FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 19, 2014

BIG RIDGE, INC., Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket No. LAKE 2012-453R Order No. 8431667; 03/06/2012 Docket No. LAKE 2012-454R Citation No. 8431668; 03/06/2012 Docket No. LAKE 2012-455R Citation No. 8431669; 03/06/2012
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BIG RIDGE, INC., Respondent	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2012-174 A.C. No. 11-03054-270696-02 Docket No. LAKE 2012-175 A.C. No. 11-03054-270696-03 Docket No. LAKE 2012-262 A.C. No. 11-03054-273420-02 Docket No. LAKE 2012-263 A.C. No. 11-03054-273420-02 Docket No. LAKE 2011-349 A.C. No. 11-03054-242336-02 Mine: Willow Lake Portal

Appearances: Letha A. Miller, Esq., and Breyana Penn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Arthur M. Wolfson, Esq., and Jason P. Webb, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania for Respondent

Before: Judge McCarthy

DECISION AND ORDER

I. Statement of the Case

This case is before me upon three Notices of Contest filed by Contestant Big Ridge, Inc. against the Secretary of Labor and five Petitions for Assessment of Civil Penalties filed by the Secretary against Big Ridge, Inc. (Respondent) pursuant to sections 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the "Mine Act"), as amended.[1] Twelve violations of mandatory safety standards remain at issue from four dockets. They involve nine 104(a)(1) citations and three 104(d)(2) orders issued by various MSHA inspectors between August 2010 and October 2011. P. Exs. 1, 4, 6, 9, 10, 12, 21, 32, 34, 38, 40, 43. The Secretary has proposed specially assessed penalties for six of the twelve unresolved citations/orders. Respondent contests the alleged unwarrantable failure, significant and substantial (S&S), gravity and/or negligence designations, and the validity of the proposed civil penalties.

A hearing was held in Carbondale, Illinois. The parties agreed to conduct several "mini trials" on each unresolved citation/order, elected to waive opening statements, and introduced testimony and documentary evidence, with witnesses sequestered. Tr. 13-24.

Based on the entire record, including the parties' lengthy post-hearing briefs and my observation of the demeanor of the witnesses,[2] I first evaluate citations/orders for roof control, accumulations of combustible material, and maintenance of the incombustibility content of rock dust. I then evaluate the ventilation control, belt maintenance, and accumulation citations written during an impact inspection in which Respondent allegedly was denied its walkaround rights under section 103(f) of the Mine Act. Finally, I affirm my bench decision vacating on credibility grounds an alleged unwarrantable order for failure to perform a pre-shift examination and certify that the examination had been made.

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[1] At the outset of the hearing, Respondent withdrew its Notices of Contests of Order No. 8431667 and Citation Nos. 8431668 and 8431669. Tr. 7. In addition, the parties settled the majority of the citations and orders at issue in the above-referenced dockets prior to hearing, including all of Docket No. LAKE 2011-349. The settlement terms were submitted to the undersigned as Joint Exhibit 2. Tr. 12. I have reviewed the parties' joint settlement motion made on the record and I approve the parties' settlement agreement set forth in Joint Exhibit 2 as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest.

[2] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack of consistency of testimony.

II. Basic Legal Principles

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial nature. 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). 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.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co. v Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that often is the most difficult to apply. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (quoting *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 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 at 1575. With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there is a confluence of factors that make an injury-producing fire and/or explosion reasonably likely. *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-971 (May 1990) ("*UP&L*"). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-03.

B. Negligence and Unwarrantable Failure

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d).

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). 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 at 136. 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. Penalty Assessment Principles

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an

> operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In exercising this discretion, the Commission has reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the de novo assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed." *Spartan Mining*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg,* 5 FMSHRC at 293.

As Senior Judge Zielinski recently explained in *American Coal Co.*, 35 FMSHRC ___, slip op at 54-55, No. LAKE 2008-666 (May 19, 2014), the purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984). Similarly situated operators, determined to be liable for violations with similar gravity, negligence and other penalty criteria, ideally should be assessed similar 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 $100 to $70,000. The Secretary's regulations for determination of a penalty amount by a regular or special assessment, 30 C.F.R. §§ 100.3, 100.5, take into consideration the statutory factors that the Commission is obligated to consider under

section 110(i) of the Act.[1] The product of these assessment formulae provide a useful reference point, which promotes consistency in the imposition of penalties by Commission judges. *See Magruder Limestone Co.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's 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 assessment process set forth in 30 C.F.R. § 100.3, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria. The undersigned recognizes that the Secretary has developed, pursuant to his authority under 30 C.F.R. § 100.5, a process for the special assessment of proposed penalties. MSHA, OFFICE OF ASSESSMENTS, ACCOUNTABILITY, SPECIAL ENFORCEMENT & INVESTIGATIONS, SPECIAL ASSESSMENT GENERAL PROCEDURES (Sep. 7, 2011), http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf. These procedures, however, have not been codified as binding regulations, and thus, have not been subject to notice and comment rule making, unlike the normal assessment procedures in section 100.3. Where the Secretary has provided adequate documentation of how he determined the specially assessed penalty and is able to demonstrate

[1] 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 proposed penalty is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies proposed penalties ranging from $112 for 60 or fewer points, up to the statutory/regulatory maximum of $70,000 for 144 or more points for non-flagrant citations and orders. 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).

the appropriateness of proposing a specially assessed penalty, the guidance in the General Procedures may also provide a helpful guide for assessing an appropriate penalty.

The Secretary has proposed a total penalty of $274,153 for the twelve citations/orders remaining at issue. For the reasons explained herein, I assess a total penalty of $116,622.

III. Stipulated Facts

The parties stipulated to the following facts at hearing.

1. At all times relevant to these proceedings, Respondent was engaged in underground bituminous coal mining operations at Willow Lake Portal (Mine ID 11-03054) in Equality, Illinois.

2. Respondent's mining operations affect interstate commerce.

3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ et seq. (the "Mine Act").

4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803 (d), at Willow Lake Portal where the Citations being contested in the proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to § 105 of the Act.

6. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

7. The individuals whose signatures appear in Block 22 of the Citations at issue in these proceedings are all authorized representatives of the United States Secretary of Labor, assigned to MSHA's Benton, Illinois and St. Clairsville, Ohio Field Offices at the time of the inspections at issue. All six inspectors were acting in official capacity when the Citations at issue were issued.

8. The Citations at issue in these proceedings were properly served upon Big Ridge, Inc. as required by the Mine Act.

9. The Citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

10. The proposed penalties will not affect Respondent's ability to remain in business.

11. The certified copies of the MSHA Assessed Violations History reflect the history of the citation issuance at the mine for fifteen months prior to the date of the Citations and may be admitted into evidence without objection by Respondent.

12. The operator demonstrated good faith in abating the violations.

13. Big Ridge, Inc. is a large operator and Willow Lake Portal is a large mine.

14. The parties have settled Docket LAKE 2011-349; and citations from Docket LAKE 2012-174, LAKE 2012-175, LAKE 2012-262 and LAKE 2012-263. The specific terms are outlined in Joint Exhibit 2.

Jt. Ex. 1; *see also* Tr. 11-12.

IV. Factual Background

Respondent operates the Willow Lake Portal Mine ("WLPM"), an underground, bituminous coal mine, located in Equality, Illinois. Jt. Ex. 1, para 1; Tr. 30-33. The coal is mined via perimeter or room and pillar mining. Jt. Ex. 1; Tr. 434. The mine is large and made up of miles of belt and air courses. Several MSHA inspectors work on a regular basis for about three months to complete each quarterly inspection. Jt. Ex. 1; Tr. 31-32.

WLPM is a "gassy" mine and liberates in excess of 1,000,000 cubic feet of methane every 24 hours. Inspectors regularly travel the mine to perform five-day spot ventilation inspections. Tr. 31, 510.

At material times herein, the WLPM operated on three shifts. The day shift ran from 7:00 a.m. until 3:00 p.m. The afternoon shift started at 3:00 p.m. and ended at 11:00 p.m. The midnight or graveyard shift started at 11:00 p.m. and continued until 7:00 a.m. Tr. 150-51.

WLPM has a significant history of roof falls and the inspectors in this case had knowledge that a number of unintentional roof falls had occurred before their inspections. Tr. 188-89, 207, 326-27, 330-31; P. Exs. 28-30, 61. Three of the citations at issue concern alleged roof control violations of §§ 75.202(a), 75.202(b) and 75.220(a)(1). They were designated as S&S violations, with high or moderate negligence. Two of these three citations were issued in August 2010 by inspector James Preece and one was issued in June 2011 by inspector James Rusher. The timing is significant because of WLPM's recent history of roof control problems and because MSHA repeatedly notified Respondent that it needed to make greater efforts to comply with roof control standards after it implemented its Rules To Live By ("RTLB") program in March 2010. Tr. 193-94; P. Ex. 26. The RTLB fatality prevention program specifically included sections 75.202 and 75.220(a)(1), the first two standards on the list. Tr. 193-94; P. Ex. 26.

MSHA inspectors specifically discussed the RTLB program and Respondent's need to comply with the roof control standards with Respondent's management at closeout meetings immediately prior to the roof control citations at issue. P. Exs. 28-29; Tr. 62-63, 192-93. The first closeout meeting occurred on March 29, 2010. The closeout document that was circulated gave Respondent the following notice:

> Better focus on the "Rules To Live By" standards especially since MSHA is holding the mine operator more accountable for violation of the identified standards with stronger enforcement.

P. Ex. 28, at 3; Tr. 192-93. The document indicates that section 75.202(a) was cited twenty-one times and section 75.220(a)(1) was cited ten times that quarter. P. Ex. 28, at 17. Thereafter, the June 2010 closeout document indicated that roof control violations had decreased that quarter, but gave the same notice regarding enhanced enforcement under the RTLB program. P. Ex. 29, at 2-3.

Inspector Preece found several roof violations in August 2010. Preece issued Citations Nos. 8030991 and 8030992 alleging violations of § 75.220(a) and § 75.202(b), respectively. *See* P. Exs. 4, 6. The day before he issued said citations, Preece issued two other roof control citations, one for violation of §75.220(a) and one for violation of § 75.203(e)(2). R. Ex. 85, at 14; Tr. 237-45.

Thereafter, on September 24, 2011, another closeout meeting occurred. P. Ex. 30. The closeout document indicated that twenty-five citations were issued for section 75.202(a) violations during the quarter. It further stated:

> Roof and Ribs - roof control violations are high here. Problems need to be addressed before we have to take care of them.

P. Ex. 30, at 9.

For the inspection quarter from July through September 2010, there were twenty-five section 75.202(a) violations, the second most violated standard at the mine that quarter. P. Ex. 30, at 5. Furthermore, Respondent was aware that its mine had a significant history of roof falls and falling rock in draw rock areas. Between February and August 2010, Respondent reported six roof falls that resulted in injuries and several others that were reported as accidents without injury. P. Ex. 61.

On June 24, 2011, inspector James Rusher issued one of the roof control citations at issue, Citation 8427546, alleging a violation of § 75.202(a). P. Ex. 21. The record establishes that 140 section 75.202(a) citations were served on Respondent in the two years prior to June 24, 2011. *Id.*; Tr. at 328, 346. Furthermore, in the six months prior to the citation issued by Rusher in June 2011, nine reportable roof falls resulted in two injuries. P. Ex. 61.

The record also establishes that Respondent had significant problems with accumulations, as evidenced by recurring citations, orders, and discussions with MSHA personnel. In the two years prior to Preece's August 2010 inspections, Respondent was cited for 299 violations of § 75.400. P. Ex. 1; Tr. 66. Although the March 2010 closeout conference noted a reduction in § 75.400 citations, the June 2010 closeout conference notes emphasized that § 75.400 violations had increased again and needed improvement. *See* P. Exs. 28-30. Even after Preece issued 104(d)(2) Order No. 8030700 on August 2, 2010. Section 75.400 was the most cited violation for the third quarter that year. P. Ex. 30.

V. Findings of Fact and Conclusions of Law

A. Roof Control Citations Nos. 8030991, 8030992, and 8427546

1. Citation No. 8030991

Respondent does not challenge the violation of section 75.220(a)(1) alleged in Citation No. 8030991 for failure to follow the MSHA-approved roof control plan. R. Br. 26. Rather, Respondent challenges the gravity, S&S, and high negligence findings and the appropriateness of the specially assessed $47,700 penalty. I affirm the violation, as written, but reduce the negligence to moderate and reduce the specially assessed penalty from $47,000 to $14,700.

a. The Alleged Violation

During an E01 inspection on August 4, 2010, inspector Preece,[2] accompanied by Respondent's safety and compliance manager, Bob Clarida, issued Citation No. 8030991 for a violation of 30 C.F.R. § 75.220(a)(1). Tr. 173-74; P. Ex. 4.[3] Preece determined that Respondent was not following the MSHA-approved roof control plan because the fender (block of coal) between the #8 and #9 perimeter cuts on unit 5 measured five-feet three-inches wide, instead of the six-foot width required in the plan. P. Ex. 4, P. Ex. 5, at 24; Tr. 192, 266. Accordingly, Preece wrote Citation No. 8030991 alleging the following unlawful condition or practice

[2] Inspector Preece has worked for MSHA since 2000 as an Authorized Representative ("AR") of the Secretary. Tr. 25-26. Preece works in the St. Clairsville, Ohio MSHA Field Office. In August 2010, he inspected the WLPM while on detail. Tr. 30. Before working for MSHA, Preece worked in the coal mining industry in various job classifications. Tr. 27-28. He has a Mining Engineering degree from West Virginia Institute of Technology, an Occupational Development degree from Marshall University, and mine foreman certifications from Ohio and West Virginia. Tr. 29.

[3] Section 75.220 states that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

> The approved roof control plan page 24 was not being complied with on the 005/005 section. The fender left between the No. 8 and No. 9 perimeter (3+25) cuts measured 5'3". Visible footprints were observed where a miner had traveled behind the barricade as referenced in citation 8030991 . . . .[4]

P. Ex. 4.

Preece determined that the violation contributed to the hazard of a roof fall, which was reasonably likely to cause an injury because miners were traveling in areas that had been mined, but not supported properly. P. Ex. 4; Tr. 178, 186, 200. Preece determined that the most likely injury would be a fatal, crushing injury from a roof fall. P. Ex. 4; Tr. 187. Preece also determined that one person would be affected because ten to twelve people were actively working on the section, and there were fresh, visible footprints in the area. P. Ex. 4; Tr. 184, 200.

b. Positions of the Parties

Respondent argues that the Secretary adduced no evidence to demonstrate a reasonable likelihood of a serious injury based on the nine-inch deviation from the plan requirement that the front of the fender be six feet wide. R. Br. 28 (citing P. Ex. 5, at 24; P. Ex. 8). Respondent also argues that there is no evidence that the cited condition adversely affected the immediate roof in the area. Rather, Respondent relies on Clarida's testimony that the narrow fender did not compromise roof control, and the roof condition in the area looked "pretty good, normal." Respondent also relies on Preece's acknowledgment that there were no problems with the roof bolts, and on compliance manager Todd Grounds' testimony that roof bolts with cables attached were installed before the continuous miner made perimeter cuts. R. Br. 28; Tr. 222, 264-65, 276.

In addition, Respondent claims that there was no exposure to the condition. R. Br. 29. Respondent notes that the perimeter cuts that created the fender were complete. *Id.* (citing Tr. 276). According to Respondent, the supplemental roof support would have been removed from the "fresh air side" of the fender. Therefore, the continuous miner operator would not have been exposed to the fender while removing supplemental support. *Id.* (citing Tr. 265). Respondent further notes that after the cut, the area around the fender was barricaded, and there was no reason for anyone to pass by that area. *Id.* (citing Tr. 276, 291). Although Preece testified that "[if] you don't follow the roof control plan, over time it's going to deteriorate and come out as well." Tr. 212. Respondent argues that "over time," there would be no exposure because the immediate area around the fender was barricaded and the entire set of rooms was barricaded at the mouth, when completed. R. Br. 29 (citing Tr. 259-60).

[4] Counsel for the Secretary represented at hearing that the citation referenced should be 8030992, discussed below, not 8030991. Tr. 185-86.

Preece designated the violation as S&S because he believed that there was travel through the area after the fender was created based on visible footprints behind the barricade. Tr. 184; P. Ex. 4. In response to a leading question suggesting that the footprints were fresh, Preece testified that the footprints were fresh because the day before there had been rock dusting citations issued, and the footprints were visible in the fresh rock dust. Tr. 199. Respondent argues that Preece was mistaken because the Certified Violation History Report shows that no citation was issued on August 3, 2010 for a violation of section 75.400 or 75.403, each of which would require rock dusting for abatement purposes. R. Br. 30, n.17 (citing P. Ex. 63). In addition, because the footprints went straight through and not around the barricade, Respondent disputes any travel through the area after the perimeter cuts were made. R. Br. 30 (citing Tr. 279-80).

Respondent further argues that even if travel past the fender occurred, the Secretary has failed to establish that the nine-inch deviation in fender width resulted in a roof condition that posed a reasonable likelihood of serious injury. Respondent relies, in part, on ALJ decisions applying section 75.202(a), which delete S&S determinations based on the unlikelihood that two specific events will occur simultaneously, i.e., a rock will fall from the roof while a miner is directly underneath it. R. Br. 29, n. 16 (citing *Ohio County Coal Co.*, 31 FMSHRC 1486, 1489 (Dec. 2009) (ALJ); *Freedom Energy Mining Co.*, 32 FMSHRC 1809, 1829 (Dec. 2010) (ALJ)). Respondent argues that Preece's own actions undercut his determination that the width of the fender posed any serious hazard because Preece placed himself at the fender to measure it and travel past it. *Id.* (citing Tr. 176-77). Finally, Respondent argues that Preece's attempt to link the purported travel past the fender to exposure to unsupported top should be discounted because Preece followed the footprints "till they ended" and he never traveled under unsupported roof. R. Br. 30-31 (citing Tr. 197, 198, 223-24). Therefore, Respondent concludes that the route of travel past the narrow fender did not place anyone under unsupported top. R. Br. 31.

The Secretary relies, in part, on a fatalgram from MSHA's website that involved the death of a miner caused by a roof fall in a mine with a similar roof. P. Ex. 31, at 2; Tr. 211. The fatalgram states that the roof at issue was "gray shale and sandstone with intermittent siltstone and carbonaceous shale deposits." P. Ex. 31, at 2; Tr. at 211. Preece testified that the roof at WLPM is similar since black shale and limestone are present. Tr. at 211. The fatalgram investigation established that the mine was not following its roof control plan and a rock – measuring 89 inches long by 45 to 54 inches wide by one to four inches thick – broke in two pieces when it struck the victim. P. Ex. 31, at 1; Tr. 211. As noted, Preece testified that when a mine does not follow its roof control plan, the roof will deteriorate over time and material will come loose from the roof. Tr. 211.

Respondent counters that the roof control plan violation in the fatalgram involved a West Virginia mine where thirty-five bolts exceeded the four-foot spacing requirement in the rock-fall area. It did not involve the width of a fender during perimeter mining. Respondent argues that the instant violation involves different requirements for different mining practices, and is not the least bit similar. R. Br. 32-33. Further, Respondent argues that none of the roof falls that occurred at WLPM between October 2009 and October 2011 (*see* P. Ex. 61) resulted from a

fender that was less than six feet in width. Therefore, Respondent argues that the fatalgram is immaterial. *Id.*

c. Legal Analysis

I find the violation to be S&S. I credit the testimony of Preece, an experienced underground coal inspector, over contrary testimony from Clarida, that the violation of the mandatory standard created a measure of danger to safety because the non-compliant fender contributed to the hazard of a roof fall that was reasonably likely to result in a serious injury. Tr. 212. Specifically, Preece testified that in his experience a roof fall is "very likely . . . if you don't support the roof, the roof will fall . . . it has no support . . . over time it's going to deteriorate and come out . . ." Tr. 212. Although Respondent relies on Clarida's testimony that no one was exposed to the noncompliant fender because the barricades were up and no one was supposed to be in that area after the cut (Tr. 276), I find that a miner was in the area based on the visible footprints that Preece observed, and that other miners were likely to be in the area and exposed to the noncompliant fender during required examinations.[5]

I also emphasize that the instant record establishes an ongoing likelihood of roof falls at WLPM. Tr. 178, 190, 206-07. Using Petitioner's Exhibit 61, Preece highlighted the multitude of roof falls at WLPM in the six months prior to his inspection. P. Ex. 61; Tr. 202. The MSHA District Office considers such history when a roof control plan is approved, and there are no exceptions to the fender-length requirement. Tr. 174. The standard requires development of a roof control plan that "is suitable to the prevailing geological conditions and the mining system to be used at the mine." MSHA determined that the geological conditions and the room and pillar mining system used at WLPM required the fender to be six or more feet wide at the front. It was nine inches too narrow.

Grounds, Respondent's compliance manager, conceded that the roof control measurements that Respondent agreed upon and MSHA approved are important and should be as precise as possible. Tr. 267-68. Respondent's other witnesses also conceded that Respondent must comply with the specific requirements of its MSHA-approved roof control plan. Tr. 286, 292. In these circumstances, particularly in light of Respondent's recent history of roof falls, I

[5] I am not persuaded by Respondent's argument that even if a section foreman or shift leader subsequently learned about the creation of the narrow fender, there would be nothing that such manager could do about it after it was created as the coal could not be put back in the fender. I find that additional support could have been installed. I further find that there was miner exposure, even in the absence of the visible footprint evidence, because the foreman or an examiner should check the cuts after they are made. Further, a weekly examination is required behind the barricade after perimeter cuts are taken. Tr. 234, 260-61. Finally, although Clarida testified that during his career he was not aware of any incident when a continuous miner operator would be operating the remote on the side of the machine opposite the fender, mining history is replete with instances of serious injury or fatality when the operator is pinned on the wrong side of the machine or struck by falling rock when in the red zone.

conclude that during continuous mining operations, it was reasonably likely that the noncompliant fender would contribute to a hazard of another roof fall that would result in serious injury.

I further find that Respondent's negligence should be reduced from "high" to "moderate." Per regulation, high negligence occurs when an operator knew or should have known of the violation, and there are no mitigating circumstances. 30 C.F.R. § 100.3, Table X. Respondent presented evidence that the continuous miner operator, an hourly employee, was responsible for taking the cuts that created the narrow fender, and that the section foreman or shift leader was only responsible for marking where the cuts were to be taken. Tr. 265, 289. In addition, Respondent presented evidence that the section foreman or shift leader would have limited opportunity to observe the narrow fender because a barricade was installed right after the cut was made and no one would travel past that point. Tr. 276, 283.[6] In these circumstances, I find that Respondent has raised sufficient mitigating circumstances to reduce negligence from high to moderate. *See Excel Mining LLC*, 497 F. App'x 78, 79 (D.C. Cir. 2013) (if no mitigating factors exist, the violation is attributable to high negligence; otherwise, the inspector must find moderate, low, or no negligence).

The Secretary justified a special assessment in this matter, particularly given Respondent's history concerning roof control violations and the Rules to Live By notice. Tr. 242-44, 246. Guided by the criteria set forth in § 100.3(a) and the Special Assessment General Procedures, I assess a penalty of $14,700.

2. Citation No. 8030992

The Secretary argues that Respondent violated § 75.202(b) when a miner traveled under unsupported roof in a previously mined area, and that such violation was significant and substantial, reasonably likely to be fatal, and resulted from moderate negligence. P. Br. 24. Respondent argues that it did not violate the standard because no miner worked or traveled under unsupported top. R. Br. 42. Respondent also challenges the S&S and moderate negligence designations and the appropriateness of the specially assessed $13,600 penalty. I affirm the violation, reduce negligence from "moderate" to "no negligence," reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and delete the significant and substantial designation. Based on said modifications, I decline to be guided by the Secretary's special assessment of the proposed penalty, and assess a penalty of $162.

a. The Alleged Violation

[6] Although Preece testified and his notes indicate that the narrow fender appears to be a practice with perimeter mining and that previous rooms and mining indicate the same violation of the plan (R. Ex. 85, at 14; Tr. 238-39), the Secretary provided no corroborating documentation or citation for such assertions, and Citation No. 8030697 was written because the entry was cut too wide, not too narrow. Tr. 243. Accordingly, I give little weight to such evidence.

Near the cited fender, Preece observed fresh footprints in rock dust that he traced back to a previously mined-out perimeter area until they turned and ended at the corner mouth of an old set of unbolted rooms (return) where a miner had gone to the bathroom under unsupported roof on fresh rock dust. Tr. 196-200; P. Ex. 8. Preece cited Respondent for a violation of § 75.202(b), which states that "[n]o person shall work or travel under unsupported roof unless in accordance with this subpart."[7] The alleged unlawful condition or practice states:

> Visible footprints were observed where a miner had traveled behind the barricade located on the 005 section, No.1 room entry, 04+00 and between the Nos. 7 and 8 perimeter cut which was not supported. The miner traveled through the bleeder in the previously cut set of rooms to relieve them self . . . .

P. Ex. 6.

Preece designated the alleged violation as S&S after determining a reasonable likelihood that standing or squatting under unsupported roof to relieve oneself would result in a crushing or fatal injury from the hazard of a roof fall. Tr. 200-01; P. Ex. 6. Preece designated negligence as moderate, but did not know whether a rank-and-file miner or a member of management was responsible for the excrement. Tr. 216-17. When asked whether management should have been aware of the alleged violation, Preece responded, "I would hope so, because management controls the workforce on the section where people work and travel." *Id.*

On cross examination, Respondent established that the entries in the old set of rooms were bolted. Tr. 225, 234. Respondent also established that when Preece was a foreman, members of his crew would take certain action unbeknownst to him. Tr. 228.

On redirect, however, Preece reaffirmed that there was no support on the corner of the old perimeter mining area where the miner went to the bathroom. "There is no support at all there." Tr. 250-51.

Respondent's compliance manager Grooms and safety representative Clarida testified that all entries and crosscuts in the rooms were bolted. Tr. 259, 282. In addition, Clarida contradicted Preece and testified that "the evidence of the person relieving themselves was under supported roof." Tr. 283. When asked by the undersigned why this was so, Clarida testified, "well, you can look up and see there's roof bolts in the roof. It's supported." Tr. 285.

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[7] The subparts are not applicable as they include roof bolting and installation of roof support using mining machines. *See, e.g.*, 30 C.F.R. § 75.204 (roof bolting), 30 C.F.R. § 75.205 (installation of roof support using mining machines with integral roof bolters).

Both Preece and Clarida confirm that they never traveled under unsupported roof. Tr. 197, 223, 282. Clarida, however, testified that when he observed the excrement, he stood only a foot away from it. Tr. 285.

On rebuttal, Preece was shown his notes for the instant citation. Tr. 298-99; P. Ex. 7. Page 8 of his notes state:

> 1) 1820
> 2) Visible footprints were observed in the number 1 entry and through the barricade into the previous cut set of rooms to relieve themself. The Miner traveled by the No. 7 & 8 perimeter cut that was unsupported.
> 3) 005/005 Section, No. 1 entry 4+00 bleeder
> 4) Foreman was not aware that a miner traveled through the area
> 5) from the previous shift
> 6) 1 miner traveling through the area to relieve themself
> 7) Crushing injuries
> 8) unsupported (illegible) 7-8
> 9) Visible footprints

b. Legal Analysis

In resolving the credibility conflict between Preece and Clarida as to whether the excrement was under supported or unsupported roof, I credit Preece's testimony in direct response to questioning from the undersigned and find that someone went to the bathroom under unsupported roof in fresh rock dust. Tr. 200, 250-51; P. Ex. 8; *see also* P. Ex. 5, at 24 (showing that about ten feet in the corner of the entry of the perimeter mining area was unsupported).

I reverse Preece's S&S determination. Preece's testimony suggests that it was not a regular practice for miners to relieve themselves under unsupported top. Rather, it was common practice was to do so under supported top. Tr. 300-01. I find that the instant violation was a brief aberration, and the hazard contributed to by the violation was not reasonably likely to result in an injury given the limited exposure and the unlikelihood that a rock would fall during such brief exposure. *Cf., Ohio County Coal*, 31 FMSHRC at 1489; *Freedom Energy*, 32 FMSHRC at 1829 (deleting S&S designation for a violation of section 75.202(a) "in light of the uncertainty of a potentially injury-causing event and limited presence of miners in the subject area"). Accordingly, I find that the third prong of the *Mathies* test was not established.

The Secretary argues that I should uphold Preece's moderate negligence determination. Although Preece could not determine if a miner or management was traveling under unsupported roof, the Secretary argues that management either knew or should have known that workers were traveling in unsupported areas. P. Br. 28. I disagree. Preece specifically testified that

management should have known of the violation because management controls the workforce on the section where miners work and travel. Tr. 217. But Preece's inspection notes indicate that the "[f]oreman was not aware that a miner traveled through the area." P. Ex. 7, at 3. As noted, Preece could not determine whether the miner who relieved himself in the old set of rooms was an agent of the operator. Tr. 216. Since the negligence of an hourly employee cannot be imputed to the operator for purposes of a negligence designation,[8] and the foreman was not aware of the violation, which represented a brief aberration from regular practice, I find that the Secretary has failed to establish any level of operator negligence.

The Secretary failed to justify a special assessment in this matter, and particularly failed to establish that multiple citations were issued for the same violation, as Preece testified. Tr. 242. Guided by the regular assessment criteria set forth in § 100.3 and my findings above, I assess a penalty of $162.

3. Citation 8427546

The Secretary argues that there was a S&S violation of section 75.202(a) resulting from high negligence because five pattern roof bolts and plates had separated from the roof causing de-lamination and increasing the pressure on surrounding bolts to support more weight than intended. P. Br. 29. Respondent does not challenge the violation, but challenges the gravity, S&S, and high negligence findings and the appropriateness of the specially assessed $50,700 penalty. I affirm the violation, as written, and the specially assessed penalty of $50,700.

a. The Alleged Violation

On June 24, 2011, inspector James Rusher[9] was traveling the No. 2 room haulageway, where steel-canopied haulers transport coal from face to feeder. P. Ex. 21; Tr. 314. Respondent's section supervisor and safety representative, Crit Stephenson, accompanied Rusher. Tr. 370-71.

Rusher noticed five pattern roof bolts that had been dislodged by mobile equipment, three in one place (tag No.0+65) and two more just a few feet away (tag No.1+95), which was causing separation and de-lamination in the immediate roof. P. Ex. 21; P. Ex. 22, at 9; Tr. 314. Rusher cited Respondent for a violation of § 75.202(a), which states, "[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." P. Ex. 21; Tr. 315.

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[8] *See, e.g., Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115-16 (July 1995), (citing *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982)).

[9] Rusher, now retired, inspected coal mines as an authorized representative for thirty-three years. He was assigned to MSHA's Benton, Illinois field office. Tr. 308-09. Rusher had twelve years of coal industry experience before joining MSHA. Tr. 309-10. Rusher had inspected the WLPM since it opened. Tr. 312.

All five plates were loose, which caused causing sagging or de-lamination of the roof in those areas. Tr. 316-17, 320-22. Rusher explained that when the bolts and plates became loose, layers of the roof began to separate, and support for the immediate roof was compromised by strain on the surrounding bolts. Tr. 314-17, 318, 322. Although Stephenson testified that he did not notice any de-lamination and that Rusher did not point it out (Tr. 378-79), I credit Rusher's specific description of the de-lamination, which was obvious after rock dusting, and made the roof unsafe because it put greater load on the surrounding bolts and would likely result in a roof fall. Tr. 316-22; 344. Rusher's testimony concerning the de-lamination is corroborated by Rusher's inspection notes. P. Ex. 22, at 9. Rusher further credibly testified that the face boss had to travel through that particular intersection to check on the face for methane every twenty minutes, and should have detected the condition. Tr. 334, 365.

I also agree with Rusher's S&S determination because the violation contributed to a specific roof-fall hazard that was reasonably likely to result in a serious or permanently disabling injury to two miners, i.e., a coal haul operator and a supervisor making rounds or checking faces, in the heavily traveled haulageway. P. Ex. 21; Tr. 322-330. Although Rusher noted that the roof conditions were solid (P. Ex. 22, at 6) and Stephenson testified that the roof looked fine (Tr. 372, 381), I find that the number of dislodged roof bolts in the pattern and the de-lamination of the roof in the immediate area contributed to a discrete roof fall hazard because during the course of continued mining operations, the other surrounding bolts would not support the weight of the roof. A roof fall across the compromised area would likely crush even those traveling in a covered canopy. Furthermore, Respondent has a remarkable history of roof falls even with fully grouted bolts. P. Ex. 61; Tr. 380-81. Accordingly, I affirm the gravity and S&S findings.

I also affirm Rusher's high negligence determination because Respondent knew or should have known about the violation, and there are no mitigating circumstances. As outlined above, there were many roof falls and roof-control issues at WLPM. P. Exs. 28-30, 61. Respondent was aware of MSHA's warnings regarding increased enforcement, particularly in light of the closeout conferences and enhanced emphasis on §§ 75.202(a) and (b) in the RTLB program. There was constant traffic in the haulageway. Tr. 325, 334. I have found that rock dusting made the separated bolts and plates and the concomitant de-lamination obvious. The face boss traveled through the intersection every twenty minutes and should have detected and corrected the condition. In these circumstances, and in the absence of any mitigating circumstances, I find that the violative condition resulted from Respondent's high negligence.

The Secretary justified a special assessment in this matter, particularly given Respondent's history concerning roof control violations, the Rules to Live By notice, and Rusher's testimony that this was an active haulageway, with five roof bolts dislodged and extensive de-lamination. Tr. 242-44, 246, 360. Guided by the criteria set forth in § 100.3 and the Special Assessment General Procedures as set applied in the Special Assessment Narrative Form (R. Ex. 58), I assess a penalty of $50,700.

B. Accumulations of Combustible Material Order No. 8030700 and Citation Nos. 8428798, 8428776, and 8436403

1. Order No. 8030700

The Secretary argues that Respondent violated section 75.400 because accumulations of combustible material were amassed in two different crosscuts, and although the non-S&S violation was unlikely to lead to a lost workdays or restricted duty injury, it was an unwarrantable failure resulting from high negligence. Respondent specifically challenges the unwarrantable failure and high negligence findings and the specially assessed $8,400 proposed penalty. As explained below, I find the non-S&S violation, reduce Respondent's negligence to moderate, reverse the unwarrantable failure finding, and assess a penalty of $500.

a. The Alleged Violation

On August 1, 2010, when inspector Preece and miner/union representative Rodney Shires were exiting the mine in a diesel vehicle driven by Respondent's mine manager, Roby Podoriscki, Preece asked, "[w]hat is that in the crosscut?" Tr. 68. Preece testified that he received a response that it was roadway gob or something to that effect, but he did not identify who gave that response. Tr. 68-69. Rodney Shires did not testify.[10] Given the noise of the diesel engine and Podoriscki's denial that he had such a conversation or heard any such conversation between Preece and Shires, the Secretary failed to establish that Podoriscki knew about the conditions on August 1, 2010. *See* Tr. 88-89, 100-104.

On August 2, 2010, inspector Preece, accompanied by Respondent's safety representative Shane Kendall and miner/union representative Rodney Shires, rode to crosscut 107 in the 5D travel road where Preece had noticed accumulations the prior day while exiting the mine. Tr. 33-37, 60, 116-17, 119. Preece issued 104(d)(2) Order No. 8030700 for accumulations of combustible material. The alleged accumulations consisted of a mix of combustible and non-combustible materials, consisting of wood, coal mixed with mud or stone, roadway material such as fire clay, gob of rock and mud, crushed up oil cans that still had oil in them, roof bolts, glue and plates, and other refuse, such as rock dust bags. The materials were piled up in two locations about 300 feet apart in the 107 and 109 crosscuts on the 5D travel road. The alleged accumulations in the 107 and 109 crosscuts where piled four feet high and covered an area of 10x20 feet and 8x15 feet, respectively. Tr. 35-37, 47, 78, 122-125; P. Ex. 1-3; R. Exs. 81(c)-(f).

The Order states:

> Accumulation of combustible materials were allowed to accumulate in the No. 6 to No. 5 entry crosscut, 5 "D" Travel road. Coal dust,

[10] I note that Roger "Blaine" Shires, section foreman, did testify at the hearing as to the facts pertaining to Citation No. 8428378, discussed below. The two Shires should not be confused as Rodney Shires was a rank-and-file miner.

> including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials (wood and paper) were not being cleaned up and permitted to accumulate. The following conditions existed:
>
> 1.) 107 crosscut, 80+70, Combustible material mixed with roadway material, gob and coal from sloughage of the rib existed next to the stopping measuring 10 feet in length, 20 feet in width and 4 feet in height.
>
> 2.) 109 crosscut, Combustible material mixed with roadway material, gob and coal from sloughage of the rib existed next to the stopping measuring 8 feet in length, 15 feet in width and 4 feet in height.
>
> Upon interviews with Mine Management, management stated that the condition was obvious and extensive, has existed for over 24 hours and has a history of accumulation violations (299 in the previous 24 months) and Mine management was in the area of the accumulations on all shifts.

P. Ex. 1. Preece testified that his concern was that the accumulations had not been rock dusted properly, although there was some rock dust underneath the piles. Tr. 46-47.

Preece designated the alleged violation as non-S&S after determining that the hazard of fire or propagation of an explosion was unlikely because of the location of the material in the crosscuts and the fact that no vehicles were running over the coal present in the piles, the coal was not raised in suspension, and other areas of the mine were adequately rock dusted. P. Ex. 1; Tr. 42, 45-46, 89. If a fire or explosion were to occur, however, Preece determined that the likely injury would be lost workdays or restricted duty to one person due to smoke inhalation. P. Ex. 1; Tr. 46.

Preece determined that Respondent's negligence was high because the condition had existed for at least three shifts, and prior to Preece's inspection the previous day, Rodney Shires had confirmed this. Tr. 43-45, 60-61, 67; P. Ex. 2, at 3. Preece also testified that management must have known of the conditions because "someone gave orders for someone to clean up these roadways and put this material in certain locations." Tr. 43.

Preece further determined that the alleged violation was an unwarrantable failure because management should have known that the condition existed, it was present for more than three shifts, it was obvious and extensive, and it was not rock dusted to ensure inertness. Tr. 66-67.

Respondent argues that the condition was not extensive or obvious, existed for an indeterminate period of time, and did not pose a high degree of danger to miner safety. Respondent further argues that the operator had no specific knowledge of the alleged violation and had not been placed on notice that greater efforts for compliance with the standard were necessary.

To abate the conditions, Preece required the material to be rock dusted, but not removed from the mine. Tr. 71, 76-77. After rock dusting, Respondent's third-shift safety manager, Andy Murphy, took a zip-lock bag sample of each pile of material by scraping off the rock dust and reaching six to eight inches into each pile to obtain the samples. Tr. 143-45. Preece did not observe the sampling. Tr. 72.

Murphy testified that in each sample, he obtained gob or real soft material, which likely originated from the travel road. Tr. 146, 150. Each sample was labeled and given to Respondent's compliance manager, Todd Grounds, who delivered them that same day to Standard Lab for analysis. Tr. 150, 157.

The sample taken from crosscut 107 was determined to be 66.12% incombustible. The sample taken from crosscut 109 was determined to be 72.71% incombustible. Tr. 157-58; R. Ex. 82. During this time, both samples met section 75.403's incombustibility requirement for a travel road, which was 65%, but has since been increased to 80%. Tr. 158-59.

The Secretary argues that combustibility tests are only performed in section 75.403 violations and are irrelevant to section 75.400 violations. P. Br. 37. Also, even if relevant, the Secretary argues that Respondent's tests would not have passed under today's standards. P. Br. 37-38; (citing Tr. 157). Finally, the Secretary notes that the samples were not band samples, and they were not taken or handled by anyone with training in sampling for incombustibility determinations. P. Br. 38 (citing Tr. 163).

Mine manager Roby Podoriscki testified that the roadway bottoms primarily consist of fireclay, a soft noncombustible substance. Tr. 108. He further testified that the practice of scooping up gob from the travel roads and pushing it into the crosscuts was common practice at WLPM and at four or five other Illinois mines where he had worked. Further, Podoriscki had never received, nor was he aware of, any citations for this practice. Tr. 107-08. Similarly, prior to the issuance of the Order, MSHA had never warned or cited WLPM for this practice. Tr. 107.

b. Legal Analysis

To the extent that Respondent's brief can be read as challenging the violation, I affirm inspector Preece's finding of a non-S&S violation. Section 75.400 provides 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 record establishes that loose coal, crushed

oil cans, wood and other combustible material, mixed with non-combustible material were allowed to accumulate in two large piles about 4 feet high, 20 feet wide, 10-15 feet long, and about 300 feet apart in the 107 and 109 crosscuts on the 5D travel road for over three shifts.

The Commission has held that a "construction of the standard that . . . allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985); *but see Lion Mining Co.,* 19 FMSHRC 651, 656 (Mar. 1977) (ALJ) (vacating 104(d) order alleging that gob material was an accumulation and concluding that section 75.403 is the appropriate standard to address the potential hazards associated with combustible material in gob). In this case, the Secretary has interpreted the standard consistent with *Black Diamond, supra,* and I give deference to the Secretary's reasonable interpretation consistent with Commission precedent. Accordingly, I affirm the non-S&S violation.

I reduce Respondent's negligence to moderate. The Respondent should have known of the violation, but there are mitigating circumstances for Respondent's failure to clean up the accumulations. Irrespective of mine manager Podoriscki's denial that he knew about the conditions until after issuance of the Order (Tr. 104) and Preece's speculation that management must have directed the workforce to push the materials in the crosscuts (Tr. 72), I credit and rely on Preece's testimony that examinations on the roadway are done by agents of the Respondent three times daily. Tr. 70. Thus, Respondent's examiner agents should have known about the accumulations.

Respondent, however, presented credible evidence of mitigating circumstances. The accumulations were significantly composed of gob laced with debris and were pushed deep into crosscuts to clear the travel roads. Respondent presented evidence that this was a common practice at Willow Lake and in the Illinois Basin and Respondent had not been cited by MSHA before for this practice. Further, both of Respondent's samples exceeded incombustibility requirements for when rock dusting was required. Moreover, MSHA required rock dusting to abate the violation. Accordingly, I reduce Respondent's negligence to moderate.

I reverse the unwarrantable failure designation. I find, contrary to Respondent's arguments, that the accumulations were obvious, existed for over three shifts, and should have been detected for clean up by Respondent's examiners even though the conditions were about 70 feet within the crosscuts. *See* R. Br. 13. In fact, Preece noticed the accumulations in passing from the 5D travel road the day before the Order was issued and specifically inquired about them. Tr. 68, 76. The fact that the accumulations of combustible and non-combustible material were unlikely to ignite does not exempt an examiner from documenting them as potential hazards in examination reports.

While Respondent concedes that the piles were significant in size, it argues that the amount of combustible material was not extensive since about two-thirds of each pile was composed of non-combustible material. R. Br 15 (citing Tr. 157-58; see also R. Ex. 82). I find

some merit in this argument since the standard requires cleanup of combustible material. Moreover, abatement was accomplished quickly by adding additional rock-dust. Preece did not require the accumulations to be removed from the mine. Tr. 76-77. On the other hand, there were two large piles of material with some combustible content within 300 feet of each other. In these circumstances, I find the extensiveness factor to be neutral in the unwarrantable failure analysis.

The condition did not pose a high degree of danger to miner safety. The Order was designated non-S&S and involved piles of material that were largely incombustible. As noted, abatement was accomplished by adding additional rock-dust, but the accumulations were not removed.

Although Respondent was clearly placed on notice of a past history of section 75.400 violations, it was not placed on notice that greater efforts were necessary to comply with its apparent practice of pushing large gob piles into a crosscut to clear travel roads. Tr. 83. The Secretary provided no evidence to rebut the testimony of Respondent's witnesses Podoriscki and Kendall that the practice was employed at Willow Lake and other mines in the Illinois Basin where they had worked, and that MSHA did not notify Respondent that the practice was prohibited. In fact, MSHA's sanctioned abatement method of additional rock-dusting rather than removal adds confusion as to what should be done with such accumulations. I also note as a practical matter, that when clearing travel roads of debris, it may be difficult to immediately remove non-S&S accumulations such as those at issue from the mine. Under these circumstances, I find that Respondent was not placed on notice that greater efforts were necessary to comply with the standard as applied in this case. Rather, in the absence of any evidence that the past citations or discussions with MSHA involved conditions that bore any resemblance to the conditions cited in Order No. 8030700, I decline to find that Big Ridge was on notice that greater efforts toward compliance were necessary. *See, e.g., Cumberland Coal Res. LP*, 31 FMSHRC 137,157 (Jan. 2009) (ALJ) (finding in the section 75.400 context that "to establish that [the operator] had been put on notice that additional compliance efforts were needed, the Secretary was required to show more than a history of prior citations for violations of the broad standard").

In sum, I find that the accumulations were obvious, extant for at least three shifts, and Respondent should have known that they existed. On the other hand, the accumulations of combustible material were not particularly extensive since they comprised only about one-third of the piles and were quickly abated through rock dusting, they did not present a high degree of danger, and Respondent was not placed on notice that greater efforts were necessary to comply with its practice of pushing large piles of gob mixed with lesser combustible material into crosscuts to clear travel roads. Thus, while the issue is close, on balance I find no aggravated conduct or unwarrantable failure here.

Since I have reduced Respondent's negligence to moderate and reversed the unwarrantable failure finding, which was the primary basis for Preece's special assessment recommendation (Tr. 72-73), I decline to be guided by the Secretary's special assessment

guidelines. Consistent with my findings above and section 110(i) criteria, I find that a penalty of $500 is appropriate for the violation.

2. Citation No. 8428798

The Secretary argues that Respondent violated section 75.400 because the transformer "5D" belt line had accumulations of float coal dust on previously rock dusted areas. The Secretary claims that the violation was S&S because it was reasonably likely to lead to a lost workdays or restricted duty injury to one person. The Secretary also claims that the violation was the result of high negligence because the cited condition was recorded in the on-shift examination records and Respondent provided no mitigating information to the inspector about why the condition was allowed to continue unabated.

Respondent argues that the citation should be vacated because no violation of the cited standard occurred; that if a violation is found, the S&S and high negligence designations are inappropriate; and that the regularly assessed proposed penalty of $13,268 is excessive.

a. The Alleged Violation

During the day shift on October 13, 2011 at 9:20 a.m., MSHA inspector Anthony Fazzolare issued 104(a) Citation No. 8428798.[11] It alleges a violation of 30 C.F.R. § 75.400, as follows:

> The transformer for the "5D" Belt Line had float coal dust deposited on previously rock dusted areas. The float coal dust was paper-thin to approximately 1/8 inch thick, black in color and from rib to rib and on the top of the transformer.
>
> This condition was listed in the on-shift examiners report from the previous shift's examination.
>
> This is the 267th violation of this standard at this mine since 10/20/2009.

P. Ex. 40. The Citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty to one person, and was the result of high negligence. *Id.* Fazzolare's photographs

[11] Fazzolare has inspected underground coal mines for more than thirteen years and began inspecting WLPM in 2008. Tr. 721-22. Before that he worked for Kerr-McGee Coal Corp., in Galatia, Illinois as a laborer, construction worker, roof bolter, and/or continuous miner operator from 1984-1998. He is also an Illinois certified examiner and mine manager, and has shop fire papers. Tr. 722.

depicted accumulations of coal on the transformer, on a permissible[12] electrical light, and on the floor as indicated by visible footprints. Tr. 812-16, 832, 898; P. Ex. 41.

The accumulations were in an active working area where miners were required to work and travel. Tr. 818-19, 890. In fact, the on-shift examiner's report from the previous shift listed the condition. P. Ex. 40.

Fazzolare's testimony about the condition was consistent with the citation, as written. Fazzolare described the float coal dust as paper thin to approximately one-eighth of an inch thick, black in color, from rib to rib approximately 20 feet in width, and present on the top of the transformer. Tr. 806, 808; P. Ex. 40.[13] Fazzolare described the condition as dangerous because float coal dust is highly combustible, can ignite at 300 degrees Fahrenheit, and was permitted to accumulate from rib to rib, and on top of the permissible transformer (power center). Tr. 806-08, 817, 869. No methane was detected in the area. Tr. 835.

Bishop testified that he did not see Fazzolare check inside the transformer, although Bishop looked inside and did not see any material. Tr. 857-58. Bishop also testified that the west side of the transformer was damp. Tr. 865.

The transformer was in the same crosscut off the 5D travelway where the accumulations were found on the floor from rib to rib. Tr. 811, 828, 852. The transformer receives power and distributes it to run the 5C belt. Tr. 806, 812. Fazzolare testified that as the transformer receives power, it generates heat, and the float coal dust on top of the transformer would act as a thermal

[12] At hearing, inspector Fazzolare referred to several pieces of electronic equipment as "non-permissible." The inspector, however, uses the term in a confusing fashion. When Fazzolare called equipment "non-permissible," he was referring to the permissibility standards for electrical equipment used *at the face*, not to the permissibility standards applicable to the rest of the mine. Tr. 807-808. The permissibility requirements at the face are more stringent as they are intended to prevent or contain the ignition of an explosive air-methane mixture. *See Knox Creek Coal Corp.*, 35 FMSHRC ___, slip op at 4, No. VA 2010-81-R (May 28, 2014). The electrical equipment addressed in this case was not located at the face and therefore was not required to include enhanced design requirements. *See* Tr. 807-808. There is no question that the electrical equipment in question met MSHA design requirements to reduce the likelihood of fire and was permissible for the location in which it was used. *Id.; see also* 30 C.F.R. § 75.2.

[13] Safety compliance supervisor, Daniel Bishop, testified that all he saw was gray material on the floor. He did not see any float coal dust on top of the transformer. I credit Fazzalore that the float coal dust was paper-thin, black in color, ran from rib to rib, and was present on the top of the transformer. Fazzolare took photographs to document the condition. P. Ex. 41.

blanket trapping heat inside. Tr. 809.[14] Fazzolare testified that the cat heads going into the power center were another potential heat or ignition source. Tr. 818.

Fazzolare was concerned about a fire because float coal dust is highly volatile and does not require much temperature to ignite. Tr. 816. Fazzolare further testified that since the float coal dust was paper thin and sat on top of the rock dust, the rock dust would do nothing to extinguish a fire. Rather, the float coal dust would burn off and add fuel to a fire. Tr. 808. Fazzolare determined that the three elements necessary for a fire were present: fuel (float coal dust); oxygen (in the air throughout the mine), and an ignition source (permissible power center). Tr. 817. Fazzolare was concerned that the power center could have a problem at any time under continued mining operations. Tr. 844. Fazzolare determined that in the event of a fire, one person in the area, an examiner or maintenance person, was reasonably likely to suffer a lost workday or restricted duty injury from smoke inhalation. Tr. 818-19.

Respondent's assistant shift mine manager, Charles Lane Hendricks, testified that during the pre-shift examination on the midnight shift, the examiner reported that the transformer for the 5D drive needed dusting because it was black. Tr. 878; R. Ex. 92. The written report was reviewed and noted by Hendricks about 6:15 a.m., prior to the start of the 7 a.m. day shift. Tr. 877-879. Hendricks discussed the condition with other shift managers and assigned day-shift belt shoveler, Harley Partridge, to address the condition. Tr. 878-79. Hendricks credibly testified that he instructed Partridge to adjust his work duties and make the condition his first stop of the day, thus giving the matter priority. Tr. 879.

Hendricks testified that Partridge typically would catch the first available ride into the mine after shift change, and get off about thirty minutes later at his golf cart located on one of the main north belts, which he used to travel to different belt drive locations. Tr. 879. Hendricks recalled that on the day in question (October 13), Partridge and others did not get a ride into the mine until about 8 a.m., which meant that Partridge would not have reached his golf cart until about 8:30 a..m., and would not have reached the location of the 5D transformer until about 8:55 a.m., i.e., about twenty-five minutes before Fazzolare wrote the citation. Tr. 880-81. Hendricks further testified that about 9 a.m., he received a call from another mine manager, Ronnie Hughes, informing him that Partridge's golf cart had malfunctioned, and that the inspector had found a problem at the transformer. Hughes asked Hendricks, who was in another area of the mine, to get down there. Tr. 882-83.[15]

Fazzolare testified that Respondent provided no mitigating information as to why the condition was allowed to continue. Tr. 823-24. By contrast, Hendricks testified that when he arrived at the transformer, Fazzolare explained why he was writing the citation. In response to a leading question, "[d]id you tell him what you told us, that you had somebody on the way,"

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[14] Respondent's mid-west safety director, Chad Barras, testified that the heat generated on the surface of the transformer was somewhere between 100 to 180 degrees. Tr. 896.

[15] Neither Hughes nor Partridge were called to corroborate this hearsay.

Hendricks testified, "Yes, I did." Hendricks did not recall any response from Fazzolare. Tr. 883. Safety compliance supervisor, Daniel Bishop, testified that Hendricks told Fazzolare that he had sent an employee to address the problem, but his ride went dead and he had not made it there yet. Tr. 865. On cross examination, Fazzolare admitted that he vaguely recalled the mine manager telling him that somebody was on the way, but his ride had broken down. Tr. 841. Accordingly, I find that Hendricks did offer evidence of mitigation, i.e., that Partridge had been dispatched to correct the accumulation problem, but his ride had broken down and Partridge had not arrived yet.

Hendricks opined that the condition would have been addressed about twenty minutes after Fazzolare's arrival at the transformer. Tr. 883-84. The Citation was abated in about ten minutes when rock dust was spread around the transformer on the floor. Tr. 859, 890. Bishop testified that Fazzolare did not require any cleaning of the top of the transformer or the nearby light to abate the Citation. Tr. 858-59, 871.

b. Legal Analysis

I find a violation of section 75.400. The credited evidence establishes that Respondent permitted accumulations of float coal dust from rib to rib in an active working area and on the transformer or power center, a piece of electric equipment. In fact, Respondent's examiner reported that the transformer for the 5D drive needed dusting because it was black. Tr. 878; R. Ex. 92.

I further find that the violation is not S&S. Fazzolare credibly testified that although coal dust has a relatively lower heat threshold required for combustion, the coal dust in the Illinois coal basin must be heated to 300 degree before it will ignite. Tr. 807; *see also* Tr. 900. Fazzolare was primarily concerned that the electrical transformer might provide an ignition source for the coal dust.[16] Fazzolare, however, did not remember if the transformer was hot during the inspection and did not offer any testimony as to the potential heat the transformer could generate. Tr. 831. Respondent, on the other hand, adduced uncontradicted testimony from Barras that the transformer was between 100-180 degrees, but was not hot enough to burn a miner if touched. Tr. 896. Furthermore, Bishop credibly testified that the transformers where never too hot to handle comfortably during the hundreds of times that he had accessed them. Tr. 856-57.

[16] It is unclear from Fazzolare's testimony how the overhead light or cat heads could act as ignition sources. No coal dust was observed on the cat heads and the overhead light would not be susceptible to the "thermal blanket effect" described by Fazzolare. Further, it is unlikely that the fluorescent bulb in the overhead light would be able to reach a temperature capable of igniting the coal dust. Tr. 898; *see generally* Clete R. Stephan, MSHA, *Coal Dust Explosion Hazards*, http://www.msha.gov/S&HINFO/TECHRPT/P&T/COALDUST.pdf (top of a 1500-watt incandescent bulb can exceed 300 degrees Celsius).

I am not convinced by Fazzolare's assertion that the paper thin layer of coal dust would have provided sufficient insulation to cause the transformer's temperature to rise over the 100 degrees necessary to cause the coal dust to ignite.[17] There is no question that there can be a danger of electrical equipment overheating and rising to a temperature capable of igniting coal if there is a significant amount of densely packed coal enveloping electric equipment. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 8-11 (Jan. 1997) (remanding S&S analysis where inspector noted up to 2 ½ feet of coal dust, hydraulic oil, and loose coal packed in and around a gear case). Commission ALJs, however, have not been inclined to find that an ignition source exists when only a relatively small layer of combustible material covers electrical equipment. *Pittsburg & Midway Coal Mining Co.*, 16 FMSHRC 574, 578-79 (Mar. 1994) (ALJ); *Cam Mining, LLC*, 34 FMSHRC 2965, 2972-75 (Nov. 2012) (ALJ) (finding that an ignition based upon the heat generated by a transformer box and the electrical connections therein was not reasonably likely).

In the case at hand, the dust on the outside of the transformer enclosure was only paper thin and there is insufficient evidence on this record to establish that enough coal dust would accumulate under continued mining operations to create the "thermal blanket effect" described by Fazzolare. No dust was observed in the enclosure where it could be ignited by sparks or arcing that might occur assuming malfunction during continued mining operations. Tr. 831; *see also Knox Creek Coal Corp.*, 35 FMSHRC ___, slip op at 7, No VA 2010-81-R (May 28, 2014) (judges should assume common malfunctions of electric equipment in determining whether electronic equipment is an ignition source).

Based on the foregoing, I find that under continued normal mining operations, it was unlikely that a fire at the transformer would result in a lost workday or restricted duty injury from smoke inhalation to a miner traveling in the active working area. Tr. 818-19. The Secretary has failed to show a confluence of factors such as methane or ignition sources as required under Commission precedent in *Texasgulf*, 10 FMSHRC at 500-3. Accordingly, the S&S designation is removed.

I reduce Respondent's negligence from high to moderate. It is undisputed that the Respondent knew about the accumulation problem. Although Fazzolare testified that Respondent provided no mitigating information as to why the condition was allowed to continue, I have found that Hendricks did offer evidence of mitigation, i.e., that Partridge had been dispatched to correct the accumulation problem, but his ride broke down and he had not arrived yet. Hendrick's testimony was corroborated by Bishop's testimony and Fazzolare's vague recollection. Although the Secretary argues this was not a mitigating circumstance because the citation was issued at least two and a half hours after the on-shift examiner recorded the hazardous condition, I credit Hendrick's testimony that he gave the matter priority that morning, but Partridge's golf cart broke down. The Secretary offered no evidence to the contrary, and did

[17] Even Fazzolare conceded on cross that the coal dust would have to build up before it would act like a thermal blanket trapping heat in the transformer enclosure. Tr. 831.

not subpoena Partridge to testify. In these circumstances, I find sufficient evidence of mitigation to reduce Respondent's negligence from high to moderate.

Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $807.

3. Citation No. 8428776

The Secretary argues that Respondent violated section 75.400 because there were accumulations of float coal dust under the cable reel of the Fletcher Roof Bolter Co. No. 425, located in the #1 Unit on the right side. The Secretary claims that the violation was S&S because it was reasonably likely to lead to a lost workdays or restricted duty injury to two persons, and was the result of high negligence because Respondent should have known about the condition and offered no mitigating circumstances.

Respondent argues that the S&S and high negligence designations are inappropriate and that the regularly assessed proposed penalty of $14,373 is excessive.

a. The Alleged Violation

On September 3, 2011, MSHA inspector Fazzolare, accompanied by Respondent's representative Mike Cummins, inspected the Fletcher Roof Bolter No. 425. Tr. 966. There were no defects observed with the cable, or any other component of the permissible roof bolter (pinner), which might act as a potential ignition source. Tr. 939, 943, 950, 966-67.

Fazzalore issued 104(a) Citation No. 8428776, which alleged a violation of 30 C.F.R. § 75.400, as follows:

> There were accumulations of coal, oil and float coal dust under the cable reel of the Fletcher Roof Bolter Co. No. 425, located in the #1 Unit on the right side.
>
> These accumulations were black in color and ranged in depth from 1 inch to 1½ inches deep and the cable reel had been rolling in accumulations.

P. Ex. 32; Tr. 956. The citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty injury to two persons, and the result of high negligence. P. Ex. 32.

Consistent with the citation, Fazzolare testified that he observed accumulations of coal, oil and float coal dust under the cable reel of the Fletcher roof bolter. Tr. 924. Cummins

testified that there was no float coal dust present. Rather, there was moist material comprised of fire clay, coal fines, and rock dust from the mine floor. Tr. 965.

The cable reel is insulated to isolate the possibility of the flow of electrical current and it carries about 350 feet of 480-volt energized cable, which powers the roof bolting machine. Tr. 924-25, 960-62, 973. The cable reel retracts or releases cable as the bolter moves. Tr. 925. The reel is guarded in front and covered on top, making observation or photographing of the inside of the reel compartment difficult. Tr. 964-65; R. Ex. 87(a). To reach into the compartment, a miner would have to reach between two guides that aid the retraction and extension of the cable. Tr. 977.

At one point, Fazzolare testified that the cable reel served as an ignition source. Tr. 927, 929; P. Ex. 32. Although the bolter is permissible equipment, this fact did not factor into Fazzolare's assessment because of the location of the accumulations underneath the cable reel. Tr. 929. Fazzolare testified that once the cable reel was full, the cable would be rolling in the accumulations. Tr. 926.

Upon subsequent questioning from the undersigned, Fazzolare testified, without further explanation, that he saw evidence that the cable *reel* had been rolling in accumulations. Tr. 932. I discredit this testimony because, as further explained below, Fazzolare walked and examined the full length of the cable when it was extended off the reel (Tr. 950), and the power was not energized on the machine to observe the retraction because the unit was idle. Tr. 934, 952, 954. Rather, I find that Fazzolare was speculating as to what would occur during the retraction process.

Fazzolare then testified that the roof bolter, the electrical motors on the roof bolter, and the cable, all generate heat. Tr. 932. Fazzolare testified that he had no knowledge of the cable being shielded. Tr. 939, 967. Fazzolare examined the full length of the cable and found no defects. Tr. 942.

Fazzolare testified that the cable reel would be full of energized cable and there could be a pinhole in that electrical cable that would be hard to see or detect and create an ignition source. Fazzolare also testified that he got shocked because of a pinhole when he was a roof bolter on a different type of machine, but the cable on that machine was not shielded. Tr. 930-31, 947, 950-51.

The specific hazard that Fazzolare was concerned with was smoke inhalation by the two roof bolters in the event of a fire. Tr. 930-31. He testified that if the cable reel was full during roof bolting, and there was a bad spot in the cable, a pinhole would ignite the float coal dust or coal, and the miners would be exposed to smoke inhalation from the fire, resulting in lost work days or restricted duty. Tr. 932-33. Fazzolare further testified that splices in cable are common because the cable or insulation gets torn, exposing the inner leads, and the cable gets run over, requiring spicing. Tr. 949.

The record establishes that underneath the cable reel and between its side walls there are clean-out holes that permit water and other material to exit the compartment when it is washed out, or enter the compartment when the rear of the articulated bolter pivots up and down to follow the contours of the mine floor during tramming. Tr. 961-63, 965-66; R. Ex. 88(a). Cummins, a former 11-year roof bolter, testified that a clean reel compartment can become dirty in minutes from mine floor material entering the compartment through the drain holes if the bolter is operated with the rear of the machine articulated on the ground. Tr. 959, 965, 984.

Cummins further testified that the retracting cable would not rub in the accumulations because a tape ball prevents overloading beyond the sides of the cable reel. Tr. 972. He further testified that the reel moves at such a slow rate of speed during the tramming process – about 35 feet of cable could be retracted in a minute – that frictional heat would not be generated. Tr. 972-73.

Fazzolare testified that the accumulations under the cable reel were in active workings because "[t]his is a producing unit." Tr. 928. Fazzolare further explained that at some unspecified time after he issued the Citation, he revisited the unit and it was running coal. Tr. 952-53. Fazzolare confirmed that the accumulations were black in color, indicating that they had not been mixed with rock dust to lower combustibility. Tr. 928. The accumulations extended about one to 1.5 inches under the cable reel and about two feet wide. Tr. 925-26. Fazzolare testified that once the cable reel was full of cable, the cable would be rolling in the accumulations creating a frictional heat source that could ignite the accumulations. Tr. 926-27. In addition, Fazzolare testified that he was concerned about the high temperature oil which was present and also combustible. Tr. 928.

Fazzolare testified that the production unit was idle at the time of his inspection and had been idle for a week. Tr. 934; 952. Fazzolare conceded that under normal circumstances, there would be no power on the roof bolter when the unit was not operating. Tr. 954. Cummins confirmed this. Tr. 981. The Secretary failed to establish that there was power on the cable.

Even when the unit was idle, the cable reel and cable were subject to a thorough permissibility examination on a weekly basis, including cleaning and washing out of accumulations, if necessary. Tr. 954, 968-69, 979. Such cleaning also occurred, as needed. Tr. 980-81. The last weekly examination was performed on August 28, 2011, six days prior to the citation and within the weekly period. Tr. 968; R. Ex. 90.

b. Legal Analysis

I find a violation of section 75.400. I credit Fazzolare's testimony about the nature of the accumulations in lieu of Cummins' testimony and find that accumulations of coal, oil and float coal dust were present under the cable reel of the Fletcher roof bolter. Tr. 924. Although Cummins testified that there was no float coal dust present and the material was moist, I discredit this testimony, particularly since the pinner had not been washed, at least since the last examination almost a week earlier.

I further find that the accumulation violation under the cable reel of the roof bolter was in an active working, even though the production unit was idle for about a week, because miners continued to work or travel in the unit for maintenance and inspection purposes. *Cf. Consolidation Coal Co.*, 20 FMSHRC at 348-49.

On the other hand, I find that the violation was not S&S under the third prong of the *Mathies* test because the violation did not contribute to a hazard that was reasonably likely to result in a mine fire. When evaluating an S&S designation related to the reasonable likelihood of a fire, ignition, or explosion, the Commission examines the "confluence of factors" present based on the particular facts surrounding the violation. *Amax Coal*, 19 FMSHRC at 848 (citing *Texasgulf*, 10 FMSHRC at 501). These factors include the extent of accumulations and the presence of possible ignition sources, the presence of methane, and the type of equipment in the area. *Maple Creek*, 22 FMSHRC at 755 (citing *Enlow Fork*, 19 FMSHRC at 9).

The unit was idle at the time of the inspection and no power was energizing the roof bolter. Tr. 952. Therefore, an ignition would not have occurred. Even when production and power was restored during continued mining operations, no ignition source was established that was reasonably likely to result in a mine fire. The bolter was maintained in permissible condition.[18] Although Fazzolare testified that he "could have missed" a pinhole defect in the cable, he found no defects with the insulated cable. In fact, Fazzolare performed a full inspection of the pinner and its cable and issued no citations. Moreover, the electric shock that Fazzolare experienced through a pinhole when he was a bolter occurred on a different type of bolting machine that lacked a shielded cable. Finally, Fazzolare provided an insufficient evidentiary foundation for his summary conclusion that if the cable reel was full during bolting, a pinhole would ignite the float coal dust or coal and the miners would be exposed to smoke inhalation from the fire, resulting in lost work days or restricted duty.

Similarly, I reject the argument that the cable reel would likely serve as a frictional heat source. I have discredited Fazzolare's testimony that he observed the cable rolling in the accumulations and found that this was mere speculation as to what he thought would occur when the cable was recoiled during the retraction process. By contrast, I am more persuaded by Cummins' testimony that the retracting the cable would not rub in the accumulations because a tape ball was designed to prevent overloading beyond the sides of the cable reel. Furthermore, the Secretary relies on little more than Fazzolare's conclusory belief that the bolter could produce heat sufficient to produce an ignition. That belief is unsupported by fact on this record. Rather, I credit Cummins' testimony that the slow movement of the cable back onto the reel at about 35 feet per minute would generate insufficient frictional heat to start a fire.

[18] Although Fazzolare testified that he was concerned about a fire and not an explosion, I agree with the Respondent that the non-defective permissible equipment was unlikely to propagate an explosion because no exposed energized ignition sources were present, no sparks were capable of emission, and the jacket of the shielded cable was made of quarter-inch-thick pliable rubber. Tr. 967.

In sum, based on the particular facts surrounding this violation, the Secretary has failed to prove that an injury-causing event was reasonably likely to occur. Accordingly, I find that the violation was not S&S.

I reduce Respondent's negligence from high to moderate. Although Fazzolare testified that there were no mitigating factors provided to him when he wrote the citation, Respondent established some at trial. The design of the roof bolter and the location of the accumulations made detection difficult. Although Fazzolare was led on cross examination to testify that the violation was obvious, I discredit this testimony because the testimony from Cummins and the photographs in evidence establish that the reel compartment was not readily visible and was protected by bolted covers and by a guard. Furthermore, one would have to get down and peer through the guides to observe the accumulations. Tr. 959-960, 964, 974, 977, 981-82; R. Ex. 87(a). Finally, since the unit was idle, it was less likely that an examiner would discover the condition until production resumed and the bolted covers were removed by a rank-and-file bolter operator during his examination and cleaning. That weekly examination was not yet due at the time the citation was written. Accordingly, I find sufficient mitigating circumstances to reduce Respondent's negligence to moderate.

Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $807.

4. Citation No. 8436403

The Secretary argues that Respondent violated§ 75.400 because there were accumulations of float coal dust in crosscut 100 on the main west travel way. The Secretary claims that the violation was S&S because it was reasonably likely to lead to lost workdays or restricted duty to one person, and was the result of high negligence because Respondent should have known about the condition and offered no mitigating circumstances.

Respondent argues that the S&S and high negligence designations are inappropriate and that the regularly assessed proposed penalty of $13,268 is excessive.

a. The Alleged Violation

On October 19, 2011, inspector Fazzolare, accompanied by Respondent's compliance supervisor, Vernon Dunn, issued 104(a) Citation No. 8436403 alleging a violation of 30 C.F.R. § 75.400, as follows:

> There were paper thin to approximately 1/16 accumulations of float coal dust in XC 100 on the Main West travelway, these accumulations were rib to rib, on the ribs and on the 1200 volt energized power center, on the overhead light, on both cat heads and on the switch box.

> This is the 267th violation of this standard at this mine since 10/20/2009.

P. Ex. 43. The citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty injury to one person, and the result of high negligence.

Fazzolare observed combustible and volatile accumulations of float coal dust out by active workings on a 1200-volt energized power center, and on the permissible overhead light, and the cat heads and switch box located at crosscut 100 in the Main West travelway, which paralleled the Main West No. 2 belt. Tr. 988, 990-93, 1010, 1015, 1022, 1024; P. Exs. 43, 44. The floor of the Main West travelway was composed of gray clay-like material, and there was approximately three to four inches of rock dust on the floor of the cited area. Tr. 1023-24. Dunn testified that the float coal dust could have come from the running belt or the roadway. Tr. 1026-27.

The accumulations were paper thin to one-sixteenth of an inch thick and found in an area that had been rock dusted previously. Tr. 989; P. Ex. 45, at 7. Fazzolare was concerned with the accumulations of combustible material on top of the rock dust. Tr. 1013. Fazzolare testified that in the event of a fire, the float coal dust would burn off and fuel the fire. Tr. 989.

There were some accumulations on top of the transformer, but not inside the transformer. Tr. 1008, 1025. No citations were issued with respect to the transformer or overhead lights. Tr. 1026. There was no methane in the area. Tr. 1029.

Based on his experience and the extent of the accumulations, Fazzolare determined that the cited condition existed for more than one shift, and likely did not arise after the last pre-shift examination. Tr. 995-96; 1033. Dunn confirmed this. Tr. 1027, 1033.

Fazzolare designated the violative condition as S&S because there were several ignition sources present around the highly volatile fuel source, which exposed an examiner or maintenance person working on the power center to the hazard of a fire, which was reasonably likely to result in lost workdays or restricted duty due to smoke inhalation. Tr. 994-95; P. Ex. 43.

Fazzolare also determined that the violation resulted from high negligence given the large number of section 75.400 citations that Respondent was issued, and because the cited area was supposed to be pre-shifted every eight hours. Tr. 996. Although Fazzolare testified that he was not shown any pre-shift inspection reports indicating that the area had been examined, he did not write any citation for failure to conduct a pre-shift under section 75.360. Tr. 991-92, 996. Fazzolare testified that the condition was obvious and should have been noted by the pre-shift examiner and by any maintenance personnel or foreman, who entered the area. Tr. 996-97, 1015. Fazzolare did not recall management providing any mitigating circumstances. Tr. 999. His notes, however, indicate that Dunn told him that he did not think there was a hazard present. P. Ex. 45, at 7.

Dunn testified that he told Fazzolare that the citation should not be written because the condition did not present a hazard given the amount of rock dust present and the absence of any ignition source. Tr. 1028, 1037-38. According to Dunn, Fazzolare responded that the transformer constituted the ignition source. Tr. 1038.

Fazzolare testified that the citation was terminated twenty minutes after issuance when Respondent's agent mixed the float coal dust with the existing rock dust in the area to lower combustibility, and also wiped off the switch box and overhead light. Tr. 999, 1014. Dunn testified that the abatement process lasted "probably ten minutes." Tr. 1025. Dunn testified that the rock dust on the floor was so deep that it was just kicked around with his feet and a broom. Tr. 1025. Dunn further testified that when he cleaned off the top of the transformer, he felt nothing but "body temperature-type heat" of about 100 degrees, which he opined was insufficient to cause any sort of ignition. Tr. 1025-26, 1029.

Fazzolare did not testify with any specificity about the overhead light mentioned in the citation. Dunn testified that it was a fluorescent-type light with a plastic cover, and that he did not recall seeing float coal dust on the light bulb, or cleaning or wiping off the light bulb or its cover. Tr. 1032-35.

b. Legal Analysis

I find a violation of section 75.400. Respondent permitted paper thin accumulations of float coal dust from rib to rib in the Main West travel way at cross cut 100, and on the transformer, overhead light, cat heads and switch box located at this location. Section 75.400 provides 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."

Essentially for the same reasons set forth above with respect to Citation No. 8428798, I find the violation set forth in Citation No. 8436403 to be non-S&S. The float coal dust accumulations on top of the coal transformer did not contribute to a discrete fire hazard that was reasonably likely to result in a serious injury. Under continued normal mining operations, it is unlikely that the paper thin layer of coal would cause the transformer to reach a temperature of 300 degrees, which was enough to ignite the coal dust. Accordingly, the S&S designation is removed.

I affirm the high negligence designation. The Secretary established that Respondent should have known of the condition. I reject Respondent's argument that it is unlikely that the condition came into existence since the last pre-shift examination because it was located near an active belt line and travel way. I note that Dunn, Respondent's own witness, confirmed Fazzolare's testimony that the condition likely existed at the time of the last pre-shift examination. Furthermore, I discount the argument that a mine examiner would not have regarded the condition as hazardous and reportable. Although Dunn told Fazzolare that he did not think there was a hazard present, particularly given the amount of rock dust present and the

absence of any ignition source, these are not mitigating circumstances because the amount of rock dust on the floor did not mitigate the float coal dust on the transformer, cat heads and overhead light, which are potential ignition sources capable but not likely to result in a mine fire. In sum, the high number of past violations of section 75.400, the fact that Respondent had notice that accumulations were at issue at the mine, the fact that the condition should have been recorded, but was allowed to exist for at least one shift, and the absence of persuasive mitigating circumstances support my finding of high negligence.

Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $2,678.

C. Maintenance of Incombustible Content of Rock Dust Order No. 8428378

1. Order No. 8428378

The Secretary alleges that the Respondent violated section 75.403 because the mine floor in entry no. 6 of MMU 011 did not contain enough rock dust to achieve 80% non-combustible content. The Secretary further alleges that the violation was unlikely to result in injury, but if injury did occur, it would be fatal, with sixteen persons affected. The Secretary further alleges Respondent's high negligence and unwarrantable failure to comply with the standard.

Respondent argues that the Order should be vacated because it was based on samples taken from discrete piles of material that were not representative of the entry floor. Respondent also challenges the gravity, high negligence, and unwarrantable failure designations, and the appropriateness of the specially assessed proposed penalty of $45,000.

a. The Alleged Violation

During an E02 spot inspection on June 20, 2011, inspector Eddie Kane,[19] accompanied by Respondent's representative Mike Cummins and miner's representative Ron Pinkston, issued section 104(d)(2) Order 8428378 for a violation of 30 C.F.R § 75.403. Tr. 564, 567; P. Ex. 34. Section 75.403 states:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and

[19] For three years prior to the hearing, MSHA inspector Kane worked as a coal mine inspector and collateral duty special investigator in the Benton, Illinois field office. Tr. 560-62. Prior to joining MSHA, Kane worked in the industry for about nine years as an outby laborer, examiner, face boss, ram car operator, roof bolter, and scoop operator. Kane possesses state mining examiner and mine manager certifications and ninety-six hours of electrical training. Tr. 560-61. Kane was the lead inspector at WLPM in early 2012 and visited the mine almost every day. Tr. 563.

> maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

The Order was designated non-S&S, unlikely to result in a fatal injury to sixteen persons, and the result of high negligence and an unwarrantable failure. P. Ex. 34. As a result of this Order, the area was closed off, and no other activity was allowed to proceed through the area. Tr. 700.

The Order issued at 10:30 a.m., when the unit was in full production running coal. P. Ex. 34; Tr. 592, 656. The shift began at 7:15 a.m. The first coal run was made at 8:05 a.m. Tr. 706; R. Ex. 25. Three cuts had been taken on the left side of the unit, at the 9 left crosscut, entry no. 9 and entry no. 8. Tr. 706-07; R. Ex. 25. Typically, three coal haulers on the left side of the unit used entry no. 6 to go to the feeder. Tr. 669. The ram cars made about 60-80 trips from face to feeder per shift. Tr. 669.

Kane testified that upon arriving at Unit 1 entry no. 6, Kane observed a lot of coal dust and float coal dust all over the entry and obvious to the casual observer. Tr. 565-66, 592.[20] Kane had to stop and wait for a ram car to pass through the area. Kane noticed that the ram car was kicking up a lot of black coal dust and suspending it in the atmosphere. Tr. 566, 577.[21]

Kane then walked further into entry 6, which was off the 2nd right panel from the 5th north main, and he noticed that this condition was extensive between survey station 10 + 75 and 12 + 35. Tr. 566. Kane took two floor samples from the area where the violative condition existed. Tr. 580-81, 583. Kane took photographs, measurements, and two spot samples about 160 feet apart across the entire entryway. Tr. 577-79, 584-85; P. Ex. 35-37. The piles of coal sampled on the return side ribs were 18-24 inches wide, and six to ten inches deep. Tr. 578-79, 584; P. Ex. 35; P. Ex. 36, at 3.[22] The piles that were cited extended approximately 18-24 inches in width

[20] Entry no. 6 was about twenty feet wide and was used as a haulage road for the left side of the unit to haul coal from face to the feeder. Tr. 656, 658.

[21] I credit this specific testimony from Kane. Although Cummins testified that he did not recall observing any ram cars drive through entry 6 and he did not observe any "rock dust" in suspension, Cummins confirmed that the accumulations were present on the mine floor along the two ribs because ram cars would rub against and grind material off the rib as they turned into the crosscut. Tr. 667-68. I also note that section foreman Blaine Shires observed ram cars running in entry 6 that day, but by the time Shires reached the area, Kane had already shut it down. Tr. 718-19.

[22] Cummins, who did not take measurements, recalled that the accumulations were about six inches deep. Tr. 662; P. Ex. 35; P. Ex. 36, at 3. Cummins further testified that the length of

from the left rib line into the entry. Tr. 578-89, 615-16; P. Ex. 35; R. Exs. 23(i), 23(k), 23(w). Cummins and Shires credibly testified, as corroborated by photographic evidence, that the piles were created when ram cars struck the ribs as they turned into the crosscut toward the feeder. Tr. 658, 668, 678, 708-09; R. Ex. 2, at 15-18; R. Ex. 23(a); R. Ex. 23(x). Cummins also explained that the miner cable was present on the opposite side of the piles, which would cause the operators to "hug farther to the left-hand rib to stay off the cable." Tr. 669-71.

Kane testified that the accumulations occurred over a period of time, which he estimated to be about two shifts, excluding the current one. Tr. 586. Although section foreman Shires testified that entry no. 6 was regularly scooped at least once per shift to clean spillage along the haulageway (Tr. 710), Respondent proffered no specific testimony or documentary evidence that entry no. 6 was scooped and/or rock dusted on the prior two shifts. By contrast, Kane's notes indicate that the condition has existed for at least two shifts since it appears that the accumulations came from overloaded ram cars dropping excess coal on the haul road, and then continually running over the coal until it was ground into a fine powder and pushed to the rib line by the wheels of the ram car. P. Ex. 36, at 3. In these circumstances, I credit Kane's empirical estimate that the accumulations existed for about two shifts. Tr. 586.

Cummins did not witness Kane take a sample across the entire width of the mine floor. Tr. 680. Cummins and Shires confirmed that Kane took two samples, although Cummins and Shires only witnessed Kane take one spot sample from the rib area floor. Tr. 680-82, 691-92, 715-16. Cummins specifically raised an objection with Kane about the manner in which Kane was taking his sample. Tr. 692. Cummins also recorded his observation in documentation that he completed immediately after the inspection. Tr. 683; R. Ex. 19. Cummins noted, "[t]he inspector only collected a sample of the coal that was spilled." R. Ex. 19. Neither Cummins nor any other representative of Respondent took a sample of their own. Tr. 689, 697.

For each sample taken, Kane received lab results indicating that the incombustible content of the rock dust was non-compliant. One sample contained 43.4% incombustible content, the other 48.1%. Tr. 585, P. Ex. 37. Per section 75.403, each sample should have had 80% incombustible content. Tr. 586.

Kane testified that MSHA's policy on rock dust sampling is dependent on the area where the sample is taken and the ability to take a representative sample of the area. Tr. 580-82. Where possible, MSHA procedures typically require the taking of a band sample from the roof, ribs, and floor, but MSHA's inspection procedure manual does not indicate that a band sample is mandatory. Tr. 588-89; P. Ex. 58. The ribs and roof had been rock dusted with a wet duster and were a whitish color. Tr. 582, 618, 667; P. Ex. 35. Kane did not include any of the rock dusted surfaces from the roof or ribs in his samples. Tr. 680.

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the condition was about 150 feet, excluding the length of the crosscut in the measurement. Tr. 666-67.

Kane testified that he took two floor samples from the area where the violative condition existed. Tr. 580-81, 583. He testified that the rib had wet rock dust on it and the floor away from the ribs was very hard and there was not enough material to sample down an inch and "cone and quarter." To obtain a representative sample, Kane used a floor brush and a dust pan to brush 1/8 to 1/4 inch across the surface of the entry floor from rib to rib. Kane then ran the sample through his 20-mesh sieve and tagged the entire sample to be sent to the lab for testing. Tr. 581-82.

As noted, Cummins and Shires testified that they did not observe Kane take a sample from across the entire width of the floor, but they each observed one sample at survey station 10+85. Tr. 679-80, 682, 709, 718. In any event, I credit Kane's testimony, confirmed on cross examination, that he used a floor brush and a dust pan to brush across the surface of the entry floor from rib to rib. Tr. 616-17. Accordingly, I find Cummins' testimony – that the floor in the entry consisted of incombustible fire clay, other than the piles cited – to be an overstatement that does not account for coal dust across the entry. Tr. 667.

Respondent's witness Steve Kattenbraker, a former MSHA field office supervisor and current contractor for parent Peabody Energy, confirmed that while a band sample from floor, rib, and roof may be preferable, an inspector could take a sample representative of the entire floor, and if such sample cannot be taken an inch down, the inspector should brush what he can off the floor. Tr. 635-39, 642-45. Further, safety compliance supervisor Danny Bishop testified regarding Citation 8428798 that Respondent has only taken floor samples, not band samples, when the floor was the area cited. Tr. 867, 869-70. Finally, based on prior sampling experience from ribs after wet-dry dusting, Kane testified that a band sample that included the ribs and roof would have been less representative of the violative condition and put even more combustible material into the sample. Tr. 626-29.

Kane determined that no methane was present in the air course in entry no. 6, and that the methane at the face was not high and measured 0.2%. Tr. 588, 620; P. Ex. 36, at 2. Kane further determined that a coal dust explosion was unlikely and the violation was non-S&S. Tr. 590.[23] Kane also testified, however, that the left-side miner was used in the entry, and cutting torches or welding equipment may be brought into the area, thereby introducing an ignition source necessary to trigger an explosion. Tr. 590-91, 621. Kane determined that in the unlikely event of a coal dust explosion, injury would be fatal, and all sixteen miners working inby would be killed. Tr. 590-94; P. Ex. 36.

Kane testified that Respondent had failed several rock dust surveys in the past and that Respondent's management was repeatedly told during closeout conferences that it needed to comply with the standard and get the mine rock dusted, or there would be increased enforcement. Tr. 571. Kane also testified about fatalities in mines because of inadequate rock dusting and that such fatalgrams are posted on MSHA's website and hand-delivered to mine operators upon

[23] Kattenbraker testified that float coal dust must be extremely dense to ignite, without methane, such that visibility would be less than two feet. Tr. 640-41.

issuance. Tr. 572-73; P. Exs. 50-51. Kane further testified that MSHA provides bulletins to operators to educate them on proper rock dusting and ventilation maintenance to keep methane away from the faces in an effort to prevent explosions and fires, especially during winter months. Tr. at 574; P. Ex. 52.

Kane determined that Respondent's violation resulted from high negligence because Respondent had been warned repeatedly to increase rock dusting, and the condition was open and obvious to face bosses, who were required to walk through the entry to reach the working section and its face for on-shift examination purposes. Tr. 591-92. Kane further determined that the violation was an unwarrantable failure to comply with the rock dusting standard because the condition was obvious and extensive and the face bosses should have known that it existed. Tr. 594.

Abatement efforts, which involved scooping the area and rock dusting the floor, took about an hour. Tr. 595.

b. Legal Analysis

I find a violation of section 75.403. Section 75.403 requires that the incombustible content of the rock dust be no less than 80%. 30 C.F.R. § 75.403; Tr. 568-69. The Secretary's unrebutted sample evidence shows that both samples were non-compliant; one sample contained 43.4% and the other 48.1% incombustible content, well below the 80% incombustible content requirement.

Respondent argues that observations alone are insufficient to support a section 75.403 violation, and that the violative samples taken from isolated coal spills are not evidence of inadequate rock dusting. Rather, Respondent argues that the samples must be taken from representative areas of the mine floor rather than from areas where discrete coal accumulations are located. Accordingly, Respondent argues that Order No. 8428378 should be vacated because it is premised upon samples that were taken from discrete piles of material that were not representative of the floor in entry no. 6.

I reject Respondent's arguments. The standard does not require the taking of band samples. *Cf. Eighty-Four Mining Co.*, 22 FMSHRC 690, 698 (2000) (ALJ). In addition, I have credited Kane's testimony that he used a floor brush and a dust pan to brush across the surface of the entry floor from rib to rib in order to take a representative floor sample. Finally, the testimony from Kane and Respondent's witnesses establishes that the sampling methodology employed to obtain representative samples was reasonable given the nature and location of the accumulations along the rib.

I further find that the violation was the result of high negligence. The record establishes that the coal dust accumulations in entry no. 6 were open and obvious to face bosses, who were required to walk through the entry to reach the working section and its face for on-shift examination purposes. Tr. 565-66, 591-92. In addition, Respondent had been admonished

repeatedly during close out conferences to enhance rock dusting at the mine. Tr. 571. Finally, Respondent proffered no evidence of mitigating circumstance other than its challenge to sampling methodology, rejected above. Tr. 595-96. In sum, the fact that Respondent had knowledge of rock dusting inadequacies and did not take facile steps to become compliant supports a high negligence finding.

Although the issue is close, I further find that the violation was an unwarrantable failure because there is sufficient evidence of aggravated conduct constituting more than ordinary negligence and a serious lack of reasonable care. As noted, "aggravating factors" include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition before citation, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *IO Coal*, 31 FMSHRC at 1350-51.

Initially, I find that the violative condition was fairly extensive. Both piles of material were twenty-four inches in width from the ribline, about six to ten inches deep, and were about 160 feet apart in the no. 6 entry. More importantly, the first sample was about 46% non-compliant and the second sample was about 40% non-compliant. Furthermore, Kane credibly testified that the coal dust and float coal dust was present all over the entry. In these circumstances, even though the condition was abated in about an hour by scooping and rock dusting, I find that the extensiveness factor tips in favor of an unwarrantable failure finding.

I have credited credit Kane's testimony that the condition existed for about two shifts, despite general testimony from Respondent that entry no. 6 was regularly scooped at least once per shift. Two shifts is definitely a period of time long enough to require that action be taken to eliminate the violative condition. *Cf., Windsor Coal Co.*, 21 FMSHRC 997, 1002 (Sept. 1999); *see also Buck Creek Coal,* 52 F.3d 133, 136 (7th Cir. 1995) (finding unwarrantable failure where cited accumulation must have been present at least since the previous shift). Accordingly, I find that the duration of the violation for about two shifts weighs in favor of finding an unwarrantable failure.

I have also credited Kane's testimony that Respondent repeatedly was placed on specific notice during closeout conferences that greater efforts were necessary for compliance with rock dusting standard section 75.403, or increased enforcement would result. Although Respondent notes that it was assigned only two repeat violation history points for Order No. 8428378 (R. Ex. 28), this fact confirms that Respondent had at least six recent violations of the same standard in the past fifteen months, and bolsters rather than undermines Kane's testimony that greater compliance efforts were necessary. Respondent did, however, make some efforts to comply with the rock dust requirement as demonstrated by the fact that the roof and ribs of entry #6 were adequately rock dusted and Respondent was supposed to regularly scoop the haulage way once per shift. Tr. 583, 630, 710. Accordingly, this factor tips slightly in favor of an unwarrantable failure finding.

With regard to whether the condition posed a high degree of danger, Kane determined that a coal dust explosion was unlikely and the violation was non-S&S. Tr. 590. No ignition sources were present. There was no methane in the air course in entry no. 6 and negligible methane at the face. Tr. 588, 620; P. Ex. 36, at 2. It is undisputed that the roof and ribs of entry no. 6 were adequately rock dusted. The Secretary's own documentation on explosions and rock dusting awareness states that "[f]loat coal dust on the ribs, roof, and other elevated surfaces (overhead dust) can be dispersed much more readily by an explosion than dust on the floor." P. Ex. 53, at 2. In these circumstances, despite Kane's testimony that in the unlikely event of a coal dust explosion, injury would be fatal and all sixteen miners working inby would be killed (Tr. 590-94; P. Ex. 36), I find that the *remote* possibility of a high degree of danger weighs against an unwarrantable failure finding.

The record establishes that the violative condition was open and obvious. Upon arriving at Unit 1 entry no. 6, Kane observed a lot of coal dust and float coal dust all over the entry and open and obvious to the casual observer. Tr. 565-66, 592. The piles of coal sampled on the return side ribs were 18-24 inches wide, and six to ten inches deep, and the dust extended approximately 160 feet across the entry. Tr. 578-79, 584; P. Ex. 35; P. Ex. 36, at 3. The piles that were cited extended approximately 18-24 inches in width from the left rib line into the entry. Tr. 578-89, 615-16; P. Ex. 35; R. Exs. 23(i), 23(k), 23(w). Accordingly, the obviousness factor supports an unwarrantable failure finding.

The operator had knowledge of the condition or at least should have known about it. Both management representatives Cummins and Shires were aware that ram cars traveling through the entry would strike the ribs, resulting in accumulations. Tr. 658-59, 672, 709. As noted, I have credited Kane's empirical estimate that the accumulations existed for about two shifts. Tr. 586. Thus, face bosses, who were required to walk through the entry to reach the working section and its face for on-shift examination purposes, should have noted and corrected the condition prior to the inspection. Tr. 591-92, 594. Accordingly, the knowledge factor supports finding an unwarrantable failure.

Finally, an operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, 31 FMSHRC at 1356 (citing *Enlow Fork Mining*, 19 FMSHRC at 17). The focus is on abatement efforts made prior to issuance of the citation or order. *Id.*

Concededly, Respondent made some efforts to rock dust to maintain the requisite incombustible content required by the standard. Nevertheless, even though Respondent did attempt to make efforts to eliminate section 75.403 violations generally, this evidence is not dispositive of the specific unwarrantable failure allegation at issue. Where an operator has actual knowledge of a violative condition, the Commission has considered the operator's abatement efforts of the specific violation in question. *See Consolidation Coal,* 22 FMSHRC at 330-33; *Windsor Coal*, 21 FMSHRC at 1005-07. As noted, both management representatives Cummins and Shires were aware that ram cars traveling through the entry would strike the ribs, resulting in

accumulations. Further, the accumulations existed for about two shifts and the face bosses examining the working section and face should have corrected the condition prior to the inspection. Accordingly, I conclude that Respondent failed to make adequate efforts to abate the known violation prior to its issuance. Respondent's inadequate abatement efforts also support an unwarrantable failure finding.

On balance, after considering and weighing the relevant Commission factors, I conclude that all of the factors except the high degree of danger factor support a finding that the violation in Order No. 8428378 was the result of Respondent's unwarrantable failure to comply with section 75.403. Moreover, even that factor had a remote possibility of a high degree on danger. Accordingly, I find an unwarrantable failure violation for Order No. 8428378.

Although the Secretary adduced no specific evidence or rationale to justify the special assessment in this matter, Respondent did so by introducing the Special Assessment Narrative Form received in evidence as R. Ex. 28. Given my high negligence and unwarrantable failure findings, I find that a specially assessed penalty was warranted here. Accordingly, guided by the criteria set forth in § 100.3 and the Special Assessment General Procedures, I assess a penalty of $45,000.

D. The September 12, 2011 Impact Inspection and the Alleged Violation of § 103(f) Walkaround Rights Regarding Citation Nos. 8431250, 8431251, and 8431252

1. Commission Precedent in *SCP Investments*

In *SCP Investments*, the Commission recognized that the qualified walkaround rights set forth in Section 103(f) of the Mine Act are mandatory, but their erroneous denial provides no basis for vacating citations or orders. *SCP Invs., LLC*, 31 FMSHRC 821 (2009). The Commission did not address the complex constitutional issue of whether a violation of the Due Process Clause of the Fourteenth Amendment would defeat the final clause of Section 103(f), which bars vacation of a citation or order for failure to comply with Section103(f) requirements. Respondent has raised that constitutional due process argument here. R. Br. at 76-78.

In *SCP Investments*, Commissioners Young and Cohen directed Commission judges to hold a suppression hearing and apply an exclusionary rule under which evidence obtained in violation of an operator's walkaround rights may be excluded when an operator can demonstrate prejudice in the preparation or presentation of its defense. 31 FMSHRC at 834-37. Chairman Jordan dissented and found that safety violations observed in contravention of walkaround rights do not constitute evidence obtained by virtue of an illegal action such as a violation of the Fourth Amendment's protection from unreasonable searches and seizures. She found it improper for the judge to consider denial of walkaround rights in deciding whether the Secretary established a

violation. *Id.* at 841-45. Commissioners Nakamura and Althen have not yet passed on the issue.[24]

Against this backdrop, the undersigned heard testimony from one company representative (Crit Stephenson) and three MSHA inspectors (Robert Hatcher, Larry Morris, and Phillip Stanley) regarding an impact inspection on September 12, 2011. Respondent argues that three citations – Citation Nos. 8431250, 8431251, and 8431252 – which inspector Hatcher wrote during that impact inspection when he walked a beltline unescorted, violated its walkaround rights under section 103(f) of the Mine Act.

The issues presented are whether Respondent's section 103(f) walkaround rights were denied with respect to the three citations issued by inspector Hatcher. If so, what is the appropriate remedy for such denial under extant Commission precedent? If not, did the violations occur as alleged, and what are the appropriate gravity and negligence findings and the appropriate penalties?

For the reasons set forth below, I find that Respondent's walkaround rights were violated during the instant impact inspection and I apply an exclusionary rule that examines whether Respondent has shown prejudice in its ability to observe the condition, as cited. Applying this analysis, I exclude all evidence in support of Citation 8431251, which resulted from the unescorted inspection, including the Secretary's photographs and Hatcher's testimony, and I find insufficient independent evidence to support that citation and the proposed penalty. Similarly, with regard to Citation No. 8431250, I also find that Respondent has been prejudiced by its inability to observe and challenge Hatcher's chemical test and his testimony based on that test. Accordingly, I exclude such evidence and conclude that there is insufficient evidence to support a violation of the cited standard. Finally, with regard to Citation No. 8431252, I find that Respondent has not been prejudiced by Hatcher's testimony or the photographs he took concerning this violation because Respondent could go back and check the belt alignment and its contact points with the brackets and stands after notice of the violation, and Respondent could observe the violation in essentially the same condition as inspector Hatcher observed it. Accordingly, I affirm that citation as non-S&S because it was unlikely to result in a lost workdays or restricted duty injury, with one person affected. I also affirm Hatcher's high negligence determination. Although Respondent was denied an opportunity to timely proffer mitigating circumstances to the inspector, Respondent was given an opportunity but failed to raise any mitigating circumstances after the fact and at trial. Accordingly, guided by the regular assessment criteria set forth in § 100.3(a) as applied to my findings above, I assess a penalty of $1,203.

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[24] Former Chairman Duffy found a suppression hearing unnecessary and would allow the judge during the crucible of a hearing to determine the existence and extent of prejudice when determining a violation and the appropriate penalty in the context of citations written after improper denial of walkaround rights on mine property. *SCP Invs. LLC*, 31 FMSHRC at 838-40.

1. Suppression Hearing Facts

On September 12, 2011, five MSHA inspectors arrived at WLPM to perform an impact inspection during the middle of the afternoon shift about 6:30-7:00 p.m. During that impact inspection, MSHA inspector Hatcher issued Citation Nos. 8431250, 8431251, and 8431252 at issue herein. Tr. 415, 421-22, 436, 468; P. Exs. 9, 10, 12.

Outby foreman Crit Stephenson had just transported a sick miner to the surface when he encountered MSHA field office supervisor Steve Miller and assistant district manager Mary Jo Bishop at the staging area of the bath house. Tr. 413-15. Miller was the lead MSHA supervisor for the WLPM. Tr. 496. Miller told Stephenson that MSHA was conducting an impact inspection and instructed him not to contact anyone or make any phone calls and to transport three inspectors (Hatcher, Morris, and Stanley) underground to different locations. Tr. 415.

Neither Miller nor Bishop testified at the hearing and the Secretary has adduced no evidence to rebut Stephenson's account of Miller's directive. Ordinarily, Stephenson would have obtained company escorts for each inspector, but he did not in this instance because he was he was told not to make any phone calls. Tr. 416.

Stephenson waited until MSHA inspectors Robert Hatcher, Larry Morris, and Phillip Stanley were ready to be transported underground. Tr. 415, 417, 469. Stephenson testified that Respondent usually uses a four-man safety ride to travel from the surface to the underground mine. Tr. 407. That ride left no room for additional escorts. I infer that MSHA knew this since inspectors were at the mine on a daily basis.

Inspector Morris testified that MSHA has impact inspections during the middle of a shift to catch an operator by surprise. Tr. 437. He further testified that when regular inspections are conducted at the start of a shift, Respondent has escorts waiting to accompany the inspectors, but MSHA is not required to wait for the escorts. Tr. 438.

Morris testified that when the inspectors arrived, they were already dressed and ready to go underground. Tr. 438. They went through the diesel shop area and offered three hourly miners the opportunity to accompany them as miners' representatives, but these miners declined. Tr. 441. Morris further testified that had there been more salaried employees (management representatives) present on the surface, they would have been offered walkaround rights as well because that is normal procedure. Tr. 441, 453. But on cross of Morris, Respondent established that although other management representatives besides Stephenson were not present, MSHA was not going to wait around for anyone else. Tr. 456.

Morris' testimony suggests that during an impact inspection, MSHA takes deliberate measures to show up mid-shift with several inspectors already dressed and ready to go when it is likely that most management representatives are already underground or gone for the day. Tr. 432, 452-53, 454-55. Morris further testified that section foremen can often be found underground on a miner or longwall unit and then offered walkaround rights, but seldom do such

representatives take MSHA up on the offer. Tr. 453-54. In this case, however, the impact inspectors targeted belt lines where foremen normally are not present. Tr. 454.

Respondent argues that MSHA did not follow its typical procedures under which MSHA inspectors, several of whom may be present at the large mine on a daily basis, arrive at the mine's safety department office prior to the commencement of the shift, announce their presence, and wait for a company escort and a miners' representative to accompany each inspector before beginning the inspection. R. Br. 63 (citing Tr. 405-06, 416, 438). Stephenson testified, and inspector Hatcher confirmed, that in such circumstances the inspectors would not tell their escorts where they were going until they left the surface. Tr. 406-07, 494. Stephenson testified, therefore, that there was no opportunity to provide advance notice of the inspection to miners working underground. Tr. 409. Stephenson further testified that this arrangement never caused any problems. Tr. 410. The Secretary did not establish any history of providing advance notice at the WLPM.

Hatcher testified that once Stephenson and the three inspectors began traveling inby, they stopped a vehicle coming out, which had some hourly miners on it, and asked if the miners wanted to accompany the inspectors. The miners declined and were instructed not to tell anyone that the inspectors were in the mine. Tr. 484-85. Morris confirmed that miner's representative Ron Pinkston was given and declined the opportunity to turn around and follow the inspection party. Tr. 458-59.

Eventually, inspectors Morris and Hatcher instructed Stephenson to drop them off at the 4th North and 1st West belt intersection. Tr. 417. Morris inspected the 4th North belt and wrote three citations that are not at issue, one for unsupported roof in the corner of an intersection on the belt line; one for a hole in a ventilation stopping; and one because four contract miners did not have multi-gas detectors. Tr. 457, 460-61.

After writing these citations without any management representative present, Morris contacted mine manager, Joel Hughes, because Morris could not leave the contract miners without multi-gas detectors. Tr. 447-451, 462. When Hughes arrived, Morris informed Hughes about the three citations that he had written and Hughes went and obtained multi-gas detectors for the contract miners. Tr. 450-451. Morris then offered Hughes the chance to accompany him as he walked the rest of the belt, but Hughes declined. Tr. 450.

As noted, Hatcher inspected the 1st West belt and wrote the three citations at issue, Citation Nos. 8431250, 8431251, and 8431252, between 9:45 and 10:45 p.m. Tr. 487; P. Exs. 9, 10, 12. In his notes, Hatcher wrote "Declined" in the space used to identify the miners' representative. But in the space used to identify the company representative, Hatcher wrote, "Impact Inspection." P. Ex. 14, at 1.

Citation No. 8431250 alleges a violation of 30 C.F.R. § 75.333(h) and states:

> The Kennedy equipment doors separating the intake (primary escape way) from the 1st West conveyor belt at cross cut #13 are not being maintained to serve the purpose for which they were built. The equipment doors next to the belt conveyor line are damaged. The west door has a hole at the top of the door 1 inch to 3 inches in width x 5 feet in length. The east door has a hole along the bottom of the door and is 12 inches to 3 inches in width x 6 feet in length. Air is leaking through the bottom and top of the doors to the belt line. This was determined by chemical smoke.
>
> Standard 75.333(h) was cited 28 times in two years at mine 1103054 (28 to the operator, 0 to a contractor).

P. Ex. 9. The citation was designated non-S&S, unlikely to result in a lost workdays or restricted duty injury, with one person affected, and the result of high negligence. *Id.* The proposed penalty is $873.

Citation No. 8431251 alleges a violation of 30 C.F.R. § 75.400 and states: as follows:

> Accumulation of combustible materials in the form of coal pressing have been allowed to accumulate under the bottom return roller at cross cut #37. The bottom return roller is in contact with the coal pressing and the mine floor. The belt was in service at time of inspection.

P. Ex. 10. The citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty injury, with one person affected, and the result of high negligence. *Id.* The proposed penalty is $13,268.

Citation No. 8431252 alleges a violation of 30 C.F.R. § 75.1731(b) and states:

> Conveyor belts must be properly aligned to prevent the moving belt from rubbing the structure or components. The bottom return conveyor belt on the 1st west conveyor belt line is not properly aligned and is rubbing the steel bottom roller hanger brackets at the following locations: 2 bottom brackets at cross cut #5 to cross cut #6, 1 bottom roller bracket at cross cut #6 to cross cut #7, and 2 bottom roller brackets at cross cut #7. Also the bottom return belt is in contact with 1 bottom belt stand on the south side of the conveyor belt at cross cut #10 and at cross cut #37 the bottom return conveyor belt has bee[n] in contact with the bottom belt stand and has cut through the steel 2 inch bottom belt stand for a depth of 1¾ inches.

P. Ex. 12. The citation was designated non-S&S, unlikely to result in a lost workdays or restricted duty injury, with one person affected, and the result of high negligence. *Id.* The proposed penalty is $1,203.

The Secretary provided no evidence that Respondent's representatives were informed of or learned of the violations written by Hatcher shortly after he observed them.

Meanwhile, after dropping Hatcher and Morris off, Stephenson continued driving inspector Stanley inby and dropped him off at the tail of the 2nd West belt. Tr. 418, 469. At that location, hourly belt shoveler Lonnie Frederickson was present and Stephenson asked Frederickson to act as a miner's escort with Stanley. Tr. 418-19. Stephenson then parked at the head of the 2nd West belt and rejoined Stanley. Tr. 418-420.

After accompanying Stanley for part of his inspection of the 2nd West belt, Stephenson subsequently met Hatcher and then Morris, before driving all three inspectors out of the mine. Tr. 420-21. On the surface, the inspectors met with the midnight-shift mine manager, Nathan Genesio, and the midnight-shift miners' representative, Martin Long, during the closeout conference. Neither Genesio nor Long raised any issue about denial of walkaround rights. Tr. 463.

It is undisputed that no company escort or walkaround representative was with Hatcher when he wrote the three citations at issue during his inspection of the 1st West belt. Tr. 420. Respondent argues that this was because Miller told Stephenson above ground that he would not permit Stephenson to make any phone calls to obtain additional escorts. R. Br. 70-71. The record establishes that Respondent provides its escorts with training on how to take samples, heat gun measurements, photographs and notes, and how to gather other information relating to particular cited conditions. Respondent does this, in part, to facilitate the presentation of mitigating factors to the inspector, which address gravity and negligence findings in a citation/order. Tr. 410-413. Of particular relevance, Stephenson testified that if an inspector, such as Hatcher here, was walking a belt line and found a roller turning in accumulations or a belt rubbing at the stand, the escort would use a heat gun to determine the temperature of the frictional ignition source and assess the likelihood of fire. Tr. 411. Similarly, for a rock dusting or accumulation citation, the escort would take a sample to determine the combustibility content. Tr. 411-12.

By contrast, the Secretary argues that at no time during Hatcher's inspection did any management representative seek Hatcher out in an effort to accompany him. P. Br. 66 (citing Tr. 489). In addition, the Secretary emphasizes that Stephenson did not ask to make any phone calls after he dropped off the inspectors underground, although he had the ability to call anywhere in the mine. In fact, Stephenson never asked any of the three inspectors whether he could call additional company representatives to accompany the inspectors once they were in place. P. Br. 64-65 (citing Tr. 424, 444, 470). Respondent notes, however, that Morris and Hatcher began their inspections as soon as they got off their ride upon arrival at their locations, and based on Morris's testimony about not waiting on the surface, Respondent argues that the inspectors were

not going to wait for management representatives or escorts to arrive underground. R. Br. 62, at n. 45, 71, 72 (citing Tr. 456, 495, 500-01).

Morris testified that Stephenson could have made phone calls once the inspectors were in place because that would not have constituted pre-notification. Tr. 444. Hatcher also testified that Stephenson could have asked for a management representative to accompany Hatcher on his inspection. Tr. 485-86.

Stephenson never indicated to the inspectors that he was upset that more management representatives were not with him to accompany the inspectors. Tr. 424-25, 444, 470, 485. To the contrary, Stanley described Stephenson as very amicable. Tr. 470. The Secretary, however, failed to establish that any inspector advised Hatcher that he could call additional representatives once the inspectors were in place or extended him the opportunity to do so after Miller issued his directive on the surface that Stephenson not call anyone.

2. Legal Analysis

a. No Fourth Amendment Violation is Present

At the outset, I reject Respondent's argument that any denial of section 103(f) walkaround rights, by extension, is also a violation of the Fourth Amendment's protection "against unreasonable searches and seizures" because the opportunity to accompany inspectors is critical to the Mine Act's "inspection program," which justifies warrantless searches. *Cf., New York v. Burger*, 482 U.S. 691, 703 (1987). In *Donovan v. Dewey*, the Supreme Court held that warrantless inspections of mines pursuant to Section 103(a) of the Mine Act are not per se unreasonable and therefore do not violate the Fourth Amendment. 452 U.S. 594, 605 (1981). Respondent argues that warrantless inspections, even in the context of a pervasively regulated industry such as mining, are deemed reasonable only if three criteria are met. *Burger*, 482 U.S. at 702 (1987). First, there must be a substantial government interest that informs the regulatory scheme to which the inspection is made. *Id.; Donovan*, 452 U.S. at 602. Second, the warrantless inspection must be necessary to further the regulatory scheme. *Burger*, 482 U.S. at 702; *Donovan*, 452 U.S. at 600. Third, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutional substitute for a warrant. *Burger*, 482 U.S. at 703; *Donovan*, 452 U.S. at 604-605.

It is noteworthy that an "impact inspection" is not mentioned in the Mine Act or any MSHA-promulgated regulation. It is a special initiative following the explosion at the Upper Big Branch Mine (UBB) to enhance surprise and promote miner safety and health, the paramount concern of the statute. Monthly impact inspections, which began in force in April 2010 following the explosion at UBB, involve mines that merit increased agency attention and enforcement due to poor compliance history or particular compliance concerns. These matters include: high numbers of violations or closure orders; frequent hazard complaints or hotline calls; plan compliance issues; inadequate workplace examinations; a high number of accidents, injuries or illnesses; fatalities; and adverse conditions, such as increased methane liberation,

faulty roof conditions, inadequate ventilation and accumulations of respirable dust. *See, e.g.*, Press Release No. 13-2103-NAT, MSHA, MSHA Announces Results of September Impact Inspections (Oct. 31, 2013), *available at* http://www.msha.gov/MEDIA/PRESS/2013/NR131031.asp.

Typically, an impact inspection involves multiple inspectors who simultaneously arrive unannounced at a pre-selected mine site, capture the phones to preclude advance notice, and spread out to find as many violations as possible. MSHA targets mines with a particular history of compliance problems. Such problems include use of tactics to hide violations from MSHA; employee hazard complaints or anonymous hotline calls; non-compliance with MSHA-approved plans; inadequate workplace exams; a high injury rate; a fatality; a pattern of violations; or hazardous conditions at the mine. *See, e.g.,* Michael T. Heenan, *Dreaded Impact*, Pit & Quarry, Nov. 2012, at 50. As in this case, these surprise impact inspections often occur mid-shift or during night shifts, when fewer representatives are available to accompany the inspectors on behalf of the operator. *Id.*

As practitioner Heenan points out, however, such inspections are not really new because MSHA has been doing "blitz" inspections since the earliest days of the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), and they have continued under the Federal Mine Safety and Health Act of 1977 (Mine Act) as consistent with provisions that encourage "frequent inspections." *Id.* After the UBB disaster, however, MSHA's impact inspections are conducted nearly every month under a formalized program in which mines are selected according to the above-referenced criteria and the results are publicly announced. *Id.* Accordingly, I find that the certainly and regularity of impact inspections targeting particular mines that meet specific criteria satisfies constitutional search and seizures concerns irrespective of whether distinct and separate statutory walkaround rights are violated.[25]

Furthermore, in the circumstances of this case, I find that the public interest in promoting safety at the WLPM outweighs the inconvenience of unannounced, warrantless impact inspections that make the exercise of statutory walkaround rights more difficult. Section 103(a) of the Act explicitly gives MSHA inspectors the right to enter any mine without any advance notice of an inspection. 30 U.S.C. § 813(a). In fact, section 103(a) of the Act grants MSHA inspectors the right to conduct warrantless inspections in the inherently dangerous and pervasively regulated mining industry to ensure compliance with mandatory health and safety standards without violating the Fourth Amendement. *Donovan v. Dewey*, 452 U.S. 594, 596, 603, 605 (1986). Accordingly, mine operators must be aware and expect continuous and frequent impact inspections without a warrant or probable cause.

[25] Respondent's Fifth Amendment due process arguments are discussed separately below under the *Matthews v. Eldridge* paradigm. *See* 424 U.S. 319 (1976).

b. The Statutory Provisions in Tension: Section 103(a) Must be Balanced with Section 103(f)

Section 103(a) of the Mine Act states in part, "[i]n carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . . ."

Section 103(f) of the Mine Act states in pertinent part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine . . . . Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

The Secretary has not issued any regulations under section 103(f). Nor has the Secretary issued any regulations to govern impact inspections, which have become prevalent since the April 2010 UBB coal mine disaster.

I agree with the Secretary that the ability of MSHA inspectors to protect miners from deadly hazards without advance notice of an inspection under section 103(a) of the Mine Act must be balanced with the operator's right to accompany the inspector under section 103(f) of the Mine Act during an inspection. P. Br. 61. This case presents the novel issue of how the Commission should determine such balance during an impact inspection involving multiple inspectors when MSHA specifically informs the operator's walkaround representative not to make any phone calls and to escort multiple inspectors underground. I conclude that MSHA is obligated to provide an opportunity to an operator representative to accompany each inspector for the purpose of aiding each inspection. Otherwise, statutory rights under section 103(f) effectively vanish during impact inspections.

In this case, there was no outright denial of Respondent's walkaround rights as in *SCP Investments*. Respondent's representative Stephenson was given an opportunity to accompany the Secretary's authorized *representatives*. But Stephenson could not be in three places at once to aid the inspectors when they fanned out underground, and he was specifically instructed by Miller, the lead MSHA supervisor for the WPLM, not to make any phone calls.

The statutory language of section 103(f) uses the word "representative" in the singular, i.e., "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection . . . . " In the legislative history, however, the Senate

Committee explained that section 103(f) requires "that *representatives* of the operator and miners be permitted to accompany *inspectors* in order to assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection." *SCP Invs.*, 31 FMSHRC at 831 (citing Rep. No. 95-181, at 28 (1977), *reprinted in* S. Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978). Thus, the Commission has held that Section 103(f) affords both *representatives* of operators and *representatives* of miners the right to accompany an MSHA inspector during a "physical inspection of [the] . . . mine" and to "participate in pre- or post-inspection conferences held at the mine." *See Sec'y of behalf of Wayne v. Consolidation Coal Co.*, 11 FMSHRC 483, 488 (April 1989) (citing 30 U.S.C. § 813(f)).

This right to accompany an inspector is not an unqualified right because it is "[s]ubject to regulations issued by the Secretary," requires that a representative "be given an opportunity to accompany" the inspector, and grants the inspector discretion to permit additional representatives where he determines that more than one walkaround representative would aid his inspection. *Id.* (*citing* 30 U.S.C. § 813(f); *Emery Mining Corp.*, 10 FMSHRC 276, 279 (Mar. 1988)). Furthermore, the Secretary has given MSHA inspectors the authority to limit the number of representatives participating in an inspection, consistent with the primary obligation to carry out inspections in a thorough, detailed, and orderly manner. Interpretative Bulletin, 43 Fed. Reg. 17546 (1978); *Emery Mining Corp,* 10 FMSHRC at 289, n. 13. More specifically, the Secretary's Interpretative Bulletin, which sets forth guidelines for the inspector's interpretation and application of section 103(f) provides that "[w]here necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection." 43 Fed Reg. at 17546.

In this case, however, the Secretary has failed to show that Miller's directive to Stephenson not to make any phone calls was necessary to assure a proper impact inspection and preclude advance notice. Rather, on this record I conclude that MSHA failed to give Respondent an opportunity to exercise its full section 103(f) walkaround rights when Miller instructed Stephenson to transport three inspectors underground and not to contact anyone or make any phone calls. Tr. 415. Miller explicitly denied Stephenson the "opportunity" to contact other management officials to act as operator representatives to aid in the inspection. I credit Stephenson's testimony that he did not attempt to obtain company escorts for each of the three inspectors (Hatcher, Morris, and Stanley) because he was told by Miller not to make any phone calls. Tr. 416. Miller's directive runs counter to MSHA's statutory obligation to afford an operator representative an opportunity to accompany each authorized representative of the Secretary during the physical inspection of the mine.

I reject the Secretary's argument that MSHA did not deny Respondent an opportunity to escort the inspectors because Stephenson should have called for an escort after dropping off each inspector at the various locations. As noted, Stephenson was given an explicit directive by Miller not to call anyone, and another supervisory official (Bishop) was present when Miller's directive was given. Tr. 415. Stephenson recognized them as supervisory officials for MSHA.

Id. I decline to require Stephenson to buck Miller's direct order and invoke or insist on the opportunity for one-to-one walkaround rights either on the surface or underground as a means of securing the opportunity that the statute requires MSHA to give. *But see NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975) (employee's statutory right to union representation during an investigatory interview arises only where the employee requests representation; hence, employee may forego his statutory right and participate in an interview unaccompanied by his union representative). Of course, the Commission is free to fashion a policy decision to the contrary.[26]

Miller's pre-emptive directive to Stephenson suggests that MSHA had little interest in affording Respondent its statutory opportunity to have a representative escort each inspector for the purpose of aiding their impact inspection. Both on the surface and underground, Stephenson complied with the government's directive and did not call any other management officials to act as company escorts. Tr. 416. As a result, Hatcher's inspection of the 1st West belt was unescorted. Although inspectors are not required to wait for management escorts and can "walk" into a mine (Tr. 456-57),[27] section 103(f) places the onus on MSHA to give an opportunity to company representatives to accompany the inspectors for purposes of aiding their inspection. In short, Miller's directive, which Stephenson followed, denied Respondent an opportunity to escort Hatcher's inspection.

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[26] There appears to be some confusion as to whether the Commission formulates any policy. Certainly, it does not formulate enforcement policy, left to MSHA. But the Mine Act does gives the Commission jurisdiction over "substantial question[s] of law, policy or discretion," 30 U.S.C. § 823(d)(2)(A)(ii)(IV), and the legislative history makes clear that "[t]he Commission was established as the 'ultimate administrate review body' under the Act due to the recognition that 'an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.'" *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 29, 1979) (citing S. Rep. No. 95-181, at 13 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 601, 635 (1978)). The Supreme Court has also recognized the *unique* role of the Commission in formulating a uniform and comprehensive interpretation of the Mine Act. *Compare Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (affirming the Commission's role as the arbiter of questions of interpretation of the Mine Act) with *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157-58 (1991) (emphasizing the narrowness of the holding that the OSH Act did not grant OSHRC the authority to interpret OSHA regulations); *see also Speed Mining, Inc.*, 28 FMSHRC 773 (Sept. 2006) (Chairman Duffy, concurring) (concurrence provides a detailed examination of the differences in the OSH Act and the Mine Act).

[27] See *DJB Welding*, 32 FMSHRC 728, 736 (June 2010) (ALJ) (inspector not obligated to delay inspection or wait longer than reasonable for a representative to arrive, citing *F.R. Carroll, Inc.*, 26 FMSHRC 97, 98 (Feb. 2004 (ALJ) (operator who was "too busy" to accompany inspector had responsibility to designate another representative).

The Secretary justifies Miller's directive to Stephenson not to call company escorts on the grounds that Respondent cannot provide advance notice of an inspection. P. Br. 61. On this record, that justification is a red herring. All inspections preclude advance notice and operators are charged with this knowledge. The Secretary failed to establish that affording Respondent an opportunity to provide an escort for inspector Hatcher would compromise any protection against advanced notice of the inspection. On the contrary, Stephenson testified that regular inspections with multiple inspectors are common at the WLPM. Tr. 405, 438. Normally, during such inspections, MSHA provides Respondent with an opportunity to obtain a company representative for each inspector before the beginning of the inspection. Tr. 406, 416. Before such inspections, the inspectors would not tell the representatives where they were going to inspect so as to reduce any likelihood of advanced notice. Tr. 406-07, 494. These inspection procedures worked and the Secretary has not alleged any problems of advanced notice at the WPLM. Tr. 504. Therefore, on this record, the Secretary's generalized concern over the possibility of advanced notice do not override the Respondent's section 103(f) right to be given an opportunity to aid in each portion of the impact inspection, including Hatcher's inspection.

In addition, I find it telling that Hatcher's notes state "Impact Inspection" in the space used to identify a company representative, suggesting that MSHA may think that such inspections are exempt from 103(f) requirements. At the very least, it would appear that Hatcher never intended for there to be a company representative with him during the impact inspection.

I reject any argument that Stephenson was an operator representative, who was given an opportunity to accompany Hatcher during his inspection. After transporting Hatcher to the 1st West belt, Stephenson was required to drive further inby and drop inspector Stanley off.

I also reject the argument or any suggestion that section 103(f) rights do not apply in impact inspections. Rather, I agree with Respondent that the Secretary cannot justify MSHA's failure to offer an opportunity to an operator representative to accompany inspector Hatcher simply by characterizing the September 12, 2011 inspection as an "impact inspection" designed to preclude advance notice. I note that inspector Morris, on cross examination, conceded that the impact inspection was part of a regular E01 inspection. Tr. 436. More importantly, the Commission has held that walkaround rights under Section 103(f) apply to *all* inspections. *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994) (issue of miners' representative). In fact, one Commission judge has characterized the right of a mine operator to be afforded an opportunity to be present and to accompany an inspector as a fundamental right and found that MSHA inspectors must make every reasonable effort to give a mine operator an opportunity to exercise its walkaround rights. *DJB Welding Corp.*, 32 FMSHRC 728, 733, 735 (June 2010) (ALJ) (emphasis added).

Although impact inspections make it more difficult for operators to invoke walkaround rights, the enhanced miner safety and health that results from impact inspections outweighs this difficulty. Furthermore, operator preparation and training for impact inspection contingencies can alleviate this concern.

On the other hand, MSHA cannot employ this successful and important initiative to deny an operator its statutory right to accompany an inspector for the purpose of aiding such inspection under section 103(f). As the Commission has stated, "[w]e are not prepared to restrict the rights afforded by [section 103(f)] absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation.") *Consolidation Coal Co.,* 3 FMSHRC 617, 618 (Mar. 1981). I find no clear indication in statutory language, legislative history, or regulation to limit section 103(f) rights during impact inspections.

In sum, I conclude that MSHA failed to give Respondent an opportunity to accompany inspector Hatcher for the purpose of aiding his inspection of the WLPM during the impact inspection on September 12, 2011. This failure violated Respondent's statutory walkaround rights under section 103(f) of the Mine Act.

As a remedy for the statutory infringement of Respondent's walkaround rights, I apply an exclusionary rule and determine what, if any, evidence from Hatcher's inspection of the 1st West belt should be excluded if Respondent can demonstrate prejudice in the preparation or presentation of its defense. *SCP Invs. LCC,* 31 FMSHRC at 835-37 (citing *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840, 846 (D.C. Cir. 2004); *Pullman Power Prods., Inc. v. Marshall*, 655 F.2d 41, 44 (4th Cir. 1981); *Marshall v. Western Waterproofing Co.*, 560 F.2d 947, 951-52 (8th Cir. 1977); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976); *Chicago Bridge*, 535 F.2d at 376; *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 833-34 (5th Cir. 1975); *Titanium Metals Corp. of Am.*, 7 OSHC 2172 (Jan. 1980); *Laclede Gas Co.*, 7 OSHC 1874 (Oct. 1979); *Able Contractors, Inc.*, 5 OSHC 1975 (Oct. 1977)).

c. The Constitutional Due Process Issue

Before addressing an exclusionary rule remedy for the statutory infringement of Respondent's walkaround rights, I first address Respondent's argument that the erroneous denial of its right to be given an opportunity to participate in Hatcher's inspection was a violation of constitutional due process. I do so because an argument can be made based on non-precedential decisions of Commission judges that a denial of due process may be grounds for vacating citations otherwise jurisdictionally and substantively valid, i.e., a potentially stronger remedy than application of an exclusionary rule. *See SCP Invs., LLC.*, 32 FMSHRC 119, at 124-25 (Jan. 2010) (ALJ after remand) (*citing American Coal Co.*, 29 FMSHRC 941, 952-53 (Dec. 2007)); *Gates & Fox Co. v. OSHRC*, 790 F.2d 1189, 1193 (9th Cir. 1982) (considerations of due process prevent imposition of a civil penalty and validation of a citation otherwise properly issued); *DJB Welding*, 32 FMSHRC at 734-35 (suggesting, even after the Commision's decision in *SCP Investments*, that a violation of walkaround rights that results from an abuse of discretion provides a sufficient basis for vacating citations). It is troubling that the Secretary does not even address the Respondent's due process arguments on brief, even though the Secretary was clearly on notice at the hearing that Respondent was raising this constitutional issue when Respondent unsuccessfully moved to vacate the citations written by inspector Hatcher. Tr. 398-400.

In its remand in *SCP Investments*, Commissioners Young and Cohen noted that "[t]he only possible basis to overcome the [jurisdictional] statutory language would have to be constitutional in nature, such as a violation of the Due Process Clause," a "complex issue" not presented in that case. 31 FMSHRC at 834, fn. 14. Extant Commission case law establishes that violations of due process are grounds for vacating citations otherwise jurisdictionally and substantively valid. *American Coal Co.*, 29 FMSHRC at 952-53 (citing *Gates & Fox Co. v. OSHRC*, 790 F.2d at 1193). Consequently, the constitutional issue presented in this case is whether MSHA's denial of the Respondent's statutory section 103(f) walkaround right to accompany inspector Hatcher when he wrote citations on the 1st West belt line was a due process violation. Especially cognizant of the judge's analysis of this issue on remand from the Commission in *SCP Investments*, I conclude that MSHA's conduct during the subject impact inspection constituted a constitutional violation of procedural due process.

The Fifth Amendment provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Clearly, no deprivation of life occurred here. Nor do I find any deprivation of a liberty interest. Concededly, the Supreme Court recognized in *Board of Regents v. Roth*, that the definition of liberty must be "broad" and include "not merely the freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of . . . conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." 408 U.S. 564, 576-78 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923)). Despite this broad definition, the *Roth* court did not look to the "weight but to the nature of the interest at stake" and held that the opportunity to keep a teaching positions at a state university, or other government job was not comparable to those freedoms enunciated in *Meyer*. 408 U.S. at 575. Similarly, I find that the mandatory language in section 103(f) creating a statutory right in an operator representative to be given an opportunity to accompany an MSHA inspector for the purpose of aiding in an inspection does not implicate a major loss of personal freedom or liberty such that due process protections must be accorded. *Compare Goss v. Lopez*, 419 U.S. 565 (1975) (ten-day suspension from high school implicates liberty interest), *and Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation), *and Morrisey v. Brewer*, 408 U.S. 471 (1972) (parole revocation), *with Sandin v. Conner*, 515 U.S. 472 (1995) (mandatory language in state prison regulations will not create a liberty interest for placement in solitary confinement because of prison misconduct unless the deprivation imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life).

The property interest analysis is more difficult. The *Roth* Court recognized that a property interest is "a legitimate claim of entitlement" that arises, not from the Constitution itself, but is created and defined "by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 576-78. Thus, Respondent must demonstrate that some authoritative source of law "establishes a definite standard to guide the decision . . . rather than confiding the decision to the discretion of the administering authorities." *See Gilbert v. Frazier*, 931 F.2d 1581 (7th Cir. 1991). For example, in *Goldberg v. Kelly*, where

the Court finally abandoned the right-privilege distinction, the welfare claimants had a property interest at stake because the underlying federal legislation provided that individuals who met certain criteria had a legal right to receive welfare payments. 397 U.S. 254, 261-63 (1970); *see also Mathews v. Eldridge*, 424 U.S. 319 (social security benefits).

Here, Respondent has demonstrated a legitimate claim of entitlement to be given an opportunity to accompany inspector Hatcher during his inspection of the 1st West belt. Like in *Goldberg v. Kelly* and *Mathews v. Eldridge,* this right is grounded in federal statute, specifically section 103(f) of the Mine Act. The denial of Respondent's statutory right to be given an opportunity to accompany inspector Hatcher during the impact inspection for the purpose of aiding such inspection also operated to deprive Respondent of an opportunity to provide exculpatory information or a different version of the facts during the course of the inspection, which could have been relied on during participation in the post-inspection conferences at the mine, and in its defense of the civil penalty petition at trial. Obviously, any civil penalty assessed compels Respondent to relinquish money, which is a tangible property interest.

Despite the Secretary's silence, I recognize that an injury to a protected property interest does not qualify as a deprivation if the injury is inflicted through mere negligence rather than deliberation. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986). On this record, however, I find that MSHA made a deliberate decision to limit walkaround rights during the impact inspection. Two facts lead inexorably to this conclusion. Lead field office supervisor Miller instructed Stephenson not to make any phone calls with the foreseeable result that Stephenson, without disobeying the government edict, could not obtain sufficient company representatives. Second, Hatcher's notes indicate that no company representative was needed because this was an impact inspection.

Since I have determined that a constitutionally protected property interest was infringed, I next address what procedures the Constitution requires for the violation. In *Matthews v. Eldridge*, the Court endeavored to maintain flexibility in due process analyses based on the particular situation presented. The Court looked to three factors in order to determine what process is due.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value if, any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. at 334-35 (1976) (citing *Goldberg v. Kelly,* 397 U.S. at 263-271).

Addressing the first factor, the deprivation of Respondent's private interest to accompany inspector Hatcher for the purpose of aiding in his inspection is readily apparent. A major

objective of the Mine Act is to encourage the efforts of mine operators and miners "to prevent the existence of . . . [hazardous] conditions and practices in . . . mines." 30 U.S.C. § 801(e). Accordingly, section 103(f) of the Act confers the right of representatives of mine operators and miners to accompany inspectors during inspections "for the purpose of aiding such inspection." 30 U.S.C. § 813(f). *See SCP Invs.* LLC, 32 FMSHRC 119, 126-27 (Jan. 2010) (ALJ). Skirting the statutory walkaround requirement during an impact inspection or otherwise could deprive the inspector of important information that would have been supplied to him by the operator representative had one been given an opportunity to accompany the inspector. *Cf., SCP Invs. LLC*, 31 FMSHRC at 843 (Jordan, Commr., dissenting).

With regard to the second factor, I have determined that MSHA's instant impact inspection, as carried out consistent with Miller's directive that Respondent not make any phone calls, erroneously deprived Respondent of its statutory right to be given an opportunity to accompany inspector Hatcher during his inspection of the 1st West belt. The Secretary, having failed to even address the complex due process argument raised by Respondent, obviously has failed to proffer any additional or substitute procedural safeguards for protecting Respondent's walkaround rights.[28] But this does not mean that there are none. Even though the statutory walkaround violation that I have found constitutes a denial of due process because of the erroneous denial of Respondent's right to be given *an opportunity* to participate in Hatcher's inspection,[29] I find that any process due for violation of this statutory right is constitutionally satisfied by application of an exclusionary remedy as explained by the Commission plurality in *SCP Investments*. This finding accounts for the Commission's unanimous conclusion that even MSHA's intentional failure to honor statutory walkaround rights under section 103(f) does not prevent MSHA from taking enforcement action under the last sentence of that provision, which precludes vacature. *SCP Invs. LLC*, 31 FMSHRC at 831.

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[28] On remand in *SCP Investments,* the judge rejected the Secretary's assertion that a close-out conference is an acceptable substitute for walkaround rights. He found clear legislative history that Congress did not intend to empower the Secretary to arbitrarily deny section 103(f) walkaround rights in favor of a substitute procedure. 32 FMSHRC at 127-28.

[29] On remand in *SCP Investments*, the judge found "[i]t is clear that the denial of Stone's right to accompany the inspector deprived the mine operator of its statutory right to provide exculpatory information during the course of the inspection." 32 FMSHRC at 125. It is not clear to me that there is any such statutory right. Rather, section 103(f) provides a right to be given "an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103](a), for the purpose of aiding such inspection . . . ." Providing exculpatory information and aiding the inspection are not necessarily the same. The judge then found "a denial of due process because of the erroneous denial of Stone's right to participate in the inspection," and applied the *Matthews v. Eldridge* factors "for determining whether a violation of due process has occurred," instead of for determining what process is due for the termination of a clear and tangible property interest, such as the social security benefits at issue there. *SCP Invs. LLC*, 32 FMSHRC at 126 (citing *Matthews v. Eldridge*, 424 U.S. at 334-35).

Finally, turning to the Government's interest, including the function involved and the fiscal and administrative burdens that [any] additional or substitute procedural safeguards would entail, I have no doubt that impact inspections, which are designed for surprise and to preclude advance notice, enhance miner safety and health. But MSHA can still employ this successful and important initiative without denying an operator its statutory right to be afforded an opportunity to accompany each inspector on an impact inspection for the purpose of aiding the inspection under Section 103(f). MSHA's provision of this mandatory but qualified right imposes no significant fiscal or administrative burden on MSHA's inspection regime.

In fact, affording Respondent an opportunity to participate in Hatcher's inspection, furthers, rather than burdens, the Government's interest in encouraging a safer mining environment. There can be little doubt that Respondent's representatives are familiar with the particular conditions that are unique to the WLPM. A representative of a mine operator can alert an inspector to potential dangers based on familiarity with the mine. Mine operator representatives, like miner representatives, are assets to a successful mine inspection, which seeks to identify hazardous conditions and require remedial actions to alleviate the dangers. *See SCP Invs. LLC*, 32 FMSHRC at 126. Accommodating walkaround rights does not result in any significant administrative burden other than having to deal with a representative who may point out hazards, offer justifications, proffer mitigating circumstances, and collect evidence that may support a perspective contrary to the inspector's view at hearing.

Accordingly, MSHA must accommodate an operator's statutory walkaround rights during an impact inspection with as little vitiation as is necessary to perform its inspection function effectively without advance notice. Here, MSHA has not done that. Miller's directive precluding any phone calls to invoke a statutory right, was less designed to preclude advance notice, already outlawed under section 103(a), than a purposeful effort to preclude Respondent's representatives from accompanying the three inspectors. Hatcher's notes bolster this inference. MSHA had many options available to afford Respondent an opportunity to aid in the impact inspection. And since MSHA failed to do so, an exclusionary rule can be applied to remedy the violation and provide a sufficient procedural safeguard should the operator demonstrate that it was prejudiced by the violation.

d. The Exclusionary Rule and Evidence of Prejudice

Applying an exclusionary rule pursuant to the plurality opinion of the Commission in *SCP Investments*, I determine whether MSHA's actions during the impact inspection prejudiced Respondent. Under this approach, once a determination is made, as here, that an operator's walkaround rights were violated, the Commission determines what prejudice, if any, resulted from the violation and what, if any, evidence proposed for admission by the Secretary should be excluded because of prejudice to the operator, i.e., some, none, or all of the evidence resulting from the inspection. 31 FMSHRC at 836-37.

Relying on the judge's post-remand decision in *SCP Investments*, Respondent argues that an arbitrary denial of section 103(f) rights is prejudicial per se, regardless of whether it interferes with an operator's ability to defend itself. R. Br. 78-79 (citing *SCP Invs.*, 32 FMSHRC at 128-29). While I am sympathetic to this argument, the Commission requires a showing of actual prejudice to the preparation or presentation of the defense. *See, e.g., Long Branch Energy*, 33 FMSHRC 1960 (Aug. 2011) (ALJ), *rev'd*, 34 FMSHRC 1984, 1992 (Aug. 2012) (Duffy, Comm'r, dissenting) (rejecting Supreme Court's "danger of prejudice" factor enunciated in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993), and requiring that the prejudice be "real" or "substantial" and demonstrated by a specific showing tied to "the preparation and presentation of the operator's case."); *Chicago Bridge,* 535 F.2d at 374, 377 (essentially rejecting company argument that to allow the Secretary to bypass the statutory walkaround right will permit the inspection process to operate on the employer in an "inherently prejudicial manner," and emphasizing *both* substantial compliance with the walkaround right and the failure of the company to demonstrate "any concrete prejudice to its defense by the exclusion from the inspection party"). On this record, however, Respondent has made a sufficient case that it was actually prejudiced in the preparation or presentation of its typical defense to the citations.

Actual prejudice occurs when an operator can show that the denial of section 103(f) rights resulted in an inability to prepare or present its defense on the merits before the Commission. *See SCP Invs. LLC*, 31 FMSHRC at 835 (Aug. 2009) (citing *Titanium Metals Corp. of Am.*, 7 OSHC 2172 (Jan. 1980); *Laclede Gas Co.*, 7 OSHC 1874 (Oct. 1979); *Able Contractors, Inc.*, 5 OSHC 1975 (Oct. 1977)). For example, an operator's ability to defend itself is adversely affected by the absence of an opportunity to provide material contemporaneous information at the time of the inspection. *SCP Invs. LLC*, 32 FMSHRC at 128-29; *but see Marshall v. W. Waterproofing Co.*, 560 F.2d 947, 951-52 (8th Cir. 1977) (a showing that a large number of citations were withdrawn and a small number of citations were sustained after a complaint was filed, coupled with the fact that an employer had to post all citations at the workplace, do not establish prejudice to an operator's ability to defend on the merits); *Titanium Metals Corp. of Am.*, 7 OSHC 2172 (a claim that failure to comply with the walkaround provision could create labor-management problems is not the type of prejudice contemplated by the OSHA). Rather, actual prejudice occurs when the operator makes a specific showing that the misbehavior prejudiced it in preparing or presenting its defense. *A. J. McNulty & Co.*, 19 OSHC 1121, 1125 (Oct. 2000) (finding no prejudice since the operator's representatives learned of the violations almost immediately after the inspector observed them); *see also Laclede Gas Co.*, 7 OSHC 1874 (Oct. 1979). Essentially, this actual prejudice requirement puts the burden on the operator to establish the speculative possibility that the inspection would have revealed different facts or the operator would have been aided in preparation of its typical defense to the citations.

On remand in *SCP Investments*, the judge recognized the difficulty in applying an exclusionary hearing to determine what information, if any, would have been provided during the inspection in defense of each citation.

> Having been deprived of the opportunity, we will never know what information Stone would have provided during the December 2005

> inspection. Any testimony he now may give concerning what he might have said is entitled to little weight because it is remote in time and self-serving. In other words, the Secretary's denial of Stone's due process has undermined the value of Stone's testimony. Certainly, the Government should not benefit from its own misconduct. Rather, two Commissioners suggested that I determine, in view of the denial of Stone's 103(f) walkaround right, whether "none, some, or all of the evidence resulting from the inspection" should be excluded. 31 FMSHRC at 836-37.
>
> Once due process issues arise, all direct and indirect evidence obtained as a result of a government official's abuse is excluded. *See, e.g., Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (suppression of "fruit of poison tree"); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) . . . . Having given the Secretary the opportunity to address the due process issue, and, having determined that Stone's right to due process was violated, all evidence obtained as a result of the inspector's observations of the mine conditions during the inspection must be excluded. *Weeks, supra.*

I decline to exclude all direct and indirect evidence obtained as a result of MSHA's violation of an operator's walkaround rights. In my view, such a result essentially compels exclusion without initial assessment of the prejudice issue in application of an exclusionary rule.

Given the difficulty of determining what evidence would have been presented had an operator's statutory rights not been violated by MSHA, I am of the view that a practical, flexible and fact-based test of prejudice should take into account the dynamic nature of the mining industry. Accordingly, when an operator is put on notice of the safety or health violation at issue, it is prejudiced if it is unable to go and observe the condition or practice cited as the inspector saw it in order to defend itself against the alleged condition. After all, the operator has only been deprived of the opportunity to accompany the inspector and observe or test as the inspector did. If this opportunity is still available, the operator is not actually prejudiced by the denial of the opportunity to observe and test. Although there may be a denial of the opportunity to timely proffer mitigating circumstances to the inspector, the operator can still raise mitigating circumstances in an attempt to reduce a negligence determination after the fact and at trial.

In this case, Respondent has offered some evidence to demonstrate that it was prejudiced in its ability to prepare its defense to the unescorted Hatcher citations. Respondent focuses on specific prejudice that is best illustrated by Citation No. 8431251.

1. Citation No. 8431251

Citation No. 8431251 alleges an S&S violation of section 75.400 for accumulations present along the 1st West belt line. P. Ex. 10. Stephenson credibly testified, and Respondent essentially demonstrated throughout the hearing, that for citations involving an alleged accumulation of combustible material, Respondent's walkaround representative would typically take a sample of material to determine the combustibility content (Tr. 411-12), take a heat reading to determine the amount of heat the alleged frictional ignition source would generate (Tr. 411), and take measurements and/or photographs to provide additional information about the condition. Here, because MSHA failed to afford Respondent an opportunity to accompany inspector Hatcher to aid his inspection, Respondent had no opportunity to gather such specific evidence in defense of Citation 8431251. In short, because Respondent was not afforded the opportunity to provide a representative to accompany inspector Hatcher along the 1st West belt line, Respondent was precluded from gathering the very types of evidence in defense of Citation No. 8431251 that it relied upon for its defenses of Order No. 8030700, Order No. 8428378, Citation No. 8428798 and Citation No. 8436403, discussed herein.

It is undisputed that Respondent was denied any opportunity to sample the material cited to determine its combustibility content. The standard, 30 C.F.R. § 75.400, requires an accumulation of combustible material. Respondent argues that such evidence would have been particularly critical because the Secretary's three photographs of the condition (P. Ex. 11) arguably shows material consisting of incombustible white rock dust. R. Br. 82. If Respondent could show that the material cited was not combustible coal pressings, but incombustible, rock-dusted material, there would be no violation of the standard and the citation could be vacated. Respondent has made a colorable showing that it was denied this opportunity.

In addition, Respondent argues that it was denied any opportunity to take a heat reading of the alleged frictional ignition source to determine if the roller that was in contact with the coal pressings was capable of generating heat sufficient to produce an ignition or smoldering fire, i.e., the basis for Hatcher's S&S finding. *See* Tr. 528-30.[30] Although extant Commission case law is not sympathetic to this argument for overturning an S&S finding, Respondent was denied the opportunity to support the arguments it has raised in an effort to convince the Commission otherwise. Further, although Hatcher determined negligence to be high because the operator had been put on notice about citations of this nature, Respondent was denied any opportunity to take measurements or photographs of the alleged condition to counter Hatcher's testimony that the condition was open and obvious, such that a belt examiner knew or should have known about it. Tr. 532. Moreover, Respondent was denied the opportunity to present any mitigating circumstances to inspector Hatcher at the time of the inspection or shortly thereafter based on observations made by its representative.

Applying the exclusionary rule in light of Respondent's prejudice arguments, I exclude all evidence that resulted from the unescorted inspection, including the Secretary's photographs and Hatcher's testimony proffered in support of Citation 8431251. Such exclusion is appropriate

[30] Hatcher took no measurements of the depth of the cited coal pressings because the belt was running. Tr. 525.

because Respondent's section 103(f) walkaround rights were violated and Respondent has demonstrated sufficient prejudice because it was denied the opportunity to observe, test, and/or photograph the alleged combustible material and frictional heat source in the same condition that the inspector observed them. *See SCP Inves.,* 31 FMSHRC at 835; *Chicago Bridge*, 535 F.2d at 378; *Marshall,* 560 F.2d at 952. Upon such exclusion, there is insufficient independent evidence to support Citation 8431251 and the proposed penalty.

2. Citation No. 8431250

I next turn to Citation No. 8431250 alleging that Respondent violated section 75.333(h) because the Kennedy equipment doors separating the intake air from belt air at cross cut #13 were not being maintained to serve the purpose for which they were intended. In its *SCP Investment* decision, the plurality found that evidence may be excluded "when the employer can demonstrate prejudice." *SCP Invs. LLC*, 31 FMSHRC at 835 (citations omitted). When addressing the question of prejudice in *Chicago Bridge*, the Seventh Circuit noted that the Secretary bears the burden of proof on the citation and the "company has not attempted to demonstrate that this burden has not been met, nor has it offered evidence to demonstrate prejudice." 535 F.2d at 377, n. 15. Although Respondent has not made any *specific* prejudice argument on brief with respect to Citation No. 8431250, Respondent has at least attempted to demonstrate that the Secretary has not met his burden of proof when an exclusionary rule is applied because it argues that all evidence should be excluded.

The Secretary attempts to prove the violation alleged in Citation 8431250 through Hatcher's observation and testimony that air was leaking through the top and bottom of the doors to the belt line based on the chemical smoke test that Hatcher performed, and from which Respondent was excluded. According to Hatcher, the top of the west door had a hole that was one to three inches in width and five inches in length, while the bottom of the east door had a hole that was three to twelve inches in width and six feet in length. I conclude that Respondent was not prejudiced by these measurements because it could go back and check them shortly after notice of the violation. But the violation turns on whether the doors were serving their intended purpose to separate the intake air from the belt air, not on whether the doors were damaged. Although Respondent could go back after the fact and observe the dimensions of the holes in the door, the Secretary provided no evidence, separate from Hatcher's testimony based on the chemical test that he performed, which would establish that the doors were not serving their intended purpose. The violation was only established by the chemical test, which the operator was unable to observe or challenge. A representative of Respondent was not given an opportunity to be present to recreate the chemical test or challenge its methodology or reliability. The Secretary failed to establish by any independent evidence that the extent of the holes in the damaged doors necessarily established that the doors were not being maintained to serve their intended purpose. While it may be possible to make such an inference had the case been tried differently, in the absence of such evidence on this record, I decline to draw the inference.

Applying the exclusionary rule in light of the foregoing, I find that Respondent has been prejudiced by its inability to observe and challenge Hatcher's chemical test and his testimony

based on that test. Accordingly, I exclude such evidence. Upon such exclusion, there is insufficient evidence to support a violation of the standard, as written, or the proposed penalty.

3. Citation No. 8431252

Finally, I address Citation No. 8431252, which alleges a violation of section 75.1731(b) because the bottom return belt on the 1st west belt line was not properly aligned and was rubbing steel hanger brackets at three specified locations, and because the bottom return belt was in contact with a stand on the south side of belt at cross cut #10, and had cut through the two-inch steel stand at cross cut #37 for a depth of 1¾ inches. Again Respondent has not advanced any *specific* prejudice argument on brief with respect to this Citation, but has at least attempted to demonstrate that the Secretary has not met his burden of proof when I apply an exclusionary rule because all evidence from the inspection should be excluded. I decline to exclude such evidence.

The violation turns on whether the belt was misaligned and rubbing the brackets and cutting into the stands. Respondent was not prejudiced by Hatcher's testimony or the photographs he took concerning this violation because Respondent could go back and check the belt alignment and its contact points with the brackets and stands shortly after notice of the violation, and Respondent could observe the violation in essentially the same condition as inspector Hatcher observed it.

Accordingly, I affirm Citation No. 8431252 as non-S&S, unlikely to result in a lost workdays or restricted duty injury, with one person affected. Although Respondent was denied the opportunity to timely proffer mitigating circumstances to the inspector in an effort to reduce the high negligence determination, the operator had an opportunity but failed to raise any mitigating circumstances after the fact in the closeout conference or at trial. Guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a penalty of $1,203.

E. Bench Decision Granting Respondent's Motion to Vacate Order No. 8428701

1. The Alleged Violation

At the end of the hearing, the undersigned granted Respondent's request for a bench decision to vacate Order No. 8428701. Tr. 1056-57. MSHA inspector Fazzolare wrote that Order alleging that Respondent had not conducted a pre-shift examination of the right-side set of rooms in Unit 5 during the midnight shift on May 9, 2011. P. Exs. 38, 39, at 12; Tr. 723-24.

Order No. 8428701 was issued pursuant to section 104(d)(2) and initially alleged a violation of 30 C.F.R. § 75.360(a)(1), as follows:

> There was no evidence of a pre-shift examination being conducted on MMU 015-0, rooms to the right on the number 5 unit, for day shift production crew.

> There were no D, T & I's in any of the three entries of the rooms. The last time there was evidence of a pre-shift examination was 05/08/2011 for the oncoming midnight shift.
>
> Standard 75.360(a)(1) was cited 2 times in two years at mine 1103054 (2 to the operator, 0 to a contractor).

The Order was designated S&S because highly likely to result in a permanently disabling injury, with nine persons affected. The Order was also alleged to be the result of high negligence and an unwarrantable failure. P. Ex. 38.

Near the end of the hearing, the undersigned granted the Secretary's Motion to Plead in the Alternative and allege a violation of 30 C.F.R. § 75.360(f), which states that the pre-shift examination shall be certified at each working place by DTIs (date, time, and initials). Tr. 1056.

The issues presented are whether a violation of either alternatively pled standard in Order No. 8428701 was established; whether any such violation was properly designated S&S and/or an unwarrantable failure; whether the gravity and negligence determinations were proper; and the appropriate amount of any penalty.

The Secretary argues that Respondent violated 30 C.F.R. § 75.360(a)(1) as alleged in Order No. 8428701 because it failed to conduct a pre-shift examination of three entries on the right side of the MMU 015 Unit. Alternatively, the Secretary argues that Respondent violated 30 C.F.R. § 75.360(f) when it failed to certify the pre-shift examination by date, time, and initials in the three entries on the right side of the MMU 015 Unit.

Respondent argues that the undersigned appropriately granted Respondent's motion to vacate at the close of the hearing because no violation occurred. Even assuming arguendo that any violation occurred, Respondent argues that the gravity, S&S, high negligence, and unwarrantable failure findings are excessive and not supported by the record evidence, and the specially assessed penalty of $52,500 is inappropriate.

2. Factual Background

a. The Secretary's Evidence

Inspector Fazzolare issued Order No. 8428701 at 9:30 a.m. on May 9, 2011 because he found a hazard in the No. 1 entry, which was cut too wide, and he could not find any DTI tags in the three right-side entries of the MMU 015 Unit. Tr. 723-724, 728. Fazzolare testified that it was obvious to the casual observer that the width of the entry was "wider than the law permits." Tr. 730. Fazzolare designated Order 8428701 as significant and substantial because the excessively wide width of the #1 entry contributed to the hazard of a roof fall, which should have been identified by the pre-shift examiner during his examination, and this condition was highly

likely to result in permanently disabling injuries, such as multiple broken bones. Tr. 728-33; P. Ex. 38.[31] Fazzolare determined that the mine examiner had not conducted a pre-shift examination of the three right-side entries in violation of § 75.360(a)(1). Tr. 723-724.[32] Fazzalore did not know who the pre-shift examiner was and never spoke to him. Tr. 741.

Fazzolare determined that undiscovered hazards, including but not limited to the wide entry contributing to a roof fall hazard, would affect nine miners on the unit. Tr. 732-33. Fazzolare also testified that methane gas buildup was another concern in the absence of a pre-shift inspection. Tr. 732. The Secretary argues that Fazzolare's determination regarding the likelihood and severity of injury was reasonable, particularly given the history of roof falls at the WLPM. Tr. 730.

Fazzolare testified that he could have cited the condition as a violation of section 75.360(f) because of the absence of the DTIs. Tr. 724.[33] Fazzolare testified that the hazard of not having DTIs in place is that miners would not know whether a pre-shift examination has been performed or whether hazards exist in a particular area of the mine. Tr. 730. When asked by the

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[31] Respondent argues that Order 8428701 should be designated as non-S&S and unlikely because the citation issued for the wide #1 entry was designated non-S&S and unlikely. The Secretary counters that the failure to discover hazardous conditions must be viewed in the context of continued mining operations, and the wide-entry citation was issued before Fazzolare discovered the failure to perform the pre-shift examination, and it was a contributing factor in Fazzolare's S&S designation for Order 8428701. Tr. 750-51.

[32] Section 75.360(a)(1) requires as follows:

> Except as provided in paragraph (a)(2), of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

[33] Section 75.360(f) requires as follows:

> At each working place examined, the person doing the preshift examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

undersigned, why he did not cite § 75.360(f), Fazzolare testified that "[o]nce I found the wide spot in the entry, I was convinced that no pre-shift had been performed in them three entries." Tr. 751-52.

Fazzolare determined that Respondent's negligence was high and the violation was an unwarrantable failure because he determined that the preshift examiner, an agent of the operator, made a conscious decision not to do the pre-shift and no one on his shift knew of any hazards. Tr. 735. Fazzolare determined that the hazard within the #1 entry was obvious, existed for at least one shift, and would have been noticed by an examiner had a pre-shift been conducted. Tr. 728- 31; P. Ex. 39, at 3 and 12.

During the third day of hearing, the Secretary moved to plead in the alternative that the conditions set forth in Order No. 842870 also violated section 75.360(f). Tr. 736, 738. The undersigned initially denied the motion because it should have been made at the outset of the hearing, particularly since the Secretary was aware through pre-trial conference calls that the Order essentially involved a credibility dispute as to whether a pre-shift was done (Tr. 739), and the allegation that there were no DTIs could be substantially different from the allegation that no preshift examination was done, particularly in the context of the unwarrantable failure designation. Tr. 738. At the conclusion of the hearing, however, the undersigned reconsidered, granted the motion to amend, and issued a bench decision, which vacated Order No. 8428701 on credibility grounds under either standard. Tr. 1056.

As further explained below, the undersigned credited the testimony of third-shift mine examiner Norman Risley, that he conducted a pre-shift examination of the right-side rooms, the left-side rooms, and the panel entries (Tr. 758); that Risley walked to each face, checked for methane or other gas, examined the bolts, roof and ribs, and ensured that ventilation curtains were hung (Tr. 759); and that Risley wrote the date and time and his initials on a paper tag that was hung from a roof bolt with wire at each entry. Tr. 759-60; *see also* R. Ex. 6 (statement given to compliance manager Grounds the next day). The undersigned also credited scoop operator Tim Whiting's testimony, which partially corroborated Risley's testimony that he hung the tags, because Whiting credibly testified that he saw Risley do so at the number 3 face. Tr. 770-71, 775. Finally, the undersigned credited the testimony of all of Respondent's witnesses that they saw Risley in the right-side rooms. *See generally* Tr. 1056-57.

b. Respondent's Evidence

Third-shift certified mine examiner, Norman Risley, credibly testified that during the midnight shift of May 9, 2011, he conducted a pre-shift examination of the right-side and left side faces and set of rooms on Unit 5. Tr. 754-58. Risley also pre-shifted the two rescue chambers, the power center, transformer, and the tailpiece on Unit 5. Tr. 759.

Risley was required to conduct his examination within three hours of the start of the oncoming day shift, which began at 7:00 a.m. Accordingly, Risley began his pre-shift examination about 4:00 a.m. Tr. 723, 727-28, 756-57.

Risley credibly testified that he examined the right-side rooms, the left-side rooms, and the panel entries. Tr. 758. Risley walked to each face, checked for methane or other gas, examined the bolts, roof and ribs, and ensured that ventilation curtains were hung. Tr. 759. At each entry, Risley wrote the date and time and his initials on a paper tag that was hung from a roof bolt with wire. Tr. 759-60; R. Ex. 6 (statement given to compliance manager Grounds the next day). When asked by the undersigned whether he specifically remembered hanging the tags, Risley testified affirmatively and recalled that he asked scoop operator Tim Whiting to move out of his way so he could get to a face to hang a tag. Tr. 760-61.

On direct examination, Risley was shown Respondent's Exhibit 11. That exhibit was a section 104(a) citation that inspector Fazzolare wrote under 75.220(a)(1) for failure to follow the approved roof control plan because the no. 1 entry exceeded the 20-foot width set forth in the plan by approximately one and three quarter feet over a six-foot distance. Risley testified that he never noticed the condition during his examination. Tr. 761.

Risley had left the mine for the day by 9:30 a.m., i.e., the time Fazzolare wrote the Order (P. Ex. 38) alleging a violation of 75.360 (a)(1) because there was no evidence of a pre-shift examination conducted for the right side rooms on Unit 5 for the day shift production crew. Tr. 763. The next day, compliance manager Grounds spoke to Risley about the Order in the examiner's room where Respondent keeps its books. Tr. 76-62. Risley told Grounds that it was a bunch of bull because Risley made the rooms and that Grounds should check with Whiting, who was present at the time. Tr. 762-63. The Secretary's cross of Risley was minimal, with little value. Tr. 765.

Scoop operator Whiting credibly testified that he was working the midnight or third shift (11 p.m. to 7 a.m.) on May 8-9, 2011, when he observed Risley conduct a pre-shift examination of the right-side rooms on Unit 5. Tr. 766-69. Whiting was sitting in his scoop in the no. 3 room waiting to clean that room after the roof bolters finished bolting a fresh cut. Tr. 769-70. While waiting there, Whiting saw Risley walk by and into the entry of the no. 3 room, conduct his examination, and hang a paper tag with wiring on a roof bolt plate to post DTIs. Tr. 770-71, 775. From where he was sitting, Whiting could not see the no. 1 and 2 rooms. Tr. 771.

As Risley apparently continued his examination of the other right-side rooms, section foreman Keith Hawkins instructed Whiting to go outby and grab the wet duster and start dusting the faces. Tr. 771-72. Whiting then used the scoop to run the hydraulically operated wet duster on the right and left-side rooms. Whiting received assistance from left-side scoop operator, Nick Courtney, who operated the hose. Tr. 772-73.

After the Order was written by Fazzolare, Risley told Whiting about it, presumably the next day. Whiting testified that Risley appeared upset and told Whiting that he had made the examination. Tr. 773-74. Whiting told Risley that Whiting saw him hang a tag in the no. 3 room. Whiting offered to vouch for Risley before compliance manager Grounds. Tr. 773-74. On the basis of the record before me, I have no basis to conclude that they conspired to produce false testimony under oath.

Grounds took a statement from Whiting the day after the Order was issued. R. Ex. 8. Whiting confirmed the accuracy of the statement except for the last notation, which states that Risley "was going toward the face of Room #3 to make his examination." *Id.* Whiting testified that he watched Risley actually walk up to the no. 3 face to hang the tag. Tr. 775. In the absence of any impeachment or effective cross examination on this issue, I credit Whiting.

Whiting expressed the belief that the pressure from the dust and water that came out of the wet duster blew the tag(s) down. Tr. 775-76. On cross, Whiting acknowledged that the tags might still be present on the mine floor, although equipment ran through the area. He further acknowledged that the wires "would probably still be there." Tr. 775-76. The Secretary argues that this is significant because neither Fazzalare nor the two employees who accompanied him could find any wires, tags, or other evidence of DTIs for the prior shift in the three entries on the right side. Tr. at 724-26, 729, 731, 735, 751. Thus, the Secretary argues that the lack of DTIs on the right side for the prior shift establishes a violation of section 75.360(f).

Section foreman Keith Hawkins also testified that he observed Risley make an examination of the right-side rooms of Unit 5 on the morning in question. Tr. 779-80. Hawkins was checking on repairs to the miner that were made between 3:15 and 4:30 a.m. (R. Ex. 4). Hawkins was engaged in conversation with shift leader Cliff Dillard and Whiting in the intersection of entry no. 1 and room no. 3, when he observed Risley walk by and use a spotter to make the face in the right-side rooms. Tr. 780-81, 786. Hawkins did not observe whether Risley hung any tags. Tr. 782.

The next day, when Hawkins heard about the Order, he went to see Grounds to tell him that Hawkins had seen Risley go up in the face and use a spotter. Tr. 783. Hawkins testified that R. Ex. 7 accurately reflects the conversation he had with Grounds. The Secretary declined to cross examine Hawkins. Tr. 783.

Shift leader Dillard also testified that he observed Risley conduct a pre-shift examination of the right set of rooms of Unit 5 during the midnight shift on May 8-9, 20011. Tr. 785-86. Dillard corroborated Hawkins's testimony that they were talking in the intersection of entry no. 1 and room no. 3. Dillard testified that he saw Risley walk out of the no. 1 room and across the no. 2 room, and then out past Dillard and Hawkins and end up in the no. 3 room. Dillard specifically testified that he saw Risley go in and out of each of the three rooms on the right side, but did not see Risley hang any tags. Tr. 786, 788-89.

Dillard testified that Hawkins told him about the Order the next day and Dillard was shocked because he saw Risley there the day before to make the examinations. Tr. 786-87. Dillard testified that Risley would typically hang his DTIs on a roof bolt in the second row from the face on the right or return air side of the entry where an air reading was taken. Tr. 789.

Dillard confirmed that Respondent's Exhibit 9 was an accurate statement of what was discussed with Grounds on May 10, 2011. Tr. 787. Respondent's Exhibit 9 states, inter alia, that

"[i]f the examiner tags are not twisted, the wet duster can knock the tags down from the roof bolt plates." Neither the Secretary nor Respondent ever asked Risley whether he twisted the tags.

Compliance manager Grounds testified that Respondent's walkaround representative Vernon Dunn called the surface and informed Grounds that inspector Fazzolare was going to issue the Order. Tr. 791. Grounds spoke with members of the crew the next day and prepared written statements from Risley, Hawkins, Whiting, and Dillard. Tr. 791-92; *see also* R. Exs. 6-9. After the interviews, Grounds concluded that Risley had conducted the pre-shift examination of the right-side rooms on unit 5 during the third shift on May 9, 2011. Accordingly, Risley did not receive any discipline. Tr. 792.

On cross, Grounds testified that he did not go underground to check on the condition cited in the Order. Rather, Grounds spoke with Dunn, who informed him that no initials were identified or tags found on the right side, but DTIs had been identified on the left side. Tr. 794-95.

On rebuttal, and in support of the Secretary's alternative pleading, inspector Fazzolare testified that he issued Order 8428701 because he could find no evidence of a pre-shift or DTIs in the 3 entries on the right side. Tr. 797-98. Fazzolare testified that he did see enough DTIs in the left side entries and the advanced entries to ensure that Respondent had pre-shifted those areas. Tr. 798, 802. He further testified that in his experience, it was unlikely that a tag wired to a roof bolt would fall down, and that it was "impossible" for all three tags to have disappeared. Tr. 798-99. Fazzolare further testified that if a wet duster caused a tag to fall down, the wire would be left on the roof bolt, and he did not see any evidence of that. Tr. 799.

Respondent declined to cross examine Fazzolare on rebuttal.

In response to questioning from the bench, Fazzolare testified that he traveled with Dunn to the face in each of the rooms on the right side. After discovering the wide spot in the last room, Fazzolare asked Dunn to help him find the DTIs to show that the examiner had been there. Fazzolare told Dunn that if you can find one set of DTIs (in the right side rooms), I will not issue the Order. Tr. 799-800.

The Secretary argues that at most, Respondent's witnesses established that Risley made a pre-shift examination of the left side and main set of entries and the #3 entry on the right side. Although several of Respondent's witnesses saw Risley in the three right-side entries, none saw Risley hang a tag in the #1 and #2 entries and none testified as to the length of time Risley was in each of these entries. Tr. 770-71, 773, 775, 782, 786-88, 792. The Secretary argues that Respondent's witnesses failed to refute Fazzolare's testimony regarding the absence of the tags or other DT&Is in the right-side entries. Thus, the Secretary argues that the evidence, even considered in the light most favorable to Respondent, shows a violation of section 75.360(f) for the #1 and #2 right-side entries. Given Risley's failure to identify the excessive width in the #1 entry as a hazardous condition, the Secretary further argues for a violation of section 75.360(a)(1). Tr. 724, 729-30, 761.

3. Legal Analysis

As noted, at the close of the hearing, the undersigned granted Respondent's motion to vacate Order No. 842870 and found that no violation of section 75.360(a)(1) or section 75.360(f) had occurred. Tr. 1056-57. I credited Risley's testimony that he conducted a pre-shift examination of the right-side rooms, which was corroborated by all of Respondent's witnesses. Tr. 1056. I further credited Risley's testimony that he hung tags denoting his DTI's in the right-side rooms, which testimony was partially corroborated by Whiting, who observed him hang one such tag at the number 3 face. Tr. 1056. Having reviewed the record, I reaffirm my credibility findings and also credit section foreman Hawkins that he saw Risley walk by and use a spotter to make the face in the right-side rooms. Tr. 780-81, 786.

The fact that the DTI's were not present when Fazzolare conducted his inspection at 9:30 a.m. does not establish that Risley did not hang the tags when he conducted his examination about 4 a.m. On questioning from the undersigned, Risley specifically testified that he hung all three tags on the right-side entries. Tr. 760. Whiting corroborated Risley's testimony for the right-side number 3 room. Tr. 770. It is conceivable, given the use of the wet rock duster after Risley conducted his examination, that the tags were blown down due to the pressure of the machine combined with the heavy mixture of dust and water it sprays. Tr. 775.

I find it possible that the pressure or force from the mixture of dust and water emanating from the wet duster after Risley conducted his examination blew the paper tags down and rendered them irretrievable, especially if the tag wires were not twisted in place. Tr. 775. It was certainly not impossible, as Fazzolare testified, particularly with equipment running through the area and the pressure of the machine combined with the heavy mixture of dust and water that it sprays. Tr. 775-76. While the wires would probably still be there, the Secretary failed to establish the exhaustiveness or specific location of Fazzolare's search for said wires. As Fazzolare acknowledged, "[o]nce I found the wide spot in the entry, I was convinced that no pre-shift had been performed in them three entries." Tr. 751-52. In my view, Fazzolare had made up his mind that no pre-shift had been performed and did not diligently search for the DTIs or attempt to speak to the examiner Risley.

Clearly, Fazzolare relied on his issuance of Citation No. 8426700, which alleged that the no.1 room was wide by less than two feet for a distance of six feet in length, as evidence that no pre-shift examination was performed. Tr. 728; R. Ex. 11. Such reliance is suspect. It is likely that the cited area was mined after Risley conducted his examination because it was inby the last open crosscut and mined recently. The Secretary failed to show that the condition was present when Risley was scheduled to conduct his pre-shift examination. Tr. 748. The mere fact that Fazzolare observed the condition cited in Citation No. 8428700 does not establish that Risley did not conduct the examination, particularly when Risley and essentially four other witnesses confirmed that he did.

I was convinced during the hearing by Risley's demeanor and clear and adamant testimony upon questioning from the undersigned that he conducted a pre-shift examination of

I was convinced during the hearing by Risley's demeanor and clear and adamant testimony upon questioning from the undersigned that he conducted a pre-shift examination of the right-side rooms and that he hung three tags denoting his DTI's in the right-side rooms. Tr. 760. Risley's testimony that he examined the right-side rooms was corroborated by Whiting, Hawkins and Dillard, each of whom observed him do so. Tr. 770, 779-80, 786. Risley's testimony that he made the examinations by DTI's is partially corroborated by Whiting, who observed him hang a tag at the number 3 face. Tr. 770, 775. Accordingly, I reaffirm my bench decision and vacate Order No. 842870.

VII. Order

WHEREFORE, the parties' joint settlement motion and agreement made on the record and set forth in Joint Exhibit 2 is **GRANTED**. It is **ORDERED** that Citation/Order Nos. 8030991, 8030700, 8428798, and 8428776 be modified to reduce the level of negligence from "high" to "moderate;" Citation No. 8030992 be modified to reduce the level of negligence from "moderate" to "no negligence;" Citation Nos. 8436403, 8030992, 8428798, and 8428776 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation; and Order No. 8030700 be modified to change the type of action from a section 104(d)(2) order to a section 104(a) citation; and that Citation Nos. 8428701, 8431251, and 8431250 be vacated. It is further **ORDERED** that the operator pay an a penalty of $116,662 for all litigated citations and $192,754 for all settled citations for a total penalty of $309,376 within thirty days of this order.[34]

Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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