FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 11 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. THE OHIO VALLEY COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2015-251 A.C. No. 33-01159-371484 Docket No. LAKE 2015-309 A.C. No. 33-01159-373906 Mine: Powhatan No. 6 Mine

DECISION AND ORDER

Appearances: Helga Spencer, Esq. and Christina Haviland, U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA, for the Secretary

Jason W. Hardin, Esq. and Jason Steiert, Fabian VanCott, Salt Lake City, UT, for the Respondent

Before: Judge Lewis

I. Statement of the Case

These cases are before me upon two petitions for assessment of civil penalties under § 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Following an inspection of Respondent's mine, an MSHA inspector issued Order No. 8061123 for coal dust accumulations along the South Mains belt line in violation of 30 C.F.R. § 75.400. Additionally, the inspector issued Order No. 8061124 to the Respondent for failing to record the accumulations in its examination books in violation of 30 C.F.R. § 75.363(b). A hearing was held in Pittsburgh, PA on December 16, 2015. At hearing the Respondent contested the high negligence and unwarrantable failure designations for both violations. Respondent also argued Order No. 8061124 should be vacated because the cited accumulations did not exist at the time of the on-shift examinations.

This Court now issues findings of fact and conclusions of law affirming Order No. 8061124 and affirming the high negligence and unwarrantable failure designations for both Order No. 8061123 and Order No. 8061124. This Court also affirms the penalties totaling $14,536.00 for those two orders.

II. Procedural History

On September 9, 2014, two 104(d)(2) orders were issued at Ohio Valley Coal Company ("Respondent" or "Ohio Valley Coal"), Powhatan No. 6 Mine. Respondent contested these orders on February 18, 2015. On November 23, 2015, the Secretary filed a motion to preclude expert testimony in response to Respondent's Prehearing Report of November 13, 2015. On December 1, 2015, the Respondent filed a motion in opposition, and the Secretary filed a reply on December 2, 2015. This Court denied the Secretary's request for exclusion of Respondent's proposed testimony and exhibits, and withheld determination as to the admissibility or weight to be given to the Respondent's proposed witness testimony and exhibits. On December 16, 2015, a hearing was held in Pittsburgh, PA. After the hearing, the parties submitted Post Hearing Briefs and Reply Briefs, which have been fully considered.

III. Stipulations[1]

1. Respondent was an "operator" as defined in §3(d) of the Federal Mine Safety and Health Act, 30 U.S.C. § 802(d), at the Mine at which the Orders in this matter were issued.

2. The operations of Respondent at the Mine at which the Orders in this matter were issued are subject to the jurisdiction of the Act.

3. The above-captioned proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its assigned Administrative Law Judges pursuant to Sections 105 and 113 of the Act.

4. The Orders in the matter were properly issued and served by a duly authorized agent of the Secretary of Labor upon an agent of the Respondent at the date, time, and place stated therein as required by the Act.

5. Exhibit "A" to the complaint accurately sets forth the Respondent's Mine size points, Controller size points, VPID points, and RPID points used by the Secretary in setting the penalty for Orders 8061123 and 8061124.

6. An E01 inspection of the Powhatan No. 6 Mine was conducted by MSHA on or about September 9, 2014.

7. Representatives from MSHA and the Respondent were present at the underground site visit on September 9, 2014.

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[1] The parties' joint stipulations were read into the record at Transcript pages 10-14. (Tr. 10-14). A paper copy was said to be attached to the record as Joint Exhibit 1, however; the exhibit attached was a Mine Citation/Order Continuation modifying Citation No. 8057495. (Joint Ex. 1). The ALJ also incorporates the recitation of the stipulations set forth in the Secretary's Post Hearing Brief that was not objected to by Respondent (except for the clerical error of using Order Nos. 802113 and 8062114 instead of the correct Order Nos. 8061123 and 8061124) as though fully recited herein. (Sec'y Post Hearing Br. at 3-4). Hereinafter, joint stipulations will be cited to as J.S. followed by the stipulation number. Exhibits will hereinafter be cited to as JX followed by a number for joint exhibits; GX followed by a number for the Secretary's exhibits; and RX followed by a number for the Respondent's exhibits.

8. On September 9, 2014, MSHA Inspector Terrence A. Saho (AR No. 25193) issued Orders 8061123 and 8061124 during an inspection of the Mine.

9. Respondent does not contest that the conditions cited in Orders 8061123 and 8061124 could be expected to cause injuries resulting in lost workdays affecting two miners.

10. The imposition of the proposed penalties will not affect Respondent's ability to remain in business.

11. The exhibits offered by the Parties are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

12. The R-17 Assessed Violation History Report is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

13. Pursuant to Section 103(i) of the Mine Act, Powhatan No. 6 Mine is subject to 5 day spot inspections for methane as this liberates more than 1 million cubic feet of methane during a 24 hour period.

IV. Factual Background

On September 9, 2014, Inspector Terrance Saho arrived at Powhatan No. 6 mine at 7:30 a.m.[2] (Tr. 28). He went to Powhatan No. 6 mine for an E0-1 inspection.[3] (Tr. 27). Prior to conducting his inspection, Inspector Saho reviewed the exam books for the mine. (Tr. 28). After reviewing such, he began his inspection of the South Mains belt and South Mains return. (Tr. 29). Inspector Saho traveled with Bill Hagedorn, Inspector Saho's supervisor, Jeremi Hossman, a safety representative, and Nathan Carlton, the union representative. (Tr. 29).

During the inspection, Inspector Saho entered the belt line at one crosscut and proceeded inby along the South Mains belt, between crosscuts 35 and 36. (Tr. 30-31). There was a wall isolating two separate parts of the belt line. (Tr. 30-31). When Inspector Saho arrived at the wall, he went through the man door, on the walking side of the belt, from a fairly well rock dusted entry into an area with black coal dust covering the roof ribs, floor, and belt. (Tr. 32). He continued walking down to the end of the belt line where he found the tail roller was turning in compacted coal and coal fines. (Tr. 32-33). At approximately 10:00 a.m., Inspector Saho issued Order No. 8061123 for accumulations between crosscuts 36 and 39 in violation of § 75.400.

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[2] Inspector Terrance Saho is an inspector for MSHA. (Tr. 20-21). In June 2014 he was authorized as a coal mine inspector. (Tr. 21). Prior to becoming a mine inspector, he received 21 weeks of training at Beckley, West Virginia at the Mine Academy. (Tr. 22). Before working for MSHA, Inspector Saho worked in the mining industry for approximately two and a half years. (Tr. 24-25). He worked two years with Consol Energy and approximately five months with GMS. (Tr. 25). He was a union coal miner at Consol, working as a bolter on the continuous miner, and various sections jobs, belt work, and general inside labor. (Tr. 25). At GMS, Inspector Saho worked on belts. (Tr. 25).

[3] An E0-1 inspection is a general inspection. (Tr. 27). At this time, Powhatan No. 6 mine was subject to a five day spot inspection where inspectors would take bottle samples to test for methane liberated from the mine. (Tr. 27).

(GX-1). He measured the accumulations at the tail roller; the accumulations were six feet across and two feet in depth. (Tr. 33). The accumulations were black, which showed that there was no mixing of rock dust. (Tr. 36-37). Inspector Saho listed float coal and loose coal accumulations for the violation. (Tr. 37). There was also no evidence that anyone had cleaned up the site of the accumulations when the orders had been issued. (Tr. 38). The operator subsequently shut the belt down to abate the condition. (Tr. 34).

Inspector Saho proceeded around the tight side of the belt to the return regulator. (Tr. 34). There he saw float dust being sucked through the return regulator and sent down the return. (Tr. 34). This indicated to him that the float dust had been in this area for an extended period of time and that no one had been in the area past the wall to maintain the coal dust accumulations. (Tr. 34). He also believed that no one had been in this area that day because there were considerable coal dust accumulations and no sign of rock dusting. (Tr. 34).

The gravity of the violation was assessed as reasonably likely and Significant and Substantial ("S&S") because the float coal dust and accumulations with the tail roller turning in the coal accumulations could have created a "fire triangle."[4] (Tr. 51-52). Inspector Saho testified that coal was impacted by the roller, which created friction that could have caused a fire. (Tr. 52). The coal was damp near the belt, and there was no other ignitable source other than accumulations around the tail roller. (Tr. 72, 76-77).

Inspector Saho determined that the injury or illness expected for the violation would be lost workdays or restricted duty because a potential fire on the belt could have led to smoke inhalation. (Tr. 52). He determined that two persons would be affected because there would have been two examiners present at any given time on a shift and a belt cleaner could have been in the area. (Tr. 52-53). Inspector Saho further found the violation was the result of an unwarrantable failure to comply with a mandatory health and safety standard. (Tr. 53).

Inspector Saho testified that the 2 South Section and West Mains Section had dumped coal directly on the South Mains belt at the 25 crosscut. (Tr. 50). The 1 South Section was not in production on September 9, 2014. (Tr. 50). Thus, there was no coal dumping on the South Mains belt that day near crosscuts 36-39. (Tr. 56). Therefore, Inspector Saho testified that the coal accumulations had to be there for longer than the on-shift exams at least. (Tr. 56).

Inspector Saho also issued Order No 8061124 for the examiner failing to report the accumulation conditions in the examination books, in violation of § 75.363(b). (Tr. 58). Inspector Saho reviewed the examination books and did not find any note of the accumulations from crosscuts 36-39. (Tr. 60). The exams were conducted between 2:00 and 2:28 a.m. and 6:00 and 6:26 a.m. (Tr. 60-61). The order was issued because the examiner failed to record all of the nine mandatory standard violations he observed. (Tr. 62). This order was designated S&S and indicated that two persons would be affected: the examiner and belt cleaner. (Tr. 61-62).

After the orders were issued, Jeremi Hossman, the safety representative, instructed miners to clean and rock dust crosscuts 36-39. (Tr. 51). The condition was abated in approximately two hours. (Tr. 51; RX 1).

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[4] Inspector Saho uses the term fire triangle, comprising of fuel, an ignition source, and oxygen, to indicate the conditions in a coal mine that can create a fire hazard. (Tr. 70).

Matthew Skolnick, the section foreman for Ohio Valley Coal, conducted the on-shift examination of the South Mains belt on September 9, 2014, before the midnight shift.[5] (Tr. 150-51). He testified that he had inspected the whole belt line all the way to the end and had only noted a bad roller during the exam. (Tr. 152). He further testified that he did not see any accumulations along the belt. (Tr. 154).

On the evening of September 9, 2014, Skolnick found out about the orders involving accumulations. (Tr. 157). The following morning, at the end of the midnight shift, Skolnick was told a tear was found in the South Mains belt. (Tr. 157).

Skolnick reviewed the Production and Labor reports for September 9, 2014, to determine which sections had been loaded onto the South Mains belt that day. (Tr. 162). Skolnick testified that during the midnight shift, the 2 South Section and West Mains Section were mined, and the coal was dumped onto the belt at crosscut 25. (Tr. 162). 9,000 tons were mined from the 2 South Section, and 34 feet were mined from the West Mains Section. (Tr. 163). The first car from the 2 South Section was dumped on the South Mains belt at 1:50 a.m., and the last car was dumped at 8:05 a.m. (Tr. 164-65). The West Mains Section was dumped on the belt between 3:00 a.m. and 8:30 a.m. (Tr. 168). Skolnick testified that during this period, before the orders were issued, the coal could have fallen through the tear in the belt and rolled back to the tail, creating the cited accumulations. (Tr. 167-68).

However, Inspector Saho did not believe coal would have traveled along the bottom belt all the way to the tail roller. (Tr. 93-95). He testified that the coal would have fallen or been flung off the belt before it reached that far. (Tr. 94-95). Both Skolnick, the section foreman, and Hossman, the safety representative, also acknowledged that coal would have likely fallen off before reaching the tail roller on the belt if the coal did fall through the tear on the belt. (Tr. 174, 222).

Jeremi Hossman, the safety representative, accompanied the inspectors along the South Mains belt on September 9, 2014.[6] (Tr. 202). He saw the accumulations that were cited along crosscuts 36-39. After Inspector Saho issued Order No. 8061123 at 10:00 a.m. and Order No. 8061124 at 10:01 a.m., the miners spent approximately two hours cleaning up the accumulations, finishing by 12:30 p.m. (Tr.243; RX 1). Hossman testified that during the inspection he had not heard Inspector Saho talk about footprints in the accumulations, and Inspector Saho testified that his notes and photographs did not indicate he found any footprints. (Tr. 89, 119-20, 240-41; RX 5,6).

In the afternoon, Hossman found out that there was a tear in the South Mains belt, which he photographed. (Tr. 207; RX 14). He said he believed this tear was in the middle of the belt. (Tr. 215). As a result of this tear in the belt, Hossman testified that the coal dumped on the belt

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[5] Matthew Skolnick has been the section foreman for Ohio Valley Coal for three years. (Tr. 146). He has worked for Ohio Valley Coal for a total of 6 years. (Tr. 146). He has been certified in both West Virginia and Ohio. (Tr. 146).

[6] Hossman was the safety representative at Ohio Valley Coal for almost six years. (Tr. 203). He also worked as a surveyor and in the warehouse at the mine. (Tr. 203). He has worked ten years in coal mining. (Tr. 203).

could have fallen through to the bottom and been carried back to the tailpiece and ground up, thus causing the cited accumulations. (Tr. 215-17). Additionally, Hossman testified that the accumulations were primarily on the edges, underneath the bottom of the belt, and behind the tail roller. (Tr. 216-17).

V. Contentions of the Parties

The Secretary contends that the coal dust accumulations by the tail roller of the Powhatan No. 6 Mine, South Mains belt, violated 30 C.F.R. § 75.400, as stated in Order No. 8061123. (Sec'y Post Hearing Br. at 11-12). The Secretary also contends this violation was S&S and reasonably likely to result in lost workdays or restricted duty affecting two miners. (*Id.* at 11). Further, the Secretary contends this violation was the result of an unwarrantable failure and high negligence, and the penalty of $8,421.00 should be affirmed. (*Id.* at 22-23).

Respondent contends that the ALJ should give no deference to the inspector because he had less than the five years of experience recommended by the Mine Act. (Resp. Post Hearing Br. at 2-5). In response, the Secretary contends that the Mine Act does not require five years of experience and that Inspector Saho had the requisite MSHA Inspector training and two and a half years of mining experience. (Sec'y Reply Br. at 1-4). Respondent concedes that § 75.400 was violated, as stated in Order No. 8061123, and that the violation was S&S, with it being reasonably likely to result in lost workdays or restricted duty affecting two miners. (Tr. 248). However, the Respondent contends that violative conduct should not be assessed with high negligence or an unwarrantable failure designation, and the penalty should be lowered. (Resp. Post Hearing Br. at 5-26).

Additionally, the Secretary contends that the Respondent failed to record the accumulations by the tail roller on the South Mains belt line during the on-shift examinations in violation of § 75.363(b), as stated in Order No. 8061124. (Sec'y Post Hearing Br. at 23-26). The Secretary also contends the violation was S&S, and reasonably likely to result in lost workdays or restricted duty affecting two miners. (*Id.* at 26). Moreover, the Secretary contends this violation demonstrated high negligence, it was an unwarrantable failure, and that the penalty of $6,115.00 should be affirmed. (*Id.* at 26-30).

The Respondent counters that Order No. 8061124 should be vacated because the accumulations did not occur until after the on-shift examinations. (Resp. Post Hearing Br. at 27-28). The Respondent contends that if a violation is found, the negligence level should be lowered, the unwarrantable failure designation should be removed, and the penalty should be lowered. (*Id.* at 28-29).

VI. Analysis

A. Burden of Proof and Standard of Proof

The Secretary bears the burden of proof of by a preponderance of the evidence for violations. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Each element in a violation must be proven by the Secretary. *In re: Contests*

of Respirable Dust Sample Alteration Citations: Keystone Mining Corp., 17 FMSHRC 872, 878 (Aug. 2008).

The Commission has held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

Further, the United States Supreme Court has found that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

B. Order No. 8061123

At hearing, Respondent conceded that the coal dust accumulations cited between crosscuts 36 and 39 violated 30 C.F.R. § 75.400 as stated in Order No. 8061123. (Tr. 248). 30 C.F.R. § 75.400 requires that:

> 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.

Respondent also conceded that the violation was likely to result in lost workdays or restricted duty injuries affecting two miners. (J.S. 9). During hearing, Respondent conceded that Order No. 8061123 constituted a S&S violation. (Tr. 248). However, the Respondent contested the high negligence and unwarrantable failure assessments.

1. Negligence

Negligence is not defined in the Mine Act. MSHA regulations provide that violative conduct is properly designated as "high negligence" when "the operator knew or should have known of a violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. §100.3(d), Table X. The Commission has held that Commission Judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the perspective of a traditional negligence analysis rather than the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015); *accord Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). "Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, *they are not limited to a specific evaluation* of potential mitigating circumstances, and... may find 'high negligence' in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "'...an aggravated lack of care that is more than ordinary negligence.'" *Brody*, 37 FMSHRC at 1703, *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). "Thus, in *making a negligence determination, a Commission judge is not limited to an evaluation of allegedly 'mitigating' circumstances...[and]may consider the totality*

of the circumstances holistically." *Brody*, 37 FMSHRC at 1702 (emphasis added). Under such an analysis, an operator *is negligent if it fails to meet the requisite high standard of care under the Mine Act. Id.*

In the instant case, the cited accumulations were up to two feet deep in some areas. (Tr. 33). The operator should have detected such an obvious violation. (*See* Tr. 33). Accumulations this extensive likely existed for several hours, if not days. The failure by the Respondent to abate these conditions, which posed such a fire hazard, displayed an aggravated lack of care.

Respondent alleges that there was a tear in the belt that was unknown to the operator. (Tr. 207). This created accumulations at crosscuts 36-39, which Respondent argues should constitute a mitigating circumstance. (Resp. Post Hearing Br. at 24-25). The tear in the belt was not found until the afternoon *after* the orders were issued. (Tr. 207). No one from the mine checked the belt and had found a tear at the time the order was issued. This would indicate that the tear may not have existed until after the order was issued. (Tr. 219-20). The inspector also did not find a tear in the belt at the time the accumulations were found. (Tr. 97-100). Further, Inspector Saho, Skolnick, and Hossman testified that—even if there was a tear in the belt—the coal would have fallen off the belt all along crosscuts 25 to 39.[7] (Tr. 94-95, 174, 222). No

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[7] The Respondent essentially argues that Inspector Saho's testimony should be accorded little weight because he lacks the five years of mining experience recommended by the Act. (See Also 20 U.S.C. §954, which states in pertinent part that "to the maximum extent feasible, in the selction of persons for appointment as mine inspectors, no person shall be so selected unless he has the basic qualification of at least five years practical mining experience.")

The Act accepts that the length of prior mining experience is a relevant factor in determining the weight to be given an inspector's opinion. However to the extent that Respondent implies that Saho's lack of five years past mining experience, standing alone, would render his opinions uncredible, the ALJ expressly rejects such.

The ALJ notes that Saho did possess approximately two and a half years of prior mining experience at the time he inspected the subject mine. Additionally, the Act explicitly uses the disjunctive "or" in listing the qualifications for an authorized representative, stating that such persons "shall be qualified by practical experience in mining *or* by experience as a practical mining engineer *or* by education." (*Id.*)(*emphasis added*). In addition to his mining experience, Inspector Saho received 21 weeks of training at the Mine Academy in Beckley, West Virginia.

Moreover, when Inspector Saho issued Order Nos. 8061123 and 8061124 on September 9, 2014, he had been accompanied by his supervisor, Bill Hagedorn, who did not disagree with any of Saho's findings. (Tr. 29).

Finally, the ALJ notes that Saho's testimony of his observations of the cited area and inspections of Respondent's examination books were essentially uncontradicted by Respondent.

Considering *in toto* the inspector's past experience and training, the additional presence of his supervisor and his uncontested observations, the ALJ found Saho to be both credible and persuasive in his expressed opinions.

evidence has been brought forward by the Respondent showing that coal had fallen off anywhere other than at crosscuts 36-39. (Tr. 222). Finally, there was no evidence that further accumulations had occurred *after* the order was issued near the tail roller. (224-28). It is unlikely that a tear, which caused accumulations in the morning, would not continue to cause accumulations until repaired later that afternoon. As a result, this Court finds that the Respondent's arguments concerning the tear are not persuasive. Therefore, this court finds that the violation was the result of high negligence.

2. Unwarrantable Failure

The Commission has determined that an "unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Such a failure may be characterized by the following types of conduct: reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987).

> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance.

Manalapan Mining Co., 35 FMSHRC at 293. The Court must consider all relevant factors, the facts and circumstances of the case, and whether mitigating circumstances exist. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

As discussed *infra*, the Respondent has essentially offered the following "defenses" or mitigating circumstances to vitiate findings of "high" negligence and unwarrantable failure: there was an unseen tear in the upper belt; coal fell through the undetected tear onto the lower belt; the fallen coal was then transported along the beltway and deposited into unsafe accumulations in the cited areas; all of which occured *after* the on-shift examinations.

This Court will discuss the *Manalapan* factors below *seriatim*. However, this Court feels constrained to observe there is no need for a sophisticated Pascalian risk analysis to discern the extremely problematic nature of Respondent's contentions. Why was the fallen coal not strewn along the entire length of the belt-way area in question rather than only in the cited areas? What are the odds that the accumulations would be so deposited and distributed in such a short period of time? Why did the inspector never observe the unsafe tear?

Much more probable and likely explanations for the unsafe accumulations and failure to report are the ones advanced by the Secretary throughout these proceedings: the operator's high negligence and unwarrantable failure in allowing the accumulations to build up and its highly negligent and unwarrantable failure to record and report such.

The Secretary has easily carried its burden regarding the operator's violative conduct and the unwarrantable nature of such by the preponderance of the evidence.

a. The length of time and extent of the condition

The accumulations that Inspector Saho found at crosscuts 36-39 were six feet wide and two feet deep under the belt tail roller. (Tr. 33). The accumulations covered the floor, roof ribs, and belt. (Tr. 17). The belt tail roller was turned in compacted accumulations. (Tr. 33). Inspector Saho testified that he did not believe accumulations so extensive could have accumulated after the on-shift examination. (Tr. 42). Conversely, the Respondent argues that a tear in the belt had caused coal to accumulate after the on-shift examination; thus arguing the accumulations existed for several hours instead of several days.[8] Nonetheless, the extensiveness of the accumulations and the fact that no coal was loaded onto the belt from 1 South contradict Respondent's contentions and support the Secretary's contentions that these accumulations most likely had existed for more than one shift.

b. Whether the violation posed a high degree of danger

There was a high degree of danger created by the instant violation. Coal accumulations were packed around the tail end roller, and the belt was also running in contact with coal accumulations. (Tr. 33, 36, 45-47, 180; GX 7, 8). These conditions created a fire hazard that could have resulted in miners suffering smoke inhalation or burns. (Tr. 52, 122). Although the Respondent argued that the accumulations were damp, the Commission has held that "[t]he fact that there was some dampness in the coal did not render it incombustible and...wet coal can dry out in a mine fire and ignite." *Utah Power & Light Co*, 12 FMSHRC 965,969 (May 1990), *Aff'd*, 951 F.2d 292 (10th Cir. 1991)(*citing Black Diamond*, 7 FMSHRC 1117,1120-221 (Aug. 1985)). Moreover, the Commission has found that "even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite." *Black Diamond*, 7 FMSHRC at 1121. Consequently, even though the accumulations were damp, they were a dangerous condition that could result in a fire and smoke inhalation hazard.

c. Whether the violation was obvious

The unsafe accumulations were readily apparent to Saho. He found widespread combustible float coal dust, loose coal, and compact coal. (Tr. 33, 36-37, 71). The accumulations were black and were not rendered inert by rock dust. (Tr. 37, 108). Considering the testimony and photographic evidence presented at trial, this Court finds the violative condition had been clearly obvious. (Tr. 33, 36-37, 71; GX 4-8).

d. Whether the operator had knowledge of the condition

The Commission has held that an operator's knowledge of a violation may be established where the operator "reasonably should have known of the violative condition." *IO Coal Co.*, 31 FMSHRC 1346, 1357 (Dec. 2009). As discussed within, there is some question as to how long

[8] At hearing, the Secretary introduced a photograph showing an examiner's initials with the date of 8/24/14. (Tr.40-41; GX 5). However, as that examiner did not testify, this Court does not find that the initials indicate the accumulations existed since that date.

the operator *actually* knew of the accumulations' existence. However, with the two examinations that occurred on September 9, 2014, and given the extent of the accumulations shown by the photographic evidence, the operator and examiner reasonably *should have known* of the violative condition. (Tr. 33, 36-37, 71; GX-4-8). Thus, this factor weighs in favor of an unwarrantable failure finding testified to by the Secretary's witness.

e. The operator's efforts in abating the condition

The Commission has explained that the abatement efforts relevant to the unwarrantable failure analysis are those that were made *prior* to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013). Prior to the order being issued, there did not appear to be any efforts by the Respondent to abate the condition. Therefore, this factor also favors an unwarrantable failure finding.

f. Whether the operator had been placed on notice that greater efforts were necessary for compliance

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *San Juan Coal*, 29 FMSHRC 125, 131 (2007) *citing Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). Additionally, "[t]he Commission has recognized that past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (2001)(finding unwarrantable failure where operator was cited 88 times in a two year period for § 75.400 violations). Respondent had been issued 107 § 75.400 violations in the two years prior for impermissible accumulations of combustible material at Powhatan No. 6 Mine. (GX 1; Sec'y Post Hearing Br. at 24). In light of these previous § 75.400 violations, it is clear that the operator had been placed on notice that greater efforts were required for compliance with accumulation violations.

3. Conclusion

After considering the above *Manalapan* factors, individually and holistically, this Court finds the record clearly supports a finding of unwarrantable failure.

C. Order No. 8061124

During Inspector Saho's inspection of the South Mains belt, he issued Order No. 8061124 for the Respondent's failure to record in the on-shift examiner's report the accumulations cited in Order No. 8061123. 30 C.F.R. § 75.363(b) requires that:

> 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.

The on-shift examination report for the South Mains belt noted "N/O" or "none observed" under the dangerous/hazardous conditions section. (GX 11). The Respondent agreed that the accumulations existed during the MSHA inspection, but not that they were visible during the examination.[9] (Tr. 57-58, 185). At approximately 2:28 a.m., Foreman Skolnick was in the area of the belt tail, and he was at the belt drive again at 6:26 a.m. (during this second exam, Skolnick was not near crosscuts 36-39). (Tr. 61, 151, 160, 183, 186). Inspector Saho observed the accumulations at approximately 10 a.m. (Tr. 84).

Inspector Saho's testimony that the accumulations were up to two feet deep and that no coal was coming onto the belt from the 1 South transfer indicate that the accumulations likely existed since at least the last time coal came from the 1 South transfer. (Tr. 33, 50). As discussed, it was much more likely that coal came along the belt from left to right (starting at the 1 South transfer) than that the coal accumulations dropped through a tear exactly as the belt intersected with the West Mains transfer, dropping to the bottom of the belt and travelling all the way back to the tail of the belt, without leaving accumulations along the way. Consequently, the Secretary has shown by a preponderance of the evidence that the accumulations between crosscuts 36 and 39 existed during the on-shift examinations and that they were not properly recorded. Therefore, Order No. 8061124 is affirmed.

Order No. 8061124 was issued as S&S, and reasonably likely to result in lost workdays or restricted duty affecting two people. Respondent does not argue the potential S&S or lost workdays or restricted duty affecting two people. (Tr. 11-12, 248-49). However, the Respondent does contest the high negligence and unwarrantable failure assessments.

1. High Negligence

The Secretary has met the burden of proving high negligence. As discussed above, it is more probable that the accumulations between crosscuts 36 and 39 had existed during the on-shift examinations and that there was a failure to report such. The two feet deep accumulations and 1 South transfer not being used on September 9, 2014, indicate the § 75.400 violation had existed prior to the on-shift exams. (Tr. 33, 50).

The Respondent had a duty to record any of the nine mandatory health or safety standards and to take corrective action. 30 C.F.R. § 75.363(b). Between 2:00 and 2:28 a.m. and 6:00 and 6:26 a.m., on-shift examinations were made by Foreman Skolnick. (Tr. 60-61). At approximately 2:00 a.m., Skolnick alleges he examined the South Mains belt to the tail roller, where accumulations were later cited by Inspector Saho. (Tr. 61, 151, 160, 183, 186). However, he did not report any accumulations and did not undertake to have the coal dust eliminated or the area rock dusted. This failure to record the cited accumulations could have caused a fire and smoke hazard. Thus, this negligent act by the Respondent put the health and safety of at least

[9] Respondent emphasizes that there were no reported footprints in the accumulations as evidence that the accumulations did not exist until after the on-shift examination. (Tr. 89, 119-20, 240-41). Specifically, the Respondent believes the absence of footprints defeats the Secretary's argument that Foreman Skolnick saw, but failed to report the accumulations during his on-shift examination. (Sec'y Post Hearing Br. at 19-20). However, even though footprints were not documented by Inspector Saho, this does not prove said footprints did not exist or that the accumulations were not present prior to the onshift exam at approximately 2:00 a.m.

two miners, an examiner and a belt cleaner, in serious danger. (Tr. 52-53). Such violative conduct was more than just ordinary negligence and shows an aggravated lack of care without any clear mitigating circumstances. As a result, this Court finds the Respondent's conduct was properly designated as "high negligence" in Order No. 8061124.

2. Unwarrantable Failure

Given that Order No. 8061124 involves essentially the same facts and unwarrantable failure factors/analysis as Order 8061123, this violation also constituted an unwarrantable failure on the part of the Respondent. *See supra* Section B.2.

For this violation, there was the same obvious condition of accumulations covering crosscuts 36-39 that were up to two feet deep. (Tr. 33). Given the depth of accumulations and the lack of coal being loaded onto the South Mains belt from the 1 South transfer, this condition likely existed longer than one shift. (Tr. 33, 50). The accumulations of two feet of compacted coal dust by the tail roller created a fire hazard and posed a high risk of danger, which the examiner failed to report. (Tr. 33). The probability of the accumulations lasting longer than one shift also indicate that Foreman Skolnick was likely on notice of the condition and still did not abate the condition or report it. Finally, the Respondent was on notice that greater efforts were necessary for compliance with § 75.363(b) given the 107 § 75.400 accumulation violations the Respondent received in the previous two years. (GX 1).

In considering all of the *Manalapan* factors, this Court finds the unwarrantable failure assessment to be appropriate. *Cf. Manalapan Mining Co.*, 35 FMSHRC at 293. The Respondent had a duty to accurately report the accumulations in crosscuts 36-39 and it failed to do so, creating the possibility of a fire and smoke hazard for miners. Accordingly, the Secretary has shown by a preponderance of the evidence that the violative conduct cited in Order No. 8061124 constituted an unwarrantable failure and that the Respondent was highly negligent in failing to report the § 75.400 violation.

D. Penalty

In determining the appropriate civil penalty, the Commission applies the statutory criteria in § 110(i) of the Mine Act. This section provides:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 802(i).

The Respondent is a large operator, with an annual coal tonnage of 5,550,146 produced at Powhatan No. 6 Mine. (GX 1, 9). The parties have stipulated that payment of the civil penalty proposed by the Secretary will not affect the Respondent's ability to remain in business. J.S. 10.

Order No. 8061123 was assessed as S&S with lost workdays or restricted duty. (GX 1). This court has affirmed the high negligence assessment and the unwarrantable failure designation. The gravity of injury was high due to the fire and smoke inhalation dangers posed by the accumulations. While there was compliance with the order in the two hours after the order was issued, the other statutory criteria weigh heavily against the Respondent. (GX 1). Thus, the originally proposed penalty for this violation was appropriate. Accordingly, Respondent is assessed a civil penalty of $8,421.00.

Given that the violative conduct in Order No. 8061124 has been assessed as S&S with lost workdays or restricted duty, and given the high negligence and unwarrantable failure findings, and having considered all of the statutory criteria in § 110(i), this Court finds the Secretary's originally assessed penalty to be appropriate. (GX-9). Additionally, as the same circumstances involving the mine size, ability to remain in business, gravity, and compliance apply to this order, the proposed civil penalty of $6,115.00 is affirmed.

VII. Conclusion

This court **AFFIRMS** Order No. 8061123 and Order No. 8061124. Consequently, it is **ORDERED** that Respondent pay the Secretary of Labor the sum of $14,536.00 within 30 days of the date of this Decision.[10] Upon receipt of payment, this case is hereby **DISMISSED**.

John Kent Lewis
Administrative Law Judge

Distribution:

Helga Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106

Jason W. Hardin, Esq., Fabian VanCott, 215 South State Street, Suite 1200, Salt Lake City, UT 84111

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