FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 1, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. VA 2012-56 A.C. No. 44-07087-269672
v.	Docket No. VA 2012-337 A.C. No. 44-07087-283547
BIG LAUREL MINING CORPORATION, Respondent	Mine: Mine No. 2

DECISION

Appearances: Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

Max L. Corley III, Esq., Dinsmore & Shohl, LLP, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon petitions for the assessment of a 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). In dispute are three section 104(a) citations, one section 104(d)(1) citation, and three section 104(d)(1) orders issued by the Mine Safety and Health Administration ("MSHA") to Big Laurel Mining Corporation ("Big Laurel" or "Respondent") as the owner and operator of Mine No. 2 in Wise, 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). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

The parties stipulated to the following:

1. Respondent was an "operator" as defined in [section] 3(d) of the [Mine] Act, 30 U.S.C. § 802(d), at [Mine No. 2,] the [m]ine at which the [citations and orders] in this matter [were] issued.

2. The operations of Respondent at [Mine No. 2] are subject to the jurisdiction of the [Mine] Act.

3. [This] proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to [s]ections 105 and 113 of the [Mine] Act.

4. The citation[s] and orders in this matter were properly issued and served by a duly authorized agent of the Secretary of Labor upon a representative of Respondent at the date, time and place stated therein as required by the [Mine] Act.

5. The citation[s] and order[s] at issue in this matter are true and authentic copies of those that were issued and served on the mine operator.

6. The proposed penalty for the subject order will not affect the mine operator's ability to remain in business.

7. The mine operator abated the alleged cited conditions in good faith.

(Joint Ex. 1.)[1]

I. STATEMENT OF THE CASE

These cases involve seven alleged violations related to roof failures in Mine No. 2 in August 2011, and Big Laurel's reactive strategy to address those and numerous other roof failures in the previous eight months of the year. Together, the seven alleged violations in two dockets carry a combined proposed penalty assessment of $305,800.00.

Docket No. VA 2012-56 involves two alleged violations at Mine No. 2. The first, Citation No. 8178521, charges Big Laurel with a violation of 30 C.F.R. § 75.223(a)(1).[2] The

[1] In this decision, the hearing transcript, the Secretary's exhibits, Big Laurel's exhibits, and the parties' joint exhibits are abbreviated as "Tr.," "Ex. GX–#," "Ex. R–#," and "Joint Ex. #," respectively. I note that Exs. R–1 through R–7, R–14, R–18, and R–19 are duplicative of the Secretary's exhibits.

[2] Section 75.223(a) provides, in relevant part: "Revisions of the roof control plan shall be proposed by the operator—(1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts[.]" 30 C.F.R. § 75.223(a).

second, Citation No. 8191715, charges Big Laurel with a violation of 30 C.F.R. § 75.380(d)(1).[3] The Secretary proposes a penalty of $6,996.00 for Citation No. 8178521 and $1,304.00 for Citation No. 8191715.

Docket No. VA 2012-337 involves five alleged violations. Citation Nos. 8178516 and 8178522, and Order No. 8178524 charge Big Laurel with violations of 30 C.F.R. § 75.202(a).[4] Order Nos. 8178523 and 8178525 charge Respondent with violations of 30 C.F.R. § 75.364(b)(1) and (b)(2),[5] respectively. The Secretary proposes a penalty of $52,500.00 each for Citation No. 8178516, Order No. 8178523, and Order No. 8178525, and a penalty of $70,000.00 each for Citation No. 8178522 and Order No. 8178524.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. VA 2012-56 and VA 2012-337 to me, and I held a hearing in Abingdon, Virginia. The Secretary presented testimony from MSHA inspectors Christopher Cain and Michael Hughes. Big Laurel presented testimony from airway examiner Jesse Ring, mine general manager John Richardson, mine superintendent Steven Moore, and former Virginia state mine inspector Jerry Scott. The parties each filed post-hearing briefs and reply briefs.

II. ISSUES

For Citation No. 8178516, the Secretary asserts that Respondent failed to fulfill the duty imposed by 30 C.F.R. § 75.202(a) by allowing an uncontrolled roof fall to occur in 1 North Mains, exposing miners to the hazards of a roof fall. (Sec'y Br. at 26–30.) For Citation No. 8178521, the Secretary asserts that Big Laurel did not fulfill its duty under 30 C.F.R. § 75.223(a)(1) by failing to revise its roof control plan for areas already mined despite repeated roof falls in those areas. (Sec'y Br. at 57–59.) For Citation No. 8178522 and Order No.

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[3] Section 75.380(d) provides, in relevant part: "Each escapeway shall be—(1) Maintained in a safe condition to always assure passage of anyone, including disabled persons[.]" 30 C.F.R. § 75.380(d).

[4] Section 75.202(a) provides: "The roof, face and ribs of areas where persons work or 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).

[5] Section 75.364(b) was amended in 2012. *See* 77 Fed. Reg. 20,700, 20,705 (Apr. 6, 2012). At the time of the violations in August 2011, section 75.364(b) provided, in relevant part, as follows:

> *Hazardous conditions.* At least every 7 days, an examination for hazardous conditions shall be made by a certified person designated by the operator at the following locations:
>
> (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.
>
> (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. § 75.364(b) (2011).

8178524, the Secretary asserts that Big Laurel failed to fulfill its duty under 30 C.F.R. § 75.202(a) by failing to address deteriorating roof conditions across the intake and return entries in 4 Northeast Mains. (Sec'y Br. at 30–33, 51.) For Order Nos. 8178523 and 8178525, the Secretary asserts that Respondent failed to fulfill its duty imposed by 30 C.F.R. § 75.364(b)(1) and 75.364(b)(2), respectively, by failing to identify extensive hazardous conditions during the mine examiner's weekly examination of the intake and return airways in 4 Northeast Mains. (Sec'y Br. at 44–46, 54–55.) Finally, for Citation No. 8191715, the Secretary asserts that Respondent failed to fulfill its duty under 30 C.F.R. § 75.380(d)(1) by allowing a large volume of water to accumulate in the primary escapeway in 4 Northeast Mains. (Sec'y Br. at 60–62.)

In response, Big Laurel asserts that it did not commit any of the alleged violations. (Resp't Br. at 20–23, 36–39, 43–46, 65–67, 70.) In the alternative, Respondent challenges the Secretary's gravity and negligence determinations for each alleged violation, specifically the significant and substantial ("S&S")[6] designations, as well as the unwarrantable failure[7] determinations for Citation No. 8178522 and Order Nos. 8178524, 8178523 and 8178525. (Resp't Br. at 23–28, 38–40, 47–61, 67–69, 72–73.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary's mandatory health or safety standards; (2) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including the S&S designations; (3) whether the record supports the Secretary's assertions regarding Big Laurel's negligence in committing the alleged violations, including the unwarrantable failure determinations; and (4) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow:

1. Citation No. 8178516 is **AFFIRMED** as written;

2. Citation No. 8178521 is **AFFIRMED** as S&S, and **MODIFIED** to change the likelihood to "reasonably likely" and to reduce the level of negligence from "high" to "moderate;"

3. Citation No. 8191715 is **AFFIRMED** as written;

4. Citation No. 8178522 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to "reasonably likely;"

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

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

5. Order No. 8178524 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to "reasonably likely;"

6. Order No. 8178523 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to "reasonably likely;"

7. Order No. 8178525 is **AFFIRMED** as S&S and an unwarrantable failure, and **MODIFIED** to change the likelihood to "reasonably likely."

III. FINDINGS OF FACT

Big Laurel's Mine No. 2 was a room-and-pillar coal mine located in Wise County, Virginia.[8] (Ex. R–10 at 1.) Big Laurel developed the mine by cutting a series of entries and perpendicular crosscuts that together form a grid if viewed from above. (Ex. R–25; Ex. GX–14.) Between these entries and crosscuts, Big Laurel left large pillars of coal in place for support while miners delved deeper into the coal seam. (Tr. 95:8–16.) To develop the mine, Big Laurel excavated long sections named Mains that provided both access for miners and fresh air to the active production sections. (*See* Ex. GX–1.) The mine then created a number of rooms branching off from these Mains. (*See* Ex. R–25.) For each room, Big Laurel first advanced into the room, developing the grid of entries and crosscuts, and then retreat-mined, removing the remaining pillars of coal and allowing the mine roof to collapse behind the miners. (*See id.*) In 2011, Big Laurel was actively mining rooms off of the 4 Northeast Mains section of Mine No. 2. (Tr. 168:16–22.) In August 2011, Big Laurel had already retreat-mined the 1 Right, 2 Right, and 3 Right panels off of 4 Northeast Mains, and was retreat-mining the final 4 Right panel. (Tr. 511:3–513:1; Ex. R–25.)

In the sections that had not been retreat-mined, the thick coal pillars left in place supported most of the weight of the mountain. (Tr. 95:8–16.) To keep the mine roof from collapsing in the excavated entries and crosscuts, Big Laurel installed lines of roof bolts. (*Id.*) Each line of installed roof bolts created a beam across the entry or crosscut that replaced the support lost by removing the coal. (Tr. 27:4–10, 31:16–23.) These beams of roof bolts were the mine's primary roof support. (Tr. 31:16–23.) The mine also installed cable bolts and longer roof bolts as secondary support that extended deeper into the mine roof. (Tr. 33:1–15, 21–24.) Where these first lines of defense against gravity were insufficient, Big Laurel installed standing support in the form of timbers, cribs, metal jacks, and beams. (Tr. 35:18–36:12, 475:4–16.)

A. Factors that Can Worsen a Mine Roof

Over time, gravity exerts pressure on a mine, deteriorating its roof and causing a number of potentially hazardous conditions. (Tr. 34:6–11.) Indicators of deteriorating conditions in the roof and mine ribs include draw rock, cutters, bending or curling of roof bolt plates, loose or broken roof bolts, and cracks in the roof. (Tr. 35:9–16, 36:24–37:2, 37:8–18.) A cutter is a

[8] Mill Branch Coal Corporation became the operator of the mine in 2013 and renamed the mine North Fork #6. (Tr. 298:10–22; Ex. R–10 at 1.) Revelation Energy, LLC, became the operator in 2015 and renamed the mine D-6 North Fork. *See* Mine Safety & Health Admin., *Mine Data Retrieval System*, http://www.msha.gov/drs/drshome.htm (last visited Aug. 31, 2015).

serious condition that occurs when the roof begins to separate from the pillar wall, or rib. (Tr. 27:10–14, 36:24–37:2.) Draw rock is a more common occurrence of loose rock that may fall if not pulled down. (Tr. 37:8–18, 138:7–13, 298:2–9.) Draw rock can range in size from a few inches deep and long to as much as six feet long. (Tr. 364:24–365:4.) Draw rock falls from the immediate roof, which extends as high as the roof bolts. (*Id.*) In contrast, a roof fall occurs when the rock separates from above the primary support's anchorage point. (Tr. 365:7–10.) Draw rock, cutters, and roof bolts showing signs of bearing excessive weight do not necessarily suggest that a roof fall is imminent, but they can indicate a heightened risk of a fall. (Tr. 34:8–15, 101:17–22.)

The quality of the mine roof can vary based on a number of factors, including the composition of the roof, the presence of small seams of coal or water in the roof, the depth of the mine, and whether coal seams above and below the mine have been excavated.

Sandstone forms a strong roof, as it is a hard material that provides solid anchor points for roof bolts and does not easily crack and fall. (Tr. 40:2–9.) Conversely, laminate shale forms a particularly weak roof, as it consists of thin layers of shale rock that can more easily crack and separate. (Tr. 27:14–28:5.)

Veins of coal known as coal rider seams can also weaken the mine roof. (Tr. 37:19–38:6.) Because coal is a naturally weak and porous substance, a coal rider seam can undermine the roof's stability. (Tr. 37:24–38:6.) The location of the coal rider seam in the strata above the mined coal may vary across the mine. (Tr. 152:8–18.) Indeed, the coal rider seam may disappear altogether in some sections. (Tr. 152:8–14.) Because coal is softer and darker in color than shale or sandstone, a mine's roof bolters should notice when they drill through a coal rider seam. (Tr. 150:13–25, 151:8–12.) Coal rider seams can also be identified in the core hole samples taken by geologists and engineers during planning of the mine. (Tr. 151:13–152:7, 571:17–19.) A roof fall that contains a significant amount of black coal also may indicate the presence of a coal rider seam. (Tr. 153:1–4.)

The presence of water may further deteriorate a mine roof. (Tr. 58:23–25, 456:17–457:10, 463:6–13.) Water can erode parts of the roof, weakening it. (Tr. 58:23–25, 94:1–9.) Because coal is porous, coal rider seams can act like a sponge and hold water in the mine roof. (Tr. 38:3–6.) Moisture can also create draw rock, as rock may loosen while drying out. (Tr. 463:6–13.)

Overmining and undermining can also adversely affect roof conditions in a mine. (Tr. 564:1–3.) Overmining occurs when another coal seam above the mine is excavated and can change the way pressure from the overburden dissipates down through the mountain. (Tr. 50:21–51:18.) To minimize the impact of overmining, mines attempt to line up the location of their entries, crosscuts, and coal pillars, a process called "stacking the blocks." (Tr. 51:8–14.) Aligning the coal pillars with those above and below allows the pressure from the overburden above the mines to go straight down through the blocks. (Tr. 51:1–18.) Conversely, improperly aligning the blocks can direct pressure onto the roof above excavated entries and passageways, accelerating the development of problems in the mine roof. (Tr. 53:8–16, 354:21–355:13.)

The depth of an underground coal mine also affects the mine's roof conditions. Shallow depths can exacerbate existing problems. (Tr. 111:17–21.) The amount of ground, or cover, over a mine varies with the topography of the surface, such as a mountain. (Tr. 111:23–112:9.) Where a mountain drops steeply into a valley or gulch, the mine's cover can vary sharply from one entry to the next. (Tr. 111:23–112:5.) This variance in cover can result in horizontally shifting pressures within the mine, particularly in mines that are shallow. (Tr. 110:25–111:16.)

B. Negative Factors Present in Big Laurel's Mine No. 2

Big Laurel's Mine No. 2 suffered from a number of these adverse roof conditions. Most of the mine's 4 Northeast Mains and 4 West Mains sections lacked a strong sandstone roof and had only a weaker laminate shale roof. (Tr. 58:8–12; Ex. GX–15.) In addition, a coal rider seam was present in much of the same area. (Tr. 38:7–12; Ex. GX–16.) Mine No. 2 was naturally wet, particularly in summer months, when fans pumped hot, humid air into the mine where it condensed on the cooler roof, ribs, and floor. (Tr. 139:2–10.) Further complicating matters, the Yellow Rose mine was engaged in overmining by mining a coal seam located 40 to 60 feet above Big Laurel's Mine No. 2. (Tr. 50:9–15, 52:2–11.) The Yellow Rose mine failed to stack the blocks with Mine No. 2. (Tr. 53:4–16; Ex. GX–17.) Finally, Mine No. 2 was a shallow mine, with cover of only around 350 feet near the 4 Northeast Mains section. (Tr. 603:14–20.) The 4 Northeast Mains area was located directly underneath a steep mountain valley. (Tr. 701:4–11; Ex. GX–14.) Taken together, a band of several inherently adverse roof conditions covered a significant area of the mine, including the active area in 4 Northeast Mains and part of the neighboring section, 4 West Mains.

C. Protective Measures Required in Mine No. 2

To ensure that underground coal mines are installing sufficient roof support, MSHA requires that each mine submit and follow an approved roof control plan. (Tr. 143:23–144:4, 145:11–19;) *see generally* 30 C.F.R. §§ 75.220–75.223 (discussing roof control plans). Roof control plans generally set maximum widths for entries and crosscuts, and minimum levels of roof support in each cut. (Tr. 32:12–23.) Mines are allowed to exceed the minimum support requirements by installing additional roof bolts or longer roof bolts. (Tr. 144:2–10.) Indeed, roof control plans generally contain clauses requiring an operator to install additional support when necessary to address adverse roof conditions. (Tr. 149:2–6, 16–20.) MSHA reviews the roof control plan during every quarterly inspection of the mine and every six months as part of a separate roof control review by MSHA specialists. (Tr. 135:14–19.) Where roof conditions deteriorate or a roof control plan has proven insufficient to support the mine roof, MSHA may require the operator to alter its roof control plan to better support the roof. (Tr. 148:10–22.) Such changes usually focus on the active mining section, not older sections that have already been mined. (Tr. 148:10–15, 503:10–12.)

Big Laurel's roof control plan required the mine to install rows of five fully grouted, five-foot-long roof bolts, as well as a cable bolt or superbolt in the entries. (Tr. 144:14–21; Ex. GX–18.) Big Laurel consistently exceeded its roof control plan by installing an additional bolt in each row. (Tr. 330:18–331:6, 465:21–466:8, 635:7–10.) The extra roof bolt provided additional support for the roof and helped shield Big Laurel from potential roof control violations if the ribs

were to slough off, expanding the width of a passageway. (Tr. 330:18–331:6.) MSHA roof control specialist Scott Beverly reviewed the mine's roof control plan on August 16, 2011. (Tr. 189:24–190:20; Ex. GX–22; Exs. R–11, R–16.) Beverly and his superiors signed off on the roof control plan as adequate on August 28, 2011. (Tr. 190:11–20.) Prior to Beverly's semi-annual plan review, MSHA inspector Michael Hughes reviewed the roof control plan in June 2011 as part of his normal quarterly inspection of the mine. (Tr. 269:22–270:4; Ex R–11.)

Coal mines are required to conduct regular examinations to identify potentially hazardous roof conditions, including a weekly examination of the mine's intake and return airways. (Tr. 314:16–24, 490:7–19.) The airway examiner's duty is to ensure that potential roof and rib hazards in the intake and return airways are addressed before the conditions can block the airways or miners' travelways. (Tr. 314:16–24.) In 2011, MSHA required mines to report any unplanned rock falls on travelways and lifelines or that impede the airways. 30 C.F.R. § 50.10 (2011); (Tr. 65:4–17; 586:15–588:16; *see also* Ex. R–13 (MSHA's new policy on reportable roof falls)).

D. Big Laurel's History of Roof Falls

Despite consistently exceeding the mine's roof control plan by using extra roof bolts, Big Laurel experienced a number of unplanned roof falls at Mine No. 2 in 2011. (Tr. 199:8–16; Ex. R–9.) Mine No. 2 reported six roof falls to MSHA in the first seven months of the year. (Tr. 199:8–16.) The first roof fall in 2011 took place on January 19 in 4 Northeast Mains, approximately 1,000 feet from the active mining section. (Tr. 160:6–22; Ex. R–9 at 1; Ex. R–24.) This fall affected the No. 3 entry in 4 Northeast Mains, forcing the mine to move its alternate escapeway from the No. 3 entry to the No. 2 entry. (Tr. 86:8–18; Ex. R–25.) Then on February 8, a fall occurred in the return airway entry on 4 West Mains, an access panel directly adjacent to 4 Northeast Mains. (Tr. 165:17–19; Ex. R–9 at 2; Ex. R–24.) The fall on February 8 happened approximately 2,000 feet from the January 19 fall in 4 Northeast Mains, or approximately 3,000 feet from the active mining face. (Ex. R–9 at 2.) The 4 West Mains fall was followed one week later on February 15 by a fall in 1 North Mains. (Tr. 167:14–18; Ex. R–9 at 3.) 1 North Mains is an older section of the mine located approximately 11,000 feet from the active mining section in 4 Northeast Mains. (Tr. 168:23–25; Ex. R–24; Ex. R–9 at 3.) Following the February 15 fall, MSHA warned Big Laurel to adjust its roof control plan.

MSHA roof control specialist Chris Cain conducted the required six-month review of the mine's roof control plan on February 28, 2011. (Ex. R–11.) Cain found the plan insufficient due to the three roof falls since the start of the year. (*Id.*) On March 6, before Big Laurel could submit an updated roof control plan, the roof collapsed in the 3 Right panel off 4 Northeast Mains, disrupting the active mining section. (Tr. 171:21–172:19; Ex. R–9 at 4.) Following this fall, MSHA required Big Laurel to use longer and stronger bolts; however, the changes only affected the active mining section. (Tr. 174:13–175:12, 498:21–499:2.) This fall was located approximately 1,000 feet from the first fall on January 19. (Ex. R–25; Ex. R–9 at 4.)

The roof falls continued through spring and summer. On April 15, the roof collapsed again in the intake entry of the 3 Right panel of 4 Northeast Mains, approximately 600 feet from the working mine face. (Tr. 177:25–178:4; Ex. R–9 at 5.) Then on July 5, the roof collapsed in

4 West Mains, the access area abutting 4 Northeast Mains. (Tr. 177:25–178:4; Ex. R–9 at 6.) The July 5 fall occurred some 3,000 feet from the working face, but only about five crosscuts away from the previous fall in 4 West Mains on February 16. (Ex. R–9 at 6, Ex. R–24.)

Altogether, Big Laurel reported six roof falls to MSHA in January to July 2011, including three roof falls in the 4 Northeast Mains section, two in the adjacent 4 West Mains section, and one roof fall in the 1 North Mains area. (Exs. GX–21, R–22.) The mine also received 39 violations for section 75.202(a) regarding roof control in the two years prior to August 2011. (Tr. 204:8–11; Ex. R–10; *see also* Ex. GX–19 (copies of Virginia citations issued at Mine No. 2).) In August 2009, a miner died from a roof fall at Big Laurel's Mine No. 2. (Tr. 61:19–20.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial (S&S)

A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135-36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

In providing guidance for the application of the *Mathies* test, the Commission has observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e. that the violation present a *measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission also has indicated that "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). The Commission further has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001

(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*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of 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.* 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.*

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

A. The August 22 Roof Fall in 1 North Mains — Citation No. 8178516

On August 22, 2011, a roof fall broke the miner tracking system in the 1 North Mains section of Mine No. 2. (Tr. 495:5–10.) The collapsed roof also fell on the lifeline, blocking the mine's primary escapeway. (Tr. 24:20–25:10.) Big Laurel called MSHA to ask whether they needed to report the fall. (Tr. 61:24–62:2.) MSHA confirmed that the roof fall was reportable, issued a withdrawal order pulling miners from the active mining section, and assigned roof specialist Christopher Cain to investigate the incident. (Tr. 24:20–25:10, 62:3–14.) Cain, who joined MSHA in October 2006 after eight years in the mining industry, had worked for the roof control team nearly a year in total by August 2011. (Tr. 28:22–29:15, 131:8–17, 132:1–7.) Cain was familiar with the history of roof falls at Mine No. 2, as he investigated several falls earlier in 2011, including the March 6 fall that led Big Laurel to adjust its roof control plan. (Tr. 171:23–172:1.)

At the mine, Cain met with Alpha Resources' assistant mine manager, John Richardson, who was acting for mine superintendent Steven Moore on August 22. (Tr. 378:4–25.) After reviewing the mine's examination reports, Cain, Richardson and mine foreman Tony Dean traveled underground to investigate the roof fall in 1 North Mains. (Tr. 62:20-63:8, 379:1–8.) There, Cain found miners already setting timbers in Entry No. 6 to reinforce the roof support and block off the approaches to the fall. (Tr. 63:5–16.) The fallen material was seven or eight feet high, nearly reaching the mine roof. (Tr. 181:18–25.) Cain believed he saw roofbolt plates around the fall curling at the edges and otherwise showing signs of bearing excessive weight. (Tr. 63:11–16.) Cain examined the adjacent intake entry, Entry No. 5, and found what he believed were similar signs of deterioration in the roof, including roofbolts bearing excessive weight. (Tr. 63:17–21.) Cain found significant amounts of moisture in both entries. (Tr. 64:1–4.)

Based upon his observations, Inspector Cain issued Citation No. 8178516, alleging a violation of 30 C.F.R. § 75.202(a):

> A roof fall has occurred in the Primary Escapeway at S.S. 2778 along the No. 1 North Mains. Upon investigation, it was found that the immediate roof was deteriorated and weakened by moisture. Also roof bolt plates inby and outby the fall area showed signs of weight. When examined, test holes at S.S. 2768 and 2783 (both in the primary escapeway) indicated moisture in the mine roof. The hazard exists of a miner traveling through the affected area and being contacted by falling roof material and receiving serious or fatal injuries. Miners work and travel through the affected area on a regular basis.
>
> This mine has experienced a total of eight unintentional roof falls, six of these occurring in the past year. Also the operator has been cited 39 times in the past two years for failure to comply with 30 C.F.R. Part 75.202(a). The operator is hereby being put on notice to comply with 30 C.F.R. part 75.202(a) in all areas where miners work and travel. Failure to do so may result in an increase in negligence when cited.
>
> Standard 75.202(a) was cited 38 times in two years at mine 4407087 (38 to operator, 0 to a contractor).

(Ex. GX–2 at 1–2.) Cain asserted that the violation affected one person and that a fatal injury was reasonably likely. (*Id.*) Cain designated the violation as S&S and characterized Big Laurel's negligence as "moderate." (*Id.*)

Mine superintendent Steven Moore subsequently examined the roof fall later on August 22. (Tr. 483:14–22.)

1. The Parties' Contentions and Principles of Law

The Secretary asserts that Big Laurel failed to fulfill the duty imposed by 30 C.F.R. § 75.202(a) when an uncontrolled roof fall occurred in Entry No. 6 of 1 North Mains on August 22. (Sec'y Br. at 26–28.) The Secretary also claims the mine failed to sufficiently support the roof in surrounding areas, including adjacent Entry No. 5, where miners were working. (*Id.* at 27–28.) The Secretary asserts that the insufficiently supported roof was reasonably likely to fall on a miner, and that any such incident could reasonably be expected to be fatal, making the violation S&S. (*Id.* at 28–29.) The Secretary further asserts that Respondent displayed moderate negligence by allowing dangerous roof conditions to go undiscovered and unaddressed for a significant amount of time. (*Id.* at 30.)

In response, Big Laurel claims the Secretary has not demonstrated that Big Laurel failed to support or otherwise control the mine roof in 1 North Mains. (Resp't Br. at 20.) Big Laurel asserts that the roof fall on its own is insufficient evidence to find a violation of 30 C.F.R.

§ 75.202(a). (*Id.* at 20–21.) Respondent argues no indications of deterioration of the roof existed prior to its collapse. (Resp't Reply at 2–3.) Respondent further claims that the alleged violation was not S&S because it did not contribute to a hazard, and that the mine was not negligent because it was in compliance with its roof control plan. (*Id.* at 23–28.)

Section 75.202(a) requires that operators support or otherwise control the roof of a mine to protect persons from hazards related to roof falls. 30 C.F.R. § 75.202(a). Accordingly, the Secretary must show (1) that the roof or ribs were not supported to protect persons from hazards related to roof falls and (2) the insufficiently supported roof or ribs were located in an area where persons work or travel. *See Jim Walter Res., Inc.*, 37 FMSHRC 493, 495 (Mar. 2015). Because section 75.202(a) is worded broadly, the Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). The Commission has further held that "a fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a)." *Jim Walter Res.*, 37 FMSHRC at 496. Regarding the second element, the Commission has found that a single trip through an area of the mine is sufficient to constitute work or travel through the area. *Faith Coal Co.*, 19 FMSHRC 1357, 1359 (Aug. 1997).

2. Further Findings of Fact

Big Laurel's mine examiner, Jesse Ring, testified that he found no indications the mine roof was weakening when he last examined the primary escapeway on August 17, five days prior to the fall. (Tr. 322:24–323:8, 328:3–16, 329:6–24.) Similarly, assistant mine manager John Richardson asserted there was no evidence after the August 22 fall of deteriorating roof conditions outside of the No. 6 entry, where the fall occurred. (Tr. 381:21–382:13.) Accordingly, Big Laurel asserts that there were no signs suggesting the need for additional roof support. (Resp't Br. at 20–22.)

In contrast, Inspector Cain testified that he found roof bolts showing signs of bearing excessive weight in Entry No. 5, to which the lifeline was being rerouted. (Tr. 63:17–21.) Cain also claimed to find signs of further deterioration of the roof where miners were working to install supplemental roof support and isolate the roof fall.[9] (Tr. 66:14–67:8.) Moreover, Cain

[9] Respondent contends that Cain's testimony is inconsistent with his actions during the roof fall investigation, as the inspector did not issue an imminent danger withdrawal order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), to the miners installing supplemental roof support. (Resp't Reply at 3.) Respondent's argument misconstrues the law. The Mine Act defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated.*" 30 U.S.C. § 802(j) (emphasis added). Violative conditions certainly may exist but not cross this heightened threshold of imminence. *See Connoly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014); *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991) ("the conditions created by [a S&S] violation need not necessarily be so impending as to constitute an imminent danger").

testified that the conditions he found would not have developed suddenly, and similar conditions would have been present in Entry No. 6 prior to the fall. (Tr. 69:23–70:10.)

The roof fall in Entry No. 6 of 1 North Mains was large, covering an area some 25 feet long and 25 feet wide with rubble up to eight feet deep. (Tr. 68:16–19.) This roof fall was not the mere dislodging of a small amount of draw rock, but a failure of the beam in the roof that keeps the mountain off miners. Although I recognize that isolated occurrences of draw rock can appear without warning (Tr. 138:7–23, 268:1–9), a collapse of this magnitude indicates the mine roof showed prior signs of deterioration.[10] *See Jim Walter Res.*, 37 FMSHRC at 496 (declining to adopt a *per se* rule that all roof falls are violations of the standard, but finding that a fatal fall of an eight-foot slab of rock unquestionably demonstrates a violation of section 75.202(a)). Given such a large collapse, I infer that there was a broader weakening of the mine roof, consistent with Cain's testimony that the roof showed signs of deterioration in neighboring entries and crosscuts. Finally, Cain's allegations are supported by the deposition testimony of mine superintendent Scott Moore, who examined the affected area several hours after Cain's investigation. Moore stated that he found a number of roof bolt plates taking excessive weight one crosscut away from the fall in Entry No. 6. (Tr. 592:1–5.) Moreover, Moore said these plates were not localized to a single line of roof bolts, but were scattered throughout the area. (Tr. 592:18–593:17.) I find Moore's deposition statements, read into the record at hearing, to be credible and supportive of Cain's testimony.[11]

Based on the evidence before me, I find that the roof in 1 North Mains showed signs of deterioration in Entry No. 6 and adjacent Entry No. 5 near the roof fall. I further find that similar signs of the mine roof's pending collapse existed prior to the fall on August 22.

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[10] Big Laurel asserts that Virginia mine inspector Scott's notes suggest the roof was sufficiently supported because Scott did not issue a citation for the roof fall. (Resp't Br. at 22.) However, Scott did not arrive until two days after MSHA had already investigated the roof fall, and Scott's notes offer little pertinent information. (Ex. R–20.)

[11] Superintendent Moore's testimony at hearing deviated dramatically from that in his deposition. Moore's answers on cross-examination regarding the August 22 fall were at best unclear and potentially obfuscatory. (*See* Tr. 591:5–593:18.) In other instances, Moore contradicted his own previous testimony. (*Compare* Tr. 511:5–513:1 (Moore contending he told workers on the active section to be more vigilant after the August 22 citation), *with* Tr. 506:6–507:13 (Moore claiming he did not understand that Cain's notice from August 22 extended to the active section).) Moore similarly contradicted testimony from Big Laurel's other witnesses (*See* Tr. 368:10–18), as well as consistent statements from inspectors Cain and Hughes. (*See* Tr. 522:3–13, 529:9–22, 539:17–21, 593:18–594:13, 26:2–17, 82:6–15, 251:19–252:6, 543:15–544:14, 723:14–724:8; Ex. R–8 at 5; Ex. GX–12 at 1l; Ex. GX–9.) These problems give me significant concerns about the accuracy of Moore's testimony. Accordingly, I do not give weight to any of Moore's testimony insofar as it contradicts the testimony of other witnesses. I do, however, give weight to Moore's contradictory deposition statements because the statements were against Moore and Big Laurel's interests. *See generally* Fed. R. Evid. 804(b)(3)(A) (creating exception to hearsay rules for statements against own interests).

3. Analysis and Conclusions of Law

a. Violation – Citation No. 8178516

The mine roof in 1 North Mains showed signs of deterioration both in surrounding crosscuts and entries and at the site of the roof fall prior to its collapse. I determine that a reasonably prudent miner seeing such signs of an impending collapse would take additional steps to support or control the roof to protect persons from the hazards of a roof fall. The Secretary has therefore satisfied the first element of a violation.[12]

Big Laurel does not dispute the Secretary's contention that Entry No. 6 of 1 North Mains was an area in which persons worked and traveled. Miners examined the entry once per week and occasionally performed maintenance. (Tr. 67:1–8, 315:3–6, 316:15–24.) The entry was also used as a travelway to bring supplies in and out of the mine. (Tr. 69:11–17.) Accordingly, I determine that Entry No. 6 of 1 North Mains was an area worked and traveled for the purposes of section 75.202(a). *See Faith Coal*, 19 FMSHRC at 1359. Given the evidence before me, I conclude that Big Laurel violated 30 C.F.R. § 75.202(a).

b. Gravity and S&S Determination

Big Laurel's violation of section 75.202(a) establishes the first element of the *Mathies* test for a S&S violation. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard. Here, Cain credibly testified that the mine's failure to support its roof exposed miners to falling roof material.[13] (Tr. 63:22–64:7, 67:21–24.) I credit Cain's testimony and determine the Secretary has satisfied the second *Mathies* element.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Because miners regularly traveled the aircourse and primary escapeway in 1 North Mains, the Secretary claims a roof fall could

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[12] Big Laurel contends that it could not have violated the standard because it exceeded its roof control plan throughout the mine, including where the roof fall occurred in 1 North Mains. (Resp't Br. at 22–23.) However, the Commission has consistently held that a violation of the mine's roof control plan is not necessary to show a violation of section 75.202(a).

[13] Respondent contends that the roof fall did not contribute to any discrete safety hazard, as required in the *Mathies* test. (Resp't Br. at 24.) Respondent asserts that the fall of the roof was limited to one intersection and would not expand further, and thus posed no ongoing threat to miners. (*Id.*) Respondent therefore argues that the roof fall was in fact the cure for an insufficiently supported roof, not the hazard to be feared. Accepting this tortured logic would effectively protect the most serious violations of section 75.202—those in which the mine has actually suffered a roof collapse—from sanction under the Mine Act. To the contrary, MSHA and the Commission have repeatedly recognized that roof falls rank among the most serious dangers in the mining industry. *See Consolidation Coal Co.*, 6 FMSHRC 34, 37–38 (Jan. 1984); *see also Safety Standards for Roof, Fall and Rib Support*, 53 Fed. Reg. 2354 (Jan. 27, 1988) (recognizing dangers of roof falls).

reasonably be expected to result in an injury. (Sec'y Br. at 29.) As I have already noted, miners used the entry as a travelway and escapeway through 1 North Mains, and examiners checked the area weekly. (Tr. 67:1–8, 315:3–6, 316:15–24.) Miners also were preparing to reroute the affected lifeline through Entry No. 5, where the roof also showed signs of deterioration. (Tr. 63:9–21.) Big Laurel has not presented evidence to counter the Secretary's assertions regarding likelihood.[14] Finally, Cain credibly testified that roof falls generally tend to be fatal for miners caught in the collapse. (Tr. 67:9–13.) Given this evidence, I determine that a roof fall was reasonably likely to occur and cause a serious injury, satisfying the third and fourth *Mathies* elements. Accordingly, Citation No. 8178516 was appropriately designated as S&S.

c. Negligence

Big Laurel also challenges the Secretary's determination that the violative conditions were a result of the operator's moderate negligence. (Resp't Br. at 25–28.) Respondent emphasizes that Jesse Ring, a mine examiner with extensive experience, traveled the area five days prior and found no roof deterioration; thus, the mine had no warning of an impending fall. (*Id.* at 26–27.) Big Laurel also stresses that it exceeded its roof control plan throughout the mine. (*Id.* at 27.) The Secretary does not challenge Big Laurel's contention that Ring conducted his exam. The Secretary instead argues that the operator should have identified the developing problems prior to the fall, as the conditions would take more than a short amount of time to develop. (Sec'y Br. at 30.)

I credit Cain's testimony that the deteriorating roof conditions did not develop suddenly, and determine that Big Laurel should have known about the poor roof prior to August 22. In addition, the high number of reported roof falls since the start of the year, including one in the 1 North Mains section, put Big Laurel on notice that it needed to be more vigilant in checking for deteriorating roof conditions. Nevertheless, the Secretary has not produced substantial evidence suggesting how long the poor roof conditions lasted and were visible to miners traveling through the area. In addition, the inspector's failure to cite Respondent for an inadequate examination suggests that the conditions could have been overlooked in an examination five days prior to the fall. Thus, the Secretary's evidence shows that Big Laurel failed to identify relatively recent conditions that were not immediately obvious to an examiner. Accordingly, I conclude that Respondent's negligence was moderate for Citation No. 8178516. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting "moderate negligence" where the "operator knew or should have known of the violative condition or practice, but there are mitigating circumstances").

[14] Respondent emphasizes that the *Mathies* test asks what is reasonably likely to occur, and not merely what "could" or "might" occur. (Resp't Br. at 25.) Although Big Laurel points to *Tilden Mining Co.*, 24 FMSHRC 53 (Jan. 2002) (ALJ), for support, Respondent does not explain how that non-binding ALJ decision supports Big Laurel's position. Instead, Respondent echoes its prior contention that no hazard existed and thus no injury would be reasonably likely to result. (Resp't Br. at 25.) It is unclear how the cited case supports Respondent's position, as *Tilden* does not address the *Mathies* test for S&S violations, but rather whether the Secretary proved the fact of a violation. *See Tilden*, 24 FMSHRC at 67. Moreover, decisions from Administrative Law Judges are not binding precedent. 29 C.F.R. § 2700.69(d).

B. The August 31 Roof Fall and Investigation — Citation Nos. 8178521, 8191715, & 8178522 and Order Nos. 8178524, 8178523, & 8178525

Nine days later, on August 31, mine examiner Jesse Ring and Virginia state mine examiner Jerry Scott were conducting the weekly examination of the mine's airways when they came across an unplanned roof fall in the No. 6 entry of 4 Northeast Mains. (Tr. 336:7–337:2.) Despite Superintendent Moore's protests to the contrary, State Inspector Scott felt the roof fall needed to be reported to MSHA. (Tr. 517:17–518:8.) Accordingly, Big Laurel reported the fall, and MSHA again assigned Inspector Cain to investigate. (Tr. 74:10–18.)

At the mine, Cain met with Superintendent Moore and MSHA Inspector Michael Hughes, who was already at the mine for the regular quarterly inspection. (Tr. 282:15–25.) After reviewing the weekly examination records, Cain asked Moore how Big Laurel planned to address the continuing roof falls. (Tr. 75:17–24.) Moore responded that the mine planned to continue to isolate the roof falls and install supplemental support when roof falls are encountered. (Tr. 75:24–76:6.)

Following Moore's response, Inspector Cain issued Citation No. 8178521, alleging a violation of 30 C.F.R. § 75.223(a)(1):

> The operator of this mine did not propose a revision to the approved Roof Control Plan when conditions indicate that the plan is not suitable for controlling the roof, face, or ribs. This mine has had 7 roof falls in a one year period. Two of these roof falls in the last 10 days. The falls are not isolated to an exact area of the mine and have occurred in areas where miners work and travel on a regular basis. The hazard exists that if the roof falls are allowed to continue that a fatality will occur. This is the second issuance of this violation as a result of the mine's roof fall history in the past 7 months and the operator is being put on notice that failure to be proactive in the controlling of roof, face, and ribs at this mine may increase the negligence of any future citations under 30 C.F.R. Part 75 Subpart C ([sections] 75.200 thru 75.223 including all subparts).

(Ex. GX–8 at 1.) Cain asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.*) Cain designated the violation as S&S and classified the operator's negligence as "moderate." (*Id.*)

Cain, Hughes, and Moore then traveled underground to investigate the fall. (Tr. 83:24–84:6.) Near the fall, the parties traveled through a large pool of water located in the primary escapeway, Entry No. 5. (Tr. 252:23–253:10.) The water stretched a length of two crosscuts. (Ex. GX–11 at 1.) Hughes did not see any water pumps set to address the accumulation. (Tr. 304:21–305:8.)

Based on his observations, Inspector Hughes issued Citation No. 8191715 to Big Laurel, alleging a violation of 30 C.F.R. § 75.380(d)(1):

> The primary escapeway is not being maintained in a safe condition to always assure passage of anyone including disabled persons. When checked, the escapeway, starting at S.S. 3345 up to S.S. 3357 (2 breaks) contains water rib to rib and measures up to 8 [inches] deep. The water is [murky] and not clear. The hazard exists that a miner may fall over unknown debris in the water and become injured. Miners travel this entry on a regular basis.

(Ex. GX–11 at 1.) Hughes asserted that the violation affected one person and that a permanently disabling injury was reasonably likely. (*Id.*) Hughes designated the violation as a S&S and assessed Big Laurel's negligence as "moderate." (*Id.*)

In Entry No. 6, the parties found the fall covering an area 25 feet long by 25 feet wide with as much as nine feet of rubble, reaching to the mine roof. (Ex. R–9 at 8.) Cain noticed a substantial amount of coal in the rock that had fallen out of the roof. (*Id.*) While investigating the new fall, Cain discovered an older fall also in Entry No. 6 just two crosscuts away. (Tr. 88:1–7.) Big Laurel had already isolated the older fall, installed timbers to stop its spread, and fully rock-dusted the area. (Tr. 99:22–100:2.) Although Entry No. 6 had been the mine's primary escapeway, Big Laurel never reported the older fall to MSHA, and mine workers and officials could not say with any specificity when the fall occurred. (Tr. 88:8–23, 356:24–358:20.) Big Laurel shifted the primary escapeway to Entry No. 5 around the time of the old fall. (Tr. 583:2–20.)

Cain examined the broader area around the two falls in Entry No. 6. The party traveled parts of entries No. 5 and 6, the intake air entries, and Entry No. 7, the return entry that was separated by stoppings from the other entries. (Tr. 84:7–13, 109:11–20.) In the entries, Cain examined several test holes and used a fiberoptic boroscope to better view the roof conditions. (Tr. 92:3–13.) Cain believed he saw a coal rider seam in the test holes he examined. (Tr. 92:8–13.) Cain also believed he saw a number of cutters and roof bolts bearing weight in all three entries. (Tr. 109:21–110:5.)

Based on his observations, Cain issued Citation No. 8178522, alleging a violation of 30 C.F.R. § 75.202(a):

> The primary escapeway for the 001 MMU along the 4 Northeast Mains from S.S. 3051 inby to S.S. [3560] was not being supported or otherwise controlled to protect persons from hazards related to falling roof material. The area was supported with 5[-foot-long] fully grouted bolts and a combination of 8[-foot-long] super bolts and 12[-foot-long] cable bolts. This combination of roof support has been indicated to have failed due to numerous roof falls along the 4 Northeast Mains and other areas of the mine. The adjacent #6 entry has had two roof falls in an area outby the 3 Right panel. The only

additional support found along the escapeway were 7 jacks and 2 posts (all located in the same intersection). When test holes were scoped the same conditions of gray laminate shale with coal streaks and a coal rider seam averaging 1 to 2 feet thick are present. Water is also present in the mine roof and was also found in the other roof falls. Cutters can be seen down the left ribline for most of the affected area and also along the right ribline [in] some areas. Draw [r]ock is present along the primary escapeway. A mine map presented outside by the superintendent indicates that active mine above the 4 Northeast Mains did not stack their blocks with the blocks that were already mined in the 4 Northeast Mains. This condition can worsen roof and rib conditions in this mine. This mine has had seven roof falls in a one year period and two in the last 10 days. The hazard exists of a miner or miners traveling down the primary escapeway and being fatally injured due to falling roof material. This entry is traveled by miners on a regular basis.

This violation is an unwarrantable failure to comply with a mandatory standard. The mine operator and agents of the operator engaged in aggravated conduct constituting [] more than ordinary negligence in that:

1. An examination by an agent of the operator is conducted weekly through the area.

2. The condition is obvious with cutters going down the ribs, roof bolt plates showing signs of taking weight, and draw rock present in the entry.

3. Reasonable efforts were not made by the mine operator to correct or increase the roof support in the area. The mine has had to change the approved roof control plan due to roof falls occurring where the same combination of 5[-foot-long] fully grouted bolts with a combination of 12[-foot-long] cable bolts and 8[-foot-long] super bolts failed on the [No.] 3 Right Panel inby the affected area. (The plan changes were to install a combination of 6[-foot-long] fully grouted bolts and 16[-foot-long] cable bolts.) No additional support was found or installed in this area to protect miners and additional roof falls occurred in areas mined where the old plan was in effect and the old roof support was used.

4. This mine was put on notice to comply with 75.202(a) on 08/22/2011 due [to] the number of roof falls occurring where miners work and travel. Standard 75.202(a) was cited 29 times in two years at mine 4407087 (29 to the operator, 0 to a contractor).

(Ex. GX–4 at 1–3.) Cain asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.* at 1.) Cain characterized Big Laurel's negligence as "high" and designated the violation as S&S and as the result of the operator's unwarrantable failure to comply with a mandatory health or safety standard. (*Id.*)

Inspector Cain then issued Order No. 8178524, alleging a violation of 30 C.F.R. § 75.202(a). The order alleged insufficient support in "[t]he right return bleeder for [No.] 1 Right, [No.] 2 Right, and [No.] 3 Right panels along the [No.] 4 Northeast Mains from S.S. 3052 to S.S. 3381." (Ex. GX–6 at 1–2.) Other than the location, the text of the order mirrored the text of Citation No. 8178522. (*Id.* at 1–3.) Cain similarly asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.* at 1.) Cain also characterized Big Laurel's negligence as "high" and designated the violation as S&S and as the result of the operator's unwarrantable failure. (*Id.*)

Because Big Laurel's Jesse Ring had completed an examination of the area earlier the same day, Cain also issued Order No. 8178523, alleging a violation of 30 C.F.R. § 75.364(b)(1):

> The weekly examinations being conducted along the [i]ntake air course and primary escapeway along the [No.] 4 Northeast Mains are being conducted inadequately by the examiner. The records for the last month do not indicate the hazards found in the form of loose ribs, draw rock, and cutters present in the mine roof. No hazards were recorded for the [i]ntake listed in the Weekly Examination Book for examinations conducted in the month of August. The hazard exists of a miner being seriously or fatally injured due to one or numerous hazardous conditions being allowed to exist with no corrective action to protect miners from them. Miners work and travel through the area on a regular basis. This mine has a history of roof falls occurring in the [No.] 4 Northeast Mains and other areas where the examiner travels.
>
> This violation is an unwarrantable failure to comply with a mandatory standard. The mine operator and agents of the operator engaged in aggravated conduct constituting [] more than ordinary negligence in that:
>
> 1. The examiner conducting the weekly exam of the intake air course is an agent of the operator.
> 2. The weekly examination record book is being certified by both the examiner and superintendent that a complete and accurate examination of the intake air course is being conducted.
> 3. The hazardous conditions present were obvious and extensive with only [an] isolated area with any type of corrective action (the installation of 7 jacks and 2 posts) being completed.
> 4. The mine has a history of roof falls and the hazards present indicate that a roof fall in the area can likely occur.
> 5. The hazards have existed for a period of at least two weeks or more.

(Ex. GX–5 at 1–2.) Cain again asserted that the violation affected two people and that fatal injuries were highly likely. (*Id.* at 1.) Cain similarly characterized Big Laurel's negligence as

"high," and designated the violation as S&S and as the result of the operator's unwarrantable failure. (*Id.*)

Cain also issued Order No. 8178525, alleging a violation of 30 C.F.R. § 75.364(b)(2) because "[t]he weekly examinations being conducted along the [r]ight [r]eturn air course for the 1 Right, 2 Right, and 3 Right panels along the 4 Northeast Mains are being conducted inadequately by the examiner." (Ex. GX–7 at 1–2.) Other than the location, the text of Order No. 8178525 mirrors that of Order No. 8178523. (*Id.*) Cain asserted the violation affected two people and that fatal injuries were highly likely. (*Id.*) He characterized Big Laurel's negligence as "high," and marked the violation as S&S and an unwarrantable failure. (*Id.* at 1.)

Big Laurel withdrew its miners from the active mining section as a result of these orders and shifted some mining equipment to another part of the mine. (Tr. 549:16–21.) The mine installed substantial supplemental roof support through the No. 5 and No. 7 entries to abate the alleged violations. (Tr. 121:9–19, 122:24–123:4, 124:3–9.) Cain eventually terminated the orders on September 12, 2011, approximately two weeks after the roof fall. (Tr. 125:2–8; Ex. GX–10.) Big Laurel also conducted a further geological survey of this area of the mine based on existing core hole data to better map the location of the coal rider seam. (Tr. 240:20–241:4; *see* Ex. GX–16.) Big Laurel never resumed mining from 4 Northeast Mains, but instead permanently closed and sealed the section in late 2011. (Tr. 550:5–9.)

1. Citation No. 8178521: Failure to Propose Changes to the Roof Plan

For Citation No. 8178521, the Secretary asserts that Respondent violated 30 C.F.R. § 75.223(a)(1) when it failed to revise the mine's roof control plan for areas already mined despite repeated roof falls in those areas. (Sec'y Br. at 57–59.) The Secretary further claims the violation contributed to potential roof falls, and thus was S&S. (*Id.* at 59–60.) Finally, the Secretary argues that Big Laurel was highly negligent in failing to amend its roof control plans. (*Id.* at 60.) Respondent asserts that it did not violate section 75.223(a)(1), as the mine's roof control plan already included provisions calling for additional support where necessary, and MSHA had repeatedly found the plan sufficient. (Resp't Br. at 36–38.) Respondent also asserts that the alleged violation did not contribute to any hazard and that the mine was not negligent because the roof control plan had passed muster with MSHA. (*Id.* at 38–40.)

a. Violation

Section 75.223(a)(1) requires operators to propose revisions to a mine's roof control plan when conditions in the mine indicate that the old plan is no longer suitable to control the roof, face, ribs, or coal or rock bursts. 30 C.F.R. § 75.223(a). When MSHA adopted this standard, the agency noted that "any condition which indicates the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts requires that the plan be revised." 53 Fed. Reg. 2354, 2372 (Jan. 27, 1988). In interpreting and applying broadly worded standards, "the appropriate test is . . . whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). To prove a violation of section 75.223(a)(1), the Secretary therefore must show (1) the existence of adverse roof

conditions at the mine, (2) that a reasonably prudent miner would have recognized the existing roof control plan was insufficient to address those negative conditions, and (3) the mine did not amend the roof control plan.

The parties do not dispute the existence of adverse roof conditions in parts of Mine No. 2. Although much of the mine had a strong sandstone roof, the 4 Northeast Mains and 4 West Mains sections had only a laminate shale roof that contained a coal rider seam and a source of water. (Tr. 58:8–12; Ex. GX–15, Ex. GX–16.) Mining had occurred both above and below Mine No. 2, and the Yellow Rose mine above it had failed to properly stack the blocks in 4 Northeast Mains and 4 West Mains. (Ex. GX–14.) These adverse conditions are important factors in the mine's ability to control its roof and ribs. (Tr. 353:10–355:7, 390:1–17.) Accordingly, I determine that adverse conditions affecting the mine roof existed in 4 Northeast Mains and 4 West Mains, satisfying the first element of a violation.

Similarly, Respondent does not contend that it proposed modifications to the roof control plan to address adverse conditions away from the active mining section. Although Big Laurel adjusted its roof control plan at MSHA's direction in March, those changes only affected newly mined areas. (Tr. 498:7–499:2.) The Secretary therefore has demonstrated the third element of a violation of section 75.223(a)(1).

The only element at issue is the second: whether a reasonably prudent miner would have recognized the mine's existing roof control plan was insufficient to address the adverse conditions encountered in the mine. The Secretary asserts that the number of roof falls and the deteriorating conditions discovered in 4 Northeast Mains on August 31 demonstrated the obvious inadequacy of the roof control plan. (Sec'y Br. at 58.) The Secretary suggests that Big Laurel's installation of extensive supplemental roof support in Entry Nos. 2, 3 and 4 of 4 Northeast Mains prove the operator was aware of the dangers the adverse roof conditions posed. (*Id.* at 58–59.)

In contrast, Big Laurel claims it did not violate 30 C.F.R. § 75.223(a)(1) for two reasons. First, it asserts that the roof control plan was sufficient to address any deteriorating roof conditions in previously mined sections because the plan already contained provisions requiring the operator to install additional support wherever needed. (Resp't Br. at 37–38.) Contrary to the Secretary's assertion, Respondent contends that its installation of supplemental roof support through much of 4 Northeast Mains demonstrates the adequacy of the plan. (*Id.*) Second, Respondent asserts that it could not have known it needed to amend its roof control plan because plan revisions for previously mined areas are rare. (*Id.* at 37.) For support, Big Laurel points to MSHA's approval of the roof control plan just days ahead of the August 31 roof fall in 4 Northeast Mains. (*Id.* at 38.)

Mine No. 2 reported eight roof falls in the first eight months of 2011 and had at least one more significant roof fall that Big Laurel neglected to report. (*See* Ex. R–9 at 1–8.) Only one fall occurred at the active mining face; the remainder occurred in previously mined areas. (*Id.*) Seven of those nine falls were located in 4 Northeast Mains or the adjacent 4 West Mains, the sections affected by the band of inherently adverse roof conditions, including a poor laminate shale roof, a coal rider seam, overmining with unstacked blocks, and low cover with a steep

ascent.[15] (*See* Ex. GX–16.) All seven of those falls occurred within approximately 2,000 feet of the first fall in 4 Northeast Mains in January 2011. (*See id.*) These falls occurred despite Big Laurel's stated policy of going beyond the minimum required by the mine's roof control plan. Twice Big Laurel received explicit warnings from MSHA that its existing roof control measures were insufficient, first in a negative six-month review of the mine's roof control plan in February, and then in a citation for failing to propose changes to its plan. Even after these notices, Big Laurel only adopted changes affecting newly mined areas. Such changes bought Big Laurel a few months' respite from MSHA's scrutiny, but they did nothing to enhance miners' safety while working or traveling in previously mined areas, where the falls continued. Big Laurel's efforts to address the mine's deteriorating roof around 4 Northeast Mains and 4 West mains proved insufficient fall after fall, on January 19, February 8, March 6, April 15, July 5, and August 31. Only the fall on March 6 occurred on the working section.

The Mine Act imposes an affirmative duty on mine operators to protect the health and safety of miners. 30 U.S.C. § 801(e). Throughout 2011, Big Laurel failed to proactively adopt measures that would ensure its workers were protected from serious, deteriorating roof conditions in previously excavated areas. Where Big Laurel did install significant secondary support, it did so only in response to a roof fall, and then only in the entries critical to the continued production of coal, such as the section's belt entry and primary travelway.

Given the evidence before me, I determine that a reasonably prudent miner familiar with the protective purposes of the standard would have recognized that Big Laurel's existing roof control policies were insufficient to address the adverse roof conditions affecting the mine in 4 West Mains and 4 Northeast Mains. Big Laurel's repeated failure to prevent roof falls demonstrates that the existing clause allowing Respondent to install additional support as needed was insufficient. Revisions to the roof control plan for areas away from the face may be rare, but the repeated falls, coupled with MSHA's prior warnings, gave Big Laurel ample notice that its roof control plan was insufficient for certain areas of the mine. At the very least, prudence demanded that Big Laurel reexamine its core hole samples to identify the conditions behind the repeated roof failures in 4 Northeast Mains and 4 West Mains, and then increase its examinations of those areas to identify potentially hazardous conditions before they become deadly. Big Laurel made no such efforts until forced to adopt these measures to terminate the violation. (Ex. R–6 at 2.) The Secretary has thus proven the second element of a violation of section 75.223(a)(1).

The Secretary having shown all three elements of a violation of section 75.223(a)(1), I thus conclude that Respondent violated 30 C.F.R. § 75.223(a)(1).

b. Gravity and S&S

Big Laurel's violation of section 75.223(a)(1) establishes the first element of the *Mathies* test for a S&S violation. For the second element, the Secretary alleges that the obsolete roof

[15] At hearing, Big Laurel's witnesses asserted that the number of falls was within reason for a mine the size of Mine No. 2. (Tr. 388:8–15.) This assertion amounts to a false equivalence that ignores the clustering of roof falls in an area that suffered from adverse conditions not prevalent throughout most of the mine.

control plan exposed miners to the hazard of roof falls.[16] (Sec'y Br. at 59–60.) Mine No. 2 suffered on average one reported fall per month in 2011, including two in the last 10 days of August. Better, more frequent examinations would have discovered signs of deterioration and allowed the mine to supplement failing roof support or cordon off hazardous areas prior to the roof's collapse. Accordingly, I determine that Big Laurel's failure to amend its roof control plan contributed to the exposure of miners to the hazards of a roof fall, satisfying the second *Mathies* element.

For the third *Mathies* element, the Secretary claims that the extent of the deteriorating roof conditions, the number of falls already experienced in 4 Northeast Mains, and the high level of danger posed by a roof fall made the hazard highly likely to result in an injury. (Sec'y Br. at 59.) Because the adverse roof conditions extended across the active mining area in 4 Northeast Mains, the likelihood of an injury was greater here than in 1 North Mains. Nevertheless, a designation of "highly likely" carries an air of imminence. *See Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 859 (June 1996) (considering an inspector's change from "reasonably likely" to "highly likely" in accord with the inspector's imminent danger order). Inspectors Cain and Hughes agreed that the conditions found in 4 Northeast Mains did not suggest another roof fall to be imminent. (Tr. 217:10–23, 226:13–227:2, 289:21–24.) The most traveled entries of 4 Northeast Mains had already been buttressed with cribs, timbers, high jacks, and beams. (Tr. 474:19–475:22.) Accordingly, I determine that the Secretary has not proven that an injury was highly likely to result; rather, the injury was reasonably likely. *See* discussion, *supra,* Part V.A.3.b.

As already explained, the injury from a roof fall could reasonably be expected to be fatal. *See* discussion, *supra,* Part V.A.3.b. Thus, the Secretary has met his burden of proving that the hazard of a roof fall was reasonably likely to cause injuries reasonably serious in nature, satisfying *Mathies'* third and fourth elements. I therefore conclude that this violation was appropriately designated as S&S.

c. Negligence

The Secretary contends that Respondent was highly negligent in failing to amend its roof control plan, as the mine had abundant notice that its efforts were no longer sufficient to control the deteriorating mine roof. (Sec'y Br. at 60.) In its defense, Big Laurel points to MSHA's recent review and approval of the plan as mitigating factors. (Resp't Br. at 39–40.)

I share the Secretary's concern that Big Laurel made little, if any, effort to understand and address the numerous roof falls in Mine No. 2, particularly in the 4 Northeast Mains and 4 West Mains areas. That said, I am also troubled by MSHA's apparent lack of care. MSHA approved Big Laurel's revisions in March, despite offering no better controls to previously mined areas. The agency then compounded its poor oversight by approving the mine's existing plan in the August six-month review. These are significant oversights that improperly suggested

[16] Big Laurel again asserts that its roof control sufficiently covered already-mined areas, and thus logically could not contribute to a hazard. (Resp't Br. at 38–39.) However, I already have found that the mine's existing roof control plan as applied was insufficient to address the set of inherently adverse roof conditions found in 4 Northeast Mains.

the mine's current roof control program was sufficient, despite numerous signs to the contrary. Although the Mine Act makes clear that Big Laurel is primarily responsible for ensuring the safety of its mine, MSHA's actions partially mitigate the company's negligence.[17] *See* 30 U.S.C. § 801(e).

Given these factors, I determine that Big Laurel was moderately negligent in failing to update its roof control plan. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting "moderate negligence" where some mitigating circumstances are present).

2. Citation No. 8178522 and Order No. 8178524: Conditions in 4 Northeast Mains

For Citation No. 8178522 and Order No. 8178524, the Secretary alleges that Respondent violated section 75.202(a) by allowing extensive dangerous roof conditions to develop unchecked in Entry No. 5, the intake entry and primary escapeway, and Entry No. 7, the return entry, of 4 Northeast Mains. (Sec'y Br. at 30–33, 51.) The Secretary asserts that the conditions constituted S&S violations, and that the dangerous nature of the conditions, the length of time they existed, and their obvious nature constitute aggravating circumstances amounting to an unwarrantable failure to comply with mandatory health or safety standards. (*Id.* at 33–44, 52.) Respondent contends the mine roof was sufficiently maintained and did not show deterioration or hazardous conditions in either entry. (Resp't Br. at 43–46.) Big Laurel alternatively argues the conditions posed no hazard and the operator was not negligent. (*Id.* at 46–61.)

a. Further Findings of Fact

Respondent first asserts that the weight of testimony at hearing shows the entries had neither extensive cutters, nor numerous roof bolt plates taking weight, nor other adverse roof conditions. (Resp't Br. at 45–46.) Respondent asserts that Inspector Cain's findings lack all credibility. (*Id.* at 45.) In support, Respondent points to the testimony of Superintendent Steve Moore, Examiner Jesse Ring, State Inspector Jerry Scott, and MSHA's Michael Hughes. (*Id.*)

Inspector Cain stated that the left-most entries of 4 Northeast Mains suffered deterioration early in 2011. As the mine settled, pressure shifted from Entry Nos. 1, 2, 3, and 4 to the right side of the section to affect Entry Nos. 5, 6, and 7. (Tr. 111:1–16.) This horizontal shift created sporadic cutters along the left-hand side of the entries and caused draw rock to form throughout the entries. (Tr. 28:9–15.) Cain's contemporaneous notes, while not identifying the specific location of the hazards discovered, corroborate his testimony. (*See* Ex. GX–9.)

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[17] Big Laurel asserts that its history of installing additional support also mitigates any alleged negligence. (Resp't Br. at 39.) As Inspector Cain noted at hearing, however, when a mine exceeds the minimum supports outlined in its roof control plan and the support still proves insufficient, the baseline shifts upward to at least the level of additional support being used. (Tr. 185:19–25.) In addition, Big Laurel's installation of cribs and timbers throughout the main travelway and belt entries of 4 Northeast Mains did not result from the company's proactive efforts to prevent roof problems. Rather, it was in reaction to a roof fall and other signs of deterioration. Big Laurel's decision to adopt extra measures to protect active coal production areas does not permit the company to neglect to adopt similar protective measures elsewhere.

Again, a major roof fall such as the one that occurred in Entry No. 6 of 4 Northeast Mains indicates a broader weakening of the mine roof in the area. *See* discussion, *supra*, Part V.A.2. Moreover, this was the second such roof fall in the entry, the other taking place just two crosscuts away. (Tr. 88:2–13; Ex. GX–9 at 3.) This older fall and other signs of a deteriorating roof led Big Laurel to shift its primary escapeway to Entry No. 5 earlier in 2011. (Tr. 653:1–11.) In addition, nearby entries had also shown signs of deterioration. A fall in Entry No. 3 and broader deterioration prompted Big Laurel to install cribs, timbers, and beams throughout Entry Nos. 2, 3, and 4. On the other side of the section, Big Laurel suffered two roof falls while mining the Right panels on the other side of Entry No. 7. Finally, the entire 4 Northeast Mains was covered by a band of inherently adverse roof conditions that could seriously, adversely affect the stability of a mine roof. (*See* Ex. GX–14; Ex. GX–15; Ex. GX–16.) This undisputed evidence supports Cain's testimony.

Big Laurel's efforts to address the violations further lend support to the allegations. Big Laurel spent nearly two weeks installing extensive supplemental support throughout Entry Nos. 5 and 7 to abate the conditions. Superintendent Moore contended that the mine installed this extensive support merely to ensure Cain would be satisfied. Cain, however, only ordered the mine to address violations in the No. 5 and 7 entries; MSHA did not direct the method of abatement. (Tr. 118:18–25.)

Big Laurel urges that I disregard this evidence and focus instead on the testimony from Moore, Hughes, Scott, and Ring. (Resp't Br. at 45.) First, Moore testified that the cited roof conditions were not present. (Tr. 528:10–16, 529:2–8.) As I noted above, however, Moore's testimony regarding the August 22 roof fall was fraught with inconsistencies. *See* discussion, *supra*, Part V.A.2. Given the considerable discrepancies in Moore's testimony, I afford it very little weight.

Inspector Hughes stated that he also found roof control violations during the investigation, but did not write up the conditions because they were incorporated by Cain's broader citation and order. (Tr. 252:15–22.) Although Hughes was not certain the conditions Cain identified were cutters, Hughes deferred to Cain's assessment. (Tr. 288:2–11, 294:20–295:1.) Moreover, Hughes admitted that he lacked the specialized training in roof control that Cain received.[18] (Tr. 246:19–247:5.)

State Mine Inspector Scott testified that he did not find obvious cutters in Entry No. 5 on August 31 or during a return visit to 4 Northeast Mains in November 2011, after Big Laurel installed supplemental support. (Tr. 664:11–665:8, 669:13–670:13; Ex. R–21.) However, Scott did find extensive amounts of draw rock in the entry for nearly the entire length of 4 Northeast Mains. (Tr. 664:1–20.) Scott issued his own citation directing Big Laurel to clean the entry of excessive draw rock. (Tr. 664:17–20; Ex. R–23 at 34–36.) Scott was a seasoned inspector with nearly 38 years in underground mines, including 26 years with Virginia's Department of Mines,

[18] Big Laurel points to Hughes's prior inspection notes to argue that the roof conditions cited by Cain did not exist. (Resp't Br. at 44, 46; Resp't Reply at 12.) However, I do not credit them, as Hughes admittedly lacked Cain's expertise and his inspection notes lacked specificity in relation to those areas cited by Cain. (Ex. R–15; Tr. 277:17–280:16; *see also* Ex. R–17 (notes of MSHA Inspector Larry Stanley from April 2011).)

Minerals, and Energy. (Tr. 622:14–18, 625:5–15.) However, Scott's training and experience did not include the kind of intensive roof control training that Cain received to become a roof specialist.

Like Scott, Mine Examiner Jesse Ring asserted that he did not find any hazards related to the roof or ribs in the No. 5 or No. 7 entries. (Tr. 347:7–24.) Ring further stated that he checked test holes near the fall and did not find any cracks or other problems in the holes. (Tr. 339:9–12.) He also did not find any roof bolt plates showing signs of taking excess weight from the nearby fall. (Tr. 339:13–19.) Ring did not record any information regarding the roof fall or the examination of neighboring entries in his notes.

Given the undisputed evidence before me, and recognizing the extensive training that MSHA specialists receive, I credit Cain's testimony over that of Ring and Scott. Accordingly, I find that cutters, draw rock, and other indicators of a deteriorating roof existed throughout the intake and return entries in 4 Northeast Mains. Nevertheless, I recognize that Scott, Ring, and Hughes did not easily identify the cutters Cain discovered along the left ribs of Entry Nos. 5 and 7. I credit this testimony and find that some of the cited conditions were not obvious without close inspection. Based on the testimony of Cain, Hughes, and Scott, however, I find that the extensive accumulations of draw rock in the entries were obvious.

b. Violation

To demonstrate a violation of section 75.202(a), the Secretary must show (1) that the roof or ribs were not supported to protect persons from hazards related to roof falls and (2) the insufficiently supported roof or rib were located in an area where persons work or travel. I have already found that cutters and extensive amounts of draw rock were present in Entry Nos. 5 and 7, and it is uncontroverted that miners worked and traveled in the entries at least once a week. The only question before me, therefore, is whether a reasonably prudent miner would have recognized that the entries required additional support.

Signs of a poor roof existed throughout Entry Nos. 5 and 7. Although some of the signs were not obvious, the extensive draw rock was obvious to any miner of reasonable prudence. More importantly, the mine had a number of roof falls—at least eight in the eight months prior to August 31—and information showing numerous adverse roof conditions across 4 Northeast Mains. These falls would have prompted a reasonably prudent miner to explore the adverse conditions affecting the roof. Miners aware that an area contains a coal rider seam and suffers from improperly stacked blocks would be extra cautious in checking for signs of a deteriorating roof. (Tr. 355:8–13, 390:7–17.) Therefore, I determine that a reasonably prudent miner, prompted by regular roof falls and spurred by an explicit warning from MSHA, would have recognized that Entry Nos. 5 and 7 required additional support.

Given these considerations, I conclude that in Citation No. 8178522 and Order No. 8178524 the Secretary has satisfied the elements of a violation of section 75.202(a) for both Entry No. 5 and Entry No. 7 of 4 Northeast Mains. Big Laurel did not sufficiently support or control its roof in these entries to protect persons from the hazard posed by roof falls.

c. Gravity & S&S

Respondent violated section 75.202(a), satisfying the first part of the *Mathies* test. As explained earlier, an insufficiently supported roof exposes miners to hazards related to roof falls such as falling rock, satisfying the second prong of *Mathies*. *See* discussion, *supra*, Part V.A.3.b. A roof fall in a primary escapeway, travelway, intake airway, or return airway, reasonably could be expected to cause serious or fatal injuries, thus satisfying the third and fourth elements of the *Mathies* test. *See* discussion, *supra,* Part V.B.1.b. As explained previously, the hazard was not highly likely to cause an injury because the cited entries were lightly traveled and a new fall was not likely in the immediate future. *See id.* I therefore conclude that the Secretary has demonstrated that Citation No. 8178522 and Order No. 8178524 were S&S, but reasonably likely rather than highly likely.

d. Negligence and Unwarrantable Failure

The Secretary designated both of these violations as unwarrantable failures and characterized Big Laurel's negligence in each case as high. In particular, the Secretary emphasizes that Big Laurel had notice the mine needed to better control its roof yet did nothing to improve its compliance in an area known to suffer from adverse conditions. (Sec'y Br. at 35–44.)

Looking to the factors for determining aggravated conduct, three of the seven factors favor the Secretary's unwarrantable failure allegation.[19] First, the violative conditions were extensive. Cutters and excessive draw rock covered the length of Entry Nos. 5 and 7, approximately 2,000 feet. The cited conditions took Big Laurel nearly two weeks to fully address. *See Manalapan Mining Corp.*, 35 FMSHRC 289, 295 (Feb. 2013) (considering the time to abate violative conditions when assessing the extent of a violation). Second, the extent of the conditions suggests that they existed for a significant amount of time before they were addressed. As Inspector Cain credibly testified, such expansive conditions could not develop in a matter of hours, but over a long period of time. (Tr. 99:7–25.) Moreover, the mine first noticed deteriorating roof conditions on the right side of the section in Entry No. 6 *several months* prior to the August 31 investigation. (Tr. 579:1–581:3.) Third, given the extent of the violation and the threat posed by roof falls, the conditions posed a high degree of danger to miners.

In its defense, Respondent contends that it did not have notice that greater efforts at compliance with section 75.202(a) were necessary. (Resp't Br. at 52–56.) Big Laurel asserts that Cain's explicit notice was insufficiently precise to put the mine on notice for conditions in 4 Northeast Mains. (*Id.* at 54–56.) Respondent further insists it was not on notice from prior citations, as the operator had steadily reduced its violations of section 75.202(a). (*Id.*) Respondent's first argument misrepresents the nature of MSHA's notice. In putting Big Laurel on notice on August 22, Cain did not direct Big Laurel to install additional support throughout the mine, but to be more vigilant in finding deteriorating roof conditions so the conditions could be addressed or otherwise controlled to protect miners. At the very least, this requires informing

[19] Respondent challenges the extent, duration, and danger of the violation on the grounds that the violative conditions did not exist. I have already made findings to the contrary.

the mine examiners to be more thorough during examinations. *See IO Coal*, 31 FMSHRC at 1354 (emphasizing that mine management had a duty to raise safety awareness of potential hazards on all mine sections, not merely those close to prior cited hazards). Big Laurel did not take even this modest step. Second, Big Laurel's improving citation history belies the large number of falls Mine No. 2 suffered in 2011. The eight prior falls in the first eight months of the year and the adverse roof conditions placed Big Laurel on notice that it needed to be more assiduous in supporting the roof of 4 Northeast Mains. This notice simply reinforced Cain's directive that the mine would be subject to heightened penalties for future failure to comply.[20]

Next, Big Laurel argues that it neither knew nor should have known of the violative conditions. (Resp't Br. at 56–58.) Respondent emphasizes that the roof fall in Entry No. 6 took place between the weekly examinations by Examiner Ring. (*Id.* at 56.) Whether Big Laurel should have discovered the fall in Entry No. 6 earlier is tangential to the issue at hand. Cain cited Big Laurel not for the fall but for extensive deterioration of the roof in adjacent entries. Those conditions developed over a long period of time, giving the mine ample opportunity to find and address the problems. Given Big Laurel's heightened notice, the operator should have known of the broader problems in 4 Northeast Mains.[21]

Big Laurel also asserts that it made reasonable efforts to protect miners from roof falls. (Resp't Br. at 59–61.) Although Big Laurel exceeded the minimum requirements of its roof control plan, those minimums are not relevant where adverse roof conditions requiring additional support are present. Indeed, I have already found that the mine's roof control plan was inadequate. Big Laurel failed to sufficiently protect its miners from hazardous conditions it knew about. Although the mine rerouted its lifeline away from Entry No. 6 in 4 Northeast Mains, the operator did not close off access points to the entry as close as two crosscuts from the older fall. Big Laurel's examination books also could not warn miners of the dangers of Entry No. 6 because the mine kept no record of when hazardous conditions first appeared in the

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[20] Superintendent Moore's reaction to the discovery of another roof fall further suggests Big Laurel understood it was subject to heightened sanctions. Rather than immediately calling in the discovered fall to MSHA, Moore attempted to dissuade Inspector Scott from reporting the collapse. (Tr. 612:8–13.) Such a reaction suggests that Big Laurel's management was far more concerned with the pecuniary impact of calling in the fall than the serious risk it posed to miners.

[21] Respondent also insists that it had no knowledge of the "specific existence of a coal rider seam" in 4 Northeast Mains, and thus should not have known that the bad roof conditions existed. (Resp't Br. at 57.) Assistant Mine Manager Richardson, however, admitted knowing of the coal rider seam, and examiner Jesse Ring had seen the coal rider seam depicted on a map. (Tr. 389:6–17, 351:21–352:4.) Furthermore, Big Laurel's engineers held proof of the coal rider seam in core samples, with which the company was able to produce a general map of the seam. MSHA may not previously have demanded the core hole data from Big Laurel, but MSHA's failure does not excuse Big Laurel's own willful ignorance. The Mine Act places primary responsibility for protecting miners' safety upon the mine operator. 30 U.S.C. § 801(e).

entry.[22] In reality, Big Laurel made no notable effort to address the deteriorating mine roof in Entry Nos. 5, 6, and 7.

Of the seven factors in the unwarrantable failure analysis, only the obviousness of the violation does not weigh sharply against Respondent. Even though the extensive draw rock in the area was obvious, some of the violations were not as obvious as Cain asserted. *See* discussion, *supra*, Part V.B.2.a. Accordingly, this factor does not weigh either for or against a determination that Big Laurel's conduct constituted more than ordinary negligence.

Big Laurel had numerous signs that the mine roof was no longer stable in 4 Northeast Mains. Despite these signs, Big Laurel's management did not seek help from mine engineers to better understand the cause of the mine's repeated roof falls. (Tr. 387:16–388:21, 504:15–22.) Indeed, Assistant Mine Manager Richardson could not even recall whether the mine had a history of roof falls prior to August 2011, despite seven falls occurring in as many months. (Tr. 388:16–389:5.) Moreover, Richardson admitted that the mine did not heed MSHA's explicit warning to do more to address roof falls because Big Laurel felt its existing efforts were sufficient. (Tr. 386:20–387:15.) Big Laurel's management knew of the coal rider seam and the overmining problems at Mine No. 2, but did not believe the conditions merited any additional attention. (Tr. 389:6–21.) Undaunted by eight roof falls in as many months, Big Laurel pushed coal production without any attempt to understand the reasons for the falls. Unfazed by a direct warning from MSHA, Big Laurel pushed coal production without even notifying its safety examiners of the need for greater vigilance. Unconcerned about the potential for another fatal roof collapse, Big Laurel addressed the serious safety concerns only insofar as they threatened the mine's haulage and belt entries, and thus the company's bottom line. More than simply ignoring the signs of danger, Big Laurel made some attempt to prevent MSHA from learning about two serious roof falls within the mine. In disregarding these signs, Big Laurel placed production ahead of worker safety. This is precisely the type of aggravated conduct the unwarrantable failure provisions of the Mine Act are designed to deter.

Based on the evidence before me, I find that for Citation No. 8178522 and Order No. 8178524 Big Laurel's conduct in violating section 75.202(a) in Entry No. 5 and Entry No. 7 amounted to an unwarrantable failure to comply with a mandatory health or safety standard. For the same reasons, I also determine that Big Laurel was highly negligent in failing to address the deteriorating roof conditions throughout the No. 5 and No. 7 entries. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances").

3. Orders Nos. 8178523 and 8178525: Insufficient Examinations

For Order Nos. 8178523 and 8178525, the Secretary asserts that Respondent did not satisfy its duty under 30 C.F.R. § 75.364(b)(1) and 75.364(b)(2), respectively, by failing to identify the hazardous roof conditions during the mine examiner's weekly examination of the intake and return airways of 4 Northeast Mains. (Sec'y Br. at 44–46, 54–55.) As with the underlying roof control violations, the Secretary claims these violations were S&S and that Big

[22] Pointing to Moore's testimony, Respondent asserts it warned miners and enlisted the help of engineers. I do not find Moore's testimony credible. *See* discussion, *supra*, Part V.A.2.

Laurel's conduct constituted high negligence and an unwarrantable failure. (*Id.* at 46–50, 55–56.) Respondent asserts that it did not violate sections 75.364(b)(1) or 75.364(b)(2) because its examiner conducted a sufficient examination of the entries. (Resp't Br. at 65–67.)

a. Violation

To show a violation of sections 75.364(b)(1) and 75.364(b)(2), the Secretary must demonstrate that either no examination for hazards took place, or that the examination took place but the examiner failed to identify hazards. Here, the Secretary alleges that Ring's examination on August 31 was insufficient because he failed to notice hazardous roof conditions throughout Entry Nos. 5 and 7.

I have found that Respondent violated section 75.202(a) by failing to support extensive deteriorating roof conditions in Entry No. 5 and Entry No. 7. Although Examiner Ring stated he actively pulled draw rock during his examinations, his contemporaneous notes fail to identify any hazards. (Ex. GX–13.) Ring performed an examination of the intake and return entries of 4 Northeast Mains just hours prior to Cain's investigation, yet Ring again did not identify any safety hazard in the examination. (*Id.*) Ring's sparse note-taking was not isolated to August 31, as the mine examiner's notes do not identify with specificity any roof hazards going back to the start of July 2011. (*Id.*) Notably, Ring never noted either the prior roof fall in Entry No. 6 or the other hazardous conditions that Big Laurel says required the lifeline to be moved to Entry No. 5. (Ex. GX–13; Tr. 356:24–358:22, 361:5–362:8.) Given this evidence, I determine for Orders Nos. 8178523 and 8178525 that Ring conducted an insufficient examination of the return and intake airways on August 31, 2011, in violation of sections 75.364(b)(1) and 75.364(b)(2), respectively.

b. Gravity and S&S

Applying the *Mathies* test, Big Laurel's violation satisfies the first element. The Commission has recognized that examinations are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). The purpose of weekly examinations such as those required under section 75.364(b) is "to discover and correct conditions posing a hazard to miners" in areas not normally examined during regular preshift and onshift examinations. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 693 (July 2002) (considering predecessor provision of section 75.360(b) in the Federal Coal Mine Health and Safety Act of 1969) (citations omitted). Ring's failure to identify the deteriorating roof allowed poor roof conditions to persist and left miners with access to the dangerous areas. Thus, Ring's insufficient examination contributed to the hazard of a roof fall, satisfying the second element of the *Mathies* test. As explained above, the roof fall was reasonably likely, but not highly likely, to contribute to an injury, and that injury reasonably could be expected to be serious or fatal. *See* discussion, *supra,* Part V.B.1.b. Accordingly, the Secretary has satisfied the third and fourth elements of *Mathies*. Based on the evidence before me, I therefore conclude that for Order Nos. 8178523 and 8178525 Respondent's violations of section 75.364(b)(1) and section 75.364(b)(2) were S&S, and reasonably likely.

c. Negligence and Unwarrantable Failure

The Secretary again asserts that Respondent's conduct amounted to high negligence and an unwarrantable failure. (Sec'y Br. at 48, 56.) Respondent avers that it was not negligent because Examiner Ring discovered the roof fall on August 31 and thoroughly examined the surrounding area. (Resp't Br. at 67–69.)

In analyzing an inadequate examination for an unwarrantable failure determination, many of the aggravating factors overlap with those of the underlying violation. *See Consolidation Coal Co.*, 23 FMSHRC 588, 597–98 (June 2001) (remanding for consideration of the extent, duration, and obviousness of the underlying violative coal accumulations when assessing unwarrantable failure of an inadequate preshift examination). However, the Commission has focused on how long the operator's examination had been inadequate and whether the operator was on notice that it needed to improve its safety checks. *See Va. Slate Co.*, 23 FMSHRC 482, 492 (May 2001) (vacating an ALJ's decision of no unwarrantable failure for violating preshift requirements).

The duration of the inadequate examination significantly overlaps with the duration of the underlying violations. As Cain explained, the signs of a deteriorating roof developed over a period of weeks or months. (Tr. 99:7–25.) Nevertheless, Ring's examination notes for months contained scant details. (Ex. GX–13.) Ring never identified the location of any roof hazards, despite several serious roof falls during the period. Accordingly, the duration of the violation was substantial.

In addition, Big Laurel was on notice that its examinations were insufficient. Cain warned the operator on August 22 that it needed to improve its efforts at supporting or controlling the roof. Inherent in that demand is notice that the operator must improve its examinations to find potential hazards so they can be addressed more quickly. Big Laurel itself knew of its inadequacy, noting that examinations needed to improve. (*See* Ex. GX–27.) Despite acknowledging the need for improved inspections, Big Laurel's management never informed Ring that his work needed to improve. The company therefore made no efforts to address its insufficient examinations despite having explicit notice of its shortcomings.

The other factors for determining whether Big Laurel's behavior constituted aggravated conduct mirror those for the underlying violations. As discussed above, the undiscovered violative conditions were extensive and the danger posed by the unnoticed conditions high.

Finally, the underlying violations were not entirely obvious. Accordingly, this factor does not weigh in favor of either side.

Given these considerations, I determine that for Orders Nos. 8178523 and 8178525 Big Laurel's violations of sections 75.364(b)(1) and 75.364(b)(2) were unwarrantable failures to comply with mandatory health or safety regulations. For the same reasons, and those explained above, I also conclude that for both violations Big Laurel was highly negligent in allowing the insufficient examinations to continue unchecked for months.

4. Citation No. 8191715: The Blocked Escapeway

Section 75.380 requires that underground coal mine operators maintain a primary escapeway in a safe condition to assure passage of anyone, including injured miners. 30 C.F.R. § 75.380(d)(1); *see Maple Creek Mining, Inc.*, 27 FMSHRC 555, 556–57 (Aug. 2005). Operators must keep escapeways clear for miners to quickly exit the mine in the event of an emergency. *Mach Mining, LLC*, 35 FMSHRC 2937, 2942–43 (Sep. 2013) (citing *Am. Coal Co.*, 29 FMSHRC 941, 948, 953–54 (Dec. 2007)). Furthermore, the Commission has held that the test with respect to the use of an escape route "is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners' ability to expeditiously escape a dangerous underground environment in an emergency." *Am. Coal Co.*, 29 FMSHRC at 950 (citations omitted).

The Secretary alleges that Respondent violated section 75.380(d)(1) when it allowed a large volume of water to accumulate in the primary escapeway in 4 Northeast Mains. (Sec'y Br. at 61–62.) The Secretary further contends that the violation was S&S because the pool of water obscured debris that reasonably could cause miners traveling the escapeway on foot to trip and fall. (*Id.* at 62–63.) MSHA initially evaluated Respondent's negligence in this case as moderate, but the Secretary argues in his brief that I should raise the level of negligence based on the evidence adduced at hearing. (*Id.* at 63.) In contrast, Respondent claims the escapeway was maintained in a safe condition, and thus there was no violation of the regulation. (Resp't Br. at 70–71.) In the alternative, Big Laurel argues the violation was neither S&S nor the result of the operator's negligence. (*Id.*)

a. Further Findings of Fact

Big Laurel contends that the Secretary has not met his burden of proof of showing a violation. (Resp't Br. at 70–71.) Respondent relies on the testimony of Examiner Jesse Ring and State Inspector Jerry Scott, who traveled the affected area approximately six hours before Hughes. (*Id.* at 70.) Although Ring and Scott found water in Entry No. 5, it was less extensive than Inspector Hughes noted. (Tr. 349:1–21, 694:21–695:5.) Neither Ring nor Scott felt the water accumulation at that time made the escapeway dangerous to travel. (Tr. 339:20–24, 694:5–14.)

Although Ring and Scott suggest the water accumulation was smaller prior to Inspector Hughes' arrival, they do not refute the Secretary's evidence in support of the citation. Scott explicitly suggested that the water could have continued to accumulate in the primary escapeway after his inspection. (Tr. 693:10–15.) Hughes similarly believed the water may have accumulated in the escapeway as a result of the recent roof fall in Entry No. 6. (Tr. 255:23–256:3.) Although Big Laurel had water pumps in 4 Northeast Mains to remove water, the pumps were not addressing the cited accumulation. (Tr. 350:4–6, 304:21–305:8, 559:4–9.)

Given the evidence before me, I conclude that the water continued to accumulate in the primary escapeway after Ring and Scott left the area. By the time Hughes arrived in the area, the water spanned the entire width of Entry No. 5 for a distance of two crosscuts and in depths of up to eight inches.

b. Violation

I have determined that the water accumulation obstructed the entire escapeway for a length of two crosscuts. Therefore, the existence of a violation hinges on the question of whether the water made traveling the route dangerous for miners attempting to escape an accident in the mine. Here, the water was eight inches deep and overlaid a mine floor that was covered in draw rock. (Tr. 693:16–21.) This amount of water could hide problems on the mine floor, causing miners to trip and fall and slowing their escape from a mine disaster. (Tr. 253:5–16.) Although the inspectors were able to safely travel through the water in vehicles (Tr. 558:21–559:3), they were neither on foot nor escaping from a dangerous incident elsewhere in the mine. During an emergency evacuation, miners would likely need to move quickly through the area to seek safe passage away from danger. *Maple Creek*, 27 FMSHRC at 560 (citing 61 Fed. Reg. 9764, 9810 (Mar. 11, 1996)).

Given the evidence before me, I conclude that such a long stretch of water eight inches deep, combined with questionable conditions on the mine floor, would significantly slow miners escaping from a danger at the face of the mine, particularly miners carrying an injured colleague. Accordingly, the Secretary has satisfied the second element of a violation of section 75.380(d)(1), and thus shown that Big Laurel violated 30 C.F.R. § 75.380(d)(1) in Citation No. 8191715.

c. Gravity and S&S

Big Laurel's violation of the standard establishes the first *Mathies* prong. For the second element, I credit Hughes' testimony that the water created a trip-and-fall hazard that would slow miners' escape in an emergency.[23] (Tr. 253:11–19.) Consequently, I determine that the Secretary has satisfied his burden of proof on the second element of the *Mathies* test.

With regard to the third and fourth elements of the *Mathies* test, The Secretary contends that, given emergency conditions, the bad conditions of the escapeway would be reasonably likely to cause reasonably serious injuries. (Sec'y Br. at 62.) I have credited Hughes' testimony that, given a hurried escape from a mine accident, panicked miners would be reasonably likely to trip and fall while traversing the watery escapeway with hidden hazards. (Tr. 254:1–4.) Hughes explained that trip-and-fall accidents could result in broken bones and twisted limbs. (Tr. 253:23–254:10.) The Commission has consistently recognized that such injuries are of a sufficiently serious nature to support a S&S designation. *See, e.g., S & S Dredging Co.*, 35 FMSHRC 1979, 1981 (July 2013) (overturning a Judge's ruling that muscle strains were insufficient to underpin a S&S designation). Based on this testimony, I determine that the Secretary has shown that, in an emergency situation, the accumulated water would be reasonably likely to cause a reasonably serious injury, thus satisfying the third and fourth prongs of the *Mathies* test. Based on the evidence before me, I conclude that Citation No. 8191715 is S&S.

[23] Big Laurel emphasizes that the inspectors traveled the escapeway without incident during their investigation. (Resp't Br. at 71) Respondent again fails to address the conditions likely present in an emergency.

d. Negligence

The Secretary next asserts that the water accumulation was the result of Big Laurel's high negligence. (Sec'y Br. at 63.) The Secretary argues that Inspector Hughes was incorrect in initially assessing the violation as being the result of moderate negligence because the mine knew of the accumulation and did nothing to remedy the condition. (*Id.*) Respondent contends it was not negligent in allowing the water to accumulate, as the mine had pumps in the area to remove the water. (Resp't Br. at 72–73.)

The water largely accumulated in the hours between the discovery of the fall and the arrival of Inspectors Hughes and Cain. *See* discussion *supra*, Part V.B.4.a. The accumulation was smaller when Ring and Scott examined the area, so the mine could not appreciate the extent of the problem. In addition, Big Laurel kept pumps in the area to address similar water accumulations. (Tr. 304:21–305:2.) Although the pumps were not in use upon Hughes' arrival, the mine was prepared to address the conditions.

I determine that these factors mitigate Big Laurel's negligence. Accordingly, I conclude that Hughes' initial assessment of moderate negligence for Citation No. 8191715 is appropriate.

VI. PENALTY

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 fines will not affect the operator's ability to remain in business, and the operator abated the conditions in good faith. (Joint Ex. 1.) I further note that Big Laurel was a relatively large mine. (Tr. 631:7–11.) The Secretary proposed a combined penalty of $305,800.00 for all seven violations.

A. Citation No. 8178516, August 22, 2011

I have determined that Big Laurel violated section 75.202(a), and that the violation was S&S and the result of the operator's moderate negligence.

The Secretary has proposed a specially assessed penalty of $52,500.00 for Citation No. 8178516, asserting that this substantial penalty is necessary to deter the operator from committing future violations of this standard. (Sec'y Br. at 63–67.) At hearing, Cain testified that he suggested the enhanced penalties because of the mine's lack of effort to prevent future falls. (Tr. 103:20–104:12, 107:21–108:6.) Inspector Hughes, however, expressed uncertainty about the need for such an enhanced penalty. (Tr. 294:7–296:21.) In the two years prior to the violation, the mine received 38 violations under section 75.202(a). (Ex. GX–26.) I recognize that section 75.202(a) is a widely cited standard. (Ex. R–12.) The August 22 roof fall was the latest in a line of serious roof falls, however, not minor violations of the standard. (*See* Ex. GX–27; Ex. GX–28.) Nevertheless, this fall in 1 North Mains was nearly two miles away from all

but one of the prior falls in Mine No. 2 and did not evidence the same adverse roof conditions found in 4 Northeast Mains. Furthermore, Inspector Cain warned Big Laurel with Citation No. 8178516 of substantially enhanced penalties for any *subsequent* violations of section 75.202(a). Given these factors and the mitigating evidence that supported a finding of moderate negligence, the Secretary's proposed penalty is not appropriate. Considering all of the facts and circumstances of this matter, I assess a penalty of $25,000.00 for this citation.

B. Citation No. 8178521, August 31, 2011

The Secretary has proposed a penalty of $6,996.00 for Citation No. 8178521. I have determined that Big Laurel violated section 75.223(a)(1) and that the violation was S&S and the result of Respondent's moderate negligence. Big Laurel received one prior citation for violating 75.223(a)(1) in the two years prior to August 31, 2011. (Joint Ex. 1.) I reduced the likelihood determination from "highly likely" to "reasonably likely" and the negligence finding from "high" to "moderate." Given the serious risk posed by roof falls, however, these changes do not justify a significant reduction in the penalty. Considering all of the facts and circumstances involved in this matter, including the parties' admissions regarding the six civil penalty criteria, I determine a penalty of $6,000.00 is appropriate for this violation.

C. Citation No. 8178522 and Order No. 8178524, August 31, 2011

The Secretary has proposed a penalty of $70,000.00 each for Citation No. 8178522 and Order No. 8178524. In each instance, I have upheld the violation and found it to be S&S and the result of Respondent's unwarrantable failure to comply with section 75.202(a), but reduced the likelihood from "highly likely" to "reasonably likely." In the two years prior to the violation, the mine received 39 violations under section 75.202(a). (Ex. GX–26.) Big Laurel's conduct was unjustified. Nevertheless, given the reduced likelihood and the substantiated questions regarding the obviousness of the cited conditions, I assess a penalty of $63,000.00 for each violation.

D. Order Nos. 8178523 and 8178525, August 31, 2011

The Secretary has proposed a penalty of $52,500.00 each for Order No. 8178523 and Order No. 8178525. In each instance, I have upheld the violation and found it to be S&S and the result of the Respondent's unwarrantable failure to comply with section 75.364(b)(1) and section 75.364(b)(2), respectively, but reduced the likelihood to "reasonably likely." I note that Big Laurel had no previous violations of 30 C.F.R. § 75.364(b)(1) in the two years prior to this inspection, and two prior violations of 30 C.F.R. § 75.364(b)(2). Because I have reduced the likelihood and found the conditions to be marginally less obvious than the Secretary asserted, I assess a penalty of $47,000.00 for each violation.

E. Citation No. 8191715, August 31, 2011

The Secretary has proposed a penalty of $1,304.00 for Citation No. 8191715. Turning to the six statutory penalty criteria, I have found that Big Laurel violated section 75.380(d)(1), and that the violation was S&S and the result of Big Laurel's moderate negligence. Big Laurel's violation history reveals it received one citation for violating section 75.380(d)(1) in the two

years prior to the citation in question. Considering these factors, as well as the mine's large size, ability to pay the penalty, and its good faith in abating the conditions, I determine the Secretary's proposed penalty of $1,304.00 is appropriate.

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that:

Citation No. 8178516 is **AFFIRMED** as written;

Citation No. 8178521 is **AFFIRMED** as S&S, but **MODIFIED** to change the likelihood determination to "reasonably likely" and reduce the level of negligence from "high" to "moderate;"

Citation No. 8178522 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to "reasonably likely";

Order No. 8178524 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to "reasonably likely";

Order No. 8178523 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to "reasonably likely";

Order No. 8178525 is **AFFIRMED** as S&S and an unwarrantable failure, but **MODIFIED** to change the likelihood determination to "reasonably likely";

Citation No. 8191715 is **AFFIRMED** as written.

WHEREFORE, Big Laurel Mining Corporation is **ORDERED** to pay a penalty of $252,304.00 within 40 days of this Decision.[24]

Alan G. Paez
Administrative Law Judge

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/lct

[24] Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.