FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 3, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. SE 2013-301 A.C. No. 01-00851-315187-01 Docket No. SE 2013-352 A.C. No. 01-00851-317727-01
v.	Docket No. SE 2013-368 A.C. No. 01-00851-319550 Docket No. SE 2013-399 A.C. No. 01-00851-320606-01
OAK GROVE RESOURCES, LLC, Respondent	Mine: Oak Grove

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings are before me based on petitions for assessment of civil penalty 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, Oak Grove Resources, LLC ("Oak Grove"). A hearing was held on September 1 and September 2, 2015, in Birmingham, Alabama.

I. Settled Violations

These consolidated dockets concern a total of 24 citations and orders. Prior to the hearing, the parties advised that 17 of the 18 citations at issue in Docket No. SE 2013-352, and two of the three 104(d)(2) orders at issue in Docket No. SE 2013-301, had settled. The record at the hearing was left open for the parties to submit their written settlement terms, which were filed on February 19, 2016.

a. Docket No. SE 2013-352

Regarding the 17 settled citations in Docket No. SE 2013-352, the parties' settlement terms include reducing the total civil penalty from $23,559.00 to $15,713.00. Specifically, the settlement terms provide for reducing the degrees of negligence attributable to the cited violative conditions in Citation Nos. 8524989 and 8524999 to "low" and "moderate," respectively, with corresponding penalty reductions. Regarding Citation No. 8526401, the parties agree to modify the number of people affected from eight to one, with a corresponding penalty reduction. Additionally, the parties agree to reduce the total civil penalty in Citation Nos. 8524490, 8524979, 8524982, 8524987, 8524991, 8524993, 8524994, 8524995, 8524996, 7684600, 8524499, and 8524500, from $17,108.00 to $11,019.00 based on the vagaries of litigation, and pay the Secretary's proposed penalties in full for Citation Nos. 8524983 and 8524491. One citation, Citation No. 8520665, remains at issue in Docket No. SE 2013-352.

b. Docket No. SE 2013-301

Regarding the two settled 104(d)(2) orders in Docket No. SE 2013-301, Order Nos. 8524255 and 8524258, the parties' settlement terms maintain the unwarrantable failure designations, but reduce the total civil penalty from $51,300.00 to $38,475.00. Order No. 8520666 in Docket No. SE 2013-301 remains at issue in this proceeding.

Consequently, the parties' settlement agreement reducing the total civil penalty for the settled 19 citations and orders in Docket Nos. SE 2013-352 and SE 2013-301 from $74,859.00 to $54,188.00 shall be approved as consistent with the penalty provisions of section 110(i) of the Mine Act.

II. Disposition of Violations at Issue

a. Summary of Violations at Issue

In addition to the two violations remaining at issue in Docket Nos. SE 2013-352 and SE 2013-301, the two orders at issue in Docket No. SE 2013-399 and the single order at issue in Docket No. SE 2013-368 have also been adjudicated in this proceeding. Of these five contested citations and orders, two orders concern allegedly impermissible coal dust accumulations along each of two conveyor belt lines, and two orders concern associated allegedly insufficient pre-shift examinations. These alleged accumulations and pre-shift examination violations have been attributable to unwarrantable failures. The remaining citation concerns an allegedly hazardous conveyor belt that was reportedly observed rubbing against the mine roof at the site of an overcast.

The Secretary initially proposed a total civil penalty of $259,848.00 in satisfaction of these four contested orders and one contested citation. The Secretary's initial total proposed civil penalty included a proposed penalty of $146,400.00 for the alleged accumulations violation in Order No. 8520664 in Docket No. SE 2013-368 that was designated as a repeated flagrant violation. As discussed below, the flagrant designation was deleted prior to the hearing. *See* Order Deleting Flagrant Designation, 37 FMSHRC 1311 (June 2015) (ALJ). Consequently,

the Secretary reduced the proposed penalty for Order No. 8520664 to $70,000.00 — the maximum penalty provided for unwarrantable failure violations under 30 U.S.C § 820(a)(1). As a result, at the time of the hearing, the Secretary was proposing a total civil penalty of $183,448.00 in satisfaction of these four contested orders and one contested citation. The parties' briefs have been considered in the disposition of this matter.

b. Order No. 8520664 in Docket No. SE 2013-368 (Main North 3 Belt Accumulations)

i. Pre-Hearing Deletion of Flagrant Designation

Order No. 8520664, issued on October 3, 2012, alleges a violation of section 30 C.F.R. § 75.400.[1] Order No. 8520664 states:

> Combustible material in the form of float coal dust and dry hard packed coal fines were allowed to accumulate on the roof, ribs, footwall, and belt structure of the Main North 3 belt entry. The hard packed coal fines were in contact with moving rollers on the belt line in multiple locations along the belt entry. The float coal dust existed on the roof, ribs, footwall, and belt structure from the Main North 3 Tail Piece extending outby to crosscut 27. This is an approximate distance of 2100 feet. Due to the extensive amount of accumulations and that this belt is examined every shift this constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard. Standard 75.400 was cited 92 times in two years at mine 0100851 (91 to the operator, 1 to a contractor).[2] This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 5. As previously noted, the accumulation condition cited in Order No. 8520664 was initially designated by the Secretary as a "repeated flagrant" under section 110(b)(2) of the Mine Act, for which the Secretary sought a proposed enhanced civil penalty of $146,400.00. The flagrant designation was deleted by an interlocutory order on June 1, 2015. Order Deleting Flagrant Designation, 37 FMSHRC 1311 (June 2015) (ALJ). The interlocutory order is incorporated by reference.

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[1] 30 C.F.R. § 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

[2] This notation of 92 section 75.400 violations in the two year period prior to the issuance Order No. 8520664 cannot be reconciled with the Assessed Violation History Report that reflects 34 section 75.400 violations during the relevant time period. *See* Gov. Ex. 1

As the criteria for a repeated flagrant violation essentially remains a matter of first impression, it is helpful to summarize the rationale for deleting the repeated flagrant designation in this matter. It is axiomatic that the Mine Act provides for the application of "increasingly severe sanctions for increasingly serious violations or [increasingly inexcusable] operator behavior." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (1981). Consistent with this statutory scheme, section 110(b)(2) of the Mine Act, which increases the maximum civil penalty for extremely hazardous violations deemed "flagrant," was promulgated by Congress in 2006 following the Sago and Darby Mine disasters. Section 110(b)(2) provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or *repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added). Thus, section 110(b)(2) applies only to the most hazardous and egregious violations.

Section 75.400, the mandatory standard prohibiting coal dust accumulations cited in Order No. 8520664, is the most frequently cited mandatory standard in underground coal mines. For example, section 75.400 violations constituted eleven percent of all citations issued at underground coal mines in 2015. MSHA, Most Frequently Cited Standards, http://arlweb.msha.gov/stats/top20viols/top20viols.asp (last visited April 25, 2016).

While the condition cited in Order No. 8520664 appeared to be a routine accumulations violation, in that it lacked the presence of an identifiable ignition source, the Secretary relied on a "predicate violation history" to support his designation of a repeated flagrant violation. However, if violative coal dust accumulations in proximity to a properly-functioning conveyor system can be elevated to a flagrant violation based on a "predicate history of violations," the vast majority of section 75.400 violations can be deemed flagrant.

Consequently, in an effort to narrow the issues, on March 14, 2014, the parties were ordered to address whether a section 75.400 violation can be elevated to a repeated flagrant violation based solely on a history of violations, if the cited condition can only contribute to a reasonably serious injury, rather than proximately cause serious bodily injury or death. 36 FMSHRC 815 (Mar. 2014) (ALJ).

In response, the Secretary conceded that "[b]oth reckless and repeated flagrant designations require violations that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." *Sec'y Resp. to Order Scheduling Briefing*, at 6 (Apr. 22, 2014). In other words, the Secretary conceded that a violative condition that cannot reasonably be expected to be the proximate cause of serious injury or death cannot be elevated to a flagrant violation based simply on a history of violations. In this regard, at an oral argument held on March 4, 2015, for the purpose of addressing the criteria for a repeated flagrant violation, the Secretary's counsel stated:

> We absolutely agree that history alone cannot elevate a violation to a flagrant violation. There is no dispute about that from the Secretary's perspective.
>
> And I think as [the Court] read yourself from the Secretary's response to your briefing order, the Secretary has noted that both reckless and repeated flagrant designations require violations that substantially and proximately caused or reasonably could have been expected to cause, death or serious bodily injury.

Order Deleting Flagrant Designation, 37 FMSHRC at 1313 (citing Oral Arg. Tr. 29-30).

Following consideration of the Secretary's April 22, 2014, response, the Secretary was ordered to file a prehearing brief addressing whether the cited violative condition in Order No. 8520664 satisfies the requisite criteria for establishing a repeated flagrant violation under section 110(b)(2) of the Mine Act. Specifically, the requisite criteria were identified as follows:

1. A repeated flagrant violation is a flagrant violation that is demonstrated by either:
    a. A repeated failure to eliminate the violation properly designated as flagrant, or
    b. A relevant history of violations that also meet the requirements for a flagrant violation with respect to knowledge, causation and gravity, as enumerated below.[3]
2. A flagrant violation must be a known violation that is conspicuously dangerous, in that it cannot reasonably escape notice.
3. A flagrant violation must be the substantial and proximate cause of death or serious bodily injury that has occurred or can reasonably be expected to occur.
    a. A substantial and proximate cause is a dominant cause without which death or serious bodily injury would not occur.
    b. A serious bodily injury is a grave injury that results in significant debilitating and/or permanent impairment.
    c. Such injury is reasonably expected to occur if there is a significant probability of its occurrence.

36 FMSHRC 1777, 1789-90 (June 2014) (ALJ).

[3] This criterion that predicate violations must also meet the requirements for a flagrant violation was included at the suggestion of the Secretary. 36 FMSHRC at 1789 n.13. However, I believe a history of relevant violations can provide a basis for a "repeated" designation, for a violation otherwise properly designated as flagrant, regardless of whether the previous violations satisfy the statutory definition of flagrant.

In response to the above criteria, the Secretary asserted that:

> In the present case, hard packed coal fines were in contact with moving rollers on the belt line in multiple locations along the belt entry. Given these ignition sources, it is reasonably expected that, *as normal operations continued*, serious and/or deadly injures from burns and smoke inhalation would result from a fire or explosion. These injuries would be the proximate and direct result of the fire or explosion because the accumulations would be the necessary fuel source that, when combined with oxygen and an ignition source, would cause the fire or explosion.

Sec'y Pre-Hearing Statement, at 2 (Aug. 7, 2014) (emphasis added). The Secretary's response relied upon a traditional significant and substantial ("S&S") analysis. Specifically, the Secretary conflated the contribution of a condition to an event resulting in injury of a reasonably serious nature, based on the potential for future ignition sources that may arise during the course of continued mining operations, with the actual presence of ignition sources that have caused, or can be reasonably expected to proximately cause, death or serious bodily injury.

Reduced to its core, while all flagrant violations are S&S, it is only the most hazardous of S&S violations that can properly be designated as flagrant. By way of illustration, an S&S violation is one that, in the context of continuing mining operations, is reasonably likely to contribute to a hazard that will result in an injury of a reasonably serious nature. In contrast, a flagrant violation is a violation that, itself, presents a present hazard that either has caused, or can be reasonably expected to proximately cause, death or serious bodily injury.

On June 1, 2015, I issued an interlocutory order deleting the flagrant designation in Order No. 8520664, which stated, in pertinent part:

> While the cited accumulations may have been exposed to future ignition sources based on conveyor belt defects that may occur during the course of continued mining operations, the undisputed material facts demonstrate that the cited accumulations *were not* in proximity to any identifiable ignition source, such as a misaligned belt or defective roller on October 3, 2012, the date Order No. 8520664 was issued. In this regard, the Secretary['s counsel] forthrightly conceded during oral argument [in this matter]:
>
> > COURT: Was there any evidence of any heat? . . .
> >
> > COUNSEL: And the simple answer I'd like to give you . . . is at the time the violation was issued, *there is no evidence of heat sufficient to ignite coal at the time the violation was issued.*
>
> [Oral Arg.] Tr. 129-130 (emphasis added).
>
> Moreover, the cited accumulations were remotely located where they could not be exposed to ignition sources at the mine face. In this regard, at oral argument, the

parties stipulated that the location of the cited accumulations was approximately .58 miles from the zero-gate continuous mining development area, .96 miles from an active working face, and 2.3 miles from an active long wall mining face. [Oral Arg.] Tr. 139-40; Oral Arg. Jt. Ex. 1. Rather, the Secretary repeatedly relies on speculation that there will be future sources of heat that will arise during the course continued mining operations, as a basis for asserting that the cited accumulations could reasonably be expected to cause death or serious bodily injury. *Sec'y Resp.*, at 6-10. In his brief, the Secretary also repeatedly proposes that the "the rationale for presuming 'continued mining operations' applies equally to 'flagrant' and [S&S] determinations." *Id.* at 18-22. Consistent with this proposition, at oral argument the Secretary['s counsel] stated:

> COUNSEL: If the Court doesn't agree that the concept of continued normal mining operations applies in a flagrant violation, then the Court should rule that way, we would lose this case.

[Oral Arg.] Tr. 151-52. Precisely.

Fundamentally, the Secretary must not be permitted to use interchangeably the term "actual (present) ignition source" with the term "potential ignition source" that may occur as a consequence of a future defect in the conveyor belt system during continued mining operations. In the present case, in the absence of ignition sources, the cited accumulations themselves are not capable of combustion and, as such, cannot be the proximate cause of serious bodily injury or death, as contemplated by section 75.400. Consideration of potential exposure to a future ignition source based on continued mining operations in the context of a traditional S&S analysis goes beyond scope a flagrant analysis.

Rather, whether the facts surrounding a violation support a flagrant designation is determined by the facts as they existed at the time the citation was issued. Coal dust accumulations *not in the presence of ignition sources* can be a *contributing cause* of injury if they propagate an explosion. However, such accumulations cannot be the *proximate cause* of injury.[4] To conclude otherwise, would be to render the vast majority of prohibited accumulations under section 75.400 flagrant violations. . . . Simply put — if everything is flagrant, nothing is flagrant. Nor does the Secretary have the prosecutorial discretion to arbitrarily and capriciously label violations as flagrant.

Order Deleting Flagrant Designation, 37 FMSHRC at 1318-19.

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[4] There may be exceptional cases where the depth of prohibited coal dust accumulations and their contact with multiple turning rollers causes demonstrable suspension of coal dust that could be construed as reasonably expected to be the proximate cause of propagation and resultant serious bodily injury or death, thus satisfying the statutory definition of flagrant.

In the final analysis, it cannot be ignored that Congress elected not to provide for the imposition of flagrant designations based on a timeline when it promulgated section 110(b)(2) of the Mine Act, as it did for withdrawal orders under section 104(d)(1). Rather, Congress provided a definition that requires that a violation deemed flagrant must have proximately caused death or serious bodily injury, *or could be reasonably expected to do so*.[5] The Mine Safety and Health Administration's ("MSHA") persistent attempts to elevate a violation to a repeated flagrant status under section 110(b)(2) primarily based on a history of violations, despite the statutory definition of a flagrant violation provided by Congress, is simply not supportable.[6] *See* Order Deleting Flagrant Designation, 37 FMSHRC at 1321.

The Secretary did not request interlocutory review of the June 1, 2015, Order Deleting the Flagrant Designation in Order No. 8520664. Consequently, the Secretary was ordered to file an amended petition for civil penalty. In response, on August 21, 2015, the Secretary filed an Amended Petition for the Assessment of Civil Penalty in Docket No. SE 2013-368, replacing the enhanced $146,400.00 penalty sought for Order No. 8520664, with a proposed penalty of $70,000.00—the statutory maximum penalty for a violation attributable to an unwarrantable failure. While not necessarily binding, it is noteworthy that, at the hearing, counsel for the Secretary represented that the Secretary is no longer pursuing the repeated flagrant designation for the accumulation violation cited in Order No. 8520664. Tr. 16-17.

ii. Post-Hearing Findings of Fact

The Oak Grove Mine is an underground coal mine in Jefferson County, Alabama. During the course of MSHA Inspector Alveriado Getter's October 3, 2012, inspection, he traveled the Main North 3 belt entry, where he reportedly observed the accumulation conditions described in Order No. 8520664. Tr. 33-34. As previously noted, the area where the cited accumulations were located was approximately .58 miles from the Zero Gate continuous mining development area, .96 miles from an active working face, and 2.3 miles from an active longwall

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[5] It is clear that the term "proximately" must be read into the statutory phrase "reasonably expected to cause" that refers to situations where serious death or bodily injury has not yet occurred. I recognize that the Secretary has been persistently vague on this point. To conclude otherwise — that violations that can reasonably be expected to contribute to, or are a secondary cause of, serious bodily injury or death, could be properly designated as flagrant — would blur the distinction between flagrant and routine S&S violations.

[6] I am cognizant that the Commission has held that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. *Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013). Of course, a history of violations may be an aggravating factor that is *always* relevant in determining the amount of the enhanced civil penalty that should be assessed pursuant to section 110(b)(2). *See also* 30 U.S.C. § 820(i). However, the Commission has not determined that a history of violations can serve as a basis for elevating a violation, not otherwise flagrant, to a repeated flagrant status. *See* Order Deleting Flagrant Designation, 37 FMSHRC at 1313 n.4.

mining face. Order Deleting Flagrant Designation, 37 FMSHRC at 1318 (citing Oral Arg. Tr. 139-40 and Oral Arg. Jt. Ex. 1).

As stated in Order No. 8520664, Getter testified that he observed accumulations of float coal dust, coal fines, and hard packed coal beginning at the feeder and extending 2,100 feet outby along the beltline.[7] Tr. 44. However, Getter further testified that, while the identified accumulations were "not continuous" along the cited 2,100 feet of belt line, the accumulations were not so sporadic to justify breaking up the condition into multiple violations. Tr. 44. Order No. 8520664 states that "hard packed coal fines were in contact with moving rollers on the belt line in *multiple locations* along the belt entry." Gov. Ex. 5 (emphasis added). When asked at the hearing to quantify "multiple locations," Getter stated that there were "more than twenty" locations where hard packed coal fines were in contact with moving rollers. Tr. 70. However, Getter conceded that neither the order, nor his contemporaneous inspector notes, provide details regarding the depth and extensiveness of the cited accumulations, or their proximity to rollers. *See* Tr. 70; Gov Ex. 3. Consequently, Getter cannot rely on any past recollection recorded to refresh his memory with respect to the depth and extent of the accumulations he observed three years earlier.

Getter believed that the cited accumulations were properly designated as S&S given the extensiveness he reportedly observed. Tr. 54-56. As relevant ignition sources, Getter relied on the purported frictional heat caused by the contact of accumulations with turning rollers, without alleging that any of the rollers were defective. Tr. 55-56. Getter conceded, however, that he did not take any heat readings, or see any signs of heat, i.e. smoke, or observe any defective rollers, to support his belief that the accumulations were in proximity to an ignition source. Tr. 56. Moreover, Getter did not express a concern that the cited accumulations could "propagate" an explosion occurring elsewhere in the mine. Tr. 59-60. Getter asserted that the cited accumulations could not have occurred during the present shift, but rather opined that the accumulations had been present over nine shifts (three days), during which time at least five examiners should have examined the belt entry. Tr. 46-48.

As a result of his observations, Getter issued Order No. 8520664 for a violation of section 75.400, characterizing the cited accumulations as S&S in nature, because of their potential to cause a fire that will result in smoke inhalation and burn-related injuries to 35 miners working the 14 East entry, the Zero Gate entry, and the longwall, "because the air on the [cited] belt line is utilized to ventilate [these inby] sections." Tr. 56-59. Getter attributed the cited accumulations to a "high" degree of negligence, given his belief that it existed for at least nine shifts. Tr. 60-61. Thus, Getter characterized the cited accumulations as attributable to an unwarrantable failure.

Oak Grove's witnesses disputed the nature and extent of the accumulations characterized by Getter, arguing that the accumulations were minimal. Tr. 131, 144-45, 147, 168. For example, consistent with Getter's testimony that the cited accumulations were "not continuous,"

[7] Order No. 8520664 also refers to nondescript float coal dust "on the roof, ribs, footwall, and belt structure." The Secretary did not provide any testimony at the hearing regarding the nature and extent of accumulations on the roof, ribs, and footwall.

Oak Grove Safety Inspector Larry Taft, who accompanied Getter during his inspection, testified that the accumulations along the Main North 3 belt were intermittent, characterizing the accumulations as barely notable relative to the visible rock dust. Taft testified:

> Counsel: And Main North 3 belt that day, how would you describe the float coal dust?
>
> Taft: Light gray.
>
> Counsel. Okay. Was it continuous?
>
> Taft: No, sir. You'd come to a crosscut that may be, like I said, might be light gray, you needed to sweep it. And then the next two or three crosscuts would be white, then a little light gray area, and a little darker gray area and then white again. It was not dark gray or heavy gray or black the entire length of the belt. No, sir.

Tr. 131. Although neither Getter's testimony, his citation, nor his contemporaneous notes quantified the depth of the cited accumulations, Taft further testified:

> Judge: The areas that it was dark gray almost black, would you say it was three inches, six inches, less than three inches; how would you quantify [the amount of accumulations]?
>
> Taft: Oh, probably 16th to an 8th inch. So less than three inches.
>
> Judge: 16th to an 8th inch. So less than three inches?
>
> Taft: Oh, gosh, yes.

Tr. 144-45; *see also* Tr. 173 (testimony of Oak Grove foreman Keith Miller that the accumulations present along the Main North 3 belt line were "about a quarter of an inch"). Given Getter's failure to quantify the extent of the cited accumulations, it is noteworthy that the Secretary did not make an effort at the hearing to rebut the testimony of Taft and Miller that the cited accumulations were significantly less than alleged by the Secretary.

Oak Grove's witnesses do, however, admit that there were accumulations in proximity to the mini-washer, a filtering device used to separate coal and rock from water being pumped through the mine to prevent coal and rock deposits from clogging the water lines. Tr. 134-36. At the mini-washer, located a few feet outby from the intersection of the Main North 3 belt and the Zero Gate belt, coal and rock are filtered from the water lines and dumped onto the Main North 3 belt. Tr. 131-32. Oak Grove's witnesses acknowledged that accumulations are common where the mini-washer dumps the coal and rock extracted from the water lines onto the belt, as they were a normal byproduct of mini-washer operations. Tr. 134, 140, 219-20. On this point, Taft conceded that the accumulations at the mini-washer were significant enough to result in contact with a single belt roller located near the mini-washer site. Tr. 135. Taft quantified these

accumulations as approximately four to six inches in depth, amounting to "about six shovels full." Tr. 139. However, Oak Grove's witnesses also asserted that accumulations at the mini-washer are extremely wet by nature. Tr. 135-36; 170-71. Taft described the the cited accumulations at the mini-washer as so saturated that water would run out of them when squeezed. Tr. 136.

Contrary to Getter's testimony, Taft did not recall any locations where belt rollers were turning in accumulations of coal dust, other than at the mini-washer. Tr. 136. Taft believed that the "hard packed coal fines . . . in contact with moving rollers . . . in multiple locations," described by Getter in the order, may have referred to clumps of caked mud that had stuck to the belt frame, rather than hard packed coal fines. Tr. 148-49.

Oak Grove foreman Keith Miller testified that abatement of Order No. 8520664 began immediately. Tr. 178. Miller testified that the wet accumulations near the mini-washer were shoveled and that the belt entry was bulk rock dusted to take advantage of the de-energized belt. Tr. 178. Order No. 8520664 was officially abated at 3:05 p.m. on October 3, 2012, about five hours after its issuance. Tr. 51; Gov. Ex. 5.

iii. Fact of the Violation

Section 75.400 requires that coal dust "shall be cleaned up and not be permitted to accumulate" where miners are usually required to work or travel. 30 C.F.R. § 75.400. Thus, consideration of whether a 75.400 violation has occurred requires an analysis of both the quantity and the duration of the cited conditions. Although Oak Grove disputes that there were sufficient coal fines in the belt entry to constitute a violation of section 75.400, Oak Grove concedes that the accumulations near the mini-washer were sufficient, alone, to support the cited violation. Resp. Br., at 9. With respect to the accumulations in the belt entry, although Getter neither documented, nor testified, regarding the depth or nature and extent of the cited accumulations, the Secretary will be afforded the benefit of the doubt that the accumulations along the belt line, although intermittent, were also sufficient to constitute a violation of section 75.400.

iv. S&S

Turning to whether the cited accumulations were properly characterized as S&S, 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:

> (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). With respect to the third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984). Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 1 FMSHRC 1125, 1130 (Aug. 1985). Thus, 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). In the final analysis, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte*, 20 FMSHRC at 1254-55.

As a general proposition, the Secretary has the burden of proving each element of a citation or order 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).

Here, the Secretary has demonstrated that the first, second, and fourth elements of *Mathies* are satisfied in that the cited accumulations constituted a violation that posed a discrete safety hazard, i.e. a fire or explosion, that was capable of causing injury of a reasonably serious nature. However, as a general matter, accumulations prohibited by section 75.400 are not S&S *per se*. Rather, when reduced to its core, satisfying the remaining third element in *Mathies* requires the Secretary to bear the burden of demonstrating that it is reasonably likely that the hazard contributed to by the cited accumulations will result in a fire or explosion, causing serious, if not fatal, burn-related or smoke inhalation injuries. *See Bellefonte*, 20 FMSHRC at 1254-55.

With respect to evaluating the likelihood of a fire, the Commission has noted that, in order for ignitions or explosions to occur, there must be a confluence of requisite factors. *Texasgulf*, 10 FMSHRC 498, 501 (Apr. 1988). Namely, these factors are the presence of oxygen and fuel in proximity to ignition sources. With respect to the question of whether violative accumulations are properly characterized as S&S, as oxygen is ever-present, the focus shifts to the extent of the accumulations and whether the cited accumulations are in proximity to potential ignition sources. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997) (citing *Utah Power &*

Light Co., 2 FMSHRC 965, 970-71 (May 1990)); *Texasgulf*, 10 FMSHRC at 500-03. With regard to the necessity of the Secretary to identify potential ignition sources to justify an S&S designation, the Commission has stated:

> It was within the province of the Judge to require evidence of a heat source close enough to sufficient quantities of dust as a prerequisite to concluding that there was a likelihood of a fire from the accumulations.

Twentymile Coal Co., 36 FMSHRC 1533, 1545 (June 2014).

Giving the Secretary the benefit of the doubt that the cited accumulations were not properly rock dusted and thus constituted a combustible fuel source, the Secretary has failed to adequately demonstrate that the cited accumulations were in proximity to any identifiable ignition source. As an initial matter, the cited accumulations were far removed from any potential acute ignition source at the face, such as sudden friction-related sparking. Getter's attempts to identify any local ignition sources in proximity to the cited accumulations were unpersuasive. Significantly, Getter failed to identify any potential beltline-related ignition sources, such as defective rollers or rubbing belts.

Rather, Getter relied on contact between dry accumulations and the resultant frictional heat from the moving parts of a properly-functioning beltline to support his S&S designation. Getter opined:

Judge:	So your position is that any dry accumulations in the vicinity of a conveyor belt would constitute an S&S violation and a fire hazard.
Getter:	Yes, sir. Yes, Your Honor.
Judge:	Even if the belt is normally operating, if there are no defects in the belt; is that correct?
Getter:	If it's operating, yes, Your Honor.
Judge:	That is dry accumulations in the vicinity of the belt.
Getter:	Yes, sir. In contact with the belt, Your Honor, or the moving parts of the belt.
***	
Judge:	So do I understand you to say that that's an ever-present fire hazard?
Getter:	Yes, Your Honor.
Judge:	If the belt is operating normally without any hiccups?

Getter: Yes, Your Honor.

Tr. 68-69; 108-09.

Getter's approach to the S&S analysis would impermissibly render the vast majority of section 75.400 violations *per se* S&S. It is noteworthy that in the two year period preceding the issuance of Order No. 8520664, Oak Grove was cited 34 times for violating section 75.400. Gov. Ex. 1. Of these violations, only eleven of the 34 were designated as S&S. *Id.* Consequently, the majority of the remaining violations were characterized as not reasonably likely to contribute to a serious injury.

In noting Getter's failure to identify the presence of ignition sources, I am cognizant that determining the likelihood of injury posed by the hazard, i.e. fire or explosion, caused by the violation must be viewed in the context of continued mining operations. *U.S. Steel Mining Co., Inc.*, 1 FMSHRC at 1130. Thus, the probability of a future beltline defect is a proper consideration. However, even considering continued mining operations, the Secretary must demonstrate sufficient quantities of coal dust accumulations in contact with moving beltline parts to support an S&S finding.

Here, Getter quantified the accumulations as "extensive" and in contact with "more than twenty" turning belt rollers, and "dry hard packed coal fines [that] were allowed to accumulate on the roof, ribs, footwall, and belt structure." Gov. Ex. 5; Tr. 70. However, Getter was unable to articulate the extensiveness or depth of any of these accumulations that were allegedly touching rollers. It is noteworthy that Getter's contemporaneous inspection notes also do not quantify the extent of the cited accumulations. *See* Gov. Ex. 3. Moreover, Getter's testimony was devoid of any references to the float coal dust allegedly on the roof, ribs, and belt structure, cited in the order. As such, Getter's testimony, given the Secretary's burden of proof, can only be characterized as vague and unconvincing. Rather, I credit the testimony of Oak Grove witnesses Taft and Miller that the hard packed accumulations were no more than a quarter inch in depth, sporadic, and, at least, partially rock dusted.[8]

Furthermore, with respect to the cited accumulations at the mini-washer, Oak Grove conceded that the wet accumulations were in contact with a turning roller. Given the water-logged nature of these accumulations, their contact with a moving roller is not reasonably likely to result in a fire or explosion. Thus, the soupy accumulations at the mini-washer do not, alone, rise to the level of an S&S violation.

[8] The lack of detail in Getter's testimony regarding the accumulations he cited in Order No. 8520664 is in stark contrast to the detailed description provided by Inspector Womack regarding the accumulations he cited in Order No. 4694424, discussed hereinafter.

With regard to the likelihood of a propagation hazard, the Commission has noted that "[i]t has long been recognized that a large expanse of float coal dust accumulations . . . can lead to the dust being put into suspension from normal mining operations." *Twentymile*, 36 FMSHRC at 1543. As an initial matter, the subject order characterizes a substantial, if not a majority of the cited accumulations, as "dry hard packed coal fines . . . on the roof, ribs, footwall, and belt structure." Gov. Ex. 5. Such hard packed accumulations are not readily capable of propagation. Moreover, Getter's testimony, given its lack of specificity, failed to demonstrate that the cited accumulations constituted a large expanse of coal dust capable of propagation. Finally, even Getter was admittedly not concerned that the cited accumulations had the potential to propagate an explosion caused by an ignition elsewhere in the mine, such as at the various working faces. Tr. 59-60. Rather, Getter testified that his primary concern was a fire caused by the local ignition of the cited accumulations in the belt entry. Tr. 59-60.

In the final analysis, the Secretary has failed to meet his burden of proof to demonstrate that the cited accumulations in Order No. 8520664 were reasonably likely to result in a fire or contribute to an explosion. Consequently, **the S&S designation in Order No. 8520664 is deleted.**

v. 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 the operator's knowledge 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 miner operator's conduct is aggravated or if mitigating circumstances exist. *Id.*

The Secretary contends that the cited accumulations conditions in Order No. 8520664 were attributable to a "high" degree of negligence sufficient enough to constitute an unwarrantable failure. In support of the unwarrantable failure designation, Inspector Getter submits that the reported extensiveness of the cited accumulations, as well as his belief that the accumulations existed for at least nine shifts, provide an adequate basis for an unwarrantable failure designation. Tr. 60-61.

However, the evidence does not support Getter's assertion that the cited accumulations were extensive. Rather, the evidence reflects that there were wet accumulations near the mini-washer and sporadic accumulations of less than a quarter of an inch along the cited 2,100 feet of belt line. The accumulations near the mini-washer did not pose a high degree of danger given their extremely wet consistency. Getter's claim that other accumulations were in contact with numerous rollers cannot be substantiated, given the lack of specificity of Getter's testimony regarding the depth and extensiveness of the accumulations.

Furthermore, as discussed below, the fact that the examination reports reflect that the Main North 3 belt line had been cleaned twice in the three days preceding the issuance of Order No. 8520664 undermines Getter's belief that the cited accumulations went unaddressed over a period of nine shifts. In sum, there is insufficient evidence of aggravating factors, such as length of time, extensiveness and obviousness, and degree of danger. While the history of section 75.400 violations is sufficient to have placed Oak Grove on notice that greater efforts were necessary in eliminating accumulation violations, given the non-S&S nature of the subject accumulations and Oak Grove's efforts at good faith abatement, the history of violations, alone, is inadequate to support an unwarrantable failure designation.

Consequently, the record, when viewed in its entirety, supports that the cited accumulations are attributable a "moderate" degree of negligence. Accordingly, **Order No. 8520664 shall be modified from a section 104(d)(2) order to a section 104(a) citation, to reflect that the cited accumulations were not attributable to an unwarrantable failure.**

vi. Civil Penalty

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:

> [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).

Oak Grove is a large mine operator and it has neither been contended nor shown that the proposed penalty for this violation is disproportionate to the size of the business or that it would impede its ability to remain in business. The cited accumulations were abated in a timely manner. While the Secretary now proposes a penalty of $70,000.00—the maximum penalty for an unwarrantable non-flagrant violation—as discussed herein, the gravity of the subject violation and the degree of negligence attributable to Oak Grove is no more than moderate. However, the history of Oak Grove's violations of section 75.400 is an aggravating factor.

Given the deletion of the S&S and unwarrantable failure designations, **a civil penalty of $5,200.00 shall be imposed for Citation No. 8520664.**

c. Order No. 8520666 in Docket No. SE 2013-301 (Main North 3 Belt Examinations)

i. Findings of Fact

Inspector Getter believed that the cited accumulations in Citation No. 8520664 along the Main North 3 belt line should have been observed by five examiners over nine shifts prior to the issuance of the violation. Gov. Ex. 2; Tr. 60-61. After observing the accumulation conditions that gave rise to the issuance of Order No. 8520664, Getter returned to the surface of the Oak Grove Mine to inspect the mine's pre-shift examination books for the operative nine preceding shifts from September 30 to October 3, 2012. Tr. 50-51. Getter testified that inspection of the books for that period confirmed his belief that accumulations in the Main North 3 belt had not been cleaned for nine shifts. Tr. 50-51.

After reviewing the pre-shift examination books, Getter issued 104(d)(2) Order No. 8520666, which alleges an inadequate pre-shift examination in violation of 30 C.F.R. § 75.360(a)(1).[9] Order No. 8520666 provides:

> The operator failed to make an adequate examination of the Main North 3 belt entry. Accumulations of float coal dust and hard packed coal was allowed to exist for an approximate distance of 2100 feet from the tail piece outby to Crosscut 27. This belt line is examined 3 times each day. 5 different examiners have traveled this belt line in the past 9 shifts. Due to the extensive amount of accumulations in the cited area it is obvious to the casual observer this condition has existed for an extended period of time. Due to 5 examiners traveling through the cited area and the extent of the accumulations this constitutes more than ordinary negligence and is a failure to comply with a mandatory health and safety standard. Standard 75.360(a)(1) was cited 1 time in two years at mine 0100851 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 2. Getter characterized the cited violation as S&S and attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $52,500.00 penalty for Order No. 8520666. Order No. 8520666 was timely abated on October 4, 2012. It is noteworthy that the Secretary did not proffer a copy of the relevant pre-shift examination notations in support of Order No. 8520666.

Oak Grove management personnel Taft and Miller both opined that the extent of the accumulations in the Main North 3 belt entry, as they existed during Getter's October 3 inspection, could have been noted as remarks by pre-shift examiners, but they did not warrant notations as hazards. Tr. 142, 189-90, 208. Nevertheless, they testified that the mine's pre-shift examination logs demonstrate that accumulations in the Main North 3 belt line had, in fact, been cleaned twice during the operative nine shifts from September 30 to October 3, 2012. Tr. 213-14.

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[9] Section 75.360(a)(1) states:

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a pre-shift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a pre-shift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required pre-shift examinations.

ii. Fact of Violation

Section 75.360(a)(1) requires a certified person to conduct a pre-shift examination, for the purpose of identifying any hazardous conditions, in the three hours preceding the start of a shift in areas where persons are scheduled to work or travel. *See Cumberland Coal Res., LP*, 32 FMSHRC 442, 446 (May 2010); *RAG Cumberland Res., LP*, 26 FMSHRC 639, 651, 653 (Aug. 2004); *Enlow Fork Mining Co.*, 19 FMSHRC at 14. In determining whether a violation of section 75.360(a)(1) has occurred, the proper inquiry is whether the subject pre-shift examination was adequately performed, as evidenced by appropriate notations and actions documented in the mine's examination book. *See, e.g., RAG Cumberland Resources LP*, 26 FMSHRC at 647 (holding that although mandatory standards may not explicitly require adequate or effective measures by mine operators, such a requirement is implicit in the standard's underlying purpose), *aff'd* 171 Fed. Appx. 852 (D.C. Cir. 2005). It is noteworthy that the Secretary did not proffer the relevant examination book notations to support his assertion that inadequate pre-shift examinations had occurred.

Obviously, pre-shift and on-shift examinations must be adequate, rather than perfunctory. However, not every violation detected during an MSHA mine inspection gives rise to a companion violation of section 75.360(a)(1) simply because the cited violation was not noted in a pre-shift examination book. In resolving the adequacy of examinations, it is helpful to apply the Commission's reasonably prudent person test: namely, whether "a reasonably prudent person, familiar with the mining industry and the protective purposes of [section 75.360(a)(1)]" would have a reasonable basis to believe that the subject pre-shift examinations were sufficiently thorough. *See Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987).

Unlike the Secretary, Oak Grove proffered the relevant examination book notations. Turning to the relevant entries in the examination book, despite Getter's testimony and belief that there were no relevant notations, there is documentation of several efforts to clean accumulations in the Main North 3 belt entry during the shifts proceeding Getter's inspection. Specifically, the mine's examination books demonstrate that accumulations along the Main North 3 belt line were flagged as hazards during the September 30 evening shift, the October 1 day shift, and the October 2 evening shift. Resp. Ex. 1. These three identified accumulations hazards were noted in Oak Grove's examination book as cleaned during the shifts following their notation. *Id.*

As previously noted, the Secretary has the burden of proof with respect to the alleged pre-shift examination violation. Despite Getter's testimony to the contrary, the above entries demonstrate that accumulations in the Main North 3 belt entry were not ignored in the shifts preceding the issuance of Order No. 8520664.

Given the relevant examination notations, as well as Getter's inability to specifically describe the nature and extent of the cited accumulations claimed to be overlooked by examiners, the record evidence fails to demonstrate that the subject pre-shift examinations were perfunctory or otherwise inadequate. Consequently, **Order No. 8520666 shall be vacated.**

d. Citation No. 8520665 in Docket No. SE 2013-352 (Main North 3 Belt Maintenance)

i. Findings of Fact

An overcast is an enclosed airway structure that separates intake air from return air in the same entry, permitting intake and return air currents to pass by one another. As a general matter, overcasts in belt entries require belt lines to be elevated to pass over the overcast structure. During the course of Inspector Getter's October 3, 2012, inspection of the Main North 3 belt line, he observed evidence of the elevated portion of the belt line rubbing the roof as it passed over the overcast.

Although it was unclear whether the belt was rubbing the roof at the time of the inspection, Getter testified that the fact that the belt was rubbing the roof was evidenced by a "smooth finish" and a "sheen" on the metal roof channel straps, Decatur plates, and roof bolt heads, as if they were being polished by the belt. Tr. 77. Despite the rubbing, Getter did not observe any damage to the belt itself. Tr. 88; *see* Tr. 126. Getter explained that the contact between the belt line and the roof was intermittent. Specifically, Getter testified:

> The belt was contacting the roof sporadically as it was loaded or unloaded, so to speak . . . . So whenever the belt was loaded, it was not contacting the roof. But after the whatever was loaded into the belt line went through and the belt was clear, it would physically raise up and contact the roof.

Tr. 72.

Below where the belt was rubbing, Getter testified that the word "drop" had been written on the belt structure, along with an arrow pointing upward to the area of contact between the belt and the roof. Tr. 87. While Getter could not determine when this notation had been written, he concluded that someone had detected the need for a belt adjustment, but failed to ensure that the adjustment was made. Tr. 87, 91.

As a result of his observations, Getter issued 104(a) Citation No. 8520665, which alleges a violation of 30 C.F.R. § 75.1725(a).[10] Citation No. 8520665 states:

> The operator failed to maintain the Main North 3 belt line in safe operating condition. Approximately 50 feet outby the first over cast outby the tail piece the elevated belt was contacting the roof, roof bolt heads, decatur plates and roof channels. The belt had been contacting the roof for an extended period of time. This was evident due to the roof being worn and the roof bolt heads, decatur plates, and roof channels being worn and having a polished appearance. Standard

[10] 30 C.F.R. § 75.1725(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

75.1725(a) was cited 17 times in two years at mine 0100851 (17 to the operator, 0 to a contractor).

Gov. Ex. 4.

Getter testified that the rubbing belt, as well as the metal splices in the belt, created the potential for frictional heat and sparks when contacting the metal roof channel straps, Decatur plates, and roof bolt heads. Tr. 76-77. Getter opined that float coal dust on the floor, ribs, and belt structure could be ignited by the heat and potential sparks caused by this rubbing. Tr. 76-77. However, there was a significant separation between any frictional heat and sparks caused by the rubbing belt and the accumulations that concerned Getter. In this regard, the coal accumulations on the mine floor and any coal fines on the belt structure were located approximately 15 feet below, and two to three feet below, the area of rubbing, respectively.[11] Tr. 82-83. Although Getter conceded at hearing that the belt was made of flame resistant materials, and that there was no float coal dust located on the roof itself, Getter believed that the heat and sparks caused by contact between the belt and the roof could ignite the accumulations on the floor and belt structure. Tr. 76-78, 88, 90. In such an event, a fire or explosion could result, causing "permanently disabling" injuries to the 35 miners working at the 14 East entry, the Zero Gate entry, and the longwall. Tr. 88-90. Consequently, Getter designated Citation No. 8520665 as S&S in nature.

In view of the fact that the condition had not been corrected despite the "drop" notation at the site of the contact, Getter attributed the violative condition to "high" negligence. Tr. 87. Citation No. 8520665 was abated about five hours after its issuance, after the belt structure was lowered and a patch of non-abrasive fire retardant Teflon material was affixed to the roof. Gov. Ex. 4; Tr. 102. The Secretary has proposed a $12,248.00 civil penalty for Citation No. 8520665.

Although Oak Grove Safety Director Taft, who accompanied Getter during the inspection, and foreman Miller testified that they did not observe the belt rubbing the roof at the time of the inspection, both Taft and Miller conceded that there was evidence of frictional contact between the belt and the roof. Tr. 127, 177. Despite its apparent relevance, Taft disputed the significance of the "drop" notation, asserting rather that notations, such as "lower," were written elsewhere on the belt structure for various reasons. Tr. 129. With respect to the likelihood of ignition, Miller testified that he does not believe that methane accumulations in roof pockets presented a source of fuel for ignition. Tr. 176-77.

[11] It is noteworthy that I do not consider, nor has the Secretary argued, that the belt maintenance defect at issue in Citation No. 8520665 was a local ignition source for the purposes of the accumulations cited in Order No. 8520664. As discussed hereinafter, the hazard contributed to by this belt maintenance defect condition was not related to float coal dust accumulations, but rather methane pockets that may have accumulated near the roof.

ii. Fact of the Violation

Section 75.1725(a) requires that belt line systems must be maintained in safe operating condition. The Commission has held that the standard for determining whether machinery or equipment is in an unsafe operating condition is "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129-30 (Dec. 1982). With respect to frictional heat, the Commission has held that a belt rubbing or cutting into the belt structure, along with combustible accumulations and possible ignition sources, constituted a hazard in violation of section 75.1725(a). *Martinka Coal Co.*, 15 FMSHRC 2452, 2456 (Dec. 1993); *Jim Walter Resources*, 18 FMSHRC 804, 817 (May 1996); *Alabama By-Products*, 4 FMSHRC at 2130-31.

Consequently, it is well-settled that a source of ignition caused by frictional heat and sparking in the presence of oxygen and sources of fuel in an underground mine poses a significant hazard. Unlike at the mine face where there is also potential frictional heat and sparking, along belt lines there are no methane monitors to guard against pockets of methane that may accumulate in the irregularities of a mine roof. As such, a reasonably prudent person must conclude that a belt generating frictional heat and sparking at the mine roof, in proximity to potential pockets of methane, constitutes an impermissible unsafe operating condition. In view of the undisputed evidence of frictional contact between the belt and roof, the Secretary has demonstrated the fact of the violation of section 75.1725(a).

iii. S&S

The Secretary has demonstrated that the first, second, and fourth elements of *Mathies* are satisfied in that the cited unsafe condition posed a discrete safety hazard, i.e. a fire or explosion, that was capable of causing injury of a reasonably serious nature. The focus of the S&S analysis now shifts to the third element of *Mathies*, which requires the Secretary to demonstrate that it is reasonably likely that the hazard contributed to by the cited belt malfunction will result in a fire or explosion, causing serious or fatal burn-related or smoke inhalation injuries. *See Bellefonte*, 20 FMSHRC at 1254-55. Resolution of whether a violation of a mandatory standard is S&S in nature must be made assuming the cited condition remains unabated during the course of continued normal mining operations. *U.S. Steel Mining Co.*, 1 FMSHRC at 1130.

As an initial matter, I do not find the potential for frictional heat and sparking as a source of ignition reasonably likely to result in combustion of the cited coal fines and float coal dust accumulations that are located from two to 15 feet from the source of the friction. However, it is reasonably likely, given continued mining operations, that the subject frictional heat and sparking caused by the cited condition will ignite pockets of methane in the mine roof, resulting in reasonably serious fire or smoke-related injuries. Consequently, **the S&S designation in Citation No. 8520665 shall be affirmed.**

iv. Civil Penalty

As previously noted, the Secretary has proposed a $12,248.00 civil penalty for Citation No. 8520665. It is not contended that this penalty is disproportionate to the size of the business, or that it would impede its ability to remain in business. While the cited condition was abated in a timely manner, the evidence supports the Secretary's contention that the condition was attributable to a "high" degree of negligence. The "high" negligence designation is justified by the location of the notation "drop" directly under the area where the belt was contacting the roof. This notation demonstrates that Oak Grove allowed the condition to exist despite its recognition of the ignition hazard. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

The dearth of mitigating factors does not warrant reducing the civil penalty proposed by the Secretary. Consequently, **a civil penalty of $12,248.00 shall be imposed for Citation No. 8520665.**

e. Order No. 4694424 in Docket No. SE 2013-399 (Slope Belt Accumulations)

i. Findings of Fact

On September 25, 2012, while conducting a quarterly inspection of the Oak Grove Mine, MSHA Inspector Steve Womack inspected the mine's slope belt, while accompanied by MSHA supervisor Brandon Russell and Oak Grove company representative William Wilson. Tr. 260-61. The slope belt is the last belt carrying coal out of the Oak Grove Mine. Tr. 263. It is located in a sloped 16 foot diameter tunnel that connects the surface to the underground coal seam. Tr. 263. The slope belt is suspended above the tunnel floor, as high as five or six feet off the ground, by roof chains. Tr. 399. The slope belt runs from the head drive unit on the surface to the tailpiece at the tunnel's deepest point, 3,500 feet below. Tr. 263. The tunnel is angled at approximately 12-16 degrees. Tr. 263. At the 3,500 foot mark there is an exit crossover that allows miners on the slope to cross over into an adjacent entry. Tr. 368-69.

At the base of the slope belt is the dump bunker, a pit that collects all of the coal arriving on belts throughout the mine. Tr. 357-58. The miner assigned to work at the dump bunker controls vibrating feeders at the bottom of the pit that periodically releases quantities of coal into a chute that ultimately deposits the coal onto the slope belt to be carried to the mine surface. Tr. 356-58. Personnel at the dump bunker can speed up or slow down the dumping process to regulate the amount of coal being deposited onto the slope belt. Tr. 357-58. The slope belt is the exclusive method of moving coal to the surface of the Oak Grove Mine. Tr. 263.

Womack, Russell, and Wilson began their inspection at the surface, descending down the slope tunnel on a walkway that runs along the right side of the slope belt when traveling in an inby direction. Tr. 264, 267. Womack testified that the first 200 feet of the belt line were unremarkable. Tr. 269. Beginning at the 200 foot mark, however, Womack testified to periodic

"deep" and "massive spillage" on the tunnel floor, and seven inches of "dried" and "anthill-type" accumulations on the metal belt structure. Tr. 270-73. Along this stretch, Womack observed "a couple feet of accumulation" on the tunnel floor beneath the belt. Tr. 272-73. These accumulations were spilling out from under the belt, causing accumulations of approximately nine inches of coal deposits alongside the adjacent walkway. Tr. 272-73.

Wilson disputes Womack's reported observation of accumulations of "a couple feet" located beneath the belt beginning at the 200 foot mark. Although Womack believed the accumulations were significant, Wilson characterized the accumulations beginning at the 200 foot mark as "small accumulations." Tr. 359. Wilson quantified these accumulations as varying from eight to 24 inches deep. Resp. Ex. 5. Wilson characterized the accumulations as "[not] continuous" and "staggered." Tr. 385. Having disputed the depth of these accumulations reportedly observed by Womack, Wilson testified that none of these accumulations were in contact with turning rollers. Tr. 360-61.

Sensitive to Womack's concerns about the accumulations beginning at the 200 foot mark, Wilson used his radio to call for men to be assigned to the slope belt to start the cleanup process. Tr. 351, 377. Typically, the slope belt is initially cleaned by removing any accumulations in proximity to the dump bunker. Tr. 354. After accumulations are removed from the dump bunker, the accumulations along and under the slope belt are removed by washing the slope belt tunnel with a powerful water hose located at the surface. Tr. 355. Accumulations that are washed from the surface down to the 3,500 foot mark accumulate in a wash hole where they are collected to be re-deposited onto the belt. Tr. 367-68.

As Womack, Russell, and Wilson descended the slope tunnel, at the 2,340 foot mark, Womack reportedly observed that the bottom belt was running in the accumulations and a bottom roller was turning in the coal fines. Tr. 290. At this location, there were two bottom rollers missing, causing the belt to sag and run in the accumulations below. Gov. Ex. 6; Tr. 290.

Wilson's testimony supports Womack's contention that there were excessive accumulations around the 2,340 foot mark. However, Wilson opined that these accumulations were caused by a broken belt line support chain, which caused the belt line to sag. Tr. 359-60. Wilson asserts that it is possible that these accumulations built up instantaneously when the chain broke. Tr. 363. Wilson testified that he did not believe that Womack observed the broken chain during the course of the inspection, although it is difficult to comprehend how Wilson knew what Womack did or did not see. Tr. 380-81. Nevertheless, it is significant that on cross-examination Oak Grove did not seek an acknowledgment from Womack as to whether the belt line support chain was, in fact, broken.

Wilson also testified that at the 2,340 foot mark there was a pipe lodged beneath the belt line, causing otherwise normal spillage to accumulate more quickly. Tr. 360-61. Wilson conceded that, here, one roller was turning in accumulations. Tr. 359; Resp. Ex. 5. While it is unclear when use of powerful hoses at the surface to clean the slope belt began, Wilson opined that the accumulations at the 2,340 foot mark were likely exacerbated by the washing process that he called for earlier in the inspection. Tr. 363. However, Wilson's opinion is belied by his testimony that he saw no evidence of coal and water running down the slope until he was at the

2,600 foot mark. Tr. 366, 379. Thus, the evidence reflects that the accumulations at the 2,340 foot mark were not the result of, or exacerbated by, the cleaning process. Wilson opined that the accumulations at the site of the alleged broken belt line support chain were quite extensive, estimating that they totaled approximated 20 tons. Tr. 370.

Inby from the 3,200 foot mark to the 3,500 foot mark, Womack also observed accumulations as much as 24 inches in depth, and "up to 47 inches" near the tailpiece. Gov. Ex. 6. Womack estimated that the extent of the cited accumulations along the entire slope belt line totaled approximately 4,200 tons. Tr. 280.

From the 3,200 foot mark to the 3,500 foot mark, Wilson acknowledged that "7 inches to 12 inches, even perhaps some places [as much as] 24 inches," of accumulations were present. Tr. 398-99. Wilson, however, asserts that the accumulations near the tailpiece were clearly the result of the washing process that was initiated during the inspection. Tr. 371-72.

Furthermore, from the buildup at the 2,340 foot mark to the 3,400 foot mark, Wilson testified that he observed no accumulations in contact with rollers. Tr. 367. Thus, although the accumulations under the belt may have been as deep as 47 inches in places along the entirety of the belt line, both Womack and Wilson agree that, with the exception of the extensive accumulations at the 2,340 foot mark, there were no other accumulations touching rollers. Obviously, accumulations of 24 inches would ordinarily contact rollers. However, here, the cited accumulations were separated from the slope belt, which was suspended as high as five or six feet off the ground by roof chains. Tr. 399.

As a result of his observations, Womack issued 104(d)(2) Order No. 4694424. Order No. 4694424 alleges a violation of 30 C.F.R. § 75.400. Order No. 4694424 states:

> From the 200 ft. marker of the Slope Belt continuing to the 3000 ft. marker, and again from 3200 to the 3500 ft. marker, run of mine spillage has been allowed to accumulate beneath the bottom belt from the walkway to the offside rib. The depth ranges up to 24 inches and near the tailpiece up to 47 inches. The spillage is dry to damp with sporadic areas which are wet. Dried coal spillage averaging 7 inches in height is present on nearly all top idlers metal framework. From 2340 to 2440 the bottom belt is running in the spillage and a bottom roller is turning in the coal fines. 2 bottom rollers are missing at this location. This is an unwarrantable failure to comply with a mandatory health & safety standard constituting more than ordinary negligence.

Gov. Ex. 6. Womack designated the cited conditions as S&S, asserting that they could "reasonably likely" result in a "lost workdays or restricted duty" injury to four miners. Womack attributed the conditions to a "high" degree of negligence and an unwarrantable failure to comply with section 75.400 of the Secretary's mandatory standards. The Secretary has proposed a $32,800.00 civil penalty in satisfaction of Order No. 4694424.

Order No. 4694424, which was issued on September 24, 2012, was abated at 4:00 a.m. on September 27 after Oak Grove contacted MSHA to advise that it had finished cleaning the slope belt. Tr. 296. Womack opined that Oak Grove was working on cleaning these accumulations during the entire two day abatement period, as the order shutting down the slope belt effectively shut down the entire Oak Grove Mine. As Womack explained, "[t]he slope belt shuts down, nothing moves. You can't mine coal on any of the sections because you have no way of transporting it." Tr. 296-97. The abatement states:

> The combustible accumulations of loose coal have been removed from the slope belt. The loose coal has been washed to the sump at the bottom of the slope, loaded on the belt, and removed from the mine.

Gov. Ex. 6.

With respect to the S&S designation, Womack testified that the roller turning in accumulations, as well as the belt dragging in accumulations, caused frictional heat that created a potential ignition source for accumulations of coal fines and float coal dust. Tr. 282-85. The potential for smoke caused by smoldering or ignited coal in the slope tunnel is of particular concern because there are only two avenues of escape for personnel in proximity to the slope belt—traveling the slope tunnel to the surface or using a crossover located at the 3,500 foot mark. Tr. 285-86. In addition, the accumulations presented tripping hazards inherent in using the steep slope walkway as an escapeway. Tr. 285-86.

Womack asserted that the subject smoke inhalation and tripping hazards will result in at least "lost workdays or restricted duty" injuries when viewed in the context of continued mining operations. Tr. 289. Womack further asserted that the cited hazard would "reasonably likely" affect four miners—the four miners he encountered working the slope during his inspection. Tr. 293. Although Womack was concerned that the cited accumulations constituted a fire hazard, Womack believed that the accumulations along the slope belt did not present a propagation hazard as they are "a couple of miles" from any working faces. Tr. 300-01.

Womack attributed the cited conditions to a "high" degree of negligence evidencing an unwarrantable failure. Womack's findings predominantly are based on the extensiveness of the accumulations and the protracted length of time the coal dust and coal fines were permitted to accumulate. Tr. 294-95. Womack believed that the cited accumulations existed for a considerable period of time, estimating that the dried anthill-type coal fines that accumulated on the belt structure existed for three days. Tr. 294. Womack testified that this type of coal fine accumulation can only occur over a period of time. Tr. 323-24. During that time, Womack believes that between 9 and 12 examinations had taken place. Tr. 325. Womack elaborated:

> The examiner[s] no way could not have seen the extensive amount of material. Even absent what was under the belt, the dried material on top, I mean, on every roller. You just don't miss that. It's just even an untrained miner is going to, you know, going to question that. You know, how long it had been there, management, I mean, certainly they—they have to have knowledge of this. . . .

Tr. 295.

ii. Fact of the Violation

As previously noted, section 75.400 requires that coal dust "shall be cleaned up and not be permitted to accumulate" where miners are usually required to work or travel. Thus, consideration of whether a 75.400 violation has occurred requires an analysis of both the quantity and the duration of the cited conditions. As a threshold matter, it is noteworthy that Oak Grove does not contest the fact of the violation in Order No. 4694424 in its post hearing brief. Order No. 4694424 addresses two types of accumulations: the extensive accumulations at the 2,340 foot mark that were in contact with the suspended belt line and its turning roller, characterized by Oak Grove witness Wilson as totaling as much as 20 tons of coal material; and extensive coal dust and coal fine accumulations on or under the slope belt throughout a significant portion of the 3,500 foot tunnel floor, which were not in contact with moving belt components.

I am mindful that the use of a high-pressure hose to clean the slope entry from the surface, which began during Womack's inspection, may have concentrated greater accumulations at the lower portions of the slope belt and at the tailpiece. However, notwithstanding Oak Grove's apparent admission of the fact of the violation, it cannot be reasonably argued that the cited accumulations, either the 20 tons of accumulations at the 2,340 foot mark alone, or along the entire belt slope in amounts totaling 4,200 tons, do not constitute impermissible accumulations of combustible material in violation of section 75.400.

iii. S&S

In evaluating the propriety of an S&S designation, the Secretary has demonstrated that the first, second, and fourth elements of *Mathies* are satisfied in that the cited accumulations constituted a violation that posed a discrete safety hazard, i.e. a fire and resultant smoke, that was capable of causing injury of a reasonably serious nature. In this regard, I credit the Secretary's assertion that smoke presents a significant hazard when present in the slope tunnel, as miners working in the vicinity of the slope may rely on the slope belt tunnel as a means of escape to the surface.

Thus, the S&S analysis shifts to the third dispositive element of *Mathies* that requires consideration of whether it is reasonably likely that the hazard contributed to by the cited accumulations will result in a fire or explosion, causing serious or fatal burn-related or smoke inhalation injuries. *Bellefonte*, 20 FMSHRC at 1254-55. The likelihood of such injury must be viewed in the context of continued exposure to the hazard posed by the violation assuming the violation continued unabated in the face of normal mining operations. *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991); *Halfway, Inc.*, 8 FMSHRC at 12; *U.S. Steel Mining Co.*, 1 FMSHRC at 1130.

While it is true that a substantial portion of the cited accumulations were located on the tunnel floor, far removed from any source of frictional heat caused by the suspended turning belt or its rollers, the uncontroverted evidence reflects that the accumulations at the 2,340 foot mark were in contact with the moving suspended conveyor belt and a turning roller. It is clear that it is reasonably likely that combustible coal accumulations in contact with the potential frictional heat caused by this condition, if left unabated, will contribute to a fire that will result in injuries of a reasonably serious nature. Consequently, **the Secretary has demonstrated, by a preponderance of the evidence, that the cited accumulations were properly designated as S&S.**

iv. Unwarrantable Failure

The cited accumulations in Order No. 4694424 were attributed to a "high" degree of negligence that evidences an unwarrantable failure to comply with section 75.400. 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 the operator's knowledge of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC at 1350-51.

The evidence reflects that the accumulations at the 2,340 foot mark, which were several feet in depth and encompassing the suspended belt and a turning roller, were extensive, obvious, and hazardous given the accumulation's proximity to potential frictional heat. To counter its apparent failure to address these extensive accumulations, Oak Grove relies on its assertion that the significant accumulations at the 2,340 foot mark in the slope tunnel occurred immediately prior to Inspector Womack's inspection, as a consequence of a recently-broken belt support chain and a pipe that had become lodged below the belt. Although Womack did not testify that he observed either the alleged broken chain or lodged pipe, Oak Grove shall be given the benefit of the doubt that the chain was in fact broken, and that the pipe was indeed lodged below the belt line.

Not surprisingly, however, this is not the first time where I have encountered a mine operator's claim that the subject violation occurred only moments before the inspector arrived at the working place. Of course, such unsubstantiated, self-serving claims should be given little weight. In fact, the defects relied upon by Oak Grove as justification for the accumulations at the 2,340 foot mark are implicating, rather than exonerating, factors. The Commission has long recognized that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *McCoy Elkhorn Coal Corp.* 36 FMSHRC 1987, 1999 (Aug. 2014) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)). Here, the inference sought by Oak Grove—namely, that the extensive accumulations were caused by a broken chain and lodged pipe that occurred immediately prior to Womack's arrival at the slope tunnel — is speculative and self-serving, and cannot be drawn from any indirect evidence. Rather, the reasonable inference is that the cited conditions at the 2,340 foot mark existed for a significant period of time during which coal accumulated in the slope tunnel despite the slope belt being manned by Oak Grove personnel.

With respect to the totality of the accumulations cited in Order No. 4694424, the extensiveness of the accumulations provides the inescapable conclusion that they were allowed to accumulate over a significant period of time. In this regard, Wilson conceded that the accumulations removed from the 2,340 foot mark totaled approximately 20 tons. Additionally, Womack testified that a total of 4,200 tons of materials had accumulated along the length of the 3,500 feet of slope belt tunnel.

The extensiveness of the total cited accumulations is further evidenced by the fact that it took Oak Grove two days to abate the order. In this regard, the two-day abatement is significant in that shutting down the slope belt meant halting production across the entire Oak Grove Mine. Thus, the record amply supports that the accumulations existed for a significant period of time and that they were obvious due to their extensive nature.

Oak Grove was also on notice that greater efforts were necessary for controlling coal accumulations at its Oak Grove Mine facility. In this regard, MSHA's records reflect that Oak Grove was cited 34 times for violating section 75.400 during the two years preceding the issuance of Order No. 4694424. Gov. Ex. 1. Finally, as discussed above, the cited accumulations were hazardous in that they could contribute to serious burn or smoke inhalation-related injuries to personnel working in proximity to the slope belt.

In sum, the Secretary has demonstrated that the subject accumulations were extensive, obvious, hazardous in nature, and existed for a significant period of time. Thus, **the Secretary has demonstrated the necessary criteria to support the alleged high degree of negligence necessary for the unwarrantable failure designation in Order No. 4694424.**

v. Civil Penalty

The Secretary has proposed a penalty of $32,800.00 for Order No. 4694424. As previously noted, it has not been contended that the Secretary's proposed penalty will adversely affect Oak Grove's ability to remain in business. The subject accumulations are attributable to a high degree of negligence. The hazard contributed to by the violation is serious in gravity. Finally, Oak Grove's history of section 75.400 is an aggravating, rather than mitigating, factor.

Consequently, **a civil penalty of $32,800.00, as proposed by the Secretary, shall be imposed for the cited coal accumulations in Order No. 4694424.**

f. Order No. 4694426 in Docket No. SE 2013-399 (Slope Belt Examination)

i. Findings of Fact

After observing the conditions cited in Order No. 4694424, Inspector Womack returned to the surface to inspect Oak Grove's examination books. The relevant examination records, which were proffered by Oak Grove rather than the Secretary, reflect that notations of accumulations along the slope belt were made during the three shifts preceding Womack's inspection. For example, the pre-shift examination for the September 24, 2012, evening shift includes a "remark" that the slope belt should be cleaned from the 2,360 foot mark to the wash hole. Resp. Ex. 6. Additionally, the pre-shift examination for the September 25, owl shift, the shift immediately preceding Womack's inspection, notes two accumulation hazards along the slope: namely, from the 100 foot mark to the 400 foot mark; and from the 2,280 foot mark to the 2,520 foot mark. Resp. Ex. 6. The former notation was acknowledged by Womack in Order No. 4694426. However, Womack testified that he "missed" the latter notation when inspecting the examination book. Tr. 328.

As a result of his review of the examination book, Womack issued 104(d)(1) Order No. 4694426, alleging a violation of 30 C.F.R. § 75.363(b).[12] Order No. 4694426 provides:

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[12] 30 C.F.R. § 75.363(b) states:

> A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found and shall include the nature and location of the hazardous condition or violation and the corrective action taken. This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found.

Adequate examinations are not being conducted and recorded on the Slope Belt at this mine. Inspections of the Slope Belt revealed missing & defective rollers, plus coal spillage from 200 ft to the tailpiece, approx 3300 ft up to 47 inches in depth and dried accumulations of coal fines on belt structure averaging 7 inches in height throughout the 3300 feet of area. Pre-shift record for 09/24/2012 and owl shift and evening shift do not list these hazards. Day shift on 09/25/2012 only lists spillage from 100 ft to 400 ft mark. These conditions are obvious to even the most casual observer. This is an unwarrantable failure to comply with a mandatory health and safety standard, constituting more than ordinary negligence.

Gov. Ex. 7 (emphasis added). Womack characterized the cited violation as S&S and attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a $15,900.00 penalty for Order No. 4694426. Order No. 4694426 was timely abated on September 25, 2012.

ii. Fact of the Violation

As a threshold matter, there is a substantive distinction between the cited mandatory section in 75.363(b), which requires that examination books shall be maintained for the purpose of recording hazardous conditions found by mine examiners, and the mandatory standard requiring adequate pre-shift examinations in section 75.360(a)(1). *See supra*, n.9. It is irrefutable that Oak Grove maintained a pre-shift examination record book, given the examination book entries noted above. Consequently, at the hearing, I expressed my concern that the Secretary was alleging a violation of section 75.363(b) that requires that pre-shift examination records be kept, rather than section 75.360(a)(1) that requires that pre-shift examinations be adequately performed. Specifically:

Judge: Why did you issue this 75.363(b) versus 75.360(a)[(1)]?

Womack: Well, [363(b)] is the record of that examination. I feel very strongly that, you know, a mine examiner is the first—it's the utmost defense that the miners have before they go into the mine. That examiner looks at an area where people are going to work and travel. If he doesn't do his job, then you've got miners that are going into this area unaware. So if he failed to put that record down and notify the people that we have a problem here, then he's—he's not only failed at his job, he's putting people in a hazardous situation.

Judge: No, I understand, but I don't know that it makes any difference, but wouldn't it have been more appropriate based on this citation for you to believe that he—that you could have cited an inadequate pre-shift?

Womack: Yes, I think I could have.

Judge: Is there a substantive distinction between this, the failure to record under section 75.363(b), versus an inadequate pre-shift examination under 75.360(a)(1)?

Womack: No, sir. I—

Judge: Basically the same thing?

Womack: I could have went actually either way.

Judge: They're basically the same thing; there's no reason why you chose one over the other, is what I'm saying.

Womack: No, sir, not other than, you know, just this 363(b) mentions the records.

Judge: Okay.

Womack: To me, the record is the important thing here. Getting those hazards listed in the record so that action can be taken.

Tr. 302-03.

Womack asserts, in essence, that the mandatory standards in sections 75.360(a)(1) and 75.363(b) are duplicative and indistinguishable. However, these mandatory standards are not duplicative in that they impose distinctly different duties on mine operators. *Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1301 (11th Cir. 2014) (holding that "citations and orders are not duplicative as long as the standards impose separate and distinct duties"). Contrary to Womack's opinion, which addresses a question of law, these mandatory standards impose different obligations—to maintain an examination record book, and to perform adequate examinations, as evidenced by notations in the examination record book. In this regard, the failure to effectively note a hazardous condition in an existing pre-shift examination book after an examination occurs is a reflection on the adequacy of the examination, not whether the examination record book is, in fact, being maintained.

Despite my expression of concern that section 75.360(a)(1), rather than section 75.363(b), is the appropriate mandatory standard in question, to date, the Secretary has not, at trial or in his post-hearing brief, sought to modify or otherwise argue in the alternative that a violation of section 75.360(a)(1) is in issue. Make no mistake, I would have unhesitatingly granted the Secretary's motion to amend Order No. 4694426 to include an alleged violation of section 75.360(a)(1), as undoubtedly Oak Grove would not have been prejudiced thereby. However, it is not the role of a Commission judge to be an eraser on the Secretary's pencil. Consequently, **having failed to assert a violation of the relevant mandatory standard in section 75.360(a)(1), Order No. 4694426 must be vacated.**

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 8520665 and Order No. 4694424 **ARE AFFIRMED**. Accordingly, **IT IS ORDERED** that Oak Grove Resources, LLC shall pay a penalty of $12,248.00 in satisfaction of Citation No. 8520665 and $32,800.00 in satisfaction of Order No. 4694424.

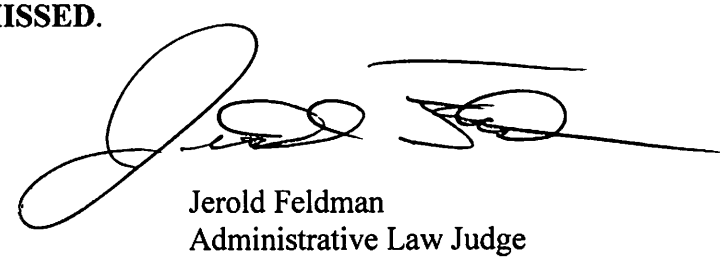
IT IS FURTHER ORDERED that Order No. 8520664 **IS MODIFIED** from a section 104(d)(2) order to a section 104(a) citation, thus deleting the unwarrantable failure designation. **IT IS FURTHER ORDERED** that the 104(a) Citation No. 8520664 **IS MODIFIED** from an S&S to a non-S&S citation. Accordingly, **IT IS ORDERED** that Oak Grove Resources, LLC shall pay a civil penalty of $5,200.00 in satisfaction of Citation No. 8520664.

IT IS FURTHER ORDERED that Order Nos. 8520666 and 4694426 **ARE VACATED.**

IT IS FURTHER ORDERED that consistent with the parties' settlement terms, Oak Grove Resources, LLC **SHALL PAY** a total civil penalty of $54,188.00 in satisfaction of Citation Nos. 8524989, 8524999, 8524490, 8524979, 8524982, 8524987, 8524991, 8524993, 8524994, 8524995, 8524996, 7684600, 8524499, 8524500, 8526401, 8524983 and 8524491 in Docket No. SE 2013-352, and Order Nos. 8524255 and 8524258 in Docket No. SE 2013-301.

In view of the above, **IT IS ORDERED** that Oak Grove Resources, LLC pay, within 40 days of the date of this Decision, **a total civil penalty of $104,436.00**, consisting of a total civil penalty of $50,248.00 for the five citations and orders adjudicated in this proceeding, in addition to $54,188.00 for the 19 settled citations and orders.[12]

IT IS FURTHER ORDERED that upon timely receipt of the total $104,436.00 payment, the civil penalty proceedings in Docket Nos. SE 2013-301, SE 2013-352, SE 2013-368, and SE 2013-399 **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

[12] 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.

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