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May 20, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0305 A.C. No. 12-02295-409606
v.	:	
PEABODY MIDWEST MINING, LLC Respondent	:	Francisco Underground Pit

DECISION

Appearances: Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner

Arthur Wolfson, Fisher Phillips LLP, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Moran

In this proceeding upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), the Secretary alleges that the Respondent, Peabody Midwest Mining, LLC, violated 30 C.F.R. § 75.202(a), a safety standard titled "Protection from falls of roof, face and ribs," which provides "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." A hearing was held on January 23 and 24, 2019 in Henderson, Kentucky.

For the reasons which follow, the Court finds that the violation was established, and that it was significant and substantial but that it was neither an unwarrantable failure nor, under any theory, was it a flagrant violation. A proposed civil penalty of $165,700.00 was assessed against Peabody for the violation in accordance with the special assessment provisions of 30 C.F.R. § 100.5(e). As also explained below, based on the Court's findings of fact and credibility determinations, a civil penalty in the amount of **$40,000.00** (forty thousand dollars) is imposed for this violation.

The Alleged Violation

On January 13, 2016, the Mine Safety and Health Administration (MSHA) issued a Section 104(d)(2) Order, No. 9036925, to Peabody Midwest Mining, LLC ("Peabody") at the Respondent's Francisco Underground Pit. (Ex. P-1). Order No. 9036925 alleges:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to fall of the roof, face or ribs. Loose coal ribs were observed in 13 entries for a distance of approximately 500 feet on the MMU-002 and [MMU-022][1] active working sections. The loose coal ribs measured approximately 4 inches to 18 inches in thickness for 6 ½ to 7 feet in height and 30 to 40 feet in length gapped away from the solid pillar approximately 3 to 6 inches with rock dust present behind them. The mine operator's pre-shift and on-shift record books indicate that the production crews had been prying down ribs but no evidence of correcting any hazardous condition was present at time of inspection. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence by allowing this condition to exist until the arrival of MSHA. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.202(a) was cited (34 times in two years at mine 1202295 (34 to the operator, 0 to a contactor.) *Id*.

Findings of Fact

MSHA Inspector Glenn Fishback testified for the Secretary. Fishback has been with MSHA for 11½ years. His total mining experience, including his years with MSHA, is 40 years. Tr. 25. Fishback has been an MSHA roof and rib control specialist for eight years. Tr. 26-29, 105. Some 29 years of his mining experience involved examining for bad roof and ribs. Tr. 106. Regarding the matter in issue, Fishback was at the mine on January 13, 2016. He was there to conduct his regular duties as a roof control specialist and to "extend the violation [regarding a separate roof control violation] which had been issued to the mine and to evaluate conditions of the area from an order that had been issued previously." Tr. 30. The extension was to allow the mine to submit a new roof control plan. Thus, he was at the mine to terminate a previous order, and in fact he did terminate that order on that day, January 13. Fishback required as part of that termination, that the mine retrain its management people in doing proper examinations. Tr. 34.

Following that, Fishback went underground. His escort that day was Travis Hayden. Tr. 36. It was during that inspection that Fishback issued the order which is the subject of this decision. Exhibit P-1 is Fishback's 104(d)(2) order for the alleged violation of standard 75.202(a), which he issued on January 13. Tr. 36. Fishback marked on a map, using an orange

[1] The order originally listed MMU-012, but was amended to reflect the correct MMU, which was 022. (Exhibit P-1, p. 4)

highlighter pen, the path, that is, the route he took that day on his inspection.[2] Tr. 38. Ex. P-2. On that day crosscut 11 was the last open crosscut. Tr. 39. Next to entry 5, the conveyor belt line, is entry 4, the travel road he used to arrive at the section. Fishback gave detailed testimony about the route he took that day and it was during that route that he came upon the areas he identified in his order.[3] Tr. 53. His examination of the cited areas took an hour or more. Tr. 54.

[2] The map, Ex. P-2, was provided by the Respondent as part of the Secretary's discovery but the Respondent asserted during the hearing that the map could not be used as a device to actually show "where *the faces* were at the time of the inspection." Tr. 38. (emphasis added). It is true that Ex. P-2 is a more recent map, as it reflects mining activity well past crosscut 11, showing crosscuts from 12 to 23. However, that does not diminish the map's usefulness, as its purpose was to illustrate where Fishback traveled on the day in issue. The precise location of the faces on January 13 is not essential to the issues at hand, nor does it diminish the identification of the route Fishback took that day. Later, on recross-examination, Fishback confirmed that Ex. P-2 reflects, in orange, the route he could definitively say he traveled but, beyond the orange highlighter marking on the exhibit, he could not be sure about other details of his travel that day. Tr. 177, 182.

[3] Although Fishback described the route he took that day, to better visualize the inspector's route of travel that day, the Court recommends that the reader consult Ex. P-2 which includes the orange-highlighted depiction of his route, as mentioned above. In his testimony, he stated that he traveled up to crosscut 8, from entry 4 to crosscut 8. Tr. 39-40. The feeder was then at 9, which he indicated on the map with a small triangle, signifying the belt tail piece location. Crosscut 9 intersects with entry 5. This was marked using a black pen. Tr. 42. From that point, Fishback traveled through crosscut 8 over to entry 5 and then at the intersection of crosscut 8 in entry 5, he proceeded to crosscut 9. Tr. 43. After checking things in that area he then returned to entry 4 and from there up to crosscut 10 and then to was is listed on the map as entry 00. Tr. 43-44. The inspector added a black arrow showing his direction of travel there. Tr. 45. Crosscut 11 was the last open crosscut at that time. Tr. 45. He then traveled from entry 00 to entry 11, taking some air readings as he progressed. Id. This was part of his imminent danger run, a standard preliminary duty before visiting the area he intended to inspect. He then traveled down entry 11 up to crosscut 5, which is just below entry 6 and from there he returned to entry 8, traveling inby to the second opening, which was then at crosscut 10. Tr. 50. Next, he proceeded from entry 8 to entry 6 and then traveled outby from 6. Tr. 53. Also, in response to the Court's questions, in learning about the distances between crosscuts and entries, Fishback stated the distances between crosscuts varied between 60 to 80 feet, but typically they would be 60 feet apart. Roof stability can be a reason for these variations. Tr. 55. The entries are also not uniform, in the distances between them. Accordingly, a pillar length may vary. Further, for purposes of record clarification, Fishback stated that the lines he marked on Ex. P-2 with an orange highlighter represented the area he walked and where he found the problems he cited in Order No. 9036925. Tr. 57. The map pertains to one unit, for which the mine had two MMU's (mechanized mining units). The right MMU is 22 and the other MMU was 2. Tr. 58-59.

Referring to the conditions he observed in connection with his order, Fishback stated there was a lot of "rib rash … and a lot of broke up rib conditions." Tr. 60. "Ribs," of course, refer to the mine's sides and it was along those ribs that the inspector observed "various cracks running through it. Some of them were gap[ped] where [he] could see in between them, and they had rock dust behind them, which indicated they'd been there." Tr. 60. By stating "they'd been there," Fishback obviously meant the gaps were not recent, as there was rock dust behind them.

There was a mud seam in the cited are and this presented a problem, according to Fishback, because it increased the risk of a rib falling on miners. This was an ongoing problem and the mine had been cited for this issue before. Tr. 61. Exhibit P-1, Fishback's Order in this matter, describes but one bad rib, that is, loose coal measurement, in it. As reflected in the text his order, he measured it at 4 to 18 inches thick by 6 ½ to 7 feet in height and 30 to 40 feet in length and having a gap of 3 to 6 inches with rock dust behind it. Tr. 61. Asked why no precise location was listed for this bad rib in the order, Fishback stated that the measurement was representative, approximately, "of all of the conditions [he] found." Tr. 61, 65. He did not contend that the ribs were bad along "every step" but rather that similar conditions existed everywhere he traveled in that area. Tr. 62. Travis Hayden, the mine's representative who was traveling with Fishback at that time, then asserted to the inspector in response to those rib conditions that the mine "had been prying on them." Tr. 62. Significantly, to the Court, Fishback did not contradict that claim of Hayden. Instead, when asked if anybody else came up to him and asserted that they were prying ribs, Fishback only responded "[n]ot that I remember." *Id.* As noted in this decision, though asked several times about that issue, the inspector could never affirmatively state that he saw no one working on ribs – he could only state that he could not *remember* such activity.

Fishback also spoke to Ex. P-3, which is a book MSHA kept in its office, reflecting notification to a mine of conditions that are continuing to exist at a mine. Tr. 66. The purpose behind the book is to have the mine conduct "heightened awareness" of a given problem. Tr. 66, 162-163. The book reflects that the mine had been put on such heightened awareness status on August 12, 2015 for standard 202(a). Subsequently they were taken off that status for that condition. Tr. 67. However, as of January 13, 2016, the mine was on that "heightened awareness" status.

While the order describes only one, approximate, measurement of the rib conditions, taken by Fishback, and about which he characterized as representative of the conditions he observed, he did take numerous photographs of the conditions he observed, which were offered in support of his order. Tr. 62, Ex. P-5. The photos in this multi-page exhibit, Ex. P-5, reflect the date and time they were taken. Tr. 69. No photo lists the *exact* location where it was taken. The reason for this was the inordinate amount of time such an effort would require. Tr. 71. At the first page of Ex. P-5, that photo was taken between crosscut 5 and 12. For that first photo, Fishback stated that it shows a rib that had either rashed off or alternatively may have been taken down. Tr. 72. However, the photo also displays, he contended, "several other areas there that [were] about to fall on themselves." *Id.* He elaborated that these areas were on the left side of the photo and show "all those areas that are cracked, [as evidenced by] the black outline [ ] around each of them, that they are about to either fall off or they need to be pried off, one or the other." *Id.* In these photos, the light, whiter, color represents rock dust that's been applied, while

the brown or light tan colors still reflect rock dust but where the moisture has been sucked out of the coal. Tr. 73. Black in the photos represents bare coal where the ribs had fallen. This fallen coal was sometimes right by the ribs and sometimes in the middle of the entries, dependent upon the thickness of the fallen material. *Id.* The roof height was seven to eight feet.[4] *Id.*

Fishback then discussed several of his other photos from the exhibit and it is fair to state, that while the particular descriptions of the conditions in each photo varied, they all represented conditions that the inspector believed supported his opinion of ribs that were in need of attention.[5] Tr. 80, 82. Explaining the pictures further, Fishback stated that "[w]here you're seeing the black area, it's already fell off where it's black, and the cracks indicate that it's going to fall in the near future." Tr. 83. More examples were cited. Tr. 85.

The Secretary stated, quite reasonably in the Court's view, that he did not want to take the witness through each of the many photos the inspector captured that day. Given that, the Court inquired whether, for all of photos Fishback had described up to that point, if they were "representative of what [Fishback] saw throughout the section and caused [him] to issue [the order in this case]." Fishback responded, "Yes." Tr. 95.

Fishback stated that there would be exposure to these rib conditions. Therefore, the ribs did not present simply an academic issue. For example, there were electrical cables along the rib and these would need attention as mining advanced. Miners doing that work would be right next to the rib. Tr. 87-88. Similar issues were identified with cables and rib issues. *See also*, Tr. 89, and Tr. 90, with the latter an example of a rib that broke from the solid pillar. Tr. 90.

Fishback was then directed to page 53 of Ex. P-5. He identified it as a rib that had either fallen out or had been taken out by the operator and for which condition the operator had installed supplemental support, timbers, to help hold the lower portion of the rib. Tr. 96. That photo was taken on January 15, 2016. *Id.* and Ex. P-5, at 54 and 55. The photos were taken in connection with his termination of this order. Tr. 96-97.

The Secretary then asked Fishback about Pages 35 and 36 within Ex. P-5. He described it as a rib with cracks in it and which had been heavily rock dusted. The photo also showed the examiner's date, time and initials, marked by orange spray paint. Tr. 97. Page 38 of Ex. P-5 also shows the same spray painted initials but for that photo, beyond recording January 2016, the exact date was unclear. Tr. 98. Fishback stated that this photo also shows loose ribs. Tr. 98-99. The Court asked the witness to focus, for the moment, solely on Photo 38, asking whether, if he only saw that condition on that day, would he have issued a 75.202(a) violation for that alone?

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[4] To gain perspective of the photo's depiction, Fishback drew a red diagonal line on the exhibit to demarcate the roof's location in the photo. Tr. 74-76. He also drew a line to show the junction between the roof and the rib. Tr. 78-79.

[5] Fishback agreed that for these photographs, most consisted of paired sets of each photo. That is, for Ex. P-5, photos one and two are the same picture, with one simply being an obviously clearer picture of the other. As a second example, Ex. P-5, photos three and four, represent the same picture. Tr. 81. Ex. P-5, photos five and six, are yet another example. Tr. 83.

Fishback answered he *probably* would have issued a citation or order for that because the examiner's initials were right on it and therefore he could not contend that he did not see the condition. However, as Fishback viewed the matter as encompassing multiple rib problems, he could not commit to asserting that condition alone would be a 75.202(a) violation. Tr. 100-101.

Fishback agreed that, for each of the photos he discussed in his testimony, the ribs were not adequately supported or otherwise controlled to protect persons from hazards related to falls. Tr. 104. When rib material comes down, it starts straight down, but he stated that if the material is sufficient it will fall into an entry. Tr. 107. Fishback knows firsthand of the hazard a rib can present, as he was once struck by a falling rib, though no broken bone resulted from that event. Tr. 108. It is noteworthy that the cited standard is considered important enough to have been designated by MSHA as one of its "rules to live by."[6] Tr. 109. The mud seam adds to the safety issue because it increases the chances of cracking and breaking around the seam and then material dislodging from the ribs. Tr. 110.

Fishback also informed that he had spoken to the mine's operations manager, Jon Dever and also "[p]robably everybody in management for sure at the mine at that time." *Id.* Those discussions included his suggestions for supplemental support, such as rib bolting and timbering, all with the idea of helping to eliminate the rib rashing. *Id.* However, he stated that so far none of his suggestions had been adopted, at least in that cited section of the mine.[7] Tr. 111-112.

As noted above, Fishback was not definitive when asked if he saw any miners taking down ribs when he issued his order, stating "not that I remember." Tr. 113-115, 140. He asserted inquiring "don't you think we need to pry some ribs around here?" Tr. 113. This was prompted because he "just kept finding" rib problems. *Id.* He then rephrased his question asking the miners "why are we not prying ribs down?" Tr. 114. Also, the mine was running coal at that time. *Id.*

[6] The Court takes official notice of MSHA's "Fatality Prevention –Rules to Live By," its initiative to improve the prevention of fatalities in mining," lists the cited standard, 30 C.F.R. § 75.202, as one of the coal priority standards, falls of roof and rib. *See Fatality Prevention – Rules to Live By*, U.S. DEP'T OF LABOR, MINE SAFETY & HEALTH ADMIN., https://arlweb.msha.gov/readroom/coal%20handbook/MSHA%20-%20Initiatives%20-%20Fatality%20Prevention%20-%20Rules%20to%20Live%20By%20I.htm (last visited April 22, 2019).

[7] It was also brought up that MSHA determined that the mine's roof control plan needed to be amended. Tr. 112. This issue arose at a point in time before the order involved in this proceeding. *Id.* However, the changes were not implemented until after the order here was issued. Tr. 113.

Fishback's order did acknowledge that the pre-shift and on-shift record books reflected that the production crews had been prying down ribs. Tr. 115. The Order also listed his determination that an injury or illness was highly likely, because of the conditions he found that day. The result could be a serious injury, such as broken bones. The maximum number of miners exposed was listed as ten. Tr. 116. Weekly examiners and the rock dusting crew would have been exposed to the conditions. It was marked as significant and substantial because of the size of the ribs and the conditions he encountered. Tr. 117. He concluded that the conditions presented a "major safety hazard." *Id.* In characterizing the conditions as "excessive," Fishback justified that term because "[i]t covered the whole working section and people were exposed to it." Tr. 118. Further, based on his experience, he believed the conditions had existed for "[o]ne to two weeks," and he expressed that they were obvious, a conclusion he believed was supported by his photographs. Tr. 119. Aggravating the situation, in his view, the operator had been put on notice that greater efforts were needed to address the issue. *Id.* In terms of correcting the suspect ribs, management informed Fishback that it took seven or eight miners over a period of seven shifts to accomplish this. Tr. 120, 161.

Before beginning cross-examination, Respondent's Attorney, Mr. Wolfson, reasserted an objection he had lodged earlier – namely that the photos should not be admitted because of the alleged "non-specificity of the location listed on the [inspector's] worksheets." Tr. 123. The Court ruled, as it had before,[8] that the inspector testified that "all these photographs were taken in the area which [the inspector] traced with the orange marker … [and that it would have been] "excessively burdensome and time-consuming" to have required the specific locations Respondent sought. The Court also noted that "[c]ertainly, there's no testimony that these were taken at some other mine or some other location." Tr. 124. For those reasons, as it did in its earlier decision involving this mine and this mud seam, the Court rejected the Respondent's objections.

Cross-examination began by directing the inspector to his notes, Ex. P-4, at page 27. They pertain to 30 C.F.R. § 75.223(a)(1), and deal with a citation he also issued on January 13, 2016, involving the mine's need to revise its roof control plan. Tr. 126. Fishback agreed that he did not issue an order shutting down the section until after he made his complete inspection of the working section. Tr. 132.[9]

The inspector concurred that he advised the crew to be more diligent in their rib prying, and that his notes reflected that the crew told him they had been prying down ribs, but he told them that he had seen no one pry a thing the whole time. Tr. 139-140.

[8] See, the Court's earlier decision involving the same mud seam at the Respondent's mine and the issue of the sufficiency of the location of the loose ribs. *Peabody Midwest Mining LLC*, 2018 WL 816286 *11 (Feb 2018) (ALJ), for example.

[9] Following that, it was remarked that in his notes regarding the working section, Fishback marked "NVO," which is shorthand for "no violations observed." However, Fishback explained that was limited to methane or oxygen issues. Tr. 133.

In cleaning up material that has been pried down, depending upon the amount involved, typically a scoop will be used to clean up the fallen material. Tr. 141. When asked if he was able to see fallen material in the photos discussed during direct examination, Fishback stated he could not detect such material in the photos and Counsel for the Secretary stipulated that in photos 1 through 22, 35, 36, and 53 through 55, they *do not* show material on the ground. Tr. 143.[10]

Respondent's Counsel raised the matter of alleged violations cited by Fishback in the prior year, on August 12, 2015. These were not located near the order in this case, but rather on the second southwest main travelway. Tr. 164-169.[11]

The Secretary then called MSHA Inspector Stephen William Tisdale. Tr. 186. His total mining experience, including that with MSHA, comprises about 15 years. Tr. 188. Directed to Ex. P-8, he identified it as orders he had previously issued on October 28, 2015 to the Francisco Mine for violations of 75.202(a), the same provision cited here, involving maintaining safe ribs and roof. Tr. 189. This was not new ground to the Court, as it presided in an earlier hearing involving those matters and had issued a decision regarding that, which decision was not appealed. *See, Peabody Midwest Mining LLC*, 2018 WL 816286 (Feb 2018) (ALJ). More will be said about this in the Discussion section below, because the Court has determined that it bears upon the present decision.

Then directed to January 14, 2016, Tisdale stated that he was at the mine that day to terminate an earlier issued (d) order, No. 9036925, the order at issue here, that as discussed had been issued by Fishback. However, Tisdale did not terminate the order that day. Tr. 194. This was because when he arrived at the areas covered by the order he "found miners still working on the conditions that were cited in the order … there was still a lot of material on the ground. There were bolters bolting [wide] bolt spacing. The faces actually had a lot of material in them also." Tr. 195. Tisdale added, "[i]n the faces, they would have been full almost to the

[10] Fishback agreed that his order reflects *one set* of "measurements" that day but he stated that he took several measurements while at the site that day. However, the listed "measurements" do not reflect "actual" measurements in the sense one would typically use that term, but rather represent an average of the estimated measurements he took. Further, he was unable to recall the number of measurements he took in order to arrive at that average, nor specifically where they were taken in the section. Tr. 146-147. It is noted that within Ex. P-4, pages 11-12 of the inspector's notes, is listed the "measurements" he took and those are the same measurements he listed in his order. Tr. 148.

[11] The Court references this only for the purpose of completeness, but it does not believe it is pertinent, nor helpful, to resolving the issues in this case. In fact, the Court expressly remarked at the hearing that it did not see how it helped resolve the present controversy. Tr. 169. It would seem to have been offered to show that the Respondent addressed those earlier identified problems by having a roof bolter move to an outby location in order to attend to them. These involved alleged violations of 75.202(a) and 75.220(a)(1). Tr. 164. On redirect, the Secretary returned to Fishback's August 12, 2015 citation, which the inspector informed was issued for a section 202(a) violation, and involved a bad rib issue. Tr. 170.

point they were into the last open [crosscut]. And [he] believe[d] that is what prompted [him] to modify [Fishback's] order because they had nowhere else to store [the rib] material. And if they would have continued to put [that material] in the faces, they would have been creating another hazard." *Id.* That other hazard was the material was making it difficult to do adequate gas checks at the faces. Miners were having to crawl over coal piles to do those checks. Tr. 196. Also, while he was there, Tisdale found some loose ribs that needed to be pulled down. In his opinion, the amount of material present was almost significant enough to prevent a scoop to drive through there. Tr. 197. Roof bolters were also working there, to replace areas where there was then wide bolt spacing created by the ribs being pulled down. Tr. 197-198.

Tisdale also identified Ex. P-8 as what was represented to him by Todd Seilhymer, who was at that time the mine's superintendent, as to the number of miners who had been working on the rib issue. Tr. 199. Yet, while the mine believed that the order was ready to be lifted and though two more shifts had elapsed before Tisdale arrived at the mine to assess the situation, work was still being done to address the problem. *Id.* Thus, the order remained intact and Tisdale only allowed a scoop to load the material on the belt. This modification was to make it clear that no mining could resume at that point – only continued cleanup was allowed. Tr. 200. At that time, Tisdale also observed scoops dealing with the ribs and pry bars being employed too. At least six ribs were pried down while he was there and some required effort to take them down, but "[t]here were [a] couple that very eas[ily] came down." Tr. 201. These pried ribs came out into the entry – they did not just fall straight down. *Id.* Tisdale knew that a lot of material had been taken down, by the amount of material that was in the faces. Tr. 202.

At that point, the Secretary having rested, subject to the potential for rebuttal testimony, the Respondent called its first witness, Casey Winters. Tr. 210. Winters has ten years of mining experience. Tr. 213. In January 2016, Winters was a "lead man," a position he described as a junior face boss or section foreman. Presently, he is an "operator." *Id.* At the time of Fishback's order, the mine ran three shifts. One of those shifts was idle, which meant that shift did anything that would help the mine run coal. This included belt moves, cleaning, building walls, and scooping. Tr. 211. Winters was then on Unit 2 production. There were then three working sections. *Id.*

Winters agreed that in January 2016, the mine had a mud seam. Tr. 213. He described the condition as "mud in between coal. It was coal on top, coal on the bottom. There would be a mud bank running all the way through it." Tr. 214. He stated that the condition did have an effect on the ribs, "Yeah, the ribs would, where the mud was, would usually kind of fall out." Tr. 214. He then elaborated how this condition was addressed, "We always – it was a rule that we always had someone, one person detected to prying ribs. All shift long, no matter shift it was, you had to have somebody prying ribs … and it was one of the biggest things we did, prying ribs and spot a bolt." Tr. 214. In response to the Court, Winters confirmed that the mine had one person dedicated to dealing with ribs at all times. Tr. 215. This was true, Winters stated for every shift. And this was full-time job, all the time, not just as needed. *Id.*

When the Court then suggested that such a practice must have meant there was much to attend to, Winters responded that he wasn't suggesting that person was "busy all the time … but it was their job to patrol the unit and look for anything, whether it would be the two-inch piece to pry down or you could spot … bolt[s]." Tr. 216. The mine also took other measures to deal with rib control. One of these was addressing mud vein corners by shearing them with the continuous miner, cutting it at an angle. This practice prevented the corners from falling out. Tr. 217.

Winters also spoke to the type of material that would come out upon prying a rib. It would vary, he said, asserting that it could be a foot by a foot or less, with a thickness of six inches. He described it as knocking chunks of coal down. Tr. 218. Asked if, per the Order in this matter, he encountered ribs in Unit 2 of the dimensions described in that Order, Winters responded that he never did. Tr. 219.

Directed to midnight shift on January 13, 2016, Winters stated that he worked the midnight shift that day on Unit 2. This was in the time frame *before* the Order in issue here, from 11 pm until 7 am. Tr. 227. He asserted that on that shift he was working on an outby drive belt, and also was there to bolt up the unit, and to add a new drive setup, which was not on Unit 2. Tr. 220. Two roof bolters did the work at the unit and, in total, there were three of them working that shift. He also asserted that he scaled the "whole time" that shift. Tr. 222. He acknowledged that coal might be run during this shift too. Tr. 223-224. Winters, while maintaining that the amount of material was only six inches to a foot or two, and up to three feet tall,[12] did acknowledge that the rib issue was *not* just in one location. Instead, it was "throughout the whole section." Tr. 225.

Winters was also shown Ex. R-3, the pre-shift book. It records the conditions he found during that exam. Tr. 228. As Respondent's Counsel walked him through that exhibit, Winters agreed that it noted wide bolt spacing and spotting 15 bolts in one location and four bolts in entry 2 and three bolts in Entry 1 and in 00, he spotted a corner bolt. Asked if those bolting actions were as a result of prying ribs, Winters responded, "[y]eah, I would say," adding that 95% of them were from prying. Tr. 229.

Winters stated that the spotting was also done outby the tail piece.[13] Tr. 230. He also maintained that, following the prying he would replenish the rock dust by hand, not by machine, and for loose debris he "would always scoop it up." Tr. 233-234.

On cross-examination, Winters agreed that if he threw rock dust on areas that had been pried, one would not expect to see blocks of black coal. Tr.236. Winters was less certain when asked whether, following the Order, issued after his midnight shift, for the next two days, there was no active mining, stating he would need to look at the production shift. *Id.* He explained that he might not have been up on that section for his next shift, the following night, but he couldn't have that response both ways, in that he could not know how much work had been done

[12] Winters did not view a piece of those dimensions to be "a big piece." Tr. 226.

[13] When shown the production report, it reflected his earlier testimony that there was no production on that midnight shift. Ex. R 2, Tr. 231-232.

to correct the problem, following the order's issuance. Tr. 237. Thus, he admitted he could not speak directly to the assertion that it took eight miners per shift for seven shifts to correct the violation. Tr. 237-238. He then conceded that he did not know the material was sufficient that, when the new inspector arrived, that inspector found chunks of coal on the ground upwards of two to three feet thick. Tr. 238.

While Winters challenged the idea that the amount of material was sufficient to block his ability to do his gas checks at the face, he admitted he couldn't recall if he even was working on that unit on the January 14. In fact, even for the next day, January 15, he could not recall if he was there following the Order. Tr. 238-239.

Travis Hayden, section foreman, then testified for the Respondent. Tr. 243. He held the same position in January 2016. However, while he escorted MSHA Inspector Fishback on that day, he had never worked in Unit 2. Tr. 244. He stated that at the tail piece Fishback found a loose rib, but that he, Hayden, was unable to get it to come down. Tr. 246. Hayden did not believe it really was a loose rib. Instead Hayden believed there was a crack in it. *Id.* Their travel continued to the far left entry, at 00. Tr. 248. In the last open crosscut Fishback pointed out one rib with an issue, between zero and double zero ("00"). Hayden considered it to be a crack, very much like the crack they viewed at the tail piece. *Id.* Hayden spoke of a crack or a small gap as essentially the same condition. Tr. 249. Fishback used a stick to pry the condition, but according to Hayden, only small pieces came out. *Id.*

Their travel then proceeded to the last open crosscut, but Hayden stated that Fishback did not raise any other rib concerns. Tr. 249-250. Nor, Hayden stated, did Fishback note any other rib issues between entries 11 and 6. Tr. 250. However, at the power center Fishback "pointed out a few ribs" needing attention. *Id.* For one of those issues, near the power center, Winters again described some cracking, but Fishback did not ask that the condition be pried, nor did he ask him to find someone to pry it, nor did he require that the location be flagged. Tr. 251. From there they continued to walk outby where some cracking was observed: "[k]ind of just cracking in the ribs. In the mud vein is what I call it." Tr. 252. He estimated there were "probably four or five spots [Fishback] pointed out to [him] in through that area." *Id.* As for the mud vein, Hayden did not view the rib issues as gapping. Instead, his description was that "it was more cracking." Tr. 253.

At that point in their route, after traveling entry 7 and over to entry 4, things changed, as Fishback told Hayden to "get ahold of the face boss on the unit. He was shutting down the unit, and … [Fishback] wanted to have … a safety meeting with the guys … on the unit." Tr. 255. Fishback, again according to Hayden, asked the crew if anyone had been prying down ribs that day. Everyone on the crew, Hayden stated, told Fishback that they had been prying ribs that day. Tr. 256. Also, at that time, Fishback pointed out a rib to the assembled crew, but when a miner, Joe Frederick, tried to deal with it, the rib could not be pried down. Tr. 256-257. The matter was addressed by having a scoop knock down the rib. Hayden also contended that he saw Fishback take only one measurement during the entire time – that was to measure the air in the width of the entry to the last open crosscut. Tr. 258.

Hayden further asserted that, while accompanying Fishback, he did see evidence that prying had occurred, as he observed pieces of rib on the ground next to the ribs. Tr. 259-260. In essence, Hayden presented a very different picture of the conditions from Fishback's accounting. For example, he stated that there were a lot of areas that had been "freshly scooped," meaning the ribs were square and the bottom was clean. Tr. 260. Despite that testimony, he acknowledged that "there were some ribs on the ground. [Hayden] even pointed some of them out to show [Fishback] that we was prying ribs out, just to show him we was making an effort to take care of the problem." *Id.*

Hayden informed that he made notes of the inspection. Tr. 262. This evolved into a statement that was derived from his notes while he was underground. Tr. 264. On cross-examination, although he may have filled out an "escort" sheet which would contain very basic information, such as stating that the inspector issued a (d) order on Unit 2, he could not be sure that was done in this instance. Tr. 265. It was in his statement that Hayden asserted that everyone had been pulling down ribs. Tr. 266. Hayden stated that whenever a (d) order is issued, a statement is to be made. Tr. 267. His statement was subsequently admitted as Exhibit R-4. Tr. 280. Although he asserted that the process at the mine was for each miner working at the unit to create a statement, he couldn't speak to whether that was actually done, nor could he inform whether Chris Robinson or Todd Seilhymer created their own statements. Tr. 269. He then backed away from his earlier remark that statements were part of the mine's protocol. Tr. 270.

After the order was issued, Hayden did not return to the unit over the next seven shifts to view the conditions. Tr. 270. However, he acknowledged awareness of what had to be done to abate the cited conditions. This included knowledge that the amount of material from the bad ribs that was placed near the face was such that it was difficult to run gas checks along the face. Tr. 271. Confronted with the disparity between his testimony that Fishback noted only four or five cracks in the areas and the great effort it took to take down the bad ribs, Hayden answered that "you can bring down whatever you want if you start picking at it all day long." Tr. 272. However, he conceded that, with ribs, small pieces can come down, but large ones can fall too. Tr. 273. Importantly, he admitted that one can't know if a small piece or a large one may come down. Further, cracks can be an indicator of loose ribs. Tr. 274. Cracks, he conceded, are an indication that there is something wrong with a rib. *Id.* Hayden was with the inspector when he was taking the photographs. Tr. 279.

Zachary Hudson next testified for the Respondent. Tr. 281. In January 2016, he was a "fill-in" face boss at the mine. He was part of the B crew and, as alluded to in earlier testimony, the crews rotated, so that one crew would work two weeks on days and two weeks on the afternoon shift. Tr. 281-282. Though he agreed there was a mud seam present, and that the condition would cause the ribs to flake out, there was "nothing real big. You know, just push out little chunks of coal or something." Tr. 283. Hudson agreed that he had testified in an earlier proceeding regarding an order issued December 22, 2015 involving rib control on Unit 2. Tr. 283. Following that order, additional steps were instituted to address rib control. *Id.* This consisted of having a designated person prying down ribs. *Id.* He then added that "everybody" was participating in the rib control issue. Tr. 284, 285. He also contended that he

would have meetings with the crew and that they talked about the rib issues "since we knew that we had that mud vein." Tr. 284.

While Hudson contended that everyone was attentive to the rib issue, he asserted that "just because the rib was gapped, doesn't mean that it was ready to come down because some of that stuff was still intact pretty damn good." Tr. 287. However, he asserted that they would still check on them, though again, at times, they turned out not to be loose. Tr. 288. He did not agree with earlier testimony that miners would hand dust after a rib had been pried down. It was not, he stated, a common practice to hand dust. Tr. 288-289, 307. When, as a result of rib issues, timbers or bolting resulted, it would be noted in the mine reports. Ex. R-5, Tr. 289. He agreed that the report reflects that ribs were pried. Tr. 291-294.

Then directed to his January 13, 2016 section report, he noted that they were not running both sides of the split area unit that day. Tr. 296. MSHA inspector Danny Mann was there for part of that time, but Hudson stated that inspector did not raise any rib issues with him. Tr. 299. Hudson did not recall speaking with Fishback about his order, though he did recall Fishback meeting with the miners about the issue. Tr. 300. There was some history between Fishback and Hudson in that, according to Hudson, for that December 2015 order, Fishback asserted that Hudson was "a bad boss." Tr. 301. For that reason he kept his distance from Fishback during the January 13 event, not wanting to have any conflict in front of his crew. Tr. 301.

However, Hudson did hear his crew talking with Fishback. Specifically, he recalled Woody Hembry telling Fishback that he did not feel things were unsafe because they were "constantly prying down ribs." Tr. 302. Hudson also disagreed with Fishback's recording in Ex. P-1 regarding the claimed loose coal ribs dimensions, stating that he never saw anything of that size, remarking that dimension would be "the whole size of the pillar." Tr. 302-303.

During cross-examination, when asked about his knowledge of two previous 104(d)(2) orders for violations of section 75.202(a), Hudson stated he did not know what that meant and that he didn't know what 202(a) referred to. Tr. 305. Referencing Ex. P-8, Hudson said he could not recall those previous orders. He then explained that in his earlier reference to Fishback's meeting with the mine crew, he was referring to the December order for loose ribs, when he and Fishback exchanged words, meaning they had a confrontation. Tr. 306. He did agree that, following the time when he had words with Fishback, additional training ensued. This involved "examining the ribs a little bit better." Tr. 306.

He did admit that, if one sees a gap, one always wants to try and eliminate that. Tr. 309. He also agreed that in this unit a rib could come down anytime, because that mud seam was a chronic rib problem in this particular section of the mine. Tr. 309.

Chase Reneer was next called by the Respondent. In January 2016 he was a roof bolter on Unit 2 working the B crew. Tr. 317. Prior to the event in issue he had worked on Unit 2 for about three years. He described the mud seam as "a fragile, brittle separation in between the coal seam." Tr. 319. To him, this meant the seam was not as sturdy. However, despite its presence, he described the effect as only "little pieces coming out … nothing big." *Id.* He maintained that

everybody participated in roof control "[e]very day." Tr. 320. It was his testimony, in effect, that the miners were quite diligent in dealing with the ribs. Tr. 319-321.

Addressing the day in issue, January 13, 2016, he was working the day shift then. Ex. R-6 reflects where he bolted on that shift. Before he started bolting on that shift, he said he saw evidence of rib prying. Tr. 323. There he noted a corner that had been pried and that it had been hand dusted. Tr. 323-324. He also contended seeing other areas that had been spot bolted, and during the shift itself, he saw miner John Butler prying ribs. Tr. 325.

He further asserted that Fishback spoke to him about a loose rib between entries 4 and 5. Tr. 326. Though he tried to pry it, it would not come down. Tr. 326-327. He then used a pinner but only a piece about the size of a tissue box came out. Ultimately it only came out after great effort. Tr. 328. He also supported the testimony of an earlier witness that, when Fishback was meeting with the miners, he directed Joe Frederick to pry down a rib, but nothing would come down. Tr. 329. After the order was issued, everyone had pry bars, trying to bring material down, but he contended that only "small, crumbly" stuff came down. Tr. 331.

On cross-examination, Reneer agreed that the mud seam was a well-known condition in that unit. Tr. 333. He remained on the unit following the issuance of the order. Tr. 335. He admitted that one can't tell, simply by looking at a rib whether the material will come down and he agreed that one starts the effort with a pry bar. One cannot say, he admitted, whether a given rib issue will come down in six minutes or six months. Tr. 336. He stated that they installed at least 200 bolts in one shift following the order's issuance. Tr. 337. He could not recall if he was present when Inspector Tisdale returned to the mine with the idea of lifting Fishback's order, nor could he recall if he was present when Fishback returned after that and did lift the order. Tr. 339. To sum up the practice they were employing, Reneer stated that if the miners saw something loose they would try and pry it down. But if it did not come down, "then it was left alone." Tr. 340.

At the start of day two of the hearing, testimony began with Joseph Frederick, who was called by the Respondent. Tr. 348. In January 2016 he was working in Unit 2 on the B crew. Tr. 349. Zach Hudson was his section foreman. Frederick had been on that unit for five years. He agreed there was a mud seam, but described the effect as causing material to "flake out," and that the pieces were "[n]ot very big most of the time." Tr. 350. This was dealt with by prying the material down and then scooping it up for the feeder. He stated that they were told to pry down the material if seen. Tr. 351. On the day in issue, January 13, Frederick was running the scoop, a machine with a bucket on the front of it. Tr. 352. Most of the time, scooped material was put into the faces and from there loaded up for the feeder. Frederick asserted that he was doing scaling on that day, using a pry bar or the scoop bucket itself. Tr. 353. After the order was issued shutting down the unit, Frederick stated that he used both a pry bar and the scoop for scaling. Tr. 353. He also asserted that he saw others engaging in scaling that day, stating that "multiple ones" were doing that. Tr. 354. He added that the scaling and scooping were being done both in the last and in the second to last open crosscut. Tr. 355. Asked about the size, how big the scaled pieces were, Frederick responded, "[m]aybe a couple feet big, yeah, couple feet big, I guess … [n]ot very big … there was some smaller ones … on average probably about two

feet around or so." Tr. 355-356. He disputed the measurement listed in Ex. P-1, stating it was "not that big." Tr. 356.

Asked about the meeting with the MSHA inspector that day, he informed that the inspector told them about the hazards from loose ribs. Tr. 357. Then the inspector pointed out a rib he believed was loose and asked Frederick to attend to it. *Id.* He worked at it for 10 minutes but "got very little out of it." *Id.* Frederick stated there was a small crack in the rib, but asserted it was not loose. Tr. 358.

On cross-examination, Frederick agreed that at times the rib material would fall out on its own. When examining the ribs, he stated he would look to see if "it looked loose." A crack, he stated, might indicate a loose rib, but if one pried and it did not come down, then he would leave it alone. Tr. 359. Frederick took the position that the mud seam did not affect the stability of the ribs. *Id.* He also disputed that they were having difficulty with loose ribs flaking out the entire time, asserting it was not the entire time. Tr. 360. However, he did admit that the mud seam created issues with the ribs. *Id.* Further, he agreed that the miners were always talking about the mud seam and how it was affecting the ribs. *Id.* While he asserted that most rib pieces were not big, some were larger, "maybe four feet or so." Tr. 362. He agreed that a rib piece of that size could seriously injure a miner. *Id.* In many respects, Frederick could not recall details associated with the order but he did acknowledge that rib control is one of the rules to live by. Tr. 361-366.

Jonathan Butler then testified for the Respondent. At the time in issue he was working in Unit 2 as a ventilation curtain operator. Tr. 368. He has five years of mining experience. Tr. 369. He agreed there was a mud seam in that area, but he didn't think it had an effect on the ribs. Tr. 370. Though some rib prying was needed it was to deal with "flaking." *Id.* The crew did talk about rib prying and to take care of any potential hazards and to "just look out for each other." Tr. 371. He maintained that he would "keep an eye out there [for rib issues]. *Id.* He repeated that the rib material he encountered was just "small, flaky material that … wouldn't amount to much." Tr. 372. As with several other witnesses for the Respondent, when asked about the rib dimensions referred to in Ex. P-1, he disagreed with those numbers, adding "[n]o, I've never seen something to this day that big." Tr. 373. In terms of addressing rib issues, Butler looked for things with a big gap that one could actually get a pry bar in. One does not, he said, "go just looking to pry stuff down if that's not ready." *Id.* Explaining further, he stated there "wouldn't really be a crack in it … [i]t would just be a solid seam." Tr. 373-374. It was his view that if one is working on a rib that isn't ready, there's a greater hazard in trying to do that. Tr. 374. He would determine this by putting some pressure on it and if it didn't move it was not wise to pry on it. Tr. 374.

Butler maintained that he was prying ribs that day before the order was issued. Tr. 375. As to where he had been doing that prying, he responded, "[i]t had been all over." *Id.* However, he reiterated that the unit's ribs "looked good." He saw no "major hazards …[nothing] besides the flaky material." Tr. 375-376. In fact, he expected that the inspector would be "pleased with the work we had done." Tr. 376. Later, Butler was part of the meeting with the inspector, who informed that the ribs were still bad and didn't look any better. *Id.*

Apparently, the miners were taken aback by the Inspector's reaction. Further, Butler confirmed that Fishback asked Joe Frederick to attend to a rib that he felt needed attention. However, Frederick, though he worked at it, could not get the rib to move. In Butler's view, trying to move a rib that is not ready to come down creates a greater hazard than leaving it alone for the time being. Tr. 380.

On cross-examination, Butler informed that the rib that Frederick could not bring down was not where the bolter cable was located. Tr. 378. He reiterated that the material he brought down was flaky, not very thick, but rather thin. Tr. 379. When asked for more specifics about the size, he stated they could be one to two feet. *Id.* He agreed that one needs to see a crack to tell if a rib is ready to come down. *Id.* Elaborating, he agreed that seeing a crack the whole length of a rib in the pillar means the rib needs to come down. Tr. 380. However, upon seeing a crack in the coal seam of 40 to 50 feet in length one needs to pry on that and if one doesn't get any movement, it's not ready to come down. *Id.* Butler did not believe that the mud seam affected the stability or integrity of the pillars. *Id.* In circumstances where a rib would not come down, Butler's approach was to "[k]eep an eye on it." Tr. 382. However, he conceded that, in such circumstances, he "probably [would] put flagging around it." Tr. 383. Speaking generally, he believed that it would probably take days for a rib that was not ready to fall, not minutes. *Id.* There is certainly an element of uncertainty to the issue however, as Butler conceded that he has seen a rib fall out on its own without any warning. *Id.* Tr. 383-384.

Following the issuance of the order, Butler started taking care of the ribs during the two and a half hours remaining on his shift. "Everybody started scaling." Tr. 384-385. He admitted that, after his shift ended, another shift continued with the abatement, that is, as Butler put it, "[f]ixing the problem." Tr. 385-386.

Todd Seilhymer was the final witness for the Respondent. At the time of the order in this matter, he was the mine superintendent, a position he also held in December 2015. Tr. 395. At the time of his testimony in this matter he was no longer in that role, having moved to the compliance department. Speaking to the mud seam which is a central topic in this matter, Seilhymer agreed to what is undisputed – there is a mud seam throughout the mine. Initially, it was small, a half-inch, but as they progressed into Unit 2 the seam continued to thicken. Tr. 397. Moisture, he explained, affects the mud seam and the seam would deteriorate creating pressure on the coal, which would then form cracks in the ribs. Tr. 398. At first the seam would look normal but then it would deteriorate, with fractures or cracks appearing. *Id.* This condition was primarily controlled by scaling. *Id.* However, consistent with other witnesses, Seilhymer maintained that most of the material came out in small pieces and it could be controlled as long as one continued to do scaling. Tr. 399. To address this, it was decided to have one person designated to continuously scale across the section. Tr. 399-400. He added this did not mean only one person did scaling. He maintained that the approach was if anyone saw something that person was to pry it down. Tr. 400.

Seilhymer also contended that, after the December order, he would visit Unit 2 and would check on the rib conditions when making those visits. It was his assertion that he would see miners scaling during those visits, including the foreman. Tr. 401.

Ex. R-9, which was a citation for a failed rock dust sample, on Unit 2, at crosscut seven, five to six intake, was shown to Seilhymer. Tr. 404. The sample was taken on January 5, 2016. That citation was subsequently terminated on January 13, 2016 by Inspector Mann. The point of Respondent's Counsel introduction of this exhibit was that Inspector Mann went through the area marked in green, as reflected in Ex. P-2. Tr. 406-407, but that he did not issue any rib control violations at that time. Tr. 407 and Ex. R-11. On January 6, 2016, Inspector Mann was also at the mine at Unit 2. Tr. 412, Ex. R-13. No rib control violations were issued by Mann on that day either. Tr. 413.

Directed then to the matter in dispute, Seilhymer stated that on that day he received a call that Fishback had issued a (d) order on Unit 2 for ribs. Tr. 414. He then proceeded underground with mine manager Chris Robinson. They then met up with Fishback who "indicated [to them] that the ribs were terrible, [that he] was not pleased with the intake [and] said [that] it was horrible and [he] couldn't believe that [the mine] would have allowed men to travel out through that at a primary escapeway [which is in the number six entry]." Tr. 415. Thus, Fishback's issues involved that escapeway and Unit 2. Tr. 416. The escapeway starts at the unit's tail piece. *Id.* Upon arriving at the unit, he saw that "guys had already started scaling ribs on the unit." *Id.* Seilhymer described some of the areas he walked. Tr. 417, Ex. P-2. In those areas, he described that the ribs looked good. There were some cracks, he acknowledged, but overall he believed that the ribs looked good and he added that the area was well rock dusted. Tr. 418. He described a crack as similar to a spider web but with a gap one can see down inside. In most cases, a gap is more dangerous because it indicates that the material is pulling away. *Id.* He admitted that the presence of a crack shows there is pressure present. That pressure causes the crack. Tr. 419. The cracks did not concern him at least in the sense that he did not feel there was a need to pull down the ribs at that time. *Id.* He didn't see any gaps, but admitted there might have been some. Still, he saw only small pieces. *Id.* While he saw one or two places that indicated some scaling may have been done, he did not see anybody scaling in that area while he was there. Tr. 420.

Seilhymer took many photos that day, some "80 or 90." Tr. 421. Ex. R-14. Photo 1, from those photos, was according to Seilhymer, generally representative of the rib material he saw that day. Tr. 422. When he took the photos, Inspector Fishback was not with him. The order had already been issued. Tr. 423. He maintained that the photos he took were not post-abatement efforts. *Id.* As with the other witnesses for the Respondent, Seilhymer maintained that only little pieces came loose. Tr. 426. He stated that the photos he took were representative of the conditions in the primary escapeway and also in the five or six crosscuts previously discussed by the witness. Tr. 431.

Seilhymer also informed that he was with Fishback when the order was terminated. Fishback required some additional prying but "most of it was small pieces." Tr. 432. The theme presented by Seilhymer was essentially that, in some instances, ribs Fishback believed needed scaling took great effort to bring them down. Typically, only small pieces were produced from those efforts. In one instance prying didn't work, nor did bumping the rib with a scoop. Ultimately, that instance required a scoop operator "ramming" the rib and even then, initially, the rib did not fall out. Tr. 437-439. Driving a machine into a rib is not a normal rib control procedure. Tr. 440.

On cross-examination,[14] Seilhymer agreed that all of the photos he took were basically in the primary escapeway, which is entry six on the map. Tr. 449. He took no photos in entry 8, nor 11, nor in any of the entries in crosscut 10, nor entry 4. Tr. 449-450. He agreed that he went down entry 6 and that was the only place he took photos. Tr. 450. He could not recall how long it took to abate the cited conditions. *Id.* He could not recall giving information to Inspector Tisdale, nor giving him a form. Tr. 450-451, Ex. P-7, at 4. As for the number of miners it took to abate the order, so that it could be terminated, Seilhymer acknowledged he may have stated this to Fishback but could not recall beyond that. Tr. 452. Though he admitted being down in the cited section between when the order was issued and when he took his photos, he did not know how much material was up at the working face. Tr. 454. Significantly, he admitted that he did not walk the entire section. *Id.* He did not think he went across the face, "because normally, *the face area didn't have deterioration as the out by areas*." *Id.* (emphasis added). Though he maintained that a person was designated to do scaling, he could not identify the individuals so assigned. Tr. 456-457. Seilhymer admitted that scaling was the chief remedy applied to address the situation. Tr. 457. Timbering was not discussed, nor was bolting into the ribs, nor wrapping the ribs with mesh or wire, primarily, he maintained, because the material was so small. *Id.*

The Court had a few questions for Mr. Seilhymer. Showing him Ex. P-2, Seilhymer acknowledged that he did not walk the entire area, as marked in orange highlighter on that exhibit that Inspector Fishback walked on the day in issue. Tr. 460-461. He stated that "[m]ostly [he] walked in by the tail piece other than entry number six. [He] walked it in its entirety." Tr. 461. Asked to estimate the percentage he walked of the area Fishback covered, he responded, "40 to 50 percent." *Id.* When he walked that 40 to 50 percent he was by himself. *Id.* As the mine superintendent at the time of this event, he acknowledged he was familiar with the cited standard: 30 C.F.R. § 75.202. Tr. 462. He was then asked, given the areas he just testified about where he walked following the order's issuance, did he see violations of that standard. Seilhymer responded, "[v]iolations, yes." Tr. 463. With refreshing candor, and appreciated by the Court, he affirmed that as his view twice more. *Id.*

Applicable Law

Unwarrantable Failure Violations

As the Commission has noted, "[t]he unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2002-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether the conduct is "aggravated" in the context of unwarrantable

[14] An interesting side note: Seilhymer, like Fishback, could not precisely identify the location of the photos he took either. In terms of how he knew the exact identification of a location, he simply responded, "[b]ecause I took the photo." Tr. 442, 444.

failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *see also Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000)." *American Coal Co.*, 39 FMSHRC 8, 9 (Jan. 2017).

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

"Significant and Substantial" Violations

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

Flagrant Violations Under the Federal Mine Safety and Health Act

In discussing preliminary matters with the parties in chambers before the hearing in this case began the Secretary indicated that he would proceed under a "repeat flagrant" theory of the case, instead of a "reckless flagrant" theory. The Secretary reiterated this litigation position in his opening statement. Tr. 15. The distinction between the two theories is more than academic, as the Secretary has two potential pathways to demonstrate a "repeat flagrant" violation under current Commission case law.

The flagrant violation provision is contained in Section 110(b)(2) of the Federal Mine Safety and Health Act ("Mine Act"). The provision was added to the Mine Act by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act") in the wake of the Sago Mine Disaster. Section 110(b)(2) provides that:

> [v]iolations 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).

The phrase "reckless or repeated failure" has been interpreted to encompass two types of "flagrant" violations. The first is a "reckless flagrant" violation, where the operator failed to take the steps a reasonably prudent operator would have taken to eliminate the known violation and consciously or deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. At hearing, the Secretary disclaimed his intent to pursue a reckless flagrant theory at hearing on this matter. Accordingly, there is no purpose served for the Court to discuss the reckless flagrant theory in greater detail here. Tr. 8.

As to a "repeated flagrant" violation, the Commission has established that can be proven in two ways.

Commission Interpretations of "Repeated Flagrant" Violations Under Section 110(b)(2)

The Commission currently recognizes two methods that the Secretary may use to prove a repeated flagrant violation under section 110(b)(2) of the Mine Act. The first approach – known as the "narrow" approach, requires the Secretary to prove that "there was a single, continuing violation serious in nature that the operator could or should have become aware of at some point, i.e., known, such that it had multiple opportunities to address the condition, but did not avail itself of those opportunities." *The American Coal Co.*, 38 FMSHRC 2062, 2065 (Aug. 2016) (*AmCoal*). In *AmCoal*, the Commission declined to delineate exactly how many opportunities to address the cited condition are necessary to prove a "repeated failure" under the narrow approach. The Commission did however agree with the parties in *AmCoal* that "two or three failures might amount to a flagrant violation in certain circumstances but not in others, depending on the particular facts." *Id.* at 2073. The principal difference between the "narrow" and the "broad" approach is that, under the "narrow" approach, the operator's past violative history plays no role in determining whether an operator "had multiple opportunities to address the condition." *Id.* at 2065.

The second approach – known as the "broad" approach – permits the Secretary to prove that the operator failed "to take reasonable steps" to eliminate a "serious, known violation" by reference to the operator's past violation history. The "broad" approach was first contemplated

by the Commission in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013) (*Wolf Run*). In *Wolf Run*, the Commission reversed the Administrative Law Judge's conclusion that past violative conduct may not be considered in determining whether a cited condition satisfies the repeat flagrant provision. However, the Commission did not articulate a standard for the Judge to apply the "broad" approach on remand, leaving the issue of which prior violations were relevant to the Judge's discretion.

While both the "broad" and "narrow" approaches remain valid under existing Commission precedent, the Commission in *AmCoal* again expressly left the issue of how to properly standardize the broad approach for another day, due to lack of consensus.[15]

Although the Secretary indicated that he intended to pursue this matter under a repeat flagrant theory, he did not state if his arguments would be restricted to the "broad" or "narrow" approaches. While both approaches remain valid under *Wolf Run*, the standard for utilizing the "broad" approach to find a repeat flagrant violation is evolving. By contrast, the "narrow" approach is largely settled Commission law under both *Wolf Run and AmCoal*.

Discussion

This case involves four distinct issues: whether the Respondent, Peabody Midwest Mining, LLC, violated 30 C.F.R. § 75.202(a), by not supporting or otherwise controlling ribs in certain identified entries on the MMU-002 and MMU-022 active working sections; whether the alleged violation was "significant and substantial; whether such violation was an "unwarrantable failure;" and finally, whether such violation constituted a "flagrant" violation under the Act. The Court read and fully considered the contentions advanced in the parties' post-hearing briefs. That any particular contention raised in those briefs is not explicitly discussed does not mean that it was not considered, but rather that the Court's findings of fact and analysis implicitly addresses the subject.

[15] *AmCoal* produced three separate opinions on the issue of the "broad" approach. Commissioners Cohen and Young concluded that the past history of similar violations was at least "generally relevant to the determination of flagrancy," as "the essence of a repeated flagrant violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility." *AmCoal*, 38 FMSHRC at 2090. (Cohen, C., concurring, joined by Young, C.). Commissioners Young and Cohen stated that "Judges should considerer allegations of repeated failure case-by-case, and should consider the operator's history of violations where it may be probative of the issue." *Id.* at 2090-91. Commissioners Jordan and Nakamura would have declined to reach the issue, as they concluded the conditions for a flagrant violation had already been satisfied under the "narrow" approach to proving a repeat flagrant violation. *Id*. at 2094-95 (Jordan, C., concurring, joined by Nakamura, C.). Commissioner Althen would have disregarded the broad approach entirely as unworkable, which would prevent the Secretary from ever considering an operator's past history of violations. *Id*. at 2099 (Althen, C., concurring in part).

The Violation Was Established

The section 104(d)(2) Order, No. 9036925, alleged loose coal ribs in 13 entries on the mine's MMU-002 and MMU-022 active working sections. The Court finds that the testimony of Inspector Fishback and that of Inspector Tisdale established that ribs in the cited areas were not supported or otherwise controlled to protect persons from hazards related to falls of the ribs. Accordingly, the violation was established. While the inspectors' testimony was sufficient, it is noted that Todd Seilhymer, who was the mine superintendent at that time, conceded that the conditions cited by the inspector constituted a violation of the standard invoked, 30 C.F.R. § 75.202(a).

The Violation Was Significant and Substantial

With the violation established, the first *Mathies* element has been met. The second *Mathies* element, a discrete safety hazard associated with the violation was also met, as the Secretary observes, by "the fact it is well known that falling rib material presents a discrete safety hazard to miners working underground." Sec. Br. at 36. As the Secretary also notes, "Section 75.202(a) is identified as a "Rule to Live By" standard, meaning it is one of the standards most commonly contributing to fatalities in the mining industry. Thus, it is sufficient to conclude that the violation contributed to a discrete safety hazard, as an inadequately supported rib could fall, presenting a risk of injury to any miner who happened to be present upon the rib falling. *The American Coal Co*., 36 FMSHRC 1311, 1326 (May 2014) (ALJ), *Peabody Midwest Mining LLC*, 2019 WL 935968, at *9 (Feb. 2019) (ALJ). There is more to say. The Commission in *Newtown Energy*, 38 FMSHRC 2033 (Aug. 2016) stated that, for the second prong of *Mathies* to be satisfied, there must be "a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id*. at 2038. Given that the record establishes that at least some of the ribs needed scaling, those conditions required prompt attention, as the record also establishes that there was exposure to them. Respondent's witness Frederick himself, while affirming that he could not remove much of the rib Fishback identified as a problem, acknowledged that *some* of the rib pieces were large – about two to four feet – and that pieces that large could cause a serious injury. Tr. 355, 362. Thus, the discrete safety hazard was not an academic exercise – it was reasonably likely that the hazard of a falling rib would occur, given the circumstances of the violation in this case.

As for the third and fourth *Mathies* criteria: a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature, these elements are supported by the testimony of Inspector Fishback. Miners regularly walked and worked in the area inspected by Fishback. Tr. 117, 175. Assuming, as required by the Commission in *Newtown Energy*, that the hazard identified is a rib fall, the presence of miners in the area makes it reasonably likely that the hazard contributed to will result in an injury. This satisfies the third prong of *Mathies*. Further, based on at least some number of the ribs for which he had safety concerns, the exposure to those concerns by miners in those areas, and Fishback's credible testimony that, if a miner were struck by a falling rib, the injury would be of a reasonably serious nature, the fourth prong of *Mathies* was established.

Accordingly, Fishback's order and accompanying testimony, supports his finding that the violation was S&S. Tr. 115-119. That Inspector Tisdale credibly testified to observing material from pried ribs falling into the travelway, at a time when the mine believed that the conditions had been sufficiently addressed to warrant lifting the order, supports those elements as well.

The Violation Was Not an Unwarrantable Failure

As mentioned above, unwarrantable failure, is more than ordinary negligence, and has been described as conduct involving "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Viewing the credible testimony as a whole, the Court cannot conclude that those terms apply in this instance. In reaching this conclusion, the Court has considered all the facts and circumstances, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance.

Before specifically addressing those seven factors, the Court takes note of its previous decision involving this mine, which addressed the same mud seam and the same section as in this matter, together with the specific facts involved here. In that earlier decision, *Peabody Midwest Mining, LLC*, 40 FMSHRC 87 (Jan. 2018) (ALJ),[16] the Court determined that the violation did not involve an unwarrantable failure by Respondent, Peabody Midwest. There, speaking to a violation of the same standard, 30 C.F.R. § 75.202(a), this Court found that "the Respondent was making some good faith efforts to address the ribs [and that] [t]o be fair, the mud seam was a bedeviling situation; the conditions could change as that seam dried out and it *was not entirely unreasonable for miners to reach different conclusions about the timing of the need for action to control the ribs*." *Id.* at 141, addressing Order No. 9036922. (emphasis added).

As discussed below, the Court believes that its previous analysis similarly bears upon the unwarrantable failure claim in issue here. While the Court has determined that the standard was violated, concluding that Inspector Fishback did observe areas of rib rash and broken rib conditions, and that he found various rib cracks and that some of them were gapped and had rock dust behind them, the unwarrantable failure issue is not similarly supported by the record.

For example, per the inspector's testimony, the miner accompanying him, Mr. Hayden, did not remain mute, but rather voiced that the mine had been prying on the ribs when Fishback asserted otherwise. Further, Fishback, repeatedly responded, when asked if he saw anyone working on the ribs during this time, that he could not remember such activity. Thus, he was unable to deny that such activity was occurring.

[16] The Court's January 26, 2018 *Peabody Midwest Mining LLC* decision also encompassed Docket No. LAKE 2016-0232, but none of the five orders in that docket involved 30 C.F.R. § 75.202(a), the standard in issue in this case.

Also supporting the Court's determination that unwarrantability was not established is that Fishback himself viewed the support for his order as resting upon the entirety of the rib conditions he asserted finding that day. Thus, he did not commit that any single instance alleged to have been found would constitute a violation. Tr. 100-101. It is also worth noting that, regarding the many photographs he took that day, Fishback admitted that he could not detect such material on the ground in the photos and counsel for the Secretary also stipulated that in photos 1 through 22, 35, 36, and 53 through 55 of Ex. P-5, they do not show material on the ground. Tr. 142-143.

Additionally, the issue of when a rib needs to be taken down is not always a simple determination. There can be good faith differences on the timing for such action. Further, in the Court's view, that Fishback asserted by inquiring "don't you think we need to pry some ribs around here," illustrates that whether a given rib needs immediate attention can be a subject of legitimate debate. Tr. 113. As Inspector Tisdale's testimony shows, while some ribs he viewed came down easily, others required "effort to take them down." Tr. 202.

Zachary Hudson, a fill-in boss at the time in issue, testified along the lines of the Respondent's other witnesses – namely that the mud vein presented issues but that those ribs which did need attention produced only small chunks of material. Tr. 283. He also was of the view that a gapped rib was not necessarily indicative that it was loose in fact. Because there was some past friction between Hudson and Fishback, the Court has relied more on the testimony of the Respondent's other witnesses in reaching its conclusions about the conditions. This does not reflect disbelief over Hudson's testimony. Rather, because other witnesses for the Respondent support the Court's conclusions, it is unnecessary to place great emphasis on Hudson's testimony.

Chase Reneer, a roof bolter on Unit 2 working the B crew at the time in issue, also testified that the rib pieces that came out were only little pieces, nothing big. Tr. 319-321. He too saw miners attending to rib issues through prying. Also, Reneer had a similar experience to that expressed by other miners, in that upon Inspector Fishback identifying a problem rib, he was unable to pry the rib down. Tr. 326-327. He also affirmed the incident that a rib identified as a problem by Fishback could not be brought down by Frederick. Thus, Reneer's testimony supported the view that determining if and when a rib needs attention can be subject to good faith differences. Applying that perspective, the mine applied a practice of trying to pry down a suspect rib, but if it would not come down it was left alone for the time being.

Jonathan Butler, then working as a ventilation curtain operator in Unit 2, held to the theme of many of the other witnesses for the Respondent, that the material which came down from the ribs was small and flaky. Tr. 372. Similar to the other witnesses for the Respondent, Butler expressed the view that sometimes it is premature to pry down a rib, that one doesn't "go just looking to pry stuff down if that's not ready." Tr. 373.

Todd Seilhymer also testified along the lines of the other witnesses for the Respondent, asserting that the condition was primarily controlled by scaling and that most of the material came out in small pieces. Tr. 398-399. He also stated that, when on the cited unit, he observed miners performing scaling. Tr. 401. As with the other witnesses for the Respondent, Seilhymer distinguished between cracks and gaps, with the latter needing prompt attention.

Upon considering the testimony of several of the Respondent's witnesses and upon concluding that, embellishments aside,[17] they presented credible testimony regarding the general condition of the ribs, the Court finds that there were legitimate differences of opinion as to the condition of the ribs and whether those conditions required immediate attention or watchfulness. For example, Winters, and several other witnesses for the Respondent, described relatively small amounts of coal that came down with prying. Another example demonstrating that there can be legitimate differences of opinion as to when a rib needed attention, Travis Hayden, section foreman, presented the example of a rib that Inspector Fishback believed to be loose but that Hayden was unable to bring it down. Tr. 246. A second instance was offered where Fishback identified a rib he believed in need of attention, but the rib could not be pried. Tr. 256-258. Hayden also stated that he identified instances to Fishback where scaling had been done but it is noted again that the Secretary, who has the burden of proof, did not use the process of rebuttal testimony to contradict such claims. Tr. 260.

Accordingly, when assessing credibility, the Court considered it to be important in this matter that the Secretary did not, through rebuttal testimony, refute the many assertions made by the Respondent's witnesses. The Court cannot simply ignore those credible accountings, which reflected a difference between a perceived rib condition requiring attention and one that in fact, arguably, was premature for scaling.

Another example demonstrating that the mine was not ignoring the rib issue and therefore of relevance to the unwarrantability issue, was that the mine also addressed the mud seam/rib issue by shearing corners with a continuous miner, thereby cutting it at an angle. This practice prevented such corners from falling out. Tr. 217. Also bearing on the unwarrantability issue, Fishback acknowledged that the pre-shift and on-shift record books reflected that the production crews had been prying down ribs. Tr. 115. It was unrebutted that that the mine always had a person dealing with ribs full time on each shift. Tr. 214- 215.

[17] Embellishments alone may not doom testimony. For example, the small, crumbly, flaky material so uniformly testified about by the Respondent's witnesses is at odds with the amount of time it took to correct the rib issues and with the amount of material from those activities that had been placed at the face but even that is not easily resolved. This is because of testimony that the presence of the mud seam meant that one could pick at a rib and eventually bring material down, sometimes with great effort. Once the order was issued the mine had to make such efforts in order to resume production. Those efforts could have included ribs which were difficult to take down, as the record reflects instances where Fishback required attention to some ribs that required such efforts.

Applying the seven factors, and speaking to the first four of them – (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, and (4) whether the violation was obvious, there was credible, good faith, disagreement between the government's and respondent's witnesses for each of those factors. The same good faith disagreement was present as to factor (5) the operator's knowledge of the *existence of the violation*, because the condition of at least some of the ribs did not call for scaling at that time. In such instances the existence of a violation was in issue. Factor (6), the operator's efforts in abating the violative condition, has been discussed and, similarly, the last factor, (7), whether the operator has been placed on notice that greater efforts are necessary for compliance, while notice was present, it was acted upon by the operator, and greater efforts were made.

The Violation Was Not Flagrant

Because of the seriousness of an alleged flagrant violation, which encompasses 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 and because of the potential monetary impact, since a civil penalty up to $220,000 may be imposed where a violation is established, whether the alleged violation was flagrant is a notable issue.

The Secretary's Repeated, not Reckless, Flagrant Claim

As noted, the Secretary's flagrant allegation rests upon a "*repeated*" failure theory, *not* the *reckless failure* theory. The repeated failure theory can be established in two distinct ways. There is the *narrow approach*, which is ahistorical, by showing either a single, continuing, serious in nature, violation that the operator could or should have become aware of at some point but, despite multiple opportunities to address the condition, the operator failed to take action. The other is the *broad approach*, which is established by showing that the operator failed "to take reasonable steps" to eliminate a "serious, known violation" by reference to the operator's past violation history.

The Narrow Repeated Claim

In this instance the narrow approach fails because there was not a single, continuing, violation in the sense that the Court has not found that each rib described by the inspector was a violation. Some conditions in the cited area violated the standard, but each rib presented its own question. Thus, there was not a reflexive, required, remediating response for each location named by the inspector. Some indeterminate number of the claimed violative conditions did not violate the standard in the sense that scaling or some other action was not required then and there. The credible testimony, as described above, establishes this determination by the Court.

In addition, some reasonable efforts were made by the mine operator to address the effects of the mud seam, through scaling when the miners determined such action was needed, by assigning one miner per shift devoted to rib safety and through the control method of shaving corners.

Viewing the testimony overall, there is ample support for the conclusion that there could be honest differences of opinion regarding whether and when action was needed for a given rib location. That this was the case was shown by those instances when a rib was identified as a problem by Inspector Fishback but which would not come down or would not come down without unusual effort. Thus, in the Court's view, based upon the record testimony, it was not inherently unreasonable for a miner to conclude that a crack in a rib needed to be watched as opposed to requiring immediate action. If the former situation obtained, immediate action would not be required under the standard, as it requires ribs to be supported or otherwise controlled to protect persons from hazards related to rib falls. The decision to designate a miner on each shift to deal with rib issues in the cited area, a decision which came about because of an earlier order addressing rib control, shows that the mine did not simply sit on its hands so to speak and ignore rib control. This is not to say that there were no violations. There were and the Court has found that that the violation was established, and that it was significant and substantial, though no longer warranting the designation of a 104(d) order, as it lacked unwarrantability.

The Broad Repeated Claim

So too, the broad approach, viewing past violative conduct, in order to establish a flagrant violation comes up short, because the Court in this instance and in an earlier instance entailing a decision involving the same mud seam area, determined that there was no unwarrantable failure involved. Given the near identity of the conditions in the prior decision and in this instance, it would be anomalous to conclude that the earlier instance, which was not an unwarrantable failure, grew into an unwarrantable failure here, especially where the mine operator took action after the earlier instance by assigning a designated miner on each shift to address rib control.

Beyond the analysis set forth above, the Court observes that reaching the question of whether a violation is flagrant contemplates a progression – one does not advance to a determination of whether an alleged violation is flagrant unless it is first determined that there was a violation, that it was significant and substantial and that it was an unwarrantable failure. Finding that there was no unwarrantable failure precludes a finding that a violation is flagrant. In other words, with no unwarrantable failure established, one cannot reach the issue of a flagrant violation, as such conduct is a step beyond that.

The Commission has previously stated that a Commission Judge is required to convert a 104(d)(1) order to a 104(a) citation where the order "lacked the required bases to stand as either a section 104(d)(1) order or 104(d)(1) citation." *Lodestar Energy, Inc*., 25 FMSHRC 343 (July 2003); *Cyprus Cumberland Res. Corp*., 21 FMSHRC 722, 725 (July 1999). As the Court determined, for the reasons described above, that Order No. 9036922 lacked the unwarrantable failure necessary to sustain a citation or order under section 104(d), it is concluded that Order No. 9036922 must be modified to a 104(a) citation.

Penalty Determination

Overview of Penalty Assessments

As this Court noted in its decision in *Peabody Midwest Mining LLC*, 2018 WL 816286 (Feb. 2018) (ALJ):

> In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the 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 on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).
>
> That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has noted that the "Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. … If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness. [*The American Coal Co*., 38 FMSHRC 1987, 1993-1994 (Aug. 2016)], (citing *Sellersburg Stone Co*., 5 FMSHRC 287, 293 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984))." *Consolidation Coal Co*. 38 FMSHRC 2624, 2643-2644 (Oct. 2016) (ALJ Moran).

Id. at *51-52.

Further, the Commission has recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria. Rather, "[j]udges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc*., 23 FMSHRC 705, 713 (July 2001). … Indeed, the Commission has held that Judges have not abused their discretion by more

heavily weighing gravity and negligence than the other penalty criteria. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept. 2016); *Signal Peak Energy*, LLC, 37 FMSHRC 470, 485 (Mar. 2015).

Penalty Assessment for the Former 104(d)(2) Order, Now Modified to a 104(a) Citation, No. 9036925

As noted, the Secretary has alleged that Order No. 9036925, a section 104(d)(2) order, was an unwarrantable failure and a significant and substantial violation of 30 C.F.R. § 72.202(a), and that it was also a repeat flagrant violation pursuant to the MINER Act, under 30 U.S.C. § 820(b)(2), for which, on those grounds, he sought the assessment of a civil penalty in the amount of $165,700.00.

Based upon the record evidence and discussion thereof, the violation and its significant and substantial nature have been upheld, but the unwarrantable failure and flagrant designations no longer stand. The same mud seam, as described in the Court's February 2018 decision, remained a bedeviling situation, but Peabody did not simply continue with business as usual following that earlier litigation, as it assigned an individual each shift solely to deal with the ribs impacted by the mud seam.

Could the mine have done better? The answer to that question is definitely "yes," as reflected by the fact that some, *but not all*, of the amount of material that was scaled following the issuance of the order. Given the mud seam, the credible testimony was that if one were to work at rib issues long enough some material would come down. The unrebutted testimony is that some of the ribs identified by the inspector as needing scaling then and there, in fact did not need attention at that time, as reflected by this Court's finding that, in some instances the material would not come down and in some instances only small amounts came down from such efforts.[18] Thus, the Court has found that there could be honest differences of opinion as to whether a particular rib was in need of, that is to say, ripe for, immediate attention or whether it was premature to act.[19]

The Court considers it significant that, in the face of testimony from multiple witnesses for the Respondent testifying about disagreements as to whether a given rib location was ripe for scaling and the lack of success, in some instances, to achieve results from scaling attempts, the Secretary did not recall any witness, and particularly did not recall Inspector Fishback, to challenge the Respondent's claims.

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[18] On the issue of the extent of material produced through scaling, recall that Counsel for the Secretary stipulated that photos 1 through 22, 35, 36, and 53 through 55 in Exhibit P-5 do not show material on the ground. Tr. 143.

[19] **The Court hopes that the message from this decision to Peabody, and perhaps more importantly to its miners, is *not* that ribs may be viewed with casualness and that the efforts being made sufficed. Such an attitude would be misguided, and only invite serious injury or worse.**

Had Order No. 9036925 been regularly assessed, the proposed penalty would have been $44,645.00. Respondent's post-hearing brief at page 58 n.60. The Secretary has agreed this figure is correct. However that calculation assumed that the violation was an unwarrantable failure, and involved high negligence, neither finding to which the Court subscribes. *See* Order No. 9036925 and associated "Narrative Findings for a Special Assessment." ("Narrative").

As the Court has determined that the principal bases for specially assessing this violation – specifically, the flagrant designation and the unwarrantable failure designation – are inappropriate in the Court's appraisal of the facts and application of the law, it concludes that in this case the proper baseline for the *Sellersburg* substantial deviation requirement, as described above, is the violation as it would have been calculated under the regular assessment formula which would have been $44,645.00.

The Penalty Criteria as Applied to this Matter.

The operator's history of *previous* violations, and the appropriateness of such penalty to the size of the business of the operator charged were set forth in the Narrative and they are not in dispute. The mine is large, measured by both its size and the controlling entity's size. The history of violations per inspection day and repeat violations were on the high end. The effect on the operator's ability to continue in business is not in dispute and, even had the Court adopted the proposed penalty for the alleged flagrant violation, would not impact that criterion in this instance.[20] The mine operator clearly demonstrated good faith in attempting to achieve rapid compliance after notification of a violation.

That leaves gravity and negligence for discussion. As for gravity, based on the credible evidence of record, the Court finds that it was reasonably likely for an injury to have occurred. The injury, should one have occurred, fell between lost workdays or restricted duty and permanently disabling. For those reasons, the Court concludes the Secretary correctly determined that the violation was significant and substantial, and upholds the Secretary's designation.

As for negligence, as explained above, the Court finds that it was moderate, but did not constitute an unwarrantable failure. A corresponding downward departure from the regularly assessed penalty of $44,645.00 is therefore warranted.

For those reasons, upon application of the statutory penalty criteria, and consistent with the credible evidence of record, the Court imposes a penalty of **$40,000.00** for this violation, Order No. 9036925, an amount which the Court considers to be both an appropriate, and significant, penalty under the circumstances. Order No. 9036925 is also modified to a section 104(a) citation.

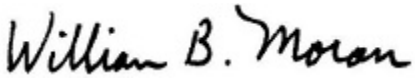
[20] The parties stipulated that payment by Respondent of the proposed penalty of $165,700.00 would not affect Respondent's ability to remain in business. Tr. 10.

Summary

It is **ORDERED** that, as it is not an unwarrantable failure, **Order No. 9036925** is **MODIFIED** to a Section 104(a) citation.

It is further **ORDERED** that, within 30 days of this order, Respondent pay a penalty of **$40,000.00** for this violation.

Upon receipt of the sum of $40,000.00, this case is **DISMISSED.**



William B. Moran
Administrative Law Judge

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