FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

May 19, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2008-666 A.C. No. 11-02752-161958
v.	Docket No. LAKE 2008-667 A.C. No. 11-02752-160563
	Docket No. LAKE 2009-6-A A.C. No. 11-02752-162890-05
THE AMERICAN COAL COMPANY, Respondent	Mine: New Era Mine

DECISION AND ORDER

Appearances: Barbara Villalobos, Esq., Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Jason W. Hardin, Esq., Mark E. Kittrell, Esq., Fabian & Clendenin, Salt Lake City, Utah, for Respondent

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petitions allege that The American Coal Company ("AmCoal") is liable for eight violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines.[1] Seven of the violations were deemed to be "flagrant," and subject to substantially higher penalties.[2] A total of $1,182,500 in civil penalties were assessed for the violations. Prior to the hearing, the parties settled three of the violations; the flagrant designations were withdrawn, and the assessed penalties were reduced from $452,000 to $30,000. A Decision Approving Partial Settlement was entered on February 25, 2014.

---

[1] 30 C.F.R. Part 75.

[2] As dicussed *infra*, the Mine Act was amended in 2006 to add a new category of "flagrant" violations, for which penalties up to $220,000 could be imposed. The statutory limit on most other violations is $70,000.

A hearing on the remaining violations was held in Evansville, Indiana and Henderson, Kentucky, before Administrative Law Judge Gary M. Melick, and the parties filed briefs after receipt of the transcript. Judge Melick subsequently retired, and the case was reassigned for purposes of writing and issuing a decision. The parties did not object to the reassignment, or request a supplemental evidentiary hearing.[3] Because of the time that had elapsed since the parties had filed their original post-hearing briefs, they were afforded an opportunity to submit supplemental briefs on the issue of whether the violations were properly assessed as flagrant. Both parties elected to submit briefs, which were filed on March 28, 2014.

Remaining at issue are five violations: Order No. 7490572 alleged a flagrant violation of a standard requiring that electrical equipment be deenergized when work is performed, for which a penalty of $161,800 was assessed. Order No. 6668524 alleged a flagrant violation of the roof control standard, for which a penalty of $158,900 was assessed. Order No. 6668526 alleged a flagrant violation of the preshift examination standard, for which a penalty of $161,800 was assessed. Order No. 6673874 alleged a flagrant violation of the accumulations standard, for which a penalty of $188,000 was assessed. Order No. 6673876 alleged a violation of the onshift examination standard, for which a penalty of $60,000 was assessed.

For the reasons that follow, I find that AmCoal committed the violations. However, the flagrant designations are vacated, and several of the special findings on the issues of gravity and negligence are modified, and civil penalties in the total amount of $36,500 are imposed.

Findings of Fact - Conclusions of Law

At all times relevant to these proceedings, AmCoal operated the Galatia Mine, an extremely large underground longwall coal mine, located in Saline County, Illinois. It is a "gassy" mine, liberating over one million cubic feet of methane in a 24-hour period, and is subject to 5-day spot inspections under section 103(i) of the Act. Underground coal mines must be inspected by the Secretary's Mine Safety and Health Administration ("MSHA") four times each year.[4] In order to timely complete the inspections, MSHA assigned several inspectors, most of whom were at the mine virtually every day. Steven Miller, one of the inspectors, issued the five violations remaining at issue. Miller has extensive experience, both as a miner, and an MSHA inspector, and has inspected the Galatia mine since 1991. The orders litigated by the parties were issued during inspections of the mine in September and November 2007, and January 2008.

---

[3] *See* Commission Procedural Rule 68, Substitution of the Judge. 29 C.F.R. § 2700.68.

[4] 30 U.S.C. § 113(a).

Order No. 7490572 (LAKE 2008-667)

Order No. 7490572 was issued by Miller at 11:30 a.m., on September 6, 2007, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.509, which requires that "[a]ll power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing." The violation was described in the "Condition and Practice" section of the citation as follows:

> A maintenance supervisor was observed reaching into a, 480 Volt AC, energized electrical panel. The supervisor had been making repairs to the Stamler Feeder, company number FB-11, located on the Flannigan New Portal Bottom active section. (MMU-003) There was an hourly employee standing next to the supervisor who was also exposed to this hazard. The supervisor stated that he was just reaching in the panel to move some wires as he was closing the access panel. His hand was within ten inches of the un-insulated lugs on the bottom of the energized circuit breaker. This is the second citation of this regulation in the last ten days. The supervisor offered no mitigating circumstances other than to state he was taking a shortcut.

Ex. S-2.

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence rose to the level of "Reckless Disregard." The violation was assessed as flagrant, and a civil penalty in the amount of $161,800 was proposed.

The Violation

On September 7, 2007, Miller conducted an inspection of the Galatia North Mine. He was accompanied by Robert Hatcher,[5] AmCoal's safety director for the mine. They rode in a golf cart approximately 7 miles to the active section of the mine, referred to as the Flannigan New Portal Bottom. When they arrived at the section, near the working face, Miller conducted an imminent danger run, while Hatcher took the cart to a charging station so that the batteries would have enough energy for the return trip.

The mine was not then producing coal, because the working section was bolting screen wire to the ribs. Tr. 47. AmCoal took advantage of the idle period to address a problem with the feeder, which had been malfunctioning. It would not stay on for extended periods due to a problem with sequencing of the electronic controls. Tr. 471. Christopher Cowsert, a maintenance mechanic, called his supervisor, John Jones, the maintenance foreman, to assist in

---

[5] Hatcher left AmCoal's employment in November of 2009, and began working for MSHA as a coal mine inspector. He was so employed when he testified at the hearing. Tr. 28.

diagnosing and remedying the problem.

Jones and Cowsert reported that they had deenergized the feeder at the power center, and locked and tagged out the 480-volt circuit prior to opening the feeder's electrical panel. One of them then returned to the power center, removed the lock/tag, energized the panel, and Jones began the task of troubleshooting. Jones did not have his equipment with him, so he borrowed Cowsert's gloves and meter while he worked on the panel.[6] Tr. 473.

The feeder's electrical panel was housed in a metal box approximately 4 feet wide, 18 to 20 inches high and 14 inches deep. Tr. 411. It was mounted at roughly waist height, and had a door that was hinged along the bottom of the 4-foot width, with a chain on the right-hand side to limit the swing of the door to an approximately horizontal position. Tr. 475. Several photographs of the panel were introduced into evidence. Ex. S-4, R-27. On the left side there was a breaker that could be re-set externally, i.e., without opening the panel. Next to that were three vacuum lugs which would transmit 480-volt AC power to the main motor. From the center to the right, there were other connections, including numerous connections to a bus bar that ran along the bottom of the panel. The other connections were primarily control circuits, operating at 110 volts or less. Tr. 61, 150, 408-10.

Believing that the problem had been fixed, Jones handed the meter and gloves back to Cowsert, and began to lift the panel door to close it. Tr. 477. No attempt was made to deenergize the panel. Tr. 31. Jones had his left hand on a handle that was located at the top, middle of the panel door, and was lifting it when he noticed that some control wires running along the bottom of the panel might be pinched as the door pivoted up. Tr. 477. He reached into the box with his bare hand, and lifted the wires to allow the door to close. Tr. 477. The wires were insulated, and there were no defects in the insulation. Tr. 93, 477.

At that time, Miller was returning from his imminent danger run and, as he approached the feeder, he observed Jones with his hand in the panel. When Miller asked what he was doing, Jones removed his hand and let the lid back down. Miller reminded the men that electrical panels could not be opened or closed while energized, i.e., that power to the panel had to be shut off and the circuit locked and tagged out, before those actions could be taken. Jones walked back to the power center, 100-200 feet away, to kill the power and lock and tag the circuit. He encountered Hatcher, who was returning from the battery charging station, and told him what happened when Hatcher inquired. Hatcher went to the feeder, where Miller was located. When Jones returned, after deenergizing the feeder panel, Miller asked him whether he was in a hurry

---

[6] Miller clarified that under MSHA's regulations voltages less than 995 volts are considered "low voltage" and there is no requirement that specially insulated gloves be worn. Tr. 88. Under the general protective equipment regulation, gloves are required when performing work which might cause injury to the hands. 30 C.F.R. § 75.1720(c). MSHA regards the wearing of leather gloves by miners working on low voltage electrical panels as complying with the requirement. Tr. 83.

or just taking a short cut, and Jones responded, "I guess I was taking a short cut."[7] Tr. 31.

AmCoal does not directly argue that there was no violation. However, it does point out that neither the Act, the Secretary's regulations, nor MSHA's publications provide a clear definition of the terms "work" or "trouble shooting and testing" as used in the standard. Prior to the issuance of the order, however, MSHA's electrical department personnel had determined that the actions of opening or closing an electrical panel constituted work, for which the standard required that the circuits and equipment be deenergized. Tr. 96. That was true even if the purpose of opening the panel was to trouble shoot or test the electrical components. Todd Horton, AmCoal's electrical foreman, confirmed that MSHA had informed AmCoal of its determination, and AmCoal had adopted it as its policy, and incorporated it into its training. Tr. 413, 446-48. Cowsert was well aware of the policy, and Jones surely must have been. Tr. 472, 480.

Any ambiguity in the terms "work" and "trouble shooting or testing" was removed well before the incident at issue, and AmCoal and its employees had received actual notice of the Secretary's interpretation of the standard. An extended discussion of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) is unnecessary. For present purposes, in light of AmCoal's position on this issue, I find that the standard is ambiguous and that the Secretary's interpretation, though not the only permissible view, is reasonable and entitled to deference. In attempting to close the panel, Jones performed work without deenergizing the equipment, in violation of the standard.[8]

Significant & Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*[9] framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65

---

[7] The Secretary argued that adverse inferences should be drawn because AmCoal did not call Jones as a witness. A similar argument was made with respect to AmCoal's failure to call examiners to explain their reports with respect to the accumulations violation. The Secretary failed in both instances to establish a predicate for his missing witness argument, notably that the witness was peculiarly available to AmCoal. In any event, the facts of the respective incidents were largely found to be consistent with the adverse inferences that the Secretary urged.

[8] In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

[9] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

(Oct. 2011), *aff'd sub nom., Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further 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.
>
> *Id.* at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized 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.*, 6 FMSHRC 1834, 1836 (Aug. 1984).
>
> . . . .
> . . . .
>
> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id.* at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has

occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. Jones was performing "work" on an electrical panel that had not been deenergized. The violation contributed to a discrete safety hazard, that Jones' hand might contact an uninsulated energized electrical component, resulting in an electrocution type of injury. Any such injury would be serious. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard would result in an injury.

Miller determined that the violation was highly likely to result in a fatal injury. As he explained his rationale, Jones' hand was within approximately 10 inches of lugs energized with 480 volts of AC power, and there were other energized connections, including a breaker, a fuse box, and a bus bar that ran along the bottom-right side of the panel. Tr. 67, 76, 104. He did not believe that Jones could see exactly where his hand was when the panel door was most of the way closed. Tr. 66-67. He also felt that there was a possibility of inadvertent contact between Cowsert and Jones that could have caused Jones' hand to contact energized components inside the panel. Tr. 104.

Miller had to have been mistaken about Jones' hand being within 10 inches of the 480-volt lugs. They were located on the left side of the panel, and Jones' hand was on the right side. Tr. 477. Miller had noted in the order that Jones' hand was within 10 inches of uninsulated lugs "on the bottom" of the panel. Ex. S-2. The lugs on the bottom of the panel were on the bus bar, and were connections for control circuits of no more than 110 volts. Cowsert described the wires as all being insulated along that strip, i.e., the bus bar on the lower right side of the panel with connections for the control circuits. Tr. 477.

The possibility of external movement, e.g., tripping or slipping, causing Jones' hand to move inside the panel was remote. Cowsert had worked as a maintenance mechanic and had received his electrical card. Tr. 484, 469. From past experience, he appreciated the dangers of other persons being too close to him as he worked on electrical equipment, and had stationed himself a safe distance away from Jones. Tr. 478-79. Neither he nor Jones were moving, and there were no other persons or moving equipment in the area. Tr. 106-07.

While Jones may not have been able to see his hand if the panel door was raised close to vertical, he was able to see the location of wires that might get pinched as the panel door closed, and had had a view of the wires as he lifted them. He was not feeling around inside the panel to locate loose wires. Cowsert testified that Jones had lifted the wires and was removing his hand when Miller approached. Tr. 478. With 20 years of experience, Jones was very familiar with the layout of the panel and the locations of the

various energized components. The 480-volt lugs for the main feeder power were located on the left side of the panel, and Jones' left hand was on the outside of the panel door, near the handle. He was using his right hand to lift the wires. While Miller estimated that Jones' hand may have been 10 inches away from those lugs, it was considerably farther away from the 480-volt lugs. Tr. 67, 101-02. The bus bar, which was closer to Jones' hand, was configured with the electrical connections recessed between non-conductive fins designed to prevent inadvertent contact with other conductors. Tr. 103; Ex. R-27. His hand would have been in the panel for a few seconds, as he lifted the wires prior to raising the lid toward closure. While the possibility of inadvertent contact with energized components existed, it was not highly likely.

Jones' violation of the standard contributed to a discrete safety hazard of a potential electrocution injury. A hazard that could have been substantially, if not completely, eliminated by his wearing of gloves, or the installation of clips to hold the wires away from the pinch point. Of course, adherence to MSHA's interpretation of the standard, and AmCoal's policy, by deenergizing the panel while it was being closed would have completely avoided the hazard, as well as the violation.

I find that the hazard contributed to was reasonably likely to result in a reasonably serious injury, and that the violation was S&S.

Negligence - Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 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) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as 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 are necessary for compliance, the operator's

efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Miller determined that AmCoal's negligence rose to the level of reckless disregard, and that the violation was attributable to its unwarrantable failure to comply with the standard. Analysis of the unwarrantable failure factors is skewed somewhat by the unusual nature of the violation. The Secretary's position is predicated almost exclusively on Jones' negligence in closing the panel door while reaching in to hold wires away from a pinch point. Since the actions of Jones, an AmCoal supervisor, are normally imputable to the operator, the unwarrantable failure analysis will initially focus on Jones' conduct.

Extensiveness - Length of Time - Abatement Efforts

The violation was not extensive, and existed only for a few seconds. There was no opportunity for AmCoal to have abated the specific violation prior to its occurrence. However, AmCoal had taken steps to eliminate such violations, by adopting MSHA's interpretation of the standard as its policy, and incorporating it into its training. It also disciplined personnel that violated the policy.

Whether Operator was Placed on Notice that Greater Efforts were Necessary for Compliance

The Secretary does not argue directly that AmCoal was placed on notice that greater compliance efforts were necessary. Sec'y. Br. at 21-23. However, he notes that prior incidents occurred ("[t]his was not the first time that an employee was working on energized equipment"), before concluding that "[r]egardless of prior violations or incidents, however, Inspector Miller would have issued the subject citation as reckless disregard because a supervisor put his bare hand into an energized electrical box." *Id.* at 23. Miller had a somewhat different focus. He testified that he would have issued the violation as an unwarrantable failure order under section 104(d)(2) of the Act, even if Jones had not placed his hand into the open panel, i.e., solely for closing the panel without deenergizing it. Tr. 149-50.

The "prior incidents" included a violation cited by Miller two weeks earlier, on August 26, 2007, where a miner conducting a permissibility check on a roof bolter ran a feeler gauge through openings in an electrical panel and lights while the equipment was energized. Tr. 78-79, 122-24; Ex. S-5, R-33. Miller determined that the actions of the repairman, who he later testified was acting as AmCoal's agent, violated section 75.509, and rated the violation as highly likely to result in a fatal injury. Tr. 147-49. While he determined that AmCoal's negligence was high, he determined that it did not rise to the level of unwarrantable failure, and issued the violation as a citation pursuant to section 104(a) of the Act. Tr. 79, 122-23; Ex. S-5. The repairman's employment was terminated for his actions, and crews were re-instructed on the prohibition of working on energized electrical equipment. Tr. 442; Ex. R-34.

Miller also testified that he was aware that "other inspectors" had issued "similar types of violations." Tr. 73. However, he was unable to relate any details of such incidents. Tr. 111-14. There were no other violations of section 75.509 noted on the exhibit introduced by the Secretary listing AmCoal's past violations although such violations occurring on AmCoal's surface facilities would have been cited under a different regulation. Tr. 112; Ex. S-1. One such incident that occurred on the surface 14 months prior to the instant violation involved repairmen installing relays on an energized panel, which Miller had evaluated as high negligence, rather than reckless disregard. Tr. 116-18. Those personnel were independent contractors, not employees of AmCoal, and the contractor was removed from the mine site as a result of the violation. Tr. 121. Interestingly, the repairman and his supervisor both stated that "they always did it that way." Tr. 120-21.

The incidents of record, two in 14 months, do not support an inference that AmCoal was put on notice that greater efforts to comply with section 75.509 were necessary. In both of the described incidents those involved had their relationship with AmCoal terminated, and it appears that MSHA's interpretation of the standard as prohibiting the opening and closing of energized electrical panels was consistently emphasized in AmCoal's training, a fact that the Secretary relies on in arguing the degree of Jones' negligence. Tr. 412-13, 423-33; Ex. R-20, R-21, R-22.

Obviousness - Knowledge of the Violation

AmCoal's knowledge of the violation, and the fact that it was obvious, are predicated exclusively on Jones' knowing failure to comply with MSHA's interpretation of the standard, which had been adopted by AmCoal and conveyed to its employees. Miller was undoubtedly correct when he surmised that Jones tired of walking back to the power center to deenergize the panel and lock/tag the circuit. Tr. 107. He decided, in effect, to take a shortcut, to close the panel while it remained energized, apparently perceiving little danger in doing so, even when he reached in to hold a wire or wires away from a pinch point. Consequently, Jones knew that he was violating the standard as interpreted by MSHA, and he knew that the violation was obvious.

Danger to Miners

As noted in the S&S discussion, Jones' actions placed him in danger of an electrocution type of injury that could easily have been fatal. To a lesser extent, Cowsert might also have suffered an injury, if Jones contacted a bare energized conductor and Cowsert tried to free him from it. However, Cowsert had experience as a mechanic, had his electrical card, and had a good understanding of the dangers presented by working on energized equipment and in close proximity to persons who did so. The relatively low voltages involved virtually eliminated the possibility of the electric current arcing, such that Jones' and Cowsert's clothing would have provided effective insulation from the current.[10] It was reasonably likely that Jones would suffer a serious injury as a result of the violation, and a slight possibility that Cowsert would have suffered an injury. No other miners were put in danger by Jones' actions.

Conclusion

As noted above, unwarrantable failure is aggravated conduct constituting more than ordinary negligence, and is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Jones' actions could certainly be characterized as intentional misconduct. However, it is not clear that they amounted to a serious lack of reasonable care. While MSHA's interpretation of the standard was reasonable, the conclusion that the opening and closing of an electrical panel constitutes work, as opposed to trouble shooting and testing, is certainly not compelled, and apparently was at odds with the common practice of two electrical contractors. It is also unclear that such actions would be inherently hazardous. Miller proffered an explanation of a danger that could be encountered by opening an energized electrical panel, i.e., that a loose wire inside might then contact the metal box, energizing it. Tr. 151. As unlikely as that scenario might be,[11] he did not describe any dangers that might typically be encountered in the closing of a panel, although pinching of an insulated wire could be one. Cowsert explained that the initial examination of the panel when it was first opened revealed no obvious problems, e.g., loose relays. Tr. 472. Jones could see that there were no loose electrical connections when he started to close the panel. The wires that he took hold of were insulated, and the insulation was in good condition, which provided an effective barrier to the transmission of electrical energy to him. Tr. 93-94, 477. In order to suffer an injury, his bare hand would have had to come into direct contact with an energized component

---

[10] See note 12, *infra*.

[11] Although not explained in detail, it appears that the energized conductors from the power center were connected to the fixed terminals, e.g., the bus bar, in the panel, and that the wires connected to those terminals conducted power to the various components of the feeder. If a wire came completely loose from the terminal, it would no longer be energized. In addition, it is highly likely that the metal boxes enclosing such components were grounded.

in the panel.[12] He knew where those components were located, and his hand was kept a reasonably safe distance away from them, especially the 480-volt lugs on the left side of the panel.

As noted above, Miller would have cited the violation as an unwarrantable failure, even if Jones' had not reached into the panel. It would be extremely difficult to characterize the mere closing of an energized panel as S&S or an unwarrantable failure. However, Jones' action of using his bare hand to lift some wires while he closed the panel door enhanced the "danger to miners" factor of the unwarrantable failure analysis. The violation was not extensive and existed for only a few seconds. AmCoal had not been put on notice of a need for greater compliance efforts. Jones knew of the violation, which was obvious, but only for its short duration. It was reasonably likely that one miner would suffer a serious injury, and there was a slight chance that one other miner would suffer an injury because of the violation.

Upon consideration of the factors applicable to the unwarrantable failure analysis, I find that Jones' negligence was high, but did not rise to the level of reckless disregard, and that the violation was not the result of an unwarrantable failure to comply with the standard.

AmCoal's Negligence

As a maintenance foreman, a supervisor, Jones was AmCoal's agent and his negligence is imputable to it. *Rochester & Pittsburgh Coal Co.* 13 FMSHRC 189, 194 (Feb. 1991). In *Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1982), the Commission held that the negligent misconduct of a supervisor will not be imputed to an operator if the operator has taken reasonable steps to avoid the particular class of accident involved in the violation and the supervisor's erring conduct was unforeseeable and exposed only himself to risk. The Commission later held that the *Nacco* defense was not available where the supervisor's conduct results in an unwarrantable failure violation. *Capitol Cement Corp.*, 21 FMSHRC 883, 894-95

---

[12] AmCoal referred to a web site in its brief (http://www.cirris.com/testing/voltage/arc.html) that it claimed established that the distance that 480 volt electric power could arc in air was approximately 0.001 inches, and requested that judicial notice be taken that the potential arc for 480 volts was "on the order of a few thousandth's of an inch." Resp. Br. at 7 n.2. The Secretary did not oppose that request in his reply brief. The web site generally supports the assertion, but not quite as AmCoal claims. The arc calculator on the site specifies that the distance that 480-volt AC power can arc in air is limited to approximately 0.003 inches. The fact that the low voltage in the panel would have such a limited arcing distance is consistent with MSHA's acceptance of leather gloves as adequate protection for miners performing trouble shooting and testing on energized low voltage electrical panels. I decline AmCoal's invitation to take judicial notice of the specific limitations urged. However, it does appear that the arcing distance of 480 volt AC power in air is extremely limited, and that Jones would have had to physically contact a bare energized conductor to have suffered an injury.

(Aug. 1999), *aff'd.* 229 F.3d 1141 (4th Cir. 2000) (unpublished opinion).

The Secretary argues that Jones' negligence is imputable to AmCoal because his conduct resulted in an unwarrantable failure violation, and that *Nacco* would not be applicable, in any event, because Jones endangered another miner, i.e., Cowsert.

Jones' conduct did not constitute an unwarrantable failure violation. Consequently, under *Nacco*, his negligence cannot be imputed to AmCoal, unless his action endangered other miners.[13] Miller testified that Jones' actions put Cowsert in danger, because he was in close proximity to Jones, and instinctively might have tried to pull Jones out of the panel if he had contacted an energized conductor. Tr. 75-76. As noted above, there was a slight possibility that Cowsert would have suffered an injury if Jones had contacted an energized conductor. Therefore, Jones' actions placed another miner in danger. While Miller's order reflects that one person, Jones, was affected by the violation, his notes and testimony consistently reflect his concern that Cowsert was also exposed to danger.

I find that Jones' violative conduct endangered Cowsert. Therefore, the *Nacco* defense is not available to AmCoal. Jones' negligence is imputable to AmCoal and I find that its negligence was also high, although it was mitigated somewhat by its efforts to eliminate such violations, as noted above.

The propriety of designations of this and the other three orders as flagrant violations is discussed *infra*.

Order Nos. 6668524 and 6668526 (LAKE 2008-666)

Order No. 6668524 was verbally issued by Miller at approximately 8:00 p.m. on November 7, 2007, pursuant to section 104(d)(2) of the Act.[14] It alleges a violation of 30 C.F.R.

---

[13] The Secretary does not argue that AmCoal had not taken reasonable steps to avoid the particular class of accident involved in the violation, or that Jones' erring conduct was foreseeable. It appears that AmCoal had taken reasonable steps to avoid the particular class of accident involved in the violation by adopting MSHA's interpretation of the standard as its policy and incorporating it into its training. As to foreseeability, Miller had formed an opinion that work on energized equipment seemed to be common practice at AmCoal. However, aside from two incidents, he was unable to provide any details of other such conduct. The incidents that were described had resulted in the termination of the involved workers. Moreover, it was Jones' reaching into the panel that presented the greatest danger, and there is no indication that that action should have been foreseeable.

[14] The order bears a date of November 8, 2007, because it was past midnight before Miller was able to compose it on his computer, and that date was automatically entered when the order was printed.

§ 75.202(a), which requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The violation was described in the "Condition and Practice" section of the order as follows:

> The roof and ribs along the 1st West Flannigan Longwall Primary Intake Escapeway were not supported or otherwise controlled to protect persons from hazards related to falls of the roof and ribs. There is loose, broken-up, or unsupported mine roof at the following locations: along this escapeway from Number 7 crosscut to Number 25 crosscut. Number 7, 8, 9, 14, 16, 20 and 25. Ribs need to be scaled and supported at the following locations: Number 10-11, 16-17, 19-20, and other intermittent locations.

Ex. S-6.

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that two persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard.[15] The violation was assessed as flagrant, and a civil penalty in the amount of $158,900 was assessed.

The Violation

Miller participated in an ongoing inspection of the mine during the second shift on November 7, 2007. He met Mark Odum, an MSHA supervisory roof control specialist, at the mine and they went underground, accompanied by Johnna Durham, an AmCoal safety specialist.[16] They traveled several miles, through the main travelway and primary escapeway, to the headgate of a longwall panel that was being set up at the time. There had been a roof fall in that area, and an order had been issued pursuant to section 103(k) of the Act. Rehabilitation measures had been taken, and AmCoal was seeking to have the order terminated.

The inspection party traveled in a 4-seat personal vehicle ("PV"), equipped with a canopy, and driven by Durham. Tr. 539. They encountered a loose rib between crosscuts 3 and

---

[15] While the order was issued by Miller, it was Odum who identified the various conditions in the first instance. After the PV was parked, Miller and Durham walked approximately 30 feet behind Odum and either abated or flagged conditions that he pointed out, and were later written into the order.

[16] Durham had over 10 years of mining experience at the time, including operating equipment on a working section, serving as mine manager, and approximately 2-3 years as an examiner. She had been a safety specialist for approximately 6 months, and was continuing to participate in on-the-job training. Tr. 536, 550-52.

4, for which a citation was issued charging a violation of the mine's roof control plan. At crosscut No. 6, they noticed a piece of draw rock hanging down from the roof. They stopped and scaled it down, leaving a loose roof bolt, which was flagged. A citation was issued for that condition. Tr. 539; Ex. S-8.

As they continued on, Odum asked Durham to back up so that he could examine something that "didn't look right" near crosscut No. 7. Miller's notes reflect that there was broken roof and a loose roof bolt at that location. Ex. S-8. After traveling approximately another two crosscuts, Odum had Durham stop so that he could examine another suspect condition. He decided to walk the rest of the way, and asked Durham to park the PV, which she did. Tr. 541. While they walked the 35-40 crosscuts to the headgate, Odum identified numerous places where he felt that the roof and ribs were not properly supported, and Miller made notes of their locations.[17] Tr. 543. At one point, Miller and Durham attempted to pry down a section of rib that appeared to be loose. However, they were unable to do so. They flagged the area and moved on. Tr. 540-41. Durham scaled many of the rib conditions that Odum identified. She described those conditions as not "real big stuff, but it was just a little bit of loose stuff that we could pull down, normal rib rash." Tr. 542. Areas that needed extra attention were flagged by Miller and Durham. Tr. 542. From her experience as an examiner, Durham did not believe that the conditions Odum was identifying were hazardous. Tr. 543.

When they reached the longwall headgate, they encountered Jeff Dyson, the longwall coordinator, and Mike Grant, the longwall boss. Durham related her experience and alerted them to the likelihood that an order would be issued by Odum or Miller, closing the travelway. Tr. 546. Stephen Willis, AmCoal's manger of health and safety for the AmCoal complex, was advised of events, and drove to the mine. He met Durham and Miller at the mouth of the Flannigan unit, and Durham told him what had occurred. Tr. 500. Willis traveled to the area to observe the conditions. Willis, who had 33 years of mining experience, including several years as an examiner, observed areas where there was some loose rock and cracks in ribs. Tr. 504, 516. However, he believed that they were typical of conditions that could be found virtually any time in a large coal mine, and whether they "were unwarrantable or not" was a "subjective"

---

[17] The description of how the inspection proceeded is based largely on Durham's testimony, and Miller's notes. Durham appeared to have had a fair recollection of the events, and described pertinent details, although she was uncertain of the specific location of some conditions. Any notes she may have taken were lost, and she had not prepared an "order report," which was AmCoal's practice at the time. Tr. 553-54. As a safety specialist in training, who had been assigned to that portal for only a few days, the inspection would have been a significant event for her. Tr. 550-52. Miller, on the other hand, had virtually no recollection of the details of the inspection, or of his visit to the mine the previous day. Tr. 160-61, 214, 262. His testimony was based on his field notes, and his interpretation of what they "evidently" or "probably" meant. Tr. 256-58, 262, 288, 290. He observed that the events occurred "five years ago," and could confirm that Odum was present at the mine, as his notes reflected, but could not recall whether Odum accompanied him. Tr. 217-18, 262.

determination - "a judgment call." Tr. 504-05, 517. Assuming they could be classified as violations, he did not feel that they "in any way" could be attributable to an unwarrantable failure, and AmCoal's negligence should have been rated at "no more than moderate." Tr. 500.

As with the previous order, AmCoal does not argue that the cited conditions did not establish a violation of the standard. The conditions noted in Miller's order were, in his opinion, violations of the standard, i.e., a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the inadequacy of the particular roof and rib support in the areas cited. *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987) (cited in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)).

As noted above, Willis confirmed, upon inquiry by the judge, that there were areas of the roof where there was "some loose rock" and there were "some cracked ribs." Tr. 504, 516-17. Durham, too, opined that there were some conditions that needed attention. Initially, a rib appeared to be loose and was flagged for further attention. Similarly, other areas that could not be scaled successfully and needed "extra attention," were flagged. As to the roof conditions, she identified an area one row of bolts into a crosscut, and an area where there was a crack in the roof that needed additional support. Tr. 545-46.

I find that the standard was violated.

S&S

The fact of the violation has been established. The violation contributed to a discrete safety hazard, that inadequately supported areas of the roof and/or ribs would fall, possibly injuring any miners who happened to be in the area. While some falls might not result in serious injury, e.g., minor sloughing of a rib, the more serious conditions, large pieces of loose rib and any significantly sized loose rock in the roof, would inflict a serious injury. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard would result in an injury.

Miller opined that a serious injury was "very highly likely" because of the number of hazardous conditions in the travelway, and the fact that virtually all of the miners, working on three shifts, traveled through the area on their way into and out of the mine. Tr. 162-68, 276. While miners generally traveled on mobile equipment for the lengthy ride, not all of the transports had canopies, e.g., some rode in open golf carts. Tr. 169.

The Secretary also notes that the travelway served as the primary escapeway. Miners were required to participate in escape drills every 90 days, and may have been required to use the escapeway in the event of an emergency. Tr. 163, 166. However, there was no evidence establishing that evacuation drills occurred, or would have occurred, while the conditions existed. The Secretary does not contend, and offered no evidence to establish, that an emergency evacuation of the mine was likely to occur while the violative conditions existed. The subject

roof control standard under which the order was entered does not apply only, or even primarily, in emergency situations. Consequently, while the possibility of increased exposure of miners in the event of an emergency could be a legitimate consideration in the S&S analysis, there is no basis for doing so here, and the existence of an emergency will not be assumed. *See Consolidation Coal Co.*, 35 FMSHRC 2326, 2333 (Aug. 2013) (discussing *Cumberland Coal, supra*).

AmCoal makes much of the fact that, in his notes, Miller placed substantial emphasis for his conclusion that a fatal injury to two miners was highly likely on the presence of two miners working "directly under" a "Big Rock" at the "#6 x-cut." Tr. 162, 165, 279-84; Ex. S-8 at 13-14. AmCoal's point is well taken. That condition was not one of the violative conditions cited in Order No. 6668524. Rather it was the subject of a separate violation, Citation No. 6668522, that was issued by Miller shortly before he issued the subject order. Ex. S-8 at 4-5. It is not clear whether, or to what extent, miners would have worked in the area of the cited conditions, i.e., crosscuts 7-25, as opposed to simply passing through it. Also unclear is how often miners traveled on foot or in equipment that did not have a canopy. There is also much uncertainty on the precise nature of the hazards presented by the various conditions, because Miller was unable to recall details of the cited roof and rib conditions.[18] He made no sketch depicting the locations of the various conditions, and could not recall whether roof conditions were located near the center of the entry where miners normally traveled, or near the rib where miners seldom traveled and injury would be unlikely. Tr. 255, 259-60. There is even some question as to whether some of the conditions were located in the travelway or in adjacent crosscuts.

Nevertheless, Miller believed that the conditions were located in the travelway and presented hazards to persons using the travelway. He had cited the travelway, not the crosscuts, and believed that the references to crosscuts in his notes were to locate the conditions along the travelway. Tr. 264. I accept his reasonable interpretation of his notes, and find that the conditions referenced in the order and his notes were located in the travelway and that at least

---

[18] Durham testified that, as Odum was pointing out conditions, Miller made gestures and comments indicating that he was not in agreement with Odum's determinations. Tr. 543-44. Miller stated that he did not recall disagreeing with Odum or apologizing for the fact that the conditions were being cited. Tr. 217-18. Durham could not recall Miller's exact words, and any notes she made of the event were lost in an office move related to the closing of a portal. At the time, she was still in training and did not prepare an "order report," as Smith had done for citations issued by Miller on November 6. Tr. 553-54. Miller's lack of recollection suggests a ring of truth to Durham's testimony. While the events had occurred years earlier, and Miller's recollection of them was extremely limited, disagreeing with or being critical of a supervisor during an inspection would be a particularly noteworthy occurrence, and it would seem that he would have had a relatively certain recollection that it either did, or did not, take place. Durham's rendition of events would also be consistent with the fact that Odum was identifying a number of conditions in an area that Miller had traveled less than 24 hours earlier without citing any hazardous conditions.

some posed a hazard to persons using the travelway.[19] The travelway was typically 18-20 feet wide. Miners traveling in mobile equipment would tend to travel near the center of the entry, but would have occasion to move closer to the ribs, e.g., when passing another piece of equipment, or maneuvering around debris or other obstructions. Sloughing of smaller pieces of coal from the ribs would not pose a reasonable likelihood of injury. However, falls of large sections of rib, some of which were described in Miller's notes, could inflict serious injuries on miners. Pieces of draw rock, of any appreciable size, falling from the roof, could also inflict serious injuries to miners riding in open vehicles, or on foot.

The "operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1255 (Nov. 1998) (quoting *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989)). As noted in the discussion of unwarrantable failure, *infra*, there is considerable uncertainty as to how long the cited conditions had existed. However, it is likely that they would have continued to exist for a significant period of time, had the order not been entered. Mine examiners had not identified the conditions as hazardous, despite having undergone special training only two weeks prior. Miller noted that rib separations can be difficult to detect, depending upon one's direction of travel. AmCoal's managers who personally observed the conditions did not regard them as particularly problematic. Willis, for example, viewed them as "nothing really out of the ordinary" – at "any given time there are going to be cracked ribs, loose rock up and down travel ways" and whether or not they're unwarrantable is a judgment call. Tr. 504-05. Durham did not feel that the conditions being pointed out by Odum were hazardous. Tr. 543.

Despite the uncertainties argued by AmCoal, there were a significant number of inadequately supported roof and rib conditions along the travelway, some of which, e.g., the large pieces of rib that had separated from coal pillars, could have caused serious injuries to miners. The main travelway/escapeway was heavily traveled, and under continued normal mining operations, the cited conditions would have continued to exist for a significant period of time, i.e., several shifts or longer. With the exception of the large piece of draw rock hanging from the roof at crosscut #6, a condition that was not included in this order, the evidence of the nature of the violative conditions established that, while a fatal injury might have been possible, a far more likely result would be that the violation was reasonably likely to result in a permanent injury to one miner.[20]

---

[19] Willis, who viewed the conditions shortly after the order was entered, conceded that some of them posed hazards. His disagreement was addressed to whether they justified the designation of unwarrantable failure. Tr. 504-05, 517.

[20] As noted, *infra*, Citation No. 6668522, which addressed the condition at crosscut #6 where two miners were working under the hanging rock, was subsequently modified to allege that one miner, rather than two, was likely to be injured.

I find that it was reasonably likely that a reasonably serious injury would have resulted from the hazard contributed to by the violation and that the condition was S&S.

Unwarrantable Failure - Negligence

Miller testified that he believed that AmCoal's negligence was high, and rose to the level of unwarrantable failure because of the number of roof/rib control deficiencies, they had existed for "quite some time," and that they were "extensive and obvious." Tr. 166, 169. Moreover, the conditions were allowed to exist, despite the fact that there had been prior discussions with management about the number of roof/rib control violations in quarterly close-out meetings and in informal close-out meetings after such violations had been issued. Tr. 167-69.

The extent of the violation

The cited conditions existed over a relatively large area, from crosscut #7 to crosscut #25, a distance of approximately 2,700 feet. Violative roof conditions were identified at seven locations and violative rib conditions were identified at at least five locations, although there is no information as to the conditions at two of those locations. Ex. S-8. However, some of the conditions may not have been in violation of the standard, and the extent of the conditions at each of the referenced areas was not great. Miller was unable to describe the conditions referenced in the order, beyond the information recorded in his notes. For example, the condition at the #7 crosscut was described in Miller's notes as "not adequately supported along the south side of travelway. Broken up roof and loose roof bolts are present in x-cut and in the intersection." Ex. S-8 at 7. Miller was unable to state how many bolts were involved, the condition of the bolts, how many were in the crosscut as opposed to in the travelway, or where they were located, e.g., along the rib or more toward the center where persons were more likely to travel. Tr. 255-60. He was also unable to recall details of other conditions noted in the order and his notes. Durham shed limited light on the conditions, noting that one of the areas where bolts were referenced involved one bolt in a row of bolts in a crosscut. Tr. 545. In another area, screen had been put up to catch pieces of draw rock, but, additional support was requested because there was a crack in the roof. Tr. 545-46.

The fact that the conditions were in an area that extended 18 crosscuts justifies a finding that they were extensive. However, the evidence does not support a finding that the individual conditions referenced in the order affected significant areas, such that the extensiveness factor does not weigh heavily in favor of a finding of unwarrantability.

Length of time conditions existed

Miller provided several estimates of the length of time that the conditions existed. He recorded in his notes that the length of time that the conditions existed was "unknown." Tr. 235; Ex. S-8 at 8. Several times he expressed his opinion that the conditions existed for "more than one shift" or "several shifts." Tr. 166-67, 211, 239; Ex. R-50. After noting that the order was

not abated until November 13, he opined that since it took 5 days to abate the conditions, "I'm going to say it took five days or better for the conditions to arise."[21] Tr. 240. He also opined that the conditions existed from 5 to 35 shifts, i.e., up to 12 days. Tr. 167. While he stated that there is "usually some evidence" indicating how long a condition existed, he did not identify any such evidence. Tr. 240. The asserted basis for Miller's various estimates of the length of time that the conditions had existed was "just my experience," a reference to his 31 years of mining experience, including serving as a roof control specialist and 15 years of inspecting the Galatia mine. Tr. 211, 240-41.

The Secretary argues that the opinion of an experienced inspector is entitled to substantial weight, citing *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998) and *Buck Creek Coal, Inc.*, 52 F.3d 133, 135-36 (7th Cir. 1995). It is well-settled that, under the Act, a seasoned inspector's judgment is an "important element" in an S&S determination. The same may be true for other opinions offered by experienced inspectors. However, estimating how long a particular condition has existed, based solely on the present appearance of the condition, strikes me as a complex and somewhat speculative undertaking, that calls for a close examination of factors affecting the reliability of such testimony.

Certainly, Miller's 31 years of mining experience and familiarity with the Galatia mine lends some degree of reliability to such an estimate. However, the bare assertion of years of experience, without identification of the particular aspects of that experience that aided the formulation of the opinion, or an explanation of how they informed the specific judgment, can significantly undercut the reliability and probative value of such testimony. Here, however, Miller's various estimates of the length of time that the conditions existed, with one notable exception, were not based upon his observations and evaluations of the conditions.

---

[21] I do not credit Miller's "five-day" estimate. Miller did not explain the basis of his assumed relationship between the length of time taken for abatement efforts and the length of time that the conditions would have existed. Willis and Durham estimated that abatement of the conditions should have taken no more than two shifts. Tr. 518, 549. Miller testified that he was in the mine daily and was told that AmCoal was working on it "around the clock." Tr. 231-32. However, as previously noted, Miller's recollection of the inspection was virtually non-existent. I find it highly unlikely that Miller, who could not remember whether Odum accompanied him on the inspection even with the assistance of his field notes, could recall being at the mine and comments about the progress of abatement efforts on 5 consecutive days, without the benefit of any notes. The 5-day period included a weekend and a federal holiday, and it is doubtful that abatement efforts actually consumed 5 days. Durham had scaled some of the conditions and, in anticipation of the order, AmCoal had moved a roof bolter and a scoop to the cited area to facilitate the abatement. Tr. 548. I find that Willis' and Durham's "two shift" abatement time estimate was a substantially more credible measure of the actual time it took to abate the conditions, especially considering that some of the initial effort had to be devoted to rehabilitation of an alternate travelway/escapeway around the area closed by the order.

As previously noted, Miller had virtually no recollection of the inspection. For example, he observed at one point that he had no recollection of a particular condition; "That's five years ago. I don't recall that. Just what I read from my notes." Tr. 262. As reflected in his notes, his opinion, recorded shortly after observing the conditions, was that the length of time that they had existed was "unknown." Ex. S-8. Three days later, when he filled out a form recommending that the violation be specially assessed, he wrote that the conditions existed "for several shifts." Ex. R-50.[22]

As candidly reflected in his notes, Miller was unable to ascertain how long the conditions had existed. There is no indication that he obtained any other information that would have given him a basis for estimating that length of time. He conceded that roof and rib strata can separate at any time. Tr. 240. The more probable basis for his estimate that the conditions had existed for more than one shift, or several shifts, was that "it would be kind of unique or unusual to have a separation of strata in that many locations along that travel way in a half mile." Tr. 240.

That would appear to be a reasonable conclusion. However, it does little to fix a time when the conditions came into existence, or when, or even if, they became hazardous conditions so as to be in violation of the standard. Some conditions, e.g., separation of large slabs of rib, or a crack in the roof, could have come about immediately before Odum and Miller saw them. They may also have occurred sometime prior to that, or have been the result of a slow movement of strata that gradually became more noticeable. Conditions like loose roof bolts, could have occurred over a considerable period of time. Miller concluded they were "probably" hanging from the roof because the immediate mine roof had sloughed away. Tr. 258-59. Such conditions are not unusual in entries that were mined years earlier, and do not necessarily present hazardous conditions.[23] It is the condition of the remaining immediate roof that generally may present a hazard, i.e., if it is broken and pieces of draw rock are likely to fall from it. Miller described some of the conditions as "broken roof." Ex. S-8. However, there is no indication of when the roof had become broken, such that it presented a hazard.

---

[22] The Secretary's objections to discovery and introduction into evidence of Special Assessment Review (SAR) forms were overruled. Those objections, on grounds of relevance and deliberative process privilege, were renewed in the Secretary's post-hearing briefs. Sec'y. Reply Br. at 2-4. The discoverability of SAR forms has been the subject of considerable, and in the opinion of the undersigned unproductive, litigation effort, with varying outcomes. *See, e.g., Big Ridge, Inc.*, 34 FMSHRC 2999 (Nov. 2012) (Order Denying Respondent's Motion to Compel). I decline the Secretary's invitation to revisit the issue. In any event, the Secretary's arguments are inapplicable to the subject phrase.

[23] If the bolts were fully grouted, support for the main mine roof may not have been compromised by the fact that the plates were no longer in contact with the immediate mine roof. *See Oak Grove Resources, LLC*, 35 FMSHRC 3039, 3046-49 (Sept. 2013) (ALJ).

Some of the conditions most likely existed for more than one shift, or several shifts, and I so find. However, there is no reliable evidence that the more serious conditions, such as the large pieces that had separated from the ribs, had existed for any appreciable length of time prior to issuance of the order, i.e., longer than one shift. This factor does not weigh heavily in favor of a finding of unwarrantability.

Operator placed on notice that greater efforts were necessary for compliance

The Secretary argues that AmCoal was put on notice that greater efforts were necessary for compliance with the standard by a high number of violations of the standard in the preceding months and by specific discussions of past violations with MSHA inspectors. An Assessed Violation History Report for the mine listing violations of section 75.202(a) issued within the 24-month period preceding issuance of the subject order established that 134 citations or orders for violations of the standard had been issued. Ex. S-1. Miller testified that violations of the standard were discussed with AmCoal officials at quarterly close-out conferences and, frequently, when such violations were issued. Tr. 167-69. MSHA had an "ongoing dialog" with AmCoal about such violations. Tr. 168. AmCoal counters that the Secretary did not establish that there was a history of roof control violations in the Flannagan Headgate travelway, and that there was no attempt to prove that the numbers of violations were excessive compared to comparable mines.

AmCoal's arguments are unavailing. It is well established that repeated similar violations may serve to put an operator on notice that greater efforts are necessary for compliance, and that such violations need not be in the same area of the mine. *IO Coal Co.*, 31 FMSHRC 1346, 1353-54 (Dec. 2009). Past discussions about a problem also can put an operator on heightened scrutiny that it must increase its efforts to comply with a standard. *Id.* at 1353. AmCoal did not introduce evidence challenging Miller's description of an ongoing dialog about compliance with the standard.

I find that AmCoal had been put on notice that greater efforts were necessary to comply with the standard.[24]

---

[24] This is not to say that AmCoal's arguments are totally without merit. The Galatia Mine was an extremely large mine, comprised of three portals. In order to complete required quarterly inspections MSHA inspectors were in the mine virtually every day. It is not surprising that, from a raw numbers standpoint, a large number of violations were issued. The Secretary's history of violations report appears to indicate that AmCoal was not regarded as having an "excess history" as of the time that the violations were issued. If the Secretary's case on notice rested solely upon past violations, the absence of qualitative violation history information may have affected the finding on this factor. However, the unrebutted evidence of past discussions of roof/rib control violations justifies the notice finding.

Efforts to abate the conditions

The focus of the abatement effort factor is on compliance efforts made prior to the issuance of a violation, generally a measure of an operator's response to violative conditions that were known or should have been known to it. Here there is no evidence that AmCoal made any effort to address the cited conditions prior to the issuance of the order. However, it had undertaken an unusually ambitious training program in an effort to identify and eliminate hazardous conditions, such as the roof and rib conditions that were the subject of the order.

In response to increased emphasis by MSHA on assuring effective preshift, on-shift and other examinations, AmCoal requested MSHA's assistance in providing additional training to its examiners. Tr. 210, 488-89. The result was a collaborative training program, involving instructors from MSHA's training academy at Beckley,West Virginia. Training was conducted at AmCoal's facilities on October 23 and 24, 2007, for examiners, safety and management personnel, and was designed to enhance the ability of responsible personnel to identify hazardous and potentially hazardous conditions. Tr. 210; Ex. R-24, R-25. Miller believed that that had been the first time that MSHA had been involved in a joint training effort with an operator, and conceded that, prior to issuance of the order, AmCoal had made an effort to inform its miners and do a better job of identifying and eliminating hazards. Tr. 205-06, 210.

While not directed at the specific conditions cited in the order, AmCoal's efforts to address such conditions is a factor that should be taken into account in the unwarrantable failure analysis, and weighs slightly against such a finding.

Obviousness of conditions

As noted above, Miller testified that the conditions were obvious. AmCoal attempted to impeach Miller's testimony by establishing that he had traveled through the cited areas only the day before, on November 6, 2007, and had not noted any of the conditions he described as "extensive and obvious." Miller was shown copies of his field notes from that day, which confirmed that he had been in the mine and had traveled to the longwall panel headgate to assess the roof fall. Tr. 213-14; Ex. R-70. However, he did not recall, and could not confirm from his notes, the route that he had traveled, noting that the area could also have been approached from the tailgate travelway. Tr. 288-90, 295-96. He also did not recall what type of vehicle he had ridden in that day, but assumed that it probably had a canopy that precluded viewing the mine roof and allowed only passing observation of ribs. Tr. 214-16. He also offered that he may have been talking to his escort, or writing notes, such that he did not observe the conditions.[25] Tr. 291.

---

[25] Miller explained that gaps in ribs might be very difficult to see when traveling in one direction. Tr. 292. However, he would most likely have traveled both directions in entering and leaving the mine.

Michael Smith, an AmCoal safety inspector, had traveled with Miller on November 6. In the course of that visit, Miller issued two citations to AmCoal and served them on Smith. Tr. 564-66; Ex. R-68, R-69. It was AmCoal's practice at the time to have its safety personnel write an "order report," memorializing the issuance of orders and S&S violations. Tr. 577-78. The reports were entered into AmCoal's computer system. Tr. 578. Smith reviewed the citations and the order report that he had prepared, which refreshed his recollection of the November 6 events. Tr. 566. He testified that he and Miller traveled the main intake travelway/escapeway to the headgate area, i.e., the same route that the inspection party traveled on November 7.[26] Tr. 567-73; Ex. R-6.

Smith also testified that he and Miller traveled in PV-79, a four-seat personal vehicle, which was the only one that the safety department had available in that area. Tr. 568. It had a canopy, but, also had a large windshield, that allowed examination of the mine roof, which safety personnel were trained to do. Tr. 580. He had ridden in PV-79 numerous times and testified that his view of the roof and ribs was not significantly impeded - "the rides are all open, you've got a big windshield in front of you, it's almost like driving in a car. You do have something overhead, but you can see out in front of you." Tr. 582. While traveling to the headgate, they stopped to abate a couple of citations, but did not observe any adverse roof or rib conditions, and Miller did not issue any citations for such conditions, either while traveling into or out of the mine. Tr. 214-15, 573, 581; Ex. R-70.

Miller's attempts to downplay the significance of his November 6 travel in the mine were unconvincing. His destination was the headgate area of the longwall panel, and the most direct and logical route of travel would have been to proceed through the main travelway/escapeway. Smith testified, credibly, that that was the route that he and Miller traveled on November 6, and I so find. It is also apparent that the canopy on the PV did not preclude viewing of the roof and ribs, and provided adequate opportunity to observe the condition of the ribs. The November 7 inspection party also traveled in a 4-seat PV that had a canopy, and Odum was able to identify several adverse rib and roof conditions prior to the parking of the PV and the party proceeding on foot.[27] Tr. 539. As Durham stated with respect to the large piece of draw rock that the party

---

[26] Smith confirmed that the area could have been approached from the tailgate travelway, but explained that it would not have "made a lot of sense" to do so. Tr. 573. The tailgate entries had to be "cribbed up" so that the adjacent longwall panel could be mined. That process had begun, and cribs would have precluded vehicular travel closer than 7-8 crosscuts away from the set-up entries. Tr. 572. Persons approaching the headgate from that direction would have had to walk to the set-up entries, then walk all the way across the width of the panel to reach the headgate, and walk back to return to the PV. Tr. 572-73.

[27] Durham testified that she "probably" parked the PV around crosscut #9, after which the inspection party walked. Tr. 542-43. According to Miller's notes, a citation was issued for fractures and slips in a coal rib between crosscuts 3 and 4, the large piece of draw rock was identified at crosscut #6, and broken roof was identified at crosscut #7. Ex. S-8. Those

observed while traveling in the PV, "we all saw it - no missing it." Tr. 539. I accept Smith's testimony that the PV afforded a reasonable view of the travelway roof and ribs, and that obvious defects should have been observed if they existed.

Miller had no recollection of the November 6 events, but he offered that he may have been talking to Smith or writing notes. He did not explain how talking to Smith may have impaired his ability to observe roof and rib conditions. There was also no explanation of why he might not have paid attention to conditions that may have posed a hazard to him, personally. He acknowledged that mine roof and rib strata can separate at any time, and it would seem that an experienced miner would always be vigilant for such hazards. Tr. 240.

As the Secretary argues, the purpose of Miller's visit on November 6 was to examine the area of a roof fall near the headgate. His ride to the area took about 10-15 minutes. He was not conducting an inspection of the travel/escapeway, which would have been "much more thorough." Tr. 292. Nevertheless, his failure to note any of the conditions that formed the bases of the November 7 order strongly suggests that they were not obvious. AmCoal points out that the examiners who conducted the three preshift inspections immediately preceding issuance of the order, did not note the conditions. They had received the specialized training on the recognition of hazards that was provided by MSHA instructors 2 weeks earlier, and should have been able to recognize obvious conditions. Other examiners had noted other hazardous conditions in their examination reports. Ex. R-16. The fact that, like Miller, the travelway examiners did not identify hazardous conditions, weighs against a finding that the cited conditions were obvious.

I find that the cited conditions were not obvious, and that this factor does not weigh in favor of an unwarrantable finding.[28]

---

deficiencies , as well as the apparently questionable condition that prompted Odum to request that the PV be backed-up and parked, would have been observed while riding in the PV.

[28] AmCoal points out that the examiners conducting the preshift examinations rode in mobile equipment to inspect the several miles of the travelway, and that there is no requirement that examiners walk. Whether examiners ride or walk, however, they are required to conduct the examination effectively, i.e., so as to be able to identify any hazardous conditions. The fact that the examiners rode, no doubt because of the significant distances involved, would not excuse the failure to identify and correct hazardous roof or rib conditions. It does, however, have some bearing on the degree of negligence. A conscientious examiner could well fail to observe a subtle, or minor problem, e.g., rib sloughage that Durham described scaling down, which would not have presented an appreciable hazard to users of the travelway.

Degree of danger to miners

As reflected in his notes, Miller's initial evaluation was that the cited conditions were "likely" to result in fatal injuries to two persons, because "miners are working in the entry every shift and these hazards are up and down the entry and crosscuts." Tr. 276; Ex. S-8 at 8. When the order was reduced to writing that night, the likelihood of injury was listed as "highly likely," the same determination that was made on the companion preshift order, Order No. 6668526. Ex. S-6, S-7. The highly likely determination for Order No. 6668526 was based, to a significant degree, on the fact that two miners were working under the large piece of draw rock that was hanging down from the mine roof at crosscut #6. Ex. S-8 at 14. That condition was the subject of Citation No. 6668522, a separate violation, for which a penalty was assessed and paid. Ex. S-8 at 4; Ex. S-1.[29] Whether or not it could properly be considered in evaluating the gravity of the preshift order, it would not be appropriate to consider the condition cited in Citation No. 6668522 in evaluating the gravity of Order No. 6668524 because it was not among the conditions underlying that order.

Miners on the working crews used the travelway to enter and leave the mine, and there were three shifts per day. Examiners, maintenance, supply, and other persons also used the travelway. Generally, persons using the travelway, including examiners, rode in mobile equipment. Tr. 164. Some pieces of mobile equipment did not have canopies, but there is no evidence as to the numbers of canopied versus open rides. Tr. 164. There were two miners working near crosscut #6, and Miller noted that "miners are working in the entry every shift." Ex. S-8 at 5, 8. The basis for the latter statement was not explained, nor was it explained what such miners might be doing in the entry.

As noted in the S&S discussion, there is considerable uncertainly as to the precise nature of the hazards presented by the cited conditions. Miller was unable to recall the details of the roof conditions, including whether they were located near the center of the entry, where persons were likely to travel, or along the sides. The indications of locations, where available, indicate that they were more to the side, where they would present less of a hazard. The rib conditions included two significantly large pieces that posed a hazard to miners who might be working or traveling near the rib, most likely a rare occurrence.

In light of the uncertainties as to the nature and locations of the conditions, I find that the violative conditions did not pose a high degree of danger to miners.

---

[29] On June 9, 2009, an order was entered approving a proposed settlement of Citation No. 6668522, which included a modification to reduce the number of persons affected to one, and a reduction in the assessed penalty from $$1,944 to $1,796. *The American Coal Co.*, Docket No. LAKE 2008-120 (unpublished Order Approving Partial Settlement) (ALJ).

Operator's knowledge of conditions

Miller had recorded in his notes that it was "unknown who knew" about the violative conditions. Ex. S-8 at 8. He could not identify a person at the mine who had knowledge of the conditions, other than persons who would have traveled through the area. Tr. 234. The Secretary attributes knowledge to AmCoal through management officials, e.g., foremen, who used the travelway, and preshift examiners, who act as agents of the operator in performing those duties. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194-96 (Feb. 1991). However, it was not established that the more serious violative conditions existed when preshift examiners conducted their examinations, and it is unclear when other management officials would have traveled the area other than that foremen would likely have done so at the beginning and end of each shift.[30] Other conditions, e.g., sloughage of immediate mine roof from around roof bolt plates, were undoubtedly known to AmCoal, but, depending upon their location and whether the roof was broken to any significant degree, may not have been hazardous when observed by preshift examiners.

The order was issued at 7:00 p.m., approximately 5 hours after the most recent preshift examination had been conducted. While there is considerable uncertainty as to how long the conditions existed, I find that the majority of them existed prior to the commencement of the preshift examination, but that some of them had not developed to the point of being hazardous at that time. Consequently, AmCoal had constructive knowledge of at least some of the hazardous conditions, but that knowledge was significantly mitigated by Miller's failure to identify any of the conditions when he traveled through the area the day before.

Conclusion

AmCoal had been put on notice that greater efforts were required to comply with the roof and rib control standard. The conditions were somewhat extensive and most of them had existed for at least one shift. AmCoal should have had knowledge of the conditions, but, that factor is partially off-set by the fact that the conditions were not obvious. The conditions did not present a high degree of danger to miners, and AmCoal had taken some steps to address potentially hazardous conditions that could be discovered during examinations.

Considering all of these factors, I find that the violation was not the result of AmCoal's unwarrantable failure. Rather, its negligence was moderate.

---

[30] The most recent preshift examination of the travelway had been conducted between 1:00 and 4:00 p.m. If the report form is indicative of how the examination was conducted, the travelway would have been examined early in the 1-4 p.m. window, approximately 5 hours before the order was entered.

Order No. 6668526

Order No. 6668526 was issued at 11:59 p.m. on November 7, 2007, 5 hours after Order No. 6668524 was issued, and alleges a violation of 30 C.F.R. § 75.360(b)(1), or, in the alternative, section 75.360(g).[31] Section 75.360(b)(1) requires that persons conducting required preshift examinations "examine for hazardous conditions" in "[r]oadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift." Section 75.360(g) requires that examination records be retained. The violation was described in the "Condition and Practice" section of the order as follows:

> An inadequate pre-shift examination for hazardous conditions was conducted along the 1st West Flannigan Longwall Primary Intake Escapeway on the 12:00 PM to 4:00 PM shift on November 7, 2007, in that the hazardous conditions listed in Mine Citation Number 6668524, were neither posted with a conspicuous danger sign nor recorded in a book maintained for that purpose. The hazardous conditions are extensive and readily visible to a mine examiner traveling this entry.

Ex. S-7.

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that two persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. The violation was assessed as flagrant, and a civil penalty, in the amount of $161,800 was assessed.

The Violation

The Secretary's motion to amend the order to allege, alternatively, a violation of section 75.360(g) was prompted by AmCoal's reaction to Miller's confirmation that he had no evidence that the preshift examinations were not conducted and that the violation was based on the examiners' failure to identify and record the hazardous conditions cited in Order No. 6668524. AmCoal contended that those facts, if proven, did not state a violation of section 75.360(b). Tr. 225-27. However, the Commission has consistently held that "section 75.360(b) essentially requires a preshift examiner to find and record a hazardous condition in a preshift examination book." *Cumberland Coal Res., LP*, 32 FMSHRC 442, 446 (May 2010); *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14-16 (Jan. 1997). Consequently, the failure of a preshift examiner to identify and record a hazardous

---

[31] During cross-examination of Inspector Miller, the Secretary's motion to amend the order to charge a violation of section 75.360(b)(1), or in the alternative, section 75.360(g), was granted. Tr. 230.

condition that has been proven to have existed when the examination was made, constitutes a violation of section 75.360(b), and the order properly charged a violation of that section.

Order No. 6668524 was issued at 7:00 p.m. When Miller exited the mine, he again reviewed the preshift examination books. Miller confirmed that notations at appropriate locations along the travelway evidenced that preshift examinations had been conducted, and that the results had been recorded in the examination book. Tr. 221-22. However, no hazardous conditions were reported for the examination that had been conducted prior to the start of the second shift or for the previous two examinations. Tr. 223-24; Ex. R-16. He then issued Order No. 6668526 before leaving the mine site.

As noted in the discussion of Order No. 6668524, there were numerous areas in the travelway where the mine roof and ribs were not adequately supported or otherwise controlled that presented hazards to miners. Some of those conditions were found to have existed for more than one shift, although there was no reliable evidence that the more serious conditions had existed for longer than one shift. That order was issued at 7:00 p.m., approximately 5 hours after the most recent preshift examination had been conducted. While there is considerable uncertainly as to how long the conditions existed, the majority of them existed when the preshift examination for the second shift was conducted, and that some of them existed when earlier preshift examinations were conducted. Accordingly, they should have been identified and reported on the preshift examination book, and the failure to do so was a violation of the standard.

S&S

The violation charged in Order No. 6668524 was found to be S&S, in that the hazard contributed to by the violation was reasonably likely to result in a permanent injury to one miner. The failure to identify and record the hazards in the preshift examination book, perpetuated those hazards and resulted in exposure of the miners to the hazards. The violation charged in Order No. 6668526 contributed to most of the safety hazards that existed as a result of the violation charged in Order No. 6668524.[32] Similarly, under continued normal mining conditions, those hazards were reasonably likely to result in a permanent injury to one miner. The violation charged in Order No. 6668526 was also S&S.

---

[32] As noted in the discussion of that order, Miller's evaluation of the gravity of the violation was premised upon consideration of the large piece of draw rock at crosscut #6 that two miners were working under. While that condition was not included in the conditions cited in Order No. 6668524, it and others cited in the travelway prior to the issuance of the order could properly have been considered predicates for the issuance of the preshift order, because the examinations would have encompassed the entire travelway. However, the order did not reference conditions other than those cited in Order No. 6668524, and there was virtually no attention devoted to those conditions during the hearing. Consequently, they will not be considered in deciding the issues relevant to Order No. 6668526.

Unwarrantable Failure - Negligence

The unwarrantable failure analysis parallels that of Order No. 6668524, with some variations because of the nature of the violation. The essence of the preshift violation occurred over the course of a few minutes when the examiner failed to identify the hazardous conditions cited in Order No. 6668524, the majority of which existed at that time. Those that conducted earlier examinations, and failed to identify hazardous conditions that existed at the time, also contributed to the violation. The extensiveness and time factors, as discussed with respect to Order No. 6668524 are not directly applicable to the preshift violation, and I find that they do not weigh heavily in favor of a finding of unwarrantability.

The more significant factors in the analysis are those directly related to the degree of negligence, or fault, of the preshift examiners, and the gravity of the violation. AmCoal had been put on notice of a need for greater efforts to comply with examination and reporting standards. Miller testified that there were "countless meetings" on those topics, which at least in part prompted the special collaborative training effort two weeks before the order was issued. Tr. 205. AmCoal also should have had knowledge of the violation, which is the essence of the preshift violation itself. As with Order No. 6668524, the notice and knowledge factors weigh in favor of a finding of unwarrantability, and the fact that AmCoal had requested and implemented the training program, weighs somewhat against such a finding. The conditions that existed when the examinations were conducted were not obvious and, again, there is insufficient reliable evidence to establish that they presented a high degree of danger to miners.

Considering all of these factors, I find that the violation was not the result of AmCoal's unwarrantable failure to comply with the standard, and that its negligence was moderate to high.

Order Nos. 6673874 and 6673876 (Docket Nos. LAKE 2008-666 and LAKE 2009-6A)

Order No. 6673874 was issued by Miller at 9:25 a.m. on January 24, 2008, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.400, which requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." The violation was described in the "Condition and Practice" section of the order as follows:

> Float coal dust, a distinct black in color, loose coal, paper, cardboard, wood, and plastic were allowed to accumulate under and along the energized Flannigan Number 2 Conveyor Belt and adjoining crosscuts. This condition existed from the head roller to crosscut number fifty. This area includes the head roller, belt drive, and belt take-up. The accumulations measured approximately 6 inches to 24 inches in depth. The bottom belt and bottom belt rollers were observed turning in these accumulations in the drive area as well as the head roller area. There was also a broken bottom belt roller throwing metal shavings into these accumulations

in this area. This condition has existed for several shifts and [is] continuing to grow as there is fresh spillage on top of some of the areas. These conditions were not reported on the examination books.

Ex. S-18

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that 10 persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. The violation was assessed as flagrant, and a civil penalty, in the amount of $188,000 was assessed.

The Violation

Miller, accompanied by Smith, inspected the belts at the Galatia mine on January 24, 2008. Coal mined at the longwall was transported out of the mine by several miles of belts. It traveled on the longwall belt to the Flannigan #3 belt, to the Flannigan #2 belt, and to the Flannigan #1 belt, on its way out of the mine. Crosscuts along the belt entry were spaced 150 feet apart. Miller started his inspection at the Flannigan #3 belt at crosscut #100. Ex. S-21. After checking on abatement of other citations, he found a carbon monoxide ("CO") monitor that was improperly positioned between crosscuts #75 and #76, and issued Citation No. 6673872 for that condition. Proceeding outby along the #2 belt, he found a broken bottom roller between crosscuts #43 and #44 that was making clanking noises and throwing off metal shavings that were falling onto coal accumulations approximately 3 feet below. Tr. 310, 583-85; Ex. S-21. He issued Order No. 6673873, pursuant to section 104(d)(2) of the Act, and Smith shut the belt down so that the roller could be changed.[33] Tr. 583; Ex. S-20.

The head drive of the #2 belt, which dumped coal onto the tail of the #1 belt, was located around crosscut #42. The head roller of the #2 belt was elevated above the #1 tail, and overlapped it by approximately 10-15 feet. Tr. 322-25, 382-89, 585-86; Ex. R-76. There were water sprays trained on the dumping point to control dust, which wet the belt and caused material to stick to it as it wrapped around the head roller and began its journey back to the tail piece. Scrapers were mounted around the head roller to dislodge the material. If a scraper was damaged or moved out of position, material could "carry back" along the bottom of the returning belt, eventually falling off, e.g., as it contacted a bottom roller. Tr. 304-07, 325-29. Miller observed accumulations of spilled coal, ranging from 6-24 inches deep at various locations from the head drive of the #2 belt, back inby to crosscut #50, a distance of approximately 1,200 feet. Tr. 299-302. Some of the coal was in contact with the belt's bottom rollers in the head drive area, and appeared to be packed. The area around the head drive was covered with a layer of black float coal dust. There was also wood and plastic in the area, along the rib and entrances to crosscuts. Tr. 589. Wooden crib ties, 6" x 6" and 2.5 feet long, were used when belt splices were made.

---

[33] Citation No. 6673872 and Order No. 6673873 are not at issue in this proceeding.

Three or four of them had been placed along the rib. Cardboard boxes for belt-splicing kits were also present, as were some plastic buckets containing sealant for use on stoppings.

Smith confirmed the observations made by Miller as to the conditions, the presence of combustible accumulations consisting of coal, float coal dust, wood, cardboard and plastic. AmCoal does not challenge the fact of violation, directing its arguments to the S&S and unwarrantable aspects of the order. Resp. Br. at 44-63. I find that the standard was violated.

S&S – Gravity

The fact of the violation has been established. The violation contributed to a discrete safety hazard, the possibility of an ignition or fire in the belt entry. Fires in underground coal mines pose a significant risk of serious injuries. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard would result in an injury.

In evaluating the reasonable likelihood of an ignition or fire, the Commission considers whether a confluence of factors render such an event likely.

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.* 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

Miller believed that the violation was S&S because the accumulations and surrounding coal provided fuel for a mine fire, there was plenty of oxygen because of the air flow in the belt entry, and the broken roller and belt rollers turning in packed coal presented ignition sources. He rated potential injuries as fatal because of the hazards of CO and smoke exposure and that the vision of persons trying to evacuate the mine would be obstructed. As to the number of persons affected, Miller explained that there had been discussions at MSHA around that time and it had been determined that, for violations of the nature of accumulations, that all persons inby would be considered affected because they would have to travel back through the area. Tr. 308-09, 352. There were multiple units working inby at the time, and Miller listed 10 people as being affected because that was the maximum number of persons that the assessment process contemplated at the time. Tr. 309, 360.

AmCoal challenges the S&S designation, arguing that, because of the water sprays, the accumulations were "likely wet to some degree," that the broken roller was not a viable ignition source, and the Secretary did not introduce studies or other evidence that friction produced by the

belt and rollers turning in the accumulations was sufficient to ignite them.[34] Resp. Br. at 45-49. In its reply brief, AmCoal argues that there is no case that holds that accumulations in contact with belts will "*necessarily* and *always* amount to an S&S violation." Resp. Reply Br. at 30. Despite AmCoal's observations, however, belts and/or rollers turning in coal accumulations have frequently been recognized as viable ignition sources, and have been acknowledged by operators as presenting hazardous conditions. *See, e.g., Big Ridge, Inc.*, 35 FMSHRC 1525, 1528 (June 2013) (S&S finding affirmed, noting MSHA inspector's testimony that ignition sources were presented by belt sliding in accumulations and rubbing on belt structure; belt examiner acknowledged that a belt running in accumulations would constitute a hazard, i.e., an immediate danger that can cause a fire); *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997) (S&S finding affirmed - 15-foot section of belt running on packed dry coal and in loose coal was a potential ignition source; shift manager admitted that a belt running in coal is a dangerous condition and poses a threat of a fire). Smith agreed that a belt turning in coal accumulations created a potential for a fire. Tr. 613.

As noted in the discussion of unwarrantability, there are questions as to how long the broken roller and the accumulations had existed. However, the belts and rollers turning in packed coal presented a viable ignition source and, combined with the other factors identified by Miller, posed a reasonable likelihood of a fire and resultant injuries. Consequently, the violation was S&S.

AmCoal challenges Miller's gravity assessment, i.e., that the violation was highly likely to result in fatal injuries to 10 persons, arguing that any injuries reasonably likely to result should be no more serious than lost work days, and that the number of persons affected should be no more than two or three. Miller had made the same gravity determinations when he issued the CO monitor citation (#6673872) and the broken roller order (#6673873). His reasoning on the subject order, and, presumably, those violations, was that smoke or fire would contaminate both escapeways, and that all persons inby were considered affected because, in trying to get out, they would have to travel back through the area. Tr. 308-09, 352-53. The air flow in the belt entry was inby, such that smoke and other products of combustion would flow into the mine. However, as Miller acknowledged, and the Secretary stipulated, that ventilation flow was coursed into a return, and did not reach the working sections. Tr. 357-59, 522-23; Ex. R-7. While the return served as the secondary escapeway, miners evacuating the mine would almost certainly use the primary escapeway, which was ventilated with fresh intake air and, as a consequence, would be unlikely to become contaminated. Miller was not aware of any deficiencies in the escapeways, e.g., problems with lifelines or the availability of SCRS.

---

[34] I accept Smith's description of the location of the broken roller as being approximately 3 feet above the accumulations. Unlike a situation where a damaged roller is in contact with accumulations, the subject roller did not present a realistic ignition source. Aside from the stand being "warm" to the touch, there were no sparks, red-hot bearings or other indications that it was generating significant heat.

The mine's air courses were separated by stoppings which were designed to contain the airflow in the designated entries. Miller had postulated that leakage could occur if stoppings were not properly sealed, and the Secretary argues that "there could develop a problem with the stoppings in which case smoke would travel from one entry into the escapeways." Tr. 353; Sec'y. Br. at 70. However, Miller acknowledged that he had made no notes of any such conditions, and had not issued citations for any of those types of conditions. Tr. 342, 353.

The Secretary also argues that the likelihood of an injury producing event was exacerbated by the possible presence of methane. Miller testified that the mine liberated over three million cubic feet of methane in a 24-hour period and that methane could accumulate anywhere at any time. Tr. 341. However, he found no methane near the cited conditions, and did not identify any instance where he had ever detected methane in the belt entries at or near the cited location. Tr. 341. That is not surprising in that the belt entries were ventilated with intake air that had not passed through any areas of active mining. While I accept Miller's opinion that a methane accumulation *could* occur anywhere in the mine, the possibility of its presence in the cited area in sufficient quantity to exacerbate a fire or result in an explosion was highly unlikely and too speculative to be considered in the assessment of gravity. Consequently, even if there were an ignition, there was no realistic possibility of an explosion that could have suspended the float coal dust, possibly resulting in a second explosion that could compromise ventilation controls and threaten other areas of the mine.

AmCoal also relies on its safety systems in arguing that injuries would not be as severe or as numerous as Miller asserted. Conveyor belt systems in coal mines are required to have numerous safety features designed to minimize the substantial threat posed by fires. Transfer points, such as the subject transfer point from the #2 to the #1 belt, where powerful equipment operates, must be equipped with fire suppression systems. CO sensors are placed at intervals along the belt lines, to detect the initial stages of combustion and transmit a warning to the surface. AmCoal also maintains "fire brigades," teams of miners specially trained to fight fires, available on each shift, to promptly respond to any ignitions. Tr. 602-05. Miller acknowledged the presence of these safety features and confirmed that he was not aware of any problems with their functionality at the time. The Secretary stipulated that there was no claim that the CO monitoring or fire suppression systems were not working properly. Tr. 461-66.

While redundant safety systems, such as CO monitors and fire suppression systems, cannot defeat a finding that a violation is S&S,[35] their presence can be taken into consideration in evaluating the number and severity of injuries that may reasonably be expected as a result of a violation. Here, AmCoal's safety systems, all of which were in good working order, could be expected to provide effective control of any fire resulting from the accumulations. While there is no evidence that anyone other than an examiner was inby in the belt entry or in the return, it is not unreasonable to assume that miners could be in those areas, and, in any event, those who responded to the ignition would have been exposed to the hazards of a fire.

---

[35] See, e.g., *Big Ridge*, 35 FMSHRC at 1529.

The Secretary's position that the violation was highly likely to result in fatal injuries to 10 persons is highy speculative, and is not supported by the evidence. I find that the violation was reasonably likely to result in lost work days injuries to two miners.[36]

Unwarrantable Failure - Negligence

The Secretary argues that the violation was the result of AmCoal's unwarrantable failure because the condition was extensive, had existed for a significant period of time, AmCoal knew or should have know of the violation, it posed a high degree of danger to miners, and AmCoal had been put on notice of a need for greater efforts to comply with the standard. AmCoal disputes most of the Secretary's arguments, asserting that the conditions had not existed for long, it did not, and should not, have had knowledge of them, it had not been placed on notice of a need for greater compliance efforts, the conditions did not pose a high degree of danger to miners, and it had taken reasonable steps to prevent the conditions from arising and going undetected.

Extensiveness

The violative conditions were extensive. The accumulations consisted of loose coal, float coal dust, paper, cardboard, wood and plastic. While the wooden crib ties and, possibly, the belt splice kit boxes and stopping sealant buckets, were most likely not unlawful accumulations in themselves, they added to the combustible load and, in combination with the loose coal and float coal dust were impermissible accumulations in violation of the standard. The loose coal was 6 to

---

[36] As noted above, the other two violations issued by Miller shortly before the instant order had also been evaluated as being highly likely to result in fatal injuries to 10 persons. Those violations were subsequently modified. The broken roller order, #6673873, was modified to a section 104(a) citation and the gravity determinations were changed; from fatal to lost work days and the number of persons affected from 10 to 3, which were "more likely" results "if a fire were to occur in the affected area cited." Ex. R-66, R-67. The negligence was reduced from high to moderate because "it could not be determined how long the cited condition had existed." Ex. R-66. The CO monitor citation was also modified to change the type of injury to lost work days and the number of persons affected to two. Ex. R-74, R-75. Miller did not participate in the modifications. Tr. 396. The Secretary contends that those modifications are not relevant, and that statements made during settlement discussions are privileged. Sec'y. Reply Br. at 1-2. The modifications are not confidential settlement negotiations. They are changes to the subject charges that were agreed to by the Secretary and AmCoal, were included in a document filed in the public record of Commission proceedings, and became final orders of the Commission when approved by the presiding judges. Similar modifications were made to citations for accumulations violations that were introduced as exhibits by the Secretary. Ex. S-92, S-93. I find that the modifications, particularly the modifications to the broken roller order, are relevant to the assessment of the gravity of the subject order, and support the determination that the violation was reasonably likely to result in lost work days injuries to two persons.

24 inches deep, at various locations along the belt from the head roller to crosscut #50, some 1,200 feet. Abatement of the conditions, i.e., cleaning and rock dusting, consumed over 100 man-hours. Ex. S-18. AmCoal does not argue that the violative conditions were not extrensive.

AmCoal had been put on notice of a need for greater compliance efforts.

AmCoal's arguments on notice parallel those made with respect to the roof control violation. It points out the broad applicability of the standard and focuses on the very limited evidence of similar accumulations violations in the cited area. As with the roof control violation, AmCoal's points about numbers of past violations have merit. However, as noted there, prior violations need not be in the same area of the mine, and Miller's unrebutted testimony that he had had repeated discussions with AmCoal managers about accumulations violations is sufficient to establish that AmCoal had been put on notice of a need for greater efforts to comply with the standard.

Degree of danger to miners

The accumulations did not present a high degree of danger to miners. As noted in the discussion of gravity, the Secretary's position that the violation was highly likely to result in fatal injuries to 10 persons was speculative and not supported by the evidence. Rather, the violation was reasonably likely to result in lost work days injuries to two miners, most likely those who would have been involved in responding to an ignition or fire. Even that potential outcome was not compelled. The material in contact with the belt and bottom rollers had been carried back on the belt that was wet from sprays at the head roller. While wet coal can dry out when in contact with rollers or the belt, if it ignited, it most likely would have smoldered, would have been detected by the CO monitoring system, and promptly addressed by the fire brigades. AmCoal's fire brigade personnel were well-trained, and, with one notable exception, there has been a remarkable absence of injuries resulting from belt fires in the nation's coal mines. AmCoal refered to an MSHA study on belt fires, referred to as the "Bentley Report," which found that there were no fatalities and no reportable lost time injuries from belt fires in all of the nation's coal mines from 1980 to 2005. Resp. Br. at 64. The belt fire at Aracoma's Alma #1 Mine on January 19, 2006, in which two miners perished, occurred outside the study period. It confirmed the serious threat that can be posed by belt fires. However, the conditions that existed at the Aracoma mine were unique and bear no resemblance to those at the Galatia mine. *See Cumberland Coal Res., LP*, 31 FMSHRC 137, 149 (Jan. 2009) (ALJ).

Length of time conditions existed

As discussed below, there were three distinct types of coal accumulations in the cited area; 1) float coal dust, which had been accumulating for 2-3 days; 2) loose coal at various locations in deposits ranging from 6-24 inches in depth, primarily alongside the belt, most of which was of relatively recent origin; and 3) dust and fines underneath the belt in contact with the belt and rollers, that had accumulated over time for two or three shifts. In addition, the

broken roller existed only for a short time, i.e., an hour or two prior to its being cited.

Float coal dust

Float coal dust was generated at the transfer point where the coal dumped from the #2 belt head roller onto the #1 belt tail. Sprays helped to control the dust, but did not eliminate it. Tr. 328-29. Miller testified that, in his opinion, the accumulations, presumably including the dust, had existed for several days or as long as a week. Tr. 303-05. His notes reflect that his assessment at the time of the inspection was that they had existed longer than a couple of shifts. Ex. S-21. Miller's opinion was based on his observations of the conditions and his review of AmCoal's reports of examinations.

Miller stated in the examination order, Order No. 6673876, and had recorded in his notes, that "accumulations" had been listed in the "remarks" section of the preshift reports for the day and evening shifts on January 22, but were dropped from the report for the third shift, with no corrective action having been noted, leading him to conclude that they had not been addressed.[37] Tr. 314, 371-75; Ex. S-19, S-21 at 13. However, the reports of the preshift examinations conducted during the day and evening shifts on January 22 did not note the presence of "accumulations." Tr. 633-34; Ex. R-17. Rather, they reflected notations in the "remarks" sections of the reports that the area of the #2 belt from the take-up to the #46 crosscut was "getting black," i.e., that float coal dust was being deposited, which indicated, according to Jimmy Wilson, the mine manager at the time, that the area should be checked, and that rock dusting was needed or soon would be. Tr. 633-34. Wilson concluded that the fact that there was no notation that the area was "black" in the subsequent preshift report indicated that the area had probably been rock dusted. Tr. 638-39. Miller testified that the notation that the float coal dust was black indicated that there was no rock dust mixed in with it. Tr. 301-02. The Secretary argues that there is no direct evidence that rock dusting had occurred, and the fact that the area was black is indicative that the area had not been recently rock dusted.

The Secretary's position is reasonable. Miller's notes reflect that when the order was issued, AmCoal officials asked if he would lift the order when the accumulations were cleaned, before rock dusting was done. The reason for the request was that "both rock dusters were down and they didn't know when they would come back up." Ex. S-21. There was no other evidence introduced regarding the rock dusters, which may have been down for some time. While hand

---

[37] Conditions noted during preshift examinations are recorded in one of two sections on the "Preshift Mine Examiner's Report," either "violations and other hazardous conditions" or "remarks." Ex. R-17. Conditions that constitute hazards must be addressed, and the corrective action taken must be recorded in the examination reports. 30 C.F.R. § 75.360(f). Conditions that do not constitute hazards, but should be monitored and/or addressed to prevent them from becoming hazards, are noted in the "remarks" section. Tr. 315, 617, 633-34. There is no requirement that non-hazardous conditions be reported or addressed, and AmCoal does not record actions taken to address non-hazardous conditions. Tr. 612-13, 639.

dusting may have occurred, is doubtful that rock dusting had been done in the recent past, i.e., few days. Consequently, I find that float coal dust had begun to accumulate on January 22, and had continued to accumulate until the order was issued on January 24.

Accumulations of loose coal in piles at various locations along the belt

Accumulations of loose coal were located at various places from the head roller to crosscut #50, and ranged from 6" to 24" deep alongside the belt. Tr. 299-303. Miller had recorded in his notes, and in the order, that the condition was "continuing to grow as there is fresh spillage on top of some of the areas," which appears to be a reference to those deposits, rather than the float coal dust or the material under the belt. Tr. 344; Ex. S-18, S-21. He was not able to ascertain what caused the accumulations. Tr. 326. He agreed that one indication of the age of accumulations would be whether they had turned brown or reddish in color, which he had not noted with respect to the subject accumulations. Tr. 370.

While these accumulations were noteworthy, the real focus of Miller's concern had to have been the material packed under the belt in the area of the take-up, close to the head drive of the #2 belt. He had approached the area from inby and had issued a citation for the mis-positioned CO monitor between crosscut #75 and #76. According to his notes, the next condition of interest was the broken roller between crosscuts # 43 and 44. Ex. S-21. While he later included accumulations extending back to crosscut #50 in the order, he apparently did not regard them as particularly problematic when he first traveled past them while walking the 900-1,000 feet from crosscut #50 to the broken roller.

Miller was unable to recall any material coming off the belt, but, he had recorded that accumulations were continuing to grow and that there was fresh spillage on top of some of the areas. The loose coal accumulations resulting from spillage would have been relatively obvious, and, with the exception of spillage in close proximity to the transfer point, had not been recorded on preshift or on-shift examination reports. I find that the loose coal accumulations alongside the belt were of fairly recent origin, and that a significant portion of those deposits had occurred within one shift.

Carry back dust and fines under the belt

Miller's primary concern was fine coal that had become packed under the belt, and was in contact with the belt rollers in the take-up area of the #2 belt head drive. The broken roller was just inby the take-up. Consequently the #2 belt take-up was within approximately 150 - 200 feet of the #2 belt head roller and the #1 belt tail. Smith had recorded in his report on issuance of the order, that "rollers were in contact with the material at the inby end of the drive and the #1 Flannigan tail roller." Ex. R-37. Miller believed that the material under the belt and around the rollers was "carry back" from the head roller that had not been removed by the scraper, and that it would normally take "some time," i.e., several shifts, to get packed like it was. Tr. 303, 325-28. Miller did not believe that the accumulations packed under the belt had been cleaned recently,

e.g., within a day or two, because he did not see any shovel marks or fresh rock dust. Tr. 317.

As noted in the discussion of float coal dust, Miller's reference to "accumulations" having been reflected in the preshift reports for January 22, was not accurate. However, there had been references to conditions at or near the transfer point, i.e., at the #1 belt tail, and that actions had been taken to address them. Most significantly, the report of the preshift examination conducted on the previous day, between 5:00 a.m. and 8:00 a.m., reflected that the "tail scraper" of the #1 belt was "dirty," and that Wilson had been informed Tr. 634-37; Ex. R-17 at 1856.[38] He assigned men to clean the area, and the on-shift report for that shift shows that the area was "cleaned." Tr. 637-38; Ex. R-17 at 1857. Wilson also stated that the report of the preshift examination conducted between 1:00 p.m. and 4:00 p.m. on January 23 showed, in the remarks section, that the tail of the #1 belt and the head of the #2 belt were getting dirty, and that the absence of any such notation on the report for the following preshift examination indicated that "it's been cleaned." Tr. 639-40; Ex. R-17 at 1858.

In addition, the hazardous conditions section of the report for the preshift examination conducted between 5:00 a.m. and 8:00 a.m. on January 24, shortly before the order was issued at 9:20 a.m., reflected that the "tail" of the #1 belt was "dirty," and that the mine manager had been informed. Tr. 623-25; Ex. R-17 at 1862. Wilson testified that he had read and signed the report and had assigned men to clean the area. Tr. 623-26. However, the cleaning personnel had to wait for transportation until the "hot-seating" working section miners, who had just been relieved by the new day shift crew, brought transport vehicles back to the bottom area. Tr. 627-31. As a result, they had not arrived at the cited area by the time the order was issued. Wilson got a call about the issuance of the order "before the men even made it there." Tr. 631.

Wilson did not think it was unusual that the #1 tail area had been cleaned the day before, and was dirty again on January 24. He pointed out that the longwall was producing over 6,000 tons of coal each shift, all of which traveled on the subject belt, at 600 feet per minute, across the transfer point from the #2 head drive to the #1 tail. Tr. 641-44. Miller had essentially agreed, stating "[I]t's mining 101. Any time you transfer coal you're going to have a little bit of spillage." Tr. 329.

AmCoal argues that the examination reports show that the belt transfer point was being closely monitored and that accumulations, including coal spillage were being promptly cleaned. The Secretary argues that the reports' references to the #1 tail are not relevant to the conditions cited in the order, because the "area at the #1 tail and the #2 head roller are different areas." Sec'y. Br. at 74. Miller also testified that the references to problems at the #1 tail had nothing to do with the cited area. Tr. 377-78. The Secretary's argument is clearly in error, but, Miller's point has some merit. AmCoal was attending to some of the cited conditions at the transfer point, but the fines and dust packed under the belt in the take-up area were not being addressed.

---

[38] Page numbers for exhibit R-17 refer to the last 4 digits of the numbering system used on all of AmCoal's exhibits.

There is no question that the #2 belt head and the #1 belt tail are in the same area. Miller's own sketch of the transfer point shows that the #2 head roller sat directly above the #1 tail piece, and the belts overlapped by 10-15 feet. Ex. R-76. The notations in the reports to the #2 belt head and the #1 belt tail being dirty were most likely references to ongoing spillage that all appear to agree was an inevitable occurrence at a transfer point where large volumes of coal are being dumped from one belt onto another. The reports evidence that AmCoal's examiners were identifying and reporting that condition, and that spills in the area of the #2 belt head and #1 belt tail were being promptly addressed.

However, the packed fines and dust that Miller was most concerned about were in the area of the #2 belt take-up, under the belt and rollers that were, at that point, very close to the floor of the mine, i.e., from 8 to 18 inches. Tr. 301. That area was just inby the transfer point, and may have extended inby approximately one crosscut, close to where the broken roller was located. That material would have been difficult to observe, and I accept Miller's estimate that it had been accumulating for more than a couple of shifts.

The broken roller

Miller testified that, in his opinion, the broken roller had existed for several shifts. Tr. 310; Ex. S-21. While the broken roller, itself, was not included in the conditions cited in the order, it did figure into Miller's assessment of gravity, and was one of the conditions upon which the inadequate examinations order was based. Consequently, the length of time that the roller was broken must be addressed. Miller had spoken to an AmCoal examiner, who informed him that he had not seen the broken roller the day before. Tr. 362; Ex. S-21. Miller wondered if the belt may have been down when that area was examined, in which case a broken roller may not have been found. Tr. 362. The broken roller had not been recorded on any of the on-shift or preshift examination reports, including the examination that had been done only hours before the order was entered. Ex. R-17.

Miller did not explain the rationale for his conclusion that the roller had been broken for several shifts, and was no doubt relying on his extensive mining experience. As noted previously, the persuasiveness of such opinion evidence is significantly undercut when there is no explanation relating particular aspects of such experience to what can be a complex task of estimating the length of time that a condition existed. Smith testified that, while some modes of roller failure, e.g., bearings going bad, might give some advance notice, there is little or no indication that a roller is about to break. Tr. 592-93. Miller confirmed that there was no apparent problem with the roller's bearings. Tr. 364. The broken roller was "clanging around on its axle" and was obvious. Tr. 584. While it is possible that the belt was not running when the preshift examinations of the area were conducted, that appears unlikely in light of the fact that the three previous shifts had each produced 5,000 - 6,000 tons of coal. The fact that the examiner had not seen the roller the day before, and that it had not been noted in any of the examinations strongly suggests that it broke shortly before Miller found it, i.e., after the preshift examination had been conducted between 5:00 a.m. and 8:00 a.m. that morning, and I so find.

In sum, there were three distinct types of coal accumulations in the cited area; float coal dust that had been accumulating for 2-3 days; loose coal in deposits ranging from 6-24 inches in depth, most of which was of relatively recent origin; and, dust and fines in contact with the belt and rollers that had accumulated over time for several shifts.

Obviousness - Knowledge of the Conditions

The float coal dust was obvious and had been noted on reports of preshift examinations. The loose coal was also obvious, but was of relatively recent origin. AmCoal had identified loose coal deposits at the transfer point and cleaned them on January 23. It had also identified deposits in the same area on January 24, and had taken steps to have them cleaned. Other deposits, further inby, had not been identified, but may have been less obvious or not existed when examinations had been made. Even on the 24th, Miller had not noted deposits between crosscuts #50 and #43 when he first walked the area. The packed fines and dust under the belt and bottom rollers in the take-up area were not obvious because the belt was very close to the mine floor in that area. Nevertheless, a competent examiner should have discovered them, at least by the morning of January 24.

This factor weighs in favor of a finding of unwarrantability.

Efforts to abate the conditions

AmCoal had cleaned the area of the #1 belt tail, where the #2 belt head drive was located on January 23. That area was reported as "dirty" again on the morning of January 24, and Wilson had dispatched a crew to clean it. These efforts were directed at the loose coal spillage in the area of the #2 belt drive, but did not include the float coal dust, the loose coal further inby, or the material packed under the belt take-up. Whether the January 24 crew would have noticed the accumulations packed under the belt and rollers is unknown. However, the broken roller may have called attention to that area, and appropriate actions may have been taken. In addition, AmCoal had implemented the special, MSHA-assisted, training program for managers, safety personnel and others. However, that program had been conducted several months earlier, and is of limited significance to this order.

Conclusion

The combination of the accumulations of float coal dust, loose coal, and the carry back fines and dust under the belt take-up was extensive. AmCoal had been put on notice that greater efforts were required to comply with the standard. The float coal dust had existed for two days, the loose coal for one shift, and the carry back material for several shifts. The conditions did not present a high degree of danger to miners. AmCoal had taken steps to abate at least a portion of the conditions prior to issuance of the order, and had undertaken efforts to better comply with the standard by providing training on the conduct of examinations.

The obvious - knowledge factors are of more significance on the facts of this case. The float coal dust was obvious, and AmCoal had knowledge that it existed for 2 days. However, it was not, in itself, a hazardous condition. Miller had not cited any inadequacies in rock dust. Tr. 336. The loose coal deposits were of more recent origin, and AmCoal had cleaned and taken steps to clean loose coal deposits in the area of the transfer point. Such deposits further inby had not been noted by Miller has he traveled to the broken roller. The carry back material packed under the belt was not obvious, but AmCoal should have had knowledge of it.

AmCoal's examination reports demonstrate that preshift and on-shift examinations of the belts were being conducted, as required. There is no evidence of deficiencies in documentation of the examinations. Examiners were noting the presence of hazardous accumulations, as well as other conditions, and at least the hazardous conditions were being promptly addressed by the mine manager. While the more serious condition, the carry back material packed under the belt and rollers in the take-up area, should have been discovered and addressed, it was not obvious. That failing, in conjunction with the other factors discussed above, does not rise to the level of aggravated conduct sufficient for a finding of unwarrantability. I find that AmCoal's negligence with respect to the violation was moderate to high.

Order No. 6673876

Order No. 6673876 was issued by Miller at 1:00 p.m. on January 24, 2008, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.363(b) which requires that a record be made of any hazardous condition found during an on-shift examination and the action taken to correct it. The violation was described in the "Condition and Practice" section of the order as follows:

> The hazardous conditions as reflected by Mine Citation Number 6673873 and Mine Citation Number 6673874 were not recorded in the examiners on-shift book as required. The broken bottom belt roller and the accumulations have existed longer than a couple of shifts. The accumulations were reported on January 22, 2008 on the day shift and the second shift in the remarks column, but dropped on the third shift January 23, 2008. There was no reference to any action taken on the conditions listed in the remarks column.

Ex. S-19

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that 10 persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. A civil penalty, in the amount of $60,000 was assessed.

The Violation

AmCoal's belts and transfer points were the subject of pre-shift examinations conducted during the 3 hours immediately preceding the start of each of three shifts, and on-shift examinations conducted during the shifts. Tr. 533; Ex. R-17. The standard, parallels the pre-shift standard, and requires that hazardous conditions found during an on-shift examination, and corrective action taken, be recorded in a book maintained for that purpose. None of the reports of on-shift examinations conducted from January 22 through the issuance of the order on January 24, recorded the broken roller or accumulations as hazardous conditions. Tr. 314-16; Ex. R-17. The Secretary argues that the broken roller and accumulations should have been reported, "at a minimum, on the third (midnight) shift on January 23, 2008." Sec'y. Br. at 83.

In that the order includes a charge that the broken roller was a hazardous condition that was not reported before the January 24 inspection, it was not a violation of the standard. As noted above, it was found that the roller did not break until after the preshift examination had been conducted for the day shift on January 24. Consequently, it did not exist and could not have been reported during any on-shift examination prior to its having been cited. In addition, there was no hazardous condition reflected in the "remarks" section of the January 22 pre-shift reports. Those references were to comments about "the area of the #2 belt from the take-up to crosscut #46 "getting black," i.e., the accumulation of float coal dust which was not regarded as a hazardous condition.

However, as also noted above, the accumulation of carry back material that was packed under the #2 belt take-up and bottom rollers, was a hazardous condition that, while not obvious, should have been identified by a competent examiner. Those accumulations grew over time as additional material was deposited, but should have been identified and reported at least on the third shift on January 23 and the shift, which began at midnight on January 24. Consequently, the standard was violated.

S&S - Gravity

The failure to identify and correct the violative condition perpetuated it, and subjected additional crews of miners to the hazard contributed to by the unlawful accumulations. Just as that violation was S&S, the violation of the on-shift examination standard was S&S. It was reasonably likely to result in lost work days or restricted duty injuries to two miners.

Unwarrantable Failure - Negligence

While not all of the unwarrantability factors of the accumulations violation apply directly to the examination violation, the outcome is the same. Required examinations were being conducted and hazardous conditions were being identified and addressed. The failure to identify and correct the condition of the carry back material during the immediately preceding on-shift examinations did not rise to the level of aggravated conduct sufficient for a finding of

unwarrantability. I find that AmCoal's negligence with respect to the violation was moderate to high.

The Allegedly Flagrant Violations

Four of the litigated violations were alleged to have been flagrant, and substantially enhanced penalties were imposed. As noted above, on March 28, 2014, the parties filed supplemental briefs on the propriety of the flagrant designations.

On August 17, 2006, following the Aracoma and Sago Mine disasters, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"). Among the provisions that were generally intended to enhance worker safety, was an amendment to section 110(b) of the Act that dramatically increased potential civil penalties that could be assessed for a new category of violations designated as "flagrant." Section 110(b)(2) reads:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000 [$242,000]. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

By most accounts, the statute is a model of ambiguity. *See Stillhouse Mining, LLC*, 33 FMSHRC 778, 799-800 (Mar. 2011); *Bowie Resources, LLC*, 33 FMSHRC 1685, 1696 (July 2011) (agreeing with *Stillhouse* finding that statute is ambiguous). More striking, however, is that nearly eight years after passage of the statute, much of the ambiguity remains, especially with regard to what constitutes a repeated flagrant violation.

Under section 8(b) of the Miner Act, the Secretary was required to promulgate rules implementing the flagrant provision. Pub. L. No. 109-236, § 8, 120 Stat. 493 (2006). However, MSHA's final rule, simply repeated the language of the statute, providing no further guidance on how the rule would be applied. 30 C.F.R. § 100.5(e). MSHA issued a Procedure Instruction Letter ("PIL"), No. 106-III-04, effective October 26, 2006, which set forth procedures to evaluate flagrant violations. With respect to "repeated failure" flagrant violations, the PIL provided the following criteria:

1. Citation or order is evaluated as significant and substantial
2. Injury or illness is evaluated as at least permanently disabling
3. Type of action is evaluated as unwarrantable failure, and
4. At least two prior "unwarrantable failure" violations of the same

safety or health standard have been cited within the past 15 months.

The PIL expired on May 31, 2008, and was later re-issued as PIL No. 108-III-02, which expired on March 31, 2010. On April 19, 2011, MSHA issued a press release entitled, "MSHA inspectors armed with new online tool to detect flagrant violations." Release No. 11-568-NAT. The press release set forth the same criteria that had been included in the PILs.

The sole case to have reached the Commission resulted in resolution of only one narrow question, that "the Secretary may permissibly consider an operator's past violation history in determining that a violation should be assessed as a 'repeated failure' flagrant violation within the meaning of section 110(b)(2) of the Act." *Wolf Run Mining Co.*, 35 FMSHRC 536, 543 (Mar. 2013). Six years after the MINER Act became law, the Secretary's interpretation was still evolving. As the Commission noted: [t]he Secretary's interpretation has changed several times during the course of this litigation." *Id.* n. 5 at 538-39. The Secretary's position continues to evolve. The flagrant designations in *Wolf Run* were eventually withdrawn. *Wolf Run Mining Co.*, 36 FMSHRC ___ (April 14, 2014) (Decision on Remand Approving Settlement) (ALJ).[39]

In *Wolf Run* the Secretary initially based his interpretation of "repeated failure" flagrant violations on the factors specified in the PIL. However, that position was broadened considerably, including the proposal and later disavowal of a requirement that past violations be "substantially similar" to the allegedly flagrant violation. In these cases, the Secretary has conceded that "the Agency has not issued a definitive interpretation of the statutory provision" and that "MSHA does not argue that the PIL [a general screening device] is entitled to deference." Sec'y. Br. at 30, n 2. As to the PIL, the Secretary claims that all violations that meet the criteria listed in the PIL could constitute flagrant violations, but, that the statutory definition "is broader in scope than the class of violations that would be derived from a strict application of the PIL." *Id.*

In *Wolf Run*, while the Commission held that past violative conduct could be considered in determining whether a cited condition represented a "repeated failure" flagrant violation, it recognized that "[o]ne might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a 'repeated failure' under 110(b)(2)," and did "not resolve which prior violations are relevant to the assessment of a 'repeated failure' violation." 35 FMSHRC at 541, 543.

As in these cases, the Secretary has typically attempted to prove the past violations element of "repeated failure" flagrant violations by introducing a computer printout listing of past violations, and copies of citations or orders charging the operator with violations of the

---

[39] As noted in *Wolf Run*, the Secretary also abandoned efforts to sustain flagrant allegations in *Conshor Mining, LLC.* 33 FMSHCR 2917 (Nov. 2011) (ALJ), after a petition for interlocutory review was granted by the Commission. 33 FMSHRC at 539-40 n 6.

same, or similar, standards. Those attempts have been uniformly criticized. In *Bowie Resources,* Judge Manning stated: "I believe that the Secretary cannot establish the 'repeated failure' element in section 110(b)(2) by simply introducing a computer printout showing that there have been multiple violations of the cited safety standard at the mine. Such statistics do not establish that the mine operator has repeatedly failed to make reasonable efforts to eliminate a known violation."[40] 33 FMSHRC at 1699. Similarly, Judge McCarthy, in *The American Coal Co.*, 35 FMSHRC 2208, 2255 (July 2013), opined that reliance on violation history to prove the "repeated failure" element "raises a host of proof problems," and observed that the "Secretary has failed to proffer sufficient evidence concerning the nature of the past violations of section 75.400 to support the repeated flagrant designation for either" of the two violations at issue. *Id.* at 2247-48 n.19, 2255. That failing was not fatal to Secretary's case, however, because the violations were sustained as flagrant on a narrow interpretation of the statute that did not rely on past violations. In *Blue Diamond Coal Co.*, 36 FMSHRC 541, 581-82 (Feb. 2014), Judge Paez held that the Secretary's introduction of two section 104(d)(2) S&S orders, 13 section 104(a) S&S citations, and the inspector's vague testimony about the operator's violation history, did not satisfy the Secretary's burden of proof to establish the predicate previous failure to make reasonable efforts to eliminate a previous violation.

Flagrant means Flagrant

As noted in *Wolf Run*, section 110(b)(2) should be interpreted consistent with the Mine Act's graduated enforcement scheme. 35 FMSHRC at 541. The Commission held in *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Mine Act's enforcement scheme, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." 9 FMSHRC at 2000 (quoting *Cement Div. Nat'l. Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). In *Stillhouse*, Judge Paez noted that "[i]n *Emory Mining*, the Commission interpreted the unwarrantable failure language of section 104(d) citations and orders in light of th[e graduated enforcement] scheme of escalating sanctions. Here, if a violation is determined to be flagrant, then the Commission is authorized to impose the highest amount of civil penalties available under the Mine Act, up to $220,000 per violation." 33 FMSHRC at 802.

The substantial civil penalties that can be imposed for flagrant violations are several rungs up the graduated enforcement ladder from even more serious violations charged under section 104(d). Accordingly, flagrant violations should denote conspicuously bad, offensive, or outrageous conduct. As Judge Paez noted in *Stillhouse*, "[t]he only thing that is apparent from the [limited] legislative history is that Congress and the President intended flagrant violations to target particularly severe violations of the mine safety and health regulations in order to promote

---

[40] In that case, the Secretary also relied on specific orders issued shortly before the subject violation. Ultimately, Judge Manning declined to rule on whether an increasing history of S&S and unwarrantable failure violations of a single standard would be sufficient to establish the "repeated failure" element, because he determined that the Secretary had not established another element of the alleged flagrant violation. 33 FMSHRC at 1700.

regulatory compliance and miner safety." 33 FMSHRC at 799. In that regard, I agree, in principle, with Judge Feldman's analysis in *Conshor Mining, LLC*, 33 FMSHRC 2917, (Nov. 2011), that a flagrant violation must be conspicuous and egregious, and the fact that Congress did not simply amend section 110(a) of the Act to raise the general statutory penalty ceiling evidences something considerably more than an intent to deter repeated unwarrantable failure violations.

The cases brought by the Secretary and that have been decided by ALJs thus far, at least under the "reckless" prong of the statute, have involved truly outrageous conduct. *Stillhouse* involved egregious conduct by several mine management personnel who ignored prior warnings from MSHA and deliberately violated the mine's approved ventilation plan on more than one occasion. Their actions created a serious risk of a mine disaster and threatened the lives of the entire mining crew, which was left underground to produce coal while the main mine fan was turned off, and then restarted. Three mine managers plead guilty to criminal felony charges for their conduct. In *Roxcoal, Inc.*, 35 FMSHRC 625 (Mar. 2013), a flagrant violation was affirmed under the "reckless" prong of the statute where an operator's chief electrician deliberately circumvented safety measures by taping down a switch that could deenergize power, and then assigned miners to work on the equipment in close proximity to 7,200 volts of electric power. He also failed to take any steps to eliminate the violation and the extremely hazardous condition. As a result, a miner suffered an injury resulting in permanent disability.

The Secretary's ventures into the "repeated failure" prong of the flagrant statute have often strayed from the egregious conduct principle and have met with less success. As noted above, the Secretary voluntarily withdrew the "repeated failure" flagrant allegations in *Wolf Run* and *Conshore Mining*. Alleged repeated failure flagrant violations were rejected in *Bowie Resources* and *Blue Diamond*. The "screening factors," now broadened considerably by the Secretary's evolving interpretation of the statute, appear to sweep within their ambit a substantial portion, if not a vast majority, of violations cited under section 104(d) of the Act. The result is that substantial penalties have been assessed under section 110(b)(2) for violations that are very similar, if not identical, to violations for which penalties have been assessed under section 110(a)(1) that have not even reached the maximum amount allowed under that section.

The Secretary's lone success was the *American Coal* case, in which two repeated failure violations were held to be flagrant under a narrow reading of the statute. Order No. 7490584, charged an S&S and unwarrantable failure violation of the accumulations standard, 30 C.F.R. 75.400, that was found to have been the result of the operator's high negligence, and was reasonably likely to have resulted in lost work days or restricted duty injuries to more than 10 persons. The conditions were found to have existed for at least three shifts, and were known to the operator because they had been noted on reports of required examinations during those shifts, but had not been corrected. The operator's failure to eliminate the known violation during each of the three shifts was held to satisfy the repeated failure element, and the violation was found to be flagrant.

Order No. 7490599, also charged an S&S and unwarrantable violation of the accumulations standard. It was found to have been the result of the operator's moderate negligence, and was reasonably likely to have resulted in serious or fatal injuries to 6 persons. It was found that the accumulations likely "began building up about two shifts before the violation was cited" and the violation was found to have existed "for two shifts." 35 FMSHRC at 2236. The conditions had not been noted on reports of examinations. However, it was found that the operator knew or should have known of the violation because the conditions were obvious and should have been discovered during required examinations. Its failure to eliminate the violation during either of the two shifts was held to satisfy the repeated failure element.

While I agree with much of Judge McCarthy's analysis in *American Coal*, I am concerned that it could be read to include a large number of violations that were never intended to be addressed by the statute. Can constructive knowledge of a violation that existed for the better part of two shifts, resulting in a finding that the operator was moderately negligent, be squared with the concept that the statute was intended to address egregious conduct, or particularly severe violations? Are those valid conclusions regarding the intent of Congress? Similarly, can a violation that was reasonably expected to result in lost work days or restricted duty injuries, and that would not have passed the Secretary's screening device requirement for at least a permanently disabling injury, be said to be expected to result in death or serious bodily injury within the meaning of the statute? Hopefully, these and other questions will soon be answered by the Commission.

Even in the absence of a review of all reported decisions involving accumulations violations cited under section 104(d), I am confident that it would be difficult to identify more than a handful that did not involve an opinion by the issuing inspector that the conditions had existed for two shifts or longer, and that injuries at least as severe as lost work days were reasonably expected.[41] Could all such violations be classified as repeated failure flagrant violations, and assessed penalties nearly four times higher than the most serious non-flagrant violations? For the reasons discussed above, I do not believe that such a result would be consistent with the Mine Act's graduated enforcement scheme, or a reasonable interpretation of

---

[41] See, e.g., *Eastern Associated Coal, LLC*, 35 FMSHRC 1438, 1442-47 (May 2013) (ALJ) (section 104(d)(1) citation issued on April 5, 2008, for S&S and unwarrantable failure violation of section 75.400, extensive accumulations, several ignition sources, inspector estimates accumulations existed at least a couple of weeks, preshift examinations conducted on each of three shifts, MSHA assessed penalty of $6,458); *Rebco Coal, Inc.*, 36 FMSHRC 181, 196-202 (Jan. 2014) (ALJ) (section 104(d)(2) order issued on July 15, 2011, for S&S and unwarrantable failure violation of section 75.400, highly likely to result in permanent injuries to eight persons, accumulations extensive, ignition sources electrical equipment, inspector estimates would have taken several days to build up, no notations in examination records, MSHA assessed penalty of $6,624).

the subject statute.

For the reasons that follow, I find that the litigated violations were not flagrant, within the meaning of section 110(b)(2). I decline to accord deference to the Secretary's interpretations of the statute, or to reach AmCoal's more sweeping arguments, e.g., that the statute is void for vagueness, and, like Judge Manning, anticipate substantive rulemaking by the Secretary and/or decisions by the Commission or the Courts, will provide considerably more guidance by the time it is necessary to revisit these questions.

The violation charged in Order No. 7490572 was not flagrant.

The Secretary's supplemental brief did not address the "reckless" prong of the statute, and, consequently, did not address Order No. 7490572. The Secretary's original post-hearing brief short-circuits a detailed analysis of the reckless prong of the statute, arguing that Jones' conduct was so "plainly reckless" that no statutory interpretation is necessary. Sec'y. Br. at 27-29. However, the violation charged in the subject order does not fit easily within the parameters of the statutory definition of a reckless flagrant violation. As AmCoal argues in its brief, "this action was an isolated incident, existed for only moments, occurred during what indisputably had been otherwise proper action, was not clearly and obviously a violation of the regulations, and was not condoned by management (as illustrated by the firing of Mr. Jones)." Resp. Br. at 86.

Jones' negligence was found to be high, but did not rise to the level of reckless disregard. The act of closing the panel without deenergizing it was, under MSHA's interpretation, a known violation. However, MSHA's interpretation of the standard as classifying the opening and closing of a panel while troubleshooting as "work" on circuits and equipment, is certainly not compelled. In fact there is evidence that it may have been a common practice of experienced electricians. It is difficult to understand how AmCoal, or Jones, could have eliminated the known violation, other than by Jones simply not committing it, or, under Judge Paez's formulation of a "reckless" flagrant violation, how "the operator [failed to] take the steps a reasonably prudent operator would have taken to eliminate the known violation . . . and consciously or deliberately disregard[ed] an unjustifiable, reasonably likely risk of death or serious bodily injury." *Stillhouse*, 33 FMSHRC at 805.

Obviously, AmCoal had taken reasonable steps to avoid the violation, by incorporating MSHA's interpretation of the standard into its policies and training. It had terminated the employment of a previous individual who had violated the policy. Aside from Jones, it had no independent knowledge of the violation and no opportunity to eliminate it. While Jones placed himself at risk of a serious, possibly fatal, injury, the risk to the other miner was only slight. Jones' negligence is imputable to AmCoal for purposes of an unwarrantable failure determination. However, in light of the considerations involved in determining whether a violation can properly be characterized as flagrant, it is not at all clear that AmCoal can be charged with a flagrant violation and subjected to substantially enhanced penalties, based solely on the improvident impulsive behavior of its maintenance foreman, who unforseeably acted in

direct contravention of its training and policies, and was terminated as a result. Jones' actions were determined not to have risen to the level of reckless disregard, and there is no evidence that MSHA initiated an investigation or pursued action against Jones pursuant to section 110(c) of the Act. Tr. 145-46. *See Blue Diamond*, 36 FMSHRC at 579.

Based upon the foregoing, I find that the violation charged in Order No. 7490572 was not flagrant within the meaning of section 110(b)(2) of the Act.

The violation charged in Order No. 6668524 was not flagrant.

Arguing in support of the flagrant designation for Order No. 6668524, the Secretary, in his supplemental brief, reiterates the argument in his original brief, relying on the "R-17" printout of AmCoal's history of violations, which shows that it was issued 86 violations of section 75.202(a) in the 12 months preceding November 7, 2007, including 52 that were S&S, and "at least one violation issued as an unwarrantable failure." Sec'y. Supp. Br. at 3. The report also shows that AmCoal had been issued 135 violations of the standard in the 24 months preceding November 7, 2007, 74 of which were S&S. The Secretary also relies on copies of citations that had been issued pursuant to section 104(a), for violations of section 75.202(a).[42] Ex. S-30 thru S-56. The Secretary maintains that: "[c]onsidering the number of repeat instances of violative conduct, the subject orders constitute 'repeated failures' to make reasonable efforts to eliminate known unsupported roof and rib violations and Order No. 6668524 should be affirmed as flagrant." *Id.*

In his original brief, the Secretary argued that the fact of the prior violations brought the instant violation so clearly within the plain meaning of the repeated failure prong of the flagrant violation definition, that interpretation of the statute was unnecessary. Alternatively, it was argued that the Secretary's interpretation of the provision, at least as reflected in his argument, is entitled to deference. The Secretary also maintained that, past violations aside, the violation was flagrant because AmCoal repeatedly failed to eliminate the violation cited in the order, which was known for at least three shifts. Sec'y. Br. at 45-52.

The Secretary's argument that an operator's history of violations can satisfy the repeated failure element of a flagrant violation has been uniformly rejected, and I reject it here. As to the argument that AmCoal repeatedly failed to eliminate the cited violation, I find that the Secretary's attempt to prove that the violation was known was effectively blunted by the fact that Miller had traveled through the cited area on two occasions the previous day and did not identify

---

[42] Those exhibits, and similar exhibits charging violations of the accumulations standard (Ex. S-91 thru S-119), had been ruled inadmissible at the hearing. In his supplemental brief, the Secretary argues that in light of *Wolf Run* those exhibits should now be considered in reaching a flagrant determination. Sec'y. Supp. Br. at 5. AmCoal did not address that question in its supplemental brief. I agree with the Secretary that under *Wolf Run* the copies of citations should be admitted as evidence, and they will be considered as part of the record in these cases.

any of the conditions that he and the Secretary characterized as obvious. In *Blue Diamond*, the fact that the issuing inspector had participated in an inspection of the cited area the day before and had not identified any of the supposedly obvious conditions was found to negate the contention that the conditions were obvious, and substantially mitigated the operator's constructive knowledge of the conditions. Here, Miller was not engaged in an inspection on his travels through the area. However, his attempts to downplay the significance of his presence in the area and failure to identify the conditions were found to be unconvincing. He rode through the area in a vehicle that provided a reasonable view of the roof and ribs, such that hazardous conditions, especially those that were obvious, should have been observed. AmCoal examiners, who had recently received special training on examinations also had not noted the conditions.

In *Blue Diamond*, it was found that the conditions were not obvious, that the operator's negligence was moderate, and that the Secretary had not established the "actual or implied knowledge necessary to characterize the cited conditions as a known violation," thereby failing to establish that it was flagrant. 36 FMSHRC at 572. Here, too, the conditions were not obvious and AmCoal's negligence was moderate. I find that the Secretary has failed to establish the actual or implied knowledge necessary to characterize the cited conditions as a known violation within the meaning of section 110(b)(2). I also find that the violation was not particularly severe, or the result of egregious conduct, so as to warrant a flagrant designation.

The violation charged in Order No. 6668526 was not flagrant.

The Secretary made similar arguments as to the examination violation, Order No. 6668526, asserting that AmCoal's history of violations of the same or "similar" standards satisfied the repeated failure element of the statute. He noted that the Act does not "say the *same* standard" and that, in *American Coal*, it was held that "*any* substantive regulatory standard" would satisfy the statutory requirement.[43] Sec'y. Br. at 62-65; Sec'y. Supp. Br. at 3-4. Alternatively, under the "current repeated conduct" theory, he contended that AmCoal had repeatedly failed to eliminate the violation cited in the order. Sec'y. Br. at 65.

The Secretary's history of violations argument has been rejected. As to the alleged repeated failure to eliminate the known violation alleged to have been flagrant, the Secretary makes the same argument that he made for the previous order, i.e., that AmCoal's failure to identify and record the violative roof/rib conditions in the course of at least three preceding preshift examinations amounted to a repeated failure to eliminate the known violation alleged to be flagrant. Sec'y. Br. at 50. Conceptual difficulties can be encountered in attempting to apply the same analysis, e.g., the unwarrantable failure factors, to an alleged violation of a standard like the roof control standard, and an alleged examination violation for failing to identify the roof control violation. The Secretary argued that the failure, during several preshift examinations, to

---

[43] The history of violations printout introduced by the Secretary listed 2,611 violations, issued in the 26.5 months preceding the latest violation at issue, raising the possibility that any, or all, of those violations could conceivably be urged as predicate repeated violations. Ex. S-1.

identify and eliminate the roof control violation rendered that violation flagrant, and that the examination violation "is flagrant for the same reasons that the violative conduct in Order No. 6668524 is 'repeat' flagrant." Sec'y. Br. at 65. I reject the Secretary's argument for the reasons that I rejected it with respect to Order No. 6668524. I am also troubled by the concept that the exact same conduct that was urged to justify a flagrant designation for the roof control violation could also justify a flagrant designation for the examination violation.

The violation charged in Order No. 6673874 was not flagrant.

The Secretary also makes a two-pronged argument urging that the violation charged in Order No. 6673874 was flagrant. He relies on AmCoal's history of violations, which shows that, in the 12 months preceding issuance of the order, AmCoal was issued 201 citations/orders for violations of the accumulations standard, 29 of which were substantially similar, and of the 29, 19 were cited as S&S. Ex. S-1, S-91 thru S-119. The violations history report also shows that in the 24 months preceding issuance of the order, AmCoal was issued 365 violations of the accumulations standard, 55 of which were S&S, and 5 of which were issued as unwarrantable failures. Two of the unwarrantable failure violations became final, one in December 2010, and one in May 2011. The Secretary contends that "under any formulation of the term 'repeated,' the subject orders constitute 'repeated failures' to make reasonable efforts to eliminate known accumulations violations." Sec'y. Br. at 78. The Secretary's violations history argument, which fails to address many of the other terms in the statute, has been rejected, and is rejected for this order. In addition, the violation was found to be reasonably likely to result in lost work days or restricted duty injuries to 2 persons. It was not reasonably expected to result in death or serious bodily injury within the meaning of the statute.

The Secretary also argues that the violation was flagrant under a "current repeated conduct" theory, in that the cited condition was "recorded in the examination records on January 22 but dropped after the midnight shift," and the examiners' failures to identify and record the conditions "over the course of five or more shifts" constitutes a repeated failure to eliminate the known violation. Sec'y. Br. at 80. However, the notations in the examination records from January 22, did not refer to the critical component of "the cited conditions." The notations, in the remarks section of the reports, referred only to the fact that float coal dust was being deposited in the area, a condition that was not, in itself, hazardous. The loose coal in piles alongside the belt was of recent origin, i.e., within one shift. The most significant component of the accumulations, the "carry back" fines that were being deposited under the bottom rollers, was not reflected in the examination reports. As Miller stated in the order: "These conditions were not reported on the examination books." Ex. S-18. Those deposits were not obvious, although they should have been discovered by a competent examiner, one or two shifts before they were cited.

The Secretary did not establish that AmCoal had actual knowledge of the critical component of the cited accumulations. It is, however, charged with constructive knowledge of them one or two shifts prior to their being cited. While that constructive knowledge could be held to satisfy the "known" violation element, it is not sufficient to bring the violation within the

statutory framework. As noted in the discussion of this violation, AmCoal's examinations were being conducted as required, and there were no deficiencies in documentation. Hazardous and other conditions were being noted, and were being addressed. The failure of examiners, over the course of 2-3 shifts to identify the conditions, which were under the belt close to the mine floor and were not obvious, did not rise to the level of aggravated conduct sufficient for a finding of unwarrantability. AmCoal's negligence was found to be moderate to high.

I find those facts insufficient to establish the actual or implied knowledge necessary to characterize the cited conditions as a known violation within the meaning of section 110(b)(2). The violation was not particularly severe, or the result of egregious conduct, so as to warrant a flagrant designation. In addition, as noted above, the violation was found to be reasonably likely to result in lost work days or restricted duty injuries, which I find does not meet the statute's requirement that the violation be reasonably expected to result in death or serious bodily injury.

Based upon the foregoing, I find that the violation charged in Order No. 6673874 was not flagrant.

The Appropriate Civil Penalties

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

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> > the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).
>
> Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."). While there is no presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria.

E.g., Sellersburg Stone, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Findings on Penalty Criteria

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that AmCoal demonstrated good faith in abating the violations in a timely manner, and that the proposed penalties would not affect its ability to remain in business. Jt. Stip. #8, #10. The parties did not stipulate to the size of AmCoal as an operator. However, forms reflecting calculations of penalty assessments were filed with the petitions and indicate that AmCoal is a very large operator, as is its controlling entity, and I so find. AmCoal's good faith abatement efforts should be considered a minor mitigating factor in the penalty assessment process. The fact that it is a very large operator and that the proposed penalties would not affect its ability to remain in business, while not aggravating factors, indicate that a penalty should be higher than that which would be imposed on a smaller operator.

History of Violations

AmCoal's history of violations is reflected in several exhibits. A report generated from MSHA's database, typically referred to as an "R-17" shows violations issued between November 7, 2005 and January 24, 2008, that had become final as of the time of the hearing. Ex. S-1. The report reflects that 2,611 violations issued in that period had become final, 539 of which were S&S, and 17 of which were specially assessed. Copies of some of the citations issued for roof and rib control and accumulations violations were also introduced into evidence. Ex. S-30 thru S-56, S-91 thru S-119. I accept the figures reflected in the reports as accurate. However, the overall violation history is deficient in that it provides no qualitative assessment, i.e., whether the

number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC at 623-24.

Qualitative violations' history information can be found on the forms reflecting calculations of the proposed assessments, and have been represented in Respondent's brief. The Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. Forms stating penalty assessments for the litigated violations generally show that AmCoal had a ratio of violations per inspection day between 0.9 and 1.1, for which 10 penalty points are assigned in the applicable table - a moderate overall violation history.

I find that AmCoal's overall history of violations, as relevant to these violations, was moderate, and should be considered a neutral factor in the penalty assessment process.

Gravity - Negligence

Findings on gravity and negligence are set forth in the discussion of each violation.

Method for Determining the Amount of Penalties for the Litigated Violations

The purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness.[44] Similarly situated operators, determined to be liable for violations of similar gravity, negligence and other penalty criteria, ideally should not be assessed significantly different penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of $1.00 to $70,000.00. The Secretary's regulations for determination of a penalty amount by a regular assessment, 30 C.F.R. §100.3, take into consideration all of the statutory factors that the

---

[44] As explained in *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984):

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

Commission is obligated to consider under section 110(i) of the Act.[45] The product of that regular assessment formula provides a useful reference point use, of which would promote consistency in the imposition of penalties by Commission judges.[46]

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's regular assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator's negligence consists of five gradations, ranging from "No negligence" to "Reckless disregard." 30 C.F.R. §100.3(d). In reality, however, the degree of an operator's negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving extreme gravity and/or gross negligence, or other unique aggravating circumstances may dictate substantially higher penalty assessments. A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the regular assessment process, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

Order No. 7490572 (Docket No. LAKE 2008-667)

Order No. 7490572 charged a violation of the standard that requires that electrical circuits and equipment be deenergized before work is done on them. It was alleged that the violation was highly likely to result in a fatal injury to one person and that it was the result of AmCoal's reckless disregard of the standard. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $161,800 was proposed by the Secretary. Application of

---

[45] Under the regulations, penalty points are assigned based on the size of the operator and the operator's controlling entity; the operator's history of previous violations; the operator's history of repeat violations of the same standard; the degree of the operator's negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A penalty amount is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies penalties ranging from $112.00 for 60 or fewer points, up to the statutory/regulatory maximum of $70,000.00 for 144 or more points. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. §100.3(f). A further reduction may occur if the operator can demonstrate to MSHA's District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. §100.3(h).

[46] See *Magruder Limestone Co., Inc.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

the Secretary's regular assessment process would have produced an assessed penalty of $63,000. Resp. Br. at 22.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered, as it was found to have been reasonably likely to result in a fatal injury to one person, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $13,500.

This violation involves serious gravity and high negligence, factors that are taken into account in the Secretary's penalty regulations. Neither the gravity, nor the negligence, were of such a level to justify imposition of substantially higher penalties. In addition, AmCoal's high negligence was predicated upon the negligence of its agent, who acted contrary to its established policies and training.

Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $15,000 for this violation.

Order No. 6668524 (Docket No. LAKE 2008-666)

Order No. 6668524 alleged a violation of the roof and rib control standard that was highly likely to result in fatal injuries to two persons and was the result of AmCoal's high negligence and unwarrantable failure. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $158,900 was proposed by the Secretary. Application of the Secretary's regular assessment process would have produced an assessed penalty of $45,708. Resp. Br. at 39-40.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered, as it was found to have been reasonably likely to result in a permanent injury to one person, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $3,000.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $5,000 for this violation.

Order No. 6668526 (Docket No. LAKE 2008-666)

Order No. 6668526 alleged a violation of the preshift examination standard with respect to the conditions cited in Order No. 6668524, that was highly likely to result in fatal injuries to two persons and was the result of AmCoal's high negligence and unwarrantable failure. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $161,800 was proposed by the Secretary. Application of the Secretary's regular assessment process would have produced an assessed penalty of $31,989. Resp. Br. at 43-44.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered, as it was found to have been reasonably likely to result in a permanent injury to one person, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate to high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $4,000.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $5,000 for this violation.

Order No. 6673874 (Docket No. LAKE 2008-666)

Order No. 6673874 alleged a violation of the accumulations standard that was highly likely to result in fatal injuries to 10 miners, and was attributable to AmCoal's high negligence and unwarrantable failure. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $188,000 was proposed by the Secretary. Application of the Secretary's regular assessment process would have produced an assessed penalty of $63,000. Resp. Br. at 64.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered considerably, as it was found to have been reasonably likely to result in lost work days injuries to two persons, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate to high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $5,500.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $7,500 for this violation.

Order No. 6673876 (Docket No. LAKE 2009-6A)

Order No. 6673876 alleged a violation of the on-shift examination standard with respect to the conditions cited in Order No. 6673874 that was highly likely to result in fatal injuries to 10 miners, and was attributable to AmCoal's high negligence and unwarrantable failure. The violation was specially assessed and a penalty of $60,000 was proposed. A regular assessment would have produced approximately the same assessed penalty.

It was sustained as an S&S violation. However, the gravity was lowered considerably, as it was found to have been reasonably likely to result in lost work days injuries to two persons, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate to high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $2,500.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $4,000 for this violation.

ORDER

Docket No. LAKE 2008-666.

Order No. 6668524 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in a permanent injury, that one person was affected, and that AmCoal's negligence was moderate. A civil penalty in the amount of $5,000 is imposed for this violation.

Order No. 6668526 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in a permanent injury, that one person was affected, and that AmCoal's negligence was moderate to high. A civil penalty in the amount of $5,000 is imposed for this violation.

Order No. 6673874 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in lost work days injuries, that 2 persons were affected, and that AmCoal's negligence was moderate to high. A civil penalty in the amount of $7,500 is imposed for this violation.

Docket No. LAKE 2008-667

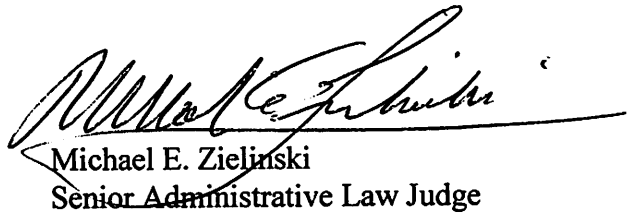
Order No. 7490572 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in a fatal injury, that one person was affected, and that AmCoal's negligence was high. A civil penalty in the

amount of $15,000 is imposed for this violation

Docket No. LAKE 2009-6A

Order No. 6673876 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in lost work days injuries, that two persons were affected, and that AmCoal's negligence was moderate to high. A civil penalty in the amount of $4,000 is imposed for this violation

Civil penalties in the total amount of $36,500 shall be paid within 30 days.



Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

Barbara Villalobos, Esq., Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, Room 844, Chicago, IL 60604

Jason W. Hardin, Esq., Mark E. Kittrell, Esq., Fabian & Clendenin, 215 South State Street, Ste. 1200, Salt Lake City, UT 84111-2323