FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 28, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. PEABODY MIDWEST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2017-450 A.C. No. 12-02295-447106 Mine: Francisco Underground Pit

DECISION

Appearances: Edward V. Hartman, U.S. Department of Labor, Office of the Solicitor
230 S. Dearborn Street, Room 844, Chicago, Illinois 60604

Arthur Wolfson, Jackson Kelly PLLC, Three Gateway Center, Suite 1500,
401 Liberty Avenue, Pittsburgh, Pennsylvania 15222

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 is one citation alleging that Peabody violated its Emergency Response Plan when it positioned a refuge chamber in the direct line of sight of a working face. Ex. S–2.

The parties presented testimony and documentary evidence at a hearing held in Henderson, Kentucky on March 28, 2018. MSHA Inspector Bryan Wilson testified for the Secretary. Peabody Director of Safety and Compliance Chad Barras and section foremen Mark Bedwell and Zeke Wilson testified for Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I affirm the citation as written and assess a penalty of **$50,000.00**.

[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 the following stipulations of fact in their prehearing reports:

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 coal mine at which the citation at issue in these proceedings was issued.

2. The Francisco Underground Pit mine is operated by Respondent in this case, Peabody Midwest Mining, LLC.

3. The Francisco Underground Pit mine is subject to the jurisdiction of the Mine Act.

4. At all relevant times, the products of the Francisco Underground Pit mine entered commerce or products affect commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.

5. 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, 30 U.S.C. §§ 815 and 823.

6. Section 316(b) of The Mine Act, 30 U.S.C. § 876(b) is a mandatory health or safety standard as that term is defined in Section 3(l) of the Mine Act, 30 U.S.C. § 802(l).

7. Payment by Respondent of the proposed penalty of $44,546.00 will not affect Respondent's ability to remain in business.

8. The individual whose signature appears in Block 22 of the citation at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.

9. A duly authorized representative of the Secretary served the subject citation and any termination thereof upon the agent of the Respondent at the date and place stated therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish its issuance.

10. The citation contained in Exhibit A attached to the Petition for Assessment of Penalty for this docket is an authentic copy of the citation at issue in this proceeding with all appropriate modifications and terminations, if any.

11. The subject refuge chamber was moved to entry no. 6 at the end of the day shift on July 18, 2017.

12. The exhibits listed in each party's List of Witnesses and Exhibits are true and accurate copies of the originals.

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. Peabody runs three working sections at the mine, identified as Units 1, 2, and 3. Tr. 95. Each working section is divided into an A-Crew, B-Crew, and C-Crew, and each crew occupies one of the three daily shifts; the day shift (7:00am to 3:00pm), the afternoon shift (3:00pm to 11:00pm), and the midnight shift (11:00pm to 7:00am). Tr. 95-96. Each working section produces coal on two of the three shifts and is idle for the third shift. Tr. 96-97. The idle shift crew is charged with setting up the section for production. Tr. 97.

In compliance with Section 2 of the MINER Act, Peabody implemented an Emergency Response Plan ("ERP") designed to "provide for the evacuation of individuals endangered by an emergency" or "provide for the maintenance of individuals trapped underground in the event that miners are not able to evacuate the mine." *See* 30 U.S.C. § 876(b)(2)(B). In order to prepare for the latter scenario, Peabody's ERP includes requirements for the positioning and maintenance of two Refuge Chambers ("Chamber" or "Alternative")[2] at each working section. Ex. S–2; Tr. 43, 81, 99. Specifically, the ERP provides:

> Refuge chambers will not be placed in direct line of sight of the working face. Where feasible, refuge chambers will not be placed in areas directly across from, nor closer than 500 feet radially from belt drives, take-ups, transfer points, air compressors, explosive magazines, seals, entrances to abandoned areas, fuel, oil, or other flammable or combustible material storage.

Ex. S–2. Peabody Director of Safety and Compliance Chad Barras ("Barras") helped write Peabody's ERP and testified to its development and implementation.[3] Barras explained that the line of sight provision is designed to protect the refuge chambers from damage or destruction in the event of an ignition or explosion at the working face. Tr. 84-85. The chambers represent the last resort in the event of an emergency, and at all times Peabody's preferred emergency response is total evacuation of the mine. Tr. 86.

In addition to the ERP's requirements, the idle shift crew must also maintain the refuge chambers within 1,000 feet of the working face to comply with 30 C.F.R. § 75.1506(c)(1). Tr. 99-100. As a working section advances, the idle crew section foreman will review the unit map

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[2] A Refuge Chamber is an enclosed structure designed to provide 96 hours of oxygen for miners to barricade in an emergency scenario where evacuation is not possible. Tr. 28. The chamber at issue measures about 10-12 feet wide and can hold as many as 20 miners, and contains various tools and supplies to assist in survival. Tr. 28, 31.

[3] Chad Barras is the Director of Safety and Compliance for Peabody Energy, the parent company of Peabody Midwest Mining. Tr. 74. He has worked for Peabody since 2004, and currently oversees safety operations at all Peabody mines in the Americas. *Id.* His responsibilities include conducting safety training and accident investigations, risk management, and compliance and litigation. Tr. 74, 91. Prior to working at Peabody, Barras was a ventilation engineer at MSHA. Tr. 75.

and determine when and to where the chambers should be moved. Tr. 100-01. The section foreman will then plot the chambers' new locations on the performance map. Tr. 37. All of the section foremen use the performance map to plot the chambers, sumps, and bolted and unbolted cuts, list needed supplies, and sign their visits to the area. *Id.*

During the week prior to the inspection at issue, Mark Bedwell II ("Bedwell"), section foreman for the Unit 1 A-Crew, determined that the refuge chambers soon needed to be moved. Tr. 94-97, 104-05. Normally, two miners can move the chambers in 30 to 45 minutes. Tr. 99-100. At that time, however, Unit 1 experienced an influx of water and mud that hindered the mine's ability to move the chambers to a location that complied with the ERP and the relevant Mine Act provisions. Tr. 102. Bedwell's crew worked to pump out the water and spread loads of bulk ash to try and solidify the ground to aid in moving the chambers. Ex. R–B; Tr. 106.

Mine conditions did not improve, however, and on July 18, 2017, Bedwell felt compelled to move the chambers. Tr. 114-15. Bedwell was able to place the first refuge chamber into crosscut #27 but did not believe that he could transport the second one into the 26 or 28 crosscuts due to the muddy conditions. Tr. 113-14. Instead, he placed the second chamber in the travelway approximately two feet off the rib and directly in the line of sight of the working face to comply with section 76.1506(c)(1) and to ensure that the chambers remained in consecutive order.[4] Ex. R–A; Tr. 31-31, 113-14, 155-56. Bedwell plotted the chamber locations on the performance map and planned to leave the chamber in the travelway for another couple of days until the belt and power center needed to be moved again. Tr. 149-50. Bedwell testified that at the time he was not aware that positioning the refuge chamber in the direct line of sight of the working face violated Peabody's ERP and would not have placed the chamber there had he known. Tr. 102, 148. He also testified, however, that at least one member of upper management knew that he placed the chamber in the travelway. Tr. 159.

On July 19, 2017, MSHA Inspector Bryan Wilson[5] ("Inspector Wilson") conducted a standard quarterly inspection at the Francisco Underground Pit. Tr. 24. He was accompanied by Peabody Safety Department employee Randy Hammond. *Id.* Since the second shift was running at the time of the inspection, Inspector Wilson wanted to walk the beltline and its intake to inspect the area while it was running coal. *Id.* The two walked past the unit power center at Entry #6 when Inspector Wilson noticed the refuge chamber positioned in the travelway. Tr. 27-28.

Inspector Wilson immediately recognized that the chamber's position violated the mine's Emergency Response Plan. Tr. 28-29. Wilson believed that the mine could have placed the

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[4] While unclear if required by the ERP, the mine's standard practice is to place the refuge chambers in consecutive crosscuts so that miners would be able to locate them easily in an emergency situation. Tr. 153, 155-56.

[5] Bryan Wilson has been an MSHA inspector for over five years. Tr. 18. He previously worked as a coal miner for Sunrise Coal, LLC for five years, spending three years as an equipment operator and laborer, one year as an examiner, and one year as an examiner and fill-in foreman. *Id.* Wilson completed training at the Mine Safety and Health Academy, and has taken accident training and journeyman training. Tr. 19. He inspects approximately four mines per year. *Id.*

chamber in crosscut #28, which already contained a high voltage tub and a slinger duster and showed no obvious irregularities or adverse conditions unfit for holding the chamber. Tr. 33.

When Inspector Wilson asked Hammond why the refuge alternative was located in the travelway and not in the crosscut, Hammond could not provide a satisfactory answer. Hammond first responded that the ERP required placement out of the line of sight of the working face only when feasible given the mine conditions. Tr. 29-30. Wilson knew this to be an incorrect reading of the ERP. *Id.* When Wilson pressed Hammond a second time, Hammond replied "I got nothing for you." Tr. 34.

Inspector Wilson informed Hammond that he intended to issue a section 104(d)(1) citation, and Hammond subsequently shut down the section and retrieved a foreman. *Id.* Inspector Wilson and Hammond met foreman Zeke Wilson in entry #4. Tr. 35. When informed of the violation, Inspector Wilson testified that Foreman Wilson was "shocked, surprised. His eyes were – were big. He appeared that he couldn't believe it." *Id.*

Inspector Wilson gave the mine one hour and 15 minutes to abate the citation and move the refuge chamber into crosscut #28. *Id.* During the abatement period, Inspector Wilson returned to the spool area where he located the section's performance map. Tr. 37. The map showed the refuge alternative plotted in direct line of sight of the face. *Id.* Upon further review of the map and other records, Wilson determined that the chamber had been in the travelway for at least 24 hours. Tr. 48.

Neither party disputes that Peabody utilized ten miners and the entire 75-minute abatement period to reposition the refuge chamber into crosscut #28. Tr. 172. However, the parties disagree as to the extent of the undesirable conditions in the mine at the time of the inspection. According to the Respondent, the abatement required significant additional steps to cope with the conditions. The miners had to jerk and pull the chamber due to the mud and water and feared that the chamber would drag against the rib because the scoop was sliding in the mud. Tr. 169-70. Eventually, the miners attached a strap from the bucket of the scoop to the front of a coal hauler to pull the chamber into the crosscut. *Id.* The miners removed the voltage tub and slinger from the crosscut, centered the chamber, installed roof jacks, and reconnected the communication and life lines. Tr. 40. Inspector Wilson disagreed and testified that he did not observe severely adverse conditions or any notable difficulty repositioning the refuge chamber in the crosscut. Tr. 40-41. Wilson did not observe any of the common issues that he associated with the moving process, including scoops spinning out, ruts in the ground, or the need for timbers or additional scoops. *Id.*

Inspector Wilson issued Citation No. 9105403 alleging a violation of 30 U.S.C. § 876(b). The citation states:

> The mine's Approved Emergency Response Plan is not being complied with on active #1 united. The Approved Emergency Response Plan states on page 9, first paragraph, that refuge chambers will not be placed in direct line of sight of working face. Refuge Chamber serial #452089-04-13 was located between crosscut #27 and #28, entry #6, MMU-011, approximately 480 feet outby the

working face in direct line of sight. Unit #1 was running and coal was being extracted from the face and sent to the surface by belt conveyor. The operator engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S–1. He designated the citation S&S, reasonably likely to be fatal, and the result of Peabody's high negligence and unwarrantable failure to comply with the Mine Act. *Id.* The Secretary proposed a civil penalty of $44,546.00. *Id.*

IV. DISPOSITION

The Secretary argues that the Respondent violated Section 316(b) by failing to follow its Emergency Response Plan. Secretary's Post-Hearing Brief ("Sec'y Br.") at 9. The Secretary contends that the violation was S&S because an explosion or ignition was reasonably likely to damage or destroy a chamber located in the line of sight of the working face, thereby rendering it unusable and exposing miners to serious injuries. *Id.* at 11-12. The Secretary also argues that the high negligence and unwarrantable failure determinations are proper because multiple mine employees knew or should have known that the position of the refuge chamber violated the ERP, the condition existed for three shifts and would have existed longer but for the citation, and the condition posed a significant danger to miner safety. *Id.* at 8, 13, 15-16. As such, the Secretary requests that the court uphold citation as written and affirm the regularly-assessed penalty of $44,546.00. *Id.* at 22-23.

Peabody contests the S&S, negligence, unwarrantable failure, and penalty designations. Respondent's Post-Hearing Brief ("Resp. Br.") at 10. Respondent argues that the Secretary's S&S designation is improper because the particular facts and circumstances surrounding the violation do not support the reasonable likelihood that miners would be unable to seek refuge in the event of an explosion. *Id.* at 21-22. Peabody contends that the Secretary's high negligence designation is not appropriate because Foreman Bedwell took considerable measures to improve the condition of crosscut #28 prior to the inspection and made a good faith mistake as to the ERP's refuge chamber requirements. *Id.* at 11-12. The Respondent further contends that the unwarrantable failure designation is improper because Peabody was not placed on notice that greater efforts were necessary to comply with the ERP provision, the cited condition was not extensive, did not exist for more than 24 hours, and did not pose a high degree of danger. *Id.* at 14-18. As a result, the Respondent contends that the Secretary's assessed penalty is excessive. *Id.* at 24-25.

A. Citation No. 9105403

The parties do not dispute the material facts surrounding the violation. Section 316(b) requires every underground coal mine to develop a written plan to provide for the evacuation of all individuals in an emergency and provide for the maintenance of miners trapped underground where evacuation is not possible. 30 U.S.C. § 876(b)(2). Peabody's Emergency Response Plan explicitly states that "[r]efuge chambers will not be placed in direct line of sight of the working face." Ex. S–2.

Here, the refuge chamber was placed in the travelway toward the beltline in the #6 entry in the direct line of sight of the working face. Ex. R–A; Tr. 27-29. Peabody's witnesses admitted at hearing that the refuge chamber's placement was in contravention of the mine's ERP. Tr. 92, 148, 177.

Accordingly, the fact of violation is affirmed.

B. Significant & 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).

I have already found that Peabody Midwest violated section 316(b), a mandatory safety standard, when it placed the refuge chamber in the direct line of sight of the working face in contravention of its ERP. 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. As an initial matter, the Commission has recognized that emergency standards "are different from other mine safety standards" because they are "intended to apply meaningfully only when an emergency actually occurs. *IGC Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016) *citing Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2367 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013). Thus, when determining whether a violation of an emergency standard is S&S, the violation should be considered in the context of the emergency contemplated by the standard and the court should assume the existence of the emergency when defining the hazard. *Id.*

Section 316(b) requires mines to develop a plan to facilitate prompt emergency evacuation or, when evacuation is impossible, ensure survival underground until rescue is possible. The line of sight provision in Peabody's ERP is intended to protect refuge chambers from damage or destruction in the event of a large fire or explosion at the working face. Ex. S–2; Tr. 84-85. The Commission has found that standards pertaining to refuge chambers are "intended to apply in the context of an emergency so severe as to make an evacuation impossible, survival outside of the refuge unlikely, and travel extremely difficult in the face of the smoke, debris, and possible injury." *ICG Illinois, LLC*, 38 FMSHRC at 2477 (finding that a mine's failure to position the refuge chamber within 1,000 feet of the nearest working face was S&S). Thus, the contemplated discrete safety hazard is that in an emergency situation where evacuation is impossible, miners would be unable to follow the ERP and access or utilize a refuge chamber.

Assuming an emergency in which evacuation is impossible, I find that Peabody's failure to comply with its ERP was reasonably likely to contribute to the discrete safety hazard of miners being unable to use the refuge chamber. Inspector Wilson and Safety Director Barras both testified that the ERP prohibits positioning the refuge chamber in the direct line of sight of the working face because an explosion traveling outby could damage or destroy the chamber. Tr. 29-30, 84-85. The Francisco Underground Pit is a five-seam coal mine that liberates one million cubic feet of methane daily, and any ignition would likely be significant. Tr. 90. The refuge chamber was located in the direct line of sight and within 480 feet outby the working face. Ex S–1. It is therefore reasonably likely that a chamber placed in the line of sight of the working face would be subject to destruction or damage beyond use in the event of an explosion or ignition.

Peabody contends that the violation is unlikely to contribute to the hazard because the mine would have to simultaneously experience (1) a buildup of methane and float dust, (2) cutting in entry #6, (3) and an explosion with sufficient force to disrupt the refuge chamber. Resp. Br. at 22. Furthermore, Peabody argues that more than 20 miners were only present at the face during a hot-seat change[6] and that work is not performed during those changes. *Id.* at 23. Thus, Peabody argues that an ignition in which the use of both chambers would be necessary is unlikely. *Id.*

Respondent's argument fails to properly assume the emergency contemplated by the standard. Consideration of whether the mine's conditions are likely to cause an explosion at the face is irrelevant because an explosion or ignition event must be assumed in the context of the standard. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2368 (Oct. 2011); *See Warrior Investments Co., Inc.*, 38 FMSHRC 651, 657 (Apr. 2016) (ALJ) (holding that a mine's low methane levels and the lack of fire, ignition, or explosion history are not relevant where the court must presume the type of an emergency where a beacon reader on the chamber becomes relevant). In this case, the court must presume the occurrence of a fire or ignition significant enough to prevent miners from evacuating the mine and rendering the chambers necessary for refuge or survival.

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[6] A "hot seat change" occurs when the miners on a given shift stay at the working section until the oncoming crew actually reaches the unit. Tr. 82-83.

Peabody's claim that both chambers would only be necessary if an ignition occurred during a hot-seat change and that no work is performed during those changes is not supported by the ERP's language or the record. The number of refuge chambers required in a given area is dictated by the number of employees that may work in the area, and the ERP explicitly requires two refuge chambers with the capacity to hold 20 miners apiece. Tr. 81-82. Barras testified that both chambers are necessary because more than 20 miners can be present at the working face on a given shift, not only during hot-seat changes. *Id.* Barras also noted that work does not necessarily stop during those changes. *Id.* Even assuming that hot-seat changes were the only time in which more than 20 miners could be at the working face, the refuge chamber was positioned in the cited location for 24 hours and would have been there for another two days if not for the citation. Tr. 48, 150. Assuming continuing mining operations, the chamber would have been in the direct line of sight of the face for up to three days, over which nine hot-seat changes could take place. Tr. 53, 150. The Secretary has satisfied the second *Mathies* element.

In the context of an ignition or explosion rendering evacuation impossible, the hazard of miners being unable to effectively use a refuge chamber is reasonably likely to result in fatal injuries. "Since refuge chambers are meant to ensure survival during an emergency which has created inhospitable conditions, then common sense dictates that an inability to reach the refuge chamber threatens miners' survival." *ICG Illinois*, 38 FMSHRC at 2481. The same logic applies when miners are unable to utilize a damaged or destroyed refuge chamber. In such dire circumstances miners would be reasonably likely to sustain serious if not fatal injuries. Aside from the miners' exposure to the triggering event that damaged the chamber, the potential dangers posed by the compromised chamber could include the inability to communicate with the surface, the lack of necessary equipment to perform first aid or other life-saving procedures, and the lack of oxygen to survive in a heavy smoke-filled environment. Tr. 43-46. All of these possibilities are reasonably likely to result in severe or fatal injuries. The third and fourth elements of *Mathies* are therefore met.

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

C. Negligence and Unwarrantable Failure

Inspector Wilson 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).

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).

1. 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.*

I find that the operator had knowledge of the violation. Mark Bedwell was Section Foreman of the A-Crew on Unit 1 and in charge of moving and plotting the chambers' positions on the performance map. Tr. 102, 138, 148. He admitted at hearing that he was unaware of the ERP's line of sight requirement. Tr. 128. While I credit Bedwell's testimony that he would not have placed the chamber there had he known it was in violation of the ERP, this assertion does not excuse his lack of familiarity with the ERP, a document crucial to ensuring the safety of Peabody's miners. Tr. 148. The record shows that Bedwell was familiar with other mine policies and Mine Act requirements as to the chambers' positioning, and as a section foreman should have known to avoid placing the chamber in the line of sight of the working face. Tr. 149, 151, 155-56. As an agent of Peabody, his negligence is imputed to the operator.

Even assuming, as Respondent contends, that Bedwell acted in good faith, other members of Peabody mine management knew or should have known that the refuge chamber was positioned in violation of the ERP. The refuge chamber sat in the direct line of sight of the working face for 24 hours and was subject to three pre-shift examinations by section foremen, none of whom took any steps to move the chamber or to notify Bedwell to do so. Ex. S–2, S–4; Tr. 48-51. Most concerning, Bedwell provided undisputed testimony that mine manager Mike Butler, a member of upper management, knew that the refuge chamber was positioned in the travelway but took no action and provided no direction or assistance to ensure compliance. Tr. 159-60. Peabody therefore knew or should have known of the violation.

2. Duration of the Violation

The refuge chamber existed in the direct line of sight of the working face for 24 hours. Tr. 48. The area was subject to three pre-shift examinations by different section foremen during that time and was plotted on the performance map. Ex. S–4; Tr. 48-53. Furthermore, Foreman Bedwell testified that if it weren't for the citation, the chamber would have remained in the same spot for at least a couple more days. Tr. 150.

3. Extent of the Violation

The violation was extensive. The refuge chamber was large and could hold as many as 20 miners for up to 96 hours in an emergency situation. Tr. 28, 31. It constituted half of the refuge chambers required by the mine's ERP in the area. The refuge chamber's position would impact the entire crew at the working section in an emergency situation and could affect two crews during a hot-seat change. Tr. 82-83. Should the chamber be damaged or destroyed during an emergency, multiple miners could be subjected to serious or fatal injuries because they could not access or utilize the chamber.

More importantly, I find that the violation was extensive due to the widespread failure of multiple members of mine management to recognize or address the situation. *See M-Class Mining, LLC*, 39 FMSHRC 1013, 1030 (May 2017) (ALJ) (finding a violation extensive where five members of mine management had the knowledge and multiple opportunities to comply with a standard but failed to do so). As discussed above, these employees were aware of the chamber's position and should have known that it violated the ERP. Tr. 48-51, 104, 159-60. Nonetheless, the chamber remained in the violative position for 24 hours, and if not for the citation it would have remained there for another couple of days. Tr. 150.

This combination of ignorance and knowing inaction on the part of management suggests that the operator was either highly negligent in training its section foremen on the ERP, highly negligent in executing the ERP, or both. Foreman Bedwell's unfamiliarity suggests a lack of or deficiency in training on effective preparation and execution of the ERP. Bedwell testified that he had read the ERP but did not remember the cited provision, and had never been trained on the ERP. Tr. 128-29, 148. Barras also failed to recall instituting any training on the ERP. Tr. 91.

Yet the record shows that only Bedwell was unaware of the terms, and makes no indication as to why the other members of management failed to act. At best, those individuals were also inadequately trained and did not recognize the violative condition. At worst, those other members were aware of the violative condition and did nothing. Particularly concerning is Bedwell's acknowledgment that Mine Manager Mike Butler was aware of the chamber's position and took no action to provide direction to Bedwell or any other section foreman. Tr. 159-60.

In all, four members of mine management failed to act on multiple occasions despite knowing that the refuge chamber was placed in the direct line of sight of the working face. Whether due to deficient training or willful inaction, Peabody's negligent conduct was extensive.

4. Obviousness of the Hazard and Degree of Danger

The hazard was obvious. The language of the ERP is clear that refuge chambers cannot be placed within the direct line of sight of the working face. Ex. S–2. Any miner familiar with the ERP would have immediately recognized the violative condition. Not only was the chamber clearly visible to all of the miners that worked in Unit 1, but it was plotted on the performance map available to management. Tr. 37, 149-50. Inspector Wilson testified as to multiple Peabody employees and management members being surprised or in shock when finding out that the chamber was positioned in the travelway in direct line of sight of the working face. Tr. 35, 138-42.

As discussed in relation to the S&S finding, the chamber's placement posed a high degree of danger to miners at the working section. Barras and Wilson testified that in an emergency the refuge chamber is the last resort for miners to seek immediate protection and survive until rescue is possible. Tr. 46, 86. The mine's placement of the refuge chamber exposed it to damage or destruction in the event of an ignition at the face. An irreparably damaged or destroyed refuge chamber has no safety value in an emergency situation. The chamber's placement was therefore highly dangerous.

5. 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).

Here, Peabody knew or should have known of the violation but did not move the chamber out of the line of sight of the working face until Inspector Wilson issued the 104(d)(1) citation. Ex. S–4; Tr. 159-60. If not for the citation the chamber would have remained in the violative condition for at least another two days. Tr. 150.

I reject Peabody's contention that Bedwell's efforts to improve conditions in the working section using pumps and ash constitute a mitigating circumstance. Resp. Br. at 11. Although I credit the testimony of the Respondent's witnesses that wet and muddy conditions existed at the mine, those same conditions existed the next day when Peabody successfully moved the refuge chamber into crosscut #28 to abate the citation. Tr. 33, 114, 167. Although it took longer than usual to move the chamber into the crosscut during abatement, Peabody was still able to do so in a relatively short period of time, and part of the delay was due to the need to remove the equipment already placed in the crosscut. Tr. 35, 40, 114, 167. Respondent could have properly positioned the chamber in the crosscut prior to the inspection if it wished to dedicate the time and manpower to ensure compliance with the ERP, but did not do so until cited. Abatement is therefore not a mitigating factor in this case.

6. 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, there is no evidence Peabody was placed on notice of the need for greater compliance in the past.

7. Conclusion

Based on the foregoing, especially the operator's knowledge of the violation, mine management's extensive negligence in training its employees to understand and execute the ERP, and the violation's obviousness and high degree of danger, I find that Peabody engaged in aggravated conduct constituting more than ordinary negligence. Though Peabody was not placed on notice of the need for greater compliance, the placement of the chamber was a clear violation of the ERP, a crucial document to miners' safety and well-being in the mine. While the violation only existed for 24 hours, it would have existed for at least another 48 hours if not for the citation and was either missed or ignored by multiple agents of the operator. In essence, Peabody failed to take a thorough and cautious approach to implementing its ERP and did not offer any credible mitigating factors.

Accordingly, I find that the violation constituted an unwarrantable failure, and for the same reasons find that Peabody's negligence was high.

V. 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).

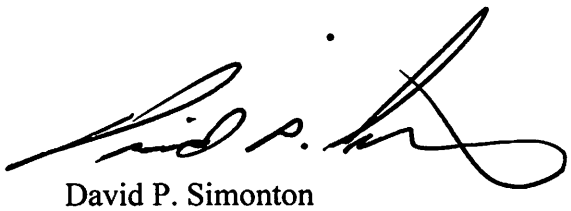
The Secretary proposed a regularly assessed penalty of $44,546.00. Peabody had one previous violation of section 316(b) over the past two years and was not assessed additional points for violation history. *See* Sec'y Br. at 22. The parties stipulated that payment of the proposed penalty of $44,546.00 will not affect Respondent's ability to remain in business. Jt. Stip. # 7. Peabody immediately dedicated ten miners and over an hour of time to abate the condition following the issuance of the citation. Tr. 62-63, 150, 172. However, Peabody also admitted that if not for the citation the refuge chamber would have likely remained in the direct line of sight of the working face for another couple of days. Tr. 150.

I discussed my gravity and negligence findings in greater detail above. Peabody violated the standard and the violation was S&S and reasonably likely to be fatal. I affirmed the Secretary's high negligence and unwarrantable failure designations because at least four members of mine management including the mine manager knew or should have known of the violation and failed to act. Of particular concern is upper management's knowledge of the violation, and its failure to act or to properly train its section foremen on the ERP's terms and their importance.

In light of the above, the court believes that the proposed penalty is not sufficient given the context and severity of the violation. Section 316(b) is intended to maximize miners' chances of survival in the face of an emergency, and the refuge chambers represent the miners' last resort in such circumstances. Yet Peabody showed little regard for the chamber's vulnerable position and its importance to effectively executing the ERP if the need arose. Despite being able to move the chamber with slightly more time and manpower than usually required, Peabody elected not to act and would have left the chamber in the direct line of sight of the working face for even longer. These decisions put miners' lives at risk. After considering the penalty criteria, I assess a penalty of **$50,000.00**.

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$50,000.00** 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