FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MILL BRANCH COAL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. VA 2013-366 A.C. No. 44-07150-320574 Docket No. VA 2014-240 A.C. No. 44-07150-346197 Mine: Osaka Mine

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

K. Brad Oakley, Esq., Jackson Kelly, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Paez

This case is before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("Mine Act"). In dispute are one section 104(d)(1) citation and three section 104(d)(1) orders issued to Mill Branch Coal Corporation ("Mill Branch" or "Respondent") at its Osaka Mine. To prevail, the Secretary must prove his charges "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. VA 2013-366 and VA 2014-240 to me in separate assignment orders, and pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, I consolidated them for hearing with Docket Nos. VA 2013-252 and VA 2013-299. The parties informed me that the latter two dockets settled prior to hearing,

and I disposed of them in separate decisions approving settlement. Thereafter, I held a hearing on January 6, 2015, in Abingdon, Virginia.[1]

Four alleged violations remain at issue, all of which were issued under section 104(d)(1) of the Mine Act. First, Citation No. 8180209 charges Mill Branch with violating its roof control plan under 30 C.F.R. § 75.220(a)(1) for failing to replace damaged roof bolts. In connection with this citation, MSHA also alleges in Order No. 8180210 that Mill Branch had not performed an adequate preshift examination of the area pursuant to 30 C.F.R. § 75.360(b)(3). Next, Order No. 8180213 alleges that Respondent violated 30 C.F.R. § 75.507 because a non-permissible electrical box was located in a return air course.[2] Finally, in Order No. 8180214 the Secretary alleges that Mill Branch violated its duty under 30 C.F.R. § 75.512 to perform an adequate electrical examination when it did not identify the non-permissible box for over a year. The Secretary designated each of these alleged violations as significant and substantial ("S&S")[3] and contends that each is the result of Respondent's unwarrantable failure to comply with a mandatory health or safety standard.[4] The Secretary also argues that all four violations were the result of Respondent's high negligence and has proposed a total penalty of $14,936.00.

At the hearing, the Secretary presented testimony solely from MSHA Inspector James Larry Bryant. Mill Branch presented testimony from former Electrician Charles Fields, former Mine Foremen Jeffrey Chad Lane, Section Foreman Matthew Gilliam, and Superintendent Hagy Barnett. The parties each filed closing and reply briefs.

II. PARTIES' ARGUMENTS AND ISSUES TO BE DECIDED

The Secretary argues that allegations underlying the citation and each of the three orders are valid and that his proposed penalties are appropriate. (Sec'y Reply at 7.) Respondent contends that the violations were neither S&S nor unwarrantable. (*See* Resp't Br. at 11, 17–18, 21, 23–24, 27–28; Resp't Reply at 3, 8–10.) In disputing the Secretary's allegations regarding the roof bolt violations, Mill Branch claims Inspector Bryant misunderstood the type of roof

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[1] In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. S–#," and "Ex. R–#," respectively. The parties also admitted a list of stipulations in a joint exhibit, which was admitted as Joint Ex. 1.

[2] The inspector initially issued Order No. 8180213 as a section 104(a) citation resulting from Mill Branch's high negligence, but later modified it to a section 104(d)(1) order alleging high negligence and unwarrantable failure. *See* discussion *infra*, Part VI.A.

[3] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[4] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

bolts it used, disputes the length of time these conditions existed, and argues that the Secretary has not shown the cited conditions affected the structural integrity of the mine roof. (*See* Resp't Br. at 4–5, 10–11, 13; Resp't Reply at 1–7.) Further, Respondent argues it held a good faith belief that the cited conditions did not violate its roof control plan. (*See* Resp't Br. at 12–13; Resp't Reply at 8.) As to the Secretary's allegations regarding the non-permissible electrical equipment, Mill Branch points to the amount of methane, as well as the high air velocity and long distance from the working section of the mine, to claim that injuries were not reasonably likely. (Resp't Br. at 23–24; Resp't Reply at 9.) Respondent also argues that the failure of both state and MSHA inspectors to previously cite the condition mitigates its negligence. (Resp't Br. at 25–26; Resp't Reply at 9–10.)

Accordingly, the following issues are before me: (1) whether the Secretary has satisfied his burden of demonstrating the length of time the cited roof bolt conditions existed on Respondent's working section; (2) whether, as to the roof bolting violations, Respondent had an objectively reasonable and good faith belief that its conduct complied with its roof control plan; (3) whether the Secretary has satisfied his burden of demonstrating that the alleged violations were S&S; (4) whether the Secretary has satisfied his burden of demonstrating that each of the alleged violations constituted an unwarrantable failure to comply with a mandatory health or safety standard; and (5) whether the Secretary's proposed penalties are appropriate.

For the reasons set forth below, Citation No. 8180209 and Order No. 8180210 are **AFFIRMED** as S&S and as the result of Respondent's high negligence but **MODIFIED** to remove the unwarrantable failure designations. In addition, Order Nos. 8180213 and 8180214 are **AFFIRMED** as written.

III. BACKGROUND AND STATEMENT OF FACTS

The Osaka Mine is an underground coal mine located in Norton, Virginia. (Ex. S–2; Ex. S–4 at 1.) Mill Branch employs large continuous mining machines with 800 foot long power cables to develop the room-and-pillar mine. (Ex. S–2; Tr. 123:18–24, 157:23–25, 235:12–24; *see, e.g.*, Tr. 53:11–22.) This type of mine requires Respondent to cut long, parallel pathways—known as entries—through the coal seam. (Tr. 218:25–219:7; Ex. S–2; Ex. S–4 at 10–11.) As Mill Branch advances deeper into the mine, it also cuts perpendicular pathways—known as crosscuts—that connect the entries. (Tr. 218:25–219:7; Ex. S–2; Ex. S–4 at 10–11.) However, Respondent does not remove the square-shaped pillars of coal that remain between the entries and crosscuts because these pillars are necessary to support the rock and dirt separating the mine from the earth's surface. (Tr. 38:6–39:6.) When viewed from above, the Osaka Mine resembles a checkerboard with entries and crosscuts surrounding pillars of coal. (Ex. S–2.)

Because the rock and dirt above an underground coal mine places downward pressure on the mine roof (*see, e.g.*, Tr. 49:20–50:5), the operator must secure the roof against cave-ins and roof falls to protect the miners working below. *See, e.g.*, 30 C.F.R. § 75.202(a) (requiring operators to support or otherwise control the roof, face, and ribs to protect persons from hazards related to falls of the roof). Deep cover increases the amount of downward pressure on the roof and ribs, and the Osaka Mine is located 1,500 to 2,200 feet beneath the surface. (Tr. 37:24–38:16, 39:19–41:2, 292:24–293:14; Ex. S–4 at 1.) In addition, the laminated sandstone roof at

the mine is not a solid formation of rock; instead, it contains individual layers. (Tr. 37:13–23, 48:14–49:6.) Finally, a mine roof that shows cracks or "cutters" may indicate that it is beginning to sag under the pressure above. (Tr. 257:6–25.)

One method of supporting a mine roof from collapse is to install metal bolts. (*See, e.g.*, Ex. S–4 at 4, 6.) Mill Branch employs large roof bolting machines to drill holes and to insert long metal roof bolts into the mine's roof along with a resin glue (or grout) to hold the bolt in place. (*See, e.g.*, Tr. 34:7–13, 35:11–18.) Some roof bolts are fully grouted, meaning that the entire bolt is covered with resin glue. (Tr. 35:19–21, 188:19–189:3, 210:22–211:5, 255:3–17.) Fully grouted bolts create a larger "beam" effect that transfers the downward force along the beam and to the pillars of coal left behind. (Tr. 255:18–256:12, 290:13–291:24, 292:21–293:14.)

Other bolts—known as torque tension bolts—include threads in addition to glue. (Tr. 35:9–18, 36:10–13, 135:14–16, 156:5–13.) Although tension bolts may be fully grouted when they are installed, torque is also applied to the bolt's nut and secures the bolt to the roof above. (Tr. 35:9–21, 135:10–25, 188:19–189:3, 210:22–211:5, 255:3–17, 285:5–15.) In addition, torque tension bolts include a bolt plate between the end of the nut and the roof itself. (Tr. 34:24–35:18, 156:5–13.) Unlike normally glued bolts, the bolt plate on torque tension bolts is firm against the roof and helps to secure loose rock within the first few inches of the roof, also known as the "skin." (Tr. 35:9–18, 35:22–36:7, 47:2–11, 48:2–9, 135:10–25, 214:5–15, 288:17–289:3, 293:15–295:2, 296:7–297:6.) If a torque tension bolt is missing its head or plate, it must be replaced. (Tr. 224:5–13, 258:2–10, 259:6–13, 288:17–289:3.)

When installed correctly, approximately one or two inches of the torque tension bolt extend beyond the surface of the mine roof. (Tr. 36:8–18, 212:19–24.) Torque tension bolts are normally installed with 165 to 225 pounds of torque, and the amount of torque on the bolt may be tested after installation. (Tr. 115:18–21, 134:23–135:9, 136:3–13, 189:20–191:2, 212:25–213:11, 213:19–24; Ex. S–1 at 14; Ex. S–4 at 6.) These bolts are sometimes installed on a 5 to 15 degree angle to accommodate mining conditions. (Tr. 60:4–12, 225:5–20; Ex. S–4 at 4.) As a result, Mill Branch uses a special washer on all of its bolts to compensate for angles and maintain bolt plates tight to the roof. (Tr. 60:4–12, 150:5–17, 158:25–159:11, 189:14–19, 225:5–20, 256:13–257:2, 295:7–296:2, 297:19–298:3; Ex. S–4 at 4.)

In accordance with the Secretary's regulations at 30 C.F.R. § 75.220(a)(1), MSHA approved a roof control plan applicable to the Osaka Mine on January 30, 2013 ("January 30 Plan"). (Ex. S–4.) However, the plan did not specifically define when a bolt should be considered "damaged" or be replaced. (Tr. 114:21–115:9.) Moreover, MSHA had not published any materials about what constituted a "damaged" roof bolt. (Tr. 116:24–117:5.)

In addition to securing the roof against collapse from the weight above, coal mine operators must also follow detailed ventilation plans to sweep noxious gasses out of their mines. In particular, underground coal mining releases methane into the mine atmosphere. Methane is an explosive gas and ignites at certain concentrations.[5] Accordingly, the Secretary's safety

[5] The Osaka Mine had a poor history of methane ignitions. (Tr. 112:9–14.) In addition, MSHA was required to provide spot inspections of Osaka Mine every 15 working days because it liberated more than 200,000 cubic feet of methane every twenty-four hours. (*See*

regulations also require mine operators to take precautions to prevent methane ignitions. (*See* Tr. 109:12–18.) Mine operators must design ventilation systems to direct fresh air through an "intake" entry to the active working face and then sweep dangerous gases away through a "return" entry. (*See* Tr. 55:7–57:4.) Because the air traveling in the return entry can contain methane, mine operators may only use permissible equipment in those entries. (*See* Tr. 84:1–22, 100:23–101:2.) Permissible equipment is specifically designed to prevent electrical sparks from escaping into the mine atmosphere. (Tr. 84:1–22.)

Careful and consistent examination by qualified mine personnel also helps to ensure safe conditions within an underground coal mine. Preshift examiners may begin up to three hours before a shift starts and must take air readings, inspect roof and rib conditions, and identify areas for cleanup across the entire working section. (Tr. 68:5–69:5.) Similarly, electrical examiners trace the power cable from the power center to the electrical equipment, ensure that the cable has not been damaged, and ensure that the attached equipment is permissible. (Tr. 90:14–25, 178:24–179:21, 281:12–15.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary 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) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that "an inspector's judgment is an important element" in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Nat'l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission clarified "the correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably

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30 U.S.C. § 813(i); Tr. 85:1–16.) The Secretary did not elicit testimony specifying the explosive range of methane, but I take judicial notice that methane concentrations of 5 to 15 percent are explosive.

likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Unwarrantable Failure Determinations

In *Emery Mining*, the Commission determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). The Commission's factors are "viewed in the context of the factual circumstances of each case, and some factors may not be relevant to a particular factual scenario." *Consolidation Coal Co.*, 22 FMSHRC at 353. All "relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated" or whether mitigating circumstances exist. *Id.*

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW — DAMAGED BOLT CITATION AND PRESHIFT EXAM ORDER — MARCH 4, 2013

A. Further Findings of Fact

1. Inspector Bryant's Inspection — March 4, 2013

On March 4, 2013, Inspector Bryant visited the Osaka Mine to collect rock dust samples from the 1 West Panel of the mine. (Tr. 15:15–16:12.) As Bryant traveled with Foreman Johnny Mullins, he noticed a portion of the mine roof near survey station number 2178 with draw rock, a few damaged bolts, and a missing roof bolt. (Tr. 16:13–17:13, 18:1–9, 25:12–17, 118:9–119:15; Ex. S–1 at 7–8.) Although this area was not part of the active working section, Bryant was concerned enough about the mine's roof that he decided to inspect the working section. (Tr. 16:24–17:13, 20:8–21, 24:8–26:17, 119:15–18; Ex. S–2; Ex. S–1 at 7–8.)

Bryant arrived in the active working area at approximately 3:00 p.m., which was near the end of the day shift at Osaka Mine.[6] (Tr. 28:1–3.) Mill Branch was in the process of developing the 2 Southeast Panel of the mine, which intersected at a right angle with the 1 West Panel. (Tr. 18:18–19:10; Ex. S–2.) Looking toward the face, the 2 Southeast Panel consisted of six entries that were numbered 1 through 6 from left to right. (Ex. S–2.) On that day, Respondent had mined just one crosscut deep into the 2 Southeast Panel and was in the process of developing a second crosscut between Entry No. 1, Entry No. 2, and Entry No. 3. (Ex. S–2.) Entry No. 5 was an intake entry that provided fresh, ventilating air to the panel. (Tr. 30:12–18, 55:19–24.) As the intake air approached the last open crosscut, it split into two air courses to accommodate the 2 Southeast Panel's two continuous miners. (Tr. 53:11–55:6, 55:19–56:12, 205:1–206:5.) Entry Nos. 1 and 6 served as return air entries, and the coal feeder and conveyor belt transporting mined coal to the surface were located in Entry No. 3. (Tr. 22:25–23:22, 29:23–30:11, 30:21–31:1, 55:7–12.) In addition, Mill Branch had built a brattice line—an airtight partition—separating the air courses in Entry Nos. 5 and 6 approximately two days prior to Bryant's inspection. (Tr. 21:7–16, 65:13–66:12, 74:9–12, 215:16–216:12; Ex. S–2; *see* Ex. S–1 at 19.) At the time, Mill Branch typically completed eight cuts in a given shift, and installed six-foot torque tension bolts that were fully grouted. (Tr. 188:16–20, 219:14–20.) Respondent had already installed approximately five thousand bolts on the 2 Southeast Panel. (Tr. 116:11–23, 264:24–265:5.)

Inspector Bryant visited each of the six entries on the 2 Southeast Panel during his inspection. Beginning in Entry No. 6, he identified a total of thirteen damaged bolts, including: five near Survey Station No. 2153 in the intersection with the second to last crosscut, three near the newly constructed brattice line separating Entry Nos. 5 and 6, three near the intersection with the last open crosscut, and two near the face. (Tr. 20:22–21:19, 27:15–19, 34:19–35:8, 41:3–42:5; *see* Ex. S–1 at 10–12; Ex. S–2.) One of the bolts near Survey Station No. 2153 had been sheared off. (Tr. 20:22–21:19, 34:19–35:8, 120:8–20, 156:18–157:1; *see* Ex. S–1 at 10–12; Ex. S–2.) He characterized the others as bent or damaged. (Tr. 34:19–35:8, 41:3–42:5, 121:10–123:10; *see* Ex. S–1 at 10–12; Ex. S–2.) Nearby Survey Station No. 2153, he also observed Foreman Gilliam's dates, times, and initials indicating he had examined the area at 11:14 a.m. and 1:50 p.m.[7] (Tr. 19:6–20:4, 21:20–22:7; 27:20–28:12; 31:5–32:17, 67:3–7, 70:4–72:21, 239:4–22; Ex. S–1 at 10, 19; *see also* Ex. S–8.) The area near Survey Station No. 2153 was well rock dusted. (Tr. 33:7–19, 66:14–19, 74:7–18; Ex. S–1 at 19.) Although Bryant saw footprints in the rock dust, he did not see any equipment tracks. (Tr. 33:7–19, 66:14–19, 72:22–73:11, 158:1–15; Ex. S–1 at 19.) Bryant also observed cracks and loose rock in the mine roof. (Ex. S–1 at 12; Tr. 21:20–22:7, 25:12–17, 33:22–34:2.)

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[6] Mill Branch operated the Osaka Mine on three overlapping shifts. (*See* Tr. 67:25–68:4, 143:7–11, 146:1–10, 187:17–19, 223:3–5; Ex. S–7; Ex. S–9.) At the time, Mill Branch was "hot seating" its equipment, meaning that miners stayed at their equipment until the next crew arrived to take over. (Tr. 236:23–237:8.)

[7] Because onshift and preshift examinations require examiners to check many of the same conditions, foremen often complete them concomitantly. (Tr. 70:9–21; Ex. S–6; Ex. S–10; Ex. R–8; *see, e.g.*, Tr. 238:20–240:5.) The preshift exam had been completed between 12:05 p.m. and 2:15 p.m. (Tr. 67:3–21, 238:16–239:3; Ex. S–9.)

As Bryant continued his inspection through the remaining entries, he identified thirteen additional damaged bolts. First, he observed one bent bolt with a damaged bolt plate in Entry No. 5 with a one-inch separation between the draw rock above and the bolt itself.[8] (Tr. 43:19–44:13; Ex. S–1 at 13; Ex. S–2.) He also identified four bent bolts in Entry No. 4, as well as a broken bolt in Entry No. 3 surrounded by loose draw rock.[9] (Tr. 45:12–46:16, 129:18–130:6; Ex. S–1 at 14–15.) Further, he identified two damaged bolts at the intersection between Entry No. 2 and the new crosscut Mill Branch was driving to connect to Entry No. 1. (Tr. 52:10–15; Ex. S–1 at 17; Ex. S–2.) These two bolts had dust and gob on the threads of the bolts. (Tr. 52:20–23; Ex. S–1 at 17.) Finally, he observed five damaged bolts in Entry No. 1. (Tr. 57:9–58:6, 139:5–10; Ex. S–1 at 18; Ex. S–2.) One of the bolts in Entry No. 1 had been broken and rusted.[10] (Ex. S–1 at 18; *see* Tr. 57:19–20.) Two other bolts had been broken off even with the nut, while another was loose. (Tr. 57:12–24; Ex. S–1 at 18.) On cross-examination, Bryant admitted either he was unsure when the area had been cut or that it was *possible* that the bolts in question had been damaged after Gilliam completed his preshift examination. (Tr. 125:21–126:2, 128:8–129:6, 130:12–133:7, 138:16–24, 140:25–141:10.)

Bryant did not see any of these conditions recorded in the preshift examination report for the evening shift on March 4, 2013. (Tr. 67:3–17; Ex. S–9.) Based on his observations, Bryant cited Mill Branch for two violations. First, Bryant issued Citation No. 8180209, which generally matches his testimony on Respondent's failure to comply with the January 30 Plan. Bryant indicated:

> The operator failed to follow his approved Roof Control Plan on the active 001/002 working section. When checked, in the #6 entry 1 break outby the last open crosscut in the middle of the intersection 1 bolt had been broken off even with the mine roof and 3 other bolts were damaged leaving an area 11 feet long x 7 feet wide of unsupported roof. 3 bolts were damaged in the crosscut to the left of the intersection and 3 more in the entry going toward the last open crosscut. When checked, the #6 heading had 3 damaged roof bolts[.] [M]ining height in this area is 6 [feet.] 1 damaged bolt was in the #5 entry[,] 20 feet outby the last open crosscut with loose draw rock with a 1 inch separation from the mine roof. 4

[8] Foreman Chad Lane attempted to pull the rock down and was unable to do so. (Tr. 147:14–24, 195:8–196:7, 261:10–20; *see* Ex. S–1 at 13.)

[9] When Respondent replaced this bolt, Foreman Lane pulled down the rock. (Tr. 46:16–47:1, 131:10–12; Ex. S–1 at 15.) Bryant measured the largest piece, which was 22 inches long by 16 inches wide by 2 inches thick. (Tr. 46:16–47:1, 132:3–16; Ex. S–1 at 16.) Smaller pieces measured 1 foot long by 6 inches wide by 2 inches thick. (Ex. S–1 at 16.)

[10] Bryant explained that he could tell the difference between a bolt that had been struck recently and one that had not. (Tr. 43:3–6.) Freshly damaged roof bolts do not have any rock dust above them. (Tr. 43:6–8.) Further, recently damaged bolts will not show any rust spots; rust appears after a day. (Tr. 43:9–12.)

> damaged bolts were in the #4 entry outby the last open crosscut, [and] 1 damaged roof bolt was in the #3 heading where the 3 left crosscut was turned with loose draw rock above the bolt, mining height was 8 feet and the rock measured 22 inches long x 16 inches wide x 2 inches thick after being pulled[.] 4 smaller pieces were pulled measuring 1 foot long x 6 inches wide x 2 inches thick[.] #2 heading had 2 damaged bolts where the 2 left crosscut was turned and the #1 heading had 5 damaged bolts with 1 bolt loose from the mine roof with a mining height of 8 ½ feet. In the #1 return entry at SS#2178 break from where they butted the mains section off a roof bolt has been broken off leaving an area of roof 7 feet x 7 feet with 1/2 inch separation in the mine roof with rock dust visible above the crack. All measurements were made with a standard rule[r]. These conditions expose miners to hazards of crushing injures while traveling and working under damaged and unsupported roof. This mine was put on notice on 2/20/13, Citation #8201859 to maintain compliance with this regulation and future non-compliance with this standard would result in evaluations for increased enforcement. This violation is an unwarrantable failure to comply with a mandatory standard. The operator of this mine engaged in aggravated conduct constituting more than ordinary negligence in that[:] #1.The condition has existed for a period of time. #2.The condition was obvious and extensive.#3.The operator was making exams of these areas 3 times per day.
>
> Standard 75.220(a)(1) was cited 8 times in two years at mine 4407150 (8 to the operator, 0 to a contractor).

(Ex. S–3.) Bryant designated the citation as an S&S violation that was reasonably likely to result in fatal injuries affecting one person. (Ex. S–3; Tr. 63:9–65:1.) He also characterized Mill Branch's level of negligence as high. (Ex. S–3; Tr. 65:2–12, 78:11–18.)

Inspector Bryant also issued Order No. 8180210 for failing to perform an adequate preshift exam for the evening shift. (Tr. 69:13–18.). He noted:

> The preshift examiners conducting the examinations of the 001/002 active section did not recognize the obvious and extensive hazards that were visible to the most casual observer. A prudent mine examiner would have observed the hazardous conditions and taken action to correct them. The hazard exists of miners traveling through the area without any knowledge of a hazardous condition and being seriously injured. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that an adequate preshift exam was not done of the 001/002 active section and the obvious and extensive conditions were not reported

> and corrected. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. S–5.) Again, Bryant marked the order as an S&S violation that was reasonably likely to result in fatal injuries to one miner. (Ex. S–5; Tr. 76:10–77:19.) Likewise, Bryant characterized Respondent's negligence as high. (Ex. S–5; Tr. 77:20–78:18.) He terminated both the citation and order after his safety talk with the miners, and Respondent replaced bolts, installed timbers as necessary, and completed an adequate examination. (Tr. 58:8–11; Ex. S–1 at 22–23; Ex. S–3; Ex. S–5.)

At 6:30 a.m. the following day, Osaka Mine Superintendent Barnett visited the 2 Southeast Panel to examine the bolts Inspector Bryant cited and the condition of the roof. (Tr. 254:7–15.) In Entry No. 6, Barnett testified that he did not see any problems with the roof conditions, but he admitted that one of those bolts might have required replacement. (Tr. 260:19–261:9; *see* Tr. 267:5–15.) He also testified that he did not see any other bolts in the other entries that needed to be replaced nor did he observe any adverse roof conditions. (Tr. 261:21–262:11, 263:3–264:8.)

2. Number and Duration of Damaged Bolts

a. *Number of Damaged Bolts*

Mill Branch repeatedly disputes Inspector Bryant's "theory of a 'damaged' bolt." (Resp't Br. at 4; *see* Resp't Br. at 12, 16–21, Resp't Reply at 1, 3–4, 7.) The crux of Respondent's argument is that Inspector Barnett misunderstood the type of bolts Mill Branch employed on the 2 Southeast Panel. (*See, e.g.*, Resp't Reply at 1 ("[T]he Secretary and his only witness rely on their mistaken belief that the Mine used 'torque tension bolts[,]' . . . . [t]hus, the Secretary's analysis of what constitutes a 'damaged' roof bolt is flawed and there is no evidence of damage to the type of bolts actually used in the [m]ine.").) Mill Branch suggests that it did not employ "pure" torque tension bolts, but rather "bolts [that] function as fully grouted glue bolts." (*Id.*) In fact, Mill Branch claims "the entire purpose of using fully grouted glue bolts is that the bolt head can be hit without affecting the integrity of the roof or roof support." (*Id.* at 2.) Respondent also avers that its bolts "are first torqued to ensure they are tight until the glue seals . . . and then the bolts function as glue bolts." (*Id.* (emphasis removed).) Mill Branch describes the fully-grouted torque tension bolt as a belt and suspenders approach, meaning it is an added level of safety.[11] (*Id.*)

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[11] Looking at the January 28 Plan, no torque test is required on previously installed roof bolts. (Ex. S–4 at 6.) Thus, Superintendent Barnett inferred that torque tension no longer served any purpose once the glue had hardened. (Tr. 285:8–15; *see* 286:8–288:9.) However, testimony from Respondent's other witnesses supports Inspector Bryant's theory that torque tension continued to play a role in the function of the bolt. (Tr. 189:20–190:3, 224:5–13.) Given this testimony, it appears that tension—and maintaining a roof bolt plate tight to the mine roof—remains important, even after the glue in the fully grouted bolt has set. Barnett's inference therefore does not appear sound. To borrow Respondent's belt and suspenders analogy, it is simply unclear why Mill Branch would throw away its belt once it attached its suspenders.

Yet Respondent's premise—that Bryant misunderstood the type of bolts in use in the area—is flawed. At the hearing Bryant specifically testified that Respondent fully grouted its torque tension bolts. (Tr. 35:9–18.) Bryant also differentiated fully grouted torque tension bolts from *normal* fully grouted resin bolts, which do not have a nut on the end. (Tr. 136:15–18.) Although Bryant acknowledged that a bolt could be struck without losing tension on the bolt plate in a fully grouted torque tension bolt (Tr. 115:10–17), he explained that the threads on the torque tension bolts make them easy to bend and crack. (Tr. 136:19–25.) Because these bolts have threads, the bolt head breaks off easily, particularly when five or six inches of draw rock weigh on the head. (Tr. 37:9–12, 136:19–137:18.) More importantly, he explained that when he referred to "damaged" bolts, he meant they had either been bent over or broken. (Tr. 36:22–37:7.)

In view of the above evidence, I reject Respondent's argument that Inspector Bryant misunderstood the types of bolts used on the 2 Southeast Panel or how to determine whether those bolts were damaged. Bryant is an experienced inspector and accurately described the bolts Mill Branch employed. Because Bryant characterized each of these bolts as bent, broken or sheared off, missing a bolt plate, or otherwise damaged, I find that each of the twenty-six bolts on the 2 Southeast Panel did not comply with the January 30 Plan and required replacement.

b. *Duration of Damaged Bolts*

Mill Branch also disputes Inspector Bryant's claim that these conditions existed for a significant period of time. (Resp't Br. at 13–15; Resp't Reply Br. at 6–7.) Respondent emphasizes the *possibility* that each of the twenty-six bolts in question was struck *after* Foreman Gilliam completed his preshift examination, and I recognize Bryant's admission that any of these bolts could have been damaged after Gilliam passed through the area. But acknowledging that any *individual* condition may have developed after Gilliam passed through an area does not necessarily imply that *every* condition developed in that timeframe. For Respondent's theory to be viable, Mill Branch would have mined from 6:00 a.m. until 12:00 p.m. without damaging a bolt, but then damaged twenty-six bolts in a pattern precisely tracing Gilliam's path. (*See* Sec'y Br. at 14.)

Given the volume of damaged bolts, Respondent's theory is implausible. Further, Respondent provided no unifying theory as to how this damage, as widespread as it was, could have occurred within the time period. As Gilliam acknowledged: "It's not likely that, what is it, 20-some bolts are going to get damaged after I [completed my preshift examination] . . . ." (Tr. 242:7–10.) Considering Inspector Bryant's admission that each condition *may* have arisen after Gilliam completed his examination, I cannot determine that *each* condition existed before Gilliam examined the area. Nevertheless, the number of damaged bolts and compressed timeframe allow me to infer that these conditions did not all develop in the three hours after Gilliam started his preshift examination.

Specifically, the evidence also demonstrates that the five bolts located near Survey Station No. 2153 in Entry No. 6 and the three bolts near the recently constructed brattice line had existed for at least one shift. Although Mill Branch had mined the face of Entry No. 6 on March 4, 2013, the face was located on the far side of the last open crosscut from the intersection in

question. (Tr. 124:15–125:13; Ex. S–2.) I recognize Bryant did not know what time the face had been cut (Tr. 127:2–4), and I have considered Respondent's contention that a continuous miner may have been backed down Entry No. 6 to straighten its power cord. (Resp't Br. at 12; Resp't Reply at 7.) However, it is uncontroverted that Mill Branch completed its machine dusting during the overnight shift. (Tr. 74:12–18.) Bryant also repeatedly testified that the area near the intersection with the second to last crosscut had been well rock dusted and that he did not see any equipment tracks in the dust. Notwithstanding the normal mining cycle of "cut, bolt, clean, dust," it is unclear how or why additional dusting would have taken place in the intersection area of Entry No. 6, meaning that the dust in question had existed since at least the previous overnight shift. Thus, I infer that no equipment had moved in that portion of Entry No. 6, and these eight damaged roof bolts had existed since at least the previous shift.[12]

The evidence also demonstrates that the rusted bolt in Entry No. 1 existed prior to Foreman Gilliam's preshift examination. I understand that Bryant admitted it was possible that bolts in Entry No. 1 had been damaged after Gilliam examined the area. (Tr. 139:1–141:10.) Yet Bryant also credibly testified—and Respondent's witnesses did not dispute—that bolts do not rust quickly enough for this bolt to have been damaged on the day shift. Accordingly, I find that this bolt had existed since at least the previous shift.

B. Analysis and Conclusions of Law — Citation No. 8180209 – Roof Control Plan

1. Fact of Violation

Section 75.220(a)(1) requires operators to develop and follow an approved roof control plan that is suitable to the prevailing geological conditions and the mining system in place at the mine and to take additional measures to protect persons if unusual hazards are encountered. 30 C.F.R. § 75.220(a)(1). An operator violates section 75.220(a)(1) when it does not comply with the terms of its roof control plan. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280–82 (Dec. 1998) (explaining how the Secretary must prove violations of roof control plans).

The January 30 Plan requires that bolt plates be secured firmly to the roof. (Ex. S–4 at 4.) It also requires Mill Branch to address adverse roof and rib conditions. (*Id.* at 2.) Finally, it requires Mill Branch to install its roof bolts in specific patterns. (*See, e.g.*, *id.* at 25.) It is uncontroverted that the roof bolt in Entry No. 6 that had been sheared off needed to be replaced. Moreover, I have found as a matter of fact that the roof bolts Inspector Bryant identified in Citation No. 8180209 constituted roof bolts that needed to be replaced. *See* discussion *supra* Part V.A.2.a. Given my factual findings, I conclude that the Secretary has met his burden of proving that Mill Branch violated 30 C.F.R. § 75.220(a)(1).

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[12] In contrast, I cannot make a similar finding regarding the two damaged bolts in Entry No. 2. Although they were covered in dust and gob, Inspector Bryant admitted he did not know when Respondent had last mined in Entry No. 2. (Tr. 138:9–19.) Unlike Entry No. 6, Bryant did not characterize the area as well rock dusted, and I therefore cannot infer that the rock dust on the bolts had been placed there by the machine dusting on the overnight shift.

2. S&S

Respondent's violation of section 75.220(a)(1) establishes the first element of an S&S violation. However, Mill Branch claims the Secretary has neither demonstrated a discrete safety hazard nor shown that any alleged hazard was reasonably likely to result in reasonably serious injuries. (Resp't Br. at 10–11.) Specifically, Mill Branch claims the Secretary has not proven that the cited conditions affected the structural integrity of the mine.[13] (*Id.* at 11.) However, the operator provides no case law supporting the proposition that the Secretary must meet such an elevated burden. The Secretary might not be able to demonstrate that the missing bolts affected the "structural integrity" of the mine even with a battery of expert testimony and geological study. But that is not the standard that *Mathies* requires. Instead, it requires the Secretary to demonstrate that the damaged roof bolts in question more likely than not contributed to a discrete safety hazard that is reasonably likely to result in reasonably serious injury.

Respondent's curious arguments notwithstanding, the facts demonstrate that the conditions at issue contributed to a discrete safety hazard. Inspector Bryant described the damaged roof bolts as contributing to the hazard of rocks falling and striking miners working on the section. (Tr. 63:14–23.) Bryant also explained that damaged bolts do not provide the support that is intended under the approved plan. (Tr. 63:4–8.) In addition, he explained that striking and loosening these torque tension bolts would make it more likely that a roof fall would occur. (Tr. 49:6–19.) He also identified draw rock and cracks in the roof on the 2 Southeast Panel.[14] Finally, during Bryant's previous inspections that quarter he identified two roof falls in other parts of the mine, as well as many areas where bolts had broken off under the weight of the mine roof. (Tr. 50:19–51:23.) Considering Bryant's credible testimony, I determine that *Mathies*' second element has been satisfied.

Likewise, this falling rock hazard was reasonably likely to result in reasonably serious injuries. It is uncontroverted that Respondent's miners worked in every one of the entries in which Bryant identified damaged roof bolts. In the course of normal mining operations, miners would have continued to work beneath the damaged bolts on the section. Considering Barnett's assertion that Mill Branch selected these type of bolts because they could be struck without requiring replacement, additional bolts would be damaged and never addressed. Draw rock—including large chunks like the piece pulled down from Entry No. 3—would have continued to develop. In this context, it is reasonably likely that falling rock would cause serious or fatal injuries. Indeed, a roof fall caused a fatality at the Osaka Mine just a few years earlier. (Tr. 64:3–10, 149:2–150:4.) Thus, I determine that elements three and four of the *Mathies* test have been satisfied.

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[13] Respondent suggests "the one potential hazard observed—the draw rock in [Entry No. 5]—was not hazardous" because it could not be pulled down. (Resp't Br at 11.) Yet, this argument ignores the large piece of rock Foreman Lane *did* pull down in Entry No. 3.

[14] Although Superintendent Barnett claimed he did not see any adverse roof conditions when he examined the 2 Southeast Panel, he did not examine the section until the next day—after Respondent had abated the conditions. Thus, I accord little weight to this testimony.

Based on the above, the Secretary has demonstrated each of the four elements of *Mathies*. I conclude that Citation No. 8180209 was appropriately designated as S&S.

3. Unwarrantable Failure and Negligence

The Secretary charges Mill Branch with an unwarrantable failure to comply with a mandatory health or safety standard and contends that the operator acted with a high degree of negligence. As I noted, the unwarrantable failure analysis is a totality of the circumstances analysis focusing on seven different factors. *See* discussion *supra* Part IV.B. Yet given the number of bolts Inspector Bryant cited and the differing factual determinations I have reached, weighing Respondent's conduct with regard to several of these factors is akin to finding the center of a Venn Diagram: identifying how many bolts were both damaged enough to be readily apparent *and* existed long enough that Respondent's examiner would have had an opportunity to observe the obvious condition.

At the hearing, Bryant ably demonstrated that he understood the types of bolts in use and the damage they might sustain, and I have determined that all twenty-six of the cited bolts were damaged for the purpose of finding a violation. *See* discussion *supra* Part V.A.2.b. and Part V.B.1. In addition, I have determined that nine of the twenty-six damaged bolts existed since at least the previous shift. *See* discussion *supra* Part V.A.2.a–b. Nevertheless, a careful consideration of the record reveals the varying level of detail Bryant presented about each bolt—details that are critical to determining the obviousness of the cited bolts, as well as their extent and Respondent's knowledge of conditions at issue.

For example, Bryant indicated that one of the bolts he found near Survey Station No. 2153 in Entry No. 6 had been "sheared off." Similarly, the bolt in Entry No. 5 had a damaged plate, while the shank had been broken off of the bolt in Entry No. 3. Three of the bolts in Entry No. 1 had been broken off. These six conditions were missing parts of the bolt itself, and they should have been apparent to a foreman carefully examining the area.

In contrast, Inspector Bryant described the other four bolts in the intersection of Entry No. 6 as merely "damaged" and "bent." When questioned about these bolts specifically, Bryant admitted he was unsure whether they were cracked. He presented neither an indication about how badly they had been bent, nor explained in what direction they were bent. Bryant's description of the three bolts he identified near the brattice line were also brief, as were his characterizations of the three bolts near the last open crosscut and the two bolts near the face, the four bolts he identified in Entry No. 4, the two bolts he noted in Entry No. 2, and two of the bolts in Entry No. 1. Without at least some description beyond the conclusory terms "damaged" or "bent," I cannot infer that this second group of damaged bolts would have been readily apparent to a foreman passing through the area.[15]

[15] If the Secretary had elicited testimony or presented evidence demonstrating that the damage to these twenty bolts was as plain as the six bolts I described in the previous paragraph, Respondent's failure to address them might have been more troubling. I recognize that the opinion of an experienced inspector is entitled to significant weight, and I understand that this second set of damaged bolts *may* well have been equally apparent to a section foreman. But the

Considering Barnett's testimony that missing bolt heads require replacement, Mill Branch could not have held an objectively reasonable belief that any of the six bolts with readily apparent damage complied with its roof control plan. But given the many thousands of bolts installed on the 2 Southeast Panel, six demonstrably damaged bolts spread across four different entries separated by hundreds of feet is not an extensive condition. (*See* Ex. S–2 (providing map scale).) Moreover, I also note that five of these six bolts may not have been obvious. In light of the six-foot mining height in Entry Nos. 5 and 6, I understand how a stooped-over miner might miss an isolated bolt when he passed through the area. Moreover, it is unclear when the conditions in Entry No. 5 and Entry No. 3 arose. *See* discussion *supra* Part V.A.2.b. Thus, it appears only *one* bolt that existed for longer than a shift—the rusted bolt in Entry No. 1—should have also been obvious to Foreman Gilliam when he completed his preshift exam. Although Mill Branch reasonably should have known about this bolt, overlooking one obvious bolt for the period of one shift does not imply aggravated conduct. Instead, duration, extent, obviousness, and knowledge all suggest that Mill Branch's negligence in this case was ordinary.

The three remaining unwarrantable failure factors likewise point to ordinary negligence. As the Secretary admits, "there was not much testimony" regarding notice to Mill Branch that greater efforts were necessary to comply with the January 30 Plan.[16] (Sec'y Br. at 17.) It also seems Mill Branch made no previous efforts to abate the conditions specifically at issue, but I note that Mill Branch regularly examined the area in previous shifts and had installed supplementary roof bolts on the section. (Ex. R–8.) Respondent's past examinations and supplementary bolts are inapposite to my S&S analysis, *see* discussion *supra* Part V.B.2, and I recognize that these conditions exposed Respondent's miners to serious dangers from a collapsing roof. However, these past examinations and supplementary bolts *are* pertinent to my negligence analysis because it appears Mill Branch took at least *some* care to protect miner safety. Those steps proved inadequate, but Respondent's past efforts suggest an ordinary level of negligence rather than the purposeful misconduct, indifference, recklessness, or serious lack of reasonable care that are the hallmarks of unwarrantable failure.

Based on the above, I understand the Secretary's concerns in this case. *Twenty-six* roof bolts required replacement, and nine of them required replacement since at least the previous shift. Six bolts had sustained damage that was readily apparent. Moreover, the damaged bolts exposed miners to serious dangers, and Mill Branch reasonably should have known about at least one of the cited bolts. In addition, abatement was relatively simple. From this perspective, I conclude that Respondent's level of negligence was high. However, I recognize that only one of

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Secretary has the burden of proving the facts underlying his allegations, including his contention that these conditions were obvious and extensive.

[16] Instead, the Secretary notes that Mill Branch was "on notice of the amount of cover they were under and the requirements of the roof plan" and claims that the two roof falls Inspector Bryant identified put Mill Branch "on notice that they were mining under bad roof." (Sec'y Br. at 17.) Yet it is unclear why the Secretary believes this would put Mill Branch on notice that it needed to take additional steps to replace damaged bolts. In fact, Inspector Bryant admitted on cross-examination that he did not know whether any of the bolts had been damaged before the roof fall. (Tr. 148:6–16.)

the cited bolts was both obvious and existed for more than a shift. Respondent made some previous efforts to protect its miners. Accordingly, I conclude that the Secretary has not met his burden of proving this violation to be the result of aggravated conduct, and the unwarrantable failure designation is removed.

C. Analysis and Conclusions of Law — Order No. 8180210 – Inadequate Preshift

1. Fact of Violation

Section 75.360(b)(3) requires that mine operators conduct "an examination for hazardous conditions at the mine . . . ." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 2000 (Aug. 2014). The adequacy of a preshift examination is based on whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard, would have recognized that the hazard needed to be recorded in the preshift examination book. *Emerald Coal Res. LP*, 34 FMSHRC 482, 495 (Feb. 2012) (ALJ) (citing *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff'd* 951 F.2d 292 (10th Cir. 1991).

In this case, the Secretary contends that Foreman Gilliam performed an inadequate preshift examination when he failed to identify twenty-six damaged roof bolts across the 2 Southeast Panel. Based on my factual determinations above, *see* discussion *supra* Part V.A.2.b, nine of these bolts existed for at least a shift. In addition, one of those bolts—the rusted bolt in Entry No. 1—should have been readily apparent to a careful examiner. Given Superintendent Barnett's admission that bolts missing their bolt nuts or plates need to be replaced, I determine that a reasonably prudent miner would have recorded this bolt in his preshift examination records so that appropriate steps would be taken to replace the bolt and protect Respondent's miners. I therefore conclude that the Secretary has proven a violation of 30 C.F.R. § 75.360(b)(3).

2. S&S

The Secretary claims that Order No. 8180120 was properly designated as S&S for the same reasons as Citation No. 8180209. (Sec'y Br. at 14.) Mill Branch again disputes Bryant's characterization of damaged bolts and notes that preshift examinations are not *per se* S&S. (Resp't Br. at 17–18; Resp't Reply at 1–3.) Rather than reiterate my analysis for Citation No. 8180209 in detail, I will succinctly address each of the *Mathies* elements. First, Respondent's failure to note the damaged bolts satisfies the first element. Second, Inspector Bryant's testimony and the roof conditions on the 2 Southeast Panel demonstrate that this violation contributed to a discrete safety hazard of falling rock striking miners beneath. Thus, *Mathies*' second element has been satisfied. Finally, in continued normal mining operations Respondent's miners would have continued to travel in the active working section as draw rock developed and roof conditions deteriorated. Thus, the hazard was reasonably likely to cause injuries. When large pieces of falling rock—like the draw rock pulled down in Entry No. 3—struck Respondent's miners, it is reasonably likely that those injuries would be serious. Accordingly, the Secretary has satisfied the third and fourth elements of the *Mathies* test. I therefore conclude that Order No. 8180210 was appropriately designated as S&S.

3. Unwarrantable Failure and Negligence

Neither party meaningfully differentiates their arguments regarding unwarrantable failure and negligence, as they apply to Order No. 8180210, from similar arguments they made regarding Citation No. 8180209. (*See* Sec'y Br. at 14–19; Sec'y Reply at 1–5; Resp't Br. at 18–21; Resp't Reply at 4–7.) Here, nine of the twenty-six damaged bolts existed for at least one shift prior to Gilliam's preshift examination, but only one of those bolts was obvious. In light of the thousands of bolts on the section and the relatively simple fix of installing a relatively small number of additional bolts, the conditions underlying the preshift examination violation were not extensive. The Secretary also introduced no evidence that Respondent was on notice that greater efforts were necessary to comply with the standard. I also recognize that Superintendent Barnett's opinion regarding what constitutes a damaged bolt is based on his conversations with the roof bolt manufacturer. An objectively reasonable miner might therefore conclude that many of these bolts were not damaged. Each of these factors suggests that Gilliam's failure to note the underlying condition in his preshift examination did not constitute intentional misconduct, indifference, or a reckless disregard for the safety of miners. Again, it appears Mill Branch made no previous efforts to abate the *specific* conditions at issue, but I note that Respondent had made some previous efforts examine the area and install supplemental roof bolts.

On the other hand, the remaining unwarrantable failure factors highlight Inspector Bryant's serious concerns with Respondent's conduct. The conditions underlying this violation presented a serious danger to miners. Although the Secretary has only proven that one bolt was both present at the time of the preshift examination *and* obvious, Gilliam should have identified the bolt. Mill Branch reasonably should have known about the violative condition.

In view of the above, I again conclude that Respondent's negligence in this case was high. However, the Secretary has not proven that Gilliam's failure to record these conditions constituted aggravated conduct. Accordingly, I conclude that Order No. 8180210 was not an unwarrantable failure to comply with a mandatory standard, and the designation is removed.

VI. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW — NON-PERMISSIBLE EQUIPMENT ORDERS — MARCH 15 & 19, 2013

A. Further Findings of Fact — Inspector Bryant's Inspection — March 15, 2013

On March 15, 2013, Inspector Bryant returned to the Osaka Mine to perform an electrical inspection of pumps, belt lines, and carbon monoxide monitors as part of his quarterly inspection. (Tr. 79:5–80:16, 99:20–22; Ex. S–12 at 1–10.) Quarterly inspections require MSHA inspectors to examine every piece of equipment at the mine. (Tr. 99:23–100:1.)

That day, Inspector Bryant traveled along with Electrician Fields and Foreman Mullins. (Tr. 79:5–80:16, 170:3–7, 268:25–269:1; Ex. S–12 at 1, 10.) During the inspection, Bryant examined two water pumps in a sump hole outside of one of the seals Mill Branch had installed to seal off an old working area that was located approximately two miles from the active mining area. (Tr. 80:17–23, 81:16–25, 92:3–9, 94:18–95:1, 97:7–15, 177:1–8, 180:2–10, 306:16–307:11.) Seals are built to help maintain stable methane and oxygen levels in the mine.

(Tr. 97:7–15.) Nevertheless, seals will sometimes either outgas—pushing air from the sealed area back into the active mine—or ingas—sucking air out of the active mine and behind the seal. (Tr. 97:16–25.) Without proper ventilation, outgassing seals will allow methane to accumulate into the explosive range. (Tr. 98:2–99:4.) Bryant did not find any problems with the seals leaking at the time. (Tr. 110:20–111:4.)

One of the water pumps was a primary pump, and the other was a backup.[17] (Tr. 270:9–271:4.) The backup pump only operated when the water level in the sump hole rose too high. (Tr. 270:9–18.) When Bryant inspected the backup pump, he followed the power connection from the pump toward the power center that provided the pumps' electricity. (Tr. 81:16–19, 270:11–271:4.) A power cord ran from the 13-horsepower water pump to a line starter box attached to the left rib approximately 150 feet away and four feet off the ground, which then connected to the power center through another power cord. (Tr. 80:19–81:8, 81:19–25, 82:6–10, 95:24–96:4, 96:10–21, 109:19–22, 177:9–178:23, 270:9–18, 281:9–11.) The line starter was gray in color and measured approximately 1 foot by 1 foot. (Tr. 170:14–171:4, 269:17–25; Ex. R–15-A; Ex. R–15–B.) The box enabled Mill Branch to run the connected pump intermittently. (Tr. 82:2–5, 170:8–13, 270:9–18.) When water in the sump hole rose too high, the pump sent a signal back to the line starter box. (Tr. 82:2–5, 94:10–17, 95:8–23, 170:8–13, 177:22–178:3.) The line starter box could then send the power it received from the power center back to the pump. (Tr. 82:2–5, 170:8–13, 177:22–178:3.)

When Mill Branch initially installed the line starter box, it was an acceptable piece of equipment because it was located in a neutral air entry separated from other air courses using a brattice line constructed of gray concrete blocks. (Tr. 82:12–23, 91:13–25, 171:5–25, 275:13–22.) However, on March 6, 2012, Mill Branch removed the brattice line and changed the ventilation of the area to ventilate seals approximately four crosscuts away that were outgassing methane. (Tr. 98:2–14, 101:3–9, 103:21–104:6, 272:6–274:5, 284:9–11; Ex. R–12 at 8 (March 19 Inspection Notes); Ex. R–14–A; Ex. R–14–B.) After the ventilation change, the line starter box was now located in a return air entry. (Tr. 82:17–23, 173:4–6, 272:6–274:5; Ex. R–12 at 8 (March 19 Inspection Notes); Ex. R–14–A; Ex. R–14–B; *see* Tr. 172:5–11.) The box at issue was non-permissible and thus provided an ignition source.

Although Mill Branch replaced its other non-permissible equipment in the area, it never replaced the line starter box at issue for a permissible piece of equipment. (Tr. 82:17–23, 174:3–16, 278:15–279:11.) Mill Branch also did not remove roughly 100 old brattice blocks—which were the same color as the line starter box—from the crosscut. (Tr. 82:6–14, 171:18–25, 274:23–275:9.) Several old water lines and cables were also in the area. (*See, e.g.*, Tr. 92:3–9.)

During his inspection, Bryant found just 0.05 percent methane at the non-permissible box, but he did not test for methane near the seals that day. (Tr. 92:13–15, 108:9–109:9.) At the time, approximately 50,000 to 55,000 cubic feet per minute ("C.F.M.") of air traveled out of the

[17] Inspector Bryant initially claimed that the line starter box was connected to the primary pump. (Tr. 94:10–95:8.) In Bryant's rebuttal testimony, he admitted that he was unsure whether the box was connected to the primary pump or the backup pump. (Tr. 306:3–307:11.) Accordingly, I credit Supervisor Barnett's testimony that the line starter box was connected to the backup pump, which had never been activated prior to March 15, 2013. (Tr. 270:19–272:5.)

mine through the return entry. (Tr. 276:24–277:5.) Based on his observations, Bryant issued Order No. 8180213, alleging:

> The 13 HP. Flyght Pump SN#MO7-0711 being used in the Return air course at the #17 Prescott Seal in the sump hole is not being maintained. When checked a non[-]permissible box measuring 1[]foot x 1 foot containing a #2 line starter, overloads and fuses is being used through a float switch to provide 440 volts of power to the pump. This condition exposes miners to the hazards of a methane ignition by the arcing of the contactor tips when they are energized. This mine is on a 15 day I spot inspection for liberation of methane.

(Ex. S–13 at 1.) Although Inspector Bryant designated the violation as S&S and reasonably likely to result in injuries of lost workdays or restricted duty to one miner, he initially characterized Mill Branch's negligence as moderate and issued *Citation* No. 8180213 pursuant to section 104(a) of the Mine Act. (*Id.*) However, after discussing the conditions with his supervisor, on March 19, 2013, Bryant modified the citation to a section 104(d)(1) *order* charging Mill Branch with an unwarrantable failure to comply with a mandatory safety standard and increased the level of negligence to high. (Ex. S–13 at 2; Tr. 86:7–87:4, 93:7–21, 104:25–107:16, 155:5–6.) He claimed he would cite the violation as an unwarrantable failure if he saw it today. (Tr. 154:15–155:4.) To abate the violation, Mill Branch removed the box. (Tr. 154:1–5.)

On March 19, Bryant also issued Order No. 8180214, alleging:

> The operator failed to do an adequate exam of the #2, 13 Horsepower Flyght pump SN#MO-0711 located in the left return air course across from the #17 Prescott Seal. When checked[,] a non[-]permissible line starter box was being used to control the float switch for the pump. All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. This condition has existed since 3/6/12, a prudent examiner would have recognized the hazardous condition and taken action to correct the condition. The mine operator engaged in aggravated conduct constituting more than ordinary negligence by not doing an adequate exam of the pump and allowing this obvious and extensive condition to exist for an extended period of time. This mine is on a 15 day I spot inspection for excessive liberations of methane. Standard 75.512 was cited 5 times in two years at mine 4407150 (5 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. S–14 at 1–2.) Bryant designated the order as an S&S violation that was reasonably likely to result in injuries of lost workdays or restricted duty to one person. (*Id.* at 1.) In addition, he characterized Respondent's level of negligence as high. (*Id.*)

No MSHA inspector identified the non-permissible box in any of their quarterly or spot inspections of the Osaka Mine between March 6, 2012, and Inspector Bryant's quarterly inspection on March 15, 2013. (Tr. 104:7–14.) Similarly, no state inspectors identified the non-permissible box during their roughly three or four inspections during that time period. (Tr. 276:3–13.)

B. Conclusions of Law — Citation No. 8180213 – Non-Permissible Equipment

1. Fact of Violation

To prove a violation of section 75.507, the Secretary must show that (1) non-permissible power connection points (2) that were further away from the working face than the last open crosscut were also located (3) in a non-intake air course. *See* 30 C.F.R. § 75.507; *Zeigler Coal Co.*, 15 FMSHRC 949, 950–51 (June 1993). The Commission has noted that "'[t]he purpose of [section 75.507] is to prevent methane gas explosions. In the presence of methane gas, a source of ignition, such as arcing from power connections, can cause an explosion." *Zeigler Coal Co.*, 15 FMSHRC at 951 (quoting *Eastover Mining Co.*, 4 FMSHRC 123, 123 (Feb. 1982).)

The facts of this case are not in dispute. Respondent's line starter box was located in a return entry. Despite weekly examinations of the area for approximately one year, Mill Branch did not identify or remove the non-permissible box. (*See* Ex. S–15.) In fact, Electrician Fields agreed that Order 8180213 was a violation (Tr. 172:1–4), but explained that the concrete blocks in the area obscured the line starter box from view. (Tr. 173:2–10, 179:2–5, 181:15–22.) Given Respondent's failure to remove and replace the non-permissible line starter box, I conclude that the Secretary has proven a violation of 30 C.F.R. § 75.507.

2. S&S

Respondent's violation of 30 C.F.R. § 75.507 satisfies the first element of *Mathies*. Inspector Bryant also credibly testified that the non-permissible line starter box provided an ignition source for a methane explosion. (*See* Tr. 84:18–85:5.) Although the line starter box connected to the secondary pump, this non-permissible piece of equipment provided an ignition source that would not have otherwise been present. Regardless of its actual use, it provided a measure of danger to safety because it made a methane ignition more likely. Thus, Respondent's violation contributed to a methane explosion hazard. Indeed, Mill Branch essentially concedes this point as it made no counterargument in its post-hearing briefs. I therefore determine that *Mathies*' second element has been satisfied.

The Secretary also argues that this hazard is reasonably likely to result in reasonably serious injuries[18] because sparks from the non-permissible box could ignite methane in the area.

[18] The Secretary relies on Bryant's testimony that Order No. 8180213 would result in "lost workday or restricted duty injuries." (Sec'y Br. at 23.) I note that the Secretary did not elicit any specific testimony about the types of injuries a methane ignition would cause. Instead, he stands on Inspector Bryant's conclusory statement that injuries would result in lost workdays and restricted duty. Although specific testimony would be helpful for my analysis, I reasonably infer from the Secretary's methane ignition theory that those injuries would be smoke inhalation

(Sec'y Br. at 22–23.) In contrast, Mill Branch claims that the Secretary has not proven that an injury was reasonably likely to result in reasonably serious injuries. (Resp't Br. at 23–24; Resp't Reply at 9.) In particular, Respondent notes the low level of methane Bryant found at the line starter box, his failure to test for methane near the seals in question, the volume of air movement at the time of the inspection, and the absence of defects on the pumps themselves. (Resp't Br. at 23–24; Resp't Reply at 9.) Mill Branch also argues that Bryant did not testify that he had any reason to expect methane levels to rise in the future. (Resp't Br. at 24.) Moreover, Mill Branch contends that an injury producing event was unlikely because the non-permissible box was approximately two miles away from the active working area of the Osaka Mine. (Resp't Br. at 23–24; Resp't Reply at 9.)

Yet Respondent's arguments fundamentally misunderstand the pertinent timeframe for an S&S analysis under *Mathies*. The Commission has long made clear that S&S determinations are made considering the length of time the condition existed and in the context of continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130. Rather than examining a mere snapshot of conditions that existed at the time of the inspection, the Commission instead asks whether a reasonably serious injury is reasonably likely to occur if normal mining were to continue. *See, e.g.*, *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014) (indicating that a Judge erred when he took a "'snapshot' approach" to the S&S analysis), *appeal pending*, 4th Cir. 14-2313. Notwithstanding the relatively low-level of methane Bryant measured at the line starter box and high volume of ventilating air at the time of his inspection, it is uncontroverted that Respondent's examiner did not identify this non-permissible box for over a year—or more than *fifty-two* examinations. Despite Fields' claim that Mill Branch was "working" on cleaning up the concrete blocks that obscured the non-permissible box (Tr. 179:7–9; *see* Tr. 173:4–10, 175:4–5, 179:17–19, 181:15–22), Mill Branch had not moved those blocks for more than a year. Thus, I infer that the non-permissible box would have simply remained in place in the return entry if Bryant had not identified it during his inspection. In view of this extraordinary duration, the Respondent's myopic focus on the level of methane and airflow at the precise moment of Bryant's inspection is misplaced. Considering Commission precedent, the relevant time period includes both the year the condition had already existed as well as continued mining operations.

It is also uncontroverted that Osaka Mine is a "gassy" mine that releases a significant volume of methane every day. Further, Inspector Bryant credibly testified that eight to ten percent of methane would outgas from the seals. (Tr. 98:2–14.) The seals were located just four crosscuts away from the non-permissible box. (Tr. 98:13–14; Ex. R–14–A; Ex R–14–B.) Over the course of a year, a disruption of ventilation would allow methane from this significant source to accumulate in proximity to the non-permissible line starter box. Moreover, this non-permissible box was located *in a return entry*. By design, return entries carry contaminants—including methane—out of the mine. Thus, the non-permissible box would come into contact with any methane accumulations being swept out of the mine. Indeed, the Commission concluded in *Ziegler Coal Co.* that these are the types of exposures section 75.507 is designed to

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and burns. The Commission has routinely considered smoke inhalation and burns to constitute reasonably serious injuries for the purpose of a *Mathies* analysis. *See, e.g.*, *Big Ridge, Inc.*, 35 FMSHRC 1525, 1528–29 (June 2013) (affirming Judge's S&S determination where smoke inhalation and burn injuries were reasonably likely).

avoid. 15 FMSHRC at 951. Although the likelihood of any one of these events might vary in a short timeframe, it bears repeating that this violation existed for *more than a year* and would have continued in normal operations if Inspector Bryant had not identified the non-permissible box. In that context, it is reasonably likely that a methane accumulation would have been present with an active ignition source. Given this confluence of factors, I determine that a methane ignition and explosion was reasonably likely to occur.

Respondent's reliance on the distance from the working face to the non-permissible box is similarly misplaced. I recognize that relatively few miners might travel in this return at any given time; in fact, it might only be the weekly examiner. However, Mill Branch again overlooks extreme duration of this hazardous condition. A weekly examiner traveled the area more than *fifty-two* times. Although no injury-producing event occurred, I have determined a methane ignition was reasonably likely to occur. Considering the length of time this methane explosion hazard existed and the continued normal operations of the mine, I give no weight to Respondent's past good fortune in avoiding injuries. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 867 (June 1996) ("The fact that injury has been avoided in the past or in connection with a particular violation may be 'fortunate but not determinative.'") (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). Thus, I determine that the Secretary has demonstrated that the methane explosion hazard was reasonably likely to result in reasonably serious injuries, and he has therefore satisfied the third and fourth elements of *Mathies*.

Given the above, I therefore conclude that Order No. 8180213 was appropriately designated as S&S.

3. Unwarrantable Failure and Negligence

The facts of this case are not in dispute. In March 2012, Mill Branch removed a brattice line as part of a change in ventilation. As a result, a formerly neutral air course became a return entry. Although Mill Branch removed other non-permissible equipment from the new return, it inadvertently failed to remove the non-permissible line starter box that connected the power center to a secondary pump located near a mine seal. In addition, Mill Branch did not remove the brattice blocks—which were the same general size, shape, and color of the non-permissible block—from the area. More than a year and more than fifty weekly electrical examinations later, the non-permissible box and brattice blocks remained in place. No federal or state inspector found the box until March 2013.

Not surprisingly, the Secretary and Mill Branch interpret those facts very differently. In the Secretary's post-hearing brief, he argues that each factor pertinent to an unwarrantable failure analysis supports his determination that Respondent's failure to comply with 30 C.F.R. § 75.507 constituted aggravated conduct that is more than ordinary negligence.[19] (Sec'y Br. at 24–27.) For its part, Mill Branch contends that the Secretary has not proven Order No. 8180213 to have

[19] The Secretary's reply brief claims that the matter before me is analogous to the facts of the Commission's recent decision in *Excel Mining, LLC*, 37 FMSHRC 459 (Mar. 2015). (Sec'y Reply at 5–7.) Given my determination in this case, I need not engage in a point-by-point comparison of the facts.

been an unwarrantable failure because MSHA and state mine inspectors failed to identify the box during their inspections of the Osaka Mine. (Resp't Br. at 24–27; Resp't Reply at 9–10.) According to Mill Branch, the failure of federal and state inspectors to identify the non-permissible box mitigates the duration of the violative condition, implies that Respondent had no notice that additional efforts were necessary to comply with the cited regulation, and demonstrates that the condition was not obvious. (Resp't Br. at 24–27; Resp't Reply at 9–10.)

Federal and state mine inspectors take their jobs seriously, and I have no doubt that their previous inspections were diligent. In some sense, that diligence suggests that the non-permissible box may not have been immediately obvious to observers in the area. I also understand that Mill Branch removed *other* non-permissible equipment from the return entry, which suggests the condition was not extensive. Instead, the violation was limited to a single non-permissible line starter box connected to a secondary pump. Looked at in isolation, these facts might support a determination that Mill Branch acted with ordinary negligence when it failed to remove the line starter box.

Nevertheless, Mill Branch ignores its *yearlong* failure to satisfy its own duties under the Mine Act. Federal and state inspectors are not charged with the primary responsibility to maintain safe working conditions in mines. Mine operators are. 30 U.S.C. § 801(e). Inspectors are not required to make weekly inspections. Mine operators are. 30 C.F.R. § 75.512. Although the federal and state mine inspectors seemingly overlooked the non-permissible box, those inspectors had *considerably fewer* opportunities to detect the violation than Mill Branch. Indeed, the extraordinary duration of the violation in this case is egregious, and it weighs heavily in favor of determining Respondent's failure to be aggravated conduct constituting more than ordinary negligence. Regardless of whether the federal and state inspectors identified the non-permissible box, Mill Branch had a continuing obligation to remove the box and protect its miners. It failed to do so despite more than fifty examinations. As a result, Respondent's failure repeatedly exposed miners to significant mine ignition and explosion dangers.

Turning to the remaining unwarrantable failure factors, I note that Respondent appears to have been aware of its duty to remove the non-permissible box from the return entry. In fact, it did remove other non-permissible equipment from the area when it made the ventilation change. It also had more than a year to clean up the brattice blocks in the area and identify the non-permissible box. Although Mill Branch may not have had any notice that additional steps were necessary to comply with 30 C.F.R. § 75.507, Respondent therefore reasonably should have known about the violation.

Reduced to their core, Respondent's arguments simply confuse an explanation for an excuse. Mill Branch believes its conduct cannot be considered aggravated when federal and state mine inspectors also failed to identify the violative condition. I understand that the nearby brattice blocks apparently obscured the non-permissible box from view. If this were an isolated or relatively recent event, I *might* agree with the Respondent. But here, Mill Branch glosses over the number times of it failed to protect its miners. Thus, the reason for Respondent's on-going failure might be explainable, but it is not excusable as ordinary negligence. In light of the danger the violation presented and Mill Branch's repeated opportunity to identify and remove the box, Respondent's failure to do so constitutes a serious lack of reasonable care. I therefore conclude

that Mill Branch acted with a high level of negligence when it failed to remove the non-permissible box from the return entry for more than a year. Likewise, I conclude that Respondent's conduct constituted an unwarrantable failure to comply with a mandatory health or safety standard.

C. Conclusions of Law — Order No. 8180214 – Inadequate Electrical Examination

1. Fact of Violation

Section 75.512 requires mine operators to "frequently" examine, test, and maintain all electrical equipment, remove any equipment where a potentially dangerous condition is found, and maintain records of those examinations. *See* 30 C.F.R. § 75.512. Section 75.512-2 defines "frequently" for the purposes of section 75.512 to mean "at least weekly." 30 C.F.R. § 75.512-2. Thus, the operator must complete a weekly examination of its electrical equipment. *See, e.g.*, *Manalapan Mining Co.*, 36 FMSHRC 53, 92–93 (Jan. 2014) (ALJ).

Respondent's failure to perform adequate electrical examinations is uncontroverted. Despite the concrete brattice blocks nearby that partially obscured the line starter box, it is also uncontroverted that a proper electrical examination would have traced the power cable between the power center and the backup pump. A reasonably prudent miner familiar with the protective purposes of the act would have performed a thorough examination and identified non-permissible box. Thus, Respondent's conduct violated 30 C.F.R. § 75.512.

2. S&S

The parties see this inadequate examination violation as linked to Respondent's failure to remove the non-permissible box in the first place. (Sec'y Br. at 24–27; Sec'y Reply at 5–7; Resp't Br. at 27–28; Resp't Reply 9–10.) Given the parties' inclination to treat these two violations together, I need not address their arguments in detail. The Secretary has proven a violation and a discrete safety hazard in satisfaction of the first two elements of the *Mathies* test. In addition, he has shown that the methane ignition hazard is reasonably likely to result in reasonably serious injuries, which satisfies the third and fourth *Mathies* elements. *See* discussion *supra* Part VI.B.2. Thus, I conclude that Order No. 8180214 is S&S.

3. Unwarrantable Failure and Negligence

The Secretary and Respondent also each treat the unwarrantable failure designation for Order No. 8180214 in concert with Order No. 8180213. (Sec'y Br. at 24–27; Sec'y Reply at 5–7; Resp't Br. at 27–28; Resp't Reply at 9.) Because the parties again view these orders as linked, I again see little reason to discuss the matter in great detail. Given the number of inadequate examinations Mill Branch performed, Respondent should have known about the violative condition. This violation exposed miners to methane ignition and explosion dangers, and the condition persisted for over a year. Nevertheless, it appears that Respondent took no additional steps to ensure it was performing adequate electrical examinations. On the other hand I recognize that the Secretary presented no evidence demonstrating Mill Branch was on notice that greater efforts were necessary to comply with 30 C.F.R. § 75.512. Moreover, it appears that

MSHA and state inspectors did not identify the non-permissible box in their own inspections. Thus, it seems the underlying condition was neither obvious nor extensive.

Considering all of the above, I conclude that Respondent's negligence was appropriately designated as high. In addition, I determine that Respondent's failure to conduct adequate weekly examinations for more than one year constituted aggravated conduct. Accordingly, I conclude that the unwarrantable failure designation is valid.

VII. PENALTIES

Turning to the six penalty factors specified in section 110(i) of the Mine Act, I note that Mill Branch has stipulated that the proposed penalty would not affect its ability to remain in business. (Joint Ex. 1. at 2.) Moreover, nothing in the record suggests the proposed penalties are inappropriate for the size of the mine, and I also note that Respondent promptly abated each violation in good faith. Although I have affirmed the Secretary's allegations regarding S&S and Respondent's level of high negligence, I have modified both Citation No. 8180209 and Order No. 8180210 to remove the unwarrantable failure designation. In addition, I have affirmed the Secretary's allegations of S&S, high negligence, and unwarrantable failure for Order Nos. 8180213 and 8180214. Finally, the Secretary's Assessed Violation History Report lists 1 final citation within the previous fifteen months at the Osaka Mine that involved 30 C.F.R. § 75.220(a)(1). (Ex. S–16.) That citation was not designated as S&S. (*Id.*) In addition, the Secretary's Assessed Violation History report lists zero final citations or orders within the previous fifteen months at the Osaka Mine involving 30 C.F.R. § 75.360(b), 30 C.F.R. § 75.507, or 30 C.F.R. § 75.512. (*Id.*)

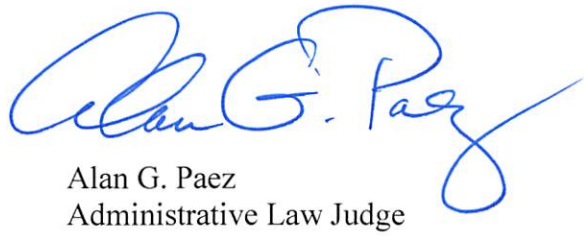
I recognize that the Secretary has proposed penalties of $3,996.00, $4,440.00, $2,000.00, and $4,500.00, respectively, for Citation No. 8180209 and Order Nos. 8180210, 8180213, and 8180214. However, the Secretary's proposed penalties are not binding upon me. Given the limited history of violations at this mine in conjunction with the other factors, I therefore determine that a penalty of $1,000.00 each is appropriate for Citation No. 8180209 and Order 8180210. Based on the six section 110(i) factors, and particularly the significant danger presented by a yearlong violation, I also conclude that penalties of $2,500.00 and $5,000.00 are appropriate for Order Nos. 8180213 and 8180214.

VIII. ORDER

In light of the forgoing, it is hereby **ORDERED** that Citation No. 8180209 and Order No. 8180210 are **AFFIRMED** as S&S and as the result of Respondent's high negligence and are **MODIFIED** to remove the unwarrantable failure designation from each. By operation of law, both violations are also **MODIFIED** to citations under section 104(a) of the Mine Act.

It is also **ORDERED** that Order Nos. 8180213 and 8180214 are **AFFIRMED** as written. Because Citation No. 8180209 was the predicate section 104(d)(1) citation for both orders, Order No. 8180213 is **MODIFIED** to a citation under section 104(d)(1) of the Mine Act by operation of law. Order No. 8180214 remains a section 104(d)(1) order.

FURTHERMORE, Mill Branch is **ORDERED** to **PAY** a civil penalty of $9,500.00 within 40 days of this decision.



Alan G. Paez
Administrative Law Judge

Distribution:

Thomas J. Motzny, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

K. Brad Oakley, Esq., Jackson Kelly, PLLC, P.O. Box 2150, Lexington, KY 40588-2150

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