FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 31, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-996 A.C. No. 46–06265–383951
v.	
RAW COAL MINING COMPANY, INC., Respondent	Mine: Sewell Mine B

DECISION

Appearances: Paige I. Bernick, Esq. (Eric Johnson, Esq., on brief), U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

James F. Bowman, Safety Consultant, Midway, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon a petition for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d).[1] In dispute are three section 104(d)(2) orders issued by the Mine Safety and Health Administration ("MSHA") to Raw Coal Mining Company, Inc. ("Respondent" or "Raw Coal"), as owner and operator of the Sewell Mine B ("Sewell mine") in Asco, West Virginia. To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998).

I. STATEMENT OF THE CASE

These three section 104(d)(2) orders were issued at Raw Coal's Sewell mine. Although none of them were designated as significant and substantial ("S&S"), the Secretary characterizes Raw Coal's negligence as "high" for all three orders and alleges that the violations were a result

[1] In this decision, the hearing transcript, the joint exhibit, the Secretary's exhibits, and Raw Coal's exhibits are abbreviated as "Tr.," "Joint Ex. #," "Ex. S–#,"and "Ex. R–#," respectively.

of the company's unwarrantable failure to comply with mandatory safety standards.[2] The Secretary proposes a penalty of $4,000.00 for each violation for a total penalty of $12,000.00.

This matter was initially the subject of a default judgement. The Commission, in an order encompassing several consolidated dockets and operators, granted Respondent's request to reopen this case. *Allstate Materials, LLC*, 38 FMSHRC 645 (Apr. 2016) (reopening unrelated matters involving eight different operators in a single order). Thereafter, Chief Administrative Law Judge Robert J. Lesnick assigned me Docket No. WEVA 2015-996, and I held a hearing on March 9, 2017, in Beckley, West Virginia. The Secretary presented testimony from MSHA Inspector Nicholas Christian and Inspector Trainee Donald LeMarr. Raw Coal presented testimony from general mine foreman Fred Ciampanella, mine superintendent Randy Campbell, and third shift section foreman Burb Blankenship. The parties each filed post-hearing briefs and reply briefs, whereby the record closed on June 7, 2017.

II. ISSUES

Raw Coal, through its lay representative, challenges the fact of the violation, the negligence and unwarrantable designations, and the proposed penalty for each order.

Order No. 9020987 charges Raw Coal with a violation of 30 C.F.R. § 75.364(b)(2) for failing to perform the required weekly examination of the Left Return Aircourse and Seals. Raw Coal, however, contends it conducted the exam but simply failed to record it.

Order No. 9064481 charges Respondent with a violation of 30 C.F.R. § 75.333(b)(1), which requires Raw Coal to construct a line of stoppings (solid physical barriers) in the crosscuts between the working section's intake and return entries, so as to separate the fresh air in the intake entry from the contaminated air in the return entry. Although the standard permits the two connecting crosscuts closest to the working face (where coal is actively being mined) to remain open for travel between the two entries, the Secretary alleges Raw Coal impermissibly allowed an additional two crosscuts between those entries to remain open.[3] Raw Coal, in turn, argues

[2] The S&S and unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" and establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." A violation that is both S&S and an unwarrantable failure shall result in a 104(d)(1) citation. *Id.* The occurrence of another unwarrantable failure violation within the next 90 days, even if not S&S, shall result in the issuance of a 104(d)(1) order withdrawing miners from the affected area. *Id.* Any subsequent unwarrantable failure withdrawal orders are issued under section 104(d)(2) until such time that an inspection of the mine discloses no further unwarrantable failure violations. *Id.*; *Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990). The 104(d)(1) predicate for the three orders in this case was Order No. 9061670, which was issued on January 21, 2015, and became a final order on November 23, 2015. (Tr. 43:9–21; Ex. S–18.)

[3] If one were to proceed away from the face where coal was actively being mined at the time of the inspection, the two crosscuts that do not require permanent ventilation controls would

that the third connecting crosscut was permitted to remain open when the order was issued, and that the ventilation control for the fourth connecting crosscut was adequately maintained.

Lastly, Order No. 9064486 charges Respondent with violating its approved ventilation plan in a number of ways, including moving an entire line of stoppings to a series of crosscuts where they were not permitted to be, altering the direction of air flow in a return entry, and creating a dead air space. Raw Coal denies it moved a line of stoppings or altered the direction of air flow, and argues that the arrangement of its ventilation controls constituted a permissible variation of the MSHA-approved ventilation plan.

Alternatively, if any violations were to be found, Raw Coal disputes the unwarrantable failure designations due to the alleged limited duration and extent of the violation in Order No. 9020987, inadequate notice that greater efforts were needed for compliance in Order No. 9064481, and complexity of the ventilation map at issue in Order No. 9064486.

Accordingly, the following issues are before me: (1) whether Respondent violated 30 C.F.R. § 75.364(b)(2) as alleged in Order No. 9020987; (2) whether Respondent violated 30 C.F.R. § 75.333(b)(1) as alleged in Order No. 9064481; (3) whether Respondent violated 30 C.F.R. § 75.370(a)(1) as alleged in Order No. 9064486; (4) whether the Secretary's gravity determinations are properly designated for these three section 104(d)(2) orders; (5) whether Respondent's negligence is properly designated as "high" and constitutes an unwarrantable failure; and (6) whether the proposed penalties are appropriate.

For the reasons set forth below, Order Nos. 9020987, 9064481, and 9064486, are **AFFIRMED**.

III. FINDINGS OF FACT

The parties stipulated to the following:

1. Raw Coal Mining Company, LLC ("Respondent") 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. Respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.
4. Respondent operates Sewell Mine B, Mine Identification Number 46-06265.
5. Sewell Mine B mined 97,208 tons of coal in 2016.
6. Respondent abated the citations involved herein in a timely manner and in good faith.

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be the first and second crosscuts encountered. Hence, they are referred to in this decision as the first and second crosscuts outby the working face. The crosscuts with allegedly missing or incomplete stoppings would be the third and fourth crosscuts encountered and are accordingly referred to as the third and fourth crosscuts outby the working face.

7. Secretary's Exhibits 1 through 22 are admissible.
8. Respondent's Exhibits 1 through 7 are admissible.

(Joint Ex. 1.)

Raw Coal's Sewell Mine B is an underground coal mine in McDowell County, West Virginia. (Ex. R–6.) The Sewell mine consists of a series of entries and perpendicular crosscuts that together form a grid if viewed from above. (*See* Exs. S–14, S–15.) Its low ceilings measure approximately 42 to 44 inches in height and generally require miners to crawl through travelways or ride in a vehicle to get around. (Tr. 25:17–26:4.) The company mines coal on three daily eight-hour shifts at the Sewell mine. (Tr. 33:1–14.) As the operator advances through a section in the course of normal mining operations, it leaves pillars of coal between entries and crosscuts that help support the roof. After a section is completely mined, the operator then engages in a process commonly referred to as "retreat mining." In other words, to collect additional coal from the remaining pillars, Raw Coal removes those pillars and allows the roof to collapse. (Tr. 67:14–68:6.)

Raw Coal also utilizes a system of ventilation controls at the mine (including stoppings and curtains positioned in various crosscuts between entries) to direct fresh air to the active production sections through "intake" entries, and to direct harmful gases and dust from the working faces out of the mine through "return" entries. (Tr. 27:11–30:23.) MSHA views the liberation of methane gas, in particular, as a problem at any underground coal mine due to its explosive potential. However, the Sewell mine produced significantly less than the 200,000 cubic feet of methane necessary to warrant a spot inspection (close and frequent monitoring for issues related to methane buildup), a fact that is reflected in MSHA's gravity determinations for the subject orders. (Tr. 34:16–20, 35:10–23, 36:16–37:4; Ex. S–5.)

A. Order No. 9020987 – The Weekly Exam Violation

Inspector Christian arrived at the Sewell mine at 7:25 a.m. on April 7, 2015, to conduct a regular inspection with MSHA Inspector Trainee Trent LeMarr.[4] (Tr. 15:3–11, 16:12–22.) They were accompanied by Raw Coal agents Fred Ciampanella and Randy Campbell. (*Id.*) Christian proceeded to the mine office and began checking Raw Coal's record books. He immediately noticed the company had not recorded in its logbook a weekly exam of the left return aircourse and seals since March 30. (Tr. 15:13–17:5; Ex. S–2.) Raw Coal was required to conduct and record another weekly exam of the area by April 6 (the prior day). (Tr. 17:13–14.) Christian knew Ciampanella had accompanied him for most of the April 6 inspection (which lasted until the early afternoon) and could not have conducted the weekly exam during that time. (Tr. 24: 15–18, 110:18–24.) But, to be certain, Christian asked Ciampanella, "Did you make the exam

[4] While Christian had only been an MSHA inspector since 2014, he had an additional 13 years of experience in the mining industry, which included jobs as a section foreman, general mine foreman, and mine superintendent. (Tr. 9:22–13:6.) As a mine superintendent, Christian was responsible for developing, reviewing, and ensuring compliance with mine ventilation plans. (Tr. 12:15–24.) Likewise, LeMarr joined MSHA in 2014 and had approximately 20 years of prior experience in the mining industry. (Tr. 274:2–12.)

yesterday?" and, according to the inspector, Ciampanella responded, "No, I did not make the exam yesterday." (Tr. 17:17–24; Ex. S–4 at 5.) Inspector Trainee LeMarr fully corroborated Christian's account of the conversation. (Tr. 276:3–7.) At hearing, however, Ciampanella denied making that statement or even being asked the question, and insisted he had in fact conducted the exam over the course of multiple days, including April 6, but simply failed to record that he had examined the entire left return. (Tr. 245:12–19, 247:20–249:13, 259:3–7.)

Christian next checked the tracking logbook in the dispatcher's office for any evidence that Raw Coal had conducted the weekly exam.[5] (Tr. 18:8–17.) When entering a return, miners are required to phone the dispatcher above ground to record their presence in the return and how long they expect to remain there, so the company knows to look for them if they remain longer than intended. (Tr. 18:8–14.) The company is also required to keep written logs of these calls. (Tr. 21:23–22:2.) The logbook did not display any record of miners entering either the left or right return since April 2. (Tr. 22:1–8; Ex. S–3.) Christian also asked individuals in the dispatcher's office if they had any other notes or records indicating that Ciampanella had been in the return recently. The answer he received was once again, "No." (Tr. 19:5–8.) At this point Christian informed Ciampanella and Campbell "that they were to withdraw the men from the mine until the aircourse [examination] could be made," and the company immediately complied with the withdrawal order. (Tr. 19:8–10, 24:19–22.)

Christian told Ciampanella that he was already planning to travel through the left return airway in the course of his regular inspection that day, so he intended to accompany Ciampanella when he conducted the exam to abate the order. (Tr. 24:23–25:3.) However, while the inspector was checking a coal truck on the surface, Ciampanella hopped onto a vehicle and hurried underground without slowing down to allow Christian an opportunity to accompany him. (Tr. 25:4–9.) Because Ciampanella had left him without a permissible ride, Christian could not travel to the return and observe the examination himself. (Tr. 25:17–26:24.) Instead, Christian waited at the surface.[6] The order was terminated when Ciampanella returned to the surface and presented a record of the exam he had just conducted. (Tr. 25:14–16.)

B. Order No. 9064481 – The Missing and Incomplete Stoppings Violation

At the start of a subsequent inspection on the morning of April 21, a section foreman at the mine asked Inspector Christian if the company was permitted to continue cutting, loading, and cleaning a working section while constructing a stopping. (Tr. 46:4–47:7.) Christian recalled that just three weeks prior he had cited the company for a violation of section 75.333(b)(1), which requires stoppings to be installed up to and including the third crosscut outby the working face, so he believed the company was concerned that it was again in violation of the same standard. (Tr. 47:5–22; Exs. S–9, S–10, S–11.) Christian told the section foreman

[5] Although Christian had already confirmed that Ciampanella had not conducted the exam, there were at least four other certified foremen who could have done so. (*See* Tr. 44:21–45:19.)

[6] Being 6'5", Christian would have needed to crawl through the travelways (which averaged 42 to 44 inches in height) to adequately inspect the return, a process he speculated would take him eight or nine hours. (Tr. 25:17–26:24.)

he would assess the situation when he arrived at the section, and then proceeded with his inspection, accompanied by LeMarr and Raw Coal agents. (Tr. 47:19–48:3.)

When Christian arrived at the working section, he observed no stoppings in the three open crosscuts outby the working section (i.e., the three crosscuts closest to the working face). (Tr. 52:12–53:16; *see* Ex. S–7 at 15.) These crosscuts provided access to the left return entry, where air that has ventilated the face directs dust and gas out to the surface. (*Id.*) While the first two crosscuts closest to the face are permitted to remain open in order to allow miners to access the return entry if necessary, the third crosscut (and each one after that) requires a permanent stopping once the first two crosscuts are fully cut through, bolted, and safe for travel.[7] (Tr. 228:13–21.) The ventilation controls are designed to separate fresh air blowing through the intake entry toward the working face from the contaminated or dirty outgoing air in the return entry that has already passed through the working sections, ensuring that a sufficient flow of fresh oxygen reaches the working face without being diverted (or short circuited) into the return entry. *See* 61 Fed. Reg. 9764, 9782 (Mar. 11, 1996) (explaining the rationale for the ventilation control requirements in 30 C.F.R. § 75.333).

The first crosscut outby the working face did not contain any ventilation controls, temporary or permanent, while the second and third crosscuts had temporary curtains installed to control ventilation. (Tr. 53:1–11.) Temporary ventilation controls do not satisfy the standard's requirements. *See* 30 C.F.R. § 75.333(b)(1). Christian observed that the stopping for the fourth crosscut outby the working section was only partially completed, as it contained exposed un-plastered wood and a hole (or opening) at the top spanning 8 to 10 feet — half the width of the crosscut — without even a curtain to fill the gap. (Tr. 48:8–12, 53:11–17, 54:10–15, 61:6–62:17.) Therefore, Christian found Raw Coal to be in violation of the standard at both the third and fourth crosscuts outby the working section. (Tr. 78:19–79:2.) He proceeded to take an air reading at the open crosscut closest to the section face and recorded an airflow rate of only 7,000 cubic feet per minute ("CFM"), well below the mine's ventilation plan requirement of an airflow of 12,000 CFM. (Tr. 53:17–54:1, 57:1–13; Ex. S–8.) Christian explained that by not having stoppings installed, the company was short-circuiting intake air through the crosscuts into the return entry instead of forcing it toward the section face. (Tr. 54:1–12.)

According to Christian, when he told Ciampanella that he would be issuing a section 104(d)(2) order for failing to install the required stoppings and asked for any mitigating circumstances, Ciampanella responded, "Why should I install those stoppings, when I'm going to tear them back out tonight when I begin pillaring?" (Tr. 67:7–13.) Since Raw Coal would eventually be "retreat mining" in the section, the company would possibly begin "pillaring later that night" after mining out the area. (Tr. 67:14–68:6.) In other words, the operator would begin to remove the pillars of coal to let the roof collapse and bury the section, thereby eliminating the need for any stoppings in the soon-to-be non-existent crosscuts. (*Id.*) Ciampanella's statement convinced Christian that Raw Coal was aware of the violative condition but allowed it to persist for the sake of expediency. (Tr. 73:12–20.)

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[7] Crosscuts must have adequate roof support to remain safe for travel, so miners can pass through them without subjecting themselves to the risk of a roof fall. Roof bolting is an essential part of the mining process and integral to a mine's roof control plan.

At hearing, Raw Coal's witnesses, Blankenship and Ciampanella, disputed Christian's testimony regarding the hole in the stopping for the fourth crosscut. (Tr. 200:15–24, 254:6–20.) Ciampanella also claimed that the stopping was fully plastered on one side. (Tr. 254:6–16.) However, the biggest point of contention at hearing was the timing for when the first crosscut had been fully cut through and bolted such that it was safe for travel, thereby triggering the requirement for a completed stopping at the third crosscut.

Christian testified that he was initially informed the company had finished cutting through the first crosscut earlier that morning, during the previous shift, but was later told Raw Coal had completed this process the prior evening. (Tr. 58:23–59:22, 60:1–6, 60:19–61:4.) Nevertheless, Christian observed that the crosscut was fully cut through, bolted, and safe for travel when he arrived at the section at 8:30 a.m. on April 21. (Tr. 59:20–24, 60:8–10, 79:8–19.)

The record for the preshift examination of the section conducted between 5:00 a.m. and 7:42 a.m. on April 21 indicates that the first crosscut outby the working face had not yet been bolted at the time of the preshift examination. (Ex. R–1 at 5; Tr. 75:15–76:8.) In addition, Raw Coal introduced a record of an onshift examination—conducted *after* the issuance of Inspector Christian's citation—that indicates this same crosscut had not yet been bolted. (Ex. R–1 at 6.) All of Raw Coal's witnesses testified at the hearing that the first crosscut had not been fully cut and bolted when Christian observed it, and that it was not until later that day that the company completed this process. (Tr. 204:7–205:18, 227:13–228:4, 250:10–254:5.) However, Inspector LeMarr, who accompanied Christian, corroborated Christian's observation that the first crosscut was fully cut through and bolted when they initially observed it at 8:30 a.m. (Tr. 277:16–24.) Also, LeMarr witnessed the hole Christian had observed in the stopping for the fourth connecting crosscut. (Tr. 278:9–19.)

C. Order No. 9064486 – The Ventilation Plan Violation

The following day, April 22, Inspector Christian returned to the mine to continue his regular inspection, again accompanied by LeMarr. (Tr. 80:21–23, 81:4–5.) At the working section, Christian noticed a number of problems with the ventilation controls in the area which convinced him that Raw Coal was not following its MSHA-approved ventilation plan. (Tr. 81:16–83:16.) Most significantly, he testified that an entire line of stoppings was missing from a series of crosscuts where the ventilation plan indicated they were supposed to be; instead, it appeared that all of those stoppings had been moved exactly one series of crosscuts over, where, according to Christian, they were not permitted. (Tr. 82:2–9, 87:17–88:16.) Christian testified that he saw leftover materials where the stoppings had once been, including blocks and plaster still stuck to the mine roof and ribs, suggesting that these stoppings had indeed been moved. (Tr. 95:10–24.) LeMarr's testimony at hearing corroborated Christian's observations of missing stoppings and leftover materials in the crosscuts where the approved ventilation plan indicated they were supposed to be. (Tr. 279:15–280:6.) However, at the hearing, Mine Superintendent Randy Campbell not only testified that no stoppings had been moved but denied that stoppings had ever been in the area where Christian believed they should have been. (Tr. 230:15–231:24.) Campbell testified the stoppings were not required to be in the area where Christian believed the ventilation plan required them and denied there were any leftover materials stuck to the roof and ribs in those crosscuts. (*Id.*)

Inspector Christian testified that he initially believed Raw Coal had removed the permanent ventilation controls in order to develop an area beyond those stoppings, and that MSHA had permitted the company to do this. (Tr. 94:4–96:20.) But, once that area had been worked out and Raw Coal retreated from there, MSHA expected the company to reinstall the removed stoppings in the same location where they had originally been, as required by the mine's MSHA-approved ventilation plan. (*Id.*) According to Christian, Raw Coal failed to do this and had not obtained any revision to its approved site-specific plan that would allow a deviation from that strategy. (Tr. 97:2–98:4.) The most recently approved revisions to the mine's ventilation plan had been submitted by Raw Coal on March 25 and approved by MSHA on April 17, five days before Order No. 9064486 was issued. (Tr. 185:1–24.) Campbell testified that he did not think Raw Coal had received the revised ventilation plan by the time of the April 22 inspection. (Tr. 234:6–16.) Yet, Ciampanella testified that he presumed the mine received the approved revisions on April 17 (Tr. 257:15–23), and Christian stated the revised ventilation plan was posted on the mine bulletin board at the time of the inspection. (Tr. 186:3–5.)

More importantly, Christian believed Raw Coal had rearranged its permanent and temporary ventilation controls (i.e., both the stoppings and curtains) to shift from a "split air" plan to a "sweep air" plan. In a split air arrangement, the intake air that reaches the section splits in two different directions down both the left and right return entries. But in the sweep air arrangement Raw Coal had created on April 22, the intake air was sweeping across the face in a single direction, down the left return entry only. (Tr. 82:10–23, 85:12–87:12, 90:19–91:21.) Mine Superintendent Campbell testified that Raw Coal had permissibly maintained a split air arrangement by allowing room for air to travel down the right side through the section they were developing at the time. (Tr. 236:18–237:11.) However, Christian maintained that on April 22 the entries had not yet been cut through in those locations to allow passage for that air. (Tr. 192:15–193:13.)

As a result of the above conditions, Inspector Christian observed that Raw Coal had altered the direction of the air in one of the entries from a return entry to an intake entry, thereby ensuring there was no available entry on that side of the section for return air to travel. (Tr. 82:23–83:3, 90:8–92:14, 182:12–19.) A regulator (i.e., a hole in a stopping) in that entry had previously redirected return (dirty) air to the bleeder entry (thus carrying harmful air-methane mixtures away from working sections to worked-out areas and finally to the surface). However, the company was now directing intake (clean) air through the regulator.[8] (Tr. 83:5–12.) There was now the potential that this regulator could direct harmful air from the worked out sections to the working section through what was now, impermissibly, an intake entry. (Tr. 103:1–105:7.) Additionally, this new arrangement of stoppings blocked all access by foot to a bleeder entry where a mine examiner would be expected to travel, according to Raw Coal's approved ventilation plan. (Tr. 92:16–24.)

Finally, this arrangement created a "dead air space" off to the side of the section where "there was no air movement whatsoever." (Tr. 88:18–24, 102:15–16.) Christian and LeMarr

[8] Christian noted that whenever a regulator is used for this purpose, a mine operator must then conduct regular preshift examinations in the areas where intake air is being directed from worked-out areas; but Raw Coal was not conducting these exams. (Tr. 83:5–12.) Its failure to do so would be the subject of a separate citation. (Ex. S–16 at 13.)

confirmed this by testing the flow of the air with chemical smoke. (Tr. 88:21–22, 280:7–11.) Although a dead air space might be especially dangerous for miners in the area, Christian saw no reason for anyone to enter the area where this lack of air movement was observed. (Tr. 102:15–19.)

Christian informed Raw Coal that he was issuing a section 104(d)(2) withdrawal order for a failure to follow the mine's approved ventilation plan, and that Raw Coal would have to shut down operations until it reinstalled its stoppings in accordance with the approved plan. (Tr. 107:10–13.) Correcting the cited condition required 33 miners working approximately 27 hours over the course of three shifts, after which point Christian terminated the order. (Tr. 107:14–20.)

IV. PRINCIPLES OF LAW

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by "indifference," a "serious lack of reasonable care," "reckless disregard," or "intentional misconduct." *Id.* at 2003–04; *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *See IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See id.* "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, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Id.*

The Commission has noted that "[s]ome of the same evidence that the Judge will examine with respect to the unwarrantable failure factors will be relevant to the question of the degree of the operator's negligence," especially since both unwarrantable failure and high negligence suggest an aggravated lack of care that is more than ordinary negligence. *Brody Mining, LLC*, 37 FMSHRC 1687, 1691, 1703–04 (Aug. 2015) (citations omitted).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

As a preliminary matter, I note that I found Inspector Christian and Inspector Trainee LeMarr to be credible witnesses. Respondent attacked Christian and LeMarr for their relative inexperience as MSHA agents, pointing out that the inspectors' accounts often diverged from those of Raw Coal's agents. Nevertheless, I find that Christian's 13 years of experience in the mining industry, including as a section foreman, general mine foreman, and mine superintendent, and LeMarr's 20 years of experience in the mining industry more than compensate for their short time as MSHA officials. (Tr. 12:15–24, 274:2–12.)

Additionally, I do not find any reason to doubt the veracity of the inspectors' accounts. In a prehearing statement, the Respondent's lay representative initially alluded to a "heated argument" following the issuance of Order No. 9020987 wherein Christian refused Ciampanella's invitation to travel to the return entry and check the DTI's[9] on site to confirm that Ciampanella had performed a weekly examination of the air course. According to Respondent, Christian instead insinuated that Ciampanella was a liar and the argument "got so bad that the inspector . . . called his supervisor . . . [and] ask[ed] his supervisor to send a federal marshall to the mine and arrest" Ciampanella. (Resp't Prehearing Statement at 1–2.) By presenting the narrative this way, Respondent implied that Christian's subsequent enforcement actions were colored by personal animosity toward Ciampanella. Yet, at hearing, it was revealed this incident occurred on May 6, well after all of the orders in this matter were issued, and no witness testified about Christian threatening to call a federal marshal. (Tr. 131:14–24, 133:17–134:24, 226:6–227:3.) I find these arguments do not undermine Christian's credibility, especially as his observations were recorded contemporaneously in his notes during the April inspection.

Respondent also asks me to discount Christian's testimony due to what it alleges are "numerous discrepancies" between his testimony and the facts in the record. (Resp't Br. at 3.) For example, Christian noted that he did not observe Ciampanella examine the left return aircourse on April 6 while the two were together "for the most part of the day," even though the inspector was only at the mine between 6:20 a.m. and 12:48 p.m. (Tr. 24:15–17; Ex. R–5.) According to Respondent's lay representative, Christian's testimony is inconsistent with the facts because this timeline establishes that Christian technically "wasn't with Mr. Ciampanella all day long" (a phrase that Christian himself never used). (Resp't Br. at 3; Tr. 112:2–113:1.) I do not find that this alleged discrepancy (if it can even be called that) undermines Christian's credibility. If I have chosen not to address any of the other numerous alleged discrepancies raised by Respondent's lay representative in his post-hearing brief, it is because I have found them to be equally insubstantial (for reasons ably demonstrated by the Secretary in his reply brief). (*See* Sec'y Reply Br. at 1–6.)

[9] "DTI's" is short for "Date, Time, and Initials." The term refers to markings at the site of an examination documenting the date and time of a weekly examination, and the initials of the individual examining the area. (Tr. 129:12–17.)

A. Order No. 9020987 – The Weekly Exam Violation

1. Additional Findings of Facts

I find that Raw Coal failed to conduct a complete exam of the left return aircourse and seals within a week of its prior examination of the area on March 30. I credit Christian's and LeMarr's testimony that during the inspection on April 7 Ciampanella admitted he had not conducted the exam on April 6, the prior day, which is bolstered by Christian's undisputed testimony that Ciampanella did not conduct the exam during the time he accompanied Christian on the prior day's inspection. (Tr. 17:17–24, 24:15–18, 276:3–7.) I further credit Christian's testimony that Ciampanella immediately, and without objection, complied with the withdrawal order and did not argue that he had in fact completed the exam. (Tr. 17:17–18:7, 24:19–22.) I also give significant weight to the fact that Raw Coal could not produce records demonstrating it had completed the exam.[10] (Tr. 19:5–8.) Yet, Respondent now offers an explanation for this omission: Ciampanella purportedly conducted the exam in segments over the course of multiple days, including on April 6, but simply forgot to record his completion of the entire exam. (Tr. 247:20–249:13, 259: 3–8.) When it was pointed out that the mine's tracking logbook also did not contain any record of Ciampanella's entry into the left return aircourse during that entire week, Respondent's lay representative provided an unconvincing explanation: "Tracking of Mr. Ciampanella is done manually by the outside person. . . . [H]uman error was possible when manually logging tracking." (Tr. 22:1–11; Resp't Br. at 16.) Perhaps this was a case of the operator repeatedly failing to do what was expected of it, except of course for the one thing that it was actually cited for. Regardless, I do not find this explanation credible.

Raw Coal also claims that had Christian accompanied Ciampanella for the order's abatement, he would have found Ciampanella's DTI's in the return aircourse confirming that Raw Coal had in fact examined the area. (Tr. 24:23–25:3, 25:4–9; Resp't Br. at 14–15.) If that were true, one might expect Ciampanella to have seized on the opportunity to show Christian those DTI's himself. Instead, Ciampanella did not allow Christian an opportunity to accompany him on his examination to abate the order, even though Christian asked to do so. (Tr. 24:23–25:3, 25:4–9.) This behavior further supports my finding that Raw Coal had not examined the left return.

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[10] At hearing, the company did submit evidence documenting Ciampanella's examination between April 1–4 of what he claimed were segments of the left return. (Tr. 247:2–249:5; Ex. R–4.) However, the referenced areas were not displayed in the exhibits relied on at hearing, because none of the maps introduced into evidence showed the entire mine. Without reference to a full mine map, Christian understandably could not point out the precise location of those areas at hearing, nearly two years after the inspection. (Tr. 122:19–124:12.) But, Christian credibly testified that he consulted a mine map at the time of the inspection to confirm the referenced areas were not located in the left return; instead, they were located in the right return. (Tr. 122:4–128:8.) Notably, of the referenced segments purportedly located in the right return, only one is clearly visible on the truncated maps actually introduced into evidence (the segment labelled "EP-5"), and that segment is located in the right return aircourse, not the left, on those maps. (Tr. 124:8–23; Exs. R–4, S–15.) Therefore, I fully credit Christian's testimony on this point.

Moreover, I find it irrelevant that a month later, in May, Raw Coal conducted but failed to record a different weekly examination of the left return aircourse, or that Christian was able to confirm this by accompanying Ciampanella and checking the DTI's in the area. (*See* Resp't Br. at 14.) As the Secretary notes, "the May inspection shows Inspector Christian's willingness to evaluate all facts provided by the mine." (Sec'y Reply Br. at 1–2.) But on April 7, even without consulting the DTI's, Christian had ample reason to conclude that Raw Coal had not conducted a weekly exam of the left return air course. Thus, I reject Respondent's contention that Christian "did not conduct even a slightest examination to sustain the burden of proving" a violation and that "[i]n the absence of DTI evidence there is no evidence to support a charge that the examination was not conducted." (Resp't Reply Br. at 3.) Rather, the evidence as a whole, including the exam records, the tracking logs, Ciampanella's admission, and Raw Coal's behavior upon being cited, leads me to find that Raw Coal failed to conduct the weekly exam.

2. Analysis and Conclusions of Law

a. Violation

The Secretary alleges that Raw Coal violated section 75.364(b)(2), which requires a certified person to examine at least one entry of each return air course, in its entirety, for hazardous conditions at least every seven days. (Ex. S–1.) I have found that Raw Coal failed to examine at least one entry of the left return air course in its entirety within seven days of its last examination of the area on March 30, 2015. Therefore, the Secretary has established a violation of the cited standard.

b. Gravity

Inspector Christian determined the violation was unlikely to result in injury or illness, but that if an injury or illness occurred, it could reasonably be expected to result in lost workdays or restricted duty. (Ex. S–1.) Christian also determined that ten persons would be affected by the violation, those being the miners working on the section and along the belts. (*Id.*; Tr. 33:17–22, 40:7–20.) Respondent did not challenge these designations. I agree with Christian's findings. At hearing, Christian explained that not examining the left return could lead the operator to fail to identify missing or incomplete stoppings or flooding in the return aircourse, which could in turn lead to contaminated air being redirected to the working section rather than out of the mine. (Tr. 34:1–40:20.) This scenario, however unlikely, could lead the ten miners working on the section to inhale harmful dust, smoke, or methane. (*Id.*) I agree with and adopt Christian's gravity determinations.

c. Unwarrantable Failure and Negligence

The Secretary asserts that Raw Coal's conduct amounted to high negligence and was an unwarrantable failure. (Ex. S–1.) In support, the Secretary argues that Ciampanella admitted to not conducting the examination and therefore knew of the violative condition, and that the violation was extensive, long-lasting, obvious, and highly dangerous. (Sec'y Br. at 14–15.) In contrast, Raw Coal asserts that the negligence and unwarrantable designations are inappropriate because of the violation's limited duration, extent, and prior history. (Resp't Br. at 17.)

In analyzing an unwarrantable failure, I must consider the Commission's factors for determining aggravated conduct. *See IO Coal Co.*, 31 FMSHRC at 1350–51. Although the danger posed by a violation "may be so severe that, by itself, it warrants a finding of unwarrantable failure[,] . . . the converse of this proposition – that the absence of significant danger precludes a finding of unwarrantable failure – is not true." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Instead, this factor must be "weighed . . . against the other relevant factors to determine whether the operator's conduct under the circumstances amounted to an unwarrantable failure." *Id.* In this case, the danger was neither a mitigating nor aggravating factor. The failure to conduct an exam of a return aircourse may expose miners to unknown hazards, but the eventual exam to abate this order did not uncover serious hazards and the violation was deemed unlikely to lead to serious injuries. Consistent with Commission case law, I must weigh this factor against the other relevant unwarrantable failure factors. The facts and circumstances surrounding this violation unveil multiple other aggravating factors.

Most significantly, with regard to Raw Coal's knowledge of the violation, Ciampanella admitted to Inspector Christian on April 7 that he had not conducted an exam the prior day, he lacked any record showing he or anyone else had been in the left return aircourse that week, and he did not protest to Christian that he had conducted (but failed to record) any part of the exam during the prior week (as he later did at hearing). (Tr. 17:17–18:7, 19:5–8, 22:1–8, 24:15–18, 110:18–24, 276:3–7.) Strangely, when asked to accompany Christian down to the return aircourse, Ciampanella left Christian behind and hurried into the mine by himself. (Tr. 24:23–25: 9.) Together, these facts indicate to me that Ciampanella not only knew he had not conducted a weekly exam of the left return aircourse, but also knew no one else in the mine had either. Ciampanella was a supervisor with the authority and responsibility to make the required examination. His knowledge of the violation and culpability, therefore, establish an aggravated lack of care on the part of the company. *See Lopke Quarries, Inc.*, 23 FMSHRC at 711.

Two other factors strongly point toward an unwarrantable failure determination: extensiveness and obviousness. Any official at the mine who checked either the examination book or tracking log entries that week would have immediately concluded, as Christian did, that no one had been in the left return. The fact that this failure constitutes a violation of MSHA's weekly examination requirements would have also been obvious. This is a basic mandatory standard. Additionally, the violation was extensive in two respects. First, the left return aircourse, by itself, is undeniably extensive – so extensive, in fact, that according to Ciampanella's own description, it could not typically be examined in a single day. (Tr. 249:3–10.) Second, the failure to examine a return aircourse also affects the entire mine, since return entry hazards can spill over into intake entries absent vigilant care and attention. (Tr. 39:6–24.)

The other unwarrantable failure factors (duration, notice, and abatement) appear to be neither mitigating nor aggravating. The violation existed for slightly more than one shift, a duration which I do not find short enough to be mitigating, nor long enough to be particularly aggravating in the context of a weekly examination requirement. (Tr. 32:17–33:8.) Additionally, I do not find the evidence of a lack of notice from MSHA to be mitigating, when dealing with an obvious and known violation such as this one. (Tr. 118:1–12.) In considering the abatement factor, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). The record

does not support a finding of any abatement efforts made prior to the order's issuance. Accordingly, I afford these factors no weight in my unwarrantable failure analysis.

After considering and weighing all the factors, particularly the violation's obviousness and extensiveness, and the operator's knowledge, I conclude that the violation was the result of the operator's unwarrantable failure. For these same reasons, I also conclude that Raw Coal was highly negligent for failing to conduct the weekly exam.

B. Order No. 9064481 – The Missing and Incomplete Stoppings Violation

1. Additional Findings of Facts

The parties do not dispute that the second and third connecting crosscuts were safe for travel and did not contain permanent stoppings on the morning of April 21, 2015. The only factual disputes concern the first and fourth connecting crosscuts. Specifically, Respondent claims that the fourth crosscut was adequately plastered on one side and contained the type of holes common to stoppings, but not eight to ten feet wide as the Secretary has alleged. (Resp't Br. at 18.) Respondent also claims that, contrary to the inspectors' observations, the first crosscut was unsupported and not safe for travel at the time Raw Coal was cited. (Resp't Br. at 20.) After weighing all the evidence, I find that all four connecting crosscuts outby the working face were in the conditions that Christian and LeMarr observed.

Christian's observations of an 8-to-10-foot hole, exposed wood, and missing plaster in the stopping for the fourth crosscut are supported not only by LeMarr's testimony but also by Christian's contemporaneous notes and drawings. (Tr. 48:8–12, 53:11, 54:10–15, 61:6–62:17, 278:9–19; Exs. S–6, S–7.) Respondent's lay representative labels the Secretary's description of this stopping as "disgusting" and an "[e]mbellishment . . . contradicted by" all available evidence. (Resp't Reply Br. at 5–6.) Respondent argues that Christian initially relied only on the missing stopping in the third connecting crosscut to establish a violation, allegedly not realizing that the crosscut was legally permitted to remain open at the time, but then, "[i]n an attempt to save the order [from being vacated after realizing his mistake], . . . included the 4th connecting crosscut" in his charge and made "an additional charge that the crosscut had a 8 to 10 foot opening." (Resp't Br. at 7; Resp't Reply Br. at 6.) In support of this allegation, Respondent claims that the inspection notes did not contain any reference to the incomplete stopping's holes, no document specified the size of these holes, and in a deposition Inspector Christian disclaimed reliance on the holes to sustain the order. (Resp't Br. at 7, 18.)

Respondent's attempt to paint a conspiratorial picture falls flat, as this alleged conspiracy rests on several factual inaccuracies. First, Respondent's argument that Order No. 9064481 relies only on the missing stopping in the third connecting crosscut to establish a violation appears premised on the phrase "three open crosscuts" in the order. (Resp't Br. at 7.) In context, however. Order No. 9064481 is intended to convey that three crosscuts were fully open, while the fourth was only partially open. (*See* Ex. S–6 ("When observed there were three open crosscuts on the left return stopping line. Also, the fourth crosscut outby had not been completed.").)

Respondent's lay representative is also mistaken in arguing that Christian's deposition testimony did not mention relying on the problems with the fourth crosscut's stopping in citing the operator. (Resp't Br. at 18.) The specific portion of Christian's deposition testimony cited by Respondent was ambiguous on this point, because Christian was cut off before he could fully answer the question posed. But, Christian later provided clarifying testimony fully consistent with the description in the order, noting the problems with both the third and fourth crosscut.[11] (*See* Ex. R–8 at 33, 37; Tr. 154:21–155:3.) Thus, I conclude that Christian's deposition testimony does not alter the order's meaning. By including the issues with the fourth connecting crosscut in the body of Order No. 9064481, the Secretary provided clear notice to Raw Coal that those issues formed part of the basis for the order. And, contrary to Respondent's claims, the body of Order No. 9064481 is not the only contemporaneous document that mentions these issues. The inspector's contemporaneous notes and diagram also make reference to holes in the fourth stopping. (Ex. S–7 at 15.) In contrast, no such contemporaneous corroborating evidence exists for Raw Coal's competing claims. (*See, e.g.*, Ex. R–2 (documenting Ciampanella's objections to Order No. 9064481 on the back of the order but not addressing the issues alleged in the order with the fourth connecting crosscut's incomplete stopping.) While Christian's notes and the order itself do not specify the exact size of the holes, Christian's and LeMarr's testimony were clear and consistent on this point: the hole (or opening) was 8-10 feet long, about half the width of the crosscut. Therefore, I credit Christian's testimony regarding the fourth connecting crosscut and reject Respondent's unsubstantiated conspiratorial allegations.[12]

Regarding the first connecting crosscut, both parties introduced into evidence contemporaneous documents supporting their respective positions. To support its argument that the first crosscut was not fully cleaned, bolted, or safe for travel when the order was issued, Raw Coal first cites to a note that Ciampanella wrote on the evening after the exam denying the fact of the violation. (Ex. R–2.) Next, Raw Coal cites to contemporaneous preshift and onshift examination reports indicating the crosscut closest to the working face had not been bolted until well after the order was issued. (Ex. R–1.) The Secretary, in turn, cites to Christian's contemporaneous notes and diagrams in support of his testimony that the first crosscut was available for travel when he arrived. (Ex. S–7 at 6–15.)

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[11] During the deposition, Respondent's lay representative asked Christian "Does the stopping that doesn't have plaster on it . . . contribute to this order in any way?" Christian responded, "No. I mean, the stopping wasn't finished. There [were] still holes in it, wasn't --" but he was interrupted by the lay representative with an entirely different question before he could finish his answer. (Ex. R–8 at 33.) Later, Christian clarified that the violative condition was "excessive because of . . . the excessive amount of open crosscuts," i.e., one stopping was missing "[a]nd the other one [was] not completed." (*Id.* at 37.)

[12] In his post-hearing brief, Respondent's lay representative attempts to put new information before me regarding the construction of stoppings in order to argue that the fourth connecting crosscut did not contain any holes. (*See* Resp't Br. at 6.) As Respondent's brief does not cite to any evidence in the record or to any other authority to support its highly technical description of the construction process, I agree with the Secretary's characterization of this "testimony" as improper and give no weight to this description. (Sec'y Reply Br. at 2.)

I ultimately credit the testimony of Christian and LeMarr, which is supported by Christian's contemporaneous notes and diagram. I recognize their testimony conflicts with at least the onshift exam report for the area from later that day and possibly the preshift report from the time of the inspection.[13] However, based on Christian's substantial expertise and experience with ventilation plans, and based on LeMarr's clear and consistent corroborating testimony, I find Christian's description of the first connecting crosscut more reliable and less susceptible to the risk of confusion, especially since irregularities in multiple preshift exam reports undercut Raw Coal's argument about timing.[14] (Tr. 9:22–13:6, 277:9–278:8.) Thus, I find that the first connecting crosscut was cut, bolted, and safe for travel when Christian issued Order No. 9064481. I also credit Christian's testimony that when asked for mitigating circumstances, Ciampanella responded, "Why should I install those stoppings, when I'm going to tear them back out tonight," which I find indicative of Ciampanella's knowledge of the violation. (Tr. 67:7–13.)

2. Analysis and Conclusions of Law

a. Violation

The Secretary alleges a violation of section 75.333(b)(1), which requires that ventilation control devices be built between intake and return air courses and maintained up to and including the third connecting crosscut outby the working face. (Ex. S–6.) Although this requirement does not apply to rooms that are 600 feet or less in length or to sections specifically exempted by an approved ventilation plan, Christian explained the latter exception did not apply to the cited area, and Raw Coal has not argued that either exception applies. (Tr. 63:3–66:24.) The standard does

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[13] Respondent's lay representative calls attention to this conflict and suggests the possibility of criminal penalties against his client if I resolve this credibility dispute in the Secretary's favor: "If the preshift and on-shift reports are not true then two certified foremen have committed a felony," which "may result in [] criminal charges against the offender[s]." (Resp't Br. at 18–20.) MSHA now has all of the information it needs to pursue a criminal investigation. However, as the Secretary points out, Respondent's lay representative has presented a "false dichotomy," because judges routinely make credibility determinations "without resorting to accusations of criminal activity." (Sec'y Reply Br. at 3.)

[14] The Secretary called into question the reliability of Raw Coal's examination reports by pointing out irregularities with the preshift reports submitted into evidence by Respondent for Order No. 9020987. One preshift exam report for the Main area, signed and reported by Burb Blankenship on the morning of April 6, 2015, indicates that a preshift exam was conducted between 5:00 and 7:56 a.m. (Ex. R–3 at 1.) However, Raw Coal also introduced into evidence another preshift exam report for the same Main area conducted the very same morning, also signed and reported by Burb Blankenship, but indicating the exam was conducted between 4:30 and 5:30 a.m. (Ex. R–3 at 2.) Ciampanella conceded that there was a "problem" with these reports, because conducting "two preshift examinations for the same morning" is "not the way business is done." (Tr. 264:19–265:9.) While Raw Coal later presented a possible theory to explain this irregularity and the Secretary did not draw further attention to these discrepancies in his post-hearing briefs, Blankenship's and Ciampanella's clear discomfort with the information contained in these reports gives me pause in relying on Raw Coal's examination reports to establish an accurate timeline of events. (*Id.*; Tr. 214:15–217:11.)

not specify the exact timing for when the stopping for the third connecting crosscut must be completed, but MSHA has issued guidance in a Procedure Instruction Letter ("PIL") clarifying that "permanent stoppings installed to separate intake and return aircourses must be completed in the third crosscut outby the face by the time the face crosscut [i.e., the first crosscut] is cleaned, bolted, and ready for travel," and both parties agree that this interpretation governs in this proceeding. (Exs. S–19, S–20; Sec'y Br. at 22; Resp't Br. at 18.)

I conclude that Raw Coal violated the standard by failing to build a stopping in the third connecting crosscut upon cutting, cleaning, and bolting the first connecting crosscut prior to the inspection, and by failing to maintain the fourth connecting crosscut in a condition that complied with the standard's requirements. The Secretary proved that this stopping was improperly maintained in that it lacked necessary plaster, contained an opening of 8–10 feet, and short circuited enough intake air into the return entry to result in legally insufficient airflow (7,000 CFM vs. 12,000 CFM) to the working face. The missing stopping in the third connecting crosscut and the improperly maintained stopping in the fourth connecting crosscut lead me to conclude that Raw Coal only maintained its stopping line up to the fifth crosscut outby the working face.

Therefore, I find that the Secretary has satisfied his burden for proving a violation.

b. Gravity

Christian determined that the violation was unlikely to result in injury or illness, but that in the event of an injury, lost workdays or restricted duty injuries could reasonably be expected. (Ex. S–6.) He determined that missing or incomplete stoppings could redirect harmful return air to a working section, leading the nine miners working in the section to inhale harmful dust, smoke, or methane. (Tr. 71:17–72:7.) I agree with this analysis and affirm Christian's gravity determinations, which were undisputed by Raw Coal.

c. Unwarrantable Failure and Negligence

The Secretary designated this violation as an unwarrantable failure and characterized Raw Coal's negligence as high. (Ex. S–6.) In support, the Secretary alleges that Raw Coal knew of and permitted the violation, was on notice that greater efforts were necessary for compliance, and that the violation was highly dangerous, obvious, extensive, and existed for an extended period of time. (Sec'y Br. at 30–33.) Respondent's lay representative largely passes on his opportunity to contest the negligence or unwarrantable nature of the violation, stating, "Since the Responde[nt] believed there was no violation[,] any question regarding mitigating circumstances would be [a] mockery of the Respondent's good faith belief." (Resp't Reply Br. at 6.) His reply brief does, however, address the Secretary's notice argument briefly, labeling the use of a recent prior citation to establish notice as "preposterous." (*Id.*)

While the *IO Coal* and *Consolidation Coal* factors are useful for determining whether an operator's culpability rises to the level of "indifference," "serious lack of reasonable care," or "reckless disregard" that generally characterize an unwarrantable failure, it is important to note, before addressing any of those factors, that this violation involves intentional misconduct. "Intentional misconduct, whether by commission or omission, is similar in terms of culpability to

. . . indifferent, willful, or knowing behavior . . . [and therefore] is a form of unwarrantable failure for purposes of the Mine Act." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). I have reached the conclusion that this misconduct was intentional based on Ciampanella's statement to Christian, "Why should I install those stoppings, when I'm going to tear them back out tonight when I begin pillaring?" (Tr. 67:7–13.) Like Christian, I interpret this statement to mean that Raw Coal knowingly and deliberately failed to construct and finish necessary stoppings near the working face because it knew it would be retreat mining imminently and therefore did not view these safety measures as being worth the effort. This, however, was not the company's call to make. An operator cannot pick and choose which standards to comply with based upon its own determination that the hazards addressed by those standards may be tolerated for a limited amount of time.

Placing these facts in the context of the Commission's unwarrantable factors, I conclude that not only does Ciampanella's statement establish the operator's knowledge of an obvious violation, but it also suggests that the company had taken no steps to abate the violation prior to being cited. In addition, as a supervisor, Ciampanella's involvement in the creation of the violative condition is an independent factor which establishes an aggravated lack of care. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).

In assessing several of the other unwarrantable factors, I find it useful to distinguish between the two violative conditions cited in the order. As noted previously, it is unclear whether the first connecting crosscut was made available for travel during the previous night's shift, or only immediately prior to the inspection. (Tr. 59:3–61:4.) Thus, the third connecting crosscut may have impermissibly lacked a permanent stopping for only a brief period of time and the omission may not have been obvious during that period. However, I conclude that the incomplete stopping in the fourth connecting crosscut would have been obvious to examiners for a much longer period of time. The hole (or opening) was half the width of the stopping, and Christian credibly explained that the stopping for this crosscut remained incomplete for at least 10, and possibly up to 24, hours. (Tr. 48:8–12, 61:6–62:17, 180:13–181:1.) Therefore, taken together, the violative conditions were obvious and existed for an extended period of time. I also conclude that the violation was extensive, given that Raw Coal violated the standard in two separate crosscuts and that the lack of permanent ventilation controls led to insufficient airflow to the section face. (Tr. 53:17–54:12.) Although this lack of airflow was not reasonably likely to lead to serious injury, and thus the degree of danger is not an aggravating factor, the duration, obviousness, and extensiveness of the violation are.

Raw Coal was also on notice that greater efforts were necessary for compliance. Christian had issued citations for missing stoppings and inadequate ventilation roughly two weeks prior and had discussed the same issues with some, but not all, of the foremen involved in the subject order. (Tr. 54:16–56:23, 73:20–23; Ex. R–8 at 14–15.) Raw Coal now disputes whether one of those prior citations was in fact justified. (Resp't Rep. Br. at 6.) However, it does not dispute that the citations were issued, that Raw Coal paid penalties for them, or that the resulting conversations with MSHA occurred. (*See id.*) Those are the more relevant considerations when analyzing the extent to which the operator was placed on notice that greater efforts were necessary for compliance. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080 n.5 ("[I]t is well settled that we examine the operator's history of violations, warnings from

inspectors, and other forms of specific warnings to determine if the operator has been placed on notice of a persistent unsafe condition or practice at its mine."). Notice which the operator finds unwarranted is notice nonetheless.

Raw Coal's lay representative also argues, "An admonishment from MSHA to the Respondent that greater effort is needed from a one time issuance of a non-significant and substantial violation is preposterous." (Resp't Reply Br. at 6.) However, in rejecting a related argument, the Commission recently clarified that "it is not pertinent to the analysis of the notice factor in unwarrantable failure determinations that the prior violations were not designated as S&S." *Manalapan Mining Co.*, 35 FMSHRC at 295–96. Similarly, in this matter, the non-S&S nature of the prior citation does not invalidate the notice it provided.

After examining the facts of this violation and the relevant factors, I conclude that the Secretary met his burden of proving that the violation was properly designated as an unwarrantable failure and that Raw Coal's negligence was properly characterized as high.

C. Order No. 9064486 – The Ventilation Plan Violation

1. Additional Findings of Facts

Christian detailed a number of discrepancies between the ventilation controls at the mine as he observed them on April 22, and the ventilation controls displayed on the mine's most recently revised ventilation plan map. (*See generally* Tr. 81:16–96:6.) Raw Coal, for the most part, does not deny these discrepancies existed, but instead disputes their cause and effect. (Resp't Br. at 20–21.) Raw Coal does not deny that an entire line of stoppings was found exactly one entry over from where the ventilation plan indicated they should be. But, whereas Christian testified that the stoppings had been physically moved from their approved location and remnants of those stoppings were still stuck to the ribs and walls of the crosscuts, indicating where they had once been (Tr. 95:10–24), Mine Superintendent Campbell denied the stoppings had ever been moved or that there were any visible remnants to support Christian's belief. (Tr. 230:15–231:24.) In addition, Raw Coal denies that the ventilation controls created a sweep air arrangement or blocked the passage of return air down the right side. (*See* Resp't Br. at 20.) This denial reflects significant disagreement about whether the working section at the time of the inspection had been sufficiently developed to provide a path for return air to flow down the right side. (*Compare* Tr. 192:15–193:13 (Christian's testimony that a right return entry had not been developed yet), *with* Tr. 236:18–237:11 (Campbell's testimony that air was split down the left return and right bleeder entry); *see also* Tr. 290:1–17 (LeMarr's testimony that he was not sure).)

On each of these points, I credit Christian's observations. Once again, the MSHA inspector had significant experience developing and complying with mine ventilation plans going back to his time as a mine superintendent, which lends credibility to his testimony. (Tr. 9:22–13:6.) In addition, LeMarr fully and credibly corroborated Christian's observations of leftover materials where the stoppings had once been, including blocks and plaster still stuck to the mine roof and ribs. (Tr. 279:15–280:6.) Having examined the map of the section, I determine that this change eliminated the entire right return entry by altering the direction of air in that entry to intake air. (*See* Exs. S–14, S–15.)

Further, I credit Christian's testimony that the working section had not been developed sufficiently to allow for return air to proceed down a different entry on the right side, and that the ventilation controls created a sweep air arrangement while Raw Coal developed that entry.[15] (Tr. 192:15–194:13.) Lastly, neither party disputes that the altered arrangement created a dead air space near the section, and I thus find that to be the case as well. (*See* Resp't Br. at 12.)

2. Analysis and Conclusions of Law

a. Violation

Order No. 9064486 alleges a violation of section 75.370(a)(1), which requires operators to (1) develop and follow an approved ventilation plan; (2) that is designed to control methane and respirable dust and shall be suitable to the mine's conditions and mining system; and (3) consists of the plan content prescribed in section 75.371 and a map as prescribed in section 75.372. 30 C.F.R. § 75.370(a)(1). Portions of the map containing information required under section 75.371 are subject to the district manager's approval. *Id.* Section 75.371's plan content provisions include "section and face ventilation systems used . . . [and] drawings illustrating how each system is used." *Id.* § 75.371(f). In addition, "any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners" must be approved by a district manager in a proposed ventilation plan before implementation. *Id.* § 75.370(d). In a Program Information Bulletin, MSHA lists examples of intentional changes that would materially affect the safety or health of miners, including "changing the direction of air in an air course." (Ex. S–21.)

The mine's ventilation plan was approved in 2012 but was regularly amended in subsequent years following requests for revision from the operator. (Ex. S–12.) Prior to the order, MSHA had approved a revision to the mine's ventilation map and incorporated it into the approved ventilation plan on April 17, 2015, where it was then enforceable as part of the requirements of section 75.370(a)(1). (Ex. S–22.) At the time of the inspection, the ventilation map for the most recently approved revisions displayed a line of stoppings between two entries separating intake air from return air. (Ex. S–14.) I conclude that Raw Coal failed to follow its ventilation plan by both removing this line of stoppings and reversing the direction of air in what had been a return entry. The company also violated the ventilation plan by adding unapproved temporary and permanent ventilation controls that blocked access to the right return air course, created a dead air space, and ensured that intake air was now sweeping across the face in one

[15] Respondent's lay representative argues in his post-hearing brief that air readings taken a day before the inspection confirm that air was split in the section and cites to one of Raw Coal's own exhibits for this proposition. (Resp't Br. at 11, 20; Ex. R–7.) However, the record lacks any testimony to support this claim, and fails to provide the necessary context for the information contained in the cited exhibit. I agree with the Secretary that "Respondent had ample opportunity to ask questions regarding this claim on direct and cross examination but failed to do so." (Sec'y Reply Br. at 3–4.) Such testimony might have helped clarify exactly where these readings were taken in relation to the missing and moved ventilation controls and how relevant or significant the measurements listed are.

direction rather than splitting in multiple directions.[16] Because these changes materially affected the safety or health of miners by increasing the risk of methane and contaminated air reaching the working section, Raw Coal was required to stick to the ventilation system diagrammed in its approved ventilation map until it sought and received approval for any desired changes. (Tr. 102:1–105:11.)

Respondent offers two arguments for why it believes it complied with its ventilation plan. It first argues that "[t]he ventilation base plan explicitly allows the operator to vary stopping lines and number of entries." (Resp't Br. at 21 (citing Ex. S–12 at 18).) In other words, Raw Coal argues it is not required to strictly follow the layout of the ventilation controls in its approved ventilation map; rather, it may vary the placement of its stopping lines and the location of return and intake entries as it sees fit. In support of this contention, Respondent cites to an illustrative diagram contained in the ventilation base plan. (*Id.*) The diagram is titled "Typical Face Ventilation" and displays a generic layout of entries, crosscuts, and ventilation controls that might be found in any mine, with notes and symbols indicating how ventilation controls should normally operate in such conditions. In order to alert the reader that this diagram is merely illustrative, the page notes that "Stopping lines and number of entries shown are typical and may vary." (Ex. S–12 at 18.) But, Raw Coal zeroes in on this language under the mistaken belief that it exempts the operator from the site-specific map's requirements. (Resp't Br. at 21.)

I conclude that the diagram and accompanying notes for the "typical" ventilation map included in the base plan do not modify the actual requirements in the mine's revised site-specific ventilation plan, from which language about varying stoppings or entries is entirely absent. (Ex. S–22.) The ventilation base plan's cited language does not affect Raw Coal's obligations to comply with the requirements of the most recently approved ventilation map. Simply put, Raw Coal requested changes to its ventilation plan and documented those changes on a revised map; it must now abide by those approved changes. No variations are allowed.

Even if some variation were permitted, I conclude that moving a line of stoppings such that it completely eliminates a return air course, changes the direction of air in the return entry, switches to a sweep air plan, and creates a dead air space (thereby materially affecting the safety and health of miners) does not constitute an acceptable "variation" of the ventilation map's requirements. This is especially true, as even the base plan map that the company references applies only to "split ventilation" by its own explicit terms. (*See* Ex. S–12 at 18-20.)

Raw Coal also argues that the most recent revised plan "was not specifically related to ventilation controls" but instead was merely intended "to change the bleeder block travel ways to monitoring points." (Resp't Br. at 20–21.) According to the operator's stated understanding of

[16] Although the body of Order No. 9064481 detailed many of these problems, Respondent notes that the order did not explicitly mention that the operator had switched to a sweep air plan. (Resp't Br. at 11.) Yet, by noting that the operator had removed a line of stoppings (that had previously regulated the flow of air in the right return aircourse) and added an unapproved stopping in an "area that the section was using for a split of the return," the order documented the conditions that created the sweep air arrangement. (Ex. S–13.) Considering how many problems there were with the ventilation system at the time, I find that this description adequately alleged the overall violative condition that formed the basis of the order.

the plan, the ventilation controls did not have to be installed in the areas designated on the map until after Raw Coal had finished cutting through the section and connecting it to the bleeder entry, and since the operator was cited only five days after the revised plan was approved, it was not given enough time to accomplish this set of tasks. (*Id.*)

I agree that the revised plan relates to Raw Coal's attempt to change the bleeders to monitoring points; but, consistent with Christian's understanding of the plan, I do not accept Raw Coal's argument that the revised *ventilation* plan's specific *ventilation control* requirements were effectively irrelevant until it had finished completing that other task. (Tr. 183:3–185:6.) The revised plan did not set forth any such conditions as to the order in which those tasks should be completed, and the operator has not cited to any other evidence or authority supporting its understanding of the plan. (*See* Ex. S–22.) Indeed, Raw Coal's positon—that it may mine first and worry about ventilation later—undermines the entire purpose of having a ventilation system in place and amounts to a complete reversal of the appropriate process. Raw Coal's failure to comply with the plan created hazards independent of whether or not the bleeder travel ways had been developed yet. (Tr. 103:1–105:7.) Thus, I determine that Raw Coal should have brought its ventilation controls into compliance with the plan as soon as the revisions were approved by MSHA and received, i.e., five days earlier. (Tr. 257:15–23.) Its failure to do so establishes a violation of the standard.

b. Gravity

Raw Coal did not dispute the gravity of the violation. Christian designated the violation as unlikely to lead to an injury, but found that lost workdays or restricted duty injuries to nine miners could be reasonably expected were an injury to occur. (Ex. S–13.) This was mainly due to the remote possibility that dust, smoke, or methane could travel from worked-out areas through a regulator and into the entry that had once been a return entry but now carried common intake air to the working section, thereby leading the nine miners working in that section to breathe in the harmful air. (Tr. 103:1–105:7.) Once again, I affirm these undisputed gravity designations.

c. Unwarrantable Failure and Negligence

In addressing the unwarrantable failure factors for Order No. 9064481, the Respondent's lay representative explains that Raw Coal offered no mitigating circumstances to Christian because they would have fallen on deaf ears and may have only helped to support an unwarrantable designation. (Resp't Br. at 22.) The purpose of asking for mitigating circumstances of course is not entrapment. It is meant to provide the inspector, and any reviewing body, with all the factual background necessary to make an informed decision about the negligence and unwarrantability of an alleged violation. Accordingly, I will consider such factors below, based on the record I have before me.

The Secretary designated this violation as an unwarrantable failure, characterizing Raw Coal's negligence as high. (Ex. S–13.) In support, the Secretary points to "the knowledge of the operator that the plan had been violated, as well as the violation's extensiveness, obviousness, duration, and high degree of danger." (Sec'y Br. at 40.) In response, Raw Coal asserts that it had

a good faith belief it was following its approved ventilation plan, and that the plan was confusing at the stage of the mining process in which the company was engaged. (Resp't Br. at 22.) As these arguments go to the operator's knowledge and the obviousness of the violation, it seems appropriate to begin the unwarrantable failure analysis there.

I conclude that Respondent had knowledge of the violation. In arguing to the contrary, and echoing the beliefs of Mine Superintendent Campbell, the operator's lay representative states, "The revised plan used by the inspector was approved by the district manager on April 17, 2015 [and] may not have been received by the respondent prior to the order being issued." (Resp't Br. at 23; *see also* Tr. 234:6–15.) Yet, Christian testified that the revised plan was posted on the mine's bulletin board at the time of the inspection. (Tr. 186:3–5.) This testimony also corroborates foreman Ciampanella's belief that the mine received the approved revisions on the very same day they were approved, and thus I credit Ciampanella's understanding. (Tr. 257:15–23.)

Curiously, Raw Coal now claims, "The approved map[s] provided by the Secretary and the [inspector] are confusing even for reasonable persons with knowledge of ventilation plans." (Resp't Br. at 22.) This argument obscures the fact that the revised map was drafted and submitted for approval by Raw Coal itself. (Tr. 97:2–22, 106:5–9; Ex. S–22.) It is difficult to believe Raw Coal had trouble comprehending its own plan, as it now claims, or to understand how this fact would mitigate against an unwarrantable failure finding. The Secretary correctly notes that an operator's good faith belief that it was in compliance with a cited standard must be objectively reasonable, *see IO Coal*, 31 FMSHRC at 1356–60, and the obviousness of this violation renders Raw Coal's beliefs anything but that. (Sec'y Reply Br. at 4.) The company's purported misreading of its base ventilation plan and assumption that the revised map's ventilation control requirements did not go into effect until after the company had finished developing a bleeder travelway do not make its beliefs any more reasonable. Further, my findings—that Raw Coal physically removed the required stoppings from locations where they had been approved and relocated them to different locations (a process that would have taken at least the same 27 hours required for the violation's abatement)—lead me to conclude that Raw Coal had plenty of time to consider the safety ramifications and legal consequences of its new arrangement.

Most of the remaining unwarrantable failure factors support the conclusion that Raw Coal's conduct exhibited an aggravated lack of care. Notably, the extent of the violation was significant, with missing or improperly placed ventilation controls in approximately two dozen different crosscuts, impacting the entire working section. (*Compare* Ex. S–14, *with* Ex. S–15.) Consequently, correcting the cited condition required 33 miners working approximately 27 hours over the course of three shifts. (Tr. 107:14–20.) As noted, a violation that extensive would be hard to miss, and thus its extensiveness and obviousness are both aggravating factors. Because Ciampanella believed the mine received the approved revisions the day they were approved, five days before the issued order, and because the operator works three shifts per day, the violation likely existed for approximately fifteen shifts, a duration that also supports an unwarrantable failure designation. (Tr. 32:1, 185:7–24, 257:15–23.) All of these facts lead me to the additional conclusion that the operator made no effort to abate the condition prior to being cited.

While I do not find the danger of the violation or prior notice that greater efforts were necessary for compliance to be mitigating or aggravating factors, every other factor points to the conclusion that Raw Coal's violation was the result of its high negligence and its unwarrantable failure to comply with the standard. I therefore conclude that Raw Coal exhibited high negligence and that the violation was an unwarrantable failure.

D. Civil Penalties

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The parties have stipulated that the operator abated the cited conditions in good faith. (Joint Ex. 1.) Raw Coal has not alleged that the proposed penalties would adversely affect its ability to continue in business. The Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247–48 (Sept. 1973)); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). I further note that Sewell Mine B was a moderately sized mine, producing 97,208 tons of coal in 2016. (Joint Ex. 1.) In the 15 months preceding the issuance of each violation, Raw Coal was issued 78 violations, and, during that period, it had zero previous violations of the cited standard in Order No. 9020987, one other violation of the cited standard in Order No. 9064481, and eight other violations of the cited standard in Order No. 9064486. (Exs. S–9, S–17, R–6.) I have determined that the gravity of the violations was non-S&S, but that the violations were unwarrantable failures and the result of the operator's high negligence. After considering these factors and the evidence as a whole, I determine that the minimum statutory penalty of $4,000.00 is appropriate for each of the three section 104(d)(2) orders. *See* 30 U.S.C. § 845(d).

VI. ORDER

Respondent Raw Coal Company, Inc. is hereby **ORDERED** to **PAY** a penalty of $12,000.00 within 40 days of the date of this decision.

Alan G. Paez
Administrative Law Judge

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