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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PEABODY MIDWEST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2019-0023 A.C. No. 12-02295-474164 Docket No. LAKE 2019-0122 A.C. No. 12-02295-478356
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MICHAEL BUTLER, employed by PEABODY MIDWEST MINING, LLC, Respondent.	Docket No. LAKE 2019-0361 A.C. No. 12-02295-497867 A Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Barbara M. Villalobos, U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

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Before: Judge Simonton

I. INTRODUCTION

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d) and 820(c) ("the Act"). [1] In dispute are three section 104(d)(1) orders issued to Peabody Midwest Mining, LLC ("Peabody") and two companion section 110(c) penalty assessments issued to Michael Butler ("Butler"), alleging his personal liability as an agent of Peabody.

The parties presented testimony and documentary evidence at a hearing held in Evansville, Indiana on March 3-4, 2020. The Secretary presented testimony from REI drill operator Robert Ferrin, MSHA inspector Keith Duncan, MSHA special investigator Phillip Stanley, and MSHA inspector Chris Persinger. Peabody presented testimony from hourly miner John Stevens, maintenance foremen Brad Cary, production supervisor James Ford, mine manager Michael Butler, general manager Brad Rigsby, maintenance manager Charles Lyons, and maintenance supervisor Michael Trueblood. The parties each filed post-hearing briefs.

II. FINDINGS OF FACT

Peabody operates the Francisco Underground Mine ("Francisco"), a coal mine located in Gibson County, Indiana. Jt. Stip. 2. In July 2018, Peabody employed a contractor, REI Drilling, to conduct horizontal longhole drilling in the "0" return entry for Unit 3. Jt. Stip. 19. The drilling was performed in order to identify old works in close proximity that might be intersected when the continuous miner on Unit 3 advanced. *Id*. This exploratory drilling is safer to do ahead of mining activity so that a barrier may be established, and the operator can be confident that abandoned workings are not too close to new ones. Tr. 398. Prior to July 2018, horizontal drilling had taken place three times before at Francisco, and in each of those instances, drilling was conducted without encountering old works. Jt. Stips. 21, 22. On July 23, 2018, however, the drill intersected old works, causing methane gas to leak into the mine. Jt. Stip. 26; Tr. 36, 261. This incident led to the issuance of the violations at issue in these matters.

A. The Drill Encounters Old Mine Works

At about 9:00 p.m. on July 22, 2018, REI drill operator Robert Ferrin and his assigned helper, Peabody employee John Stevens, arrived at the drill site in the 0 entry between crosscuts 65 and 66. Jt. Stip. 25; Tr. 248. As they worked, Ferrin operated the drill and Stevens worked at Ferrin's direction, loading the drill rods. Tr. 33, 249. After drilling for several hours, the drill hit a void at approximately 1:49 a.m. on July 23, 2018. Jt. Stip. 26. The drill rods jumped forward much faster than normal, and air began to exit the borehole at significant pressure. Tr. 34-35, 250; Jt. Stip. 26. The sound of the air escaping was very loud. Tr. 53, 290.

[1] In this decision, the joint stipulations, transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S-#," and "Ex. R-#," respectively.

Stevens immediately went to the phone to call the tracker, and asked the tracker to contact mine manager Michael Butler and inform him that he was needed at the drill site. Tr. 254. He provided no other information to the tracker. Tr. 254. Stevens' spotter—the methane detector on his person—showed elevated methane levels "just moments" after the drill encountered the void, and the level went up to "over range," which indicates greater than 5% methane concentration. Tr. 253, 261. He could not recall whether his spotter went off before or after calling the tracker. Tr. 254. Butler received the call to go to the drill site at approximately 1:50 a.m. Tr. 376.

Stevens returned to the drill, and Ferrin, having realized that they had "punched into the old works," told Stevens to engage the blowout preventer ("BOP"). Tr. 50, 252. The BOP is a device that seals the hole and contains the methane behind the wall to stop it from entering the drill site. Tr. 50, 60. In Ferrin's experience in other methane inundation incidents, the BOP has successfully contained the escaping gas. Tr. 63. In this instance, however, the pressure buildup was so great that the gas began to come out the rib itself, so Ferrin told Stevens to stop engaging the BOP. Tr. 61, 65, 252. Ferrin did this because he did not want to blow out the drill casing, which would have caused him to lose all control over the escaping gas. Tr. 61-63.

Ferrin then directed Stevens to begin pulling out drill rods so that they could install a plug. Tr. 35, 51, 253. This was no small task, as the rods are approximately 10 feet each in length, and the drill had drilled in about 900 feet. Tr. 50. The drill rods needed to be removed in order for the hole to be plugged, so that a "packer" could be pushed into the hole and form a plug. Tr. 51, 73. Stevens' spotter continued to alarm throughout the time that they were pulling rods. Tr. 262. Ferrin's spotter went over range during the methane inundation as well. Tr. 43.

The methane detector on the drill causes the drill to shut down when methane reaches a concentration level of two percent. Tr. 43-44, 70, 364. During this incident, the methane level at the drill site fluctuated. Tr. 43-44, 70, 119-120, 264. Therefore, after each time the drill kicked power off due to elevated methane levels, the methane level diminished to a point where Ferrin was able to restart the drill and continue working. Tr. 44. Both Ferrin and Stevens agreed that the drill shut down and was restarted a total of two or three times during this inundation before the drill was de-energized and the mine evacuated. Tr. 44, 100, 349.

B. Mine Manager Michael Butler Arrives at the Drill Site

Minutes after Stevens called the tracker, at approximately 1:53 or 1:55 a.m., Butler arrived at the drill site. Tr. 101, 335-36, 376-77. He brought maintenance foreman Brad Cary with him, since at that point he thought there might be a problem with the drill. Tr. 276, 335; Jt. Stip. 27. Cary stayed back, near the drill tender approximately 10 feet from the drill, and Butler continued walking down toward the drill. Tr. 286. Butler met up with Stevens just inby the drill tender, and Stevens informed him that they had drilled into old works and that Steven's spotter was reading over range. Tr. 336-337, 368-69. Butler then walked up to the drill to speak with Ferrin. Tr. 337. Butler leaned in to ask Ferrin a few questions, and as he leaned over the drill, Butler's own spotter went off. Tr. 338. He looked at it and saw that it was over range. Tr. 338. At hearing, Cary could not recall whether his spotter ever alarmed near the drill tender. Tr. 277, 294.

Ferrin told Butler that they had breached old works, and Butler asked him what the procedure was because Butler knew "nothing about that drill." Tr. 38, 339. Ferrin told him that they had to pull out the drill rods and plug the hole. Tr. 339. Butler thought that sounded like a wise thing to do, and figured that if something was "off," they would have already had an explosion by the time he arrived at the drill site. Tr. 345-46. Ferrin had made the decision to pull rods prior to Butler's arrival, but testified that the decision to continue pulling the rods and attempt to plug the hole was "kind of discussed between everybody," including Butler, once Butler had arrived at the drill site. Tr. 44-45.

Butler then went to the phone and called the tracker. Tr. 340. He told the tracker what was going on and informed him that he needed to "make some phone calls and get some people out of bed." Tr. 340. After calling the tracker, Butler told Cary to return to Unit 3, kill power on the Unit 3 equipment, and evacuate the miners on the unit. Tr. 290, 340, 347. Unit 3 was inby the drill site in close proximity, and, according to Butler, evacuating the miners on the unit was a "no-brainer." Tr. 340, 383.

Once back at Unit 3, Cary found production supervisor James Ford, and told Ford that the drill had hit a void and that they needed to evacuate. Tr. 278, 317. They ensured that the equipment was backed out and power was killed, and then conducted a head count and sent the miners outside. Tr. 278, 317. Once everyone on the unit had evacuated, Ford went over to the drill site. Tr. 317. Cary stayed at Unit 3 and killed power on the back of the power center, which shut down power to everything on the unit. Tr. 279, 291-92. Butler had specifically told Cary not to kill power to the power center that provided power to the drill, so he only shut off power to the unit. Tr. 292. He then also went back to the drill site. Tr. 279.

Ford initially approached the drill site by coming up crosscut 65, outby the drill, but his spotter alarmed and went over range. Tr. 326. He then retraced his steps and approached the site by traveling up crosscut 66, inby the drill. Tr. 326-27. When Ford arrived at the drill site, Butler told him to go get some curtains to ventilate toward the drill. Tr. 318. He went back to the unit to retrieve the curtains, and then hung two curtains in order to provide more air flow to the drill site. Tr. 318-21; Ex. R-A-2. He also opened a man door for additional ventilation. Tr. 321.

When Cary returned to the drill site after shutting down the power to Unit 3, he was accompanied by mechanic Jesse Mitchell. Tr. 292. At this point, only Ferrin, Stevens, Butler, Cary, Ford and Mitchell remained underground. Tr. 293; Ex. S-10B. When Cary approached the drill site, he saw that Butler was on the phone. Tr. 282.

C. General Manager Brad Rigsby Orders the Miners to Stop Work and Evacuate

Above ground, by this point, Francisco's general manager Brad Rigsby had been contacted. The tracker called Rigsby at his home and informed him that the drill had intersected an old mine and that gas was coming out of the hole. Tr. 400. Rigsby did not have any information about methane levels, but he had "enough" information to instruct the tracker that they needed to cease operations on Unit 3 right away and get ready to pull out. Tr. 400-01. Rigsby then left his home and headed to the mine. Tr. 401. On his way in, Rigsby made calls to mine personnel and to MSHA district manager Ron Burns. Tr. 401-02. Rigsby told Burns what the tracking office had told him, and Burns told Rigsby that they needed to evacuate. Tr. 402. Rigsby interpreted Burns' instruction in their initial conversation as a directive to evacuate the "affected area," which Rigsby believed was "the split going into Unit 3." On a later call between Rigsby and Burns, Burns clarified that they were to evacuate the entire mine, not only Unit 3. Tr. 402.

When he arrived at the mine, Rigsby called Butler, who was still at the drill site. Tr. 403-04, 414. Butler did not relay any methane levels, but he did inform Rigsby that they were getting ready to insert the packer in the hole. Tr. 404-05, 415. The drill rods had all been removed, the plug had been inserted in the casing, and they had just started to push it into the hole. Tr. 350. Prior to this conversation with Butler, Rigsby was not aware that any work was occurring at the drill site. Tr. 417-18. As soon as he learned of that activity, and still without knowing any methane levels, Rigsby told Butler to stop, just let the hole "bleed," and come out of the mine. Tr. 415.

After Butler got off the phone with Rigsby, he briefly spoke with Cary and told him to go kill power to the drill. Tr. 298-99, 347. Cary and Mitchell went together to de-energize the drill. Tr. 280-81. They went to the roadway and killed power at the vacuum breaker and put a lock on it. Tr. 280. Then, they went back to the drill and Butler informed them that they were going to evacuate. Tr. 282. When Ford finished hanging the curtains, the others were evacuating. Tr. 321-22.

When the miners finally evacuated, there was still air coming out of the hole. Tr. 363. The six miners left in the mine evacuated at the same time. Tr. 293. On their way out of the mine, Cary killed power at another vacuum breaker and then, once out of the mine, he put a lock on the substation which "killed all power on the rim." Tr. 282. Ford and Butler were the last people to exit the mine. Tr. 324. Ford's notes indicate that he evacuated at 3:00 a.m. Ex. R-H. Tracking records indicate that both Butler and Ford left the drill site at 3:11 a.m. and arrived at the surface at 4:28 a.m. Ex. S-8; Tr. 106-107.

D. The Hole is Plugged on July 24, 2018

The hole was plugged the next day, on the evening of July 24, 2018. Jt. Stip. 28. Ferrin again operated the drill. Tr. 54, 72. Also present were state mine inspector Steve Riley and MSHA inspector Chris Persinger. Tr. 356, 379. Even then, air was still loudly rushing out of the hole. Tr. 72, 379-80, 469. Butler testified that he also went to the drill site that night, and he heard someone's spotter beeping. Tr. 355. However, Persinger took seven methane readings while he was at the drill site, both inby and outby the drill, and all were less than one percent. Tr. 465-68, 470. None of the readings were taken standing next to the drill. Tr. 471. Persinger testified that he never heard anyone's spotter alarm, and if he had, he would have "shut everything off." Tr. 468, 474.

The plug was placed approximately 400 or 500 feet inside the hole. Tr. 64. More than 600 feet of cementitious grout was applied, and the hole "was dead at that point." Tr. 411. The abatement was completed by the morning of July 25, 2018. Tr. 420.

E. The Permissibility Exam

The July 2018 drilling project at Francisco began on July 11, almost two weeks before the methane inundation incident. Jt. Stip. 24. On that date, before the drill was put into service, Peabody conducted a permissibility examination of the drill. Tr. 129-130. The purpose of a permissibility exam is to examine the electrical components of the equipment to ensure that the equipment is safe and does not present an ignition hazard. Tr. 435. Though the drill belongs to the contractor, REI Drilling, Peabody is responsible for conducing permissibility exams, and they are supposed to be conducted on a weekly basis. Tr. 134, 426, 454. During the July 11 exam, Peabody discovered that the "sniffer head," or methane sensor, on the drill was in need of replacement. Tr. 129-30; Ex. S-7, p. 2. It was replaced and the drill went into service. Tr. 130.

No additional permissibility exams were reported for the drill equipment between July 11 and the July 23 incident. Tr. 429; Ex. S-7. An exam was conducted on July 24 following the breach into old works on July 23. Ex. S-7, p. 7. During that exam, Francisco maintenance supervisor Michael Trueblood and foreman Robert Ewers identified six issues with the drill. Tr. 446-52; Ex. S-7, p. 7. They corrected all the issues, and Trueblood testified at hearing that none of the issues they identified were of serious concern in terms of their potential for causing an explosion. Tr. 455-56.

F. Violations

MSHA inspector Keith Duncan conducted an investigation of the July 23, 2018 incident. On August 16, 2018, he issued Order Nos. 9106663, 9106664, and 9106665 to Peabody. Jt. Stips. 9, 10, 11. Following a special investigation, MSHA also proposed penalties against Butler, requesting that the Commission hold him personally liable under section 110(c) of the Mine Act for his role in the violations alleged in Order Nos. 9106663 and 9106664. Jt. Stip. 18, Pet. for Assessment of Civ. Penalty at 2 (Sept. 13, 2019).

III. DISPOSITION

A. Order No. 9106663

1. The Violation

In any enforcement action, the Secretary bears the burden of proving an alleged violation by a preponderance of the evidence. *RAG Cumberland Resource Corp.,* 22 FMSHRC 1066, 1070 (Sep. 2000). The Secretary may sometimes establish a violation by inference, but only when the inference is inherently reasonable and there is a rational connection between the evidentiary facts and the conclusion inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138 (May 1984).

In Order No. 9106663, the Secretary alleges that Peabody violated section 75.323(c)(2)(ii) of MSHA's health and safety regulations, which mandates that

> [w]hen 1.5 percent or more methane is present in a return air split between the last working place on a working section and where the split of air meets another split of air, or the location where the split is used to ventilate seals or worked-out areas—
>
> . . . .
>
> [o]ther than intrinsically safe AMS, equipment in the affected area shall be deenergized, electric power shall be disconnected at the power source, and other mechanized equipment shall be shut off.

30 C.F.R. § 75.323(c)(2)(ii). In Order No. 9106663, Inspector Duncan reported that the drill at Francisco remained energized for 35 minutes in the midst of a methane inundation on July 23, 2018, that resulted in methane concentrations ranging from 1.5% to over 5% in the area. Ex. S-2. Given the risk of combustion, Duncan found that the violation created a reasonable likelihood that a fatal injury would occur, and that this risk affected 10 miners. *Id*.

It is clear the drill remained energized despite methane levels exceeding 1.5 percent. The overwhelming weight of the evidence presented at hearing supports this conclusion. The drill, which is designed to shut down when methane concentration reaches two percent, shut itself off two or three times, indicating that it had indeed been operating in violation of the standard when methane levels were between 1.5% and 2%. Tr. 70, 264. Ferrin also admitted that his spotter detected methane levels that were over range (greater than 5 percent) at some point during the inundation, and yet he continued to use the drill to plug the hole. Tr. 43. Ferrin's helper, Stevens, who was tasked with pulling rods at the drill site, also testified that his spotter alarmed and went over range. Tr. 262. He reset it several times and yet the readings went over range again within a minute throughout the time that the miners unloaded drill rods out of the bore hole. Tr. 262.

Butler arrived at the drill site around 1:55 a.m. and oversaw the drill's continued operation. Tr. 107-08, 376. He immediately learned from Stevens that the drill had encountered old mine works. Tr. 336. When speaking with Stevens, Butler learned that Stevens' spotter had a reading of over range. Tr. 370-71. Butler then leaned over the drill to talk to Ferrin, and Butler's own spotter went off, registering yet another methane reading that exceeded the device's detection range. Tr. 370-71. The data presented by the Secretary shows that the methane readings on Butler's spotter were consistently over range. Ex. S-9A. Butler was therefore almost immediately on notice that methane levels near the drill were unacceptably high. As mine manager, Butler had the authority to shut down the drill that night. Tr. 366. He failed to do so, even after seeing several indications that methane concentrations in the mine were in excess of 1.5%. In sum, Peabody continued to work with energized electrical equipment when methane levels exceeded 1.5%, and thus the fact of violation is proven.

The inspector's gravity findings were reasonable, given the risk presented by the methane inundation. Inspector Duncan testified that a fatal injury could be expected because methane levels at various times exceeded five percent and therefore presented a major combustion risk. Tr. 122. This is supported by methane spotter logs and other information in the record. *See* Exs. S-9A, S-9B, and S-9C. Methane combustion could have easily caused a mine explosion, and history counsels that such explosions are often deadly. Tr. 123. According to Duncan's experience, the presence of oxygen, high levels of methane, and an ignition source (the energized drill) made the risk of combustion reasonably likely. Tr. 122. Finally, Duncan testified that the explosion risk affected at least 10 miners who were underground at the time, which is supported by the record. Tr. 167-68, 315-16, 333, 353.

Accordingly, I find that the Secretary has satisfied his burden in proving the fact of violation and the gravity determination for Order No. 9106663.

2. Significant and Substantial

The Secretary also alleges that this violation is significant and substantial. A violation is significant and substantial (S&S) "if based upon 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." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

The test associated with S&S violations has undergone a decades-long process of refinement. *See, e.g., id*.; *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *Newtown Energy, Inc.,* 38 FMSHRC 2033, 2037 (Aug. 2016). Under the Commission's most recent articulation of this test, in order to establish that a violation of a mandatory safety standard is S&S, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020).

The *Peabody Midwest* test—which imposes a greater burden on the Secretary than previous versions of the S&S standard—did not exist at the time that this case was heard. The Secretary argued vigorously in his brief that a more lenient standard ought to be applied. *See* Sec'y Br. at 17-21. Notwithstanding the Secretary's argument, I must apply the *Peabody Midwest* test as the most current, controlling precedent regarding the S&S threshold. I have not asked for supplemental briefing because I find that the Secretary has satisfied his burden of proving S&S even under the stricter *Peabody Midwest* standard.

The Secretary has clearly proven the underlying violation of 30 C.F.R. § 75.323(c)(2)(ii). This section of the MSHA regulation aims to avoid mine explosions caused by the ignition of subsurface methane. When issuing this regulation, MSHA recognized:

> Methane is the most dangerous gas encountered by miners working underground. When the level of methane reaches 5.0 percent it is explosive. Section 75.323 generally establishes action levels below this lower explosive limit to permit appropriate actions to be taken by mine operators in order to prevent an explosion.

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9777 (Mar. 11, 1996) (to be codified at 30 C.F.R. pt. 75). I find the first prong of the *Peabody Midwest* test has been met by the Secretary.

In order to satisfy prong 2 of the test for S&S, the Secretary must prove that the violation was reasonably likely to cause an explosion. The Secretary has met this burden. He has offered uncontroverted proof that, at times, the concentration of methane at the drill site exceeded five percent. Tr. 43, 255, 370-71; Exs. S-9A, S-9B, S-9C. This is the level of methane accumulation that the regulation sought to avoid. A methane concentration of five percent is combustible and, in the presence of an ignition source like an energized drill, is reasonably likely to cause the sort of explosion that the ventilation rule is directed against. Prongs 3 and 4 of the test are also satisfied, given the serious injury that is reasonably likely in the event of a mine explosion. Accordingly, the Secretary has successfully shown that the violation described in Order No. 9106663 was significant and substantial.

3. Negligence and Unwarrantable Failure

Based on his observations, the inspector designated the violation as high negligence and as an unwarrantable failure to comply with the mandatory standard. An operator is negligent when it violates its duty of care to avoid violations of mandatory safety standards. *A.H. Smith Stone Co*., 5 FMSHRC 13, 15 (Jan. 1983). To determine whether the operator has met its duty of care, the Commission considers "what actions a reasonably prudent person who is familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances." *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016). A judge is not required to apply or even consider the definitions of negligence found in 30 C.F.R. § 100.3. *Id*.; *Mach Mining LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

The term "unwarrantable failure" arises in section 104(d) of the Mine Act, describing serious misconduct that triggers the issuance of a citation under that section. 30 U.S.C. § 814(d). The Commission has defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corporation*, 9 FMSHRC 1997, 2001 (Dec. 1987). The conduct that qualifies as unwarrantable failure is often characterized as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Martin County Coal Corp*., 28 FMSHRC 247 (May 2006) (citing *Emery*, 9 FMSHRC at 2001).

While these descriptors are helpful guideposts, the inquiry of whether conduct is "aggravated" is ultimately a holistic analysis of both aggravating and mitigating circumstances. Such circumstances include (1) the extent of the violative condition, (2) the length of time 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 had been placed on notice that greater efforts were necessary for compliance. *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

a. Extent of the Violative Condition

The first factor to consider is the extent of the violative condition. The extensiveness of a violation is determined by examining "the extent of the affected area as it existed at the time" and "the number of persons affected by the violation." *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014).

Here, the Secretary has proven that dangerous methane levels existed at the drill site, but there is very little indication of elevated methane levels in other parts of the mine. Inspector Duncan testified that he believed James Ford's spotter went over range upwind of the tender, but Special Investigator Stanley testified as to his belief that Ford's spotter exceeded its range when he was only slightly outby the drill. Tr. 113, 225. The remaining spotter data tends to indicate that the unlawful methane conditions were concentrated around the drill. The Secretary has therefore only proven by a preponderance of the evidence that a limited physical area (the area near the drill) was affected by the methane accumulation.

I also must take into account the number of persons affected by the violation. Initially, up to 60 underground miners were exposed to the potential for a calamitous mine explosion. Tr. 123. However, Michael Butler gave orders to evacuate most of those miners very quickly after the old works were breached. Tr. 340. After the evacuation of Unit 3, the number of miners affected by the violation was drastically lower. The Secretary never conclusively proved how many people remained in the mine post-evacuation outside of Butler, Cary, Ford, Stevens, Ferrin and Mitchell.

I take the initial risk to 60 miners very seriously. However, as soon as Butler became aware of the methane inundation and initial over range methane levels, he did order the evacuation of Unit 3 where most of the miners were located. The fact remains though that no less than six miners were allowed to remain in the drill area where the methane levels were known to be at or above combustible levels for a period of time while the drill remained energized. While the Secretary proved only a limited physical extent of the methane accumulation, the violation was still extensive insofar as it affected initially dozens of nearby miners and for a longer period of time no less than six miners in the drill area where methane concentrations were unacceptably high, at or above combustible levels. All told the extensiveness factor weighs in favor of a finding of unwarrantable failure.

b. Duration of the Violative Condition

The Commission has highlighted the duration of the violative condition as a "necessary element" of the unwarrantable failure analysis. *IO Coal Co*., 31 FMSHRC 1346, 1352 (Dec. 2009). A duration of seconds or minutes often mitigates the severity of the violation. *See, e.g., Dawes Rigging*, 36 FMSHRC at 3080. However, when a hazardous condition is "readily distinguishable from other types of danger due to [its] high degree of danger [and] its obvious nature," the brief duration of the hazard will not militate against a finding of unwarrantable failure. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361 (Sep. 2016) (quoting *Midwest Material Co*., 19 FMSHRC 30, 36 (Jan. 1997)) (internal quotations omitted).

In the present case, the duration of the violative condition is contested. Butler arrived at the drill site around 1:55 a.m. Tr. 101. He claimed that he was present at the drill site for about half an hour before ordering the drill to be deenergized. Tr. 377. The driller, Ferrin, testified that he did not recall how long the drill remained energized, but he told the special investigator in October 2018 that approximately thirty minutes elapsed between the first time the drill "kicked" and Butler's directive to exit the mine. Tr. 47; Ex. S-13. Testimony and contemporaneous notes from James Ford, however, indicate that Ford and Butler did not exit the drill site until 3:00 a.m., which is about an hour after the inundation. Tr. 328; Ex. R-H. Similarly, tracking data for Michael Butler and John Stevens shows that they passed through the second west main roadway around 3:10 a.m., suggesting that they exited the drill site just minutes before. Ex. S-8; Tr. 105-06, 267-69. With all of this in mind, I find that the drill remained energized for 30-60 minutes after methane inundation.

However, it is unclear whether the methane level was consistently over 1.5% for the entire time that the drill remained energized. The methane levels did in fact fluctuate. *See, e.g*., Ex. S-9A. In addition, the nature of the methane spotters makes it difficult to discern the actual methane level over time, because once a spotter goes over range, it must be reset to resume its active methane measurements. Tr. 108, 262.

The duration of the violation remains a relevant consideration in this analysis even when the record does not permit a conclusive finding regarding the duration of the hazardous condition. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). The Secretary in the present case has proven that the drill was energized for 30-60 minutes after Butler became aware of the elevated methane levels. What has not been proven is the duration of specific methane levels. However, Butler continued to allow the drill to be energized despite his knowledge that methane levels were not only above 1.5% but reached combustible levels numerous times during the 30-60 minute time frame. The duration factor therefore supports a finding of unwarrantable failure.

c. Degree of Danger

The Commission has found that a high degree of danger presented by a violation constitutes an aggravating factor in support of a finding of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1355-56. In this case, the degree of danger was high. The drill remained energized even while methane levels nearby exceeded five percent, creating the conditions that could have led to combustion and a major accident. As Inspector Duncan said, "we're very lucky that we did not have a mine explosion that night." Tr. 126. The degree of danger unequivocally points toward a finding of unwarrantable failure.

d. Obviousness of the Hazard

The obviousness of a violation can be an aggravating factor in the unwarrantable failure analysis. In some ways, methane—as an invisible and odorless gas—is a nonobvious hazard. However, the risk of methane accumulation became obvious when it set off at least three methane spotters and tripped the emergency shut-off feature on the drill no less than two or three times. Tr. 43, 370-71, 378. The methane accumulation was an obvious hazard, and this militates toward a finding of unwarrantable failure.

e. Operator's Knowledge of the Violation

The operator's knowledge of the existence of the violative condition is also relevant. The knowledge of a corporate agent may fairly be imputed to the mine operator. *See Va. Crews Coal Co*., 15 FMSHRC 2103, 2106 (Oct. 1993) (citing *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194-98 (Feb. 1991)). In this case, various members of Peabody management possessed different levels of knowledge regarding the violative condition. The mine's general manager, Brad Rigsby, testified that he did not know about the elevated methane levels until after he had already directed that the mine be evacuated. Tr. 404-05. Michael Butler, on the other hand, knew of multiple methane spotters going over range. Tr. 370-71. He also knew that the drill's emergency shut-off had been triggered. Tr. 378. Nevertheless, Butler allowed the drill to remain energized and went so far as to direct that the power to the drill be maintained when other power was being shut off in light of the hazard. I therefore find that Butler did have knowledge of the violative condition and that, as mine manager, his knowledge may be imputed to the operator.[2] *See Va. Crews Coal Co*., 15 FMSHRC at 2106. Accordingly, the operator's knowledge is an aggravating factor that supports a finding of unwarrantable failure.

f. Abatement Efforts

Another relevant factor is whether the operator took action to abate the violative condition before the issuance of the citation or order. When an operator has been put on notice of a problem, "the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis." *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487 (Mar. 1997).

I find that Respondent's abatement efforts weigh heavily against a finding of unwarrantable failure. Peabody kept the drill energized for one reason: to stanch the stream of methane infiltrating the mine. The evidence presented at hearing by both parties demonstrates that Respondent acted in good faith to address the hazard that was created when the drill hit the old works. There is no indication in the record that Respondent ignored the dangerous condition; rather, its miners worked diligently in an attempt to fill the borehole and eliminate the hazard.

Respondent took additional measures to abate the dangerous conditions when it organized an effort to increase ventilation at the drill site. Michael Butler instructed James Ford to hang curtains that would increase the flow of oxygenated air towards the drill, and Ford obliged by hanging curtains at the No. 1 entries to crosscuts 66 and 67. Tr. 233; 318-20. Ford also opened a man door at crosscut 67 to increase the airflow to the drill. Tr. 321. Further, John Stevens testified that he also installed curtains to help ventilate the area and reduce the methane concentration at the drill site. Tr. 255. These efforts were intended to abate the hazardous methane levels and to keep miners safe in the wake of the inundation. Given this response by the operator and its miners, I find that the abatement efforts constitute a major mitigating factor that weighs in favor of Respondent and against a finding of unwarrantable failure.

[2] See *infra*, Section C, for additional discussion about Michael Butler's knowledge of the violation.

g. Notice to the Operator that Greater Efforts Were Necessary

Finally, when an operator has previously committed similar violations, those violations are relevant to an unwarrantable failure determination to the extent that they give the operator notice that greater efforts are necessary for compliance with a safety standard. *Brody Mining,* 37 FMSHRC at 1691. The Secretary has not presented any evidence of previous violations, and therefore this factor does not affect the unwarrantable failure analysis.

h. Conclusion

I find that the preponderance of the evidence supports a finding of high negligence for Order No. 9106663. By showing that the operator knew or should have known that the methane concentration exceeded 1.5%, the Secretary has successfully proven that the operator's lack of care rises above the level of ordinary negligence. Peabody might have acted in good faith to address the source of the methane, but no prudent operator would have believed that it was reasonable to continue powering the drill in a persistently high-methane environment in light of MSHA's safety standards.

Similarly, after careful consideration of the aggravating and mitigating factors, I find that the violation clearly and persuasively constitutes an unwarrantable failure. Peabody ignored an extensive, obvious, and extremely dangerous hazard despite having knowledge of the violation. The mine manager knew about methane accumulations that exceeded five percent and that, therefore, put 60 underground miners at risk of a mine explosion. He should have immediately deenergized the drill as required by law, and his failure to do so was unwarrantable. I recognize that Peabody acted in good faith to address the source of the hazard—as its miners are trained to do in other contexts—and that this selfless conduct may be seen as laudable. However, "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource[,] the miner," 30 U.S.C. § 801(a), and keeping the drill energized in the high-methane environment constituted an unacceptable risk to miner safety. Accordingly, I affirm the Secretary's finding of unwarrantable failure for Order No. 9106663.

B. Order No. 9106664

1. The Violation

In Order No. 9106664, the Secretary alleges that Peabody violated section 75.323(c)(2)(iii) of MSHA's mine safety and health regulations. In pertinent part, section 75.323(c) states:

> (1) When 1.0 percent or more methane is present in a return air split between the last working place on a working section and where that split of air meets another split of air, or the location at which the split is used to ventilate seals or worked-out areas changes or adjustments shall be made at once to the ventilation system to reduce the concentration of methane in the return air to less than 1.0 percent.

> (2) When 1.5 percent or more methane is present in a return air split between the last working place on a working section and where that split of air meets another split of air, or the location where the split is used to ventilate seals or worked-out areas
>
> . . . .
>
> (iii) *No other work shall be permitted in the affected area until the methane concentration in the return air is less than 1.0 percent*.

30 C.F.R. § 75.323(c) (emphasis added). The inspector reported that mine management "knowingly and willfully allowed work other than ventilation corrections to be performed for approximately 15 minutes" even though methane detectors sensed concentrations of greater than five percent methane. Ex. S-3. Inspector Duncan again found that the violation created a reasonable likelihood that a fatal injury would occur, and that this risk affected 10 miners.

I have made my findings regarding the elevated methane levels above. *See* Section A, *supra*. Mine management was consistently aware of methane levels that exceeded five percent, well above the level that triggers mandatory work stoppage under this regulation. Methane levels between 5% and 15% are explosive. Tr. 101. Nonetheless, mine management permitted miners to continue pulling rods and attempting to plug the borehole for approximately half an hour, if not longer. Tr. 377.

Respondent argues that its response to the mine inundation did not violate section 75.323(c)(2)(iii) because management did not permit the type of "other work" that is contemplated in the regulation. Peabody interprets the regulation to allow work to "change or adjust the ventilation system"—even if the methane concentration exceeds 1.5%—and to forbid any "other work" from continuing. Resp. Br. at 19. Based on this interpretation, Peabody argues that the efforts to plug the borehole constituted ventilation control and therefore were not forbidden by the regulation.

But the miners were not merely conducting ventilation control. By attempting to plug the borehole, the miners engaged in remedial actions that sought to address the source of the methane. These actions, while perhaps admirable, constitute the sort of "other work" forbidden by section 75.323(c)(2)(iii). MSHA has made clear that efforts to investigate and address the source of the methane accumulation must be secondary to the critical actions that are immediately necessary to protect miner safety in the face of a mine inundation:

> Other commenters thought that the standard, as proposed, would cause hasty, ill-advised changes to be made and would prohibit an investigation into the cause or source of the methane problem which could result in phased-in corrections. MSHA agrees that operators should seek long term solutions and should fully investigate the cause or source of methane accumulations. Investigation and long term corrections are not prohibited by the rule. However, *the final rule does require that certain actions be undertaken at once to correct the short term or acute safety hazards resulting from accumulations of methane*.

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9778 (Mar. 11, 1996) (to be codified at 30 C.F.R. pt. 75) (emphasis added). Miners should have been evacuated "at once" when management saw consistent methane readings over 1.5%. *Id*. Getting miners to safety must be the priority, and then the operator can determine the best way to address the methane source.

With regard to gravity, the Secretary has proven that there was a high risk of methane combustion and miner fatality given the mix of high methane levels, oxygen, and ignition source, and given the continued presence of miners underground due to Respondent's inaction. I therefore find that the Secretary has satisfied his burden in proving the fact of violation and the gravity determination for Order No. 9106664.

2. Significant and Substantial

The mine inspector designated this violation as S&S, and I find that this designation is proper. First, the Secretary has proven the fact of violation. Second, the mine operator's decision to permit work to continue in the mine was reasonably likely to cause the safety hazard that the regulation was designed to address. Section 75.323(c)(2)(iii) aims to reduce the risk that miners will be harmed or killed by a mine explosion. The presence of the miners underground and their continued work drilling and pulling rods amid a methane inundation made it reasonably likely that those miners would face a mine explosion. Third, a mine explosion is reasonably likely to cause injury. Finally, injuries following a mine explosion are reasonably likely to be serious in nature, if not deadly. Therefore, the Secretary has borne his burden of proving that the violation was significant and substantial.

3. Negligence and Unwarrantable Failure

The factors at play in the unwarrantable failure analysis for this order are very similar to those discussed above for Order No. 9106663.[3] First, I find that the extent of the violative condition is an aggravating factor due to the risk presented initially to 60 miners and then at least six miners for a longer period of time. Second, the duration of the violation is an aggravating factor given that the Secretary has proven that work continued for 30-60 minutes after Butler became aware of the elevated methane levels. Third, the hazard is dangerous given the combustion risks of methane, and this factor points toward a finding of unwarrantable failure. Fourth, the hazard was obvious in light of the methane sensors on the drill and on personal spotters, and the obviousness is an aggravating factor. Fifth, the operator had knowledge of the violative condition since Michael Butler knew about the elevated methane levels. This knowledge is an aggravating factor. Sixth, Respondent's efforts to abate the hazard—including its efforts to plug the borehole and to ventilate the area—weigh against a finding of unwarrantable failure. Finally, the Secretary has not shown any previous history of violation.

[3] To the extent they are applicable, I incorporate my earlier findings into this analysis.

I again find that the violation constitutes high negligence and unwarrantable failure on the part of the operator. A prudent operator would not have permitted miners to continue working while methane spotters blared and showed over-range readings. Furthermore, just as with Order No. 9106663, the factors at play in the unwarrantable failure analysis tend to aggravate (rather than mitigate) the severity of the violation. Peabody permitted non-ventilation work to continue in an explosive methane environment, despite its knowledge of the high methane levels. The company repeatedly ignored obvious signs of the dangerous condition. To protect its miners, Peabody should have responded swiftly and decisively to follow the law and put a stop to the work that persisted underground. Accordingly, the Secretary has satisfied his burden in showing that Peabody's actions constitute an unwarrantable failure to comply with section 75.323(c)(2)(iii).

C. 110(c) Case Against Michael Butler

The Secretary also seeks to hold mine manager Michael Butler liable for his conduct in connection with the two violations discussed above. Section 110(c) of the Mine Act provides that when a corporate operator violates a mandatory safety standard or order under the Act, "any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c). The Commission's precedent elucidates a test for whether an agent of the mine can be individually liable: liability attaches when the agent (1) knew or had reason to know of the violative condition, (2) was in a position to remedy the condition, and (3) failed to act to correct the condition. *See Northshore Mining Co.,* 43 FMSHRC __, slip op. at 8 (Jan 21, 2021); *Oak Grove Resources, LLC*, 38 FMSHRC 1273, 1281 (June 2016); *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981).

When Michael Butler arrived at the drill site, he faced a cacophony of alarming methane spotters and the loud rush of mine gases inundating the site. Butler testified that he knew of at least two spotters that reached an over-range methane reading, signaling methane accumulation of at least five percent. Tr. 370-71. One of those spotters was on his own person. Tr. 370-71. Nevertheless, Butler actively oversaw continued operation of the energized drill and the continued work of the miners as they attempted to plug the borehole. Butler therefore knew or had reason to know of the violative condition. Butler also testified that he was in a position to shut down the drill and evacuate the miners "if [he] felt that was needed." Tr. 366. Finally, the overwhelming weight of the evidence demonstrates that, despite his knowledge of the methane levels and his authority to stop work, Butler allowed the drill to remain energized and permitted six miners including himself to continue working for at least half an hour in elevated methane conditions. That constitutes a failure to correct or remedy the violative condition. Therefore, I find that Butler is individually liable for the violations in Orders Nos. 9106663 and 9106664.

D. Order No. 9106665

1. The Violation

Finally, the Secretary alleges that Peabody violated section 75.512–2 of MSHA's mine safety regulations, which states that "examinations and tests required by § 75.512 shall be made at least weekly" and that "[p]ermissible equipment shall be examined to see that it is in permissible condition." 30 C.F.R. § 75.512–2. Mine operators must examine "[a]ll electrical equipment" and must remove equipment from service if the operator finds a "potentially dangerous condition." 30 C.F.R. § 75.512. Order No. 9106665 alleges:

> The operator failed to perform a weekly permissibility examination on the horizontal drill (serial #81134/2008800) located in the 2nd West Main at crosscut 65-66 for the week of 7/15/2018 thru 7/21/2018 according to permissibility records provided by the mine operator. Five permissibility deficiencies were found on 7/24/2018 which were not recorded on 7/11/2018. These permissibility deficiencies existed at the time of the accident on 7/23/2018 and the reasonable likelihood exist[s] that they would cause a methane ignition.

Ex. S-4. The inspector found that the condition was reasonably likely to cause an injury that could be expected to be fatal for 10 miners. *Id*. He marked the negligence as high and determined that the violation was S&S. *Id*.

There is no dispute that Peabody failed to conduct a permissibility examination on the drill between July 11 and July 24. Resp. Br. at 32. The Secretary introduced records and testimony showing that Respondent failed to carry out a permissibility exam on the drill for the week of July 15-21. Ex. S-7; Tr. 129. Peabody's maintenance manager also testified to this effect. Tr. 430, 439. Accordingly, I find that no exam took place during the week in question, which constitutes a violation of section 75.512–2.

The Secretary's gravity determination is also supported by the record. The permissibility examination, designed to alert mine operators as to electrical issues with equipment, is an important safeguard that helps to ensure that electrical components are not spark risks in a high-methane environment. The operator's failure to conduct this exam subjected miners to reasonable risk that an electrical malfunction would cause a fatal injury when they hit the old works and the mine was inundated by methane-rich gases. No less than 60 individuals were affected by this risk. The Secretary has satisfied his burden in showing the fact of violation and the gravity by a preponderance of the evidence.

2. Significant and Substantial

The Secretary has also satisfied his burden in showing that the violation was S&S. First, he has proven the fact of violation as just discussed. Second, he has shown that the violation was reasonably likely to cause the occurrence of the discrete safety hazard that the standard is designed to address. Regular examinations are "of fundamental importance in assuring a safe working environment underground," and the inspector attested that permissibility exams in particular are meant to discover electrical issues that could spark a fire or even an explosion. *Buck Creek Coal Company, Inc.*, 17 FMSHRC 8, 15 (Jan. 1995); Tr. 132. Failing to conduct this exam before sending the equipment underground to drill near old mine works was therefore reasonably likely to cause the safety hazard that the regulation is directed against. Third, a fire or mine explosion would be reasonably likely to cause injury. Finally, an injury that follows a mine fire is reasonably likely to be serious. The Secretary has carried his burden in proving that the violation of section 75.512–2 is S&S.

3. Negligence and Unwarrantable Failure

The inspector found that Order No. 9106665 involved high negligence and an unwarrantable failure on the part of the mine operator.

a. Extent of the Violative Condition

The Secretary alleges that Peabody failed to examine the drill. The extent of the operator's oversight is therefore limited to a single piece of equipment. At the same time, the operator's failure to inspect the drill put no less than 60 miners at risk when the mine was inundated by methane and the drill lacked proper electrical inspection. These are both relevant considerations under extensiveness analysis. However, the Commission warns against using this factor as a proxy for the danger or obviousness of the hazard, counseling instead to focus on "the scope or magnitude of a violation." *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). I find that the scope of Peabody's violation was limited to its examination of one piece of equipment among hundreds, and accordingly this factor does not support a finding of unwarrantable failure.

b. Duration of the Violative Condition

The Secretary has proven that no permissibility examination occurred on the drill between July 11 and July 24. The violation itself, however, is for failure to conduct an exam during the week of July 15-21. Therefore, the violative condition arose on July 22 and only existed for two days. Furthermore, Respondent accurately notes that it is possible for thirteen days to pass between properly conducted permissibility exams under the regulation. The thirteen days that transpired between examinations here is therefore not wholly unreasonable. Given these factors, I find that the short duration of the violative condition is a mitigating factor that weighs in Respondent's favor.

c. Degree of Danger

The discrete hazard at issue in this case is a mine explosion and fire. The drill at issue was used to perform exploratory mining near old works, actually breached the old mine, and caused an inundation of methane gas. The lack of a proper permissibility examination therefore presented great danger to the miners underground at that time, and this factor points toward a finding of unwarrantable failure.

d. Obviousness of the Hazard

The hazard presented by the absence of a permissibility examination was not immediately obvious. Peabody kept records indicating the dates that such examinations occurred, which should have helped it notice the issue. However, Respondent also notes that a lapse of thirteen days between exams is sometimes proper, so the issue was not readily obvious. The Secretary has not presented any other evidence indicating that the hazard was particularly obvious. Accordingly, I find that the obviousness of the hazard is a mitigating factor in the unwarrantable failure analysis.

e. Operator's Knowledge of the Violation

Respondent argues that its failure to perform the permissibility exam was due to a miscommunication among its miners. Resp. Br. at 32. Peabody's maintenance manager testified that David Justen, the supervisor of one of the crews tasked with conducting permissibility exams, was told by one of his crew members that the drill had indeed been inspected. Tr. 429-32, 439-40. Justen then relayed this information to mine management. Tr. 429. Clearly, someone along this chain of communication was mistaken because the exam was never done. However, the weight of the evidence supports Respondent's claim that the error was inadvertent and was based on a miscommunication among its employees. The Secretary has therefore failed to show that Respondent had knowledge of the violation, and this factor mitigates against a finding of unwarrantable failure.

f. Abatement Efforts

An operator's abatement efforts are a relevant consideration in the unwarrantable failure analysis, but only where the operator has been placed on notice of the violative condition. Respondent did act promptly to address the issue once the inspector issued an order, but post-citation efforts are not relevant to the determination of whether the operator engaged in aggravated conduct. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Peabody did not receive notice of the violative condition until the inspector's issuance of the order, and therefore this factor does not affect the unwarrantable failure inquiry.

g. Notice to the Operator that Greater Efforts Were Necessary

The Secretary's Exhibit 1 indicates that Respondent had been cited regarding its permissibility examinations over twenty times in the two years prior to this incident. Ex. S-1. Even though it appears that only one of those violations concerned the precise regulation at issue here, Peabody should have been on notice that greater efforts were necessary to ensure that permissibility exams were properly conducted and recorded. This final factor is therefore aggravating and weighs in favor of an unwarrantable failure finding.

h. Conclusion

A preponderance of the evidence supports a finding that Peabody was highly negligent. Clearly, Peabody's miners relied on the weekly maintenance and examination of the equipment. Michael Butler testified at hearing that he felt comfortable operating the drill in the high-methane environment in part because he "knew that permissibility was good" on that piece of equipment. Tr. 386. However, the permissibility exam was not current, and miners were left operating non-permissible equipment underground during a methane inundation. Peabody also should have known from past citations that greater efforts were necessary to conduct and record permissibility examinations properly. Given these circumstances, a prudent operator with knowledge of the mining industry, the relevant facts, and the protective purpose of the regulation would have implemented more rigorous examination and recording protocols to ensure that equipment is permissible before it is deployed underground. *See Leeco*, 38 FMSHRC at 1637. The Secretary has thus satisfied his burden in showing high negligence.

However, Peabody's failure to follow the regulation was not unwarrantable. There is no evidence that Peabody's management knew about the lapsed examination. Rather, due to a miscommunication, management mistakenly believed that the exam *had* been conducted. The exam was only a few days out-of-date—not weeks or months—and only one piece of equipment was affected. Altogether, the mitigating factors outweigh the aggravating factors here. The Secretary has therefore failed to prove that this violation constituted unwarrantable failure, and this 104(d)(1) order accordingly becomes a 104(a) citation.

IV. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall 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).

A. Peabody's Penalty

For Order Nos. 9106663 and 9106664, the Secretary proposed a penalty of $45,455.00 for each violation. Peabody is a large operator, and the proposed penalty would not impair its ability to stay in business. *See* Jt. Stip. 6. MSHA cited Peabody for 494 violations in the fifteen-month period preceding this incident. Ex. S-1. No citations during that period, however, were issued for violating section 75.323(c). Ex. S-1. With regard to gravity, each of these two violations was proven to be S&S. Peabody was also highly negligent, but I must note that Peabody worked to abate the hazard and swiftly evacuated Unit 3 instead of allowing mining to continue underground following the inundation. The operator also showed good faith by cooperating with MSHA after notification of the violation. After careful consideration of the penalty criteria, I assess a penalty of $38,000 for each violation, resulting in a total of $76,000 for Orders No. 9106663 and 9106664.

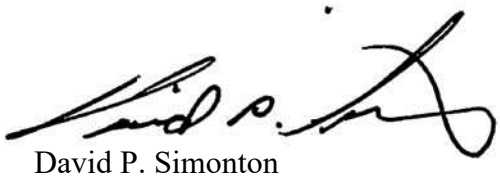
For Order No. 9106665, which is now a 104(a) citation in light of my findings above, the Secretary proposed a regularly assessed penalty of $45,455.00. The gravity here is again high. Peabody does have a history of previous violations that relate to permissibility examinations, but its history of violating this particular regulation is less extensive. Further, while Peabody was negligent in its failure to conduct the exam, its negligence did not rise to the level of unwarrantable failure as in the other orders. Finally, once alerted to the violation, Peabody immediately conducted the permissibility exam. In light of Peabody's quick response and the lack of an unwarrantable failure designation, I find that a penalty of $20,000 is appropriate for this violation.

B. Michael Butler's Penalty

The Secretary has proposed that Butler pay a penalty of $7,800.00 for knowingly authorizing or carrying out violations of 30 C.F.R. §§ 75.323(c)(2)(ii) and 75.323(c)(2)(iii) as an agent of the mine. The parties have stipulated that the proposed penalties would not affect Butler's personal financial obligations. Jt. Stip. 8. Butler did act knowingly, and the gravity of each violation was high. However, the Secretary has not introduced any evidence that Butler has been responsible for such violations in the past. Butler also acted in good faith to abate the hazard, and he cooperated with MSHA personnel to address the violation and the hazard once the personnel arrived at the scene. I find that Butler's actions warrant a penalty of $3,000 for each violation, resulting in a total penalty of $6,000.

V. ORDER

It is hereby **ORDERED** that Orders Nos. 9106663 and 9106664 are **AFFIRMED**. Order No. 9106665 is hereby **MODIFIED** from a section 104(d)(1) order to a section 104(a) citation and as otherwise set forth above. The section 110(c) liability of Michael Butler is **AFFIRMED**. Peabody Midwest Mining, LLC is hereby **ORDERED** to pay the Secretary of Labor the total sum of $96,000.00 within 30 days of this decision.[4] Michael Butler is **ORDERED** to pay a civil penalty of $6,000.00 within 30 days of this decision.



David P. Simonton
Administrative Law Judge

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[4] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

[5] For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.