

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
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March 1, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2009-755
Petitioner	:	A.C. No. 15-02709-176578-01
v.	:	
	:	Docket No. KENT 2009-756
	:	A.C. No. 15-02709-176578-02
HIGHLAND MINING COMPANY, LLC,	:	
Respondent	:	Highland 9 Mine

**DECISION**

Before: Judge William B. Moran

Appearances: Neil A. Morholt, Esq. on behalf of the Secretary of Labor  
                  Michael T. Cimino, Esq., Jackson Kelly, PLLC, on behalf of Highland Mining  
                  Company, LLC

As noted in the caption, this decision involves two dockets. Docket KENT 2009 0755 alleges two violations at the Respondent Highland Mining Company's ("Highland" or Respondent), Highland 9 Mine. The first, a section 104(d)(2) order, **Order Number 8489815**, alleges a failure to follow the approved roof control plan, in violation of 30 C.F.R. § 75.220(a)(1). That Order, issued on December 3, 2008, alleged that the violation was significant and substantial, involved a high degree of negligence, was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty. The proposed assessment was \$15,971.00.

The second violation contained within this docket was also a section 104(d)(2) order, **Order Number 8492281**. Issued on December 9, 2008, it cited the mine for accumulations of combustible material in the 5B belt conveyor entry, alleging that it constituted a violation of 30 CFR §75.400. The gravity and negligence were designated with the same evaluation given for the roof control violation described next above. Thus, the order was marked as significant and substantial, with high negligence, that it was reasonably likely to occur and would result in lost workdays or restricted duty. The issuing inspector also considered the violation to be an unwarrantable failure. The proposed assessment was \$32,810.00.

For Docket Number KENT 2009 0756, one out of some 33 alleged violations remained in dispute. This was a 104(a) citation issued on December 9, 2008, for operation of the 5 B belt

conveyor not being maintained in safe operating condition. Marked as significant and substantial, the citation, **Citation Number 8492282**, also listed the gravity as “reasonably likely” for an injury to occur, that it could reasonably be expected to result in lost workdays or restricted duty and that the negligence was considered to be high and the proposed assessment set at \$14,373.00.<sup>1</sup>

For the reasons which follow, the Court affirms the violations, and each of the special findings contained in the citation and orders.<sup>2</sup> It also adopts each of the proposed penalties, and therefor the total civil penalty to be imposed for the three violations is \$64,752.00.<sup>3</sup>

In order to set the stage for understanding the Court’s summary and view of the testimony presented, the following overview is presented.

The section 104(d)(2) order, **Order Number 8489815**, alleged a failure to follow the approved roof control plan in that there were nine (9) rows of roof bolts where the spacing between the bolts was too wide. Highland does not dispute the excessive widths existed. Instead it contends that as the roof was in relatively good condition and as the condition was difficult to detect, the order should be reduced to a 104(a) citation, deemed non S&S, and as unlikely to result in an injury.

For **Order Number 8492281**, a section 104(d)(2) Order, Highland was cited for accumulations of combustible material in the 5B belt conveyor entry, in violation of 30 CFR §75.400. Highland disputes both that the violation was unwarrantable and the significant and substantial designation. Included among a host of defenses asserted by Highland are that the

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<sup>1</sup>The Court’s original decision in this case incorrectly listed the proposed assessment as \$15,971.00.

<sup>2</sup>The Court fully considered the post-hearing briefs. Any contention not expressly discussed in this decision means that it was rejected by the Court.

<sup>3</sup> The parties stipulated that the proposed penalties will not affect the Respondent’s ability to continue in business, that the Respondent is engaged in mining and that it affects interstate commerce, that it is subject to the 1977 Mine Act, that the Court has jurisdiction to hear the dockets, that all citations/orders issued in connection with these dockets were properly served upon the Respondent, that the Respondent demonstrated good faith in abating the violations, that the proposed data sheet as well as the contested assessment sheets for these dockets, as contained within Exhibit A, and the R 17 Assessment History Report, may be admitted into evidence. Tr. 11. Also, the parties have stipulated that there was not a clean inspection as of the last D order immediately prior, which would have been August 29, 2008. That is, there was not a clean inspection prior to the issuance of the two orders involved in this case. Tr. 11. The Petitioner asserts that the predicate citation was an August 28<sup>th</sup> Order. Respondent’s Counsel agreed that between August 29, 2008 and December 3, 2008, with the latter date being the first of the two D orders in this case, there was no clean inspection. Thus, Respondent concedes that the December 3, 2008 order was correctly classified as a D 2 Order, but does not concede that there was no clean inspection between August 2007 and August 2008. Tr. 12.

condition was attended to in a timely and appropriate manner, that the problems were not as serious nor as extensive as MSHA claimed, and that Highland had no prior notice that this type of accumulations problem was of concern to MSHA.

Last, a 104(a) citation was issued for the 5 B belt conveyor not being maintained in safe operating condition. It was issued in conjunction with the issuance of the D Order, No. 8492281. Marked as significant and substantial, the citation, **Citation Number 8492282**, was also listed as involving “high negligence” on Highland’s part. Respondent disputes not only both of those special findings, but also the conditions MSHA claimed to exist with the belt in that it disputes that the belt was cutting or rubbing the belt structure. MSHA believes that, together, the Citation and the Order increased the likelihood of a reasonably serious incident occurring underground, namely a fire or an explosion, which would have affected the 18 miners working inby.

### FINDINGS OF FACT

The testimony involving the allegation that Highland failed to follow the approved roof control plan, in violation of 30 C.F.R. § 75.220(a)(1), pertaining to Docket KENT 2009 0755 began with MSHA inspector Tony Fazzolare. That inspector issued a section 104(d)(2) Order on December 3, 2008, alleging that the violation was significant and substantial, involved a high degree of negligence, was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty. **Order No. 8489815**, Gov. Ex P 13, the roof control plan in effect at the time, P 14, Fazzolare’s notes and P 15. Tr. 425.

Inspector Fazzolare has a long history of employment in mines and as a mine inspector. Tr. 426-427. Fazzolare stated that a flexible conveyor train or flexible belt, described as an FCT unit, differs in the entry width in that a belt entry can be 21 feet wide, as opposed to the usual belt entry maximum of 20 feet. Tr. 431. An FCT unit cuts at angles. That is, crosscuts are cut on angles to allow the FCT unit to move from entry to entry more easily because such FCT units can’t make a 90 degree turn. Tr. 431. On the day in question Fazzolare was at the mine to do a respirable dust survey for the Number 4 unit, which is an FCT unit. Tr. 432. Fazzolare began by looking for any imminent dangers in the No. 9 entry. However when he continued upon reaching the No. 5 entry he noticed a row of bolts going down the middle that were crooked. With the miners’ representative, Mr. Alby, he measured the distance between the bolts, finding nine rows, continuous rows, that were wider than permitted under the roof bolt plan. The No. 5 entry is a belt entry, which has a 21 foot width. Tr. 436. Fazzolare used a standard map of a typical room and pillar arrangement so that he could record what he observed about the bolt placements. Tr. 437. Exhibit P 14. Thus, Fazzolare recorded on the map to show the nine continuous rows that were wider than 5 feet. Tr. 437- 438. Specifically, Fazzolare found four rows with spacing approximately 5 feet 7 inches, two rows with 5 feet 1 1/2 inches, and three rows with spacing of 5 feet 5 inches. Tr. 438.

Fazzolare found this at the first row inby the last open crosscut. Tr. 439. Typically, the miner operator, the FCT operator and the miner helper will be in the entry. Tr. 439. While that entry was an active one, they were not removing coal at the time Fazzolare spotted the problem. Tr. 439. Fazzolare’s notes also indicated that he marked the surveyor tag where he found the problem.

This was at approximately tag 10 plus 40. Tr. 440. The inspector knew when the area had been bolted because the preshift examiner had walked under it and placed his initials on the left rib. Thus he knew it was bolted prior to 1:45 in the afternoon because the preshift examiner's initials were inby the area and the examiner wouldn't have gone in the area unless it had been bolted.. Tr. 441.

Fazzolare noted that on his map he marked areas of concern with the roof in that area. These consisted of a "moderate slip in the top." This is sometimes described as a cutter or runner, and involves conditions where draw rock has been breaking and falling. Tr. 442. Fazzolare remained concerned about those "slips" because, while the area at tag 9 plus 52 had been taken of, he was concerned that the slip problem could continue inby. Tr. 443. Thus, this condition caused Fazzolare to have greater concern about the roof bolt spacing issue. Tr. 445. The reference he made to "draw rock" was part of the slip issue. At any rate, upon issuing the D Order, the unit was shut down and the bolts installed. Tr. 448. Order Number 8489815 was issued by Fazzolare on December 3, 2008 for failing to follow the approved roof control plan, in that there was wide bolt spacing in the Number 5 entry. Tr. 451.

While the Plan requires that roof bolts be *no wider* than 5 feet, he found 9 continuous rows that were in excess of the 5 foot limit. Tr. 451. The standard cited was 75.220(a)(1), the requirement to submit and follow an approved roof control plan. Tr. 452. Fazzolare was concerned that with the slip outby, the slip would continue in the wide bolt spacing inby and that part of the roof could fall. Tr. 452. The inspector considered it "reasonably likely" an injury would occur, as there had already had part of the roof fall on the previous crosscut outby. Tr. 452. If hit, he believed a miner would suffer lost work days or restricted duty. Tr. 453. However, at the hearing, he believed that one person was a more realistic number of the number exposed, not ten as he originally listed. Tr. 453. In terms of negligence, which he considered to be "high," the inspector noted that the preshift examiner, who was also the previous face boss, missed this violation of the plan. Tr. 453. It was an obvious condition, Fazzolare believed, because of the wavy way the row went in. That is to say, because the bolts were not in a straight line, he was able to 'eyeball' the problem, spotting it right away. Tr. 453. The condition had existed for at least one shift, because it had been bolted on the day shift. Tr. 454. Fazzolare was sure the problem was not outby the last open crosscut because he used a map sketch to record his observation. Tr. 455.

Although Counsel for Highland suggested that perhaps there is no need to record problems in a preshift exam if the problem will be corrected immediately, Fazzolare did not agree with such a hypothetical practice. Tr. 462. The inspector noted that he cited Highland for failing to recognize the obvious hazard, not for ignoring a condition that it knew about. Fazzolare also believed that the second shift foreman should have seen the problem as well. Tr. 464.

The Respondent's main defense for this violation appears to be that it was not a knowing violation on the part of those that should have seen the spacing problem. Tr. 460- 465. Although Fazzolare agreed that Highland addressed the slip in No. 5 entry by "spotting up" roof bolts, this occurred after the draw rock had fallen out. Tr. 470. Although Respondent noted that the draw rock had already fallen out, the inspector's concern was that the slip would continue towards the face and therefore to the rows that were too wide. Tr. 472. While an attempt was made to have the

inspector appear to be too rigid, by asking him if roof bolts had to be “perfectly spot[ted] exactly 5 feet apart from each other,” he aptly noted that one can always space those bolts at *less* than the maximum allowable width. Tr. 473. When asked, Fazzolare stated that he *did* believe that the 9 rows of improperly spaced roof bolts affected the integrity of the roof support. Tr. 476. Although he was presented with a MSHA procedure instruction letter that allowed for intermittent roof bolt spacing exceedances of less than 6 inches, Fazzolare did not believe that applied here because the letter only allows for “occasional variances,” not 9 continuous rows of spacing problems. Tr. 479.

Highland called Slade Kuykendall who was a section foreman for the second shift at the mine on the day in issue. Tr. 483-484. Kuykendall stated that the first shift pre-shifter called out his report to him that day but there was no mention of any roof bolting spacing issue mentioned. Tr. 485. No miner advised him of the bolt spacing problem nor did he note the issue. Tr. 485-486. Had he observed the problem he would have corrected it immediately. Tr. 486. He believed that the area had been bolted on the previous, that is the day, shift. Tr. 487. He did not agree with Fazzolare’s opinion that the slip<sup>4</sup> was running towards the face. Rather he believed it was running into the crosscut. Tr. 490. Although Kuykendall stated the improper bolt spacing was not obvious, he noted that he had been no closer than 50 feet to the condition and that, at that distance, it was hard to see such a spacing issue. Tr. 491.

Jeffrey Wilkins was also called by Highland. He was employed by the mine as a section foreman on the day shift on December 3, 2008. Tr. 500. His duties include performing preshift exams and roof bolts are part of that. Tr. 501. No one informed him of the roof bolt spacing problem and he offered that the bolters would not tell him if they bolted with spacing too wide. Tr. 503-504. He also expressed that he would not be able to note a bolt discrepancy of 7 inches; he would need a tape measure to tell. Tr. 505. Despite 36 years of mining experience, he has never visually observed during a preshift exam an area where the bolts are spaced too wide. Tr. 507.

Government witness Felix Caudill, an MSHA ventilation specialist in the Madisonville office, District 10, has long experience in mining, both with MSHA and in private employment.<sup>5</sup>

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<sup>4</sup> Kuykendall referred to the condition as a “cutter,” while Fazzolare called it a “slip.” Whatever term is applied, it refers to a roof condition. In Kuykendall’s opinion this condition is not a problem unless the roof is “working,” that is, making noise. One can hear the pressure. Tr. 489.

<sup>5</sup> The Government’s first witness was MSHA coal mine inspector Archie Coburn. His testimony is placed in a footnote because the court’s determinations here are not dependent upon that testimony. However, the information in this footnote still constitutes findings of fact. Coburn is quite familiar with the Highland 9 mine. On September 19, 2008 during the closeout meeting at the mine, MSHA advised that it would have to step up its enforcement due to the number of section 75.400 accumulations violations. Tr. 38. Coburn asserted that Highland official Mr. Milburn acknowledged that the mine had a problem with accumulation on the belt lines and that he was planning to hire more belt cleaners to keep the spills cleaned up. Tr. 39-40. MSHA inspector Charlie Jones notified Highland at that time that its negligence would go up if any more 75.400 violations were issued. Tr. 43. MSHA Inspector West, who issued the citation and order for two of

His experience includes being a belt examiner. Tr. 59. Caudill is familiar with the Highland # 9 ventilation system. That system employs a single exhaust fan. Such an exhaust system creates a negative pressure because it pulls air out of the mines. Tr. 64. Caudill was at the Respondent's mine on December 9, 2008, along with his supervisor, Inspector David West. He was there to go to the number 5 unit. That unit is a split air unit, meaning that intake air comes up the middle entries and then splits at the face, from which it exits, to a return on each side.<sup>6</sup> Tr. 69. West and Caudill traveled to the number 5 unit at which point West decided to walk the 5 B belt while Caudill went to the 5A tail.<sup>7</sup> Caudill found an accumulations problem at the 5A belt<sup>8</sup> then

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the three violations addressed in this decision, *was not* present when Charlie Jones put Highland on notice in September 2008 that 75.400 violations were not excusable and that its negligence would increase and he stated that his determinations regarding the violations addressed in this decision were was not based on Jones' warning. Tr. 248-249. Although the Court has determined that the circumstances surrounding the order and citation issued here are sufficient to make the needed determinations without it, and while West's determinations as to unwarrantability were not based on the earlier warning about the mine's accumulations problems, nevertheless it is fair to consider that factor *as an independent additional* basis for the Court's findings in that regard. Highland's Scotty Maynard admitted in his testimony that the mine was advised about the 51 accumulations violations issued to it during the fourth quarter of 2008. Tr. 405-406. The contention that the majority of those accumulations violations did not involve belts is, in the Court's view, a distinction without meaningful difference, because they did pertain to the problem of accumulations, wherever they happened to occur.

<sup>6</sup> In that arrangement the primary escapeway is in the main intake. The secondary escapeway is in the entries that are the belt entry and the supply road entry. They are separated from the return and the primary by a solid concrete block stopping which is built in the crosscuts between those entries. Tr. 70.

<sup>7</sup> The 5 B head drive dumps on to the 5 A tail; that is, coal coming off the 5 B dumps on to the 5 A. Accordingly, the 5 A tail is closer to the portal and as one goes in by the 5 B belt is next. Tr. 72. At the 5 A tail, Caudill found the last 4 bottom rollers to be turning in loose coal and coal fines. This problem had been "cleaned halfway across," but the job had not been completed. Tr. 72. The accumulations were 3 feet long, a foot wide and 8 to 10 inches deep and he noted that the accumulations were cupped around the bottom rollers. Tr. 73. These were accumulations of coal and a bottom roller was turning in direct contact with the accumulations, at least half-way across. Significantly, the mine was running coal at that time and a bottom roller running in coal creates the hazard of a frictional point. That is, such coal provides the fuel and the friction provides the heat. As there was also air, that completes the "triangle" for a fire to occur because one has heat, fuel and air. Tr. 73-74. Caudill stated that Respondent's employee, Troy Cowan, who was with him at that time then contacted the belt cleaners to come there and start cleaning those belts. Tr. 74.

<sup>8</sup> Although the Respondent objected to the introduction GX P 5, involving the 5A belt, as this case involves alleged problems with the 5B belt, the exhibit was admitted because the 5A belt is essentially continuous with the 5 B belt. The 5 B belt is adjacent, that is, one crosscut over to the supply road. The Court concluded that, given the proximity to the 5B belt and that the problem was

proceeded one crosscut over, to the supply road and from there started traveling towards the No. 5 unit until he met up with Inspector West at crosscut 14. Tr. 77. Caudill then walked the distance between the supply road and the belt entry, at crosscut 15. At that time West told him he had some 20 bottom rollers turning in coal. Because of that, West had him start at the tail of that belt (i.e. the area closest to the unit) and walk outby to meet him. Tr. 78.

Caudill then found loose coal at crosscut 63, along with coal loading up on one side of the belt, causing the belt to run up on the structure from the tail to crosscut 54, a total of 15 crosscuts. Tr. 79. Caudill noted that finding rollers running in loose coal at crosscut 63 is the same problem he observed at the tail of 5A. Tr. 80. In sum, Caudill found bottom rollers running in loose coal at crosscut 63 and misalignment running a distance of 15 crosscuts.<sup>9</sup> Tr. 81. He then met Inspector West at crosscut 63. At that point, West told Caudill to continue with his ventilation review.<sup>10</sup>

A primary defense of the Respondent is that it was diligently addressing the accumulations issue and it points to the belt clean-up work being performed by miner Cavanaugh at the time West identified them. In this regard Respondent tried to have Inspector Caudill concede that Cavanaugh

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detected at essentially the same time that the problems on the 5B were found, and that the same class of problems was involved, coal accumulations, the 5A finding is useful, contextually, to evaluating the problems alleged along the 5B and it is also pertinent to assessing the credibility of the conditions claimed by the inspectors.

<sup>9</sup> Caudill found rollers turning in coal at crosscut 63 but no other rollers turning in coal. Tr. 96. He could not say if those rollers were warm or hot to the touch. Tr. 97. He also observed that the metal frame was shiny from the belt having rubbed against it, although his notes did not include that finding. Highland did not dispute that there could be shiny frames. Instead it argued that such conditions were old, having occurred from the belt frames' use in prior locations. Tr. 98.

<sup>10</sup> In proceeding with his ventilation review, Caudill took air intake readings and in doing that he learned that there was belt air traveling to the face. Tr. 85. One is not permitted to use belt and supply road air to ventilate the faces. Tr. 85. As there was more air going out than was coming in, Caudill knew there was belt air going to the face. Tr. 86. A smoke tube employed by Caudill confirmed that the air was going inby, through the airlocks and straight to the intake. Tr. 86-87 and GX P 6, the citation he issued for belt air going to the face of the No. 5 unit. Although the Respondent objected to this information, as the ventilation violation is not in issue here, the Court concludes that it is relevant, contextually, as it shows the close interrelationship which can occur between belt and ventilation issues and hence it speaks to the importance of addressing coal accumulations. Caudill listed 18 persons affected because that is the number of miners on that unit. Tr. 89. He also issued a violation for an airlock constructed using nails and spads, as opposed to framed on wooden frames or hilti nails. The mine's use of that arrangement allowed air from the belt to enter the intake air at that unit. Tr. 91.

must have been doing his job, addressing the 5B belt accumulations. However Caudill did not oblige with that view, responding that if West came behind Cavanaugh and still found 20 bottom rollers turning in coal from crosscut 1 to crosscut 15, and Cavanaugh had already been there, then that miner “evidently [ ] hadn’t done what he was supposed to do.” Tr. 104.

Further, when it was asserted that Caudill must not have been claiming that West found 20 rollers running in coal from crosscut 3 to crosscut 15, Caudill maintained that in fact *was* his assertion and that it was reflected in his notes. Tr. 104-105. Those notes reflect that he met West at crosscut 14 and that there were “[t]wenty bottom rollers in coal.” Tr. 105. While Respondent’s counsel suggested that *the location* of those 20 rollers wasn’t explicitly stated in his notes, Caudill advised they could only be between crosscut 3 and 15 because West had started at crosscut 1 and Caudill had met him at 14. Tr. 105.

MSHA Inspector David West, who has a bachelor of science degree from the University of Kentucky in mining engineering and some twenty years of underground mining experience in private industry before starting work with MSHA in 2003 is presently the ventilation specialist supervisor in the Madisonville district office. Tr. 128-130. As noted, Felix Caudill is one of the two ventilation specialists that work for him. Tr. 131. West, like Caudill, is familiar with the Highland # 9 mining ventilation system. Tr. 132. In this regard, he noted that the mine uses a main exhaust fan in its negative pressure arrangement. In the negative or “exhaust” system normally belt air and the supply road air will be travelling inby and dumped into the return air course *before* it gets to the units. Tr. 133.

West testified about the events of December 9, 2008 at the Highland Mine.<sup>11</sup> Upon arriving at the mine at 7:10 a.m., among other tasks, he looked at the preshift books. This included the belt examination book entry for 12/8/08 on second shift which listed that the 5A tail was wet and dirty and the 5B header to crosscut 15 was black and that the header and tail at crosscut 41 to 60 was “dirty”<sup>12</sup> and bottom roller 19 and a half, 22 and a half.” Tr. 139.

A reference to black means that there is a good possibility that there is float coal dust or coal dust in the area. This is dangerous because if ignited or put in suspension and ignited, one could have a fire or explosion. If coal dust is in direct contact with a frictional or heat source, a fire can occur. Tr. 139-140.

West also noted that the belt examiner listed “5A cleaned spill at head and tail area. 5B cleaned head 41 to 46, 58 to 60.” Those were listed as corrections, reflecting what had been cleaned. Tr. 140. Those corrections were written on the second shift on December 8, 2008 or the shift prior. Tr. 141. West agreed that it is possible that second shift corrections are actually to correct the conditions that are listed during the day shift. Tr. 141. As to any corrections being made during the third shift on December 9, 2008, West explained that when he arrived at the mine, the

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<sup>11</sup> GX P 8 reflects the notes on that date.

<sup>12</sup> In West’s experience, a reference that the header and tail at crosscut 41 to 60 are “dirty” means that the belt needs to be shoveled. Tr. 140.



third shift was still in the mine, that is, they had not come out yet. Tr. 141. Therefore if that third shift had done any corrections, they likely had not put them in the belt books at that time.

After reviewing the books, West, accompanied by company representative Troy Cowan and others, entered the mine. As there were some hazards listed in the record book,<sup>13</sup> West stated that it was his intention to go to the 5B belt first, to be sure that the area had in fact been cleaned up and rock dusted. Tr. 154. <sup>14</sup> West's inspection of the 5 B belt started at the drive and proceeded inby, that is, heading towards the No. 5 Unit. Tr. 153. At this time West was checking to see if the hazards, as listed in the book outside, such as the note that crosscut 3 to 15 was black in color, had been corrected. Tr. 153. West found some belt cutting into the framing between crosscut 2 and 3, that is, the bottom belt was cutting into the roller stands. The belt *was operating* and it had cut into the stand about a half inch. Tr. 154. West then felt the belt frame with his hand and found that it was hot. Tr. 155. West added that, from crosscut 3 on inby as far as he could see, the belt was black in color from rib to rib and there was float coal dust on the belt framing. The entry at that location is 19 to 20 feet wide and he saw float coal dust from crosscut 3 to 15. That is a length of about 840 feet, and the float coal dust was about 1/16 to 1/8 inch in depth. Tr. 155, 160. The Court believes that it is helpful, in appreciating the scope of this problem, to envision a length of nearly 3 football fields. Importantly, West observed no one as he traveled that distance. Tr. 160. West also observed 20 bottom rollers running in coal and coal dust between crosscuts 3 and 9. West then confirmed that what he observed was coal by digging under the bottom rollers. Tr. 156. West stated that the coal accumulations underneath the rollers were black from crosscut 3 to 9 were cupped around the rollers, "basically submerging them." Tr. 157. He explained that this creates a fire hazard due to frictional heating and the rollers moving in coal causes it to become more powdery, causing float coal dust. Tr. 158.

Between crosscut 6 and 7 West also found the bottom belt cutting into the frame. Tr. 158. This is another fire source and there was float coal dust on the frames too. Tr. 159. West also found the belt rubbing against the framing at three additional places between crosscut 11 and 12. Tr. 159. At that location it felt warm to hot to the touch. Tr. 159. Concerning that 840 foot distance, West opined that since it was already in the examination book, the mine operator knew of the problem and it should have been rock dusted on the third shift prior to production beginning on the day shift. Tr. 160. In fact, West suggested that it could have been rock dusted even earlier, that is, on the second shift after the examiner found the condition. Tr. 161. This earlier action was warranted, West believed, because if the examiner found the belt black in color, that examiner should have notified the mine foreman right then. Tr. 161. It was West's opinion that the condition had existed for two

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<sup>13</sup> West confirmed that before he entered the mine that day he had viewed the inspection reports and with those in mind he was looking particularly to see if those problems had been corrected. West agreed that one of the things he noted in that report was the presence of float coal dust. The belt running on a frame and the bottom roller running in coal were not listed in the report. Instead, he discovered those things during his inspection. Tr. 157.

<sup>14</sup> On the way to the 5B, a loose rib was discovered and a citation was written for that condition. Tr. 151.

shifts. Tr. 161. The basis for this view was that the belt was examined some time during the second shift on the 8<sup>th</sup>. That is uncontested. West then arrived at a time into the morning on the 9<sup>th</sup>. Therefore, all of the third shift had passed and part of the prior day's second shift and part of the following day shift on the day he was there. Adding those together, the time elapsed totals nearly two shifts. Tr. 161.

Upon discovery of this 840 foot area, West found Troy Cowan, the mine's ventilation supervisor, along with the miners' representative and Felix Caudill and he then issued an order and hung his red tag<sup>15</sup> at crosscut 3. Tr. 161. Having found those problems, West then made the decision that he needed to walk the rest of the belt. Tr. 162. He accomplished this by teaming up with Caudill, sending him to the tail piece of that belt and having him walk from there to him, that is walking outby towards West, while West started at crosscut 15 and started walking inby towards Caudill. Tr. 162. In that process, West next found coal under the belt 4 inches deep at crosscut 21 to 26. This encompassed a distance of about 350 feet. West explained that this was coal and coal dust and that it had been there for quite awhile, by which he meant one to two production shifts with the belt running, as it takes time for a buildup of 4 inches to accumulate. Tr. 162-163. Following that, from crosscuts 30 to 38, West observed 4 inches of coal under the belt. That distance, 8 crosscuts, amounts to 560 feet. Tr. 164. This too would have existed for one to two production shifts. Tr. 164. Then, from crosscut 39 to 41, a distance of about 140 feet, he found 3 bottom rollers running in coal and the belt on the supply road side was not level, causing it to spill coal. Tr. 164. Showing his fairness and attention to detail, West volunteered that at that location only 3 bottom rollers were observed to be running in coal. Thus the entire 140 feet was not running in coal. Tr. 165. However there was float coal dust there, 1/16 to 1/8 inch deep, and on the belt frame, rib to rib. The coal dust, as opposed to the rollers running in coal, was not limited, because it was there over the 140 foot distance and its 20 foot width. Tr. 165.

Again, West stated that there was no one working in that area, so the problems were not being addressed. Next, West spoke to crosscuts 43 to 44, where he found 4 inches of loose coal under the belt.<sup>16</sup> Tr. 166. It was not until crosscut 49 that West observed anyone working on the belt. Thus, he computed that he walked some 3,430 feet, or more than 6/10th of a mile, before observing someone working on the belt. Tr. 167. At that crosscut, No. 49, he saw Perry Cavanaugh, who informed West that he was shoveling the belt. Tr. 167. This was around 10:45 a.m. Tr. 167. Cavanaugh told West that he was given a list of places to shovel that morning at the start of his shift and stated that he spot cleaned the 5B belt drive to crosscut 3 and then moved to crosscut 41. Tr. 168-169. Although Cavanaugh told West that he had shoveled from crosscut 41, West found accumulations at crosscuts 43 and 44. Tr. 169.

West noted that Cavanaugh was wet from sweat, indicating that he had been working hard that day. West concluded that having a single man deal with the accumulations was not enough

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<sup>15</sup> The red tag signifies a closure order for a particular area which has the effect of taking such area out of service. Tr. 162.

<sup>16</sup> The distance between two crosscuts is about 70 feet. Tr. 167

because they were too extensive. Tr. 169. The Court agrees with that conclusion as well. Further, in West's estimation, the problem was not solely about shoveling; rock dusting also needed to be performed. At the time West met him, Cavanaugh still needed to shovel eleven more crosscuts, a distance of about 770 feet. Tr. 170. Again, it is useful to envision a length of 2 and ½ football fields, a significant distance. West believed it would have taken Cavanaugh at least the rest of his shift to complete the shoveling. That is to say, to shovel the areas cited in the belt inspection record from the second shift of December 8, 2008. Tr. 170. Given the amount of workers and the time ultimately expended to correct the accumulation problems, West's estimate was too modest. Until West had 'red-tagged' the belt that morning, issuing his D order, the mine had been producing coal at the face. Tr. 171. It was West's view that if the problems he found had been addressed at the start of that day shift, it would have taken seven or eight men about the entire shift to correct the problems.<sup>17</sup> Tr. 172. West stated, without equivocation, that the mine should not have been running coal until the problems listed in the belt inspection record had been corrected. Tr. 172. The Court, finding West's accounting of the problems credible, agrees.

Following West's meeting with Cavanaugh, he discovered more problems. From crosscut 50 to 51, there were two bottom rollers running in coal and there was float coal dust 1/16 to 1/8th of an inch deep. Float coal was on the frame as well. Tr. 172. West then met up with Caudill at crosscut 53. Caudill informed West of the problems he saw of the belt rubbing the frame on the belt entry from crosscut 53 to the tail piece, in twenty locations and this was recorded by West in his notes. Tr. 174. Caudill also reported to West that he found float coal dust between crosscuts 62 through 64 and that it was 1/16 to 1/8 of an inch deep. When the Court asked if that was a significant amount of coal dust, West advised that it has been shown that a lot less than that, probably only half what was found, can cause an explosion if it gets suspended in the air. Tr. 174. West later learned that the mine assigned 14 people to correct the conditions that he and Caudill found on the 5 B belt and that it took them 5 hours to correct the problems. Tr. 176, 185. That totals about 70 man hours and accordingly the Court agrees with West's characterization that the correction required an extensive amount of time.

Referring to his contemporaneous notes, West related that the rock dusting began on that day at 12:45 p.m.. Tr. 179. The rock dusting started out by the airlocks, at the temporary stoppings just out by the tail piece, in the belt entry. Tr. 180. This resulted in inundating the area with rock dust up to and including the last open crosscut on both sides of the unit. Tr. 180. Thus, rock dust was visible in the air, and it had traveled through the air locks on to the unit and then mixed with intake air and traveled to the last open crosscut and from there to both sides of the unit.<sup>18</sup> Based on those

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<sup>17</sup> West's estimate was based on his personal observations and did not take into account Caudill's observations. Accordingly Caudill's observations of problems would be in addition to those West observed. Tr. 173.

<sup>18</sup> Regarding Inspector Caudill's citation, No. 8492213, Gov. Ex. P 6, alleging that rock dust inundated the last open crosscut, Highland's Cowan later stated that the 5B tail piece on that day was in by the airlocks. Under the mine's plan it was allowed to have the tail piece just in by the airlock and thus it was about 40 feet in by the airlock curtain. Tr. 342. Thus, Cowan asserted that if

observations, West knew that some of the belt air was traveling towards the last open crosscut on the unit. Tr. 181. That meant the belt air had a higher negative pressure than the primary escapeway on the main intake that was traveling to the unit. With that situation, belt air and supply road air is trying to get to the last open crosscut on the unit.<sup>19</sup>

Around 3:25 p.m. that day the conditions on the 5 B had been corrected and West met with Scotty Maynard, the mine assistant superintendent. Tr. 182, 185. According to West, Maynard told him that he knew about the hazards in the book but that he didn't have sufficient rock dusters to correct the problem and that he decided to go ahead and run the unit (i.e. produce coal) anyway. Further, Maynard allegedly told West that higher ups, in St. Louis, would have to approve pulling personnel from production to correct problems like West cited. Tr. 183. West's notes at p. 27. In fact, West was so surprised at Maynard's candor that he asked him again if he meant what he had stated and Maynard confirmed his statement to him. Tr. 184. Having later heard the testimony of Mr. Maynard, the Court credits West's testimony about this conversation.

Although Maynard also told West during that conversation that he had found only five

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miners were rock dusting the tail piece, it would inundate the section because the feeder is in the intake and therefore it would inundate the last open crosscut. Tr. 342. Cowan maintained that rock dust inundating the last open crosscut does *not* mean there is belt air traveling to the face. Tr. 342. Cowan admitted that he did not know if French told Cavanaugh to rock dust along the 5B belt. Instead his assertion to that effect was based upon that it would be "normal procedure." Tr. 354. Also, he did not know where they started rock dusting to abate the violation, rather he made assumptions about that. Tr. 355. Cowan was also asked about Caudill's citation, No. 8492214, in which Highland was cited for using spads instead of Hilti nails. A Hilti nail has a one inch head on it but a spad, which is a wedge piece of steel, does not. Tr. 344. Cowan admitted that the spad is not approved under the plan but he maintained that it serves the same purpose. Use of such spads would not, Cowan stated, have any effect on rock dust inundating the unit. Tr. 344. Cowan did not believe that the mine had belt air at the face. Instead he believed they had "stuck a rock dust hose through the airlock and rock dusted the tail piece," as required. Tr. 344-345. The problem with that belief is that, as noted in footnote 17, below, West saw rock dust inundating the last open crosscut. While the Court credits West' testimony on this, ultimately, it concludes that this issue is more of a distraction from the accumulations problem involved in this decision.

<sup>19</sup> West later clarified that he also *observed* rock dust inundating the last open crosscut, along with Caudill. Tr. 231. West did not agree that if the mine rock dusted inby the airlocks, rock dust would be inundating the last open crosscut. Rather, he maintained that this would not occur continually and that it would clear but that, in this instance, it did not clear. Tr. 231-232. Thus, because the air pressure was not right, the rock dust on the section did not clear directly after rock dusting began. Tr. 233. As noted, the whole matter of rock dust at the face can be viewed as a misfocus, because the case is not about a violation for the presence of rock dust at the face. Rather, the rock dust issue was offered as additional evidence that belt air was moving to the face. Tr. 245-246.

bottom rollers running in coal between crosscut 3 and 15 and that he had cleared them,<sup>20</sup> West then went to that area but found five rollers that were still running in coal. Maynard then returned to that area and re-shoveled it. Tr. 185.

In citing the Respondent for a violation of 75.400 for the accumulations of loose coal, coal dust and float coal dust, West reiterated that it presented a risk of fire and/or explosion, that the likelihood of injury was reasonably likely in that it presented a discrete hazard to miners because a fire or explosion would inundate the escapeways with smoke and carbon monoxide. Again, West found that the ingredients were present because there was fuel, oxygen in the airflow and ignition sources from the frictional rubbing of the belt on the frame. Tr. 188. The ventilation violations found by Caudill was a factor considered in determining the number of persons affected. Tr. 189. West marked lost work days or restricted duty as the type of injury which could occur and 18 persons, the number of miners on the No. 5 unit, being affected. Tr. 189. This number was based on the number of persons inby and West provided considerable detail about what could happen, including the air courses which would be affected by smoke or carbon monoxide traveling inby towards the section. Tr. 190. The Court agrees with, and adopts, West's analysis of the S & S dimension to the cited violation.

In addition to his statement that Scotty Maynard had acknowledged his awareness of the problems, West also expressed that Terry Johnson, the third shift mine foreman, was aware of the conditions that were cited, as he countersigned the record book on the surface. Tr. 191. West concluded that the conditions he observed justified classifying Highland's negligence as "high," but he did not list it as "reckless disregard" because he took into account that Perry Cavanaugh was shoveling the belt at some point. That effort by Cavanaugh was insufficient however, in West's estimation, because the problem was too extensive for one person to take care of it. Tr. 193. The result was that West issued a 104 (d)2 order, which reflected his view that it was an unwarrantable failure on Highland's part. Tr. 193-194. The Court also agrees with this evaluation and adopts it as findings in support of its unwarrantable determination.

Following his testimony regarding the problems on the 5B belt, West identified the violation he issued on December 9, 2008 for a section 1725(a) violation. Tr. 195, GX P 11., Citation No. **8492282**. That standard requires equipment to be maintained in safe operating condition. Tr. 195. This related to the 5B bottom belt rubbing the hangers in several locations, presenting the risk of fire or explosion from frictional heating.<sup>21</sup> Tr. 195. He believed this condition "could easily" start a fire

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<sup>20</sup>Maynard acknowledged that there was an area that was blacker than what he had expected to find. Tr. 184.

<sup>21</sup>The citation stated that the "bottom belt is rubbing the roller stands in approximately twenty seven places from crosscut two to crosscut 69 ... Four places are cut into the bottom roller stands ½ inch in depth. The places where the belt is cutting the frames were hot to the touch and all others where the belt is rubbing is warm to the touch. In several of these places float coal dust, coal dust, and loose coal accumulations exist [the citation referenced citation 8492281 which was just discussed in this decision]. The out of align *running* belt conveyor is very obvious and extensive

and that the same 18 miners would be affected as with the other citation.<sup>22</sup>

Tr. 196. For this citation, West also considered it to be ‘high negligence’ due to the amount of spillage that was present and his opinion that this had to have existed for one to two shifts. Tr. 197.

Upon cross-examination, the Respondent attempted to show there was some mitigation. In that respect, West agreed that if a mine operator identifies a problem in a record book and made an effort to address it, that is mitigation. Accordingly, West agreed that the December 9, 2008 entry in the belt books for 5A and 5B noted the hazards listed and the corrections that had been made. That belt book report in issue was for December 8<sup>th</sup> and West agreed that he reviewed the corrections that were listed on the second shift for that date.<sup>23</sup> Tr. 201. While there was some mitigation that does not mean that the required special findings should be rejected and, upon consideration of the entire record, the Court upholds those findings.

As to West’s view that the violation was high negligence and unwarrantable failure, he stated that while Scisney wrote that 41 to 60 were dirty, when West viewed the area he saw that only 41 to 46 and 58 to 60 had been cleaned. Tr. 206. Thus, he listed the situation as unwarrantable and high negligence because nothing had been done between crosscut 3 and 15. Tr. 206. Accordingly, West compared what was listed in the belt book with what had been accomplished when he viewed the problems. Tr. 208.

Although the corrections on December 8, 2008 belt inspection report for the second shift only referred to cleaning on 41 to 46 and 58 to 60, West agreed that his unwarrantable and high negligence findings were based on the corrections he read in the belt inspection report for the second

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when inspector made belt entry. The mine operator shut the belt conveyor down until cleaning, rock dusting, and the proper belt alignment could be made.” Citation 8492282 (emphasis added). The Court finds that all noted aspects of the citation were established by a preponderance of the evidence of record.

<sup>22</sup> The Court inquired of West why he did not choose the other characterizations of “unlikely” or “highly likely.” West explained that those choices were not appropriate because a fire *would* occur if the belt continued to operate under the conditions he observed. It would only be a matter of time before such an event. On the other hand, West did not opt for “highly likely” as he prefers not to list that unless the condition is approaching an imminent danger. Tr. 198-199.

<sup>23</sup> In a matter that ultimately is not of determinative consequence, West stated that the belt examiner had listed that the belt was black from crosscut 3 to 15. Tr. 202. However the Respondent challenged West’s note in that regard, because Respondent’s Exhibit 5, belt examiner Scisney’s report lists the belt as ‘black to gray’ not simply ‘black.’ West maintained that *his* notes would have listed “black to gray” if that had been written at the time he reviewed Scisney’s report. Thus, the implication was that the language about “gray” had been added subsequently. While not willing to claim that falsification occurred, West stood by his remark that he would have included the “gray” language had it been there. Tr. 202- 204. The Court finds it unnecessary to resolve this conflict.

shift on December 8, 2008. However, West's position was strengthened by his remark that his view was also based on what he observed underground. Tr. 208. Accordingly, while West did not dispute that he observed Cavanaugh shoveling on the belt, and that he could have been shoveling for about two hours before West saw him, it was West's point that the effort was both late and an insufficient response. The Court agrees with that assessment. West also did not question that Cavanaugh was given a list of areas that needed to be addressed that day and that Cavanaugh told him he had been assigned to shovel the belt that day. Tr. 210. While Respondent suggested that West had no reason to doubt that Cavanaugh would rock dust after he finished shoveling, West responded that Maynard told him he didn't have anyone to rock dust. Tr. 212.

Further, while the Respondent tried to challenge West's tally of the number of crosscuts with problems, West, upon checking his notes stated that there were some 26 crosscuts where there was coal that needed to be cleaned up or float coal dust was present. Tr. 214. West added that there were several other places where there was "just coal underneath bottom rollers." Tr. 214. Thus, West maintained that there were 26 crosscuts that needed to be cleaned in addition to areas where there was coal under bottom rollers.

As pointed out by the Respondent, Highland did not run production on the third shift on December 8, 2008 and West arrived at the mine right after that third shift. Tr. 224. Further, West agreed that there is no requirement to walk or examine a belt if it's not going to be operated or worked on during a shift. Tr. 224. Although West did not assert that Maynard knew more about the conditions beyond what was listed in the belt examination report, he at least knew about the report's identification of problems.<sup>24</sup> Tr. 225. In the Court's view, these contentions miss the larger point that the extent of the problem, the attendant aggravating conditions, as identified by West, the time that had elapsed since the examiner's report, and the insufficient response, all add up to, and amply support, his special findings.

Addressing a major contention of the Respondent, as evidenced through its demonstrative exhibit enlargements of the belt inspection report presented at the hearing, with the point of comparing the belt inspection report for the second shift on December 8, 2008 with the corrections during the second shift on December 8<sup>th</sup>, West was asked to assume that the December 8, 2008 correction sheet for the second shift was dealing with the corrections for the belt inspection report made during the day shift on December 8, 2008. West's response was that if the corrections were for the day shift inspection, then the conditions he would consider the situation to be *more* serious. Tr. 250.

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<sup>24</sup> Upon cross examination of West's claim that Terry Johnson, Guy Scisney and Dean Arnold had knowledge of the conditions listed in his order, West agreed that his basis for imputing knowledge to Johnson was the fact he countersigned Scisney's inspection of the 5 B belt and he agreed that Johnson's knowledge would be limited to what Scisney had written in his inspection report. Tr. 217-218. However, West did not back away from his position that if one has bottom rollers running in coal when the belt report says 'dirty' or if one has float coal dust on the belt when it says 'black,' one should not be producing coal. Tr. 219. The Court agrees with West's assessment that coal production should not be ongoing under such conditions.

Accordingly, West stated that when, on December 9, 2008, he examined the second shift belt inspection report of December 8, 2008, he assumed that the corrections for those problems had been made by then. Tr. 251. West maintained that the corrections the mine operator had put forward were for the first shift on December 8<sup>th</sup> and that the no corrections for the second shift had been put in the books, if in fact any corrections at all had been made by then.<sup>25</sup> However, the Court concludes and finds that, given all that West found underground, even buying into the Respondent's argument for the moment, the extent and nature of the problems West found are determinative here. Simply put, Highland should have done more in reaction to the belt exam report and done so sooner.

Ezra French, Highland's mine superintendent was called as a witness by the Secretary. At the time of the events in issue in this proceeding, he was the mine foreman. French agreed that if a report listed an area as 'dirty,' he would assign someone to clean it up and that means shoveling. Tr. 264. He also confirmed that the phrase "black to gray" means that the area needs to be rockdusted. Tr. 264. Although on December 9, 2008, the mine had a "3 person dedicated belt crew during production shifts," the other 3 miners on the 'belt crew' would have been handling anywhere from 13 to 16 belts at the Highland underground mine. Tr. 266.

French conceded that, at least one purpose of a belt corrections page is to show that a correction has actually been made along a belt and he moved back from his earlier contention that belt examiners may exaggerate problems, allowing that a given examiner "may see things a little differently than another individual." Tr. 266-267. He admitted that on December 9, 2008<sup>26</sup> he had

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<sup>25</sup> West understood, without agreeing, that it was Highland's claim the corrections were not listed in the page *after* the problems identified in belt report. Tr. 252.

<sup>26</sup> Some questions were directed to belt exams prior to those in issue here. Directed to the 5B belt exam for December 3, 2008, which listed header to crosscut 15 as black to gray, French agreed that the corrections page, at page 26, listed nothing regarding cleaning that area and he conceded that meant that no dusting occurred on that night, which was the idle shift, after the exam conducted on the second shift for December 3<sup>rd</sup>. Tr. 272. French was then asked to view the examination part for the first shift on December 4<sup>th</sup>, and its notation for 5B of a small build-up under the head roller, outby end of takeup dirty. It also listed black to gray from header to crosscut 30. Then, French was asked to look at the second shift corrections for that day shift report, which stated only "5B is clean header and tail and crosscut 38 and 3" and he agreed that meant no rock dusting had occurred during that shift. Tr. 273. GX at page 29. Next, French was asked to look at the second shift inspection report for December 4, 2008, and he agreed it stated, 'header to crosscut 15 black to gray' and that the next page reflects that it was dusted at the 5B header, but with no note that dusting occurred after that header to crosscut 15. Tr. 273. GX 12 at 30.

Critically, French agreed that if the inspection reports show only that there was rock dusting on the 5B for the third shift on December 5<sup>th</sup>, he has no evidence to show more rock dusting was done. Tr. 274. French also conceded that at page 35 for December 5, 2008 and the remark that 5B header to crosscut 15 black to gray, there is no mention about 5B, but area belts 2A, 2B, 4A and 4B are mentioned as being dusted in parts. Tr. 274. For December 6<sup>th</sup>, at page 38 of the exhibit, French



no personal knowledge of the conditions along the 5B belt. Tr. 267. Instead he was working entirely off of the information he had from the belt examiner. Tr. 267. He added that belt examiners at the mine may only list areas that need to be addressed but that if an examiner encounters an immediate danger, those must be addressed immediately. Tr. 268. The Court finds that it is fair to note that French contradicted himself on what belt examiners do and do not write down and he stated that he found it difficult to explain what he was trying to express. Tr. 270.

French acknowledged that the mine does the bulk of its rock dusting on the third shift and that, in December 2008, one of his duties as the mine foreman was to review the belt examination report for the preceding shift. Tr. 271.

French agreed that for the day shift of December 8, 2008, the examination for the 5B header reflects that it was cleaned on header to crosscut 15 and tail, but there is no mention of rock dusting. Tr. 276. GX at page 43. French also conceded that, by signing his name on the report, he was going back to correct conditions that were listed during the second shift on December 6, 2008. Tr. 276. GX at page 40. As mentioned earlier, French admitted that he reviewed the belt inspection report prepared by the second shift belt examiner on December 8<sup>th</sup> and he identified R 5 as the belt examiner report for that date.<sup>27</sup> R5 is the same exhibit as P-12.

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agreed that it states 5B black to gray header to crosscut 28, tail dirty. Tr. 275. Further, he agreed that for the second shift for ‘corrections,’ it reflects ‘clean header and tail crosscut 15 to 25 but that it says nothing about cleaning or rock dusting from the head or after the header to crosscut 15. Tr. 275. Ex. at p. 39. So too, he agreed that for the second shift the inspection report shows 5B header to crosscut 15, black to gray and that for December 7, for the idle shift, it mentions only cleaning but no rock dusting and there is no mention of cleaning on 5B. Tr. 275. Ex. 9 at page 40. Further, at page 42 of the exhibit, pertaining to December 8<sup>th</sup>’s idle shift, there is no mention about dusting or cleaning of the 5B. Yet there is mention of dusting at 2A tail, 2B dump point and the slope tail. Tr. 275-276. Thus, it is fair to conclude that if dusting was not listed, it did not occur.

<sup>27</sup> French read from Exhibit R 5, the second shift belt examination report of December 8, 2008, which was made by Mr. Scisney. While the Court does not find French’s take on that report to be critical to its findings of the conditions involving the citation and orders in issue here, it is included as a footnote for the purpose of completeness. In any event, French noted that it recorded: “5B header to crosscut 15 black to gray. Header and tail and crosscut 41 to 60 dirty. BR 19 and a half 22 and a half.” Tr. 290. French interpreted that information as follows: “5B header to crosscut 15 black to gray” means an area needing dusting. “Header and tail and crosscut 41 to 60 dirty” means that area also needs to be cleaned. “BR 19 and a half 22 and a half” indicates “this is third shift information that there is a roller that needs to be seen; that it refers to a roller that is damaged “a little bit” and needs to be changed out. Tr. 291. French confirmed that Scisney would have filled out the actual belt examination book at the end of Scisney’s shift, around 11 p.m. Tr. 292. This would be done before the third shift would go underground. Tr. 293. Problems identified by the belt examination are not corrected until the next shift. That is, corrections are not made during the same shift in which the belt exam is conducted. Tr. 294. For this reason, French stated that *corrections* listed on the second shift for December 8, 2008 are addressing items listed on the day shift for December 8, 2008, that is to say, from the *first* shift. Tr. 294-295.

French, asked what Highland attends to on the third shift regarding belts, responded that among other tasks, rollers may be changed out, and tank dusters will be used during that shift too. Belts are not examined during that shift because they are not running at that time. Tr. 295. French stated that he did have four shovelers working on December 9, 2008, the day the order in this case was issued, although normally there would only be three shovelers. Tr. 295. French added that it was his practice to make a copy of the belt inspection report and then use a “highlighter” and make a list for each person working the belts on a given day. Tr. 296. On December 8, 2008, French assigned Perry Cavanaugh to clean the 5 B belt. Tr. 297. He handed Cavanaugh the list he had copied with the tasks on it and he stated that he highlighted the entire line next to 5B. Tr. 297. French described Cavanaugh as an “older gentleman,” who recently retired and is probably 63 or 64 now. Tr. 298. French confirmed that there is some subjectivity in assessing the conditions with belts as, for example, one examiner might call a belt gray while another might describe it as ‘black to gray,’ for example. Tr. 298- 299.

French believed that Cavanaugh could do the tasks identified with the 5B belt, which included cleaning crosscuts 41 to 60 and rock dust at the header to crosscut 15 if it was needed. Tr. 300. In sum, from French’s perspective, there was nothing out of the ordinary regarding the 5B belt report for that day, no MSHA inspector had ever told Highland if it finds conditions such as 41 to 60 dirty or a belt described as “black to gray,” that the belt should be shut down; that he had no knowledge on December 9<sup>th</sup> of rollers running in coal; and that nothing in Scisney’s report suggested the belt was out of alignment or rubbing a frame making it hot or warm to touch. Tr. 302-303. He also disagreed with the claim that someone would need to call St. Louis before sending anyone to help a shoveler who needed help with assigned tasks.<sup>28</sup> Tr. 303.

Troy Cowan, Highland’s ventilation supervisor, was called as a witness for the Respondent. Cowan was working at the mine on the day West issued his 104(d)(2) order, number 8492281 and he went underground with MSHA’s West and Caudill on December 9, 2008. Tr. 323. Cowan agreed that West walked the 5B belt line. Tr. 324. While Cowan stated that West told him that he wanted the belt aligned from crosscut 7 towards the header, Cowan couldn’t see the belt rubbing anywhere but he acknowledged where it might “had possibly rubbed in the past.” Cowan believed that the cuts in the frame also occurred at some time in the past, as he asserted that the frames were five or six years old and they had been used in different panels. Tr. 325. Clearly, Cowan maintained that he saw nothing to support West’s claim of misalignment. Tr. 326. Also, he felt no heat on the frame.<sup>29</sup> Tr. 326. At that point, Cowan related, West told him he wanted the belt shut down and he advised Cowan that he, West, would be walking to the header. Tr. 326. Cowan then walked from crosscut 7 to 3, where the telephone was located, so that he could have the belt shut down. Tr. 327.

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<sup>28</sup> French agreed that back in December 2008 Scotty Maynard was French’s supervisor but now French is *his* supervisor. Tr. 315-316. French admitted that he wouldn’t know if Maynard was required to call St. Louis before shutting down a belt, but he still added that such calls do not happen. Tr. 316.

<sup>29</sup> Cowan did agree that if there was a fire in the belt entry, smoke could enter the secondary escapeway. The secondary escapeway is adjacent to the belt entry. Tr. 355.

Cowan essentially disagreed with all of West's view of the situation. For example, he noted only "dry flakes" under rollers, but nothing to support West's view that they were "dirty." Tr. 327. The "flakes" in Cowan's view were mud, or "fireclay," not coal.

The stark differences between Cowan's perception of the conditions and those of West, prompted the Court to note that great disparity between their assessments of the same area. Tr. 328. When the Court asked just how far apart Cowan's view was from the inspectors' view of things, asking if Cowan felt that not only was no Order justified but perhaps there shouldn't have even been a citation, Cowan would not go quite that far, as he acknowledged a spill at crosscut 39 to 41, but he called this a "fresh" spill and that was right where Cavanaugh was working to clean it up. Tr. 329. With that kind of opinion expressed by Cowan, the Court observed that his testimony suggested that not even a citation should have been issued.<sup>30</sup> Tr. 329. It is of significance that Cowan admitted however that he was *not* with West during the whole time of his inspection. Tr. 331. As Cowan put it, "[h]e took off by himself and walked to the unit." Tr. 331. Further, when West did meet up with Cowan and informed him of more areas that needed to be addressed, *Cowan did not argue with him*, acknowledging, "I couldn't. I hadn't made the areas yet." Tr. 332.

Yet, despite the extent of his disagreement with MSHA's view, Cowan hedged when the Court questioned him, asking if he believed there was no need to even clean the belt areas cited. Thus, the Court concluded that Cowan's primary objection was whether the violation was unwarrantable, as Cavanaugh had been assigned to the problem. While he admitted there was spillage, stating "I'm not saying we didn't have spillage there. We did," he asserted it was just one fresh spill. Tr. 339-340.

The Respondent also called Guy Scisney. Scisney, an hourly employee of the Respondent, is a mine examiner, a job which includes examining belt lines. He was a belt examiner on December 9, 2008 and he identified Exhibit R 5 as the report he filled out upon returning to the surface following that examination. Tr. 366. Scisney stated that 'black to gray' means the rock dust was not adequate and needs dusting. 'Black' means immediate attention is needed. 'Dirty' means there is an accumulation of coal and coal dust on the belt line. Tr. 371. He later elaborated that 'black to gray' means the 'second stage' that is, a belt in need of rock dusting, but for which there is some time to get that fixed and does not need immediate attention. Tr. 378-379. In contrast, the description 'black' means you need to do something now. Tr. 379. Scisney would not seek to have a belt shut down unless he believed there was an imminent danger. Tr. 375. In response to questions from the Court, he stated that, as to Exhibit R 5, his signature is the top one on the page listing "bad rollers 19 and a half." Tr. 375. Scisney's practice when examining a belt was to write down what he observes on a pad and then he will write it down again when he goes to the surface, unless he is sure he can remember where a particular problem was spotted. Tr. 376.

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<sup>30</sup> Mr. Cowan's dramatically different view of the conditions observed by Inspector West continued as he went through the areas listed in West's Order. Tr. 333-339. Cowan agreed that Caudill had issued an accumulations violation at the 5A tail roller prior to West's order for the 5B, but as with his view of West's citations, he did not think the conditions cited by Caudill were as bad as the inspector's evaluation of the conditions. Tr. 350.

Scisney stated that he did not see rollers running in coal along the 5B belt on December 8, 2008. Tr. 379. Nor did he observe a belt out of alignment nor cutting the belt structure when he made his exam, though he conceded there was evidence that it had been out of line and that there had been cutting in the past. Tr. 380. However, Scisney did believe Highland should have had somebody on the issues he identified in his belt exam, because he did write it up as “dirty.” Tr. 381. He did agree that it was possible that a belt examiner could report a condition and then the next belt examiner could observe the same condition before the belt crew could get to the problem. Tr. 382. Scisney confirmed that the belt was running that day and that production usually stops around 1:30 a.m. He would have completed his belt exam sometime around 5 or 6 p.m., that is, around seven hours earlier. The shifts run about 10 hours, Scisney explained. Tr. 384.

Scisney acknowledged, belt exams are important. As he put it, “It’s got to be done, because we [ ] have mine fires here in west Kentucky, a couple of mines were shut all the way down because of mine fires, and they originated on the belt line. So you’ve got to examine them daily, because if you don’t we won’t have [a] job and people could get killed in there.” Tr. 385. Scisney explained that it’s his job to write it up and “then it’s left up to Highland to address it.” Tr. 386.

He added that his exam noted “three different findings [Highland] needed to address.” These were to change two rollers, rock dust black to gray from the header to 15 and third, 41 to 60 dirty. Tr. 386. Scisney had to examine four to five miles of belt back in December 2008, a task that he does most of it by using a golf cart, although there are areas where he has to get off the cart and walk the belt.

Scott Maynard, who is the assistant superintendent at the Highland #9 mine and who was at the mine on the day of the citation in issue was called by the Respondent. Tr. 391, 393. As he does not review belt exam reports he did not know of any issue for the 5B belt until Troy Cowan called him and advised that inspector West was issuing an order and a citation for it. Tr. 393. Maynard essentially agreed with Cowan that the conditions on the belt were nothing like West’s contentions. Tr. 394- 400. Regarding the tail piece and the rock dusting there, Maynard stated that as soon as one sprays, the dust will go into the intake air and go to the face, exiting both sides, left and right. Tr. 402. The tail is located in by the airlocks. That arrangement is used so the neutral air can’t go to the face. The neutral air is channeled to the return. Tr. 402. As to whether belt air was being used to ventilate the face, Maynard denied that occurred, as he sprayed the rock dust over the top of the feeder into the intake air, which then goes to the face. Tr. 402.

After the rock dusting, Maynard wanted to find the whereabouts of Inspector West, “to make sure he [West] was satisfied that we could start the belt back up and start producing coal.” Tr. 403. Maynard denied that he ever told West that he knew about the problems identified in the belt exam and that he went ahead and produced coal anyway. Tr. 403-404. He also denied making any statement about the need to call St. Louis before miners could be pulled off the face. Tr. 404.

While Maynard agreed that he met with MSHA’s Charlie Jones on September 19, 2008 and that Jones advised him that there were 51 section 75.400 violations in the fourth quarter of 2008, he stated that the majority of those involved accumulations on things *other* than belts. Tr. 405. In response to that meeting the mine purchased another tank duster and two trickle dusters, and took

other actions in response to that meeting. Tr. 405-406.

Inconsistent with his assertion that he did not observe anywhere near the problems that West claimed were present, Maynard stated that after seeing Cavanaugh working on the 5 B belt, he “told him to get the man-trip and go up to the unit and start bringing people out and distribute on the areas that we needed shoveled.” Tr. 407. Those would be the areas where Maynard stated there were essentially no or minimal problems. Further, Maynard implicitly acknowledged Highland’s reluctance to stop producing coal by stating that if a belt examiner sees a roller running in coal, the examiner is to either fix it himself “or shut the belt off. At that point he’ll get plenty of attention.” Tr. 407.

Other than relying on the mine’s usual practices, Maynard admitted he had no personal knowledge that rock dusting occurred between when Scisney examined the belt on December 8<sup>th</sup> and when he examined the belt the following day. Tr. 411.

Regarding the need to rock dust between crosscuts 7 and 3, Maynard would only agree that “[b]ehind the bottom roller you could have put some dust on it.” Tr. 417. However, he didn’t feel there was any *need* to do that and it was just Scisney’s opinion. Tr. 418. In his deposition, however, Maynard stated that crosscuts 7 to 3 needed dusting. Tr. 419. While Highland talked about its trickle duster, Maynard admitted that on the morning of December 9, 2008, it was about 3 miles from the 5B header. Tr. 424.

## **ADDITIONAL FINDINGS, DISCUSSION, AND CONCLUSIONS OF LAW**

### **Applicable Law:**

#### **Unwarrantable failure**

The unwarrantable failure terminology is taken from section 104(d) of the Act, 1. 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See, for example, *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("Consol").

## Significant and substantial

A significant and substantial or “S&S” violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Accord, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving Mathies criteria). In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (August 1985), the Commission explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). It noted that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). Further, the question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Last, any determination of the S&S nature of a violation must be made in the context of continued normal mining operations. *U.S. Steel*, 7 FMSHRC at 1130; *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

## Additional Contentions, Comments and Conclusions regarding the Orders and Citation.

### 1. The Roof Bolt Spacing Violation.

Regarding the section 104(d)(2) order, **Order Number 8489815**, alleging a failure to follow the approved roof control plan, in violation of 30 C.F.R. § 75.220(a)(1), Respondent contends that neither the S & S designation nor the unwarrantable finding are justified. Regarding that finding, made by MSHA Inspector Fazzolare, Highland contends that the inspector's basis rested upon a “small slip” some 90 feet away from the condition. Also, Respondent contends that the Secretary failed to show that “the bolt spacing discrepancy itself was reasonably likely to have an adverse impact on the stability of the mine roof.” R's Br. at 33.

As to the unwarrantable finding, Highland asserts that the condition was neither extensive nor of long duration. *Id.* at 35. Beyond those contentions, it notes this was not a situation where Highland had knowledge of the bolt spacing discrepancy and then ignored it. Merely contending that Highland “should have known” of the condition does not justify an unwarrantability finding. Further, it

maintains that there were no “aggravating circumstances” present to show unwarrantability. *Id.* at 35-36.

The Court does not share Highland’s perspective. First, the condition, while escaping Highland officials’ notice, was immediately obvious to Fazzolare. Although the precise distances of exceedance were presented as difficult to detect, it was the crooked row that first caught Fazzolare’s attention, not measurements. That condition was readily apparent and it should have alerted Highland, just as it did Inspector Fazzolare. That it escaped Highland is not surprising as Highland’s Mr. Wilkins has never detected wide bolt spacing in 36 years of mining experience. Kuykendall, though the section foreman, also found that the condition was not obvious. However, this was understandable as well, as he stated that he never got closer than 50 feet to the condition and from that far away it was hard to detect spacing issues. While the distances of exceedance for any particular row varied, the more pertinent point is that the problem was over *nine continuous rows*. Accordingly, the MSHA document referring to small exceedances does not apply because that only allows for “occasional variances.” Nine continuous rows with excessive spacing is not an occasional variance. Beyond that, even that MSHA document, highlighted by the Respondent, allowed the occasional exception only for exceedances *less* than six inches. Here, Fazzolare found several instances that did not even meet that, quite limited, exception allowing for small exceedances.

Also relevant, the preshift examiner was exposed to the wide spacing, as his initials had been recorded on the rib. Fazzolare was justifiably concerned about the moderate slip in the top and that it might continue inby, presenting the risk that there could be a roof fall. That this was listed as “reasonably likely” is more than demonstrated by the fact that the mine already had part of a roof fall on the previous crosscut outby. Accordingly, based on the record evidence, as already set forth in more detail *supra*, the special findings are all upheld.

## **2. The accumulation of combustible materials violation.**

Regarding the second violation contained within this docket, the section 104(d)(2) order, **Order Number 8492281**, issued on December 9, 2008, for accumulations of combustible material in the 5B belt conveyor entry and alleging a violation of 30 CFR §75.400, the Court upholds the special findings, and therefore determines that the violation was significant and substantial, with high negligence, that it was reasonably likely to occur, would result in lost workdays or restricted duty, and that the violation was the result of an unwarrantable failure.

The Respondent asserts that the Secretary failed to establish the “confluence of factors” necessary to show that the violation was significant and substantial. It also maintains that the condition would have been corrected if normal mining operations had continued, as the 60 plus year old Cavanaugh had been assigned to the problem and the belt would have been examined again during the 1<sup>st</sup> shift on December 9, 2008. R’s Br. at 15-16. The Respondent also maintains that the violation was not unwarrantable.

Respondent argues that Inspector West got it wrong in asserting that the belt was black. Instead, it was noted by Scisney as “black to gray.” R’s Br. at 17. Beyond that, Respondent also asserts that West assumed that the corrections noted in the December 8, 2008 belt examination report

were for the conditions noted by Scisney on that same shift. Because Scisney did not record his belt examination report until the end of the second shift, the 2<sup>nd</sup> shift crew was correcting the problems identified in the report for the 1<sup>st</sup> shift of December 8, 2008. Highland also asserts that West did not list the violation as a “reckless disregard,” and could not have, because action was underway to correct the conditions. R’s Br. at 18.

More specifically addressing the unwarrantable finding, Highland maintains that knowledge of the conditions could not be imputed to Highland as it can only be held accountable for what is reported in the belt examination report. It maintains that Highland “took timely and adequate action to correct those conditions.” R’s Br. at 19. Highland thus asserts that the focus should be on how it responded to the belt report. In that regard, it contends that assigning Cavanaugh was a sufficient and fully adequate response. *Id.* at 21. Respondent contends the conditions were neither extensive nor did they present a “high degree of danger.” *Id.* Highland maintains that the conditions identified in Scisney’s report existed for a portion of the second shift, and for the idle 3<sup>rd</sup> shift and accordingly correcting them during the 1<sup>st</sup> shift of December 9, 2008 was timely on its part. Beyond that, the Respondent contends that additional problems must have occurred after Scisney made his examination and therefore Highland can hardly be held accountable for what must have transpired after Scisney’s exam. Thus, Highland argues that those subsequent problems existed for an even shorter period of time. *Id.* at 23.

It is also Highland’s contention that it received no notice that greater efforts were needed for compliance with accumulations on belt lines. In support of this, Highland first notes that West himself stated that his findings were not based on any prior warnings but rather on the conditions he observed at the time he issued the citations/ orders in issue here. Apart from that, it asserts that the Secretary must “establish the precise nature of the prior violations to show that they would be relevant to place the operator on notice regarding the violation at issue.” *Id.* at 24 citing *Cantera Green*, 21 FMSHRC 310, 312 (ALJ 1999).<sup>31</sup> It is not sufficient, Highland maintains, that the same standard was involved. Still another problem with using past violations of 75.400 to establish notice and therefore unwarrantability, is that the standard is so broad. Whereas the violations involved here concerned accumulations, the standard is much broader than that. Respondent characterizes it as a “catch all” standard. Besides, Highland continues, even if notice is considered to have been established, that doesn’t mean by itself that unwarrantability has been proven. *Id.* at 35. Continuing with its claim that unwarrantability was not proven, Highland asserts that applying the test of considering all the relevant facts and circumstances, no such aggravated conduct was established. Thus, by its lights, Highland didn’t know about the conditions cited in the Order, those conditions were not extensive anyway, they posed no high degree of danger, none of the conditions existed for an extended period of time and Highland took adequate and timely steps to deal with those conditions it knew about and further, Highland made good faith efforts to reduce 75.400 violations along its belt line. *Id.* 26

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<sup>31</sup> Displaying the candor that is required, Respondent’s Counsel does acknowledge that the Commission has held to the contrary of the view expressed in *Cantera Green* by stating that previous conditions need not be identical to those involved in the violation at issue. *Peabody Coal Co.* 14 FMSHRC 1258, 1263 (Rev. Comm. Aug. 1992). R’s Br. at 24.



In support of its contention that the violation was S & S, the Secretary's view as to Order No. 8492281 is that the discrete safety hazard was the risk of fire and/or explosion resulting in fumes, smoke and CO that would flow towards the unit. It was reasonably likely to occur because of the presence of fuel, oxygen and ignition sources from frictional heating. That amounts to a confluence of factors. Sec. Br. at 10. The injury would be lost workdays or restricted type duty. 18 persons would be affected because the pressure differential would cause the smoke or carbon monoxide contaminated air to travel down the belt entry and inundate the section. It adds that a fire or explosion would obviously produce graver results.

As to unwarrantability, the Secretary cites *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-4 (December 1987) for the principle that such conduct involves reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care. In practice, factors to be considered include, the extent of a violative condition, the length of time it has existed, whether it was an obvious violation or posed a high degree of danger, whether the operator has been placed on notice that greater compliance efforts are necessary, and the efforts the operator has made since such notice. *Amex Coal Co.*, 19 FMSHRC 846, 851 (May 1997). Further, the Commission has explained that all the relevant facts and circumstances at least should be considered. *Coal River Mining*, 32 FMSHRC 82, 88-89 (February 2, 2010). The Secretary asserts that the conditions were extensive. Thus, this speaks to the scope or magnitude of a violation. The Secretary notes that in *Consolidation Coal Company*, 23 FMSHRC 588, 593-594, it was determined that accumulations of 20 inches in depth, 12 feet long and 8 feet wide at one crosscut, along with other accumulations some 600 feet in length, were extensive. Sec. Br. at 12. The Secretary contends that the accumulations in this case were of a similar extensiveness.

The Secretary also asserts that the duration of the cited conditions was considerable. However, the Secretary also notes that unwarrantability can be satisfied even if the duration is short, where the other factors point to that conclusion. That aside, the Secretary maintains that at least 15 hours elapsed with the conditions. Sec. Br. at 14. It notes that the conditions could have been corrected during the third shift but were not. The Secretary further contends that there was a high degree of danger associated with the conditions in that there were frictional heat sources in contact with fuel. Caudill's testimony regarding belt air reaching the face also supports the confluence of factors element. Sec. Br. at 16.

As to the issue of whether Highland was on notice that greater efforts were needed to comply with 75.400, the Secretary asserts that past discussions with an operator about accumulation problems puts that operator on "heightened scrutiny" about the compliance steps it must take. *Enlow Fork Mining Co.* 19 FMSHRC 5, 11-12 (Jan. 1997). In this regard the Secretary points to the testimony of MSHA's Archie Coburn and a September 2008 meeting he attended with Highland to address the subject of the mine's accumulation violations. Then too, West noted that less than a week before the violations in this case, he cited Highland for an accumulations violation along its Main East belt entry.

The Secretary also contends that several Highland agents were aware, or should have been, of the conditions on the 5B belt on December 9, 2008. To establish this, the Secretary notes that

Scisney, as the certified belt examiner, is considered to be an agent of the operator when performing in that role. Sec. Br. at 20. The conditions noted by Scisney were hazards which Highland needed to address. Beyond that, the third shift mine foreman, Terry Johnson, was aware of the conditions cited by Scisney in the preceding shift but he took no corrective actions for those.

The Secretary maintains that, putting actual knowledge aside, Highland's agents "reasonably should have known" of the violative conditions on the 5B. The Court agrees with the Secretary's contentions. Finally, the Secretary maintains that the abatement efforts conducted by Highland were inadequate. Highland had been informed in the September 19, 2008 meeting with MSHA that the belt accumulations were a problem but there is scant evidence that Highland did much to deal with this issue. While there was talk of doing more rockdusting, the fact is that no rockdusting occurred during the third shift on December 9, 2008. Certainly the evidence shows at most that Cavanaugh was there to shovel, not rockdust. Here as well, the Court concurs with the Secretary's arguments.

### **3. The failure to maintain machinery and equipment in safe operating condition.**

Regarding Citation No. **8492282**, within Docket Number KENT 2009 0756, as noted, that 104(a) citation was issued on December 9, 2008, for operation of the 5 B belt conveyor not being maintained in safe operating condition. Marked as significant and substantial, this Citation is closely related to Order Number 8492281, discussed immediately above, as it pertains to the same matter, accumulations along the 5B conveyor belt. Both parties largely focused their energies in their briefs on that first Order and then applied those arguments, in large part, to this Citation. The Court has employed the same approach in its decision.

As with its analysis for Order number **8492281**, Highland believes that no "confluence of factors" was established by the Secretary. It contends that West erroneously believed that the 5B belt was cutting or rubbing the belt's structure and he could not have made that assessment as the belt was not running. R's Br. at 27-28. Further, it asserts that the accumulations were not in close proximity to any heat source. Even where West claimed the belt was rubbing the structure, West himself admitted there were no fuel sources at those locations. *Id.* at 28. It takes the same position, that is, denying West's claim that the belt was running in coal dust, as its witness did not observe such conditions.

Highland also contends that there was no high negligence for this Citation. From its perspective, Highland maintains that it neither knew nor should have known about the condition and, beyond that, there were mitigating factors. R's Br. at 30. It asserts that West's claim that the condition existed for one to two shifts, means that Scisney should have seen the problems but Scisney's testimony does not support West's claims. In addition, Highland maintains that the Secretary's evidence actually shows that some "unpredictable event" likely occurred sometime after Scisney's examination. *Id.* at 31. Even if these contentions are rejected by the Court, Highland asserts that there were mitigating factors. These consist of its employment of "belt examiners to detect and prevent hazardous conditions" and by the fact that it had assigned a miner to clean up the conditions. *Id.* These proactive steps, Highland maintains, justify reducing the negligence attributable to it.

From the Secretary's point of view, concerning Citation No. 8492282, that violation was also S & S and high negligence was associated with it as well. As the Court's earlier recounting of the evidence for this citation amply demonstrates, the preponderance of the evidence supports the Secretary's position.

Beyond the matters already noted in this decision, the Court wishes to reemphasize and highlight the following points. However, before making these points, it must be noted that, with such sharp differences in the accounts of the conditions along the 5 B belt between West and Caudill for MSHA and French, Cowan, Maynard for Highland, the Court had to determine which side's account was more credible. To do this, beyond assessing the witnesses during the testimony and finding that the testimony of West and Caudill was more trustworthy, the Court's determination of credibility is supported by a very significant and unchallenged fact. Namely, it took 14 miners 5 hours to clean up the accumulations and this was after Cavanaugh had been at the task for some hours. Those uncontested remedial actions taken by Highland are not unlike the expression that actions speak louder than words. Here the extensive actions required to correct the conditions West found demonstrate that the testimony from the MSHA inspectors was more credible. One would not assign so many miners to perform a task which was as minimal in scope as Highland's witnesses suggested nor would such a task have required so much time to correct.

A word must also be stated about one of Highland's major contentions. This relates to its claim that when Scisney finished his belt exam, the shift following that was the evening or "Hoot Owl" shift. When West arrived the next morning, Highland contends, it was already addressing the matter with Cavanaugh assigned to the clean up. Highland asserts that it had no duty to deal with the belt examination findings from the second shift until that morning following the evening shift. There are significant problems with that point of view. Highland *did know* that MSHA had concerns about its section 75.400 problems, Scisney noted these problems early during the second shift and had the observations recorded well before the Hoot Owl shift commenced. Highland could have attended to those identified problems during that time. Further, the idea that an MSHA inspector could arrive at the mine, become alerted to the problems identified in the belt exam report and then proceed underground to discover a problem of significant scope which was being attended to by only a single miner of advanced years, while the mine itself is apparently less well informed about the conditions easily detected by the mine inspector, is inconsistent with the safety obligations of a mine under the Mine Act.

Accordingly, with the observation just made borne in mind, the Court finds the testimony of the MSHA inspectors to be more credible and it adopts the following as additional findings of fact. At the time Inspectors West and Caudill were at the 5B belt, the mine was running coal. It is undeniable that a bottom roller running in coal creates the hazard of a frictional point. That is, such coal provides the fuel and the friction created by the roller provides the heat. As West noted, there was also air, and that completes the "triangle" for a fire to occur because one has heat, fuel and air. Further, again noting that the belt was operating, the Court finds that it had cut into the stand about a half inch. West then felt the belt frame with his hand and found that it was hot. West added that, from crosscut 3 on inby as far as he could see, the belt was black in color from rib to rib and there was float coal dust on the belt framing. The entry at that location is 19 to 20 feet wide and he saw float coal dust from crosscut 3 to 15. That is a length of about 840 feet, and the float coal dust was about 1/16 to 1/8 inch

in depth. A length of almost 3 football fields is a very significant distance. It is noted that West observed no one as he traveled that distance. West also observed 20 bottom rollers running in coal and coal dust between crosscuts 3 and 9. Significantly, West then took the important step to confirm that what he observed was coal and he did this by digging under the bottom rollers. West stated that the coal accumulations underneath the rollers were black from crosscut 3 to 9 were cupped around the rollers, to the point that basically the rollers were submerged. He explained that this creates a fire hazard due to frictional heating and the rollers moving in coal causes it to become more powdery, causing float coal dust.

Again, West stated that there was no one working in that area, so the problems were not being addressed. Next, West spoke to crosscuts 43 to 44, where he found 4 inches of loose coal under the belt. It was not until crosscut 49 that West observed anyone working on the belt. Thus, he computed that he walked some 3,430 feet, or more than 6/10th of a mile, before observing someone working on the belt. At that crosscut, No. 49, he saw Perry Cavanaugh, who informed West that he was shoveling the belt. This was around 10:45 a.m. Cavanaugh told West that he was given a list of places to shovel that morning at the start of his shift and stated that he spot cleaned the 5B belt drive to crosscut 3 and then moved to crosscut 41. Although Cavanaugh told West that he had shoveled from crosscut 41, West found accumulations at crosscuts 43 and 44.

West noted that Cavanaugh was wet from sweat, indicating that he had been working hard that day. West concluded that having a single man deal with the accumulations was not enough because they were too extensive. Further, in West's estimation, the problem was not solely about shoveling; rock dusting also needed to be performed. At the time West met him, Cavanaugh still needed to shovel eleven more crosscuts, a distance of about 770 feet. One should again call to mind a length of some 2 ½ football fields. West believed it would have taken Cavanaugh at least the rest of his shift to complete the shoveling. That is, to shovel the areas cited in the belt inspection record from the second shift of December 8, 2008. Until West had 'red-tagged' the belt that morning, issuing his D order, the mine had been producing coal at the face. It was West's view that if the problems he found had been addressed at the start of that day shift, it would have taken seven or eight men about the entire shift to correct the problems. West's estimate was based on his personal observations and did not take into account Caudill's observations. Accordingly Caudill's observations of problems would be in addition to those West observed. West stated, without equivocation, that the mine should not have been running coal until the problems listed in the belt inspection record had been corrected.

Following West's meeting with Cavanaugh, he discovered more problems. From crosscut 50 to 51, there were two bottom rollers running in coal and there was float coal dust 1/16 to 1/8th of an inch deep. Float coal was on the frame as well. West then met up with Caudill at crosscut 53. Caudill informed West of the problems he saw of the belt rubbing the frame on the belt entry from crosscut 53 to the tail piece, in twenty locations and this was recorded by West in his notes. Caudill also reported to West that he found float coal dust between crosscuts 62 through 64 and that it was 1/16 to 1/8 of an inch deep. As noted earlier in this Decision, when the Court asked if that was a significant amount of coal dust, West advised that it has been shown that a lot less than that, probably only half what was found, can cause an explosion if it gets suspended in the air. West learned that the mine assigned 14 people to correct the conditions that he and Caudill found on the 5 B belt and that it took them 5 hours to correct the problems. That totals about 70 man hours and accordingly the Court

agrees with West's characterization that the correction required an extensive amount of time.

In citing the Respondent for a violation of 75.400 for the accumulations of loose coal, coal dust and float coal dust, West reiterated that it presented a risk of fire and/or explosion, that the likelihood of injury was reasonably likely in that it presented a discrete hazard to miners because a fire or explosion would inundate the escapeways with smoke and carbon monoxide. Again, West found that the ingredients were present because there was fuel, oxygen in the airflow and ignition sources from the frictional rubbing of the belt on the frame. The ventilation violations found by Caudill was a factor considered in determining the number of persons affected. West marked lost work days or restricted duty as the type of injury which could occur and 18 persons, the number of miners on the No. 5 unit, being affected. This number was based on the number of persons inby and West provided considerable detail about what could happen, including the air courses which would be affected by smoke or carbon monoxide traveling inby towards the section.

Although the corrections on December 8, 2008 belt inspection report for the second shift only referred to cleaning on 41 to 46 and 58 to 60, West agreed that his unwarrantable and high negligence findings were based on the corrections he read in the belt inspection report for the second shift on December 8, 2008. However, West's position was strengthened by his remark that his view was also based on what he observed underground. Accordingly, while West did not dispute that he observed Cavanaugh shoveling on the belt, and that he could have been shoveling for about two hours before West saw him, it was West's point that the effort was both late and an insufficient response. West also did not question that Cavanaugh was given a list of areas that needed to be addressed that day and that Cavanaugh told him he had been assigned to shovel the belt that day. While Respondent suggested that West had no reason to doubt that Cavanaugh would rock dust after he finished shoveling, West responded that Maynard told him he didn't have anyone to rock dust.

Further, while the Respondent tried to challenge West's tally of the number of crosscuts with problems, West, upon checking his notes stated that there were some 26 crosscuts where there was coal that needed to be cleaned up or float coal dust was present. West added that there were several other places where there was "just coal underneath bottom rollers." Thus, West maintained that there were 26 crosscuts that needed to be cleaned in addition to areas where there was coal under bottom rollers. French admitted that on December 9, 2008 he had no personal knowledge of the conditions along the 5B belt.

Cowan agreed that West walked the 5B belt line. As Cowan acknowledged, West took off by himself and walked to the unit. Further, when West did meet up with Cowan and informed him of more areas that needed to be addressed, Cowan did not argue with him, acknowledging, he couldn't as he hadn't made the areas yet.

After the rock dusting, Maynard wanted to find the whereabouts of Inspector West in order to make sure that West was satisfied that we could start the belt back up and start producing coal. Further, Maynard implicitly acknowledged Highland's reluctance to stop producing coal by stating that if a belt examiner sees a roller running in coal, the examiner is to either fix it himself "or shut the belt off. At that point he'll get plenty of attention." Tr. 407. This admission by Maynard speaks volumes about Highland's misplaced priority in focusing upon producing coal in the face of

significant accumulation of combustible materials issues.

### **CIVIL PENALTY ASSESSMENT**

Having found the alleged violations existed, and affirming each of the special findings associated with those violations, the Court must assess civil penalties for them and do so by taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(I). The Negligence, Gravity, including significant and substantial findings have already been discussed.

**Ability to continue in business.** The parties have stipulated that the proposed penalties will not affect the Respondent's ability to continue in business.

**Good faith.** The Respondent demonstrated good faith in abating the violations.

**History of previous violations.** Per the parties' stipulations, the proposed data sheet as well as the contested assessment sheets for these dockets, as contained within Exhibit A, and the R 17 Assessment History Report were admitted into evidence for this criterion. They stipulated that a computer printout is the history of prior violations for the Mine for the purposes of this proceeding

**Size.** Highland Mining Company, LLC, is a large mining operation.

Given the civil penalty criteria discussed above, the Court assesses a civil penalty of \$64,752.00.

### **ORDER**

Within 40 days of the date of this decision, Highland Mining Company, LLC, is **ORDERED** to pay a civil penalty of \$64,752.00 for the violations set forth above. Upon payment of the penalty, this proceeding IS DISMISSED.

William B. Moran  
Administrative Law Judge

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