FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 27, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2010-039 A.C. No. 12-02010-197503-01
v.	Docket No. LAKE 2010-106 A.C. No. 12-02010-200613-03
BLACK BEAUTY COAL COMPANY, Respondent	Air Quality #1 Mine

DECISION

Appearances: Nadia A. Hafeez, Esq., and Matthew M. Linton, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Author M. Wolfson, Esq., and Page Jackson, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, and Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Black Beauty Coal Company, owned by Peabody Midwest Mining, LLC ("Peabody") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Evansville, Indiana, and filed post-hearing briefs.

Peabody operated the Air Quality #1 Mine in Knox County, Indiana. A total of three section 104(a) citations and four 104(d)(2) orders of withdrawal were adjudicated at the hearing. Two orders and 49 citations settled in these dockets.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8421043; LAKE 2010-106

On August 28, 2009, Inspector Philip Douglas Herndon issued Citation No. 8421043 under section 104(a) of the Mine Act, alleging a violation of section 75.1403-5(g) of the Secretary's safety standards. (Ex. G-3). The citation stated that the walkway around the Main South slope tail was not being maintained because the walkway was covered in a layer of mud that was about 1 foot deep, 5 feet wide, and 9 feet long. The citation stated that the muddy conditions made travel around the tail slick and hazardous. Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was

significant and substantial ("S&S"), the operator's negligence was high, and that one person would be affected. Section 75.1403-5(g), which is a safeguard criterion, states that "a clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970." 30 C.F.R. § 75.1403-5(g). The Secretary proposed a penalty of $3,689.00 for this citation.

Background

Inspector Herndon testified that the mud he encountered made the travelway slick and created a hazard to miners traveling in the area. (Tr. 30-31). He determined that the conditions violated Safeguard Notice No. 7591942. The conditions made it reasonably likely that a miner traveling in the area would slip, fall, and come into contact with sharp objects in the area such as the belt structure or the tailpiece. (Tr. 21-32). He concluded that any injuries would likely result in lost workdays or restricted duty. He determined that Peabody's negligence was high because mine examiners were required to walk through the area to conduct examinations. (Tr. 33). Peabody previously received citations for muddy conditions in the same location. (Tr. 33-35). Indeed, the inspector testified that he previously fell in the cited area as a result of muddy conditions. *Id.*

Safeguard Notice No. 7591942 was issued on May 7, 2003, and was modified on August 9, 2007. (Ex. G-1). The safeguard was issued because rib coal and rib rock fell into the travelway along each side of the 2-A conveyor belt at crosscut 17. The safeguard notice required Peabody to maintain a 24 inch travelway on both sides of all belt conveyors. The safeguard notice was modified in August 2007 to include a requirement that "the 24 inch travelway shall be clear of mud and water." *Id.*

Discussion and Analysis

Peabody maintains that this safeguard notice, as modified, is invalid and should be vacated. I previously held that Safeguard Notice No. 7591942 is valid and enforceable as modified. *Black Beauty Coal Co.*, 36 FMSHRC ____, slip op. at 23, No. LAKE 2009-414 (March 10, 2014).[1] For the reasons set forth in that decision, I affirm my holding that the safeguard notice was validly issued and modified.

Inspector Herndon testified that he observed mud on the right side of the tail that presented a slipping hazard. (Tr. 31). He did not measure the muddy area, he simply estimated the dimensions. (Tr. 42). At the hearing, the inspector did not testify about the width of the travelway or how much of the travelway's width was compromised by mud and water.

Randall Hammond was Peabody's escort during Inspector Herndon's inspection of the mine on August 28, 2009. He testified that the citation was issued at the tail of the Main South Slope belt, which is a transfer point between the Main South Belt and the Main South Slope belt. (Tr. 48). The area is often wet because water is applied to the belts, scrapers wipe water from the

[1] Commission Judge Miller also determined that this safeguard notice was valid including the modification. *Black Beauty Coal Co.*, 33 FMSHRC 1504, 1517-18 (June 2011) (ALJ).

bottom belts, and the area is frequently washed to clean up accumulations. Peabody constructed a 24 inch wide wooden bridge on the left side of the tail area parallel to the transfer point. (Tr. 48-49; Ex. R-2, R-3). Peabody also placed wooden pallets at the cross-under point of the Main South belt to create a walkway. *Id.* Hammond testified that the travelway on the right side of the tail structure was 10 feet wide and there was room for safe passage despite the presence of mud and water. (Tr. 51, 57). He said that he walked through the area during the inspection without stepping in mud or water. He took measurements in the area. At least 5 feet of the 10 foot travelway was clear of mud and water. (Tr. 52, 58).

Peabody maintains that Citation No. 89421043 should be vacated because the Secretary did not establish a violation of the safeguard. Peabody does not dispute that there was mud on the right side of the tail, but argues that the presence of mud does not establish a violation because the safeguard notice requires that a "24-inch travelway shall be clear of mud and water." (Ex. G-1 at 3). Hammond testified the muddy area was near the corner of the tail so that there was at least a clear 24-inch wide walkway provided between the muddy area and the rib. (Tr. 53; Exs. R-2, R-3). Consequently, the Secretary failed to prove a violation.

I credit the testimony of Hammond as to the measurements that he took. I also note that Inspector Herndon did not compare the width of the subject travelway to the width of the wet and muddy area to see if 24 inches of clearance was provided.[2] The presence of mud in a travelway does not establish a violation of the safeguard notice unless there is not a clear 24-inch path along the travelway. The Secretary bears the burden to establish a violation of a safeguard notice. *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1785-86 (Nov. 1997). The Secretary assumed that the presence of mud in the travelway established a violation due to the hazards presented. Although the Secretary's authority to issue safeguards is broad, the language of a safeguard must be construed narrowly. *Cyprus Cumberland*, 19 FMSHRC at 1785; *Southern Ohio Coal Co.*, 7 FMSHRC 590, 512 (April 1985).

Citation No. 8421043 is therefore **VACATED.**

B. <u>Order No. 8421014; LAKE 2010-39</u>

On August 5, 2009, Inspector Herndon issued Order No. 8421014 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. (Ex. G-6). The order states, in part, that the Main South Slope Belt was operating while in contact with an accumulation of coal fines that was 6 feet wide and 10 feet long. The coal fines were black in color and dry. The inspector alleged that the accumulations should have been obvious to the "most casual of observers." *Id.*

Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he

[2] Both Inspector Herndon and Hammond are experienced miners. The inspector had about 27 years of coal mining experience including 3 years as an MSHA inspector. (Tr. 27). Hammond also had about 27 years of coal mining experience including several years as director of the Indiana Bureau of Mines. (Tr. 47).

determined that the violation was S&S, the operator's negligence was high, and that three people would be affected. Section 75.400 states that "coal 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 . . . ." 30 C.F.R. § 75.400. The Secretary proposed a penalty of $15,971.00 for this order.

Background

This order was issued in the same area as Citation No. 8421043, discussed above. At this location the Main South belt dumped coal onto the Main South slope belt, which transported coal out of the mine.[3] Inspector Herndon observed that the Main South slope tail was running and the belt was contacting an accumulation of coal fines. (Tr. 61). The accumulation was about 18 inches deep. (Tr. 65-66). The guard around the tail was packed with accumulations so that when the guard was removed, about three feet of fines were released. (Tr. 66). Inspector Herndon determined that the coal fines took a significant amount of time to accumulate in the area. He was especially concerned because the coal fines were compacted and conformed to the shape of the belt. (Tr. 67; Ex. G-6). The fines were dry where the rollers contacted them. (Tr. 63, 89).

Timothy Thompson, a safety technician for Peabody, accompanied Inspector Herndon on August 5, 2009. He testified that the area cited by the inspector was wet. (Tr. 93). The slope belt tail was installed upon a concrete pad and water tended to accumulate in the area because it was in a low lying area. (Tr. 94). Thompson testified that there is water is on the South Slope belt and water sprays were directed at the head roller on the Main South Belt. (Tr. 95). This water tends to drip down toward the tail piece of the South Slope belt. (Tr. 96; Ex. G-7 at 11). There were also CO sensors inby the location of the tail for the South Slope belt that notify the control center on the surface in the event of an increase in carbon monoxide levels. (Tr. 97-98).

The Secretary argues that the violation was S&S because the evidence establishes that the moving belt and turning rollers contacted dry coal fines. (Sec'y Br. 17; Tr. 63, 73, 75). The discrete safety hazards created were the inhalation of smoke and burns suffered by miners fighting a fire. It was reasonably likely that a fire would start and seriously injure a miner in the area.

The Secretary also maintains that the inspector's unwarrantable failure determination is supported by the evidence. The inspector determined that Peabody knew about the condition for five production shifts because it was recorded in the belt books that long. (Ex. G-8). Peabody was also warned about accumulations in this area many times. The operator was deliberately ignoring the problem.

Peabody, on the other hand, contends that the violation was not S&S because a confluence of factors that would make a fire reasonably likely was not present. The material cited was wet and much of it was made up of noncombustible material. The evidence establishes that the area was consistently wet and, assuming continued normal mining operations, it would

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[3] At the time of the hearing, Peabody was no longer using the South Slope and the Main South belts. It had consolidated its operations to the west side of the mine.

have remained wet. (Peabody Br. 17; Tr. 73, 93). In addition, three miners were shoveling in the area so it can be inferred that the condition would have been cleaned up in a short period of time. It was not reasonable likely that a fire would start or that anyone would be seriously injured if the material began to smolder.

Peabody also maintains that the Secretary did not establish that the violation was the result of its unwarrantable failure to comply with the safety standard. The evidence shows that the accumulation was not extensive; it would not have been present for a long period of time; and it did not pose a high degree of danger. Peabody was in the process of removing the accumulation and it was not on notice that additional efforts were needed to remove accumulations at the mine.

Discussion and Analysis

I find that the violation was serious but the Secretary did not establish that the violation was S&S.[4] I find that it was unlikely, taking into consideration continuing mining operations, that the cited condition would have ignited or created a fire. I reach this conclusion for several reasons. First, I find that the evidence establishes that the material in the area was wet and much of it was incombustible mud and rock. Although I credit the inspector's testimony that the material that contacted the belt was dry, the remaining material was too wet to burn and would not have dried out quickly. It was not reasonably likely to ignite. Second, it was not reasonably likely that anyone would suffer smoke inhalation or burns because it was unlikely that the condition would have led to an event in which significant smoke was produced. Although there was a remote possibility that some smoldering would have occurred in the event the accumulations were not removed, the evidence establishes that it would have been localized and the mine's firefighting team would not have been exposed to the hazards of burns or smoke inhalation. Third, Peabody's Belt & Roadway Inspection Reports (the "Inspection Reports") establish that during many shifts when the examiner discovered accumulations in the cited area, actions were taken to remove them. During the shifts immediately preceding the inspection, Inspection Reports note that there were mud and fines at the tail and that either work was in progress to remove the mud and fines or that the area was washed down. (Ex. G-8). Peabody did not ignore the accumulations. Miners were shoveling accumulations in the area at the time

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[4] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

of the inspection. There was no methane present; other sources for an ignition were not present; and the area was a long distance from working sections of the mine. The gravity was serious.

I also find that the Secretary did not establish that the violation was the result of Peabody's unwarrantable failure to comply with the safety standard.[5] Peabody was negligent with respect to this violation but its negligence did not rise to the level of aggravated conduct. The violation was obvious because Peabody knew that it was common for coal fines, muck, and mud to accumulate at the bottom of the South Slope belt. The area was consistently wet, however, and was frequently cleaned. Although accumulations had been present for several shifts, the area was cleaned regularly and miners were shoveling in the area. It is not clear how long the particular accumulation discovered by the inspector was present. Peabody, through its examiners, knew that material frequently accumulated around the tail of the South Slope belt. The condition did not pose a high degree of danger as discussed above. The accumulation was mostly wet and included mud and muck. Peabody was aware that MSHA issued many citations for accumulations along belt lines over the previous few years. (Ex. G-26). MSHA instituted a belt initiative following the fire at Aracoma Coal Company's Alma Mine belt fire. MSHA routinely warned mine operators, including Peabody, to do a better job of keeping their belts clean.

In a previous case, I came to the same conclusion with respect to two accumulation violations issued in February 2009 near the tail of the South Slope belt and along the outby end of the Main South belt. *Black Beauty Coal Co.*, 36 FMSHRC _____, slip op. at 12-18, No. LAKE 2009-413 (Mar. 10, 2014). I determined that Peabody violated section 75.400 and that the violations were serious but were not S&S or the result of an unwarrantable failure. My reasoning in this case parallels my reasoning with respect to those violations.

Order No. 8421014 is **MODIFIED** to a section 104(a) non-S&S citation with moderate negligence. The violation was serious. A penalty of $12,000.00 is appropriate for the present violation.

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[5] Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F. 3d 133, 136 (7th Cir. 1995). 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 e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

C. **Order No. 8420824; LAKE 2010-39**

On August 5, 2009, Inspector Anthony DiLorenzo issued Order No. 8420824 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.363(a) of the Secretary's safety standards. (Ex. G-10). The order states that the conditions described in Citation No. 8420822 existed since July 28, 2009, and no apparent effort was made to correct the conditions. The order states that the conditions described in the citation were extensive, obvious, existed for a significant length of time, and were included in the Inspection Records since July 28, 2009. The underlying section 75.400 violation described in the citation occurred along the 5 C belt and consisted of an accumulation of combustible material from crosscut 0 to crosscut 13.[6]

Inspector DiLorenzo determined that an injury was unlikely, but that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was not S&S, the operator's negligence was high, and that four people would be affected. Section 75.363(a) states, as relevant here, that any "hazardous condition found by a mine foreman or equivalent mine official . . . [including mine examiners] . . . shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected." 30 C.F.R. § 75.363(a). The Secretary proposed a penalty of $4,000.00 for this order.

Background

Inspector DiLorenzo testified that the 5 C belt advances with the working section as it progresses further into the mine. (Tr. 106). The accumulations consisted of loose coal, coal fines, and float coal dust that were black in color. The coal dust was upon all surfaces and structures. Piles of coal and coal fines were under the head and tail in an area that was 2 feet wide, 3 feet long, and 16 inches deep. *Id.* Loose coal and rib rolls were also present along both ribs up to 20 inches deep, 2 feet wide, and 15 feet long. This condition was continuously listed in the Inspection Reports since the day shift of July 28, 2009. (Tr. 107; Ex. G-12). At the hearing, Inspector DiLorenzo went through the Inspection Reports to show where the entries were made for belt 5 C and what the entries said. (Tr. 108-09). The inspector believed that an ignition or fire was unlikely because there were no friction or ignition hazards. (Tr. 110).

Hammond explained that on the front page of each Inspection Report for a particular shift, the examiner records any "violations or hazardous conditions" that are discovered along a beltline. (Tr. 127). The examiner records on the back of the page any actions taken to remedy the hazards or violations recorded on the front of the page and also may add additional remarks concerning the conditions he observed along the belts. These remarks are "conditions that are observed by an examiner which he deems are not hazardous conditions or violations." *Id.* By company policy, any conditions recorded in the "Violations or Hazardous Conditions" column on the front of the page are to be corrected immediately. (Tr. 128). Conditions listed in the "Remarks" column do not require immediate attention.

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[6] Peabody paid the Secretary's proposed penalty for this citation so the conditions described therein are deemed admitted.

Hammond did not dispute that the conditions described in Citation No. 8420822 by Inspector DiLorenzo existed on August 5, 2009. (Tr. 129-30; Ex. R-16). Nevertheless, he does not believe that the conditions set forth in the citation created a hazard because there were no ignition sources that could ignite the accumulations. (Tr. 130). He testified that the presence of coal in a coal mine does not constitute a hazard because "coal in itself is not a hazardous condition." *Id.*

Discussion and Analysis

Peabody contends that all the references in the Inspection Reports to areas along the 5 C belt that needed to be cleaned were in the remarks section on the back page for each shift. These entries did not document hazardous accumulations that needed to be immediately removed but documented conditions that needed attention but were not hazardous. When the inspector issued the underlying citation, he determined that the accumulations were unlikely to result in an injury, which confirms the examiners' conclusion that the conditions did not present a hazard. Peabody argues that section 75.363(a) was not violated because "hazardous conditions" were not "found" by the mine examiners. The conditions that the examiners found and recorded in the comments section were not required to be immediately corrected because they were not hazardous.

The Secretary argues that the conditions the inspector observed created the safety hazards of inhalation of smoke and burns. A violation need not be S&S to create a hazardous condition. The lack of ignition sources, while relevant when considering whether the cited condition was S&S, is not relevant when considering whether a hazard existed. (Sec'y Br. 23). The Secretary states that any injuries resulting from the accumulations "could reasonably be expected to result in lost workdays or restricted duties." Sec'y Br. 21.

In *Black Beauty Coal Co.*, Commission Judge Miller set out the following test for analyzing whether the safety standard has been violated:

> In order to establish a violation, the Secretary must first demonstrate that "hazardous conditions" existed. Next, she must establish that the hazard had not been corrected or posted. Hence, the Secretary has the burden of demonstrating that the conditions listed by [the inspector] are a hazard, that they can cause damage or accidents. Once the existence of a hazard has been established, the focus shifts to the actions, if any, taken to remediate the condition.

33 FMSHRC 1504, 1511 (June 2011) (ALJ).

Whether the conditions observed by Inspector DiLorenzo were hazardous is a close question. In Citation No. 8420822, the underlying citation that was issued under section 75.400 for the accumulations, was marked as non-S&S, and an injury or illness was marked as "unlikely." The accumulations were extensive, but there were no ignition sources in the area.

In *Enlow Fork Mining Co.,* the Commission considered a similar issue under section 75.360(b). 19 FMSHRC 5 (Jan. 1997). That safety standard requires that persons conducting preshift examinations "shall examine for hazardous conditions and violations of mandatory health or safety standard . . . ." 30 C.F.R. § 75.360(b). There is no indication that the Secretary intended the term "hazardous conditions" to have a different meaning in section 75.360(b) than in section 75.363. In *Enlow Fork*, the Commission held:

> Section 75.360(b) requires that a preshift examiner "examine for hazardous conditions." We reject Enlow's argument that, because the judge concluded the . . . accumulations were not S&S, they were not "hazardous" within the meaning of section 75.360(b). The plain language of section 75.360(b) does not support Enlow's construction. Section 75.360(b) does not specify that hazardous conditions are only those reasonably likely to result in serious injury, nor does that section repeat the S&S language from section 104(d) of the Act, requiring that the conditions be "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."
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> Section 75.360(b) does not define the phrase "hazardous condition." However, the Commission recognized in *National Gypsum* that, based on its dictionary definition, a "hazard" denotes a measure of danger to safety or health. 3 FMSHRC at 827 & n.7. The Commission has approved the definition of "hazard" as "a possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility of loss." *Id.* (citing *Webster's Third New International Dictionary* 1041 (1971)). Accumulations of combustible materials have been recognized by Congress and this Commission as representing hazardous conditions. (citations omitted).

19 FMSHRC at 14. The Commission concluded that "accumulations of combustible materials qualify as hazardous conditions that should be recorded by a preshift examiner when found." *Id.* at 15. Although I conclude that there may be accumulations that should not be considered a hazardous condition, I credit that testimony of Inspector DiLorenzo that the accumulations were obvious and extensive. (Tr. 111-12). Consequently, the accumulations were a hazardous condition that was required to be immediately removed.

The Inspection Reports indicated that accumulations were "found" along the 5 C Belt for several shifts between July 28, 2009, and August 5, 2009. (Ex. G-12). These conditions were recorded in the comments section of the Inspection Reports. The issue is whether Peabody took actions to immediately remove the hazardous conditions after they were found. Peabody argues that it did, as recorded in the Inspection Reports:

July 29, 2009, midnight shift: "cleaned tail' (Ex. G-12 at 180).
July 31, 2009, day shift: "Drive pressings-cleaned" (Ex. G-12 at 195).

August 1, 2009, midnight shift: "Drive pressings-cleaned" (Ex. G-12 at 197).
August 1, 2009, afternoon shift: "Drive pressings-cleaned" (Ex. G-12 at 199).
August 3, 2009, day shift: "Cleaned tail" (Ex. G-12 at 209).

(Peabody Br. at 25). The Secretary does not dispute these notes, but contends that there are no similar notations for other shifts and, more importantly, there is no indication that the entire beltline was completely cleaned during this period. The inspector testified that the accumulation extended for about 13 crosscuts along the beltline and that he observed different types of combustible material along the belt including loose coal, coal fines, and float coal dust. (Tr. 106). Given the size of the accumulation, Inspector DiLorenzo believed that it had existed for a lengthy period of time.

I find that although Peabody had performed some cleanup work, the Secretary established that Peabody failed to remediate the condition. I find that the Secretary established a violation of 75.363(a) because it did not immediately remove the accumulation.

The Secretary maintains that all the factors relevant to high negligence and unwarrantable failure findings are met. The violation existed for one week. The underlying violation was obvious and extensive, with accumulations along the belt for 13 crosscuts. Peabody was placed on notice that greater efforts were necessary to comply with section 75.400. Peabody knew of the violative conditions, as documented in the Inspection Records, but allowed them to continue for many days. The underlying condition presented a discrete safety hazard.

Peabody contends that the Inspection Reports demonstrate that it cleaned areas along the belt at least five times between July 29 and August 5, 2009. The evidence establishes that Peabody took deliberate steps to keep its beltlines clean. The cited condition did not present a high degree of danger because there were no ignition sources present. Indeed, in both the underlying citation and the subject order the inspector determined that an injury was unlikely. The company's examiners acted in good faith when they reasonably determined that, because no ignitions sources were present, the accumulations did not create a hazardous condition.

Although the Secretary established some of the unwarrantable failure elements, I find that Peabody's conduct did not demonstrate an unwarrantable failure to comply with section 74.363(a). Peabody regularly examined the 5 C belt and carefully monitored conditions along the belt. It removed accumulations near the head and tail as needed. It reasonably and in good faith believed that a hazardous condition does not exist unless ignition sources are present. If accumulations were close to the bottom of the belt or rollers and pulleys, it immediately cleaned the accumulation.

In *Kellys Creek Resources, Inc.*, the Commission held that "if an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was *objectively reasonable under the circumstances,* the operator's conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator's belief was in error." 19 FMSHRC 457, 463 (Mar. 1997) (emphasis added). I credit the testimony of Hammond that Peabody did not consider that the conditions along the 5 C belt created a hazard because there were no ignition sources that could ignite the accumulations. (Tr. 130).

Coal is everywhere in a coal mine with the result that its mere presence does not necessarily create a hazard. Consequently, Peabody reasonably believed an accumulation was not a "hazardous condition," as that term is used in the safety standard, if no ignition sources were present.

It is difficult to ascertain how long the accumulations Inspector DiLorenzo observed had existed. More than likely some of the accumulations existed for a shift or longer. I find that Peabody's violation of section 75.363(a) was not the result of its unwarrantable failure to comply with that standard. I find that the violation was serious and was a result of low negligence.

Order No. 8420824 is **MODIFIED** to a section 104(a) citation with low negligence. A penalty of $2,000.00 is appropriate for this violation.

D. Citation Nos. 8420857 and 8420858; LAKE 2010-106

On August 31, 2009, Inspector DiLorenzo issued Citation No. 8420857 under section 104(a) of the Mine Act, alleging a violation of section 75.403 of the Secretary's safety standards. (Ex. G-13). The citation stated that two out of 13 samples collected along the 2 Right, 3 Right, 4 Left in the 4 Main North intake and return air courses contained less than the percent of incombustible content required by the standard. Inspector DiLorenzo determined that an injury was unlikely to occur. Further, he determined that the violation was not S&S, the operator's negligence was high, and that 10 people would be affected.

At the time this citation was issued, section 75.403 stated that where rock dust is required, "it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum." 30 C.F.R. § 75.403. The Secretary proposed a penalty of $3,405.00 for this citation.

On August 31, 2009, Inspector DiLorenzo issued Citation No. 8420858 under section 104(a) of the Mine Act, alleging a violation of section 75.403 of the Secretary's safety standards. (Ex. G-14). The citation stated that 12 out of 33 samples collected along a different area of the 1 Right, 3 Right, 4 Left in the 4 Main North intake and return air courses contained less than the percent of incombustible content required by the standard. Inspector DiLorenzo determined that an injury was unlikely to occur. Further, he determined that the violation was not S&S, the operator's negligence was high, and that 10 people would be affected. The Secretary proposed a penalty of $3,405.00 for this citation.

Background

Inspector DiLorenzo testified that he took samples only from the floor of different areas off the 4 Main North entry (MMU-005) because the roof and ribs were too wet to take samples. (Tr. 143). He did not specify in his notes why he only took floor samples. (Tr. 154-55). Two of the first 13 samples collected contained less than the required percentage of incombustible

material when tested by MSHA's laboratory. (Tr. 142-43; Ex. G-16). He issued Citation No. 8420857 based upon these noncompliant samples.

Inspector DiLorenzo then traveled to a different area of MMU-005 and took 33 samples off the 4 Main North. The inspector testified that he took all these samples except one from the floor of the mine because the ribs and roof were too wet. (Tr. 148; Ex. G-16). Again, the inspector's contention that the roof and ribs were too wet to sample is not documented in his contemporaneous notes. MSHA's laboratory determined that 12 of the 33 samples collected contained less than the required amount of incombustible material. *Id.* He issued Citation No. 8420858 based upon these noncompliant samples.

When taking samples under section 75.403, MSHA inspectors generally take band samples. Samples are taken from the roof, ribs, and floor following a procedure set forth in MSHA's General Coal Mine Inspection Procedures Handbook. (Ex. R-22 at 33-39). Steven Kattenbraker, a mine safety consultant and former MSHA Field Office Supervisor, testified on behalf of Peabody and described the procedures used by inspectors to determine if sufficient rock dust has been applied; samples should be taken from representative areas of the roof, ribs, and floor and the inspector should note if an area is too wet to sample. (Tr. 183-95). He believed that it was unusual for the roof and ribs to be too wet to sample at a given location when the floor is sufficiently dry to sample. (Tr. 193). Typically, if the roof and ribs are too wet, then the floor is too wet as well. *Id.*

Discussion and Analysis

Peabody contends that because the inspector did not take a band sample and only took spot samples from the floor, the rock dust survey was deficient and the citations must be vacated. There is no question that Inspector DiLorenzo did not take band samples as specified in the Coal Mine Inspection Procedures Handbook because all the samples except one were taken from the mine floor. The issue is whether that fact alone should invalidate the samples.

The safety standard does not require that band samples be taken. In *Consolidation Coal Co.*, Commission Judge Jerold Feldman held "[w]hen an MSHA inspector departs from recommended procedure by collecting floor samples instead of band samples as representative of mine conditions, the Secretary must bear the burden of demonstrating the samples are representative." 22 FMSHRC 455, 465-66 (Mar. 2000) (ALJ). Judge Feldman vacated the order alleging a violation of section 75.403 because the inspector sampled areas on the mine floor that the inspector believed looked "really bad" rather than random samples. *Id.*

I find that the conditions described in Citation Nos. 8420857 and 8420858 violated section 75.403. I agree with Judge Feldman's analysis of the issue. I find that the evidence establishes that Inspector DiLorenzo took random samples from the floor. (Tr. 140-42, 151). There is no evidence that he looked for areas where the layer of rock dust appeared to be especially thin and that he collected the samples from those locations. He followed the inspection handbook except he did not sample from the ribs and roof. There is nothing in the

record to suggest that, in following this procedure, he obtained results that were unrepresentative of the mine environment. I find that the Secretary established a violation in each instance.[7]

The violations were non-S&S. At the hearing, Inspector DiLorenzo agreed that only one miner would be affected and not ten as he alleged in the citations. (Tr. 144, 149). I reduce the gravity of the violations.

I find that the Secretary did not establish that the violations were the result of Peabody's high negligence. Both violations occurred in return air courses. These areas are only regularly traveled by weekly examiners, who are required to travel the length of one entry. (Tr. 148, 162, 165). There is no evidence as to how long the cited conditions existed. The inspector did not issue the citations based upon his visual observations. He did not determine that the area needed to be sampled because the rock dust levels appeared to be low. When the area became return air courses, the area was no longer active but coal dust could have been deposited in the area. The only justification for the high negligence determination was Inspector DiLorenzo's general testimony concerning Peabody's compliance history under section 75.403. (Tr. 145-46; Ex. G-26).

The citations are **MODIFIED** to reduce the number of people affected by the violations and to reduce the negligence to moderate. A penalty of $2,000.00 is appropriate for each of these violations.

E. Order No. 8416329; LAKE 2010-39

On June 17, 2009, Inspector DiLorenzo issued Order No. 8416329 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.364(b)(4) of the Secretary's safety standards.[8] (Ex. G-19). The order states, in part, that an inadequate examination was conducted of the Main West seals on June 15, 2009. He determined that there were 12 inches of water at the #3 seal, 17 inches of water at the #6 seal, 14 to 17 inches of water at the #7 seal and up to 44 inches of water at the #8 seal. The order states that the pumps were de-energized at the time of the inspection.

Inspector DiLorenzo determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 75.364(b)(4) requires that at least once every seven days, "an examination for hazardous conditions" shall be made by a certified person "at each seal along return and bleeder air courses and at each seal along intake air courses. . . ." 30 C.F.R. § 75.364(b)(4). The Secretary proposed a penalty of $4,099.00 for this order.

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[7] Peabody did not argue that there were insufficient numbers of noncompliant samples to establish violations of the standard.

[8] The subject order is dated June 18, 2009, but Inspector DiLorenzo testified that his inspection was actually on June 17, 2009. (Tr. 215).

Background

Inspector DiLorenzo testified that the water at the #8 seal spanned the entire entry and spread outby toward the #7 seal for a distance of 45 feet. (Tr. 199; Ex. G-19). The water pumps in the area were de-energized and all the power cords were unplugged. (Tr. 204, 242). The inspector checked the record books which indicated that flooding was reported in the area on June 8, 2009, but the record for the most recent examination on June 15, 2009, reported no hazards in the area. (Tr. 203; Ex. G-20). Inspector DiLorenzo assumed that an adequate examination of the seals did not occur on June 15 because the water he observed on June 17 must have been present on June 15. (Tr. 215).

Peabody presented testimony concerning the chronology of events leading up to the time of the inspection. Peabody presented evidence that during a weekly examination of the area on June 8, 2009, Andrew Herndon, an examiner for Peabody, discovered that the area in front of several seals was flooded, including the #7 and #8 seals. (Tr. II 48).[9] He recorded this condition in the record book. It was later documented in this book that pumping in the area was "in progress." (Ex. G-22). Herndon's next examination of the area was during the midnight shift on June 15. The water that was present on June 8 was no longer present; there was no water in the area at the time of his examination. (Tr. II 48). He was able to examine the face of the #8 seal and he put the date, time, and his initials upon the card at the seal face. (Tr. II 47).

During the midnight shift on June 16, Pumper John Lane was in the area to do permissibility examinations of the pumps. (Tr. II 19-20). He testified that the pumps were running and there was no flooding in front of the #8 seal. He de-energized the pumps in the area because he saw a broken discharge line just inby the main sump. (Tr. II 20-21). He needed to take this action to repair the discharge line, which took about two hours. (Tr. II 21-22). He restarted the pumps before he left the area.

Lane returned to the area on the midnight shift of June 17 to complete his permissibility examinations. He testified that the pumps were running and the area was not flooded. (Tr. II 23). He examined the explosion-proof, permissible electrical box called the "suitcase" and the surrounding electrical cables. (Tr. II 23-24). He wrote the date, time, and his initials upon the suitcase. The pumps were running and the area was not flooded when he left the area. *Id.*

Inspector DiLorenzo conducted an inspection of the Main West seals during the afternoon shift on June 17. His escort was Randall Hammond. (Tr. II 58). As the inspection party entered the area, Hammond noticed that the cat heads (plugs) at the electrical distribution box were disconnected and laying on top of the box. (Tr. II 59-60). When the inspection party arrived at the seals, the pumps were not working and the area was flooded. The flooding that was present at the time of MSHA's inspection was not present the last time Lane was there on the midnight shift earlier that day. (Tr. II 25-26).

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[9] The transcript was renumbered the second day of the hearing. Transcript references designated with "II" refer to the second day of the hearing.

Discussion and Analysis

The area at the #8 shield was about 6 miles from the closest active area of the mine. This cited area was the lowest point at the mine and the #8 seal was at the bottom. A series of pumps were present to pump water out of the area, which was a continuous process. (Tr. II 10). If the pumps do not operate, the area will flood. (Tr. II 14-15). If water in front of seals impedes the examiner's ability to safely perform his weekly examination, a violation of section 75.364(b)(4) is established.

I find that the Secretary did not establish a violation of section 75.364(b)(4). The fact that the area was flooded at the time of Inspector DiLorenzo's inspection does not establish that the area was flooded during the previous weekly examination. The Secretary did not establish that the area was flooded at the time examiner Herndon conducted his examination on June 15.[10] Inspector DiLorenzo assumed that the water that was present on June 17 was present on June 15. (Tr. 215). Proof that conditions existed at the time of an MSHA inspection is, by itself, insufficient evidence to infer that the condition existed at the time of the examination. *See e.g. Big Ridge, Inc.* 33 FMSHRC 718-19 (March 2011) (ALJ).

I credit the testimony of John Lane, Andrew Herndon, and Randall Hammond as to the chronology of events between June 8 and June 17. I find that their testimony was lucid, logical, and trustworthy. I find that the cited area was not flooded during Herndon's previous weekly examination and the area was not flooded when Lane left the area on June 17. The evidence establishes that Herndon conducted a proper weekly examination of the seals and that he placed the date, time, and his initials in the area. The Secretary did not establish that there were hazardous conditions present at the time of Herndon's examination. Consequently, Order No. 8416329 is **VACATED**.

F. Order No. 8416348; LAKE 2010-39

On July 1, 2009, Inspector DiLorenzo issued Order No. 8416348 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.364(b)(4) of the Secretary's safety standards. (Ex. G-23). The order states, in part, that an inadequate examination was conducted of the Main

[10] At the hearing, the principal focus was on the #8 seal because that seal is at the lowest elevation and water in the cited area flows down to the #8 seal. (Tr. 198, 213). In his brief, the Secretary for the first time focused on the #6 seal. (Sec'y Br. 29-34). He argues that the water Inspector DiLorenzo discovered at the #6 seal on June 17, 2009, could not have developed to a depth of 17 inches in the time since the Lane and Herndon were in the area. He argues that a significant amount of water must have been present at the #6 seal when the last examination took place. He bases this argument on the configuration of the pumps, water lines, and sumps. I reject this argument because there is not enough evidence in the record to make this finding. The Secretary bears the burden of proof. It also presupposes that water would simply sit in front of the #6 seal and not flow down to the lower seals. Herndon credibly testified that, when the pumps were de-energized, the area in front of the seals would flood within a matter of hours. (Tr. II 16, 22).

West seals on June 29, 2009. A water level line with condensation below it was observed over 5 feet high on the #8 seal causing the surface plaster to crack and flake off. Water was leaking from the face of the seal and the condition of the mortar between the blocks evidenced that the cited condition existed for an extended period of time. The #4, #5, #6, and #7 seals were also observed with waterlines and condensation created by water impounded behind the seals. No hazards were listed in the weekly examination book.

Inspector DiLorenzo determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The Secretary proposed a penalty of $4,099.00 for this order.

Background

When Inspector DiLorenzo traveled to the #8 seal on July 1, he saw that it leaked water. (Tr. 225). The surface plaster on the seal was cracking and flaking off up to the water line. There were also red/orange deposits running down the front of the seal. (Tr. 209). Other seals also had water lines with condensation below these lines. He determined that water had backed up behind several seals. The inspector concluded that Peabody's examiners were not performing adequate examinations because the hazard was not recorded and the conditions present would prevent an examiner from conducting an examination.

Lane conducted a weekly examination of the area on June 22, 2009, and he observed no hazards. (Ex. G-25). Andrew Herndon conducted another weekly examination on June 29 and he testified that he did not observe any hazards. (Tr. II 50). At the time of Herndon's examination, water was flowing out of the drain pipe at the bottom of the #8 seal. (Tr. II 51). Herndon testified that he did not observe any water leaking out of the seal and he did not see any water lines upon the seals, which would indicate that water was building up behind the seals.

Discussion and Analysis

Based upon the evidence it presented, Peabody maintains that the Secretary failed to establish a violation of the safety standard. Inspector DiLorenzo issued the order because water was present behind the seals and was leaking through the mortar on July 1, 2009. (Tr. 209). He believed that Peabody should have known of the condition and that the weekly examiner failed to record the condition and immediately correct it. Herndon testified that when he conducted the weekly examination on June 29, 2009, water was coming through the pipe at the bottom of the seal and was not leaking through the mortar. (Tr. II 51). There was no sign that water was building up behind any of the seals. (Tr. II 51, 54). Any water lines visible across the face of the seal were from water that previously accumulated in front of the seals when the area flooded. There had been a flood in front of the seals on June 17. (Tr. II 30, 54).

As with the previous order, I find that the Secretary did not establish a violation. I incorporate my analysis of Order No. 8416329 into my analysis of the present order. Peabody does not dispute that if water is leaking out of the face of a seal or if water backs up behind a seal a hazardous condition is present that must be reported and corrected. (Peabody Br. 59; Tr. II 51).

As with the previous order, I credit the testimony of Peabody's witnesses as to the chronology of events. The #8 seal is at the lowest point in the area and there is a pipe at the bottom of that seal that drains water from the area behind the seals. This pipe functioned correctly on June 22 and June 29 when weekly examinations were conducted. When Inspector DiLorenzo inspected the area on July 1, something prevented the water from flowing through the pipe and water backed up behind the seals. I credit the testimony of Peabody's witnesses that this condition did not exist at the time of the weekly examinations and that the area can flood in a matter of hours if the pumping and drainage systems are not working.[11] For the reasons discussed above, Order No. 8416348 is **VACATED.**

II. SETTLED CITATIONS AND ORDERS

A number of the citations and orders at issue in these cases settled. By order dated June 14, 2013, I approved the parties' settlement of Order Nos. 8416419 and 8421022 in Docket No. LAKE 2010-39 and ordered Peabody to pay a penalty of $13,632.00. By order dated June 14, 2013, I approved the parties' settlement of 49 citations issued under section 104(a) of the Mine Act in Docket No. LAKE 2010-106 and ordered Peabody to pay a penalty of $122,920.00.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I reviewed the Assessed Violation History Report, which is not disputed. (Ex. G-26). At all pertinent times, Peabody was a large mine operator and the controlling company, Peabody Energy Corporation, was also a large operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
LAKE 2010-39		
8421014	75.400	$12,000.00
8420824	75.363(a)	2,000.00

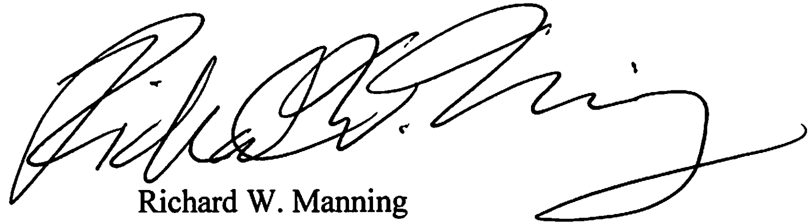
[11] The Secretary argues that Peabody should have known that the drainage system that was in place "was not draining the water behind the seals efficiently enough and that excessive pressure was being placed on the #8 seal, which could damage it." (Sec'y Br. at 37). That issue is beyond the scope of this proceeding. The issue before me is whether the Secretary established that Peabody violated section 75.364(b)(4) by failing to perform an adequate weekly examination.

8416329	75.364(b)(4)	Vacated
8416348	75.364(b)(4)	Vacated

LAKE 2010-106

8421043	75.1403-5(g)	Vacated
8420857	75.403	2,000.00
8420858	75.403	2,000.00
	TOTAL PENALTY	$18,000.00

For the reasons set forth above, the citations are **MODIFIED**, or **VACATED** as set forth above. Black Beauty Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $18,000.00 within 30 days of the date of this decision.[1]



Richard W. Manning
Administrative Law Judge

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RWM

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