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 2012-552 A.C. No. 11-00726-284930
v.	
MARYAN MINING, LLC, Respondent	Mine: Shay #1 Mine

DECISION AND ORDER

Appearances: Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

Christopher D. Pence, Esq., Hardy Pence, PLLC, Charleston, West Virginia, for the Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor ("the Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). At issue are one citation and one order issued to mine operator MaRyan Mining, LLC ("MaRyan") under section 104(d)(1)[1] of the Mine Act.

A hearing was held in St. Louis, Missouri on January 29, 2015, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I uphold and modify each of the violations as set forth below.

[1] The issuance of a citation or order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or safety standard. 30 U.S.C. § 814(d)(1).

II. FACTUAL BACKGROUND

The parties have stipulated to the following facts:

1. MaRyan Mining, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

3. MaRyan Mining, LLC has an effect upon commerce within the meaning of section 4 of the Federal Mine Safety and Health Act of 1977.

4. MaRyan Mining, LLC operates the Shay #1 Mine, Mine Identification Number 1100726.

5. The inspector was acting in his official capacity when the citations/orders herein were issued.

6. MaRyan Mining, LLC was served with a copy of the citations/orders on the date and time indicated.

7. The total assessed penalty, if affirmed, will not impair Respondent's ability to remain in business.

8. The size of the mine and the size of the controller are accurately reflected and accounted for in the Proposed Assessment of penalty for Citation No. 8419744 and Citation No. 8419745.

Joint Exhibit 1; Tr. 7.[2]

MSHA Inspector Rexdon L. Boliard[3] visited the Shay #1 Mine on November 1, 2011 to perform a methane spot inspection on the Unit 2 production unit. Tr. 22. He arrived at the mine with his field office supervisor at 6:40 AM, a few minutes before the start of the day shift. Tr. 22-23. After talking to day shift mine manager Monte Jones and looking at the examination books for Unit 2, he entered the mine and performed the spot inspection. Tr. 22-25.

[2] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered S-1 through S-4 and the Respondent's exhibits are numbered R-1 and R-4.

[3] Boliard began working for MSHA in 2010. He underwent on-the-job training and 22 weeks of classroom training at MSHA's Mine Academy to become a certified coal mine inspector. He also holds certification as a special investigator and accident investigator. Before coming to MSHA, Boliard worked in a coal mine for almost seven and a half years as a laborer, equipment operator, repairman, and qualified electrician and served as a safety committeeman for United Mine Workers of America for approximately six years. He still holds his electrical card and maintains certification in the state of Illinois as a mine examiner and mine manager. In the fall of 2011, Boliard was the lead inspector conducting MSHA's quarterly regular inspection at the Shay #1 Mine. Tr. 13-17, 35, 54-58, 75.

While in the mine, the inspection party observed four employees of General Mine Services (GMS), a contractor that provides labor at the mine, entering the 1R1LMW worked out panel (referred to as Old Unit 2). Tr. 24-25, 60; Ex. S-1. A worked out panel is an area where the mine operator has removed all the coal it can, after which the operator retrieves its equipment and moves on. Tr. 41-42, 99-100. The GMS crew had been intermittently recovering belt structure from Old Unit 2 for several weeks. Tr. 28-29, 51-52, 100, 160-63. The leadman for the crew was Jimmy Harper. Tr. 30, 100, 161. The other three GMS workers on the crew were inexperienced miners with less than a year of mining experience each. Tr. 30.

After Inspector Boliard finished the methane spot inspection and returned to the surface, he checked the examination books again to see whether a preshift exam had been performed for Old Unit 2 for the day shift. Tr. 24-25, 84-85. He saw that it had not, and notified Jones and mine superintendent Todd R. Leverton. Tr. 25. Boliard then traveled to the mine's communication and tracking office with Jones to inspect the communication and tracking records. Tr. 26-27. The records showed that GMS leadman Harper had called the surface at 8:39 AM that morning to report to the communication and tracking office that the GMS crew would be going off grid because they would be traveling into the worked out area, where the tracking system would not be able to detect their tracking devices.[4] Tr. 27-28, 71, 120-22; Ex. S-3 at 2. The communication and tracking system had later picked up the GMS crew's tracking devices' signals when they exited Old Unit 2 at 10:50 AM. Tr. 28; Ex. S-3 at 3.

Leadman Harper was called to the surface to discuss the crew's work in Old Unit 2 that morning. He recounted to Inspector Boliard that the day before, he had told mine examiner Robert L. Yeske that the area where the GMS crew would be working needed to be preshifted for the November 1 day shift. Tr. 28-29, 67, 87. Because no preshift exam had been performed for Old Unit 2 within three hours before the day shift had begun on November 1, Boliard issued Citation Number 8419744, which alleges a significant and substantial (S&S) section 104(d)(1) violation of the mandatory safety standard at 30 C.F.R. § 75.360(a)(1) for allowing miners to work in an area that had not been preshifted. Ex. S-1; Tr. 36-37, 43.

After issuing the citation, Inspector Boliard went back underground with Jones and Harper and traveled to the part of Old Unit 2 where the GMS crew had been working. There, he observed two loose ribs about a crosscut apart, each measuring 7½ feet tall by 5 feet long. One of them was 12 inches thick. The other was 10 inches thick and was across from a damaged roof bolt, which created a 6½-foot by 6½-foot area of unsupported top. Tr. 31; Ex. S-2. The loose ribs had gapped out from the mine wall and the roof bolt was hanging down from the roof, its plate was dislodged, and some of the roof material had fallen out from around it. Tr. 32-33, 50, 109. On the basis of the two loose ribs and the damaged roof bolt, Inspector Boliard issued Order Number 8419745, which alleges an S&S section 104(d)(1) violation of the mandatory safety standard at 30 C.F.R. § 75.202(a) for failure to adequately support or otherwise control the roof and ribs so as to protect miners from the hazards of roof or rib falls. Ex. S-2; Tr. 46.

[4] Underground coal miners are usually required to wear GPS tracking devices to comply with the emergency response plans that underground mines are required to develop pursuant to section 316(b)(2) of the Mine Act. *See* Tr. 26, 176; 30 U.S.C. § 876(b)(2)(E)(ii).

Subsequently, Inspector Boliard attempted to pull down the loose ribs with his fiberglass sounding rod but was unable to do so because the rod bent when he tried. Tr. 34, 80-81. Jones retrieved a stronger metal pry bar and was able to pull down the ribs. Tr. 34, 81. Jones also flagged off the area around the damaged roof bolt to prevent travel underneath it. Tr. 33. In all, these abatement efforts took about 20 to 25 minutes. Tr. 53, 90-91. Boliard thereafter terminated the order and exited the mine. Tr. 35.

At the hearing, MaRyan presented testimony from shift manager Jones, mine examiner Yeske, and superintendent Leverton indicating that the preshift examination violation was caused by a miscommunication between the GMS crew and mine management. MaRyan's witnesses explained that Yeske had conducted a preshift exam of Old Unit 2 between 8:00 and 11:00 PM on the evening of October 31, 2011 because the GMS crew was scheduled to work there during the following shift – the midnight shift, which ran from midnight until 7:00 AM on November 1. The mine examination report confirms that Yeske examined Old Unit 2 the night of October 31. Ex. R-1. However, the GMS crew showed up later than expected on the morning of November 1 and took it upon themselves to perform their work on Old Unit 2 during the day shift instead of the midnight shift without informing mine management. Tr. 102-06, 137-38, 142-45, 165-66.

With regard to the roof and rib control violation, MaRyan's witnesses suggested that the hazard posed by the violation was minimal because roof conditions at the mine were very good. Tr. 107-09, 131, 145-51, 155-60. Inspector Boliard agreed that roof conditions were generally good at the mine. Tr. 77-80.

III. LEGAL PRINCIPLES

A. Gravity/Significant & Substantial (S&S) Designation

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated 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.

6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation*

Coal Co. v. FMSHRC, 824 F.2d 1071, 1075 (D.C. Cir. 1987). The inspector's judgment is also an important element of an S&S determination. *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Mathies*, 6 FMSHRC at 5. The S&S determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see, e.g.*, *Wolf Run*, 36 FMSHRC at 1957-59.

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. This element is established only if the Secretary proves "a *reasonable likelihood* the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). Evaluation of the reasonable likelihood of injury should be made assuming "continued normal mining operations," *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be 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." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

The S&S nature of a violation and the gravity of the violation are not synonymous. Gravity, generally expressed as the degree of seriousness of the violation, is an element that must be assessed for every violation, while an S&S finding is applicable only where the *Mathies* criteria are met. The gravity assessment and a finding of S&S are frequently based upon the same or similar factual circumstances, *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987), but the focus of the inquiries differs. The Commission has pointed out that the focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996); *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that notwithstanding the likelihood of injury, some violations are serious in the context of the standard violated and the Mine Act's deterrent purposes, such as a violation of an important safety standard; a violation demonstrating recidivism or defiance on the operator's part; or a violation that could combine with other conditions to set the stage for disaster).

B. Negligence/Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Mine Act, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). High negligence is defined by the Secretary as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." *Id.* § 100.3, Table X.

More serious consequences can be imposed under the Mine Act for violations that result from the operator's unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (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, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

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 or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *see Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2011). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries*, 23 FMSHRC at 711.

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

IV. FINDINGS OF FACT AND ANALYSIS

A. Citation Number 8419744 (Preshift Exam Violation)

1. The Violation

Citation Number 8419744 was issued for a violation of the mandatory safety standard at § 75.360(a)(1). Ex. S-1. The cited regulation provides, in pertinent part:

> [A] certified person designated by the operator must make a 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.

30 C.F.R. § 75.360(a)(1).

The Shay #1 Mine has three shifts that run consecutively beginning at midnight (the midnight shift), 7:00 AM (the day shift), and 3:30 PM (the afternoon shift). Tr. 91, 96. Thus,

when work is to be performed in a particular area during one of these shifts, a preshift exam must be conducted for that area at the start of the shift or during the last three hours of the preceding shift in order to comply with § 75.360(a)(1).

On November 1, 2011, four GMS contractors spent about two hours working on Old Unit 2 during the day shift even though the area had not been examined by a certified examiner during that shift or during the immediately preceding midnight shift. Accordingly, a violation of § 75.360(a)(1) occurred, as conceded by MaRyan's witnesses. *See* Tr. 102, 164.

2. Gravity and S&S Designation

Parties' Positions

Inspector Boliard marked this violation as reasonably likely to cause an injury that would result in lost workdays or restricted duty for four miners. Ex. S-1. He also marked the violation as S&S. Ex. S-1; Tr. 38. He reasoned that sending the four GMS miners into an unexamined area was reasonably likely to expose them to any number of hazards, such as low oxygen, high methane, or the hazardous roof and rib conditions that were actually observed, and these conditions could in turn expose the miners to injuries such as strains, contusions, or broken bones from a rib or roof fall or suffocation from low oxygen or high methane. Tr. 37-39. Boliard believed that the gravity of this violation was serious because "[i]f the practice is continued to send miners in where no examination has been done … bad things could happen." Tr. 38.

MaRyan argues that this violation is not S&S because the roof and rib conditions cited by Boliard were not reasonably likely to cause an accident or injury in this case, considering that miners rarely accessed the cited area, the roof at the mine was competent, and the loose ribs could not be pulled down with Boliard's fiberglass sounding rod. Resp.'s Post-Hr'g Br. 13-15.

S&S Analysis

A violation of a mandatory safety standard occurred, satisfying the first element required to sustain an S&S finding under the *Mathies* test.

The second *Mathies* element, the existence of a discrete safety hazard contributed to by the violation, is also satisfied because this violation contributed to the discrete hazard that the four GMS miners would be injured when they entered and remained in an underground area where conditions were unknown and potential safety hazards had not been identified and addressed through a preshift examination.

Turning to the third *Mathies* element, I find that this hazard was reasonably likely to result in an injury-causing event with continued normal mining operations under the circumstances of this particular case. Two loose ribs and a damaged roof bolt were found in the unexamined area where the four GMS miners were working. Given the witnesses' uniform testimony that the mine roof was stable and largely composed of competent limestone, I find that the damaged roof bolt was unlikely to lead to a roof fall. *See* Tr. 77-80, 89-90, 107-09, 131, 156-60. However, rib falls or rib rolls can occur at any time and are just as dangerous as roof falls.

The coal seam is thick and the roof is high in this mine, averaging 7½ to 9 feet, which contributes to the risk of a rib fall or rib roll. Tr. 32, 158. The two loose ribs observed by Inspector Boliard had gapped out from the mine wall, meaning they had already begun to fall down, and when pulled they came down in large pieces that could have caused serious injuries. Tr. 32, 81, 90. Furthermore, miners were reasonably likely to access the cited area. Four GMS contractors had been regularly working on Old Unit 2 for the past few weeks. They would not have known to avoid the area where the loose ribs were observed on the morning of November 1 because no preshift exam had been performed. Boliard testified that he observed fresh tire tracks and footprints with no rock dust in them in the immediate vicinity of the loose ribs and that the GMS contractors had been working in that particular area several hours earlier. Tr. 33-34, 82. Under the circumstances I find that it was reasonably likely that a rib fall would occur and cause injury to a nearby miner or miners who would be struck or pinned by falling rock. Any such injury would be of a serious nature, satisfying the fourth *Mathies* element.

Because the four *Mathies* criteria are met, this violation is S&S.

Gravity Analysis

The gravity of this violation is serious in light of both the importance of the cited safety standard, (*see Jim Walter Res., Inc.*, 28 FMSHRC 579, 598 (Aug. 2006) (recognizing "fundamental importance" of preshift examination requirement); *Birchfield Mining Co.*, 11 FMSHRC 31, 34-35 (Jan. 1989) (explaining purpose and significance of requirement)), and the circumstances surrounding the violation. Allowing miners to work in an unexamined area exposes them to the hazards of unknown conditions, and in this particular case the conditions in the unexamined area included two loose ribs and a damaged roof bolt, which exposed four miners to a concrete risk of serious injury from a rib fall or rib roll.

3. Negligence and Unwarrantable Failure

Parties' Positions

Inspector Boliard charged the operator with high negligence and issued this violation as an unwarrantable failure under section 104(d)(1). Ex. S-1. He believed that mine management knew the GMS miners would be working on Old Unit 2 yet sent them into this off-grid area without performing any type of exam, which was an obvious and dangerous violation. *See* Tr. 39-45. The Secretary asks me to find that Inspector Boliard's high negligence and unwarrantable failure designations are appropriate under the facts of this case. Sec'y's Post-Hr'g Br. 10-16.

MaRyan contends that mine management was unaware of this violation and had no opportunity to avoid or abate it, and argues that the factors which would support a finding of unwarrantable failure are not present in this case. MaRyan requests that this citation be modified to a 104(a) violation involving no negligence. Resp.'s Post-Hr'g Br. 15-23.

Operator's Knowledge of Violation; Obviousness of Violation

The operator's knowledge of a violation is both a factor affecting the unwarrantable failure analysis and a prerequisite for an MSHA inspector to make a finding of high negligence

under 30 C.F.R. § 100.3. Knowledge is established where the operator knew or should have known of the violation. *See Coal River Mining, LLC*, 32 FMSHRC 82, 90-92 (Feb. 2010).

Contrary to Boliard's belief that mine management knowingly sent the GMS crew into an unexamined area, there is evidence that due to a miscommunication or mistake made by the GMS crew, the operator did not know of this violation until after it had occurred. MaRyan's witnesses testified that GMS leadman Harper brought his crew onto the Old Unit 2 worked out panel several hours later than expected on November 1. The crew was scheduled to complete their work on Old Unit 2 during the midnight to 7:00 AM shift that day, which accorded with their normal schedule. Tr. 105-06, 163. A preshift exam had been performed for that period of time. Ex. R-1; Tr. 103-04, 136-37. However, the crew did not enter the panel until approximately 8:40 AM. Tr. 27.

The GMS crew should have notified mine management that they would not be completing their work during the midnight shift as scheduled so that management could arrange for a preshift exam for the day shift. Moreover, when the crew went into Old Unit 2, they should have looked at the DTI (dates, times, and initials) board at the entrance to the panel, which would have shown that the area had not been examined for the day shift. *See* Tr. 59-60, 74, 126, 166. Yet the crew apparently ignored the DTI board and failed to communicate their plans to mine management.

Harper told Inspector Boliard that he had asked mine examiner Yeske to perform an exam for the day shift. Tr. 28-29. Yeske, however, denied having any such conversation with Harper. Tr. 142. Yeske was the examiner for the midnight shift. He said that if he had been asked to perform an exam for the day shift, he would have told Harper to speak to someone else or write it on the whiteboard in the office where the mine examiners filled out their paperwork. Tr. 142-43. This makes sense considering the mine's normal procedures for scheduling preshift exams: either the location that needs to be preshifted is identified on the whiteboard or the shift mine manager verbally instructs the mine examiner to examine it. Tr. 70, 101, 137-38, 163. Yeske followed normal procedures and examined Old Unit 2 for the midnight shift. Tr. 137, 144-45. Boliard testified that he found Yeske to be competent and to exercise good judgment. Tr. 59. Boliard did not provide any reason why Yeske would have examined Old Unit 2 for the midnight shift if the GMS crew had been scheduled for a different shift. In fact, Boliard was unaware that Yeske had conducted a preshift exam at all. Tr. 58. Boliard did not look at the whiteboard or the exam books to see what shifts were identified as working shifts for Old Unit 2 and did not speak to the mine examiners or anyone else on the scene other than Harper to determine what the GMS crew's intended shift was. Tr. 63, 68-70. Harper was not called as a witness. Although hearsay is admissible in administrative hearings, in this instance Harper's credibility is extremely important and MaRyan was not given the opportunity to confront him. Harper had reason not to admit he had been late and had never requested a preshift exam; if that were the case, GMS likely would have received the citation instead of MaRyan. Tr. 75. The only evidence that MaRyan's management should have known miners would be working on Old Unit 2 during the day shift was Harper's self-serving hearsay assertion that he had told Yeske they would be there. I find that Harper was likely lying and Yeske was being truthful. Mine management was not aware that Old Unit 2 needed to be examined for the day shift on November 1.

I further reject the Secretary's argument that the operator should have recognized the need for a preshift exam as soon as the GMS crew arrived at the mine. The Secretary reasons that the crew had been working on Old Unit 2 for several weeks and the mine was tracking their location and directing their work, so mine management should have known an exam was needed. Sec'y's Post-Hr'g Br. 11-12, 15. In essence, the Secretary is arguing that the violation was obvious. However, the GMS crew normally worked on Old Unit 2 during the midnight shift and therefore mine management would not have expected them on the day shift. Tr. 106, 162-63. This work was intermittent and the crew lacked authority to decide when they would go onto the worked out panel without getting clearance from management ahead of time, which did not happen in this case. Tr. 100, 119-20, 162. Although the crew was wearing tracking devices, the purpose of the tracking system is unrelated to mine examinations. The workers manning the tracking warehouse had no reason to know and no means of finding out that Old Unit 2 had not been preshifted. Tr. 71, 122, 177-78. Thus, it would not have been obvious to mine management that the GMS crew was working in the unexamined area.

For all the reasons discussed above, I find that this violation was not obvious and that the operator did not have knowledge of it until after it occurred.

Operator's Notice that Greater Efforts at Compliance Were Necessary

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the extent the past violations and warnings placed the operator on notice prior to the issuance of the citation that greater efforts were necessary for compliance with the cited safety standard. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080-81 n.5 (Dec. 2014).

In this case, there is no evidence that MaRyan received past similar violations or specific warnings from MSHA that greater efforts were needed to comply with the cited preshift exam regulation. *See* Tr. 75, 88; Ex. S-4.

Operator's Abatement Efforts

The abatement effort factor measures an operator's response to violative conditions that it knew or should have known about before the citation was issued. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Also relevant is the level of priority the operator has placed on abating conditions for which it received prior notice that greater compliance efforts were necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Abatement efforts undertaken after the issuance of the citation are not relevant. *Id.*

The operator made no effort to abate this violation before the citation was issued. However, as discussed above, mine management had no knowledge of the violative condition and the operator had not previously been placed on notice that greater efforts at compliance with the cited standard were necessary. I find that the lack of abatement efforts does not weigh against MaRyan under these circumstances.

Extensiveness; Duration; Degree of Danger Posed

The extensiveness of a violation can be assessed in terms of the extent of the affected area, the number of people affected, or the measures required to abate the violation. Here, the affected area was the portion of the No. 4 entry between SS25+95 and SS27+45 on the Old Unit 2 worked out panel. Ex. S-1; *see* Tr. 133-36; Ex. R-4. This a relatively small area. Because the violation occurred in a worked out panel where miners do not normally work and travel, it affected only the four miners in the GMS crew who were recovering belt structure there. The only measure required to abate the violation was the performance of a preshift exam. Ex. S-1. I conclude that this violation was not extensive.

With regard to the duration of the violation, this violation lasted for less than one shift. Ex. S-1. Miners were in the unexamined area for approximately two hours, from about 8:40 to 10:50 AM. Tr. 27-28; Ex. S-3 at 2-3.

Although this violation was serious and posed a concrete risk of injury, the degree of danger was not unusually high considering all the circumstances, including the relatively short duration of the violation and the fact that only one hazardous condition was actually discovered and cited in the unexamined area.

Conclusions

After considering the seven factors discussed above and all the factual circumstances surrounding this violation, I find no evidence of aggravated conduct on the operator's part. This violation occurred because four GMS contractors entered Old Unit 2 at an unexpected time without notifying mine management. The operator was unaware of the violation until the citation was issued. Afterward, the operator promptly terminated GMS from performing this type of work. Tr. 166-67. The operator's conduct did not constitute an unwarrantable failure to comply with the cited safety standard. Accordingly, the criteria for me to uphold the citation under section 104(d)(1) are not met. The type of action is hereby modified to a 104(a) citation.

The negligence associated with this violation is low because there was no reason for the operator to know the GMS crew would be working on Old Unit 2 during the day shift instead of the midnight shift.

B. Order Number 8419745 (Roof & Rib Control Violation)

1. The Violation

Order Number 8419745 alleges a violation of the mandatory safety standard at 30 C.F.R. § 75.202(a). Ex. S-2. The cited regulation states: "The roof, face and ribs of areas where persons work and travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a).

The violative conditions observed by Inspector Boliard included a damaged roof bolt and two loose ribs. The roof bolt was hanging down, its plate was dislodged, and cap rock had fallen out from around it. Tr. 31-33, 109. The two loose ribs were gapped out from the wall and one of

them was across from the damaged roof bolt, which created a 6½-foot by 6½-foot area of unsupported top. Tr. 31-32; Ex. S-2. These conditions establish that a violation of § 75.202(a) occurred, which MaRyan does not dispute.

2. Gravity and S&S Designation

Parties' Positions

Inspector Boliard marked this violation as S&S and reasonably likely to cause an injury that would result in lost workdays or restricted duty for four miners. Ex. S-2. He explained that a rib or roof fall would be expected to cause injuries such as contusions, strains, broken bones, and crushing injuries, and he felt that all four miners on the GMS crew would be affected because he observed tire tracks and footprints where the miners had been standing between the rib and the belt structure they were recovering. Tr. 47-49.

As argued with respect to the preshift exam violation, MaRyan contends that this violation is not S&S because the roof and rib conditions were not reasonably likely to lead to an accident or injury under the circumstances of this case. Resp.'s Post-Hr'g Br. 13-15.

S&S Analysis

A violation of a mandatory safety standard occurred, satisfying the first *Mathies* element.

The violation contributed to the discrete hazard that the four GMS miners would be injured by a roof fall, rib fall, or rib roll caused by the operator's failure to support or otherwise control the roof and ribs. Thus, the second *Mathies* element is satisfied.

This hazard was reasonably likely to result in an injury-causing event with continued normal mining operations under the circumstances of this case, satisfying the third *Mathies* element. As explained above in my discussion of the third *Mathies* element for the preshift exam violation, I find that the damaged roof bolt was unlikely to cause a roof fall considering the composition of the roof at this mine, but the two loose ribs were reasonably likely to lead to an injury-causing rib fall or rib roll. The 7½-foot-tall ribs had already begun to fall and came down in dangerously large pieces when pulled, according to Inspector Boliard. Tr. 32, 81, 90. Although MaRyan argues that the cited area was not frequently accessed, four GMS miners were in fact working in the vicinity of the loose ribs at the time the violation occurred, leaving fresh tire tracks and footprints nearby. Tr. 33-34, 47, 49, 82. Under these circumstances, I find that the loose ribs were reasonably likely to lead to a rib fall or rib roll that would cause injury to the GMS miners who were recovering belt structure in the area.

A rib fall or rib roll would be expected to cause injuries such as broken bones and crushing injuries. These types of injuries are serious in nature. Thus, the fourth *Mathies* element is satisfied.

Because the four *Mathies* criteria are met, this violation is S&S.

Gravity Analysis

The gravity of this violation is serious in that the violation exposed four miners to a risk of serious injury from a rib fall or rib roll.

3. Negligence and Unwarrantable Failure Designation

Parties' Positions

Inspector Boliard charged the operator with high negligence and characterized this violation as an unwarrantable failure under section 104(d)(1). Ex. S-2. He believed that the violation was obvious and that the operator had failed to discover it only due to the operator's failure to conduct a preshift examination for Old Unit 2. *See* Tr. 49-53. The Secretary asks me to find high negligence and unwarrantable failure based on the obviousness of the violation, the high degree of danger presented due to the GMS miners' lack of experience and the off-grid location where the violation occurred, the history of rib and roof falls at the mine, and the operator's failure to conduct an on-shift or supplemental exam. Sec'y's Post-Hr'g Br. 17-19.

MaRyan contends it had no knowledge of this violation and no opportunity to abate it. MaRyan argues that the unwarrantable failure designation is not supported by the evidence and requests that the order be modified to a section 104(a) citation involving no negligence. Resp.'s Post-Hr'g Br. 15-23.

Duration of Violation

Inspector Boliard testified that the ribs and roof bolt cited in this order had probably been loose for one shift. Tr. 51. He explained these conditions can arise very quickly. Tr. 53, 81. Yeske, who testified he would have flagged the loose ribs and damaged roof bolt if he had seen them, had examined the area two shifts earlier without reporting the violative conditions. Tr. 138-41. I find that this violation lasted for approximately one shift.

Operator's Knowledge of Violation; Obviousness of Violation

The operator had no knowledge of the violative conditions because no preshift exam had been conducted for the cited area. The Secretary faults the operator for failing to conduct an examination of the area and concludes that the operator should have known of the violative conditions because they would have been obvious to a mine examiner. For the reasons discussed above, however, I find that the operator had no reason to know of the need to conduct a preshift exam on Old Unit 2 for the November 1 day shift.

Old Unit 2 was not an active production unit. It would not have been traveled frequently by anyone. Accordingly, I find that the violative conditions were not obvious to MaRyan because none of its supervisors or agents were in the area to notice them.

Notice that Greater Efforts at Compliance Were Necessary; Abatement Efforts

The safety standard at issue here, § 75.202(a), was cited to MaRyan 33 times in the two years preceding the issuance of Order Number 8419745. Ex. S-2; Tr. 172; *see also* Ex. S-4. The Secretary argues that these prior violations placed the operator on notice that it needed to check for roof and rib control problems. Sec'y's Post-Hr'g Br. 19. However, even the inspector agreed that the mine's roof conditions were generally good. Tr. 77-78. Moreover, there are two reasons that the operator likely was not on notice that greater compliance efforts were necessary under the particular circumstances of this case. First, the mine's past roof control problems were related to phenomena such as kettlebottoms and slickensides, which were not a concern in the instant case. Tr. 79-80, 159, 174-75. Second, the operator would not have known to check the roof and rib conditions on Old Unit 2 on the morning of November 1 because the operator lacked knowledge that miners would be working and traveling in the area.

Similarly, although the operator made no effort to abate this violation before the inspector cited it, the lack of abatement efforts is of minimal relevance because the operator lacked knowledge of the violation.

Extensiveness; Degree of Danger Posed

This violation was not extensive. The cited conditions affected a relatively small portion of the Old Unit 2 worked out panel that was traveled by just four miners. The violation was abated without extensive efforts by flagging off the area under the damaged roof bolt, retrieving a metal pry bar, and pulling down the two loose ribs, all of which took less than 30 minutes. Tr. 33-34, 80-81, 90-91.

Although this violation posed a discrete risk of injury to the four GMS miners, I find that the degree of danger was not unusually high given the short amount of time the violation existed and the fact that a metal pry bar was needed to pull down the ribs instead of the inspector's fiberglass sounding rod, which indicates the ribs were not so loose that they would have fallen without the application of a significant force.

Conclusions

For all the reasons discussed above, I find that the operator did not engage in aggravated conduct with respect to this violation. The violation was not extensive or unusually dangerous and the operator had no reason to know of it until after Inspector Boliard cited it. The factors which would support an unwarrantable failure finding are not present. Because this violation is not an unwarrantable failure, the type of action is hereby modified from a section 104(d)(1) order to a section 104(a) citation.

The negligence associated with this violation is low because, as discussed above, the operator had no knowledge or reason to know of the violation.

V. PENALTIES

A. Legal Principles

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247 (May 2006).

B. Parties' Positions

The Secretary proposes "specially assessed"[5] penalties of $15,200.00 for Citation Number 8419744 and $24,600.00 for Citation Number 8419745. The Secretary has offered no testimony or argument explaining how he arrived at these penalty amounts.

MaRyan argues that the Secretary's proposed penalties should not be imposed because the negligence and gravity of the violations were overstated and because the Secretary has failed to offer any evidence as to why a special assessment is warranted. Resp.'s Post-Hr'g Br., 23-26.

C. Assessment of Penalties

Violation History

[5] Although the Commission holds the authority to assess all penalties under the Mine Act, the Secretary ordinarily proposes penalties using a points formula set forth in 30 C.F.R. § 100.3 and referred to as the "regular assessment" process. Section 100.5 provides that MSHA may waive the regular assessment process "if it determines that conditions warrant a special assessment," which must be based on the six statutory penalty criteria. 30 C.F.R. § 100.5(a), (b).

The Secretary has submitted an MSHA document showing the operator's violation history for the 15 months preceding the occurrence of the two violations at issue here. MaRyan received 252 violations that became final during that period. Ex. S-4. MaRyan argues that this document does not demonstrate poor compliance or any other basis for the special assessment. Resp.'s Post-Hr'g Br. 25. I agree. In fact, the violation history provides no qualitative analysis at all and no basis for me to determine whether the number of violations shown is high or low.

The Secretary's penalty petition assigns 8 out of 25 possible penalty points for the operator's overall history of violations per inspection day. *See* 30 C.F.R. § 100.3, Table VI. This corresponds to a moderate violation history. I find that the operator's moderate violation history is not a mitigating factor or a significant aggravating factor in the penalty calculation.

Size of Operator; Ability to Continue in Business

The parties have stipulated that the penalties proposed by MSHA will not impair MaRyan's ability to remain in business. Joint Exhibit 1. The parties have not stipulated to the size of the operator's business, but the penalty petition reflects that the mine's tonnage is over 1 million and the controller's tonnage is over 8 million, indicating a large business. I have taken into account the appropriateness of the penalties to the size of the operator's business, as well as the desired deterrent effect of the civil penalties in comparison to the size of the operator and its overall resources. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012); *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997).

Good Faith

The Special Assessment Narrative Forms submitted with the Secretary's penalty petition reflect that the operator was credited with good faith in abating Citation Number 8419744 but not Citation Number 8419745. However, the testimony presented by both parties indicates these violations were timely abated in good faith, and I have taken this factor into account.

Negligence and Gravity

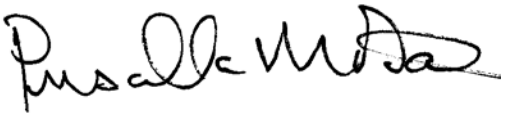
The factors that have weighed most heavily in my penalty assessment are the gravity and degree of negligence associated with each violation, which are discussed at length within the body of the decision above.

Conclusion

After considering the six statutory penalty criteria, I assess a penalty of $500.00 for each of these violations.

ORDER

MaRyan Mining, LLC is hereby **ORDERED** to pay the sum of $1,000.00 within thirty (30) days of the date of this Decision and Order.[6]



Priscilla M. Rae
Administrative Law Judge

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[6] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.