FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 14, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. LAKE 2013-66 A.C. No. 11-03054-301718 Docket No. LAKE 2012-506 A.C. No. 11-03054-284471 Docket No. LAKE 2013-251 A.C. No. 11-03054-309969-01 Docket No. LAKE 2013-252 A.C. No. 11-03054-309969-02 Docket No. LAKE 2013-307 A.C. No. 11-03054-312677 Docket No. LAKE 2012-896 A.C. No. 11-03054-298858
v.	
BIG RIDGE, INC., Respondent.	Mine: Willow Lake Portal

DECISION AND ORDER

Appearances: Ryan Pardue, Office of the Solicitor, U.S. Department of Labor 1999 Broadway, Suite 800, Denver, CO 80202 for Petitioner

Lauren Polk, Office of the Solicitor, U.S. Department of Labor 1999 Broadway, Suite 800, Denver, CO 80202 for Petitioner

Arthur Wolfson, Jackson Kelly, 3 Gateway Center, Suite 1500, 401 Liberty Ave., Pittsburgh, PA 15222 for Respondent

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Big Ridge, Inc. at its Willow Lake Portal mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The cases include six separate dockets that originally included 33 contested violations with a total proposed penalty of **$801,018.00**. The parties settled all but eight of these contested violations prior to hearing. The parties presented testimony and documentary evidence at the hearing held in Benton, Illinois beginning December 3, 2013.

II. BACKGROUND

Big Ridge, Inc. ("Big Ridge") operates an underground bituminous coal mine, the Willow Lake Portal mine (the "mine") in Equality, Illinois. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Big Ridge, Inc. is the operator of the mine and that its operations affect interstate commerce and it is subject to the jurisdiction of the Mine Act. Tr. 9.

At hearing, the Secretary presented testimony by MSHA Inspectors Chad Lampley, Larry Morris, Eddie Kane, Scott Lee, and Dean Cripps. I have organized my findings by individual docket and detailed my final ruling for each citation within its respective subsection. For the eight citations contested at hearing, the Secretary has assessed a combined monetary penalty of **$316,142.00.**

The Secretary designated the majority of these contested citations as "Significant & Substantial" (S & S) violations that also constituted an "unwarrantable failure" to comply with mandatory safety standards. Additionally, for five of these citations, the Secretary assigned specially assessed monetary penalties in excess of the standard penalty calculation. At hearing, Big Ridge contested the factual representations of the testifying MSHA inspectors, the underlying legal basis of the citations, the Secretary's gravity and negligence designations, and the assessed monetary penalty amounts.

As such, I have prepared a Statement of Law outlining the Commission's instructions regarding: 1) Statute and Safety Plan Interpretation; 2) Burden of Proof; 3) Significant and Substantial violations; 4) Unwarrantable Failure; and 5) Civil Penalty and Special Assessment. I have followed these guidelines for each of the eight contested violations.

The hearing for these eight citations lasted three days and produced a 670 page transcript with numerous exhibits. The parties submitted a combined total of over 200 pages of post-hearing briefs articulating their position on the evidence presented at hearing. I have reviewed all of this evidence at length. In the interest of clarity, I have not included a summary of the testimony presented, but have cited to the testimony, exhibits, and arguments I found critical to my ultimate ruling within my analysis.

III. STATEMENT OF LAW

A. Interpretation

Mandatory site specific safety plans, including ventilation plans, are enforceable as mandatory standards. *UMWA v. Dole*, 870 F. 2d 662, 671 (D.C. Cir. 1989); *Ziegler Coal Co. v. Kleppe*, 536 F. 2d 298, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995).

Because MSHA-required site specific safety and health plan provisions are enforceable as mandatory standards,

> The operator is entitled to the due process protection available in the enforcement of regulations... When a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly

Energy West Mining Co., 17 FMSHRC 1317-18 (internal citations omitted).

However, the Secretary is not required to provide the operator actual notice of its interpretation of a mandatory site specific safety standard, rather,

> The Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission has summarized this test as 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.'

Id. at 1318 (internal citations omitted).

B. Burden of Proof

The Commission has long held, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992). The Commission has described the Secretary's burden as:

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

C. Significant and Substantial

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*; 6 FMSHRC 1, 3-4 (Jan. 1984).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The Secretary does not necessarily have to "prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (holding that failure to maintain emergency equipment was S&S despite low likelihood of emergency occurring); *See also Musser Engineering, Inc. and PBS Coals* 32 FMSHRC 1257, 1280-81 (Oct 2010) (PBS).

However, the Commission has recently reiterated that "it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. " *Black Beauty Coal*, 34 FMSHRC 1733, 1740 (August 2012) (upholding Judge's S&S determination that a ¼ mile wide gap in a protective berm created a safety hazard of trucks driving over a steep embankment) (*quoting US Steel Mining Co.*, 6 FMSHRC 1834, 1836)(Aug 1984).

Additionally, for accumulation violations of 30 CFR § 75.400, the Commission has ruled the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-71 (May 1990). 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. An ALJ has also recently determined that roof control violations of 30 CFR § 75.202(a) are S&S when the Secretary demonstrates hazardous conditions in the roof and a reasonable likelihood of injury, but non S&S when the Secretary has failed to demonstrate a reasonable likelihood of injury. *Hidden Splendor*, 34 FMSHRC 3310, 3318, 3370 (ALJ Manning) (December 2012) (holding that (75.202(a) violation was S&S when roof was taking weight and sagging in area of travel but separate 75.202(a) violation was not S&S when Secretary did not show likelihood of miners travelling in that area); *See also C.W. Mining,* 15 FMSHRC 178, 186 (ALJ Cetti) (January 1993) (holding that 75.202(a) violation was non S&S when area was 5'8" high, difficult to get under, and resistant to scaling attempts).

D. Unwarrantable Failure

Section 104(d) (1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard... and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent", "indifference", or the "serious lack of reasonable care." *Id.* at 2004-04; Rochester *& Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94. (February 1991).

The Commission considers the following factors when determining the validity of 104(d)1 and 104(d)2 orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

E. Penalty Assessment

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the 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 on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820 (I).

Although I assess monetary penalties de novo, the Secretary has submitted proposed penalty amounts for each citation contested at hearing. Following 30 CFR §100.3, the Secretary submitted regularly assessed penalty amounts based upon point values corresponding to the six statutory criteria for Citation Nos. 8445336, 8431905, and 8444863. Pursuant to 30 CFR §100.5(a), the Secretary has submitted specially assessed penalty amounts for Order Nos. 8436212, 8436107, 8445268 and Citation Nos. 8444809 and 8445037.

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order). Similarly, for specially assessed penalties in excess of the standard penalty calculation, the Secretary has the burden of establishing the existence of aggravating factors to justify such an increase. *S&M Construction, Inc.*, 18 FMSHRC 108, 1052-53 (ALJ Koutras) (June 1996); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller) (January 2013)

In this matter, the parties have stipulated that Big Ridge is a large operator and Willow Lake is a large mine. Tr. 10. Big Ridge has not argued or presented any evidence indicating that any of the proposed penalties would affect its ability to continue business operations. I have discussed the violation history, negligence, gravity, and abatement efforts pertaining to each alleged violation within my findings for each order/citation.

IV. ANALYSIS LAKE 2012-506

A. Order No. 8436212

MSHA Inspector Chad Lampley issued Order No. 8436212 on September 12, 2011 for an alleged violation of 30 CFR § 75.400. Tr. 12. Lampley alleged within the citation that:

> Accumulations of combustible materials are present at the 2nd North conveyor belt tail. Accumulations are in the form of coal fines with dry material in contact and pressed by the moving conveyor belt. Accumulations range from 24 to 16 inches in depth for a distance of approximately 6 feet.

Sec'y Ex. 1, 1.

Lampley determined that the violation was reasonably likely to result in a lost workdays or restricted duty injury, affected 2 persons, the violation was S&S, the result of Big Ridge's high negligence, and a 104 d (2) unwarrantable failure. Sec'y Ex. 1, 1. The Secretary has proposed a specially assessed penalty of $66,142.00. Sec'y Br., 13.

1. **Findings**

30 CFR § 75.400 mandates that:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active working areas or on diesel-powered and electric equipment therein.

On cross examination, Inspector Lampley confirmed that 30 CFR § 75.400 only prohibits accumulations of "combustible" material in active workings, and does not prohibit accumulations of water, rock dust, or other incombustible material. Tr. 62-63. As such, I have reviewed the testimony of Inspector Lampley and Shift Manager Podoriscki in order to determine whether or not the accumulated material at the 2nd North tail pulley was indeed combustible. However, the Commission has firmly held that it is *not* necessary for an inspector to test the combustibility of an accumulation in order to issue a valid 30 CFR § 75.400 citation. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1290 (December 1998). Instead, a determination of combustible content can be based on the experience of the observing inspector. *Id.*

Furthermore, the presence of rock dust, moisture, and reject material within the accumulation of what Inspector Lampley described as "coal fines" does not remove the accumulation from coverage of the standard. Tr. 27. 30 CFR § 75.400 itself specifically prohibits "coal dust deposited on rock-dusted surfaces." Additionally, other ALJs have previously upheld 30 CFR § 75.400 citations when the accumulations contained wet portions. *Eastern Associated Coal Corp.*, 7 FMSHRC 601, 603 (April 1985) (ALJ Faveur). ALJ Faveur reasoned that when an accumulation of partially damp coal is present in an active working area, a hazard still exists as, "water on the coal would only slow down the burning process; it would not make the coal incombustible." *Eastern*, 7 FMSHRC 603.

Inspector Lampley credibly testified that the accumulation contained "a lot" of coal fines at the center of the accumulation and that the accumulation was dried out where the pile was in contact with the moving conveyor belt. Tr. 27, 29, 37. Inspector Lampley also credibly testified that the coal was so compacted that it took at least an hour for several miners to chip away at the pile and remove the material. Tr. 48. Big Ridge has contested Lampley's assertion that it took over an hour to clean the accumulation, stating the belt had been restarted before Lampley returned to the area to officially terminate the order. Resp. Br,, 12. However, I credit Lampley's testimony and note that Big Ridge felt it necessary to provide additional workers in order to remove the accumulation. Tr. 48. Additionally, the photos offered by the Secretary substantiate Inspector Lampley's observations regarding the compacted nature of the accumulations, as they

show vertical shelves of what appears to be coal in close contact with the conveyor belt and tail roller. Sec'y Ex. 2A, 2B.

For this reason, while I find Shift Manager's Podoriscki's testimony generally credible, I do not believe his description of the accumulation as a wet slurry to be an accurate description of the accumulation. Tr. 89. If the accumulation had indeed been a recently formed wet slurry, it would not have stood up in a vertical shelf or been layered with distinct layers of rock dust. Tr. 30; Sec'y Ex. 2A, 2B.

Thus, I find that the material accumulation at the 2nd North tail pulley primarily consisted of compacted coal fines, and that these coal fines were dry and combustible where they were in contact with the moving conveyor belt. Therefore, I hold that Big Ridge violated 30 CFR § 75.400 by allowing this condition to develop and persist.

2. Gravity

Additionally, I find that Inspector Lampley correctly designated the accumulation as an S & S violation. I have already held that the accumulation constituted a violation of 30 CFR § 75.400. Coal accumulations at an active conveyor belt contribute to the discrete safety hazard of an increased likelihood of an ignition, fire, and/or explosion occurring.

In this particular situation, Lampley credibly testified that contact between the coal fines and the moving conveyor belt could produce enough frictional heat to start a fire. Tr. 50-51. I do take note that an ALJ has declined to designate a violation of 30 CFR § 75.400 as S & S when the accumulation was completely saturated with water. *United States Steel Mining*, 5 FMSHRC 1873, 1874-75 (October 1983) (ALJ Broderick) (upholding 330 CFR § 75.400 violation but removing S&S designation when accumulation was so wet it was too "soupy" to shovel). However, in this case, the compacted coal fine accumulation at the back of the tail pulley was dry and in contact with the moving belt. Tr. 26. As such, I hold that there was a reasonable likelihood of the accumulation resulting in a fire that would cause serious injuries to the belt worker and examiner assigned to this area. Tr. 52.

Finally, I find that if a fire did occur, it was reasonably likely that workers would suffer serious burn and or smoke inhalation injuries. As such, the Secretary has produced sufficient evidence to sustain all four elements of the *Mathies* S&S test.

I also hold that the presence of fire suppression systems do not motivate me to downgrade the violation from S & S. As explained by Inspector Lampley, the fire suppression systems in place may have detected a fire and prevented the fire from spreading, but they would not have prevented the fire from starting in the first place and endangering miners in the immediate area. In fact, the Commission has recently held that the presence of fire suppression systems does not "mean that fires do not pose a safety risky to miners." *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013) (quoting *Buck Creek Coal Co. v. FMSHRC*, 52 F. 3d 133, 136) ("*Big Ridge I*"). Therefore, I uphold Order No. 8436212 as an S&S violation.

I agree with Inspector Lampley in his determination that the violation most likely endangered the two miners who normally work in that area. Both Inspector Lampley and Shift Manager Podoriscki testified that Ms. Tucker was working in the adjacent area at the time of the citation. Tr. 46; 89. Lampley also credibly testified that a fire at this area would also expose the belt examiner who was required by law to be in the belt travel way while the belt was operating. Tr. 52. To hold that this violation affected more than two persons would be to assume that any fire that occurred would be reasonably likely to spread smoke and or flame to other areas of the Willow Lake mine not detailed at hearing. I decline to make this assumption as I cannot completely ignore the presence of fire suppression systems, fire resistant conveyor belts, and split air ventilation systems at the Willow Lake mine. For these reasons I hold that the violation in Order No. 8436212 affected 2 persons.

3. Negligence

I also find that the violation was the result of high negligence on the part of Big Ridge. Inspector Lampley credibly testified that an agent-operator was required to examine the area at least once per shift and yet the accumulation was so compacted it appeared that it had been there for at least three shifts. Tr. 43, 53. Lampley also explained that MSHA had previously notified Big Ridge personnel in close-out conferences about the importance of properly cleaning up accumulations along conveyor belt lines. Tr. 54, 57. While Lampley stated that Big Ridge personnel informed him they had recently held safety meetings about cleaning up coal accumulations, the compacted nature of the accumulation and multiple layers of rock dust within the coal fines indicated that this was not a recently formed accumulation. Tr. 29-30. For these reasons, I find that Big Ridge's clean-up efforts at this location were ineffective and demonstrated a high level of negligence.

4. Unwarrantable Failure

For Order No. 8436212, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The entered photos and Inspector's Lampley testimony demonstrate that the accumulation of coal fines had built up past the midpoint of the tail pulley, indicating that the accumulation was significant and had lasted for some time. Tr. 22; Sec'y Ex. 2A, 2B. Additionally, the layers of rock dust within the compacted coal fines also show that the accumulations had persisted for at least several shifts. Tr. 30, Sec'y Ex 2B.

b. Notice to the Operator

Inspector Lampley credibly testified that MSHA had recently issued similar citations for impermissible coal accumulations at the Willow Lake portal mine. Tr. 54, 55. Additionally, Lampley stated that MSHA had emphasized the importance of important cleanup measures at conveyor belts in recent closeout meetings. Tr. 54, 57.

c. Prior Abatement Efforts

Big Ridge Shift Manager Podoriscki credibly testified that he assigned an hourly employee to the dedicated task of cleaning conveyor belts in this area on a regular basis and had done so on the day of the violation. Tr. 85. Inspector Lampley corroborated that a miner was cleaning a conveyor belt in an adjacent area when he issued the citation. Tr. 46. However, the presence of rock dust within the accumulated and compacted coal fines indicates that previous clean-up efforts were insufficient. Tr. 32.

d. Obviousness of the Hazard and Degree of Danger

At the time of the citation, the accumulation was 24 inches high and in contact with the conveyor belt and roller. Tr. 22; Sec'y Ex. 1. Although Shift Manager Podoriscki claimed that wet sprays could cause material to build up quickly, I have repeatedly noted that the presence of rock dust within the coal fines indicates that this condition had existed for several shifts. Tr. 32, 90. Similarly, although Big Ridge contends that the accumulation was too wet to ignite and Lampley concedes the accumulation was not warm at the moment, it is reasonably likely that the material would have continued to dry out and increase frictional heat under continued belt operation. Tr. 39-40. As such, the condition posed a high degree of danger as it increased the likelihood of a coal-belt fire occurring.

e. Operator's Knowledge of the Violation

Again, the presence of rock dust within the accumulation and compacted nature of the coal fines indicates the accumulation had existed for several shifts. Tr. 22, 32. As such, Big Ridge examiners failed to identify the hazard and completely remove the accumulation during mandatory pre and on-shift examinations.

Thus, the Secretary has produced supporting evidence for all Commission unwarrantable failure factors, and Big Ridge's evidence of prior abatement efforts only point to previous ineffective efforts. Therefore, I hold that Big Ridge conducted cleanup efforts with a "serious lack of reasonable care" and hold that the violation was properly designated a 104 d (2) unwarrantable failure.

5. Penalty Assessment

Although I assess monetary penalties de novo, the Secretary has submitted a proposed specially assessed penalty of $66,142.00 for Order No. 843212 without any evidence to justify or support the enhanced penalty. Secy. Br., 13. The Respondent introduced, over the Secretary's objections, a Special Assessment Narrative Form that indicates the penalty for Order No. 8436212 would have been regularly assessed a penalty of $15,971.00. Resp. Ex. B. The special assessment form indicates that the specially assessed penalty was due to an increase in the number of points assigned to the likelihood of occurrence, severity of injury, number of persons affected, negligence, and unwarrantable failure penalty designations. Resp. Ex. B.

As indicated by Inspector Lampley's testimony and the Special Assessment Narrative Form, Big Ridge has been cited for numerous violations of 30 CFR § 75.400 at the Willow Lake Mine. Tr. 55; Resp. Ex. B. The parties have stipulated that Big Ridge is a large operator. Tr. 10. Big Ridge has not claimed or presented any evidence indicating that the proposed penalties will affect its ability to continue mining operations. I have found that Big Ridge's negligence was high due to a serious lack of reasonable care in properly cleaning up accumulated material. However, I find that its attempt at clean-up efforts prior to the citation, while insufficient, indicate that the accumulations were not the result of intentional misconduct or wanton disregard of the standard. I have determined that while an injury was reasonably likely to cause permanently disabling injuries to miners in the immediate area, the number of miners likely to be affected is two. Finally, Big Ridge personnel promptly and properly removed the accumulation from the tail pulley area after Inspector Lampley issue the order.

After considering these statutory factors, consulting, for reference purposes, the 30 CFR 100.3 penalty tables and noting the high degree of danger posed by the violation, I assess a civil monetary penalty of $30,000 for Order No. 8436212.

B. Order No. 8436107

MSHA Inspector Larry Morris issued Order No. 8436107 as a 104(d)(2) unwarrantable failure on November 28, 2011 for an alleged violation of 30 CFR § 75.202(a). Tr. 239. Morris alleged within the citation that:

> An area of roof, measuring 5 feet by 8 feet 8 inches, at cross cut # 92 along the 2nd Main North travel way, is not supported or otherwise controlled to protect persons from hazards related to falls of the roof or rib. There is one loose roof bolt in this area and it had been painted a bright orange and was visible to even the most casual observer. The travel way between cross cut 3 92 and # 93 has tensar bolted to the roof and is bagged down with the weight of loose rock. These tensar bags must be cut down and the area re-supported.

Sec'y Ex. 6, 1.

Morris determined that the likelihood of injury was unlikely, that a resulting injury would be lost workdays or restricted duty, the violation was non S&S, 4 persons were affected, and that the violation was a 104 (d) (2) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 6. The Secretary has proposed a regularly assessed penalty of $14,700.00 for Order No. 8436107. Sec'y Br., 32.

1. **Findings**

The cited standard, 30 CFR § 75.202 (a), requires that:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

Inspector Morris credibly testified that the base plate of the cited roof support bolt was bent and loose. Tr. 249. The Secretary introduced photos that clearly showed the bent condition of the base plate. Morris explained that the damaged bolt was part of the standard support pattern in this area and necessary under the mine's mandatory roof plan. Tr. 290. Respondent has not disputed the damaged condition of the roof bolt base plate or the violation itself. As such, I hold that Big Ridge violated 30 CFR 75.202 (a) by failing to repair the damaged base plate on the pattern roof bolt.

2. **Gravity**

Morris testified that the bent base plate was the only damaged bolt in the adjacent area and that the roof was sound in this specific area. Tr. 249, 255. Morris maintained at trial that he determined an injury was not reasonably likely to result from this condition. Tr. 256. For these reasons, I find that the cited condition was "unlikely" to result in injury and that the violation was appropriately designated as non S&S. The damaged bolt was located in a main travel way regularly traveled by unprotected personnel carriers. Tr. 246. Therefore, I uphold Inspector Morris's determination that in the event of a roof-fall, the condition could expose four persons to "Lost Workday or Restricted Duty" injuries.

3. **Negligence**

Inspector Morris based his high negligence designation for Order No. 8436107 upon his belief that the rock dust on top of the plate indicated Big Ridge had failed to repair the damaged bolt for more than one shift and was in fact aware of the damage since the bolt was painted orange. Tr. 247, 251. Morris also referenced his previous warnings to Big Ridge about the lack of clearance in travel ways and the high number of previous 30 CFR 75.202 violations at Willow Lake Mine. Tr. 258.

Big Ridge contests the high negligence designation, arguing that the damaged base plate was not obvious, as a different MSHA inspector had passed through the same area only half an hour earlier without noting the damaged bolt or issuing a related citation. Tr. 277; Resp. Br., 51. Big Ridge also argues Willow Lake personnel normally flagged off a safe perimeter around a damaged bolt rather than painting the damaged bolt in order to avoid exposing workers to a roof-fall hazard. Tr. 280-81; Resp. Br., 57.

Big Ridge further contends that the Secretary's photo show that neither the roof nor the top of the bent plate is painted. Resp. Br., 57. Big Ridge concludes that this demonstrates the

bolt was painted before the damage occurred. *Id.* Big Ridge also contends that as the damaged bolt was a replacement bolt installed after the roof was originally rock dusted, it is reasonable to conclude that some rock dust would have adhered to the topside of the plate before it was bent loose from the roof. Resp. Br., 56.

After considering both parties arguments and the entered exhibits, I hold that the Secretary did not produce sufficient evidence to establish that Big Ridge acted with high negligence. Big Ridge personnel credibly testified that miners normally flag off a safe perimeter rather than painting damaged bolts. Tr. 280-81. In the Secretary's photos, a clear outline appears on the roofline indicating where the baseplate was positioned before it was struck and rotated loose from its original position. Sec'y Ex. 8, 1-2. As such, I hold that the base plate was painted before the bolt was struck loose. Although neither party offered an alternate explanation for why the roof bolt was painted, I find that given the high volume of traffic in this passageway, Big Ridge may have painted the bolt bright orange to warn equipment operators and prevent equipment from striking the bolt. For all of these reasons, I hold that the Secretary failed to show that the roof bolt had been damaged for a long enough period of time to justify a high negligence designation

Additionally, I find that the presence of bagged down tensar netting was neither a violative condition nor an indication of Big Ridge's negligence. The Secretary did not contend that the use of tensar violated Willow Lake's roof plan or point to any official guidance that provided guidelines for appropriate vs. non-appropriate use. Although an inspector may rely upon his experience in issuing citations, Inspector Morris did not claim that the tensar was frayed or damaged in any way. The photos entered into evidence do not demonstrate any excessive loading or damaged conditions. Sec'y Ex. 7, 19-21. For these reasons I have not factored the presence of the rock-filled tensar netting into my negligence findings.

I also find Inspector Morris's reference to previous meetings on equipment/roof clearance, and Willow Lake's history of 75.202(a) citations an insufficient basis to merit a finding of high negligence for this Order. I have already ruled that the Secretary did not establish that the roof bolt had been damaged for an extended period of time. As such, previous meetings regarding the importance of roof clearance and a history of roof control violations did indeed put Big Ridge on notice that more effort was needed in general to achieve roof control compliance. However, the Secretary has only demonstrated that Inspector Morris found one partially damaged bolt in the course of his inspection on Nov 28. 2011. Therefore, I find that Big Ridge acted with moderate negligence in failing to immediately identify and repair the single damaged bolt.

4. <u>Unwarrantable Failure</u>

For many of the same reasons discussed above in my negligence findings, I find that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The Secretary did not establish that the roof bolt had been damaged for a significant time period, and the violative condition was not extensive as only one bolt was partially damaged. Sec'y Ex. 6.

b. Notice to the Operator

MSHA had put Big Ridge on notice that greater efforts toward roof-control compliance were necessary through previous close-out meetings and other 30 CFR 75.202 citations. Tr. 258.

c. Prior Abatement Efforts

The parties did not specifically discuss prior abatement activities, but Inspector Morris testified that the Willow Lake mine had suffered numerous roof falls in the recent past. However, Inspector Morris and Supervisor Cummins also testified that Big Ridge began using longer roof bolts in response to roof falls, that the bolt in question was itself a replacement bolt for a different damaged bolt, and that a nearby hazardous kettle bottom had been supported and then eventually removed from the roof. Tr. 244, 252-53.

d. Obviousness of the Hazard and Degree of Danger

While the roof-bolt was painted bright orange, that paint was not necessarily indicative of damage and it is undisputed that an MSHA inspector passed through the area shortly before without noting the damage. Tr. 277. As such, the damage was not inherently obvious and Inspector Morris confirmed that the roof in the area was structurally sound and it was unlikely for an injury to result from this specific violation. Tr. 249, 256.

e. Operator's Knowledge of the Violation

The Secretary did not present convincing evidence that Big Ridge was aware of the damage to this specific bolt. The Secretary has argued that the bright orange paint indicates that Big Ridge marked the bolt as damaged yet failed to install a replacement bolt. However, I have found that the absence of paint on the roof underneath the base plate and top of the bent plate indicates that the bolt was painted before it was struck loose. As such, I find that Big Ridge did not have any actual knowledge of the damaged roof bolt.

Therefore, I find that the Secretary has only offered supporting evidence for the second and peripherally third factors considered by the Commission in an unwarrantable failure analysis. Additionally, the testimony indicates that Big Ridge had undertaken some abatement work in improving their roof control measures, mitigating the Secretary's contention that the Willow Lake Mine had pervasive roof control problems.

The Secretary has only offered evidence supporting two of the five unwarrantable failure factors. The underlying violation itself in Order No. 8436107 concerned a single partially damaged bolt that was not likely to cause an injury. While it is not necessary for the Secretary to

provide supporting evidence for all of the unwarrantable failure factors, the *Consolidation Coal* unwarrantable failure test is a balancing test and I hold that the evidence, when considered as a whole, fails to establish that Big Ridge acted with a serious lack of reasonable care, willful intent or reckless disregard. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. As such, I find that the Secretary has not established that Order No. 8436107 was an unwarrantable failure to comply with a mandatory safety standard due to more than ordinary negligence. For this reason, Order No. 8436107 shall be modified from a 104(d) (2) Order to a 104 (a) Citation.

5. Penalty Assessment

The Secretary has proposed a specially assessed penalty of $14,700 for Order No. 8436107. Sec'y Br., 2. The Special Assessment Narrative Form indicates that Order No. 8436107 would have received a regularly assessed penalty of $4,000.00. Resp. Ex. K. As discussed above, I have already held that the negligence designation for this citation shall be reduced from high to moderate and that the unwarrantable failure designation shall be removed. The Secretary has not specifically addressed his justification for the specially assessed penalty amount, but has pointed out that Big Ridge was cited 136 times in the previous two years for alleged violation of 30 CFR § 75.202(a), that the Willow Lake mine had experienced numerous roof falls in the recent past, and that Inspector Morris had specifically addressed the need to improve equipment clearance in travel ways. After considering all statutory penalty criteria and the specific background for this violation, I assess a civil monetary penalty of $1,500.00 for the modified Citation No. 8436107.

V. ANALYSIS DOCKET LAKE 2012-66

A. Citation No. 8444809

MSHA Inspector Scott Lee issued Citation No. 8444809 on June 12, 2012 for an alleged violation of 30 CFR 75.202(a). Tr. 373. Lee alleged within the citation that:

> The roof where persons work or travel was not adequately supported to protect from hazards related to falls of the roof. Two roof bolts in patterns were damaged and were not tight against the roof. One of the roof bolt plates was completely missing and the other bolt was curled up towards the roof. The area of exposure was approximately 4 to 5 feet in width and approximately 10 feet in length.
>
> This condition was observed in the # 6 entry (SS 84+25) on the inby corner of the intersection immediately adjacent to the dumping location on the feeder (#5 entry) in unit # 4, (MMU 014).

Sec'y Ex. 11, 1.

Lee determined that that the violation was reasonably likely to result in a lost workdays or restricted duty injury and affected 1 person. Lee also determined that the violation was S&S and the result of Big Ridge's high negligence. Sec'y Ex. 11, 1. The Secretary has proposed a specially assessed penalty of $47,700.00. Sec'y Br., 42.

1. Findings

The cited standard, 30 CFR § 75.202(a) requires that,

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

Inspector Lee testified that without the bearing plate tight to the roof, the grouted roof bolts were not serving their intended purpose. Tr. 388. Big Ridge Safety Manager Schiff stated that in his opinion, the bearing plates were not necessary for structural support, but agreed that the Willow Lake Roof Plan required bearing plates to be tight to the roof.[1] Tr. 414. Both Lee and Schiff testified that, in addition to the missing and loose bearing plates, the bolts were bent over. Tr. 386, 407. As such, it is clear that the two pattern bolts were not in place as designed and required by the mine's mandatory roof control plan. Therefore, I hold that the Secretary has established that Big Ridge violated 30 CFR § 75.202(a) and the mine's mandatory roof control plan by not repairing bent pattern roof control bolts and baseplates.

2. Gravity

Inspector Lee designated Citation No. 8444809 as an S&S violation. Sec'y Ex. 11. I have already held that the Secretary has established the violation of a mandatory standard thus meeting the first element of the *Mathies* test. However, I find that Big Ridge has sufficiently rebutted the Secretary's allegation that the bent plates created a discrete safety hazard by presenting credible testimony corroborated by Inspector Lee that the roof was in fact sound in this area.

Specifically, the affected area was described by Inspector Lee as creating a 20 square foot area of exposure. Tr. 390. The surrounding roof was properly bolted and the bent bolts were up against the rib. Sec'y Ex. 42. Additionally, the bent bolts were fully grouted and the immediate area was still solid according to Safety Manager Schiff. Tr. 410. Although Inspector Lee testified to a history of roof falls at the Willow Lake mine, Lee confirmed that the roof in this area was not cracked at the time of the inspection and did not give any other indication of

[1] Although Manager Schiff agreed that the Willow Lake roof control plan required bearing plates to be tight to the roof, the Willow Lake Roof Control Plan submitted by the Secretary does not appear to actually state this requirement. Additionally, in their Post Hearing brief, the Secretary relied upon Schiff's statement during cross-examination rather than pointing to a particular clause of the roof-control plan to assert that the Willow Lake Roof Control plan required bearing plates to be tight to the roof. Sec'y Br., 43. As Respondent has not contested this ambiguity, and Inspector Lee credibly testified that the loose bearing plate and bent bolt were violations of 30 CFR § 75.202(a), I have accepted the Secretary's representation for the purpose of determining that a violation occurred.

instability. Tr. 389, 394. Even after considering continued normal mine operations given the surrounding roof bolting, the fully grouted installation, the stability of the immediate roof area, and the location of the damaged bolts up against the rib; I find that in these specific circumstances the Secretary has not demonstrated that a hazard was created by the bent base plate and bolts.

Additionally, even if I were to have found a discrete safety hazard was created by the bent roof bolts, I also find that due to the particular location and the relatively small size of the affected roof area, it was highly unlikely for an exposed miner to be in that area in the unlikely event of a roof fall. Big Ridge Safety Manager Schiff credibly testified that a No Walk Zone prohibited miners from entering Entry #6 from the nearby dinner hole and feeder belt. Tr. 407-08. Big Ridge Section Foreman Reeves also testified that mining activities were located in a separate area and only haul cars with protective canopies traveled entry #6 during the June 12, 2012 production shifts. Tr. 423. Inspector Lee's diagram in his inspection notes indicates that the damaged bolts were up against the rib. Sec'y Ex. 42. Similarly, Safety Manager Schiff stated that a miner would have to almost "crawl" against the rib in order to pass underneath the damaged bolts. Tr. 416. As any roof fall that occurred in the affected area would likely involve relatively small amounts of material, I find that ram car operators were protected from injury by the canopy of their cars. As pedestrian traffic was prohibited in this area, I find that the Secretary has not established there was a reasonable likelihood of an injury occurring. For these reasons, I rule that the likelihood of injury for Citation No. 8444809 shall be **MODIFIED** to unlikely. Additionally, as the Secretary has failed to satisfy the second and third elements of the *Mathies* test, I also hold that Citation No. 8444809 shall be modified to non- S&S.

For reasons discussed above regarding the location of the damaged bolts, I also hold that any resulting accident would likely involve lost workdays or restricted duty injuries and affect one person.

3. Negligence

I find that the violation was the result of moderate negligence on the part of Big Ridge. Inspector Lee stated that the bolts had been dusted over and had likely been damaged somewhere between 5 to 12 shifts prior to his inspection depending on whether a ram car or miner had struck the bolts. Tr. 391, 398. However, the Secretary did not present any definitive evidence of when the bolts had actually been damaged. Furthermore, rock dust made it difficult to detect the damage, as Inspector Lee himself noted that "if you wasn't looking real close at it, you would miss it because it had been dusted through." Tr. 392-93. Indeed, Lee himself passed by the bolts without noting the damage on his way towards the face, and MSHA Inspector Eddie Kane also passed by the area without noticing the damaged bolts earlier that same shift. Tr. 407, 409. As such, although the damaged bolts were in an area that required mandatory inspections, it is reasonably likely that the damage occurred within the past several shifts and was obscured by rock dusting operations. Therefore, the location of the damage at a corner up against the rib, the layer of rock dust, and the likelihood of recent damage all decreased the likelihood of Big Ridge identifying the damaged bolts and stand as mitigating circumstances. As such, I rule that the negligence designation for Citation No. 8444809 shall be **MODIFIED** from high to moderate.

4. Penalty Assessment

The Secretary has proposed a specially assessed penalty of $47,700.00. Other than listing the factors considered in the negligence designation for this penalty, the Secretary has not presented any specific evidence supporting the justification for the specially assessed penalty. Upon review of the Special Assessment Narrative Form and 30 CFR § 100.3, it appears that the original penalty designations would have resulted in a regularly assessed penalty of $15,971.00. Resp. Ex. S. However, I have already held that Citation No. 8444809 shall be modified from reasonably likely, S&S and high negligence to unlikely, non-S&S and moderate negligence. After considering these modifications and the six 30 CFR § 100.3 penalty criteria, including Big Ridge's history of previous roof control violations, I assess a civil monetary penalty of $3,000.00.

B. Citation No. 8445037

MSHA Inspector Eddie Kane issued Citation No. 8445037 on June 19, 2012 for an alleged violation of 30 CFR § 75.202(a) as a 104(a) citation. Tr. 300-01. The Citation alleges in part that:

> There is an area of unsupported roof on unit # 5, entry # 6 in the last open crosscut, at survey station 8+40. The unsupported area measured 9.75 feet by 6 feet with an unsupported coal brow in the affected area that measured 4.5 feet wide by 22 inches thick by 26 inches tall.

Sec'y Ex. 13, 1.

Inspector Kane determined that the condition was reasonably likely to result in injury, a resulting injury was likely to be fatal, the violation was S&S and that the violation was the result of Big Ridge's moderate negligence. Sec'y Ex. 13. The Secretary has proposed a specially assessed penalty of $47,700.00. Sec'y Br., 38.

1. Findings

Inspector Kane issued Citation No. 8445037, because he determined that the overhanging coal brow was a violation of 30 CFR § 75.202(a) which mandates in part that:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof...

The testimony from both parties clearly indicates that an overhanging coal brow approximately 4 feet wide, 9 feet long, and 26 inches thick was left during the mining cycle and not bolted sometime prior to June 19, 2012. Both the Secretary and Big Ridge have generally

agreed that the overhang varied between 55 and 66 inches in height above the mine floor. Tr. 307-08; Tr. 340. The photos entered into evidence by Big Ridge corroborate Compliance Supervisor Cummins's statements that the majority of the unsupported overhang was only 55 inches above the mine floor. Tr. 340; Resp. Ex. AA 4, 5.

Although Big Ridge has not contested the violation itself, they have argued that it would have been difficult for a miner to get under the overhang. Resp. Br., 67. As such, it is necessary to determine whether this unsupported area meets the standards definition of an area "where persons work or travel." 30 CFR 75.202(a). Both parties testified that the coal brow was located at the last open crosscut in Unit 5, Entry # 6, which was an active face of the Willow Lake Portal Mine. On cross-examination, Compliance Supervisor Cummins confirmed that while miners generally walked down the centerline of the entry, it would have been possible, if not likely, for the coal brow to fall and trip out into the entry. Tr. 333, 337-38. As such, I hold that the Big Ridge violated 30 CFR 75.202(a) by failing to control or support the coal brow in an active entryway where miners worked and traveled.

2. Gravity

Inspector Kane designated Citation No. 8445037 as an S&S violation. However, I find that the Secretary has failed to establish the second and third elements of the *Mathies* S&S analysis and hold that Citation No. 8445037 is non-S&S.

I have already determined that Big Ridge violated 30 CFR § 75.202(a) and, thus, the Secretary has shown the violation of a mandatory safety standard. However, while the coal brow was not bolted, I have found that in this specific case, Big Ridge has sufficiently rebutted the Secretary's determination that the coal brow contributed to a discrete safety hazard of a possible roof fall.

The Secretary argues that Inspector Kane's notes and testimony regarding a crack and oozing water supports his determination that the brow was certain to fall. Sec'y. Br. 39-40. Both Big Ridge witnesses testified they did not observe any cracks and oozing water at the time of the citation. Tr. 330, 353. The photos entered by Big Ridge are not entirely clear, but they do not indicate any obvious gaps, water, or sluffage. Tr. 330-31; Resp. Ex. AA 4, 5. While I find that Inspector Kane must have seen something that caused him to note a crack and oozing water, it is clear that the coal brow was in fact stable at the time of the citation. Kane, Cummins, and Kanady all testified that when the continuous miner was brought in to remove the coal brow, it was necessary to turn the mining heads on to cut the overhang down. Tr. 319, 332-33, 354. Compliance Supervisor Cummins testified in detail that the operator first tried the normal method of tramming the continuous mining machine into the coal brow with the cutting heads off but the brow would not fall under pressure from the 20 ton machine. Tr. 332-33. Additionally, Kane himself testified that the surrounding roof area was generally sound and properly bolted up to the coal brow. Tr. 312, 323. Given this specific evidence regarding the stability of the coal brow and surrounding roof, I find that the Secretary has not shown the coal brow created a discrete safety hazard even when considering, as I must, normal continued mine operations.

Furthermore, the Secretary has not shown that even if the coal brow did fall, it was reasonably likely for miners to be struck by the coal brow and injured. Inspector Kane measured the overhang as standing between 55 and 66 inches above the mine floor. Tr. 307-08. Compliance Supervisor Cummins testimony that the majority of the overhang was only 55 inches above the mine floor is supported by the photos entered into evidence by Big Ridge. Tr. 340; Resp. Ex. AA 4, 5. Relying on Cummins's statement that hard hats add 3 inches of clearance height to miners, I find that only a miner shorter than 5'-3" could walk under the highest part of the coal without stooping or crawling. Tr. 344-45. In fact, a miner would have to be 4'-9" or shorter to walk under the majority of the overhang closer to the rib. Furthermore, Big Ridge Supervisor Cummins credibly testified that miners were trained to walk down the centerline of entryways to increase visibility. Tr. 333-34. Given the height of the overhang, the absence of any evidence demonstrating a need for miners to pass under the relatively small overhang, and the fact that miners typically walked down the center of the travelway, I find that it was not reasonably likely for a miner or ram car to travel underneath the underhang.

The Secretary stated during cross-examination that it is not possible to predict how material in a roof collapse will fall and that miners further out into the entry would have been endangered by the coal brow against the rib. Tr. 337. While I do not disagree with the Secretary's argument as a general proposition, the third element of the *Mathies* test requires the Secretary to show a reasonable likelihood that the hazard contributed to will result in an injury. Although, as I have ruled above, the Secretary has established a theoretical possibility of the overhang falling and striking workers further out into the entry, the Secretary has not provided sufficient evidence to raise the likelihood of a roof fall in this area actually striking a miner to the level of reasonably likely.

Additionally, the next workers to enter this location would have likely been continuous miner operators making their next cut into the Entry # 6 face. Section Foreman Kanady credibly testified that once in the area, the continuous miner operator would have identified and brought the overhang down as part of the normal mining cycle. Tr. 352. Inspector Kane testified that he thought Big Ridge personnel may continue to overlook the overhang. Tr. 320. However, I find Foreman Kanady's testimony credible, particularly given that the coal brow obviously contained coal, providing additional motivation to Big Ridge personnel to quickly bring the overhang down and add to their production totals.

After considering evidence regarding worker travel in this area, I hold that the Secretary has failed to show that the overhang was reasonably likely to result in an injury. As such the Secretary has failed to satisfy the second and third elements of the *Mathies* test and I rule that Citation No. 8445037 shall be **MODIFIED** to non S&S.[2] For these same reasons, I rule that the likelihood of injury for Citation No. 8445037 shall be **MODIFIED** to unlikely.

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[2] In modifying Order Nos. 8445037 and 8444809 from S&S to Non S&S, I am not requiring the Secretary to demonstrate roof instability in order to sustain an S&S determination. However, in both these instances, the Respondent has produced credible and sufficient evidence corroborated by the Secretary's witnesses to show that the roof was in fact stable at these areas. Tr. 319, 332-33, 354, 389, 410. As such, I have determined that in these specific instances, although Big Ridge violated the specific mandates of the Willow Lake roof control plan, these violations did not in fact create or contribute to a discrete safety hazard as required by the second element of the *Mathies* test.

Inspector Kane designated Citation No. 8445037 as reasonably likely to result in a fatal injury. Kane based this determination partly upon a recent fatality at a nearby mine that involved a roof fall similar in size to the size of the coal brow. Tr. 314. While roof falls may certainly be fatal, Big Ridge Compliance Supervisor Cummins credibly testified that miners traveled down the center of the entry way and ram cars could not fit under the underhang. Tr. 333-34. As such, I find that if the coal brow were to fall, it would only be reasonably likely to result in an indirect glancing blow to a miner. For this reason, I rule that the type of injury for Citation No. 8445037 shall be **MODIFIED** to permanently disabling. Additionally, as I have found that ram cars were not able to pass under the coal brow, I uphold the Inspector Kane's determination that the violation affected one person.

3. **Negligence**

Inspector Kane determined that this violation was the result of Big Ridge's moderate negligence. Kane based this designation partially on previous meetings with Big Ridge regarding the need to control and or support coal brows. Tr. 314-15. Kane also noted in his inspection notes and testified that Section Foreman Kanady told him he had set sights in this entry twenty minutes before Inspector Kane arrived, but that the rock dust and perspective from the entry prevented him from noticing the overhang. Tr. 312, 317.

At hearing, Section Foreman Kanady disputed Kane's assertion that he had set sights in this area, and testified that he had not set sights in any area that morning and had not yet traveled the # 6 Entry. Tr. 350-51. Big Ridge further argues that the negligence designation should be reduced to low or none based upon Kanady's testimony and lack of management knowledge. Resp. Br., 70-71.

The Secretary argues that as the area had been previously scooped, dusted and examined at the beginning of the shift, Big Ridge management had ample opportunity to identify the overhang in the two and a half hours after the area was cut and a negligence designation of moderate or high is warranted. Sec'y Br. 41-42.

The Mine Act defines high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and, low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

In this situation, Big Ridge had been cited for this standard 119 times in the previous two years and at an unspecified time, Inspector Kane had conducted close-out meetings focusing on the hazards of coal brows. Tr. 315. However, the coal brow had only been created two and a half hours before Inspector Kane traveled Entry # 6 and rock dust made the coal brow difficult to see as miners approached the face. Therefore, I find that mitigating circumstances made it difficult for Big Ridge to promptly identify the hazard. Thus, I find that the violation was the result of Big Ridge's moderate negligence.

4. Penalty

The Secretary has proposed a specially assessed penalty of $47,700.00 for Citation No. 8445037 as originally written. The Special Assessment Narrative form indicates that Citation No. 8445037 would have received a regularly assessed penalty of $15,971.00. Resp. Ex. CC. I have already ruled that the Citation No. 8445037 shall be modified from reasonably likely to unlikely, from fatal to permanently disabling, and from S&S to non-S&S.

Other than noting Big Ridge's history of 30 CFR § 75.202 violations and Inspector Kane's previous focus on controlling coal brows when supporting their negligence designation, the Secretary has not provided any specific support for the specially assessed penalty. I have found that Citation No. 8445037 was unlikely to result in injury and non-S&S. I have determined that the violation was the result of Big Ridge's moderate negligence. Inspector Kane testified that Big Ridge immediately abated the condition by bringing the overhang down with the continuous miner. Tr. 318-19. After considering the six statutory penalty criteria and reviewing the standard penalty tables provided in 30 CFR § 100.3, I assess Big Ridge a civil monetary penalty of $2,000.00 for Citation No. 8445037.

C. Citation No. 8445268

MSHA Inspector Lampley issued Citation No. 8445268 on August 23, 2012 for an alleged violation of 30 CFR § 75.512. Tr. 101. Lampley alleged within the Citation that:

> The company 301 welder, in service and energized at the unit # 1 battery barn has not been frequently examined, tested, and properly maintained. Multiple hazards were found on the 480 V.A.C. power cable for the welder, reference citation # 8445267, in which three damaged areas were found... Upon inspection of the weekly electrical examination book, records indicate the company #01 welder has not been examined since 08/06/2012. The operator engaged in aggravated conduct in that management is directly responsible for completion of required weekly electrical examinations...

Sec'y Ex. 15, 1-2.

Lampley determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Big Ridge's high negligence. Sec'y Ex. 15, 1. Lampley also determined that the violation was a 104(d) (1) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 15, 1. The Secretary has proposed a regularly assessed penalty of $25,810.00. Sec'y Br., 20.

1. Findings

30 CFR § 75.512 and subsection 30 CFR § 75.512-2 require mine operators to inspect equipment "at least weekly." 30 CFR § 75.512; 30 CFR § 75.512-2. Inspector Lampley credibly

testified and introduced inspection logs that showed Big Ridge failed to inspect the welding machine located at the No. 1 battery barn for a period of 17 days. Tr. 118; Sec'y Ex. 16 A-C. Big Ridge management acknowledged that the required weekly inspection for the welder was indeed missed. Tr. 139. As such, I hold that Big Ridge violated 30 CFR § 75.512 by failing to inspect the welding machine on a weekly basis.

2. Gravity

As an initial matter, I take note that Inspector Lampley issued Citation No. 8445267 for the damaged electrical cable itself on the same day as Citation No. 8445268. Sec'y Ex. 15, 1. Big Ridge has accepted and paid the civil monetary penalty for Citation No. 8445267.[3] As such, I have focused on Big Ridge's knowledge of, and negligence in failing to inspect the welder while taking note of the actual hazards that developed during the missed inspection time period as evidence of the violation's gravity.

I uphold Inspector Lampley's designation of Citation No. 8445268 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to inspect the welding machine for a period of 17 days was a violation of 30 CFR § 75.512. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to inspect the welding machine and its power cable, Big Ridge allowed damaged electrical components to go unrepaired, exposing miners to possible electrocution, fire, and ignition hazards.

The third *Mathies* element requires a showing that a significant injury is reasonably likely to occur under normal mining operations. The Secretary contends that an electrocution injury was reasonably likely to occur through one of several different possibilities. Sec'y Br., 22-23. According to the Secretary, a miner may have unknowingly contacted one of the damaged areas of the cable without realizing the copper conductors were exposed, or have been electrocuted if they contacted the metal a-frame hoist or welding trailer with the damaged area in contact with the metal frame. Sec'y Br. 23.

Big Ridge argues that the violation was not reasonably likely to lead to a significant injury as Mr. Pinkston, the normal examiner, would have inspected the welding machine on his return and identified the damaged areas. Resp. Br., 30. Big Ridge also argues that the damaged areas were not reasonably likely to cause a significant injury because miners did not normally contact the power cable directly while it was energized. Resp. Br., 30-31.

After considering both parties testimony, I find that the missed electrical inspection did make it reasonably likely that a significant injury would occur. Inspector Lampley credibly testified that the No. 6 gauge cable was thin for a 480 VAC power supply and easily susceptible to damage. Tr. 123. Indeed, after 17 days this cable was damaged in three different places, exposing copper conductors in two locations. Tr. 105, 107. Although Big Ridge contends that Mr. Pinkston would have eventually inspected the cable and identified these hazards, it is unclear how soon Mr. Pinkston would have inspected the welding machine due to the confusion regarding inspection responsibilities.

[3] MSHA website http://www.msha.gov/drs/ASP/MineAction.asp Mine ID 1103054 08/23/2012 Citation Status.

Additionally, although Maintenance Foreman Melvin credibly testified that miners did not normally handle the energized power supply cable, Big Ridge did not state that they had a policy in place to prevent such contact with the energized cable or the metal frame of the welding machine/A-frame hoist during welding operations. Tr. 163. I also take note that another Commission ALJ has previously upheld an alleged violation of 30 CFR 75.512 at the Willow Lake Portal mine as S&S despite the presence of safety protocols when the judge found the protocols did not prevent the possibility of an electrocution. *Big Ridge Inc.*, 33 FMSHRC 2238, 2248-49 (Sept. 2011) (ALJ Melick). In this situation, hazards could and actually did develop in the time period of the missed inspection. Tr. 104-05. Therefore, given that the time period for the next welder inspection was uncertain and miners routinely worked around, and with, the three damaged areas on the 480 VAC power cable, an electrocution was reasonably likely to occur. Tr. 124, 170-71.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Both Inspector Lampley and Supervisor Mullins testified that a miner who contacts an exposed 480 VAC conductor could suffer a fatal shock. Tr. 121, 150. While the ground fault protection system for the welder may have mitigated the potentially fatal hazard of uncorrected damaged electrical components, it is clear that failing to inspect and repair the damaged power cable exposed miners to a reasonable likelihood of suffering a reasonably serious injury.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I hold that the Secretary has established that Citation No. 88445268 was an S&S Violation.

As stated above in my analysis of the third *Mathies* element, I find that the missed inspection was reasonably likely to cause a significant injury as the missed inspection allowed damage to a high voltage power supply cable and welding machine to go unrepaired. I also find that due to the high voltage capacity of the 480 VAC damaged power cable, a resulting injury was likely to be fatal. I additionally find that the missed examination exposed the one worker observed by Inspector Lampley in the battery barn to the violative condition. Tr. 124.

3. Negligence

Big Ridge personnel failed to inspect the welder at the unit #1 battery barn when inspection duties were transferred from the normal examiner, Mr. Pinkston, to a qualified replacement examiner, Mr. Schutt. Tr. 158. Mr. Schutt was not aware that the welder was located nearby the battery barn because the battery barn inspection log did not contain an entry for the welder. Tr. 159. As such, Mr. Schutt did not inspect the welder and management officials that reviewed the inspection logs did not notice the missed inspection because the welder did not have a formal entry in either the battery barn log or the outby equipment log. Tr. 167, 173. The Secretary has alleged that these circumstances show Citation No. 8445268 was the result of high negligence on the part of Big Ridge. On the contrary, Big Ridge has argued that these facts should motivate this court to reduce the negligence designation to either moderate or low. The Mine Act defines high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or

constructive knowledge of the violative condition with mitigating circumstances; and, low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

The two examiners responsible for inspecting the welder, Mr. Pinkston and Mr. Schutt, both appeared to have carried out their individual inspection duties in good faith. Tr. 157-58. However, I find it concerning that Big Ridge management did not have a more accurate method of ensuring inspection of mobile equipment other than relying on individual examiners to manually write in mobile equipment whenever it was within their inspection area. Tr. 172. I also note that Inspector Lampley testified that he and other inspectors had issued similar citations for failure to inspect equipment within the last couple of years. Tr. 130.

As testified to by Big Ridge witnesses, the size of the Willow Lake Portal mine and the sheer number of different pieces of equipment made it difficult for shift and area level foreman to track and inspect each piece of equipment. Tr. 171-72. Given Big Ridge's status as a large sophisticated operator, Big Ridge should have known that the very nature of mobile equipment and the size of the Willow Lake Portal mine required a more fail-safe inspection tracking method other than penciled-in inspections on various different inspection logs. However, I do acknowledge that Mr. Pinkston's temporary absence contributed to the missed inspection. I also credit Big Ridge's inspection supervision efforts, as management reviewed the inspection log on a daily basis to ensure all listed hazardous conditions were promptly corrected. Tr. 162.

As such, while I find that Big Ridge should have identified the missed inspection; I also hold that Mr. Pinkston's absence and Big Ridge's efforts to ensure prompt corrective action for completed inspections stand as mitigating circumstances. Therefore, the negligence designation for Order No 8445268 is **MODIFIED** from high to moderate.

4. <u>Unwarrantable Failure</u>

I hold that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

Order No. 8445268 involved a failure to inspect the welding machine at the No. 1 battery barn for a period of 17 days. Tr. 118. Due to the construction of the governing statute Big Ridge was 4 days overdue in inspecting the welding machine. Resp. Br., 33. Big Ridge Safety Manager Grounds credibly testified that Mr. Schutt had properly inspected all other pieces of equipment at the battery barn during Mr. Pinkston's absence. Tr. 142. Although Inspector Lampley testified that other citations for failure to inspect equipment had previously been issued at the Willow Lake mine, it does not appear that there were any other failures to inspect equipment in this area in the immediate timeframe.

b. Notice to the Operator

As I have just noted, Inspector Lampley credibly testified that he had previously cited Big Ridge for failure to inspect equipment and emphasized the importance of properly conducting inspections with maintenance foremen in closeout meetings. Tr. 130.

c. Prior Abatement Efforts

Although Big Ridge had not developed a formal program to ensure inspection compliance in the event of an examiner's absence, Big Ridge did appoint a qualified miner to conduct Mr. Pinkston's inspections during his absence. Tr. 152. Additionally, Big Ridge also instituted a voluntary back-check system designed to ensure listed hazards were promptly corrected. Tr. 162.

d. Obviousness of the Hazard and Degree of Danger

As the welder inspections had previously been penciled-in to the outby equipment log rather than formally entered the battery barn inspection book, the missed inspection was not obvious to Mr. Schutt or Big Ridge management who reviewed the logs. Tr. 160. However, as I have previously noted, the multiple entry logs and policy of allowing pencil inspections should have alerted upper management that an inspection could be missed without an examiner realizing his oversight. I have already held that the missed inspection exposed miners to a high degree of danger as it permitted a damaged high voltage power cable to go unrepaired for multiple shifts.

e. Operator's Knowledge of the Violation

Big Ridge did not have actual knowledge of the missed inspection as Mr. Schutt relied upon the battery barn inspection log as the complete list of equipment in that area. Tr. 160. Additionally, Big Ridge management that reviewed inspection logs would not have known to look for a missed welder inspection as the welder had previously only been penciled-in to the outby inspection log. Tr. 161. For these reasons, I strongly urge Big Ridge to consider a more failsafe comprehensive inspection log. However, it does not appear that Big Ridge was aware of, or had been notified by MSHA of the need to improve its inspection logs at the procedural level.

As I have found that the missed examination was not extensive, did not exist for a significant period of time relative to the inspection cycle, was not obvious to mine examiners or immediate management, and that Big Ridge had undertaken genuine effort to improve inspection follow-up, I hold that the violation was not due to a reckless disregard or serious lack of reasonable care in conducting inspections. For these reasons, Order No. 8445268 was shall be **MODIFIED** from a 104(d)(2) order to 104(a) citation.

5. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $25,810.00 for Citation No. 8445268. As I have held above, Citation No. 8445268 shall be modified from a high negligence 104 d(2) unwarrantable failure Order to a moderate negligence 104(a) Citation. Big Ridge abated the violation by completing the required electrical examination for the welder. Sec'y Ex. 1, 3. After accounting for these modifications, considering the six statutory penalty criteria, including the hazard of an uninspected high voltage cable, and reviewing the 30 CFR § 100.3 penalty tables, I assess a civil monetary penalty of $15,000.00.

VI. ANALYSIS DOCKET LAKE 2012-251:

A. Order No. 8444863

MSHA Inspector Scott Lee issued Order No. 8444863 as a 104(d)(1) Order on August 20, 2012 at 9:45 a.m. for an alleged violation of 30 CFR § 75.370 (a)(1). Tr. 429. The Order alleges that:

> C Crew (Midnight A Shift) was not mining coal according to the mines approved ventilation plan in unit # 2 (MMU 002). The Plan requires that a spray block of 5 have 5 sprays available with at least 3 of those sprays working. The bottom left block on the left side of the cutting head had 1 of its 5 sprays plugged, (with a steel plug). Also a block of 3 sprays must have 3 sprays available with 2 of those working at a minimum. The block of 3 sprays just behind the cutting head on the left side of the machine had one of its sprays plugged with wood, leaving only 2 available, none of those sprays were working properly at start of "A" shift, (days). There was a blown water line to these sprays that had to be repaired at start of shift. The mine plan also requires a block of 3 sprays be centered in the throat of the conveyor. This miner had 2 blocks of 3 sprays on either side of the conveyor in this location, only 1 side was working and not adequately covering the width of the conveyed coal... A spray count was done at 1300, (6 hours into the shift) the repairmen at that time had only been able to repair 32 of the 35 sprays required to operate with a minimum spray count. The crew foreman on unit 2 (MMU 002) engaged in aggravated conduct constituting more than ordinary negligence in that he allowed this condition to exist while mining.

Sec'y Ex. 17, 1-2.

Inspector Lee determined that this violation was reasonably likely to result in an injury, that the resulting injury would be expected to be permanently disabling, the violation was S&S, two persons were affected, the violation was the result of Big Ridge's high negligence, and that the violation constituted an unwarrantable failure to comply with a mandatory safety standard.

The Secretary has proposed a specially assessed civil monetary penalty of $52,500.00.

30 CFR § 370 (a) (1) requires that:

> The operator shall develop and follow a ventilation plan approved by the District Manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

Inspector Lee issued this Order after he attempted to obtain a routine dust pump sample for the #242 miner and was unable to do so because the day shift was unable to get the machine up to compliance after six hours of repair work. Tr. 433-35. In particular, Lee alleged Big Ridge had violated 30 CFR § 370(a)(1) and the mine's ventilation plan due to 1) the presence of spray plugs, 2) an unapproved throat spray configuration, and 3) his determination that the Midnight crew must have operated with an insufficient total number of sprays. Tr. 439, 441, 450.

1. Spray Availability

According to Inspector Lee, the Willow Lake ventilation plan required spray banks to have all sprays available, if not actually operational. Tr. 438-39. For this reason, Lee considered the presence of steel and wood plugs at several of the spray nozzles to be an unacceptable violation of the mine's ventilation plan. Tr. 439. On cross examination, Lee confirmed that the plan stated that 3 out of 5 sprays in a bank of 5 and 2 out of 3 sprays in a bank of 3 must be "operational", and did not actually state that all sprays must be "available." Tr. 465. However, Lee maintained that the diagram in the ventilation plan depicted a certain number of sprays at each bank. *Id.* Lee stated that this diagram indicated that while the plan allowed a certain number of sprays to malfunction, it was necessary to have all sprays "available." *Id.*

Big Ridge argues that Inspector Lee's interpretation of the ventilation plan is incorrect and unsupportable, as neither the diagram nor the text of the ventilation plan make any explicit reference to a minimum number of "available" sprays. On cross-examination, Big Ridge pointed out that there is no functional difference between a spray clogged with sediment and a spray that is mechanically plugged. Resp. Br., 88; Tr. 465. Additionally, Big Ridge contends that the plugged sprayer is in fact available, as an operator can replace the plug with a new spray in several minutes with simple hand tools if needed. Tr. 469, 519.

I find that the presence of plugs on the continuous miner was not in itself a violation of the 30 CFR § 370 (a) (1) or the mine's ventilation plan. The Willow Lake Ventilation Plan neither prohibits the use of plugs nor mandates that all sprays be "available" at all times. Sec'y Ex. 19. The plan does require a certain number of sprays at various locations on the continuous miner, but allows the miner to operate as long as a certain fraction of the sprays in that bank are "operational". Sec'y Ex. 18, 27.

Inspector Lee's determination that the diagram's depiction of five sprays prohibits the use of spray plugs is illogical. According to Lee, a bank of five sprays with one sediment clogged spray is acceptable but a bank of five sprays with one mechanically plugged spray is

unacceptable. Tr. 466-67. This interpretation of the plan would not improve dust control at the continuous miner or at the Willow Lake Portal mine. Indeed, as alluded to by Inspector Lee, the use of a plug at a damaged spray head may allow a mining crew to maintain proper water pressure across the entire machine. Tr. 458. Additionally, although Lee referenced previous meetings regarding the need to maintain sprays, Lee did not indicate he had previously instructed Big Ridge not to use spray plugs. Other than relying on Lee's interpretation of the ventilation plan, the Secretary has not pointed to any program policy manual or other agency publication that warns against the use of spray plugs.

As the ventilation plan did not prohibit the use of plugs, the Secretary did not introduce evidence demonstrating that MSHA had prohibited the use of spray plugs at the Willow Lake Portal mine, and the Secretary's interpretation is not one a reasonably prudent miner would have anticipated, I hold that the presence of plugs was not in itself a violation of the mine's ventilation plan or 30 CFR § 370 (a) (1).

2. Throat Spray Configuration

Inspector Lee testified that the unit #2 miner had two separate banks of three sprays offset to either side of the conveyor belt at the throat, rather than the one bank of three sprays centered on the conveyor belt depicted in the mine's ventilation plan. Tr. 441. Lee confirmed that positioning dual spray banks to the side of the conveyor belt was not a hazard in and of itself, but he maintained that the failure to obtain MSHA approval constituted a violation. Tr. 441, 444-45.

Big Ridge Safety Compliance Manager Todd Grounds testified that nearly every continuous mining machine at the Willow Lake mine had the dual offset throat spray configuration. Tr. 485. Grounds stated that the continuous miners were configured this way by the factory and that MSHA Inspectors, including Inspector Lee, had never previously issued a citation regarding the offset spray configuration for the 242 machine or any other continuous miner. Tr. 485-86.

I find that the offset dual spray block configuration was not in itself a violation of the mine's ventilation plan or 30 CFR § 370 (a) (1). As pointed out by Big Ridge and confirmed by Inspector Lee, the dual spray block provided additional sprays and adequate coverage of the conveyor belt when the sprays were working. Resp. Br., 91; Tr. 441. As such, "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard" could have determined that while the diagram required a *minimum* of three sprays centered on the throat, it was acceptable to position a total of six sprays to the sides of the conveyor belt in order to ensure proper coverage and avoid damage. *Energy West Mining Co.*, 17 FMSHRC 1318. Indeed, Inspector Lee himself explained at length that:

> Typically they'll move the (throat spray) to the side like that, because if they put them dead center, if they're not just right, a rock or something will come through there and knock them out. So they move them on either side which is fine, because, you're just trying to knock dust down there in that conveyor.

Tr. 442.

The Willow Lake ventilation plan did explicitly require that "Any changes or deviations in the plan require approval by the district manager before implementation." Tr. 443. However, it is also clear that this offset dual spray bank set-up was installed in the majority of the continuous miners at the Willow Lake Portal mine and had been observed by MSHA inspectors on numerous previous occasions without incident. Tr. 485-86. Indeed, as emphasized by Inspector Lee, he himself had inspected and collected dust samples from continuous mining machines over a dozen times in the 2012 fall quarter. Tr. 457, 459, 467. As MSHA performed regular and extensive dust control checks on the continuous mining machines at the Willow Lake Portal Mine, and had never previously raised any concerns regarding this common and obvious condition, it was reasonable for Big Ridge to assume that the dual spray block configuration complied with the mine's ventilation plan and 30 CFR § 370 (a) (1). *Good Construction*, 23 FMSHRC 995, 1005 (Sept. 2011).

As such, I hold that the dual spray block configuration at the throat was not a violation because it met the minimum requirements of the ventilation plan and MSHA had never provided Big Ridge any advance notice that this common configuration was impermissible.

3. Midnight Shift Operation

Inspector Lee alleges within Order No. 8444863 that the midnight shift operated the #242 continuous miner in violation of the mine's ventilation plan and 30 CFR § 370 (a)(1). Tr. 450. Lee based this conclusion on the presence of a blown water line at the beginning of the day shift and the day shift's inability to achieve the required 80% level of functioning sprays in six hours of repair time.

Lee testified that he had persistent difficulties obtaining dust samples from continuous mining machines at the Willow Lake Portal mine. Tr. 434. Lee had only been able to gather 3 valid samples out of 13 attempts during the 2012 fall quarter. Tr. 434. Lee stated that he was often not able to collect a sample at all because Big Ridge personnel were unable to meet the requirements of their dust plan, including sufficient spray nozzles. Tr. 435, 459. Lee stated that that he was confident Big Ridge only performed the lengthy dust parameter repairs during MSHA inspections, and simply ran out-of-compliance when MSHA was not present. Tr. 460.

I find that the Secretary has not produced sufficient evidence to support Lee's determination that the August 19-20 midnight shift operated with insufficient sprays or water pressure. Lee was not present during the midnight shift and did not question any midnight shift employees regarding August 19-20 shift operations. Tr. 463. Lee assumed that the presence of the broken water line at the beginning of the morning shift indicated that the midnight shift had produced coal without the water line or sufficient water pressure. Tr. 450. However, midnight Section Foreman Davis credibly testified that the water line blew at the end of the shift and that the crew reported the damage to the maintenance department for repair. Tr. 507-08. Indeed, Lee confirmed that the day shift was already repairing the damaged line at the start of the day shift when he first arrived at the # 242 miner. Tr. 450; Sec'y Ex. 17. As such, it appears that Big Ridge considered the blown water line a necessary repair item and was working in earnest on the

line before Inspector Lee began to inspect the machine.

Additionally, Lee's conclusion that the midnight shift must have run without an adequate number of sprays is not supported by sufficient evidence. Lee based this conclusion on the day shift's inability to obtain 35 working sprays after 6 hours of repair time. However, Section Foreman Davis credibly testified that he personally checked the #242 miner at the beginning of the August 19-20 shift and observed 36 working sprays. Tr. 514. Davis also stated that the miner operator checked the sprays between each cut and that the operator could quickly repair malfunction sprays if necessary. Tr. 506.

At hearing, Lee stated that the day shift could not get spray nozzles to stay in certain spray heads because the threads were worn. Tr. 439. However, on cross-examination Lee stated he was not entirely certain that spray heads on the #242 had blown out under pressure. Tr. 469. While I generally found Lee a credible witness, Lee did not note worn spray threads or blown out spray nozzles in the text of the citation or within his inspection notes. Additionally, Compliance Supervisor Grounds testified that repair difficulties were due to the spray nozzles clogging quickly with in-line debris. Tr. 497. Indeed, Inspector Lee himself testified that debris within the water line was a common cause of clogged sprays and could be caused by the installation of a new water line. Tr. 474-75. In this situation, both parties agreed that a main feeder bull line and the continuous miner's water line had blown and been repaired in the previous 12 hours. Tr. 453, 510.

After reviewing all available evidence, I find that the day shift's difficulty in obtaining a sufficient number of sprays was most likely due to recent damage to the water lines that fed the sprays. While I acknowledge Inspector Lee's concerns regarding his inability to gather valid dust samples in the past, neither Lee nor the Secretary presented sufficient evidence to support an inference that Big Ridge personnel were ignoring or postponing necessary dust parameter repairs. Therefore, I credit the testimony of Davis who observed the #242 continuous miner in operation during the August 19-20 midnight shift over the inferences of Inspector Lee who was not present. For these reasons, I hold that the Secretary has not produced sufficient evidence to establish that the midnight shift violated the mine's ventilation plan or 30 CFR § 370 (a) (1).

As I have found that neither the spray plugs nor the dual bank spray configuration violated the mine's ventilation plan in themselves, and that the Secretary has failed to demonstrate that the midnight shift operated the #242 miner with an insufficient amount of sprays or water pressure, Order No. 8444863 is **VACATED**.

VII. ANALYSIS DOCKET LAKE 2012-307

A. Order No. 8445336

MSHA Inspector Lampley issued Order No. 8445336 for an alleged violation of 30 CFR § 75.403 on October 29, 2012 as a 104 (d) (2) unwarrantable failure to comply with a mandatory safety standard. Tr. 174. Lampley alleged within the Order, in part, that:

> As the result of lab analysis, 10 out of 24 (41.67%) samples

> collected in rock dust Survey #1 contain less than the required 80 percent incombustible content. Rock dust survey # 1 was collected on October 23, 2012 in the second right panel off the 5th North Sub-main, Unit # 2 (MMU-002 & 012). The affected areas of the mine floor are black with pulverized coal mixed into the clay.

Sec'y Ex. 21, 1.

Lampley determined that the violation was unlikely to result in an injury, that any resulting injury would be fatal, the violation was non-S&S, 4 persons were affected, the violation was the result of Big Ridge's high negligence, and that the violation constituted a 104(d) (2) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 21, 1. The Secretary has proposed a regularly assessed penalty of $7,774.00. Sec'y Br., 26.

1. Findings

At the time of Order No. 8445336, 30 CFR § 75.403 required 90% of samples taken in a rock dust survey to have an incombustible content higher than 80%. Inspector Lampley credibly testified and provided documentation demonstrating that only 14 of the 24 samples he collected at the Old 2nd Right Area met the 80% incombustible content requirement. Tr. 185. Thus, only 58% of the samples taken by Lampley on the October 29 survey met the standard and the survey did not meet the requirements of 30 CFR § 75.403.

Although Big Ridge pointed out that Lampley did not collect samples from the roof at any of the sample locations, they did not contradict Lampley's assertion that his sampling methods were acceptable under MSHA regulations and the Mine Act. Tr. 216. Big Ridge has also stated that the average incombustible content of all 24 samples was 80.8% when considered as a collective whole. Tr. 229. However, Safety Director Barras confirmed that the standard required operators to maintain an 80% incombustible level at each sample location throughout all required areas. Tr. 236. As such, I hold that the Secretary has established that Big Ridge violated 30 CFR § 75.403 by failing to maintain the mandatory level of rock dust throughout the sampled Old 2nd Right Area.

2. Gravity

Inspector Lampley found that Citation No 8445336 was unlikely to result in injury due to the lack of ongoing mining activities at this area. However, he credibly testified that the scheduled removal of remaining equipment would require powered machinery that could produce an ignition source. Tr. 203-04. Lampley also stated that that the insufficiently rock dusted area extended for several hundred feet and contained enough combustible material to sustain a coal dust explosion. Tr. 206. Lampley explained that a coal dust explosion of that size would generate a massive amount of heat and gases that could cause a fatal accident. Tr. 205.

Big Ridge argues, in essence, that there was no likelihood of ignition or injury because Big Ridge had stopped active mining in that area. Resp. Br., 45. Big Ridge states that Lampley did not provide a specific mechanism for ignition other than referencing the presence of electrical

equipment. *Id.* However, I find that Lampley provided adequate support for his unlikely and fatal gravity designations by detailing the high combustible content of the samples gathered near the face, referencing the removal plans for electrical mining equipment including the continuous mining machine, and explaining the severe effects of a resulting explosion. I also find that Lampley credibly testified removal efforts would typically involve a crew of four miners, justifying his designation of four persons affected.

3. Negligence

The Mine Act defines high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances. Within the citation itself, Inspector Lampley noted that several of the failing areas were black in color and easily visible, and that MSHA had notified Big Ridge on Sept 26, 2012 that greater efforts were required to comply with rock dust standards. Sec'y Ex. 21. Lampley testified to all these conditions at hearing and added that MSHA personnel had informed Big Ridge prior to this survey that they had not yet surveyed the Old North panel and that it would be necessary to do a good job rock dusting that area. Tr. 209.

Big Ridge argues that the Secretary has failed to establish a nexus between the September 26 close out meeting, previous failed surveys, and Order No. 8445336. Resp. Br., 46-47. Big Ridge contends that the violative condition resulted from the unusual nature of the halted mining activities at the fault location. Resp. Br., 38-39. Big Ridge also contends that the increase an rock dust applied per ton of coal produced over the previous years demonstrates that Big Ridge was making serious efforts towards compliance with the standard. Tr. 233-34; Resp. Ex. EEE. Big Ridge argues that it would be improper to rely on Lampley's characterization of the failed areas as very dark in color as an indication of Big Ridge's negligence, as Lampley himself did not issue a citation until he received official lab results. Resp. Br., 43-44.

I find that Big Ridge was aware or should have been aware of the violation, and the conditions listed by Big Ridge are not mitigating circumstances in terms of Big Ridge's negligence. Mining operations had stopped four days before Lampley conducted the survey, and yet 10 of the 26 samples taken failed to meet the standard, and the area closest to the abandoned working face was dark in color and obviously in need of additional rock dust. Tr. 182-83, 186, 200-01. Lampley credibly explained that he waited on the official lab results, not because he was uncertain about whether individual samples would fail, but because he was following standard protocol and allowing for the possibility that several individual samples could fail and the overall survey still pass if 90% of the samples were compliant. Tr. 218.

Although Big Ridge contends that previous meetings and citations regarding rock dust levels did not notify management regarding this specific condition, I find that MSHA provided ample notice of the specific need to adequately rock dust the old North area. Inspector Lampley credibly testified that in addition to the Sept 26 meeting following a failed dust survey, MSHA had also specifically informed Big Ridge that this panel was due for dust sampling and that greater efforts would be needed to achieve compliance as several recent surveys in adjacent areas had failed. Tr. 208-09. Big Ridge criticizes Lampley's testimony regarding these meetings as lacking specificity. However, I found Lampley's testimony regarding meetings in the months prior to this citation entirely credible and sincere.

Additionally, I find that the significant increase in rock dust application in terms of pounds applied/coal tonnage mined from 2009-2012 at the Willow Lake mine is not a mitigating factor for this Order. Tr. 233-34; Resp. Ex. EEE. While this metric may serve as a useful tool for Big Ridge management in monitoring mine-wide rock dusting efforts over the course of a year, it tells me very little about Big Ridge's effort to improve rock dust levels following the Sept 26, 2012 meeting in which Big Ridge was notified that a mining area at the Willow Lake mine had failed to meet the standards of 30 CFR § 75.403. Similarly, I do not find the presence of a geologic fault at this area as a mitigating circumstance that excuses the lack of mandatory levels of rock-dust in a required area. Although the fault may have forced Big Ridge to change their standard pattern of equipment removal/belt advancement, Big Ridge Safety Manager Barras confirmed that at the time of the Order, four days and 12 shifts had already passed since mining activities had been halted at the fault. Tr. 237. As such, Big Ridge had adequate time to meet the requirements of 30 CFR § 75.403 through some combination of dusting equipment, yet failed to do so.

For all these reasons, I hold that Order No. 8445336 was the result of high negligence on the part of Big Ridge, as they should have been aware of the violation and there were no legitimate mitigating circumstances.

4. Unwarrantable Failure

For Order No. 8444536, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The Secretary established that the Big Ridge had stopped actively mining at the Old North face four days before Lampley conducted the survey, and the band of failed samples extended for several hundred feet. Tr. 182-83, 206. These conditions demonstrate that the condition had existed for a significant period of time and that the violation was extensive. Big Ridge's attempt to cite the overall 80% incombustible content of the entire survey as evidence the condition was not extensive is misleading. This contention ignores the requirements of the standard itself and fails to acknowledge that six of the ten failed samples were significantly below the required 80% standard and located in an unbroken survey band that extended for several hundred feet. Sec'y Ex. 21, Tr. 206.

b. Notice to the Operator

MSHA had put Big Ridge on notice that greater efforts towards rock dusting were necessary through the Sept 26, 2012 close out meeting, advance warnings of the need to survey the old North area, and the issuance of 44 other 30 CFR § 75.403 violations in the previous two years at the Willow Lake mine. Tr. 208-09; Sec'y Ex. 21, 2. Big Ridge's argument that Inspector Lampley failed to provide specific evidence of this notice is unavailing, as I found Lampley's testimony regarding the early warning for the Old North rock dust survey entirely

credible. Tr. 208-09. As Big Ridge Safety Manager Barras himself acknowledged that management was tired of getting rock dust failure citations, it is clear that Big Ridge was aware that rock dusting was considered a critical safety requirement by MSHA and that they needed to do a better job of rock dusting. Tr. 234.

c. Prior Abatement Efforts

Big Ridge presented credible evidence that they had increased rock-dusting efforts at the Willow Lake Mine from 2009 to 2012. Tr. 232-33; Resp. Ex. EEE. However, they did not present any evidence concerning heightened efforts after the Sept 26, 3012 closeout meeting or claim they were applying additional rock dust at the Old North face at the time of Lampley's inspection. Thus, Big Ridge did not present convincing evidence of specific prior abatement efforts related to the specific violative condition identified in Order No. 8445336

d. Obviousness of the Hazard and Degree of Danger

Inspector Lampley credibly testified that near the abandoned face, the sample areas were dark, indicating to him that those samples would not meet the 80% incombustible requirements of the standard. Tr. 200. Indeed, at the farthest inby survey band, six samples were collected and none of those samples contained more than 65% incombustible material, with one sample containing only 49.5% incombustible material. Sec'y Ex. 21. As such, I find that the test results corroborate Lampley's testimony that the condition was visually obvious. In an apparent attempt to dispute the obviousness of the violation, Safety Director Barras stated at hearing that the test results indicated that rock dust was present at every sample location. Tr. 238. However, after reviewing the test results, it is clear that the test results only report total incombustible content and do not detail specific amounts of applied rock dust. As the Respondent pointed out in regards to Order No. 8436212, not all mined material is combustible and the average baseline incombustible content of mined material at the Willow Lake mine is 50%. Tr. 93. Thus, noting Big Ridge's earlier statement that Willow Lake material on average has a 50% incombustible content, I find that incombustible content results in the 50% to 65% range indicate that very little rock dust had been applied at that sample location. As such, the test results corroborate Mr. Lampley's observations that at the farthest inby band, rock dust was very thinly applied and visually deficient.

I have already held that due to halted mining activities, there was only a small probability of an ignition occurring at the old North area. However, if planned equipment removal activities were to cause an ignition, the presence of uncontrolled combustible material throughout a several hundred foot area could sustain a fatal coal dust explosion. As such, while the likelihood of an injury event occurring was low, the risk of such an ignition was not totally eliminated and the insufficiently rock dusted areas still presented a high degree of danger.

e. Operator's Knowledge of the Violation

The Secretary has not established that Big Ridge management had actual knowledge that the old North area was not adequately rock dusted. However, as I have ruled above, the fact that

the area closest to the abandoned face was dark and significantly lacking in sufficient rock dust indicates that Big Ridge should have identified the violation.

As such, the Secretary has presented strong evidence for four of the unwarrantable failure factors while Big Ridge has only produced evidence of a general effort to improve rock dusting efforts without providing evidence of specific efforts at the location in question or time period immediately before the survey. Therefore, for all the reasons stated above, I find that Order No. 8445336 was the result of Big Ridge's unwarrantable failure to comply with a mandatory safety standard and uphold the Secretary's 104(d) (2) designation.

5. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $7,774.00. In considering the six statutory penalty criteria, I find that Big Ridge violated 30 CFR § 75.403 44 times in the two years prior to this citation and the proposed penalty is appropriate to Big Ridge's status as a large operator. I have ruled that Big Ridge was highly negligent and that the violation involved a low likelihood of injury yet still presented a high degree of danger. The Secretary acknowledged that Big Ridge did abate the condition through repeated redusting efforts. Tr. 197; Sec'y Ex. 21, 3.

After considering all these criteria, I uphold the Secretary's proposed penalty and assess Big Ridge a civil monetary penalty of $7,774.00 for Order No. 8445336.

B. Order No. 8431905

MSHA Inspector Dean Cripps issued Order No. 8431905 on November 29, 2012 for an alleged violation of 30 CFR § 75.220 (a)(1), finding that Big Ridge had violated its roof control plan by allowing miners to operate in the "red zone". Sec'y Ex. 34, 1. The Order alleges in part that:

> ...Interviews were conducted with several employees as part of an accident investigation. Several of the employees stated that they have recently observed continuous miner operators in the Red Zone while operating the machine. They have also stated they have recently observed operators tramming the continuous mining machine while standing on the cable and leaning against the machine....

Sec'y Ex. 34, 1-2.

Cripps determined than an injury was highly likely, a resulting injury would be fatal, the violation was S&S, 1 person was affected, the violation was the result of Big Ridge's high negligence, and constituted a 104(d) (2) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 34. The Secretary has proposed a regularly assessed penalty of $53,858.00. Sec'y Petition: Exhibit A.

30 CFR § 75.220(a) (1) states:

> Each 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 relevant portion of Respondent's roof control plan cited in the order states in part:

> While repositioning the continuous mining machine within the working place, all persons involved shall be positioned in a safe location away from any part of the continuous mining machine. During place changing, all persons involved with the move shall be positioned in a safe location away from the continuous mining machine while the machine is being trammed.

Tr. 572, Sec'y Ex. 34.

Inspector Cripps issued Order No. 8431905 while completing an EO3 hazard complaint investigation in response to a November 17, 2012 miner hazard complaint. The complaint alleged that employees at the mine were operating continuous miners in the red zone while standing on the power cable and leaning against the machine, an action Cripps refers to as "cable surfing". Tr. 533, 546. The hazard complaint investigation occurred in conjunction with a separate accident investigation initiated on the same day. Tr. 537. On November 19, 2012, MSHA investigators Cripps and Steve Miller interviewed Willow Lake Section 1 third shift crew members about miner operators allegedly working in the red zone. Tr. 538. Several of the interviewed miners confirmed that they had observed miner operators working in the red zone and standing on the continuous miner power cable while tramming, leading Cripps to believe the alleged hazard complaint was valid. Tr. 549, 557-58. As such, Cripps issued Order No. 8431905 based on the miners' descriptions of violative actions separate from the events of the November 17 accident. Tr. 538-539. Specifically, six of the eight miners interviewed confirmed observing miner operators performing work in the red zone. Tr. 540, Sec'y Ex. 45.

Inspector Cripps designated the risk of injury in the order as highly likely and fatal, stating that many fatalities had resulted from employees being "pinched" while operating the miner in the red zone. Tr. 567-568. He designated the negligence level as high and an unwarrantable failure because everyone he interviewed had knowledge about and had been trained with regard to the red zone. Tr. 568. Cripps concluded that management must have seen or been aware of miners working in the red zone due to the number of miners working in a variety of positions indicating they had witnessed red zone violations. One such miner, Josh McClendon indicated it was a common practice for miners to operate in the red zone and that he had observed this practice as recently as the last full shift he worked. Tr. 568-569. As such, Cripps determined that the widespread knowledge of this common practice among hourly employees indicated that the practice must have been extensive enough for the shift foreman and management to have observed the practice as well. Tr. 569. Cripps also testified that as there were no records of anyone being disciplined for working in the red zone despite the miners' statements regarding how common red zone work was, it appeared that Big Ridge was not

enforcing their red zone policy. Tr. 571. Cripps noted one person would be affected, the person who was working in the red zone. *Id.*

1. **Findings**

Big Ridge argues that Order No. 8431905 fails to meet the particularity requirements of Section 104(a), which should be incorporated into the elements of a 104(d) (2) order. Resp Br. 111-113; *Emerald Mines Co.* 863 F.2d 51, 52 (D.C. Cir. 1998). Big Ridge specifically questions a lack of specificity regarding which miners were observed in the red zone, when the instances occurred, the circumstances surrounding the violations, and whether any managers were present when the alleged instances occurred. Resp. Br. 114. Accordingly, Big Ridge urges me to vacate the Order entirely. Resp. Br., 109. While I agree the particularity requirement in 104(a) generally applies to a 104(d) enforcement action, and that MSHA needed to provide more details to sustain the Secretary's high negligence and unwarrantable failure designations, the Order and evidence gathered during the E03 investigation produced sufficiently specific facts to sustain the underlying violation.

Big Ridge notes that the Commission has held that an order must allege particular facts so that the operator has an opportunity to both abate the violation and defend itself by challenging the legitimacy of the allegations. Resp. Br., 115-117; *Erie Mining Co.*, 2 FMSHRC 2717, 3721 (Sept. 1980)(ALJ Lasher)(vacating citation when the Order recited language of the standard without specifying whether cable was energized, whether tongs were used, or whether other protective measures were employed). In the present case, the Willow Lake mine was closed permanently following the November 17 accident thus, abatement efforts are not at issue in this matter. Resp. Br., 115 n. 96. Furthermore, in *Erie Mining,* the standard, 30 CFR § 55.12-14, allowed for alternate means of compliance that were not addressed by the citation issued, leading the judge to conclude that the operator did not understand what it was being charged with. *Erie Mining Co.*, 2 FMSHRC 2722. Indeed, the judge in *Erie* warned the regulation at issue in that case must not be confused with other regulations which are more simplistic. *Id.* at 2721. I find the regulation at issue in this case, the specific red zone prohibition required by 30 CFR § 75.220(a) (1), lacks the alternate means of compliance dilemma that was presented to the ALJ in *Erie*. In this case, the Willow Lake roof control plan clearly prohibits miners from operating in the red zone whenever the continuous miner is energized and not cutting coal. More specifically, anytime the continuous miner is "tramming", or moving from one cut to another, and a miner enters the area between the miner and the rib or actually contacts the machine, that miner is automatically violating the red zone prohibition. Tr. 598.

Additionally, the Order itself specifically charges that miners were "tramming the continuous mining machine while standing on the cable and leaning against the machine." Sec'y Ex. 34. As such, the Secretary must point to evidence that sustains this allegation and Big Ridge may defeat the allegation by rebutting the Secretary's evidence that miners have recently "surfed" the continuous miner power cable or otherwise violated the red zone prohibition. Big Ridge management and their legal representative were present at the November 19, 2012 interviews with the Willow Lake Section 1 third shift crew members and thus, were aware of their identities. Big Ridge had over a year before the hearing to further interview or depose those crew members in order to prepare a defense rebutting the miners' statements regarding red zone violations. Tr. 664-65. Indeed, Big Ridge did call one of the original interviewees, Shift Leader Duty, to explain the exact meaning of his statements to MSHA during the hazard complaint

investigation. Tr. 643. Thus, I find that the Order described minimally sufficiently specific factual allegations that allowed, and did in fact prompt, Big Ridge to prepare a defense to the Secretary's allegations.

Alternatively, Big Ridge argues that the Secretary has failed to meet his burden of establishing a violation by a preponderance of evidence because the cited violation is based entirely on unsubstantiated hearsay interviews conducted by Cripps and Miller. Resp. Br. 117. Respondent correctly acknowledges that hearsay evidence is admissible in a FMSHRC hearing and cites Judge Feldman's *Metz* decision for the proposition that it is most apt to be credited when it is corroborated. See, e.g., *Metz v. Carmeuse Lime, Inc.*, 32 FMSHRC 1710, 1713 (Nov. 2010), aff'd 532 Fed. Appx. 309 (3rd Cir. 2013) (unpublished). While I acknowledge this holding, I must note that hearsay testimony "may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984) (finding hearsay evidence is admissible in Commission proceedings so long as it is material and relevant)(quoting *Hayes v. Department of the Navy*, 727 F. 2d 1535, 1538 (Fed. Cir. 1984)).

In this light, Big Ridge specifically questions whether some of the interviewed miners understood that when a continuous miner is cutting coal the red zone prohibition does not apply. Resp. Br. 118. Big Ridge bases this claim on Car Drivers Hawkin's and Van's statements that red zone violations could occur any time the continuous miner was "tramming back or any time it's energized" and "any time the miner is running if it's up against the rib or a car." Tr. 544, 547. Big Ridge claims that these statements may indicate that the miners believed a red zone violation could occur while the miner was cutting coal. Resp. Br., 118. However, I find that as Big Ridge had provided extensive red zone and pinch point training to the entire underground crew, these statements demonstrate that the miners fully understood it was not permissible to enter the red zone while the continuous miner was neither cutting coal or actively tramming, but was energized with the pumps on. Tr. 598-99, 654, 659. Additionally, Van specifically stated that he himself had trammed the continuous miner but had never cut coal. Sec'y Ex. 45: Van 1:08:00- 1:09:00.[4] As such, Van obviously understood the difference between tramming and cutting. While I recognize some variances in the way each interviewed miner explained their understanding of the red zone, none of them inaccurately described a situation where they characterized an operator as violating the red zone regulations while the continuous miner was cutting coal.

Additionally, Roof Bolter McClendon and Car Driver Van explicitly stated they had observed operators standing on the power cable and leaning back against the continuous miner while tramming.[5] Tr. 557-58, Sec'y Ex 45, Van 1:07:00-1:10:00. McClendon specifically stated

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[4] The CD audiotape submitted by the Secretary does not contain an index or accurate time search function. I have cited to the relevant segment of the audio recording to the best of my ability.

[5] A third miner, Car Driver Hall similarly confirmed he observed operators in the red zone leaning against or sitting on the continuous miner while moving it and with their feet on the cable to keep their feet and the cable from under the cats. He is not relied upon in my finding because he also testified somewhat inconsistently that he had not observed miners in the red zone while they were tramming the continuous miner from place to place. TR 552. A fourth miner, Shift Leader Duty corroborated the observations of the other three miners when interviewed by Miller and Cripps but he is not relied upon in findings regarding the underlying violation because it is unclear whether he understood he was being asked about his observations while working at the Willow Lake mine. In fact, he testified

that he had observed this type of red zone violation as recently as the last full shift he worked and described it as a "common practice" Tr. 557-58. Van stated he had observed operators tramming the continuous miner while standing on the cable as recently as two weeks before the November 19 interview. Sec'y Ex 45, Van 1:07:00-1:10:00. These observations clearly and unequivocally describe recent tramming operations at the Willow Lake Portal mine while the continuous miner was not cutting coal, and by definition depicted violations of the red zone prohibition. Tr. 545-46. As such, I do not agree with Big Ridge Safety Manager Barras' belief that all the interviewed miners were referring to red zone violations outside of the Willow Lake mine or to instances in the distant past. Tr. 664-65.

In addition to questioning the accuracy of the miners' interpretation of the red zone, Big Ridge has argued that the miners' out of court statements are not corroborated by independent evidence. Resp. Br. 117-119. I acknowledge that the Secretary has not produced physical evidence or first-hand testimony from an MSHA inspector that corroborate the red zone violations described by the interviewed miners. However, while preferable, such evidence is not absolutely necessary in order to prove a violation. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1135. I would also note in fairness that Big Ridge urged me, in order No. 8444863, to rely on a Big Ridge Section Foreman's hearsay testimony that a separate miner operator, who did not testify at hearing, had told him he checked the spray heads of a continuous miner in support of their argument that the order should be vacated. Resp. Br. 89; Tr. 507. Here, the Secretary presented audio recordings of the miners' November 19, 2012 interview responses. Tr. 544-566. I find the recordings absolutely relevant and material to the question of whether there was a violation of Big Ridge's roof control plan. All of the interviewed miners sounded entirely direct, genuine and sincere in their responses. However, even after accounting for some apparent and unexplained inconsistencies in some of the miner's statements about general red zone violations I still find the responses by McClendon, Van and Duty, specifically related to cable surfing while at the Willow Lake Portal mine, consistent and compelling enough to support an affirmative finding for the underlying violation. This is underscored by the fact that these interviews were conducted in response to a hazard complaint and a fatal accident investigation, a fact each miner was painfully aware of and which dispels Big Ridge's argument that somehow they thought they were being asked about red zone violations occurring at any time in their careers prior to working for Big Ridge.

Accordingly, I find that the Secretary of Labor demonstrated by a preponderance of the evidence that miners at the Willow Lake Portal mine had recently entered the prohibited red zone area around a continuous miner while it was energized and not cutting coal. As such, I hold that Big Ridge violated 30 CFR § 75.220 (a)(1) and the mine's mandatory roof control plan.

2. Gravity

Inspector Cripps stated that operating in the red zone is an S&S violation because it is highly likely that a continuous miner operator would suffer severe or fatal injuries due to the risk of being pinned between the machinery and a coal rib. Tr. 567-568. Applying the four *Mathies* S & S criteria, I have already found a violation of 30 CFR §75.220(a) (1). Additionally, operating the continuous miner while in the red zone creates a discrete safety hazard by

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at hearing he believed he was being asked about whether he had ever seen this practice in his mining career, not specifically at the Willow Lake mine. TR 560-561, 643.

increasing the likelihood of caught-between, struck by, and pinch injuries. In this situation, the Secretary presented credible statements of Big Ridge miners describing operators standing on the continuous miner power cable and leaning back against the machine while the machine was tramming at the Willow Lake Portal mine during recent shift work. Tr. 558. As such, the preponderance of evidence indicates that there was a high likelihood that the hazard would result in a serious injury, as operators who surfed the cable could be caught underneath the tracks of the continuous miner, or pinched between moving machine parts and the coal rib. Big Ridge has previously emphasized that the 20 ton continuous mining machines at the Willow Lake Portal mine can crush and shatter rock and coal formations through their weight alone. Tr. 332. As such, I agree with Inspector Cripps that a miner caught underneath the miner or between the miner and the rib would most likely suffer severe or fatal injuries in the event of an accident. Tr. 567. Therefore, I find that the Secretary has produced satisfactory evidence to meet all 4 *Mathies* elements necessary to establish that the violation at issue is S & S. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

I note that Big Ridge has challenged the S & S and highly likely chance of injury designations of Order No. 8431905 due to a lack of specificity cited in the order. Resp. Br. 119-120. However, as I held above, the Secretary has credibly established through the statements of Willow Lake employees that operators at the Willow Lake Portal mine stood on the continuous miner power cable and leaned back against the machine while tramming the machine backwards in the shifts prior to November 17, 2012. Due to the weight of the machine, the close confines of the mine entryways, and the multiple trip/pinch point hazards presented by the power cable and articulated joints of the continuous miner, I cannot conceive of a situation in which these actions would not be highly likely to lead to a serious injury or death. As such, I uphold Order No. 8431905 as S&S and highly likely to result in an injury.

3. Negligence

Inspector Cripps determined that Order No. 8431905 was the result of Big Ridge's high negligence. Sec'y Ex. 34, 1. He made this determination based upon the number of miners in different positions that observed miners operating in the red zone and McClendon's statement that surfing the cable was a "common practice" at the Willow Lake mine. Tr. 558. Cripps surmised that if numerous hourly employees had observed red zone violations, management officials must have been aware of these actions as well. Tr. 569. Furthermore, the fact that Big Ridge had not previously disciplined or terminated any miner for working in the red zone led him to believe Big Ridge was not enforcing its red zone policy. Tr. 570-71.

Big Ridge disputes these inferences and denies any knowledge of red zone violations. Resp. Br., 121. Of the eight miners interviewed, one would clearly be considered management, Section Foreman Benjie Reeves. Reeves stated he has never observed or caught any miners at Willow Lake operating in the red zone or "cable surfing". Tr. 562. Although not relied upon as a management employee by MSHA for negligence designations, Shift Leader Duty's interview with Miller and Cripps is more difficult to assess.

Rank and file hourly employees are considered agents when they perform inspections, "that one might expect an employer more normally to delegate to management personnel," *Pocahontas Fuel Co.*, 8 IBMA 136, 48 (1977). As such, I find that Duty was a member of management for the two years he was a shift leader as his duties included directing production on

one side of a split air unit and examining pre-shift inspection records. Sec'y Ex. 45: Duty 3:35:00-3:39:00. During the November 19 interview, Duty stated he had both observed people operating the continuous miner in the red zone and leaning against the machine with their feet out and pushing the cable away as they trammed the machine. Tr. 560-561. At hearing however, Duty denied ever seeing these practices while working either as a shift leader or previously as a mechanic at the Willow Lake mine, but testified that he had seen it in his previous mining experience at other mines. Tr. 639-640. Big Ridge argues that Duty was in a bad emotional state during the November 19 interview because he had just lost a friend, co-worker Chad Meyers, who was the subject of the concurrent MSHA accident investigation. Big Ridge reiterated Duty's claim that he interpreted the interview questions about observing work in the red zone to mean whether he had ever observed these practices at any time during his seventeen year mining career. Resp. Br., 123, Tr. 643.

Close examination of the questions asked of Duty during the interview lends partial support to Big Ridge's argument. Duty was asked "Have you *ever* observed anybody else operating the continuous miner while in the red zone?" And "Have you *ever* noticed anyone moving a continuous miner - - I used to call it the old way - - with kind of leaning against the machine with their feet out and pushing the cable away as he trammed the machine around it? Have you *ever* seen that happen? Tr. 561. (Emphasis added). He answered affirmatively to both questions. However, his response to a follow-up question – "How recently have you seen that happen?" adds confusion –"It's been probably a pretty good while because I've been on the idle crew mostly here lately." Tr. 560-561.

I find Duty's reference to his current assignment on the idle crew indicates that his answer described actions he had observed at some point during his work experience at the Willow Lake mine contrary to his testimony at trial. However, as stated by Duty himself during the interview, it had "been a good while" since he had observed red zone violations. As such, it appears doubtful that Duty was aware of the violations Roof Bolter McClendon referred to as a "common practice" that McClendon had observed as recently as the last full shift. Tr. 558.

The preponderance of the evidence compels me to hold that "surfing the cable" was a common enough occurrence that Big Ridge management should have been able to identify violations of the red zone and initiated disciplinary action. However, as Big Ridge had instituted a zero tolerance policy regarding red zone violations, it is entirely plausible that operators would only engage in the "cable surfing" practice when they knew management was not present or in a position to see them. When Inspector Miller asked Roof Bolter McClendon if he believed operators were violating the red zone due to a lack of safety training or the operator's desire to take a short cut, McClendon answered "I believe the operator think it's easier for them; they have more control of the cable." Tr. 559. McClendon went on to state that he had participated in plenty of safety talks regarding the prohibition of red zone work. Tr. 559. When Inspector Miller asked Duty a similar question regarding what might cause operators to enter the red zone, Duty replied, "I think they need to move their cable, and that's the only reason I can think of." Tr. 561. Section Foreman Reeves stated he'd received red zone training in annual refresher trainings and that he'd never caught anybody operating in the red zone. Tr. 562-63. These responses indicate that the practice of surfing the cable appeared to be initiated by individual operators in direct contradiction of Big Ridge's safety policy when management personnel were not present or in a position to readily observe them.

While Inspector Cripps and Miller did ask questions about safety training, the interview excerpts presented by the Secretary do not indicate that they asked any hourly miners if management was aware of red zone violations, if management was present during any of the violations observed by hourly miners or if they reported their observations to management. Section Foreman Reeves indicated he had never operated or observed anyone else operate in the red zone. Tr. 562-63. Even discounting Duty's claim at hearing that he only observed red zone violations at other mines, Duty stated at the November 19 interview that he had been on a different work assignment and it had been a "good while" since he had observed anyone operate in the red zone. Tr. 561, 640. I find the Secretary has not demonstrated by a preponderance of evidence that management was aware of the recent red zone violations upon which the underlying violation is based.

Big Ridge Operations Superintendent Haantz, Mine Manager Genisio and Regional Safety Manager Barras testified regarding Big Ridge's zero-tolerance red zone policy. Haantz, Genisio and Barras described Big Ridge's daily safety meetings, annual safety refresher training, an off-site "Safety, A Way of Life, Days" training, and posters warning against work in the red zone placed on bulletin boards and in the facility restrooms. Tr. 614-15, 631-32, 562, 653-60, Resp. Ex. PPP; RRR (1), (3); QQQ (1); OOO; MMM; NNN. Big Ridge also maintains a 1-800 "Tell Peabody" anonymous hotline whereby employees can call into the company's legal group for any issue they have. Tr. 650. These witnesses also confirmed that Big Ridge instructs all employees if they are caught working in the red zone, they will be subject to immediate termination with no progressive discipline. Tr. 619, 630, 649-650. Both Haantz and Barras confirmed that miners had been fired from other Peabody mines in the region for violating the red zone policy as well as other life-saving rules. Tr. 618-619, 650. Finally, Big Ridge management personnel Haantz, Barras, Genisio, and Reeves all deny having any prior knowledge of any allegations of miners working in the red zone at the Willow Lake mine. Tr. 616, 632, 660, 562-63.

Big Ridge had instituted a comprehensive safety plan prohibiting red zone work and encouraging anonymous safety complaints to be filed by Peabody employees. Therefore, although it appears that red zone violations occurred often enough that management should have been aware of the issue; the hourly operators who violated the red zone did so on their own accord in direct violation of the company's safety policy without the actual knowledge of management. Thus, I hold that the company's efforts to prohibit, identify, and discipline red zone violations are legitimate mitigating circumstances. As such, I hold that the negligence designation for Order No. 8431905 shall be **MODIFIED** from high to moderate.

4. <u>Unwarrantable Failure</u>

For Order No. 8431905, I find that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

After reviewing the transcript and the submitted compact disk recording of the eight interviewed miners, it is clear that some continuous miner operators at the Willow Lake Portal

mine violated the red zone on an intermittent basis, "when they felt like they needed to be there." Tr. 549. However, it also appears some operators followed the mine's safety rules and consistently stayed out of the red zone. Sec'y Ex. 45: Van 1:07:00- 1:10:00. Unfortunately, the length of time the violation existed cannot be determined because as Big Ridge argues there is very little evidence provided regarding the details of observed red zone violations. All we really know is that several miners answered affirmatively when asked if they had ever observed miner operators either working in the red zone or using their feet while tramming to push the power cable out of the way of the miner cats, a term Cripps refers to as "cable surfing." This evidence is woefully inadequate to meet the burden of demonstrating duration. Likewise the extent of the violation is difficult to assess. Out of all the miners interviewed only one, Roof Bolter McClendon opined that it was common practice to see a miner operator using their feet while tramming to push the cable out of the way of the miner cats. This is minimally sufficient to at least suggest that the violation was relatively extensive.

b. Notice to the Operator

The Secretary did not produce any evidence suggesting that MSHA had previously cited or warned Big Ridge about red zone violations at the Willow Lake Portal mine. Big Ridge Safety Manager Barras credibly testified that he had never been informed of any red zone violations at the Willow Lake Mine during ten years as a safety officer. Tr. 660-61. Section Foreman Reeves stated during the Nov 19 interview he had never observed anyone working in the red zone. Tr. 562-63. I find on balance, Shift Leader Duty's statements indicate that while he had previously observed red zone violations most likely at the Willow Lake mine there is no indicia of specifically when he made such observations, who was involved, the circumstances he observed and most importantly his reaction to what he observed. As such, the Secretary has not produced any evidence to demonstrate that MSHA had notified Big Ridge of a need to increase red zone enforcement/monitoring, and woefully insufficient evidence that Big Ridge management was aware of ongoing red zone violations in the weeks and months prior to the November 17 hazard complaint.

c. Prior Abatement Efforts

Big Ridge incorporated red zone violations into a group of Life Safety Rules that were posted throughout mine facilities. Big Ridge conducted numerous pre-shift safety talks on red zones and hosted a full day refresher course that emphasized the hazards of working in red zone and pinch point areas. Tr. 559; 651-52. Big Ridge created an anonymous safety complaint hotline to encourage miners to report safety hazards. Tr. 650. Big Ridge also appears to have consistently and promptly terminated any employee observed by management working in the red zone at other nearby Peabody mines whenever a complaint was filed. Tr. 618-19. However, Barras stated management had not observed or received any reports regarding red zone violations at the Willow Lake mine. Tr. 660-61. Therefore, I find that Big Ridge instituted a substantial preventative safety program designed to prevent red zone violations from occurring.

d. Obviousness of the Hazard and Degree of Danger

As red zone violations involved the minute to minute work movements of miner operators, red zone violations could only be identified by closely monitoring the operation of the continuous miner operator or unfortunately, if an accident occurred. Although hourly employees described seeing red zone violations, no evidence was proffered to show that the hourly employees ever reported them to management. Tr. 660-61. As such, while the hazard of a red zone violation was obvious at the times it actually occurred, such a violation appears to have lasted for a brief period of time and was not detectable as soon as the operator removed himself from the danger zone. Additionally, the Secretary has not specifically contended that Big Ridge management failed to adequately supervise continuous miner operations in their work. In fact both Shift Leader Duty and Reeves informed MSHA inspectors that they watched continuous miner operators make cuts as part of their regular supervisory duties. Sec'y Ex. 45: Duty 3:44:00-3:46:00, Reeves 4:03:00-4:05:00.

As I have held above, red zone violations posed a high degree of danger to continuous miner operators, as the operator could become entrapped or crushed by the continuous miner.

e. Operator's Knowledge of the Violation

The Secretary has presented no evidence of management's knowledge of red zone violations in the months leading up to the November 17 hazard complaint. The Secretary merely relies on an inference made by Inspector Cripps that given the observations of the interviewed miners management must have been aware of red zone violations at Willow Lake. Said inference is countered by the credible straightforward testimony, on this point, by Big Ridge management officials. Safety Manager Barras stated that while he had received reports of other life safety violations at Willow Lake, he had never been informed of a red zone violation at Willow Lake in his ten years as a safety officer. Tr. 660-61. Mine Manager Genisio testified that he had never observed or received a report of a red zone violation during two years as the third shift mine manager at Willow Lake leading up to November 2012. Tr. 632-33. Section Foreman Reeves stated during the November 19 interview that he had never operated or observed anyone else in the red zone of a continuous miner. Tr. 562-63. Shift Leader Duty did state in the November 19 interview that he had observed red zone violations but that he had not seen any for a "pretty good while" since he had been assigned to an idle shift. Tr. 561. As such, I cannot conclude, with so little information about Duty's prior observations, that he was aware of the recent red zone violations observed by McClendon and Van referenced in the order at issue.

The Secretary has argued that since McClendon described red zone violations as a "common practice", it is simply not credible that Big Ridge management was not aware of ongoing red zone violations. However, when reviewing the statements made by the miners during the November 19 interview, it appears that the miners' exposure to red zone violations varied greatly as some workers had seen red zone violations as recently as the "last full shift" while some had not seen any violations for "months" or a "long while" Tr. 558, 553, 566. As the third shift ran two separate continuous mining operations and different continuous miner operators ran the miners from shift to shift, it appears that this variance may be attributed to the

tendencies of individual continuous miner operators. Sec'y Ex. 45: Hawkins 23:00-25:00; Sec'y Ex. 45: Van 1:07:00- 1:10:00. As noted in the discussion regarding prior abatement efforts, Big Ridge management testified without dispute that it had terminated employees for violating its red zone violations at other mines in the region. Tr. 618-19. Thus, I find it reasonable to believe that a few continuous miner operators at the Willow Lake mine simply, and regrettably, disobeyed company policy when they knew management was not present and that no one reported such violations to anyone in management. Tr. 618-19.

After reviewing all five unwarrantable failure factors, I have determined that the Secretary has not presented sufficient evidence to demonstrate Big Ridge was aware of ongoing red zone violations, and that Big Ridge credibly demonstrated it had instituted comprehensive life-safety training and policies designed to prevent such violations. Although the Secretary does not necessarily have to prevail on all unwarrantable failure factors, I find that when the factors are considered as a whole, the Secretary has not demonstrated that Big Ridge acted with a serious lack of reasonable care, intentional misconduct or reckless disregard of the standard. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004. As such, Order No. 8431905 shall be **MODIFIED** from a 104(d) (2) Order to a 104(a) Citation.

5. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of $53,858.00 for Order No. 8431905. Resp. Br., 127. I have already held the negligence level shall be modified from high to moderate and that the 104(d)(2) unwarrantable failure designation shall be modified to a 104(a) citation

Order No. 8431905 indicates that standard 75.220(a) (1) was cited 46 times in two years at the mine. Sec'y Ex. 34. However, the Secretary did not present any evidence showing whether any of these citations were for red zone violations. The parties have stipulated that Big Ridge, Inc. is a large operator. Tr. 10. I have found Big Ridge to be moderately negligent. There is no indication that the assessed penalty would have any impact on Big Ridge's ability to continue in business. I have determined that the gravity of the violation is properly assessed as highly likely and S &S. Finally, Big Ridge acted in good faith to achieve rapid compliance after being notified of the violation when it closed the mine. Tr. 572. After considering all of the above factors, the 30 CFR § 100 penalty tables, and noting the extraordinary danger involved in red zone violations, I find it appropriate to assess a penalty of $35,000 for Citation No. 8431905.

VIII. JUDGMENT SUMMARY

For the eight citations and orders contested at hearing, I hereby **ORDER** that the following penalty modifications and monetary penalty adjustments shall be made:

Citation No.	Originally Proposed Assessment	Judgment Amount	Modification
LAKE 2012-506 (Judgment Only)			
8436212	$66,100.00	$30,000.00	Reduce Number of Miners Affected from "4" to "2"
8436107	$14,700.00	$1,500.00	Modify 104 (d)(2) Order to 104(a) Citation

LAKE 2012-66 (Judgment Only)			
8444809	$47,700.00	$3,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Reduce Negligence from "High" to "Moderate"
8445037	$47,700.00	$2,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Reduce Severity of Injury from "Fatal" to Permanently Disabling
8445268	$25,810.00	$15,000.00	Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "High" to "Moderate"
LAKE 2012-251 (Judgment Only)			
8444863	$52,500.00	$0.00	Vacate
LAKE 2013-307 (Judgment Only)			
8445336	$7,774.00	$7,774.00	Upheld as Written and Assessed
8431905	$53,858.00	$35,000.00	Modify 104(d)(2) Order to 104(a) Citation Reduce Negligence from "High" to "Moderate"
Judgment Total	**$316,142.00**	**$94,274.00**	

IX. SETTLEMENT

The Secretary has filed a motion to approve settlement of 25 of the violations involved in this matter. I acknowledge and accept the explanation for the agreed upon settlement contained in the parties' settlement motion and amendments. The originally assessed amount for these 25 citations was **$484,876.00** and the proposed partial docket settlement is for **$296,571.00.** The parties have moved to approve the proposed settlement as follows.

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
LAKE 2013-251 (Settlement Only)			
8445322	$32,800.00	$32,800.00	
8407445	$70,000.00	$35,000.00	Modify Number of Persons Affected from "9" Persons to "4" Persons
8407466	$70,000.00	$35,000.00	Modify Number of Persons Affected from "9" Persons to "4" Persons

LAKE 2013-252			
8407448	$2,901.00	$15,000.00	Reduce Monetary Penalty
8407451	$2,678.00	$2,000.00	Reduce Monetary Penalty
8407464	$3,405.00	$2,678.00	
8407902	$3,689.00	$3,405.00	
8444868	$19,793.00	$3,200.00	Reduce Monetary Penalty
8445325	$3,996.00	$2,200.00	Reduce Monetary Penalty
8445328	$2,473.00	$3,689.00	
8445332	$1,795.00	$1,795.00	
8445339	$11,306.00	$8,500.00	Modify Severity of Likely Injury from "Fatal" to "Permanently Disabling"
LAKE 2012-506 (Settlement Only)			
8428748	$27,900.00	$20,000.00	Modify Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8434918	$21,900.00	$14,000.00	Modify "104(d)(2) Order" to "104(a) Citation"
8435824	$14,700.00	$10,000.00	Modify Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8435826	$35,500.00	$20,000.00	Reduce Monetary Penalty
8428781	$13,600.00	$8,899.00	Modify "104(d)(2) Order" to "104(a) Citation"
8435650	$6,600.00	$5,000.00	Modify Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
LAKE 2013-307 (Settlement Only)			
8445327	$14,700.00	$14,700.00	
8445331	$70,000.00	$35,000.00	Reduce Monetary Penalty
LAKE 2012-896			
8445020	$13,600.00	$8,000.00	Reduce Monetary Penalty
8424296	$9,882.00	$2,000.00	Modify "104(d)(2) Order" to "104(a) Citation"
8424297	$4,440.00	$1,000.00	Modify "104(d)(2) Order" to "104(a) Citation"
8428355	$13,609.00	$6,396.00	Reduce Monetary Penalty
8428356	$13,609.00	$6,309.00	Reduce Monetary Penalty
Total	**$484,876.00**	**$296,571.00**	

X. ORDER

I have considered the submitted settlement documents and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110 (i) of the Act. The motion to approve settlement is **GRANTED** and the citations contained in this agreement are **MODIFIED** as set forth above for a partial settlement total of $296,571.00.

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess the eight penalties contested at hearing above for a total judgment penalty of $94,274.00. Big Ridge, Inc. is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$390,845.00** within 30 days of this order.[6]

David P. Simonton
Administrative Law Judge

Distribution: (First Class U.S. Mail)

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1999 Broadway, Suite 800, Denver, CO 80202 for Petitioner

Arthur Wolfson, Jackson Kelly, 3 Gateway Center, Suite 1500,
401 Liberty Ave., Pittsburgh, PA 15222 for Respondent

[6] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390