FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS DOCKET NO. LAKE 2012-0898 A.C. No. 11-03058-299585-01
v.	DOCKET NO. LAKE 2012-0899 A.C. No. 11-03058-200595-02
WHITE COUNTY COAL, LLC, Respondent	Mine: Pattiki Mine

DECISION AND ORDER

Appearances: Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Gary D. McCollum, Esq., White County Coal, LLC, Lexington, KY, for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves two dockets with two citations each, all relating to the Respondent's Pattiki mine, which were litigated at a hearing held on February 4, 2014, in Henderson, Kentucky.[1] MSHA conducted two inspections, the first on June 12, 2012, and the second on July 30, 2012. These case dockets resulted from those inspections.

LAKE 2012-0898 originally comprised two 104(a) citations, one 104(d) citation, and three 104(d) orders. All but the 104(d) citation and one 104(d) order were settled by the parties, prior to the hearing.[2] At the hearing, LAKE 2012-0898 comprised Citation No.

[1] The trial was scheduled for two days. Because of inclement weather, the trial was stopped at the end of the first day's presentation. The presentation of evidence was completed by written submission. MSHA witness, Rodney Adamson's testimony was submitted by affidavit. Ex. A.

[2] Three matters originally related to this case were settled prior to the hearing. Citation No. 8431484 was modified from Reasonably Likely/S&S to Unlikely/Non-S&S, Order No. 8431485 was modified from a Section 104(d)(1) order to a Section 104(a) citation, and Order 8431486 was modified from a Section 104(d)(1) order to a Section 104(a) citation.

8438790, a Section 104(d) citation, alleging a violation of 30 C.F.R. § 75.400, and Citation No. 8438791, a Section 104(d)(1) order, alleging a violation of 30 C.F.R. § 75.360(a)(1). LAKE 2012-0899 originally comprised three citations; one was settled prior to the hearing, leaving two 104(a) Citations: Citation No. 8447018, alleging a violation of 30 C.F.R. §75.1506(b)(2), and Citation No. 8447019, alleging a violation of 30 C.F.R. § 75.1506(a)(3).

STIPULATIONS

1. White County Coal was at all times relevant to these proceedings engaged in mining activities at the Pattiki Mine, in or near Carmi, Illinois.

2. White County's mining operations affect interstate commerce.

3. White County is subject to the jurisdiction of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. Section 801, *et seq.*

4. White County is an "operator" as that word is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 803(d), at the Pattiki Mine, Federal Mine ID No. 11-03068, where the contested citations in these proceedings were issued.

5. The administrative law judge has jurisdiction over these proceedings pursuant to Section 105 of the Mine Act.

6. On June 12, 2012, MSHA Inspector Kenneth Benedict was acting as a duly authorized representative of the United States Secretary of Labor assigned to MSHA and was acting in his official capacity when conducting the inspection and issuing the citations from Docket LAKE 201-0898, at issue in these proceedings.

7. On July 30, 2012, MSHA Inspector Terry A. Hudson was acting as a duly authorized representative of the United States Secretary of Labor assigned to MSHA and was acting in his official capacity when conducting the inspection and issuing the citations from Docket LAKE 2012-0899, at issue in these proceedings.

8. The citations at issue in these proceedings were properly served upon White County as required by the Mine Act.

Section 104(a) Citation No. 8431486 is the only citation remaining unchanged as a result of the parties' partial settlement. These citations were dismissed in a Decision Approving Partial Settlement on October 30, 2013. *See* Dec. Approving Part. Settlement, Order to Modify, Order to Pay (Oct. 30, 2013).

9. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.

10. White County demonstrated good faith in abating the violations.

11. At all times relevant to these citations, White County produced in excess of two million tons of coal annually.

12. Without White County admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary in this case will not affect the ability of White County to continue in business.

Tr. 8-9; Jt. Pre-Hearing Report.

Basic Legal Principles

Significant and Substantial

One of the citations in dispute and discussed below has been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon 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). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining,* the Commission provided additional guidance: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*; *PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Unwarrantable Failure

A violation of a standard is an unwarrantable failure if it demonstrates "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (1987). A violation is also an unwarrantable failure if it demonstrates the operator's "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991). A court must examine all relevant facts and circumstances to determine whether an operator's conduct is aggravated or whether mitigation is present. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). Specific factors to consider to determine whether a violation constitutes an unwarrantable failure include: 1) the length of time that the violation has existed, 2) the extent of the violative condition, 3) whether the operator has been placed on notice that greater efforts were necessary for compliance, 4) the operator's efforts in abating the violative condition, 5) whether the violation was obvious or posed a high degree of danger and 6) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994).

Burden of Proof

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations,* 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. SOL v. Keystone Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.").

Negligence

Negligence is relevant in cases under the Mine Act, but since the Act creates a strict liability enforcement model[3], negligence is not an essential part of the calculus to determine whether an operator is at fault. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required; irrespective of fault.[4] Negligence is, however, central to the assessment of civil penalties and to the evaluation of the enhanced enforcement elements of S&S-unwarrantable failure, and flagrant violation.

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case,

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[3] "*If, upon inspection or investigation, the Secretary* or his authorized representative *believes that an operator* of a coal or other mine subject to this chapter *has violated* this chapter, or *any mandatory health or safety standard, rule, order, or regulation* promulgated pursuant to this chapter, *he shall, with reasonable promptness, issue a citation to the operator.*" 30 U.S.C.A. § 814(a) (emphasis added). This court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." 8 FMSHRC at 1636.

we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

A. H. Smith Stone Co., 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be assessed assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Penalty

The principles governing the authority of Commission judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also

govern the Commission."); *see also American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ)(explaining that based upon the statutory language, the Commission alone is tasked with assessing final penalties).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g*, 32 FMSHRC 1257, 1289 (Oct. 2010)(holding that the judge was justified in relying on utmost gravity and gross negligence in imposing a penalty substantially higher than that proposed by the Secretary); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (finding it appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (holding that the judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592-01, 13,621(Mar. 22, 2007)(codified at 30 C.F.R. pt. 100).

In addition, Commission judges are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone*:

> When it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Sellersburg Stone, 5 FMSHRC at 293.

Special Assessment

Through notice and comment rule making, the Secretary promulgated regulations specifying the "Criteria and Procedures for Proposed Assessment of Civil Penalties." 30 C.F.R. Pt. 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the "regular assessment" process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.[5] Nor do they identify how the amount of a special assessment will be determined, other than to state that "the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form." *Id.* The narrative findings for special assessments are typically brief and conclusory. The Secretary's proposed special assessment is not binding on the Commission; the Commission imposes civil penalties *de novo*.

DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

LAKE 2012-0898: Citation No. 8438790

In Citation No. 8438790, the Secretary alleged that White County Coal ("WCC") violated 30 C.F.R. §75.400[6] because of material accumulations observed by MSHA Inspector Benedict in three areas near Unit No. 2's third belt line during his E01 inspection of the Pattiki Mine on June 12, 2012. Benedict testified that he observed fine coal accumulations: (1) on the outby side of the takeup roller; (2) along the walkway on both sides of the belt extending the full length of the drive and the takeup assembly; and (3) under the bottom rollers of the drive two crosscuts inby the belt header. Tr. 51-52. The citation text described the following violating conditions:

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[5] In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. 72 Fed. Reg. at 13,621.

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

> Coal, coal fines, and coal dust (dark in color) has been allowed to accumulate on the mine floor along the Unit #2's 3rd belt from the head roller to 2 crosscuts inby. The accumulations of coal fines on the outby side of the take-up roller measured 18 inches by 4 feet wide by 3 feet in length and the rotating belt conveyor was rubbing the packed coal fines. The walkway on both sides of the belt has 2 inches to 4 inches of coal accumulated along it for the full length of the drive and take-up assembly and has been rock dusted over. There are fine coal piles 4 to 12 inches in depth under the bottom rollers from the drive 2 crosscuts inby. Standard 75.400 was cited 110 times in two years at mine 1103058 (110 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-3.

The parties agree that there were material accumulations in the three locations relevant to this dispute, and WCC admits that these accumulations violated the relevant standard. However, WCC challenges the "reasonably likely" gravity designation, the S&S designation, the unwarrantable failure charge, and the penalty assessment. Resp. Post-Hearing Br. p. 11. Inspector Benedict testified that the large collection of coal fines on the outby side of the take-up roller (the third listed location) was the impetus for the enhanced enforcement order he wrote. Tr. 64, 124-25, 145.[7] Therefore, this discussion focuses on the third location.

Inspectors Kenneth Benedict and Phillip Stanley presented notably synoptic versions of what they saw, albeit lacking in documentary confirmation. Tr. 89-90, 152, 154-155, 158, 161. WCC's witnesses relayed a version that casts doubt on the inspectors' testimony, is functionally more consistent with normal mining operations, and is supported by contemporaneous notes.

Of greatest importance to the outcome of this decision is whether the accumulations were combustible. "Combustible" is defined at 30 C.F.R. § 57.2 as "capable of being ignited and consumed by fire." *FMC Corp.*, 6 FMSHRC 1566, 1567 n. 4 (July 1984). It is the Secretary's burden to convince the court that the accumulations were combustible. The Secretary failed to do this. For the reasons developed below, I conclude that the accumulations were not combustible. As a result, the S&S charge fails. It is not reasonably likely that non-combustible material will cause an event that is, in turn, reasonably likely to result in serious injury.

Of similar import is my decision that the level of negligence attributable to the buildup of accumulations is no more than "moderate." The Secretary's claim that this violation arose as a result of an unwarrantable failure on WCC's part, requires a finding of at least "high" negligence and a constellation of aggravating factors. Without "high" negligence or a sufficiently convincing list of elements which show "aggravated conduct

constituting more than ordinary negligence," the Secretary has not proved an unwarrantable failure. *Emery Mining Corp.*, 1997, 2001, 2003-04 (Dec. 1987).

What remains is a simple violation of 30 C.F.R. §75.400.

Discussion

Belt Friction

According to the inspectors' testimony, the accumulations had to be in friction contact with the belt in order to create a fire hazard. Tr. 36. Both inspectors testified that the belt made contact with the accumulations (Tr. 23-24, 89), however, WCC showed that Benedict did not remember many of the details surrounding this issuance because more than two years had passed (Tr. 55), and his field notes were silent about some of the accumulations being in contact with the belt (Tr. 55-56), implying that he would have noted it if it had been true. Ex. S-5.[8] One of WCC's witnesses, Lonnie Garrett, denied at one point (Tr. 108) and then conceded at another (Tr. 130) that there was friction contact. Finally, Thomas Smith admitted that there was friction contact. Tr. 140. I find that the moving belt line rubbed across the accumulations. I find further that this constituted a hazard and should have been regarded as such by WCC.

Composition of the accumulations

The fire hazard Benedict had in mind when he wrote this order requires that the accumulated material be combustible. Tr. 21. This is consistent with the wording of the standard 30 C.F.R. §75.400. *See supra* note 6. He testified that the accumulations at the friction point were dry and that dry coal dust can be as volatile as gun powder. Tr. 22. He described the accumulations as generally dark-to-black in color. Tr. 21-22, 157. Both Benedict and Stanley testified that the material they observed consisted predominately of pulverized coal fines which had changed color where it had been heated by friction from the belt line. Tr. 151. The citation narrative alleges that the accumulations consisted of "coal fines." Ex. S-3. Benedict's field notes mention "coal, coal dust, and coal fines." Ex. S-5, pp. 3 - 4. Significantly, Benedict did not test the accumulations to determine if they were combustible. Tr. 54.

In contrast, WCC's witnesses Garrett and Smith testified that the accumulated material was an amalgam of bottom clay (Tr. 109,146), coal fines (Tr.146), water (Tr. 140,146), and rock dust (Tr.147), all of which affect the combustibility of the accumulations. Tr.111, 146. The less coal dust and the more non-combustible material in the mixture, the less combustible it is. Tr. 23, 146. The less combustible the mélange, the less likely it is that the proposed gravity, S&S, and unwarrantable failure elements are justified.

The testimony about the amount of water in the accumulations is particularly important. The belt line above the contested accumulations was fitted with a water spray system that operated whenever the belt line was moving. Tr. 113, 141. The belt line had

been running at least from the beginning of the shift[9] to the moment it was shut down to facilitate the abatement clean up. Tr. 63. The MSHA inspectors testified that they did not notice the spray system (Tr. 115), but WCC's witnesses stated that not only was the spray system in place and operating, the accumulated material at issue here was wet -- so wet that Tom Smith said he saw Lonnie Garrett form a handful of it into a ball. Tr.109,146.[10]

S&S requires a reasonable likelihood that the violating condition will result in an injury and that such injury be reasonably likely to be serious in nature. The Secretary has the burden to prove that the accumulations were combustible. *The Pittsburg and Midway Coal Mining Co.*, 2 FMSHRC 3049, 3050-51 (Oct. 1980) (ALJ). The preponderance of evidence supports a finding that the material was wet, composed of an undetermined mixture of coal fines and non-combustible material, and not easily combustible. Therefore, the belt friction found in the previous section does not support a conclusion of S&S or unwarrantable failure.

Gravity

Wet accumulations of mixed materials in the presence of a friction source – the only source of serious injury identified by Benedict – are not likely to result in an injury, even assuming the violation persists as a part of normal continued mining operations, which would presume the conditions extant at the time and place of the violation, i.e., wet material, would remain until a cleanup was done. If they did contribute to the likelihood of an injury, the injury would not be combustion related and would not be reasonably likely to be serious in nature. The appropriate gravity designation for this violation is "unlikely" to cause injury or illness. I will not speculate about serious injury attributable to other theoretical possibilities.

Negligence

WCC allowed accumulations to build up over a period of days and several work shifts. It was also aware of the buildup as it happened. It argues that its awareness of the buildup and failure to clean up before the inspection were consistent with its view that the accumulations did not present a hazard. Given the fact that the accumulations consisted of a mixture of coal fines, rock dust, and other non-combustible elements and they were too wet to allow friction combustion, the urgency of performing a cleanup before the inspection was low in both WCC's and court's opinion. This is a significant mitigating factor which prompts me to characterize WCC's negligence as "moderate."

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[9] The shift began at 7:30 a.m., and the inspection was done at 8:00 a.m. Tr.119.

[10] The Secretary's witness, Kenneth Benedict, denied seeing Garrett make a ball out of the wet material. Tr. 160.

Unwarrantable failure

Unwarrantable failure requires a showing of aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). Relevant factors to consider in determining whether the operator is guilty of aggravated conduct include the length of time a violating condition has existed, the operator's efforts to abate the condition, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the operator's knowledge of the violating condition (or lack thereof), and whether the violation poses a high degree of danger. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

Benedict alleged that WCC unwarrantably failed to comply with the mandatory standard based on: (1) the amount of accumulations (Tr. 34-35); (2) their obviousness (Tr. 29); (3) the presence of mine examiners in the area (Tr. 37); (4) WCC's repeated failure to note a hazard (Tr. 34-36); (5) the high degree of danger inherent in the belt rubbing on accumulated coal fines (Tr. 36); and (6) WCC's probable knowledge of the violating condition based on their having applied rock dust to some parts of the area. Tr.36-37.[11]

Since there was not a high degree of danger that the wet accumulations would cause a fire, the unwarrantable failure analysis must focus on evidence showing aggravated conduct. Although under Section 814(d) of the Mine Act a finding of unwarrantable failure requires more than ordinary negligence, the Commission and relevant federal appeals courts have found that the 30 C.F.R. § 100(3)(d) negligence terms used for calculating monetary penalties should not be directly linked with the unwarrantable failure analysis. A finding of "moderate negligence" does not necessarily preclude a finding of unwarrantable failure any more than a finding of "high negligence" or greater requires it. *See Excel Mining, LLC v. Dep't of Labor*, 497 F. App'x 78, 79 (D.C. Cir. 2013), and cases cited therein.

Extent and Obviousness of the Accumulations

Without a fire danger, the extent of the accumulations becomes the focus for evaluating whether the violation was the result of aggravated conduct and justifies a finding of unwarrantable failure.

The shift just before Benedict's inspection was non-production. Tr. 19, 76-77, 143. Garrett argued that in the course of normal start-up following a non-production shift, it was possible that a volume of material consistent with what the witnesses saw under and around the belt line could have fallen or been scraped off the belt line. Tr. 119. In his

[11] Benedict did not sample the rock dust on the coal accumulation to see if it was combustible. Tr. 54.

experience, belts are most likely to experience spillage at the time they are restarted. Tr. 121.

The Secretary contended that the amount of accumulated material was more consistent with a gradual buildup spanning several shifts, including the non-production shift.[12] Inspector Benedict believed that in order for so much material to accumulate, it would require much more time for the material to pulverize than the few hours since the belt line was started up again after the non-production shift (Tr. 159), although he agreed it was theoretically possible. Tr. 162.

On balance, I find that the accumulations accrued over a period of several work shifts.

WCC Knew That Material Was Accumulating

Benedict testified that WCC was on notice of belt line accumulation problems. Benedict was at the mine the day before and wrote another citation for coal accumulations along a different belt line. Tr. 68-69. Garrett testified that Benedict did not tell management that another citation for the same violation would result in a 104(d) order and elevated enforcement. Tr. 69-70, 126-127. Benedict may have warned them in general that they had to do a better job of keeping the belt lines clean, but he went from not issuing an elevated citation the day before to writing a 104(d) on June 12. Tr. 70.

The Secretary points out that the pre-shift examination records show that WCC was aware that accumulations were building for at least two days and multiple work shifts, but did nothing about them until this order was issued. WCC counters that although they were aware of some accumulations, they were neither extensive nor obvious enough to be considered a hazard needing immediate attention.

Inspector Stanley characterized the accumulations as obvious and so extensive that anyone in the area would have been able to see them. Tr. 89. Tom Smith, Safety Assistant for WCC (Tr. 135), accompanied Stanley to the belt area described in the order (Tr.139; Ex. S-3 and S-4) and observed material accumulations under the bottom rollers inby the head roller, as alleged in Ex. S-3.[13]

I find that WCC was aware that the accumulations were building up.

Existence of a Hazard

Lonnie Garrett testified that he did not consider these accumulations to be a hazard. In his opinion, the belt scraper had scraped material off the belt line onto the ground in the

[13] Smith testified, contrary to the two inspectors, that the accumulations were not in contact with the belt. He noted more than three feet of clearance from the belt to the material. Tr. 147-48.

period between when the belt line started that morning and the inspection. Tr. 112-119. He saw no sign of friction heat in the area, therefore there was no hazard. Tr. 120.

WCC argued that there is a difference between their noting the presence of some accumulations over a period of time and the accumulations being so extensive and obvious as to require a finding of unwarrantable failure. In other words, WCC argued that it was only required to take action if the accumulations were so extensive and persistent as to constitute a hazard, *in its opinion*. This misses the point of the reasonable person test so broadly applied in Commission decisions.

The reasonable person test requires that an operator take action if a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have acted to provide the protection intended by the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990). This objective test requires the court to weigh the evidence and apply reasonable inferences rather than merely accept the testimony of the operator.

WCC mingles its argument about the non-combustibility of the accumulations with its claim that it did not consider the building accumulations a hazard and therefore did nothing to deal with them prior to this inspection. It argues that because the accumulations were not combustible – primarily because of the presence of the water spray system – it was justified in not removing them although it was aware for some time that they were present and growing.

I find that WCC was on notice that it needed to remove the accumulations.

In summary, the accumulated material was extensive, and WCC knew that it needed attention; the material accumulation was noted in the DTI records. However, the material was wet and non-combustible under normal mining operations, and the level of negligence attributable to WCC's violation was no greater than "moderate." Some factors support a finding of aggravated conduct; others do not. On balance, I conclude that WCC's failure to remove the accumulations prior to the inspection does not rise to the level of aggravated conduct and does not support a finding of unwarrantable failure.[14]

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[14] WCC claimed that Inspector Benedict's issuance of a 104(d) citation for these accumulations was inconsistent with the way in which he handled the abatement. It argued that Benedict's decision to designate this violation as S&S and unwarrantable was inconsistent with his apparent impatience to get the situation cleaned up just enough to restore coal production. It claimed that a team of a few workers cleared enough of the accumulations away from the belt line in only a few minutes to prevent any further friction contact (Tr. 23-24, 63-64), and that Benedict was notably preoccupied with restoring coal production as soon as possible so that his respirable dust sampling – the primary reason for his being at the Patiki mine that day (Tr. 13, 16, 86, 105,135-136) – could continue and would produce reliable readings. Tr.123, 145.

Penalty

The Secretary proposed a specially assessed penalty of $38,000.00 for this violation (Citation No. 8438790). WCC asked the court to reject the Secretary's special assessment request. Resp. Post-hearing Br., p. 20. The exhibits supporting Secretary's recommended special assessment, Exhibits S-1, S-2 and S-3, show nothing out of the ordinary to warrant a penalty of $38,000.00. The special assessment narrative form merely recites the basic allegations regarding gravity, negligence, and prompt abatement. It makes reference to the violation history (Ex. S-1), number of inspection days, and mine and company size shown on the standard penalty worksheet (submitted with the Secretary's Petition for Assessment of Civil Penalty) used for all violations. Of that, the only data possibly bearing on whether a penalty should be specially assessed are the number of inspection days (588) and the related number of violations (550).

Turning to the testimony offered at trial, there is nothing specifically relevant to the proposed special penalty assessment. The trial evidence pertains only to the basic elements of gravity, negligence, S&S, and unwarrantable failure discussed above.

The Secretary has given the court no evidence above or beyond that relating to the basic and standard elements of the violation on which to evaluate whether the proposed special assessment should be sustained. It is the Secretary's burden to support his request for special assessment with competent evidence. Failing that, the court has no choice but to reject the special assessment.

What remains are findings of "unlikely" gravity, "moderate" negligence, non-S&S, and no aggravated conduct to support an unwarrantable failure finding. According to the penalty packet submitted with the Petition, the mine produces over 2,000,000 tons of coal per year. The penalty I assess here is appropriate to the size of WCC's business.

The parties stipulated that the proposed penalty ($38,000.00) would not affect WCC's ability to stay in business (Jt. Pre-Hearing Report, Stip. 12), and that WCC exercised reasonable diligence in abating the citation. Jt. Pre-Hearing Report, Stip. 10.

Roughly applying the calculus set out in 30 CFR §100.3 to the findings relevant to the regular assessment of penalties, I conclude that a penalty of $165.00 is appropriate for this violation.

Order No. 8438791

Inspector Benedict issued the 104(d)(1) Order No. 8438791 (Ex. S-4) on June 12, 2012, alleging that WCC violated 30 CFR § 75.360(a)(1)[16] by failing to perform an

[16] 30 CFR § 75.360(a)(1):

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a

adequate pre-shift examination relating to the same material accumulations and area of the mine discussed above. Tr. 40. Because the belts in question had not been in operation during the preceding maintenance shift (Tr. 142-43), Benedict concluded that the accumulations had to have been present and discoverable for at least two production shifts prior to his inspection. Tr. 27. He believed WCC's management knew about the accumulations because anyone performing a pre-shift exam would document the exam on the DTI board[17] located in the immediate area of the accumulations. Tr. 25-29, 41. Benedict also believed that the DTI records were silent about the accumulations. Tr. 37-38, 46; Ex. S-7, S-8, S-9, S-10, and S-11. He was convinced that WCC did not perform a competent or adequate pre-shift examination.[18]

Benedict's citation narrative described the following conditions:

> An adequate pre-shift examination has not been performed at the Unit #2's second belt conveyor tail piece area and the Unit #2's 3rd belt drive / take-up transfer areas due to the following reasons: These two conveyor belts have accumulations that were quite obvious to the most casual observer when checked by MSHA at 0800. The belts had not been running on the previous shift so the accumulations would have been present for at least two production shifts prior. Citation #8438789 was written on the Unit #2 second belt and Citation #8438790 was written on the Unit #2 third belt drive and take-up area. The DTI board in this area had been dated 6/12 @ 4:55 a.m. by M.P. and was 6/11 @ 12:50 by J.H. There were not [sic.] hazards listed in the examiner's books for this purpose on the surface. Standard 75.360 (a) (1) was cited 2 times in two years at mine 1103058 (2 to the operator, 0 to a contractor). This violation was an unwarrantable failure to comply with a mandatory standard.

Ex. S-4.

> preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

[17] DTI is the acronym for "Dates, Times, and Initials."

[18] Lonnie Garrett testified that he made a DTI entry on June 10, 2012, for which corrective action was taken on June 11 and 12, even though he did not consider the conditions to be hazards. Tr. 133-34.

Discussion

There is no question that a WCC agent had been in the area to conduct a pre-shift examination. Lonnie Garrett made a notation in the DTI records for the area in question at 4:55 a.m. on June 12, 2012. Ex. S-4). He wrote "OK" in the area of the DTI record book (right side) where hazards or violations were to be documented. Ex. S-8, S-9, S-10, and S-11. WCC's exhibits R-16 and R-17 show the opposite (left) side of the oversized DTI record book (Tr.94), a section Benedict did not note when he issued this order. Tr.60-62. Benedict attended only to the right side page of the record book where the "OK" notation was made. Tr. 37. It is reasonably clear that the "OK" notation is related to the detail on the left side of the DTI record pages. Ex. R-16, R-17. It is also sufficiently clear that, although there is little detail about the violating condition, corrective (mitigating) action was taken to remedy the condition. The left side records show a pre-shift examination entry made on June 10 (also not considered by Benedict) and that "cleaning and dusting" was needed and was apparently done on June 11 and 12. Tr. 60-61. Despite questioning and argument by the Secretary suggesting that R-16 and R-17 had been falsified after-the-fact (Tr. 61-62), they are reliable enough to establish that WCC's examination agent observed and noted a condition that in his view needed corrective attention, and that "cleaning and dusting" was done in the area prior to Benedict's inspection.[19] A pre-shift examination was performed. The question remains whether it was meaningful or effective.

If the conditions observed by Garrett and noted on the right side of the DTI record page as "OK" describe the conditions existing at the time of the pre-shift examination, there was no violation, and the order should be vacated as WCC urges. Also, if the conditions observed by Benedict – which WCC admits constituted a violation of the related regulation (Tr. 108, 110, 120, 125-126, 146) – accreted between 4:55 a.m. and 8:10 a.m. as the belt line was being transitioned from maintenance to production (Tr. 116, 143), the examination was effective and the order should be vacated. But, if they were present in sufficient volume to have been an unaddressed violation at the time of the pre-shift examination, the pre-shift examination was ineffective and nugatory. *See Energy Fuels Coal, Inc.*, 18 FMSHRC 171, 176 (Feb. 1996) (ALJ); *see also Enlow ForkMining Co.*, 19 FMSHRC 5, 12-13 (Jan. 1997); *Shelby Mining Co.*, LLC, 31 FMSHRC 1501, 1510 (Dec. 2009) (ALJ) ("The critical question is whether the conditions existed at the time of the preshift examination.").

Violation

The pro-forma pre-shift examination was ineffective due to: (1) the amount of material accumulated at the time of the pre-shift exam; and, (2) the failure of the "OK" notation in the DTI records to trigger an effective clean-up before the inspection. For the reasons that follow, I find that the material observed by Benedict was present in sufficient

[19] This is consistent with the evidence about there being rock dust in the accumulations that are the subject of Citation No. 8438790. Ex. S-3; Tr. 36-37,147.

quantity at the time of the pre-shift examination to render Garrett's pre-shift examination functionally and legally ineffective.

Inspector Benedict saw the accumulations in the area of the DTI board, inspected the DTI records, and reviewed the pre-shift book at the surface. Tr. 37. The DTI records showed that a pre-shift examiner (Lonnie Garrett) had been in the immediate area of the accumulations shortly before Benedict's inspection. Tr. 37-38. The DTI records that Benedict reviewed did not specifically note any hazards (or violations) in the area. Tr. 38; Ex. S-7, S-8, S-9, S-10, and S-11. However, Garrett did write "OK", showing that he had been in the area for pre-shift examination purposes. Tr.42; Ex. S-7, S-8, S-9, S-10, and S-11. Garrett did not document the fact that there were at least 10 inches of accumulations under the belt line in some places. Tr. 131. Garret explained that even with 10 inches of accumulations, he did not consider the conditions serious enough to document in the DTI records as a violation or hazard. Tr.131-32. On further questioning, he testified that it would be unusual for an examiner to find 10 inches of material and not note it in the DTI records. Tr. 132.

WCC argued that there was no violation because an effective pre-shift exam must only be done prior to a shift, but not at any specific time. Inspector Benedict observed the accumulations at 8:10 a.m. WCC argued that it was not obligated to revisit the area again after the 4:55 a.m. examination, and the Secretary has the burden to prove the existence of violating conditions at the time of the pre-shift. Resp. Reply Br., p. 9-10.

It is not clear from the examination record exhibits alone how much accumulated material was present during the pre-shift exam or how long it took for it to build up. WCC claimed that the accumulations were the result of belt spillage that happened between 4:55 a.m. and 8:10 a.m. Tr. 119. The belt was not running at 4:55 a.m., the time of the last exam. The preceding shift was a non-production, maintenance shift. Tr. 142-43. The normal startup time for the belt was 6:00 a.m. Tr. 143. According to Exhibits R-16 and 17, WCC took some action on June 11 and 12 in response to the buildup of accumulations in the same area. The area was cleaned and rock dusted during the third (maintenance) shift from June 11 to June 12. Tr. 59-60. The Secretary argued that WCC's DTI notes (Ex. R-16 and R-17) deserve little weight because: (1) Benedict did not see them; (2) they may have been added after-the-fact (Tr. 60-62); and, (3) WCC did not raise the mitigating issue of having done the rock dusting and cleaning shown in Exhibits R-16 and R-17 during the close-out meeting with Inspector Benedict. Tr. 79.

The record contains convincing evidence of significant accumulations present when the examiner looked at the area. For example, in addition to the 10 inches of accumulations discussed above, Benedict testified that he observed two distinct types of material under and along the belt lines, spillage and "powdery, ground up stuff was stuff that had spilled and been run through. It takes a long time to get those type of accumulations. It doesn't happen quickly." Tr.74. Benedict testified that the coal would not have been ground up if it were a recent spill. Tr.151. This is enough to call into question the efficacy of the pre-shift exam.

The existence of a hazard or violating condition, specifically a coal accumulation, at the time of a pre-shift examination may properly be made by inference based on the extent of the accumulation at the time it is observed by the inspector. *Enlow Fork Mining Company,* 19 FMSHRC 5, 15-16 (Jan. 1997). There were extensive material accumulations in the area, observable (if not actually observed) by the pre-shift examiner at 4:55 a.m. It is improbable that the amount of material accumulation found by the inspector at 8:10 a.m. could build up in the interval after the 4:55 a.m. pre-shift record was made. Tr.162-63. A violation of 30 C.F.R. § 75.360(a) can be upheld if the inspector finds violating conditions that were present when the pre-shift examination was conducted, but were not noted on the pre-shift inspection. *Remington, LLC*, 36 FMSHRC 491, 510 (Feb. 2014) (ALJ). These accumulations should have been documented in the pre-shift examination (DTI) records as a violating condition needing at least clean-up attention.

WCC's argument that it did not take further action because it did not consider the accumulations hazardous is unconvincing and would undercut the strict liability character of these regulations by making the ultimate determination about the existence of a violation a matter of the operator's agent's subjective assessment. *Brody Mining*, LLC, 33 FMSHRC 1329 (May 23, 2011) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco*, Inc., 8 FMSHRC 1631, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 (1998)). WCC's failure to document the condition defeated the pre-shift examination process and was a violation of 30 C.F.R. § 75.360.

WCC pointed out in its post-hearing brief that the language of certain subsections of 30 C.F.R.§ 75.360 was changed shortly after this order was issued. The new language was broadened to require a pre-shift examiner to look for and document both hazards and violations of certain enumerated mandatory items, whereas at the time of this order, only hazards were covered. WCC argued that its examiner fully complied with the regulatory requirement in place at the time by noting "OK" for the locations where these accumulations were found because: (1) he was not obligated by the language of the regulation to note conditions that were merely non-hazardous violations; and (2) he did not deem the accumulations to be a hazard.

The language changes in parts of 30 C.F.R. §75.360 do not excuse WCC's failure to note these violating conditions as part of its pre-shift process. The new language in §75.360(a)(2) requires examination for *hazards and violations* now, but only spoke of examination for *hazards* prior to the change. Yet the subject matter of §75.360(a)(2), the so-called "pumper's exception," is so specific and different in purpose, a change in the language there does not apply to the language in the more general §75.360(a)(1), the section under which this order was issued. There is nothing in the language itself, its context, or the legislative history that supports WCC's claim that the amendatory language justifies WCC's failure to document non-hazard violations in its pre-shift examinations.[20]

[20] *See generally, Spartan Mining Co.*, 415 F.3d 82, 83 (D.C. Cir. 2005); *Cannelton Industries, Inc.*, 26 FMSHRC 146 (Mar. 2004).

The attempt to limit the coverage of 30 C.F.R. § 75.360(a)(1) to the reporting of hazards to the exclusion of violations by reference forward in time and across regulatory topics to the more specific coverage language of 30 C.F.R. § 75.360(a)(2), which came into effect *after* this violation was written, violates logic, context, and syntax. I reject the argument that an amendment to the more specific portion of the regulation should be read into the more general portion. As a result, WCC's pre-shift examiner was obligated to look for and record violating conditions, even if he did not deem them to be hazards. WCC's interpretation of the regulatory language and history does not shield it from liability for this violation.

Negligence

The Secretary based his negligence allegation on the same theory presented in relation to Citation 8438790, i.e., that the material accumulations were extensive and combustible. He did not present an alternate theory of negligence. I determined that the accumulations were not proved to be combustible and therefore did not create the hazardous conditions on which the Secretary based his claim of negligence and S&S for Citation 8438790. Failing proof of some other hazard arising from these accumulations or from the fact that no meaningful pre-shift examination was performed, all that has been proved is a bare violation of the pre-shift examination requirement.

The question here is what degree of negligence inheres in the failure to perform a meaningful pre-shift examination, not what negligence level is appropriate for the existence of the accumulations themselves. Inspector Benedict considered the negligence for this violation to be high. Under Commission precedent, high negligence entails actual or putative knowledge of the violating condition and a lack of mitigating circumstances.

Two points must be resolved: (1) was WCC aware of the violation; and, (2) were there any mitigating circumstances? WCC's excuse for failing to perform a meaningful pre-shift examination was semantic – it did not consider the accumulations a hazard and was under no obligation to document and remedy. This argument has no traction. 30 C.F.R. § 75.360(a)(1) required WCC to examine for violations, not just hazards, and appropriately note its findings.

WCC knew of the material accumulation violation but its pre-shift examination failed to note it in a manner that would provide notice to miners of the existence of the accumulations, their magnitude, or the need to effectively clean them up. A considerable period of time elapsed while these accumulations built up and existed before Benedict's inspection (Tr. 47), which supports a finding of high negligence. Nonetheless, there were documented efforts to clean up and rock dust the area. Given the fact that the accumulations consisted of a mixture of coal fines, rock dust, and other non-combustible elements which were too wet to allow friction combustion, the urgency of performing a cleanup before the inspection was low in both WCC's and court's opinion. These are mitigating factors which weigh in favor of a finding of moderate negligence.

Gravity / Severity

The Secretary presented the same scenario in support of his claim that this violation presented a reasonable likelihood of lost workdays or restricted duty as he did for the negligence element. That scenario assumes dry coal dust rubbing on the belt lines causing a fire which would cause smoke inhalation and burns. Tr. 46-47. However, that assumption is unsupported due to the Secretary's failure to prove combustibility. The only other evidence in the record addressing likelihood of injury or the severity of such injury arising from WCC's failure to perform a meaningful pre-shift examination is an inference drawn from the volume of accumulated material and the length of time the accumulations existed (discussed above). From that, I conclude that it was unlikely that an injury would occur as a result of this failed pre-shift examination. In reaching this conclusion, I assume that the conditions extant at the time of Benedict's inspection (continuing operating conditions) would continue, which in turn assumes that the accumulations would continue to be incombustible due to the effects of the operational water spray system. If an injury were to occur, the Secretary's suggestion that it would result in lost work days is reasonable.

Significant & Substantial

In dealing with the previous citation, I determined that the Secretary failed to prove that the accumulations in question were combustible, therefore the violation was not S&S. The Secretary now seeks confirmation that this pre-shift exam violation was S&S based on the same evidence that failed to prove the hazard above. Tr.47-48. The Secretary points out in his post-hearing brief, "the existence of the accumulations presented a discrete safety hazard, that is, they contribute to a measure of danger to miner safety caused by the violation." Sec'y. Post-hearing Br. p. 17. This can be parsed into two elements: (1) any amount or type of accumulation is a violation (strict liability); and (2) if the violating condition creates a measure of danger to miner safety, it is a hazard. In order for a violation to be a candidate for enhanced enforcement (S&S), it must present a danger to miner safety. The *sine qua non* of an S&S determination is the existence of a hazard, not just a violating condition. It is feasible, subject to appropriate proof, that non-combustible accumulations such as these could create a hazard, however the Secretary put all of his proverbial eggs in the combustibility basket, and failed to give the court any evidence of an alternate hazard, such as trip-and-fall, for instance. For failure of proof, I conclude that the pre-shift examination violation was not S&S.

Unwarrantable Failure

In order to establish unwarrantable failure under the Commission's case law, the Secretary must prove aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). Other relevant factors to consider include the length of time a violating condition has existed, the operator's efforts to abate the condition, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the

operator's knowledge of the violating condition (or lack thereof), and whether the violation poses a high degree of danger. See *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

This violation involved moderate negligence. Although unusual, moderate negligence can support a finding of unwarrantable failure. *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001). WCC's failure to perform a compliant pre-shift examination was based, at least arguably, on its non-frivolous though unconvincing two-prong theory that: (1) it did not consider the accumulations in question to be a hazard; and, (2) it interpreted the language of the regulation to required only that its agents document and remedy hazards, not mere violations. Though rejected for purposes of liability and negligence analysis, these theories have enough plausibility and substance to keep WCC's violation from rising to the level of aggravated conduct.

Otherwise, WCC was on notice that it needed to better attend to material accumulations along its belt lines. Tr. 30. It was cited for similar violations multiple times during the preceding 24 months (Ex. S-1), although 30 C.F.R. §75.400 is one of the most frequently cited standards of all. Resp. Reply Br., p. 9. WCC was aware and documented that material was accumulating, (Ex. R-16 and R-17) and once cited, WCC took immediate steps to abate the violation. Stip. No. 10; Tr.124, 144.

The balance of relevant factors tips away from a finding of unwarrantable failure.

Penalty

MSHA specially assessed this violation and proposed a penalty of $23,800.00. Applying the regular assessment paradigm of 30 CFR §100.3, I assess a penalty of $264.00.

In determining penalties, the Commission and its ALJs make penalty determinations *de novo*, and neither the ALJ nor the Commission is bound by the penalties proposed by the Secretary. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); *Cantera Green*, 22 FMSHRC 616, 622 (May 2000); 30 U.S.C. § 820(i); *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). Yet, the Commission has held that, when a judge determines penalties that "substantially diverge from those originally proposed [by the Secretary], it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

The Court is required to consider the following specific criteria in order to determine the appropriate penalty:

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;

6. The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

Section 110(i) of the Mine Act; 30 U.S.C. § 820(i).

Special assessment is appropriate for enhanced enforcement but not for ordinary violations such as this with negligence and gravity findings of "moderate" and "unlikely," respectively. I have assessed a penalty using the point values for the various standard criteria summarized above. The size and history numbers were provided by the Secretary to support his Petition for Assessment in this case. The negligence and gravity points come from the point table in Section 100.3. The adjustment for prompt abatement is supported by the parties' stipulations. I assess a penalty of $264.00, as summarized in the following table.

Criterion	Date / Finding	Points
Size of mine	(From Pleadings)	15
Size of operator	(From Pleadings)	10
Number of violations	550	
Number of inspection days	588	10
Negligence	Moderate	20
Likelihood	Unlikely	10
Severity	Lost work days	5
Number of persons affected	2	2
	Total Points	**72**
Good faith abatement	-10%	-$29.00

Penalty From Points	**$293**
Final Net Penalty	**$293 - $29 = $264**

LAKE 2012-0899: Citation Nos. 8447018 and 8447019

Citation No. 8447018

MSHA Inspector Terry A. Hudson inspected the Pattiki mine on July 30, 2012. Tr.168. He issued a 104(a) Citation, No. 8447018 (Ex. S-12), alleging that WCC violated 30 C.F.R. §75.1506(b)(2)[21] by not having sufficient emergency refuge capacity for all the miners in the area of the No. 7 crosscut, Unit No. 3, Travelway No. 4 ("the working section"), during the shift change on July 27, 2012. Tr.171,190-191. The citation alleges high negligence, that an event would be unlikely, but that such an event could cause a fatal injury, and that five miners would be affected. It is not alleged to be significant and substantial (S&S) nor to involve an unwarrantable failure to comply with regulations.

This violation depends on the evidentiary weight of the method used by Hudson to determine the lack of refuge capacity. For the reasons that follow, I find that his methodology does not support the conclusions asserted here and I vacate the citation. I do not address the issues of negligence, gravity, or penalty.

Instead of going to the working section to visually count how many miners were present (Tr.176; 190-191), Hudson based his decision to write this citation solely on a review of selected data from Pattiki's Matrix METS 2.1 Miner and Equipment Tracking System (Tr. 173, 192, 198, 205, 210), a method he had never before used to determine lack of refuge capacity. Tr. 199. The data Hudson reviewed shows[22] that the tracking signals from twenty-nine miners (Ex. S-15; Tr. 174-175,197) -- five more than the twenty-four person refuge capacity Pattiki maintained (Tr. 172,191) -- were received and registered by the METS systems at *one* of the antenna locations in the Pattiki mine close to the working section during a forty-four minute period on July 27, 2012. Tr. 197-198, 207.[23] Of the twenty-nine miners Hudson alleged were in the unit (Tr.197), he was able to verify a time for only twenty of them; the other nine were unaccounted for. Tr. 197. There is no evidence about when these nine miners were picked up by a reader. Tr. 197.

Moreover, it is impossible to tell a miner's exact location without determining which antenna responded at a given time. Since there are no time records for the nine miners, it is not possible to determine where they were with any confidence. Tr. 217-18. As such, the information Hudson relied on is nearly meaningless. The data does not show

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[21] 30 C.F.R. §75.1506(b)(2): Refuge alternatives for working sections shall accommodate the maximum number of persons that can be expected on or near the section at any time.

[22] I am aware that "data" is a plural noun and technically should be used with a corresponding plural verb form. But, since it still sounds odd to say "data are" as opposed to "data is", I opt for the less jarring but grammatically incorrect version.

[23] WCC used a "hot seat" method for its shift changes at the Pattiki mine. Miners from the outgoing and incoming shifts were in the section at the same time, which effectively doubled the number of miners for a short time. Tr. 196.

which miners were in the area, whether or when each miner left the area during the 44 minutes, or most importantly, whether all 29 miners were in the area at the same time.

I find the testimony of Tracy Hayford, the director of development and chief architect for Matrix, more convincing. Hayford designed both the hardware and software for the METS 2.1 tracking system. Tr. 209-11. He explained how Hudson's conclusion about the number of miners in the section at the time of the shift change was at best unreliable and more likely meaningless and misleading. According to Hayford, the METS data could not yield reliable information about how many miners were in any given area, what area the miners were in, or even when the miners were in the area – all irrespective of how Hudson used the data.

The METS system tracks miners and equipment using antennae and signal tags. Tr. 211. METS can locate a tag with an accuracy of several hundred feet only. It is not able to pinpoint locations like a global positioning satellite (GPS) system. Tr.211-12. According to Hayford, METS data was not intended nor is it useful to determine how many people were present in a given location. It registers every tracking tag that passes by it. It does not identify individual miners when they come within range of one of the antennae. As a result, it is possible that some miners passed back-and-forth by an antenna and generated data which could be interpreted (wrongly) that more individuals were in the area than was actually true. Tr. 212-13.

The METS antennae will detect a signal both inby and outby for several hundred feet. Tr. 211-12. The system is not sufficiently accurate to determine who is inby or outby a given antenna. Tr. 213-14. To tell where a miner is located, it is necessary to track his tag signal as it passes by more than one antenna. Tr. 213. Until a miner is within range of another antenna, he is shown in the area of the last one he registered on. Tr. 214. Without input from more than one antenna, it is impossible to tell whether a miner is several hundred feet outby or inby the antenna location. Tr. 214.

According to Hayford, it is unlikely that Hudson could determine how many miners were on the working unit using the METS data the way he did. A bigger picture is needed to tell where a miner has been over a period of time. Tr. 214-15. Data from at least two antennae must be triangulated to get an accurate idea of where a miner is at any given time. Tr. 215-16. As a minimum, Hudson would need to look at a relatively long period of time to increase the accuracy. Tr. 216-17. He would also have to compare data from more than one antenna to see if, when, and how miners moved from one area to another. Tr. 217. For example, a miner might be walking along a belt line, be picked up by an antenna that is more inby, but keep walking outby. Within the time frame reflected in the records Hudson reviewed, a miner could be as much as a mile away. Tr. 215-19. While traveling that distance, a miner would pass by several antennae (and presumably several refuge locations). Tr. 219.

The METS system works by placing antennas throughout the mine in accordance with distances set forth under the WCC's Emergency Response Plan ("ERP"). Tr. 211.

Hudson did verify that the tracking system worked by having the system track him as he did his inspection (Tr. 207). But, he did not note the location of the tracking system antennae when he went underground. Tr. 193-94. More specifically, he did not know or verify the location of the closest tracking system antenna outby the loading point (Tr. 191,194)[24], he did not have a list of antenna locations in the No. 3 unit (Tr.194), nor did he know if he was looking at the antenna data for Unit 3, or any other specific antenna, when he reviewed the records he requested. Tr. 195-196, 206). Hudson did not request records for any antenna outby the working section to see if any of the miners had been picked up by them. Tr. 196-97. As a result, the Secretary: (1) could not document the location or name of the tracking system antenna for the loading point of the No. 3 Unit (Tr. 193); (2) did not document the location of the closest tracking system antenna outby the loading point for the No. 3 Unit (Tr. 191, 194); (3) did not create or maintain a list of antenna locations across the working faces of the No. 3 Unit (Tr. 194); (4) did not provide the Court with a copy of the actual tracking system records requested on July 30, 2012; (5) produced no inspection note evidence of obtaining such tracking system records (Tr. 194); (6) did not identify the specific tracking system antenna record reviewed; (Tr. 194-95); (7) did not show whether wired or wireless tracking records were reviewed (Tr. 195-96); and, (8) did not request to review any outby antenna records, located off the No. 3 Unit, to determine when any individuals in the Secretary's list were picked up by antenna outby the No. 3 Unit (Tr. 196-97). In short, the Secretary failed to demonstrate the presence of miners on the No. 3 Unit in excess of the refuge alternative limit.

It is not that the tracking data is irrelevant or inaccurate; it is so incomplete and unfocused that the Secretary did not prove the presence of twenty-nine miners on Unit 3 at the same time as alleged. (Tr. 220) Citation No. 8447018 is vacated.

Citation No. 8447019

On July 30, 2012, MSHA Inspector Hudson issued a 104(a) Citation, No. 8447019 (Ex. S-14; Tr.177-78), alleging that WCC violated 30 C.F.R. §75.1506(b)(3) by not having a type "A" refuge alternative in service at crosscut #3 in the 4th 48 primary escapeway. The citation alleges high negligence, that an event would be unlikely, but that such an event could cause a fatal injury, and that three miners would be affected. It is not alleged to be significant and substantial (S&S) nor to involve an unwarrantable failure to comply with regulations. WCC acknowledges a "fact of violation" with regard to this citation (Resp. Post-Hearing Br., p. 11), however, it contests the high negligence determination and the Secretary's proposed civil penalty assessment. (Resp. Br., p.43)

Changes made to 30 C.F.R. §75.1506(b)(3) required WCC to upgrade its existing stacked wall and curtain refuge structures by December 31, 2010.[25] Tr. 204,229,234.

[24] Pattiki maintained another refuge for miners outby and farther from the working section. It was not considered close to the working section. Tr. 191. Pattiki was not short of refuge space for miners when other refuge locations are considered. Tr.191-92)

[25] 30 C.F.R. §75.1506(b)(3):

WCC was aware of this requirement well in advance of the due date. Tr. 178-179, 243. WCC's existing refuges consisted of skids with supplies behind a wall accessible by a man door. Tr. 179-81. The man doors had been manufactured by Matrix (Tr. 228-29) and MineArc (Tr. 244-45) and were approved by MSHA as part of WCC's existing emergency response plan (Tr. 199-200) which had been in place since March 15, 2010. (Tr.226-27; Ex. R-5; Ex. R-6).

WCC proposed to retrofit its Matrix refuge units with 15 psi pressure resistant stoppings,[26] which its engineers indicated would comply with 30 C.F.R. §75.1506(b)(3).[27] WCC needed MSHA approval (Tr.229, 232-233) for the proposed 15 psi stoppings.[28]

> Prefabricated refuge alternative structures that states have approved and those that MSHA has accepted in approved Emergency Response Plans (ERPs) that are in service prior to March 2, 2009 are permitted until December 31, 2018, or until replaced, whichever comes first. Breathable air, air-monitoring, and harmful gas removal components of either a prefabricated self-contained unit or a unit consisting of 15 psi stoppings constructed prior to an event in a secure space and an isolated atmosphere that states have approved and those that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009 are permitted until December 31, 2013, or until replaced, whichever comes first. Refuge alternatives consisting of materials pre-positioned for miners to deploy in a secure space with an isolated atmosphere that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009 are permitted until December 31, 2010, or until replaced, whichever comes first.

[26] A 15 psi stopping is a concrete wall designed to handle 15 psi of pressure-a blast. (Tr. 231).

[27] WCC focused on one of the two alternatives in 30 CFR § 75.1506(a)(3):

> "Each operator shall provide refuge alternatives and components as follows: . . . Breathable air, air monitoring, and harmful gas removal components of either a prefabricated self-contained unit ***or*** *a unit consisting of 15 psi stoppings constructed prior to an event in a secure space and an isolated atmosphere that states have approved and those that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009, are permitted until December 31, 2013.*"

Resp. Post-Hearing Br., p.45 (emphasis added).

On November 22, 2010, (Tr. 200-201;231) WCC submitted to MSHA the first of three ERP change proposals (Tr. 231) that would have allowed it to upgrade its existing outby refuge units with 15 psi stoppings. (Tr.232). MSHA did not respond to this proposed ERP revision until July 7, 2011, when it sent WCC a denial letter. (Tr.234-236). The denial letter contained a list of alleged deficiencies, none of which, as Chris Russell testified (Tr. 228-229), had anything to do with WCC's request to upgrade with 15 psi stoppings. Russell also stated he gained no insight or understanding from MSHA why it had not approved WCC's stoppings upgrade request. (Tr. 236).

WCC submitted the second of its three ERP change proposals on September 2, 2011, (Tr. 237; Ex. R-9) and repeated its request for approval of its use of 15 psi stoppings. MSHA responded to the second request on December 20, 2011, when it rejected the revised ERP and provided a new list of alleged deficiencies. (Tr.237-238; Ex. R-10). As before, none of the alleged deficiencies related to WCC's request to install the 15 psi stoppings. In the meantime, the deadline for the refuge changes came and went, WCC waited for MSHA approval (Tr.237-239; Ex. R-6; Ex. R-10), and MSHA took no action during any of its ongoing mine inspections to indicate that WCC's change request would not be approved. (Tr.234).

Anticipating MSHA's ultimate approval of its stoppings proposal, WCC contacted Micon, a seal manufacturer. WCC understood that Micon was the only manufacturer that made NIOSH-approved 15 psi stoppings for use in underground coal mines at the time. (Tr.232) Micon visited the Pattiki mine, and worked with Chris Russell (Tr.228-229) to evaluate potential sites to install the 15 psi seals, and to insure the mine was correctly preparing the sites for installation. (Tr. 232-233) WCC started the recommended site preparation but did not complete it because it had not received approval from MSHA to use 15 psi stoppings. *Id.*

Following the December 20, 2011 denial letter, WCC requested a face-to-face meeting with MSHA, which did not occur until May 2012. (Tr. 239-240). At the meeting, Pattiki asked for guidance. Russell understood that WCC was to submit a third ERP proposal with some changes and MSHA would approve the 15 psi stoppings – a meeting of the minds. Tr. 240-41. Accordingly, WCC submitted a third revised ERP, including 15 psi stoppings, on June 13, 2012. Tr. 241-42, Ex. R-11. WCC waited for a response from MSHA from June 13, 2012, through July 29, 2012. Tr.235,242. On July 30, 2012, MSHA issued Citation No. 8447019. Ex. S-14. Apparently, MSHA did not share WCC's belief that there was an agreement in principle after the May 2012 face-to-face meeting because it did not approve WCC's third ERP proposal.[29]

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[28] The lack of an approved 15 psi stopping was ultimately the basis for this citation. Tr. 178, Ex S-14. Hudson wrote the citation because the existing man door was not able to withstand pressure of a mine explosion, 15 psi. Tr. 181-82.

[29] Interestingly, Inspector Hudson testified that he had been prompted by his supervisor, Rodney Adamson, to issue a citation for this violation before even going to the mine. Tr. 203. Hudson was not aware of the content of the various proposed ERPs. Tr. 201-03.

This chain of events cannot be construed as a mine operator attempting to skirt the provisions of the law or otherwise engaging in negligent behavior. WCC submitted ERP revisions to satisfy MSHA's demands, believing in good faith that doing so would allow it to install 15 psi stoppings to retrofit its Matrix refuge units. WCC attempted to discuss the issue with MSHA on multiple occasions, and as recently as June 13, 2012, submitted an ERP revision it believed would be approved. Tr. 241. In the end, WCC purchased new refuge units at great cost[30] to abate this citation, when other mines were allowed to merely issue purchase orders, which seemed to satisfy MSHA. Tr. 202, 228-29.

The equities of this event are dramatically in WCC's favor. Largely because of MSHA's failure to timely or substantively respond to WCC's repeated requests to modify its ERP (Tr. 234), WCC did not have compliant refuge alternatives in place at the time of Hudson's inspection. WCC relied on MSHA to its detriment. WCC's reluctance to spend a substantial sum for the Strata refuge units that MSHA eventually suggested it adopt (Tr. 245; Ex. A, Adamson Affidavit at ¶27) when it had no indication from MSHA that WCC's preferred, and apparently fully compliant (15 psi stoppings for its Matrix units) alternative would be rejected or ignored, is not negligent at all. There was no negligence on WCC's part and only a technical violation of 30 C.F.R. § 75.1506(a)(3).

WCC had no history of violations of 30 C.F.R. § 75.1506(a)(3) for the fifteen-month period prior to this citation. WCC exhibited good faith in its efforts to anticipate the need to upgrade its Matrix refuge units and to get MSHA approval of the 15 psi stopping option prior to the deadline. MSHA never gave WCC the go-ahead to install the 15 psi stoppings, never explained why it would not approve them, apparently never intended to approve them (per Adamson's after-the-fact affidavit), and never justified these delinquencies to the court. These factors constitute significant mitigation against any liability beyond what I order here.[31]

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[30] MSHA suggested to WCC that it purchase Strata tent chamber refuge units to abate the citation. (Tr.244). The Strata units cost $151,000 each. Tr. 245-46. The 15 psi stopping alternative would have cost only $50,000 each. Tr. 233.

[31] Estoppel defenses are not generally available against the federal government. *See, e.g., Knob Creek Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Inspectors' previous representations about compliance with a regulation do not estop MSHA from issuing future citations, but detrimental reliance on an inconsistent interpretation is properly considered in mitigating the penalty. *Cf. Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000); *U.S. Steel Mining, Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984) (indicating that a local MSHA office's past approval of operator's transportation methods does not negate an S&S finding and noting that detrimental reliance may be considered in mitigation of penalty). *See also Mach Mining, LLC,* 36 FMSHRC 2533, 2536-37(Sept. 2014).

Citation No.8447019 is **modified** from "high negligence" to "no negligence." I impose a symbolic fine of $10.00 to reflect the imbalance of equities.

WHEREFORE, it is **ORDERED** that WCC pay a combined penalty of $439.00 within thirty (30) days of the filing of this decision.

L. Zane Gill
Administrative Law Judge

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