opportunity to talk with Welch about the third shift's assignment to rockdust the area and use the equipment Rees had set up. Based on these facts, I find Rees reasonably should have known rockdusting would occur in the Main North Intake section during the subsequent third shift. Accordingly, Rees should have known an examiner needed to perform a pre-shift examination of the area prior to that shift.

Given this knowledge, Rees was responsible for ordering the pre-shift examination of the areas in the Main North Intake that Jackson scheduled to have rockdusted for the oncoming third shift. (Tr. 105:2–13, 167:20–168:5.) Because Rees was responsible for ordering pre-shift examinations for the next shift, he normally reviewed the third shift's pre-shift examination report to see what his examiners entered into the book. (Tr. 168:10–169:16.) This review typically occurred toward the end of his shift when he returned aboveground from the mine. (Tr. 169:4–6.) The third shift's pre-examination report on the night of Hatcher's inspection had no pre-shift examinations listed for the Main North Intake area.¹¹ (Ex. S–3.)

Rees maintains he did not believe a pre-shift examination of the area was necessary because the aboveground examination book showed that an examiner examined the Main North

¹⁰ Although Jackson's instructions mentioned a map, the map was no longer available at hearing, and Rees did not recall whether it was attached to the instruction sheet. (Tr. 183:2–184:3.) Nevertheless, Rees had the equipment delivered to the proper area. (Tr. 105:18–25, 177:7–11; Exs. S–4 at 1, R–10 at 6 [17].)

¹¹ Although the report listed an examination for the Main North Intake escapeway, the escapeway examination was not a pre-shift examination, but an on-shift examination. (Tr. 142:20–143:1.) At that time, Prairie State's practice was to list its on-shift escapeway examinations in the same section as its pre-shift examinations. (Tr. 17:2–3; 148:19–149:1.)

Intake escapeway during that night's second shift. (Tr. 170:23–171:3.) However, special investigator Bretzman and examiner Bertelsman both testified that an experienced mine manager would know that escapeway examinations were limited to only the escapeway route. (Tr. 116:13–20, 142:15–144:22.) In fact, Bertelsman conducted a portion of the Main North Intake escapeway examination that day and only followed the normal route of the escapeway during such examinations unless a shift manager instructed him otherwise. (Tr. 134:12–18, 135:12–20.) According to Bertelsman, unless an examination was part of a routine daily duty, mine examiners only examined areas upon a shift manager's request. (Tr. 134:11–18.) The Main North Intake area was not a normal travel area and thus was not routinely pre-shifted. (Tr. 203:23–204:5, 214:3–6.) In order to have a pre-shift examination performed in the Main North Intake, Rees therefore would have had to specifically ordered an examiner to conduct one. Rees did not order any examiners to perform such a pre-shift examination. (Tr. 186:19–25.)

Given this evidence, it was not reasonable for Rees to believe a pre-shift was performed for the Main North Intake on June 25. Accordingly, I do not credit Rees's testimony regarding the escapeway examination book entry based on his inconsistent statements. Rather, I credit Bretzman and Bertelsman's testimony and determine that Rees, an experienced mine manager, should have known the escapeway examination was not a pre-shift examination and did not include the areas outside the escapeway route.

As the second shift manager, part of Rees's duties entail checking the examination books for hazards and other abnormalities and bringing them to the attention of the third shift manager, Welch. (Tr. 169:25–170:20.) When Rees had reason to know an examiner needed to perform a supplemental examination during the next shift, he normally would tell the oncoming shift manager. (Tr. 170:4–20.) In particular, Rees would discuss anything out of the ordinary, such as "equipment out of place or whatever." (Tr. 169:22–170:20.) Such conversations allowed the managers to tie up any loose ends left from the previous shift. (*Id.*) Rees usually had ample opportunity to speak with Welch, as both managers were at the mine for four and one-half hours from Welch's arrival at 9:00 p.m. until Rees ended his overlapping second shift at 1:30 a.m. (Tr. 190:5–7, 139:19.) Indeed, on the night of Hatcher's inspection, Rees spoke with Welch at some point during their overlap. (Tr. 187:1–4, 190:5–7, 139:19.) Rees had delivered rockdusting equipment to an infrequently traveled area of the mine. Yet Rees never put the pieces together to inform Welch that a full pre-shift examination had not been performed for the Main North Intake and that a supplemental examination was necessary. (Tr. 185:18–21.)

The Mine Act demands a high level of care from mine supervisors. *See Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997). Given the evidence before me, I determine that Rees had a duty to either order a pre-shift examination or alert Welch that a supplemental examination was necessary. By neither conducting a pre-shift examination nor informing Welch that he needed to perform a supplemental examination, Rees failed in his responsibility to pass the baton to the oncoming shift and ensure that the necessary safety precautions took place before the third shift began work. A simple, brief conversation about each manager's work assignments would have revealed that miners were headed to an unexamined work area, blind of the hazards that could be lurking therein. That simple conversation did not take place.

I therefore conclude that Rees should have known that a pre-shift examination was necessary for the Main North Intake area before the third shift on June 25, 2012. By neglecting to either order the pre-shift himself or inform the third shift manager that a supplemental examination was necessary, Rees failed to act as required by the Mine Act to protect miners. Rees's inaction exposed miners to serious hazards. A simple discussion with Welch would have avoided such a dangerous situation. Given the danger presented and the ease of the solution, I conclude that Rees exhibited a serious lack of reasonable care constituting more than ordinary negligence. Accordingly, Rees engaged in aggravated conduct and is liable under section 110(c) of the Mine Act.

2. Welch – Section 110(c) Liability

The Secretary argues that Welch had reason to know an examination of the Main North Intake area needed to be performed and that Welch's reliance on the recorded escapeway examination was unreasonable. (Sec'y Br. at 23.) The Secretary asserts that Welch knew the escapeway examination was limited to the escapeway route and failed to act by not performing a supplemental examination of the other areas. (*Id.*) The Secretary claims that Welch exhibited reckless disregard in exposing miners to danger. (*Id.*)

In contrast, Welch asserts that he should not be held liable under section 110(c) because he reasonably believed the required examination had been performed. (Resp't Br. at 20.) Welch argues that his belief that the escapeway examination covered the entire work area was reasonable because the mine's examiners routinely listed pre-shift examinations by general location, rather than specific location. (Resp't Br. at 20–22; Tr. 195:7–17.) Welch also claims he was inexperienced as a mine manager, having only been in that position for a month at the time of the violation, and performed his duties in good faith to the best of his ability. (Resp't Br. at 20–22; Tr. 189:11–14.)

Upon arriving at the mine around 9:00 p.m. prior to the start of the third shift, Welch reviewed his work orders, which included Jackson's instructions to rockdust the Main North Intake. (Tr. 189:24–190:4, 190:5–7.) Jackson's written instructions were detailed about the area needing rockdusting, specifying exact entries and crosscuts. (Ex. R–8(b).) Welch subsequently checked the pre-shift examination book to see whether an examiner had examined the area where rockdusting was going to occur. (Tr. 194:14–18.) Welch saw that the second shift mine examiners had examined the Main North Intake escapeway and incorrectly concluded that the examination covered the entire area to be rockdusted. (Tr. 194:22–195:14.) However, most of the entries and crosscuts Jackson specified in Welch's instructions were outside of the Main North Intake escapeway. (Ex. S–4.)

Though a few examination book entries describe general areas, such as "Third North Construction Area," nearly all of the entries describe areas with specificity, listing particular entryway numbers, travelways, and belts. (*See* Exs. S–3, R–2(a), R–2(b).) Although Welch had only been a mine manager for one month before the violation, he had 17 years of mining experience. (Tr. 209:6–8.) Moreover, Welch obtained his mine examiner's papers before he began working in Prairie State's safety department in 2010. (Tr. 208:8–209:5.) Thus, Welch had significant experience, particularly in mine safety and in performing examinations.

A reasonably prudent mine manager would know that escapeway examinations do not include the areas outside the escapeway route. (Tr. 122:23–123:9.) If Welch was unfamiliar with Prairie State’s examination procedures, as a mine manager he had a duty to inquire and know about those practices, as they are fundamental to protecting the safety of the miners who work under him. Indeed, Welch had opportunities to do so before sending miners underground to rockdust. Not only did Welch speak to his superior, Superintendent Jackson, that evening, he could have checked with Rees, a more seasoned shift manager, about whether a pre-shift examination in the Main North Intake area had occurred. (Tr. 187:1–4, 190:5–7, 139:19, 213:2–7, 219:9–15.) Given the facts before me, I determine that Welch’s reliance on the Main North Intake escapeway examination as a pre-shift examination was unreasonable. Consequently, I determine that Welch should have known an examination of the area had not been performed.

Despite his reason to know an examination was necessary, Welch did not conduct a supplemental examination of the area during his shift. (Tr. 46:25–47:2, 197:21–198:1.) As a result, Welch sent miners down into an area that had not been examined and contained serious hazards. I therefore determine that Welch failed to act in protecting those miners.

Welch’s mistaken belief that the area had undergone a pre-shift examination does not satisfy the high duty of care required of mine supervisors. Welch knew or had reason to know an examination of the work area had not been performed, and he failed to act by not ordering a supplemental examination before miners began working in the area. Welch exhibited a serious lack of reasonable care by sending miners into an unexamined area and exposing them to serious danger. Accordingly, I conclude that the Secretary has also proven Welch engaged in aggravated conduct and is liable under section 110(c) of the Mine Act.

VI. PENALTY

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator’s business; (3) the operator’s negligence; (4) the penalty’s effect on the operator’s ability to continue in business; (5) the violation’s gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). These same section 110(i) factors are also applicable when assessing penalties under section 110(c) cases. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012). In the section 110(c) context, the “relevant inquiries include whether the penalty will affect the individual’s ability to meet his financial obligations and whether the penalty is appropriate in light of the individual’s income and net worth” but should “not include the size of the mine [or] . . . the penalties levied against the corporation.” *Id.* at 1764–65.

A. Prairie State’s Penalty

The Secretary has proposed that Prairie State pay a penalty of \$2,000.00 for Order No. 8440269, the minimum penalty for an unwarrantable failure violation under section 104(d)(1). 30 U.S.C. § 110(a)(3)(A). Nothing in the record suggests that the proposed penalty is inappropriate for the size of Prairie State’s business, and the parties have stipulated that the

proposed penalty will not affect Prairie State's ability to remain in business. (Ex. S-1.) Additionally, nothing suggests that Prairie State failed to make a good faith effort to achieve rapid compliance with the safety standard after Inspector Hatcher issued the order. In fact, Prairie State has since changed its examination recording procedures in order to help eliminate any possible confusion as to whether a pre-shift examination has been conducted in the mine. (Tr. 149:2-8; Ex. R-11.)

On the other hand, I have upheld the Secretary's S&S, unwarrantable failure, and negligence designations. Such conclusions ordinarily support the Secretary's proposed penalty. In addition, I considered the mine's history of violations concerning this safety standard. (Exs. S-2, S-7.) MSHA cited Prairie State for another violation of section 75.360(a) less than one month prior to the issuance of Order No. 8440269. (Ex. S-7.)

Prairie State's systemic failure to ensure that required examinations took place at the mine placed miners in grave danger, putting them at risk of serious injury. Prairie State had direct control over training its managers on the mine's examination recording procedures; yet it put in charge a new shift manager who apparently did not know how to read the examination book properly. Superintendent Jackson then gave written instructions to both Rees (second shift) and Welch (third shift) and was in the best position to know when work was to be done and when pre-shifts should be ordered. Yet Jackson not only failed to communicate adequately with Rees about work to be done on the third shift that would trigger a pre-shift examination, he also failed to adequately oversee Welch, a new shift manager, thus raising serious questions about the operator's procedures. These failures of Prairie State's management warrant an increased penalty. Given the gravity of the hazardous conditions found, coupled with Prairie State's failure to coordinate and supervise adequately its shifts to ensure compliance with examination requirements, I determine that a higher penalty is appropriate for Prairie State's unwarrantable conduct. Considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of \$4,000.00.

B. Steven B. Rees's Penalty

The Secretary has proposed that Rees pay a penalty of \$1,500.00 under section 110(c). Rees did not present evidence regarding his ability to meet his financial obligations or his individual income and net worth. Rees' failure to either conduct a pre-shift examination or inform the oncoming shift manager an examination was needed resulted in a violation of the pre-shift standard that was S&S, highly negligent, and an unwarrantable failure. However, no evidence in the record shows that Rees has engaged in any past violative conduct. The Secretary did not prove Rees's action or inaction was intentional. Nonetheless, the facts and circumstances establish that Rees failed to meet his high duty of care. Accordingly, I conclude a penalty smaller than the Secretary's proposal is appropriate in this case. Thus, I assess a civil penalty of \$500.00 against Rees under section 110(c).

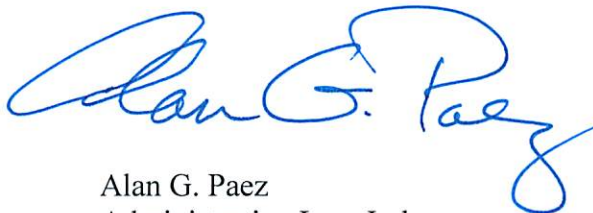
C. Michael Welch's Penalty

The Secretary has proposed that Welch pay a penalty of \$1,500.00 under section 110(c). Welch did not present evidence regarding his ability to meet his financial obligations or his

individual income and net worth. Welch's failure to act resulted in a pre-shift violation that was S&S, highly negligent, and an unwarrantable failure. His mistake in this case was objectively unreasonable and resulted in a serious hazard to miners. However, the absence of intentional misconduct and the fact Welch had only been a manager for a short period before the violation occurred suggests some leniency is appropriate. In addition, the record contains no evidence demonstrating Welch's involvement in any past violative conduct. In light of the above criteria, I conclude a penalty smaller than the Secretary's proposal is appropriate in this case. Thus, I assess a civil penalty of \$500.00 against Welch under section 110(c).

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 8440269 is **AFFIRMED**. The section 110(c) liability of Steven B. Rees and Michael Welch is **AFFIRMED**. Prairie State is **ORDERED** to **PAY** a civil penalty of \$4,000.00 within 40 days of the date of this decision. Steven B. Rees is **ORDERED** to **PAY** a civil penalty of \$500 within 40 days of this decision. Likewise, Michael Welch is **ORDERED** to **PAY** a civil penalty of \$500 within 40 days of this decision.¹²



Alan G. Paez
Administrative Law Judge

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¹² Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.