

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 27, 2019

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
Petitioner,

v.

PEABODY MIDWEST MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2018-0159
A.C. No. 12-02295-457966

Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Barbara M. Villalobos, U.S. Department of Labor, Office of the Solicitor,
230 S. Dearborn Street, Room 844 Chicago, Illinois 60604

Arthur M. Wolfson, Fisher & Phillips LLP, One Oxford Center, 301
Grant Street, Suite 4300, Pittsburgh, PA 15219

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Peabody Midwest Mining, LLC, (“Peabody” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801.¹ At issue are two section 104(d)(2) Orders alleging violations of 30 C.F.R. § 75.400 and 30 C.F.R. § 75.363(a), respectively. Peabody challenges the fact of violation, S&S and gravity findings, and the negligence and unwarrantable failure designations for each Order.

The parties presented testimony and documentary evidence at a hearing held in Henderson, Kentucky on February 20, 2019. After fully considering the testimony and evidence presented at hearing and the parties’ post-hearing briefs, I modify Order No. 9106459 to moderate negligence and vacate Order No. 9106460. I assess a penalty of **\$2,500.00**.

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.

II. STIPULATIONS OF FACT

The parties jointly filed eight stipulations of fact in their prehearing reports and read stipulations nine and ten into the record at hearing:

1. Peabody Midwest Mining, LLC, is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. § 803(d), at the time the citations at issue in this proceeding were issued.
2. Peabody Midwest Mining, LLC operated the Francisco Underground Pit located in Francisco, Gibson County, Indiana at the time the subject violations were issued.
3. The Francisco Underground Pit mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act.
5. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
6. A duly authorized representative of the Secretary served the citations and terminations of the citations upon the agent of the Respondent at the date and place stated therein as required by the Mine Act, and the citations and terminations may be admitted into evidence to establish their issuance.
7. The total proposed penalty for the citations at issue (\$23,519.00) will not affect the Respondent’s ability to continue in business.
8. The Orders contained in Exhibit A attached to the Petition for Assessment of Penalty are an authentic copy of the citations at issue in this proceeding with all appropriate modifications and terminations, if any.
9. Citation No. 9106452, which is Secretary’s Exhibit S–8, is a final violation with all original determinations. It was issued on October 31, 2017, at 8:45 a.m. and terminated by MSHA at 10:15 a.m.
10. Citation No. 9106453, which is Secretary’s Exhibit S–9, is a final violation with all original determinations. It was issued on October 31, 2017, at 8:55 a.m. and terminated by MSHA at 10:18 a.m.

Secretary’s Prehearing Report at 2-3; Tr. 9.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Peabody Midwest Mining, LLC, owns and operates the Francisco Underground Pit, a bituminous coal mine located in Gibson County, Indiana. At the time of the inspection, the Francisco Pit had three working units. Tr. 140. Each unit contains two working sections. Tr. 140.

On the morning of October 31, 2017, MSHA Inspector Nicolas Vandergriff² and Supervisory Inspector Anthony DiLorenzo arrived at the mine to begin a routine inspection. Tr. 35, 139. Todd Seilhymer,³ a compliance officer at Peabody, accompanied the inspection. Tr. 139. The party began the inspection in Unit 3 at the 3-C Beltline. Tr. 53-54, 139. Coal produced in Unit 3 will dump onto the 3-C Beltline, transfer to 3-B, to 3-A, and finally up the main south belt to the prep line. Tr. 141. Vandergriff issued two initial citations in the 3-C Beltline, one for improperly spaced fire suppression and another for accumulations along the tail piece that continued along 3-B. Exs. S-8, S-9; Tr. 143. Those citations were abated as the inspection party proceeded to 3-B, where Vandergriff met with mine examiner Ryan Kyle Brown to observe his examination of the beltline. Tr. 55. At this time, Seilhymer followed behind in a ride as the Inspectors and Brown walked along the belt. Tr. 148.

Miners examine the conveyor belts at each working section once a shift. Peabody conducts pre-shift examinations at the same time as its on-shift examinations. Examiners evaluate any conditions they find and determine whether or not those conditions rise to the level of a "hazard" that must be immediately addressed. If an examiner discovers a hazard, they will address the situation immediately. If the examiner decides that the condition does not require immediate attention, they will record the condition in the inspection book, and crews will address the matter if they have time or pass the matter to the next crew. Once a condition is corrected, the miner that completed the task will report to his supervisor, and one of those two miners will note the correction in the inspection book. Tr. 220.

As Brown conducted the examination, Vandergriff noticed that accumulations of float coal dust were present along the beltline. Tr. 149. He testified that the accumulations were extensive and stretched from crosscut 28 to 23, measuring between one-eighth and one-quarter of an inch. Tr. 58-59. He observed the accumulations on every horizontal structure, including the belts, the ground, the water line, and all over the ribs. Tr. 58. Although he noted that the accumulations existed for five shifts, at hearing Vandergriff estimated that the accumulations had

² Vandergriff has been a MSHA Coal Mine Inspector since April of 2015. Tr. 32. Prior to that, Vandergriff worked at Sunrise Coal in Carlisle, Indiana for nine years. Tr. 32. There he worked in nearly every facet of the mine, from outby work to work on the unit. Tr. 32-33. He also served as a foreman and belt examiner for over two years. Tr. 32-33.

³ Todd Seilhymer has been a coal miner for 22 years. Tr. 138. His job duties include escorting MSHA inspectors, inspection recordkeeping and documentation. Tr. 138. He is a certified mine foreman in Indiana and Illinois. He is also a certified examiner in Illinois. Tr. 138.

been present for two to three active shifts based on their extensiveness and because the beltline was relatively new. Tr. 63, 120.

At or around crosscut 23, Vandergriff reportedly asked Brown whether he considered the accumulations to constitute a hazard or a condition. Tr. 57-58. Vandergriff testified that Brown told him that he did in fact consider the accumulations to be a hazard but was instructed to write it as a condition in the pre-shift inspection book. Tr. 58. According to Vandergriff, Brown told him that they do not have enough examiners and that he often felt rushed to complete the exam within the required timeframe. Tr. 58.

Brown disputed Vandergriff's recollection. He testified that Vandergriff and DiLorenzo accompanied him during his examination, but lingered behind him. Tr. 259. When he turned back he noticed the inspectors kicking rock dust on the ground and asked them if there was an issue. Tr. 259-60. Vandergriff then asked him if he believed the accumulations were a hazard. Tr. 263. When asked how he would categorize the accumulation, he told Vandergriff that he would call it a condition because there was no heat source or gas present and the size of the accumulations were not extensive and did not contain a significant amount of float coal dust. Tr. 260-63. He believed that the color of the material indicated that it was primarily road dust. Tr. 261. Brown also denied telling Vandergriff that he believed the accumulations constituted a hazard in his view, but admitted saying sometimes it is hard to get the work done with limited personnel. Tr. 264, 270-271. Brown also explained in his testimony that if the accumulations he finds are in fact hazards he doesn't write them in the examination book for the next shift to address but proceeds to immediately address the hazards. Tr. 264.

Vandergriff and DiLorenzo conversed and decided that the accumulations warranted a citation. Vandergriff asked Seilhymer to call out to see what examiners wrote about the belt line in the pre-shift inspection book over the previous two shifts. Tr. 149. Seilhymer did so and was informed that the book said that the 20 to the tail needed dusting, while 3-20 needed brooming. Tr. 150. It did not list any hazards for the dates in question. Exs. S-6, S-7. Vandergriff then issued the two (d) Orders at issue. He then proceeded from crosscut 29 to crosscut 3, taking pictures and notes regarding the accumulations along the way. Tr. 61. He used a white piece of notebook paper to note the contrast in color of the accumulations. Tr. 61. After he finished photographing the area, Vandergriff exited to make copies of the pre-shift inspection book. Tr. 63-64.

Once Vandergriff issued the (d) Orders, Seilhymer called mine manager Mike Butler to inform him that he was shutting off the beltline and to ensure that the mine did not start abatement efforts until he completed his investigation. Tr. 151-52. Seilhymer remained in the 3-B area after the Inspectors left to investigate on behalf of Peabody. Tr. 156. He had been alone on the inspection and unable to both take notes and keep up with the Inspectors as they photographed the belt line. Tr. 156. He proceeded to follow the Inspectors' route as closely as possible to take his own photographs and samples. Tr. 181. He used a paint chip, consisting of three shades of gray, to compare the color of the accumulations. Tr. 159-60. Following Seilhymer's investigation, Peabody terminated the Orders on the morning of November 1, 2018. Exs. S-2, S-3. The mine challenges the fact of violation; the gravity, negligence and unwarrantable failure designations; and the Secretary's penalty assessments for each Order.

IV. LEGAL PRINCIPLES

A. Establishing a Violation

The Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary’s burden as:

The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.”

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSRC at 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984). If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary’s prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ).

B. 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).

In order to uphold a citation as S&S, the Commission has held that 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id.* at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.*, 32

FMSHRC 1257, 1280–81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

C. Negligence and Unwarrantable Failure

Under the Mine Act, operators are held to a high standard of care, and “must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA’s determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), *citing Brody Mining, LLC*, 37 FMSHRC 1687, 1701–03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically.” *Id.*; *see also Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

More serious consequences can be imposed for violations that result from the operator’s unwarrantable failure to comply with mandatory health or safety standards under section 104(d) of the Mine Act. Section 104(d)(1) states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard...and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

“Unwarrantable Failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “willful intent,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

The Commission considers the following factors when determining the validity of 104(d)(1) and 104(d)(2) orders: (1) the length of time that the violation has existed and the extent

of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

D. 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 (March 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). These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. If the conditions of the violation so warrant, the Secretary may waive the regular assessment under § 100.3(a) and specially assess a penalty. 30 C.F.R. § 100.5(a). The special assessment must also be based upon the six criteria outlined above, and all findings must be in narrative form. 30 C.F.R. § 100.5(b).

V. DISPOSITION

The Secretary argues that the Court should affirm both Orders as written. Secretary's Post-Hearing Brief ("Sec'y Br.") at 1. The Secretary contends that Respondent allowed float coal dust to accumulate along the 3B energized conveyor belt. The violation involved in Order 9106459 was S&S because the float dust accumulations were extensive and were located approximately one crosscut, or 35 to 50 feet, from the tail belt area, where Vandergriff also issued two separate S&S citations not at issue in this case for accumulations and improperly spaced fire suppressor sprinklers during the same inspection. *Id.* at 3-5, 8-9. The Secretary maintains this confluence of factors was thus likely to result in ignition or fire because the accumulations were extensive along the beltline and some were even in contact with the moving belt. *Id.* at 8. The Secretary also argues that the high negligence and unwarrantable failure determinations are proper because Peabody had previously been placed on notice that greater compliance efforts were necessary. *Id.* at 18, 25. The accumulations were obvious and extensive as demonstrated by photos taken by Inspector Vandergriff, existed for multiple shifts, and posed a serious risk of danger due to the presence of an ignition source. *Id.* at 18-23. Peabody

managers and mine examiners had knowledge of or should have known of the condition yet failed to abate the violative condition. *Id.* at 23-25. Specifically, when asked by Vandergriff mine examiner Brown said he considered the observed condition to be a “hazard” but was instructed by management to write it down as a “condition.” *Id.* at 15. Peabody also has a history of violations of the cited standard and was on “heightened negligence” for violations of § 1731(a) which requires damaged belt conveyor components that pose a fire hazard to be repaired or replaced immediately. *Id.* at 25.

The Secretary contends that Peabody violated section 75.363(a) because the mine failed to immediately address the accumulations, which constituted a hazard. The Secretary points out that, despite the obvious hazard posed by these accumulations, mine examiners continued to identify the accumulation as a “condition” in the pre-shift inspection book for the beltline, and did not address it for multiple shifts. As such, the Secretary requests that the Court uphold both Orders and affirm the specially-assessed penalty of \$23,519.00. *Id.* at 15, 20-21, 31.

Peabody seeks to have both Orders vacated. It argues that the accumulations around the beltline were not combustible coal dust, but rather a combination of rock dust and road dust with low amounts of permitted float dust. Respondent’s Post-Hearing Brief (“Resp. Br.”) at 18. Respondent contends that it did not violate section 75.400 because it did not permit the cited material to accumulate as it consistently detected and corrected any material around the beltline, and that the material cited in Order No. 9106459 was not combustible. *Id.* at 20-21. Even assuming that a violation is found, Peabody argues that it was not S&S because no ignition source existed near the beltline and the cited material was sufficiently mixed with incombustible rock dust and road dust. *Id.* at 30, 31. Specifically, the conditions relied upon by the Secretary as the potential ignition source that led Vandergriff to issue an accumulations citation, not at issue in this case, at the 3C beltline ended at cross cut number 29 whereas the condition under examination in this matter began at crosscut 28. *Id.* at 30. Furthermore, Peabody contends that the high negligence and unwarrantable failure designations are inappropriate because the mine examination records indicate that it adequately detected and corrected any conditions involving material along the beltline. *Id.* at 33-35. In addition, mine examiner Brown emphatically denied telling Vandergriff he would have characterized the noted accumulations at issue as “hazards” and that he was instructed to write them in his exam book as “conditions”. *Id.* at 38-39.

Peabody also argues that Order No. 9106460 should be vacated because the condition was non-hazardous and did not need to be immediately corrected. *Id.* at 33-35, 37. Specifically, Respondent argues that the condition listed in the pre-inspection book was different than the one the inspector observed the following shift because additional production occurred in the interim. *Id.* at 35-36. It further argues that the observed accumulation did not amount to a “hazard” as defined by the standard and did not need to be corrected immediately. It contends that the condition was largely incombustible, that its color indicated that the material was primarily road dust, and that sufficient rock dust was present. *Id.* at 24-26, 29, 33-35, 37. Respondent contends that it would have addressed the matters the following day shift, which is within MSHA’s requirements and company policy. *Id.* at 33-35. Peabody thus argues that it properly tailored its procedure to comply with section 75.363(a) and was taking appropriate steps to ensure that accumulations did not become hazards. *Id.* at 33-35. Finally, Peabody maintains that to the degree that any violation is found, the assessed penalties are excessive in that the Secretary has

not met his burden of proof to justify the specially assessed penalty for Order No. 9106460, the unwarrantable failure designations, high negligence levels nor the S&S findings for either Order No. 9106460 or 9106459. If violations are found, it proposes a regularly assessed, moderate negligence level, non S&S penalty of \$232 for Order No. 9106460 and \$477 for Order No. 9106459.

A. Order No. 9106459

Order No. 9106459 alleges:

Combustible materials shall not be allowed to accumulate in active workings. Accumulations in the form of float coal dust was observed along the 3 B energized conveyor belt ranging from a film up to ¼ inch in depth from XC #3 to XC #28. Float coal dust was observed deposited on top of rock dusted surfaces including the mine floor, coal ribs, belt structure, water line, and all other vertical surfaces. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-2. Inspector Vandergriff designated the violation as S&S, with high negligence, and as an unwarrantable failure to comply with a mandatory safety standard. The Secretary assessed a penalty of \$7,819.00.

1. The Violation

30 C.F.R. § 75.400 states that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.”

The parties do not dispute that accumulations of material existed in the cited areas. Inspector Vandergriff credibly testified that the accumulations measured one quarter to one eighth of an inch and were extensive along the entire beltline. Tr. 58, 95-96. He took photographs demonstrating accumulations all along the beltline. See Ex. S-5. Relatively dark accumulations are present on the ground and across the belt structure. *Id.*, pp. 1-4, 9-12, 15-18. Photographs show footprints in the accumulated material along crosscuts 9-10 and crosscut 17. *Id.*, pp. 5-8, 21-22. The photographs also indicate some accumulation on the ribs and walkway along crosscut 12 to 14. *Id.*, pp. 13-14.

The parties' primary dispute is over what materials were present in the accumulation and whether that mixture was combustible under the standard. Seilhymer's pictures and samples appear to cast doubt on the exact composition of the accumulations based upon his inclusion of a paint chip to demonstrate the varying shades of gray. Ex. R-B; R-G. Many of his photographs also show lighter colors of grey or white near and underneath the belt floor and on the ribs. *Id.*, pp. 7, 8, 21, 22, 23, 33-34. He testified that the lighter colors indicated that the accumulations consisted mostly of road dust and not coal dust. Tr. 162-63. Other pictures also indicated the presence of moisture, thereby reducing the combustibility of the accumulations. Ex. R-35, 36,

80; Tr. 166, 171. Overall, Seilhymer testified that he saw very little evidence, if any, of coal dust accumulations in his photographs. Tr. 210. He also testified that the samples, with the exception of a single sample, were all well within the prescribed incombustibility limits. Ex. R-G(2); Tr. 184-85. However, Seilhymer acknowledged that he was unable to take pictures in the exact same areas as Vandergriff because he did so after the initial inspection ended. Tr. 156-57. Furthermore, the material's shading varied significantly in different areas when compared to the paint chip, with some photographs showing much darker shades than others. *See generally*, Ex. R-B. Seilhymer also acknowledged that some of the photographs could have been affected by the camera flash or the printer. Tr. 199.

Upon review, I conclude that a sufficient amount of coal dust was present to affirm the violation. *See* Exs. S-5, R-B. The shades of accumulations varied and some showed dark gray accumulations, indicating that at least some float coal dust was present in the photographed areas. *Id.* Although some areas appeared lighter in color, the camera flash, which both Vandergriff and Seilhymer acknowledged affected the photographs, would tend to make the accumulations look lighter in color rather than darker.

Moreover, Respondent's samples of the material in the area indicated that at least some of the material did not meet MSHA's incombustibility standards. *See* Ex. R-G(2).⁴ One of the samples taken tested less than 80% incombustible, which Respondent acknowledged at hearing to be below MSHA's required threshold. Tr. 185. While the exact concentration may have differed throughout the cited area, I find that the evidence supports that Peabody failed to address existence of combustible accumulations along the beltline.

Accordingly, I affirm the fact of violation.

2. Significant & Substantial

I have already found that Peabody Midwest violated section 75.400, a mandatory safety standard, when it allowed coal dust and other materials to accumulate along the 3-B beltline. The first *Mathies* element is therefore satisfied.

I next turn to whether the violation was reasonably likely to contribute to the hazard contemplated by the standard. Section 75.400 is intended to prevent accumulations of material that could lead to an ignition or propagation of a fire or ignition hazard. 30 C.F.R. § 75.400. Here, the Secretary has demonstrated that a confluence of factors exists around the violation that

⁴ The Secretary cites to the Commission's decisions in *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117 (Aug. 1985) and *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218 (June 1994) to argue that Peabody's sample analyses (Ex. R-G(2)) are irrelevant and thus inadmissible. I reject the Secretary's claim. Although these cases do imply that a material need not have a high level of combustibility to qualify as S&S, they do not suggest that combustibility in itself is irrelevant. *See* 16 FMSHRC at 1222; 7 FMSHRC at 1120-21. Both cited provisions either explicitly mention combustibility or require a consideration of combustibility to determine whether a condition is hazardous, and are thus clearly relevant to the sample tests and are admitted into evidence.

would reasonably contribute to the contemplated hazard. Earlier in the inspection, Vandergriff issued citations alleging accumulations and Peabody's failure to install fire suppression sprinklers within the prescribed intervals along the conveyor branch lines located along the 3C beltline which is adjacent to the 3B. See Ex. S-8, S-9. Both of those citations were S&S because coal was running in the belt, creating an ignition source near the beltline. Tr. 113-114. He also testified that the mine was already on heightened negligence for bad belt rollers, increasing the opportunity for friction to create a heat source and ignite the accumulations. Tr. 66-67. Furthermore, he took two additional photographs that show the accumulations near the diesel fuel station and touching the belt on the 3-B tail roller. Ex. S-5, pp. 31-34; Tr. 113-14. The violation involved in Order 9106459 is located approximately one crosscut, or 35 to 50 feet, from this tail belt area ignition source. The accumulations were on the tail roller of the 3-B, the head roller of the 3C. Tr. 67. It is important to note here that Respondent's mine examiner Brown was not present for and was unaware of the issuance of the citations issued by Inspector Vandergriff on the 3C beltline, thus explaining his insistence that an ignition source did not exist along the 3B beltline at issue in this case. Tr. 271. Finally, I credit Inspector Vandergriff's testimony that he believed the violations he found on the 3C beltline had co-existed for two to three shifts with those on the 3B beltline. Tr. 67-68. My evaluation here also must take into account an assumption of continued mining operations absent the inspector discovering the hazardous conditions on the 3C beltline. For these reasons, I reject Respondent's argument that the violations found on the 3C beltline were abated by the time the inspector discovered the accumulations at issue in this case along the 3B beltline, thus eliminating the potential ignition source. Given the size of the accumulations along the 3B beltline and potential presence of a heat source in the area, I find that the violation was reasonably likely to result in an ignition.

Peabody contends that the violation was not reasonably likely to contribute to an ignition or fire because the majority of the cited accumulations consisted of road dust or rock dust and thus were unlikely to combust. Resp. Br. at 18-19, 24-26, 29, 33-35, 37. It offered sample analyses taken from the cited areas to show that nearly all of the alleged accumulations were above the acceptable incombustible level. Ex. R-G(2). However, at least one of those samples did not meet the minimum incombustibility level, and although the level of combustibility may have been low, "coal is, by its nature, combustible." *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994). The Secretary has satisfied the second *Mathies* element.

I credit Vandergriff's testimony that the hazard was reasonably likely to result in serious injuries such as flash burns or smoke inhalation. Tr. 70. Vandergriff testified that float coal dust was allowed to accumulate in numerous areas, including under the B belt tail roller, where the accumulations were in contact with the moving belt. Tr. 65. Since the fire suppression system would not be able to put the fire out and air ventilates outby in the mine, any fire would likely proceed along the 3-B belt line, the same path that served as the secondary escape way. Tr. 67, Sec'y Br. At 14-15. Due to the ventilation system in the area, an ignition may cause smoke inhalation injuries to any miner working downwind. Tr. 70. Assuming continuous normal mining operations, these accumulations were reasonably likely to result in an ignition that could cause flash burns and smoke inhalation injuries that would result in lost workdays.

Accordingly, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

Inspector Vandergriff designated the citation as high negligence and an unwarrantable failure. The Commission has recognized the close relationship between a finding of high negligence and a finding of unwarrantable failure. *See Dominion Coal Corp.*, 35 FMSHRC 1652, 1663 (June 2013) (ALJ), *citing San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007).

a. Operator's Knowledge of the Violation

An operator's knowledge of a violation is an important factor in unwarrantable failure analysis and is a requirement for a finding of high negligence under 30 C.F.R. § 100.3. *Maryan Mining, LLC*, 37 FMSHRC 1715, 1723 (Aug. 2015) (ALJ). Where an agent of an operator has knowledge or should have known of a safety violation, such knowledge should be attributed to the operator. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000). The knowledge or negligence of an agent may be imputed to the operator. *Id.*

Due to the extensiveness of the violation and the fact that mine management was required to sign the pre-inspection book, the Secretary argues that Peabody should have been aware that the accumulations constituted a hazard. Tr. 71. Vandergriff testified that the condition along 3-B was so obvious that any properly trained miner would identify that as a hazard that required immediate correction. Tr. 71-72.

Peabody was aware of the accumulations. Its examiners wrote about the accumulations in the belt line pre-inspection book. Exs. S-6, S-7. Those examiners, however, did not believe that the accumulations consisted of much float coal dust, if any, or that the accumulation was otherwise so severe or hazardous that it required immediate attention. The inspection books thus recommended brooming⁵ or dusting the accumulations when possible. Exs. S-6, S-7.

b. Extent and Duration of the Violation

Inspector Vandergriff testified that the accumulations were extensive all along the belt line. Tr. 71. He took numerous pictures that clearly show accumulations in multiple areas. Ex. S-5. Moreover, the violation existed for two to three shifts and was extensive along the beltline.⁶ Tr. 63. However, the extensiveness and duration can both be attributed to Peabody's consistent belief that the accumulations were not combustible because they consisted primarily of road dust, and thus did not require immediate remediation.

⁵ Brooming is a method, alternative to dusting, by which miners use a broom to sufficiently mix any coal dust accumulations with rock dust to eliminate a combustion hazard. Tr. 40-41.

⁶ Although Vandergriff's inspection notes indicate that the condition existed for five shifts, he clarified that the fifth shift included Brown's examination shift and that the mine would have been idle for two of the shifts. Tr. 115.

c. Obviousness of the Hazard and Degree of Danger

As discussed above, the accumulations were obvious along the beltline but were not perceived to be a hazard during Peabody's pre-shift examinations. Peabody's miners credibly testified that in instances where a hazard was observed they would have immediately addressed the matter rather than writing it down in the book to pass it on for the next shift to address. Tr. 219, 253. Their testimony is supported by the pre-inspection books. See Ex. S-6. Listed hazards were addressed, while conditions, including those cited here, were noted and passed on as permitted by the regulations and mine policy. *Id.* Thus, while the accumulations themselves were obvious, the compositions of the accumulations remain the primary source of dispute between the parties. Given these factors, I find that the obviousness of the hazard and degree of danger were not significant factors weighing against Peabody's negligence.

d. Abatement Efforts

Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342-43 (Aug. 2013); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996).

Peabody's pre-inspection books and the corroborating testimony of its miners demonstrate a systematic approach to examining the beltline and both documenting and addressing conditions and hazards. Vandergriff testified that the accumulations were extensive enough to suggest that it could not have accumulated over the course of a single shift. Tr. 114-15. However, there is no evidence to suggest that Peabody's abatement efforts were insufficient or that, if not for the citation, the conditions would have been allowed to remain or worsen over a long period of time. Peabody's inspectors outlined the action to be taken in their view, either dusting or brooming the areas, that would likely have been taken care of shortly thereafter and before the mine considered the accumulations to become a serious hazard.

e. Notice to the Operator that Greater Efforts Were Necessary for Compliance

The notice factor of the unwarrantable failure analysis pertains to previous citations, directives, and communications prior to the violation at issue that notify the operator of hazardous conditions or practices. *Consolidation Coal Co.*, 22 FMSHRC 2326, 2342 (Aug. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1353-55 (Dec. 2009).

Here, Peabody had been cited for violations of § 75.400 on 146 occasions over the past two years. Ex. S-1. It was also placed on heightened negligence regarding bad belt rollers, suggesting that accumulations may be more subject to ignition risks. Tr. 24, 65-66. However, Inspector Vandergriff acknowledged at hearing that section 75.400 is a very broad standard, and can be used to cite for conditions other than float coal dust accumulations in the mine, including but not limited to other combustible materials, hydraulic oil, and trash. Tr. 106-107. He also testified that he did not observe any bad rollers along the 3-B beltline during the inspection at issue. Tr. 72.

f. Conclusion

Based on the foregoing, I find that the violation did not constitute an unwarrantable failure to comply with the standard. Although Peabody had knowledge of the accumulations, which were obvious and extensive along the beltline, I do not find sufficient evidence that the mine's efforts were unreasonable or constituted more than ordinary negligence. Peabody recorded the condition in its pre-inspection book for the beltline as something that ought to be addressed when time permitted, but that it did not amount to a hazard. It systematically addressed the matters according to its examination schedule, and there is no evidence that the accumulations would have been ignored for significantly more shifts. There is no evidence that Peabody knowingly ignored a hazard or would have done so if it believed the accumulations to constitute a hazard. "If an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator's belief was in error." *Kelly Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997); *Black Beauty Coal Co.*, 36 FMSHRC 778, 788-89 (Mar. 2014) (ALJ). I therefore find that the unwarrantable failure designation is inappropriate in this circumstance.

I therefore reduce Peabody's negligence to moderate and remove the unwarrantable failure designation.

4. Penalty

The Secretary proposed a penalty of \$7,819.00. Peabody has had 146 previous violations of section 75.400 over the past two years. Ex. S-1. The parties stipulated that the penalty amount will not affect Peabody's ability to remain in business. Jt. Stip. # 7. Peabody quickly abated the citation by shutting down the belt line and rock dusting the entire 3-B beltline, removing all float coal dust following the mine's own investigation. Ex. S-2.

I have discussed my gravity and negligence findings in detail above. Peabody violated the standard and the violation was S&S and reasonably likely to result in lost workdays. I modified Peabody's negligence to moderate and removed the unwarrantable failure designation because there is no evidence indicating that Peabody had a lax attitude toward addressing accumulations that it deemed to be hazardous, but simply did not consider the cited accumulations to merit immediate action. Accordingly, I assess a penalty of \$2,500.00.

B. Order No. 9106460

Vandergriff issued Order No. 9106460 alleging:

Hazardous conditions shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. Hazardous conditions have existed on the 3B beltline for 5 consecutive shifts. These hazards have been listed in the "conditions observed" side of the company's belt inspection report book and have been continually carried over onto the next working shift without an

action taken to immediately correct the hazards found. This is an unwarrantable failure to comply with a mandatory safety standard...

Ex. S-3. Inspector Vandergriff designated the violation as S&S, the result of high negligence, and as an unwarrantable failure. The Secretary specially assessed a penalty of \$15,700.00.

1. Fact of Violation

30 C.F.R. § 75.363(a) states:

Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the hazardous condition may enter the posted area. Any violation of a mandatory health or safety standard found during a preshift, supplement, on-shift, or weekly examination shall be corrected.

In order to establish a violation, the Secretary must demonstrate that hazardous conditions existed and that the hazard had not been corrected or posted. *Black Beauty Coal Co.*, 33 FMSHRC 1504, 1511 (June 2011) (ALJ). Once the existence of a hazard has been established, the focus shifts to the actions taken, if any, to remediate the condition. *Id.* There is no dispute that Peabody's examiners found the condition and recorded it in the belt inspection report book as such. Thus, the validity of the Order rests on whether the accumulations along the beltline constituted a "hazardous condition" as identified by the standard.

The Commission has approved the definition of "hazard" in the context of section 75.360 to be "a possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility of loss." *Black Beauty Coal Co.*, 36 FMSHRC 778, 786 (Mar. 2014) (ALJ) (citing *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997)). That definition is equally applicable here.

Vandergriff believed the accumulations constituted a hazard because they were extensive along the entire beltline and created an ignition risk. Tr. 73-74. He noted that the conditions had been allowed to worsen over a couple of shifts, when they should have been immediately addressed. Tr. 74. Seilhymer testified that an ignition source was not required in order for an accumulation to be a hazard, but it would escalate the situation to that of a hazard if an ignition or heat source was present. Tr. 194, 207. He noted that a hazard would entail a high concentration of coal dust dark in color. Tr. 194. If the accumulation reached a certain amount and shade of darkness, an examiner would appropriately understand when immediate action was necessary. Tr. 194-95. However, he acknowledged that this may differ based on the individual

examiner. Tr. 195. Normally, however, the goal is to address the condition long before it escalates to a hazard. Tr. 195. He testified that he did not believe any of the accumulations amount to a “hazard” as contemplated by the examination standards. Tr. 208.

Miner Casey Winters testified that a hazard is a condition that requires immediate attention, while a condition is not time sensitive. Tr. 221. In the context of an accumulation, Winters testified that he believed the transforming factor would be a heat or ignition source. Tr. 222. He noted that he would not have called any of the cited accumulations a hazard. Tr. 234-42. However, after seeing photographs of an accumulation, he testified that he would have at the very least shoveled it out and if need be shut the belt down to do so safely. Ex. S-5; Tr. 230-31. Respondent’s Mine Examiner Brown also confirmed that in the context of an accumulation near the beltline, a heat source was necessary to constitute a hazard. Tr. 254. At no point during his examination did he believe there to be an ignition source or any hazard along the belt line. Tr. 267. However, he was unaware of the citations issued by Vandergriff along the 3C beltline immediately prior to inspecting the 3B beltline. Tr. 271. He noted that he would be able to tell if coal dust accumulated because it is coarse and does not mix with rock dust. Tr. 268-69.

Although I found that the accumulations were reasonably likely to create a hazard, they did not amount to such a level at the time of the inspection. The Secretary has not shown that any of the accumulations created a potential for immediate danger. Although some photographs showed evidence of coal dust in accumulations of material, Respondent provided strong evidence that most of these accumulations were mixtures of road and rock dust that neutralized any presence of coal dust. It is critical to note that the Secretary failed to address Respondent’s evidence on this point in their case in chief or by proffering any rebuttal on this issue. None of the photographs offered by either party indicate significant evidence of large amounts of coal dust. This assertion is supported by the majority of Peabody’s samples, which were well above the minimal incombustibility level. Ex. R-G.

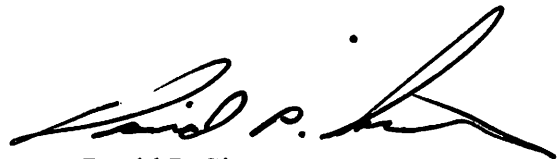
Furthermore, Peabody’s examination books show that, it consistently noted ongoing accumulations issues and corrected them as necessary. I find that Brown credibly testified in an unwavering, forthright and consistent manner, supported by his essentially contemporaneous notes, that he did not consider any of the conditions to be a hazard and the specific reasons for that belief, contrary to Inspector Vandergriff’s notes, and would have immediately addressed the matter had he believed otherwise. Ex. S-10. Vandergriff testified that Brown told him he was instructed to note the accumulations at issue as conditions in his examination book even when he believed they were hazards. However, Vandergriff’s own notes do not reflect that is what Brown told him. Rather the notes merely indicate that when asked if Brown considered the accumulations to be a hazard or condition he said, “that he considers this a hazard but is told it is a condition.” Ex. S-4, 47-48. I find it implausible to believe, given his testimony, that Vandergriff would not have specifically noted had Brown actually told him he was instructed to write conditions in the book when he found hazards. Brown, on the other hand, in an earnest and convincing fashion testified that had he found the accumulations hazardous, he would not have noted them in his exam book for the next shift to address, but rather immediately addressed them. Tr. 264.

This credibility dispute, while important, does not take away from the fact that the Secretary failed to rebut Respondent's primary defense that the observed accumulations along the 3B beltline were made up of primarily road dust from the adjacent travelway and rock dust with smaller non-combustible levels of coal dust, constituting a condition rather than a hazard. This, in conjunction with the totality of the evidence and testimony proffered and noted above, leads me to conclude that at the time of the pre-shift examination what Brown observed were in fact conditions rather than hazards which did not require immediate attention but needed to be addressed in a timely fashion at the end or beginning of the respective shifts.

Accordingly, Order No. 9106460 is **VACATED**. For these reasons, I need not address the Secretary's S&S, high negligence, and unwarrantable failure designations.

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$2,500.00** within 30 days of this order.⁷



David P. Simonton
Administrative Law Judge

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⁷ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390