FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

August 26, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2009-377
Petitioner	:	A.C. No. 11-03054-177990 -01
v.	:	
	:	
BIG RIDGE, INC.,	:	Willow Lake Portal
Respondent	:	Mine ID 11-03054
	:	
BIG RIDGE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2009-274-R
	:	Order No. 6683084; 01/22/2009
	:	
	:	Docket No. LAKE 2009-276-R
v.	:	Order No. 6683965; 01/23/2009
	:	
	:	Docket No. LAKE 2009-277-R
	:	Order No. 6683966; 01/23/2009
	:	
	:	Docket No. LAKE 2009-278-R
SECRETARY OF LABOR,	:	Order No. 6683088; 01/26/2009
MINE SAFETY & HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. LAKE 2009-279-R
Respondent	:	Order No. 6683089; 01/26/2009
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	:	Docket No. LAKE 2009-280-R
	:	Order No. 6683090; 01/26/2009
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	:	Docket No. LAKE 2009-310-R
	:	Order No. 6683968; 01/29/2009
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	:	Docket No. LAKE 2009-311-R
	:	Order No. 6683972; 01/29/2009
	:	
	:	Docket No. LAKE 2009-312-R
	:	Order No. 6683973; 01/29/2009
	:	
	:	Willow Lake Portal
	:	Mine ID 11-03054

DECISION

Appearances: Anthony Jones, Esq., and Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois on behalf of the Secretary of Labor;
R Henry Moore, Esq., and Arthur Wolfson, Esq., Jackson Kelly, Pittsburgh, Pennsylvania on behalf of Big Ridge., Inc.

Before: Judge Melick

This expedited civil penalty proceeding is before me upon a petition filed by the Secretary of Labor (consolidated with related contest proceedings) on July 23, 2009, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" charging Big Ridge, Inc. (Big Ridge) with twelve violations of mandatory standards and proposing civil penalties of $230,003.00 for those violations. The general issue before me is whether Big Ridge violated the cited standards as charged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted. The Secretary filed a motion for expedited hearings on May 19, 2010 and, upon agreement of the parties, expedited hearings were held over three days commencing on June 22, 2010 in Evansville, Indiana.

Order Number 6683824

This order, issued on December 10, 2008 pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:[1]

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[1] Section 104(d) of the Act provides as follows:

(1) 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 or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, 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 finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection © to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the secretary who finds upon any subsequent inspection the existence in

> Accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust (distinct black in color), was [sic] also observed along both sides and beneath the 4 E belt conveyor from the head roller inby to the belt tail. When inspected accumulations of coal was [sic] observed from 1 inch to 5 inches in depth from the head roller inby to 8 crosscut. Accumulations of coal was [sic] also observed from 2 feet inby the belt tail for a distance of 18 feet outby along both sides and beneath the belt tail. These accumulations were observed up to 2 feet in depth and was [sic] observed with the bottom belt sliding on the coal, and the tail roller turning in the coal. Also, float coal dust distinct black in color was observed deposited upon the roof, rib floor, and belt structure, to and including the connecting crosscuts.

The cited standard, 30 C.F.R §75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein".

This order alleges two violative conditions along the 4E belt conveyor; (1) accumulations from the head roller inby to the No. 8 crosscut; and (2) accumulations at the tail piece. Michael Rennie, an experienced inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) credibly testified that on December 10, 2008, he saw accumulations of loose coal, coal fines, and float coal dust along both sides and beneath the 4E belt conveyor from the head roller inby to the belt tail. Inspector Rennie estimated the accumulations around the belt tail of the 4E conveyor to be approximately two feet deep and eighteen feet long. According to Rennie, the bottom belt and tail roller of the 4E conveyor were also turning in coal around the belt tail and that the friction caused thereby was an ignition source. The belt was also misaligned causing the belt to cut into the belt structure almost an inch. This too was a potential ignition source. Accumulations of coal ranging in depth from one to five inches were also seen by Rennie from the head roller inby to crosscut 8.

Bart Schiff, Respondent's safety manager who accompanied Rennie, testified that there were accumulations on both sides of the bottom belt and that the bottom belt was running in the coal accumulations at the 4E conveyor tail. Schiff further testified that he observed accumulations underneath the rollers that were approximately "three to five inches" deep along several sections of the 4E conveyor. James Holmes, Respondent's section foreman, testified that he checked the cited tailpiece around 7:00 a.m. and 9:00 a.m. and found it to be clean. Around 9:15 a.m., however he found that the 4E tail was full of coal fines. According to Holmes, it took only 15 minutes to shovel the tailpiece, but six hours to get equipment and to clean and rock dust the entire beltline. Monty Applin, Big Ridge's mine examiner, testified that he performed an inspection on the 4E conveyor

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> such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

around 3:15 a.m. on December 10, 2008 and observed float dust at the 4E head roller that needed rock dusting. Applin recorded this in the "remarks" section of his pre-shift inspection book.

Respondent asserts that the coal found by Inspector Rennie at the tail piece was non-violative "spillage" and not an "accumulation"citing *Old Ben Coal Company 1 FMSHRC* 1955 at 1958 (Dec 1979) and *Utah Power and Light v. Secretary* 951 F.2d 292 at 295 n.11 (10th Cir. 1991). The Commission stated in *Old Ben* that "we accept that some spillage of combustible materials may be inevitable in mining operations. Whether a spillage constitutes an accumulation under [30 C.F.R §75.400] is a question, at least in part, of size and amount" The Circuit Court in *Utah Power and Light* similarly stated that "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power and Light* 951F.2d at 295 n. 11. In this case however, I find that because of the significant size and amount of the cited coal spillage, the exception noted in the cited cases is not applicable herein.

The secretary has alleged that the violation was "significant and substantial. "A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard-that is a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984)(footnote omitted). This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 599, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573 at 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.,* 10 FMSHRC 498 (Apr. 1988).

I find that the Secretary has, indeed, met her burden of proving each of the four elements outlined in *Mathies.* As noted, a violation of the mandatory standard at 30 C.F.R § 75.400 has been proven. I find that this condition exposed miners to an identifiable and discrete safety hazard, i.e., the danger of a belt fire from the friction caused by the belt cutting into the belt structure. The belt was misaligned and credible testimony established that it had cut almost an inch into the belt structure. I further find that a belt fire was reasonably likely because the coal accumulations were significant and an ignition source was present. Indeed, the serious hazard of hot metal and rubber shavings igniting coal was corroborated by the Respondent's own expert witness, Chad Barras.I have no doubt

that should a belt fire occur, the injuries could reasonably be expected to be severe or even fatal from smoke inhalation, carbon monoxide poisoning and/or burns. It is also undisputed that miners frequently worked and traveled near the 4E belt conveyor and that shuttle cars frequently entered the belt tail area. The violative conditions were therefore "significant and substantial" and of high gravity.

Respondent argues that, assuming a violation has occurred, that violation was not "significant and substantial" for several reasons. Respondent first argues that an MSHA report prepared by its Chief of Health and Safety, Terry Bentley, "Reducing Belt Entry Fires in Underground Coal Mines" (2007) demonstrates the unlikelihood of substantial injury as a result of a belt fire. I do not however agree that the report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine." Respondent next argues that the accumulations were not extensive. However, based on the credible testimony of Inspector Michael Rennie, the accumulations around the belt tail alone were two feet deep and eighteen feet long. I find such accumulations to be extensive. In addition, according to Respondent's section foreman, James Holmes, it took about six hours to obtain the equipment and to clean and rock dust the entire cited beltline. That is evidence that the accumulations were extensive. Under the circumstances I reject the Respondent's arguments that the accumulations were not extensive.

Respondent next argues that there was no heat or ignition source for the accumulations. To the contrary, the evidence shows that the subject belt was misaligned causing it to cut into the belt structure nearly an inch. As previously noted, Respondent's own expert witness, Chad Barras, testified that there was a serious hazard of ignition of coal from hot metal and rubber shavings. This testimony further corroborates the credible testimony of Inspector Rennie regarding the existence of an ignition source.

Respondent further argues that it has "numerous fire detection and suppression systems at the Willow Lake Mine and has "a fire brigade trained in techniques similar to those employed by fire departments." Respondent argues that these are the types of preventive measures in place that would minimize the possibilities of injuries and death in the event of a fire on a belt line." In *Buck Creek Coal Inc., v. FMSHRC*, 52 F.3d 133, 136; 7th Cir. (1995), the Court in addressing a "significant and substantial" issue rejected the same argument, i.e., the mine operators' reliance on fire suppression equipment such as CO monitors and water sprays, mitigates accumulation hazards. The Commission is in agreement. See *Amax Coal Company*, 19 FMSHRC 846, 850 (May 1997)

The Secretary also alleges that the subject order was the result of Respondent's "unwarrantable failure." In *Lopke Quarries, Inc*. 23 FMSHRC 705, 711 (July 2001), the Commission recently reiterated the law applicable to determining whether a violation is the result of "unwarrantable failure" and stated as follows:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that

unwarrantable failure in aggravated conduct constituting more than ordinary negligence. Id at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. At 203-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb 1991); *Lopke Quarries Inc*., at 711.

Whether conduct is "aggravated" within the context of determining an unwarrantable failure is determined by analyzing the facts and circumstances of each case to identify whether any aggravating factors exist. Such factors include: the length of time the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. Id. See also *Jim Walter Resources, Inc.,* 28 FMSHRC 579 (Aug 2006).

The credible evidence in this case establishes that the coal accumulations were obvious and extensive. Loose coal, float coal dust and coal fines two feet deep extended over a distance of 18 feet around the belt tail of the conveyor. Accumulations of coal were also observed from one to five inches deep from the head roller inby to the No. 8 crosscut. Moreover, it took 15 minutes to clean the belt tail area and took a crew of at least six miners more than six hours to get equipment and to remove the material and rock dust along the length of the cited belt conveyor.

It is also noted that prior to the issuance of the subject order on December 10, 2008 Big Ridge was placed on notice that greater efforts were required to comply with the cited standard by the fact that it had 118 final citations and orders for violations of that standard in the 15-month period preceding the issuance of the subject order. Respondent argues that those prior violations may have no relevance to this case without knowing the precise nature of those violations. This Commission has, however, rejected such arguments. See *Enlow Fork Mining Company 19 FMSHRC 5* (Jan. 1997). MSHA also held closeout and pre-inspection conferences with management officials from Big Ridge. The precise conversations at these meetings were not revealed but it may reasonably be inferred that problems with accumulations of combustible materials were discussed.

The existence of any one of the above factors, would justify a finding that the violations were the result of Respondent's unwarrantable failure and high negligence. Since there is no dispute that there had been no intervening clean inspection (determined by conference call on August 8, 2010), "Section 104(d)(2)" Order No. 6683824 is hereby affirmed[2]. See *Secretary v. Cypress Cumberland Resources Corporation*, 21 FMSHRC 722 (July 1999); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911 (Aug. 1984).

Order Number 6683084

[2] There is likewise no dispute that there had been no intervening clean inspections preceding all of the "Section 104(d)(2)" orders in these proceedings.

This order, issued on January 22, 2009, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.362(b) and charges as follows:

> An inadequate on shift examination was made on the slope belt. This inspector walked this belt approximately forty five minutes after the on shift examination had been made. Three bottom rollers were observed turning in coal fines approximately 100ft. outby the slope tail piece. The coal accumulations were packed around these rollers. Based upon this inspector's experience this condition had been present for at least one shift. No notification had been made by the examiner to management about this condition. The belt was de-energized until another examination was made of the belt and rollers cleared. Also, a citation in conjunction with this order was issued for the accumulation of coal. To abate this order, all examiners will need to be re-instructed on the proper way to examine a belt line.

The cited standard, 30 C.F.R § 75.362(b), provides as follows:

> During each shift that coal is produced a certified person shall examine for hazardous conditions along each belt conveyor haulage way where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

The specific violation charged herein is that in inadequate onshift examination was performed because the mine examiner did not report to management a condition found by Inspector Lee about 45 minutes after the mine examiner's examination i.e. that three of the slope belt bottom rollers were turning in coal accumulations.

MSHA Inspector Scott Lee testified that on January 22, 2009 about 45 minutes after the shift examination, he observed that three of the slope belt's bottom rollers were turning in accumulations of coal fines. He estimated that the accumulations ranged from 3 to 12 inches around the bottom rollers at multiple locations along the bottom of the 800- foot long belt.

The shift examination was conducted by Big Ridge's examiner, Dennis Morris. Morris had found and recorded in the examiner's book the existence of "carbon piles" under the slope belt "from the top of the slope to the bottom of the slope". (Ex. RB-24). Morris testified however that he did not find any points of friction between rollers and accumulations. Lee nevertheless speculated that this examination was inadequate based on his belief that the conditions he later observed had also existed at the time of the examination by Morris and that Morris therefore should also have seen and reported the belt rollers turning in coal accumulations.

Lee's speculative conclusion that the condition he found 45 minutes after the mine examination also existed at the time of Morris' examination was based apparently only on his "experience". I find however, that examiner Morris' firsthand testimony regarding his actual

observations during his mine examination to be entitled to the greater weight and I conclude that neither the "carbon piles"nor any accumulations he observed some 45 minutes before Lee's examination were in contact with the bottom rollers of the slope belt at the time of his examination. Under the circumstances, I find that the Secretary has failed to have sustained her burden of proving the violation as charged and Order No. 6683084 must be vacated.

Order Number 6683086

This order, issued on January 22, 2010, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.1107-1(d) and charges as follows:

> The following pieces of equipment were left energized for approximately 2 hours while unit 4 (014/004) people were sent outby to shovel on belt: ram cars 859, 861, 856, and 857. Also battery scoop 514. The 861 ram car was loaded with coal sitting on the feeder. Management should have known before leaving unit to make sure all electrical equipment was de-energized. This mine has already experience [sic] a battery scoop fire due to the power being left on between shifts and the electrical short circuiting. In order to abate this citation all people at this mine will have to be re-instructed on de-energized equipment when left unattended.

The cited standard, 30 C.F.R §75.1107-1(d), provides that:"[m]achines and devices described under paragraph (c) of this section must be inspected for fire and the input powerline de-energized when workmen leave the area for more than 30 minutes."

There is no dispute that on January 22, 2009, Inspector Lee observed four battery operated ram cars and one battery operated scoop that were left energized and unattended on Unit 4. It is further undisputed that all five machines had been left energized for more than 30 minutes while the Unit 4 miners were sent outby to clean up accumulations on the slope belt Lee had previously cited.

Respondent maintains that there was no violation as charged because the cited standard does not apply to battery operated equipment. Respondent notes that the standard, on its face, applies only to machines and devices having an "input powerline" and therefore it applies only to equipment connected to an outside source of power.

When confronting a matter of regulatory interpretation, the starting point is the language of the standard itself. See *Consumer Product Safety Commission v. GTE Sylvania Inc.,* 447 U.S. 102, 108 (1980). Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission* 447 U.S. at, 108; see also *Phelps Dodge Tyrone Inc.,* 30 FMSHRC 646, 651-52 (Aug,. 2008). Unless words are otherwise defined, they are to be interpreted as to their ordinary, contemporary meaning. *Perrin v. United States*, 444 U.S. 37, 43(1979).

As noted, the language of the cited standard is clear and compliance is achieved when "the input powerline [is] de-energized." The term"input powerline" indicates that power is supplied to

the piece of equipment from a separate source and the term is recognized as such throughout the industry. Accordingly, the cited standard does not apply to equipment having no "input powerline" such as battery powered equipment.

The Secretary argues that the reference in the standard to "[m]achines and devices described under paragraph(c) of this section" renders Section 75.1107-1(d) applicable to battery-powered equipment. The Secretary points to the language in Section 75. 1107-1 (c) that refers to "any machine or device regularly operated by a miner assigned to operate such machine or device" and argues that this language brings battery-powered equipment within the scope of Section 75.1107-1(d). However, under the rules of regulatory construction, the more specific standard controls the more general. *Morales v. Trans. World Airlines. Inc.,* 504 U.S. 374, 384 (1992); *Lyons v. Ohio Adult Parole Authority.* 105, F.3d 1063, 1070 (6th Cir. 1997), cert. denied, 520 U.S. 1224 (1997).

Here, under the Secretary's argument, the two "associated standards" are Sections 75.1107-(1)(c) and 75.1107-1(d). Section 75.1107(1)(c) is the more general referring to "any machine or device regularly operated by a miner assigned to operate such machine or device." Section 75.1107-1(d) is the more specific referring to equipment with "an input powerline." Because the more specific standard controls the more general, the reference to "any machine or device....." in Section 75.1107-1(c) is qualified by the reference to "an input powerline" in Section 75.1107-1(d). Therefore, the reference in Section 75.1107-(1)(d) to equipment described under paragraph (c) does not undercut the Respondent's argument that the standard applies only to equipment with an input powerline. Indeed there are legitimate differences between battery equipment and cable-powered equipment that the Secretary appears to recognize in the standard.

The Secretary also relies on an interpretation of the meaning of "de-energized"in the Program Policy Manual in support of her position. Her reliance is misplaced. The relevant portion of the Program Policy Manual is unclear. It reads as follows:

> Paragraph (d) of this Section requires that machines normally used at the face be inspected (for fire), and the input powerline de-energized when the miner leaves the area for more than 30 minutes. De-energization means disconnecting the power cable, or equivalent, at the power center.

Program Policy Manual, Vol. V at 114, Exh. (RC-39). The Secretary argues that the Program Policy Manual contemplates an equivalent to "disconnecting the power cable at the power center". But that is not how the language reads. The term "or equivalent" modifies "power cable". It does not modify "at the power center." To illustrate, an equivalent of disconnecting the power cable while still de-energized at the power center would be to lock and tag out the power center, which again does not involve battery operated equipment.

The Program Policy Manual is unclear, except to make clear that the standard is addressing cable equipment. It makes no reference to battery operated equipment which would be expected if it were to apply to such equipment. In any event, since the Program Policy Manual is not binding, it would be inappropriate under these circumstances to apply it. See *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981); *Bulk Transportation Services, Inc*., 13 FMSHRC 1354, 1360

(Sept. 1991). If the Secretary is correct and the Program Policy Manual extends the standard to battery equipment, she has adopted a substantive change without notice and comment rule-making. This she cannot do. See Keystone Coal Mining Operation, 16 FMSHRC 6 (Jan. 1994); Drummond Co., Inc., 14 FMSHRC 661 (May 1992); and *Hibbing Taconite Company*, 21 FMSHRC 346 (March 1998) (ALJ).

Under the circumstances, I find that the cited standard is indeed inapplicable to battery operated equipment. Since the equipment cited herein was battery operated, Order Number 6683086 must therefore be vacated.

Order Number 6683965

This order, issued on January 23, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R § 75.400 and charges as follows:

> An accumulation of combustible materials, in the form of coal fines, belt pressings, and loose coal, is present on the operating 3A conveyor belt from the drive to the tail piece (approximately 900 feet). There are 19 bottom rollers turning in contact with these accumulations. The accumulations are under the bottom rollers, but are also between the bottom rollers under the belt. The accumulations range from 1 to 18 inches in-depth by 2 to 6 feet in width and at various lengths along the belt line. These accumulations were seen from the travel way entry and are obvious to the most casual observer. The conveyor belt was removed from service by management when notified by management. This violation is an unwarrantable failure to comply with a mandatory standard.

Experienced MSHA Inspector Larry Morris testified that on January 23, 2009, he observed accumulations of loose coal, coal fines, and belt pressings along the entire 900-foot length of the 3A conveyer belt from the drive to the tail piece. Morris testified that he found the accumulations to be from 1 to 18 inches deep by 2 to 6 feet wide at various locations along the belt. Morris also testified that he found 19 bottom rollers turning in contact with the coal accumulations and determined that the friction caused thereby was an ignition source.

While the inspector's testimony is credible in itself, it is also largely corroborated by Respondent's mine manager Bob Hill. Hill observed accumulations beneath the belt rollers and that the belt rollers were turning in the coal fines. He thought the coal fines were wet, but he nevertheless considered it a hazard noting that friction will dry out the coal. within this framework of evidence, I find that the violation has clearly been proven as charged.

The Secretary argues that the violation was also "significant and substantial" under the *Mathies* criteria. The credible evidence establishes that there was a reasonable likelihood of an ignition of the cited coal accumulations considering normal continued mining operations with 19 rollers turning in coal fines and with the history at this mine of belt misalignments and cutting into the belt frame. The operator's expert, Chad Barras also confirmed that hot rubber and metal shavings from a belt and hot lubricant from a defective roller are ignition sources. In addition, should a belt fire occur, the resulting injuries would reasonably be expected to be severe or even fatal from smoke

inhalation, carbon monoxide poisoning and/or burns. Miners frequently access the area near the 3A belt thereby exposing them to these hazards. Within the above framework of evidence, I conclude that, indeed, the violation was "significant and substantial" and of high gravity and that the Secretary has met her burden of proof in this regard.

In reaching this conclusion, I have not disregarded Respondent's arguments that, assuming normal mining operations, the accumulations would have been discovered by the day shift examiner who would have shut the belt down and have had the accumulations cleaned. The Respondent further notes that no methane was found along the 3A belt at the time the order was issued, and that historically, very little methane is found along the belts at the subject mine. In addition, Respondent asserts that the fire detection and suppression system, the water sprays and the existence of a trained fire brigade contradicts any "significant and substantial"findings. While evidence that would reduce the likelihood of a fire or the likelihood of a more serious fire would appear to be relevant and probative in determining whether a violation is "significant and substantial" the Commission and the Federal Circuit Court for the seventh circuit have rejected such measures as negating such findings. *Buck Creek Coal Inc., v. FMSHRC*, 52 F.3d 133, 136; 7th Cir. (1995); *Amax Coal Company*, 19 FMSHRC 846, 850 (May 1997).

The Secretary further argues that the violations were the result of Respondent's "unwarrantable failure". In this regard, the Secretary maintains that the coal accumulations were obvious and extending at various locations over a distance of 900 feet along the 3A conveyer. At various locations, the accumulations ranged from 1to 18 inches deep by 2 to 6 feet wide. In addition, Inspector Morris credibly testified that he observed 19 bottom rollers turning in contact with the accumulations. Moreover, the 3A conveyer had less than 90 total rollers and 19 of them were turning in the accumulations. Indeed, the accumulations under the 3A belt were so obvious that Inspector Morris initially saw them from 75-80 feet away. Morris found that they would have been obvious even to a casual observer. Finally, it is undisputed that the accumulations were so extensive that it took a crew of at least 6 miners between 1 and 2 hours to abate the condition.

Big Ridge had also been placed on notice that greater efforts were required to comply with the cited standard. Indeed, it had received 118 final citations and orders for violations of that standard in the preceding 15 months. Respondent's mine Manager, Bob Hill, also knew that they had a problem with coal accumulations on the 3A conveyer. Hill acknowledged that the 3A conveyer had to be cleaned every day because of accumulations. Mine Superintendent, Ricky Phillips also told Morris that the 3A conveyer had had problems with accumulations since its installation. The knowledge management had regarding continuing problems with accumulations therefore required that closer attention be paid to the condition of the 3A belt. Under the circumstances, I find that the Secretary has met her burden of proving that the violation was the result of unwarrantable failure and high negligence.

In reaching these conclusions, I have not disregarded Respondent's argument that the accumulations existed only because of an inadvertent mistake. Mine Manager Hill thought he had instructed the belt cleaners to clean the 3A belt at the beginning of the morning shift on January 23, 2009 but according to Hill, the belt cleaners mistakenly believed that a note he gave to the crew stated "3D" and the crew accordingly went to the 3D belt instead of the 3A belt. Hill acknowledged however, that the 3A belt needed more cleaning since it was accumulating faster than the other belts,

and that the cleanup crew ordinarily started its shift by first cleaning the 3A belt. Within this framework of evidence, I find that Hill's failure to have followed up with the cleanup crew to make sure they were cleaning the known problematic 3A belt constituted a serious lack of reasonable care and, therefore, the violation was the result of Respondent's unwarrantable failure and high negligence. Under the circumstances, I can give this asserted defense but little weight. Order No. 6683965 is accordingly affirmed.

Order Number 6683966

This order, issued on January 23, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R § 75.362(b) and charges as follows:

> An inadequate on shift examination was made of the 3A conveyor belt on the evening shift of 01/22/2009. An accumulation of combustible materials was present on the conveyor belt and were [sic] not recorded in the violation/hazards area of the examiner's record book as referenced by Order#6683965. These accumulations were seen from the travel way entry and should have been seen by the examiner that examined the conveyor belt. To terminate this order, all examiners will have to be re-instructed on the proper way to examine a belt line and to enter the hazards and violations in the proper area of the examiner's record books.

This order is based upon the conditions Inspector Morris observed at 8:25 a.m. on January 23, 2009 as described in Order Number 6683965 and the report of the onshift examination of the 3A belt conducted by Mr. Minic during the second shift 11 hours earlier at 8:48 p.m. on January 22. Minic reported the conditions he found as "fine piles inby the head and slurry and fines under the rollers from the takeup to the 3B"(Exh. RB24). According to the order at bar, it is the Secretary's position that Minic's onshift examination was inadequate because he should have seen and reported the conditions Inspector Morris saw at the 3A belt 11 hours later. The Secretary's argument is premised on the inspector's unsupported opinion that the same hazardous condition he observed at 8:25 a.m. on January 23 also existed at 8:48 p.m. on January 22 I find however, that the Secretary has failed to sustain her burden of proving that premise. Indeed, the persuasive evidence is that the accumulations described in Order Number 6683965 developed after Mr. Minic's examination at 8:48 p.m. on January 22nd.

It is noted in this regard that, following Minic's examination, coal production continued until 1:00 a.m. on January 23rd, that the belts would have run until 1:30 a..m. and that production resumed at 7:00 a.m. on January 23rd. In addition, there is affirmative credible evidence that the conditions Inspector Morris observed were not in fact present even at the time of the most recent onshift examination preceding Morris' observations. Mr. Whiting conducted the preshift examination of the transfer points, drive, and tail of the 3A belt between 4:30 a.m. and 5:30 a.m. on January 23rd and did not see the conditions Inspector Morris later cited at 8:25 a.m. that day. Under all the circumstances, I do not find that the Secretary has met her burden of proving that the violative conditions cited by Inspector Morris in Order No. 6683965 existed at the time of the mine examination at issue. Order Number 6683966 must accordingly be vacated.

Orders Numbers 6683087; 6683088; 6683089 and 6683090

Order Numbers 6683087, 6683088, 6683089, and 6683090 involve MSHA Inspector Scott Lee's January 26, 2009 inspection of the 1A belt. The 1A belt was approximately 500 feet long and was considered to be a relatively short belt at this mine. At the time of Lee's inspection, a water pump was located beneath the belt. There is conflicting evidence as to what material was on the top and base of this water pump. This evidence is discussed below, under the heading for Order Number 6683087.

Inspector Lee was accompanied on his inspection by company representative Mike Davis and union representative Greg Fort. Upon arriving at the 1A belt, the inspection party initially stopped at the water pump where Lee indicated that he was issuing an order for spillage on top of the pump. Messrs. Lee, Fort and Davis then walked the entire belt line. There was material along the 500 feet of the 1A belt variously described as float coal dust, coal fines and wet coal fines. In addition, the shaft of a roller had broken off on one side of the belt and, as a result, the roller had dropped to the ground. A ribbon or warning flag was hanging from the top of a rail about a foot above the damaged roller.

Charlie Hyers was the mine examiner who conducted the onshift examination of the 1A belt for the day shift on January 26, 2009. He examined the 1A belt at approximately 8:00 a.m. and walked the entire beltline to complete his examination. He observed a hazard in that a carbon pile was present under the belt at the No. 3 crosscut. He addressed the hazard, by knocking the pile down and away from the belt. He also observed that the beltline was dark in color and needed rockdusting. Hyers testified that he did not observe a bad roller at the time of his examination.

Order No. 6683087, issued on January 26, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:

> Excessive accumulations of coal fines was [sic] allowed to accumulate on top cover of unit #1(011/001) 480 VAC water pump. These accumulations were 4 to 8 inches deep, 10.5 feet in length and four feet in width. There were also accumulations present next to the electrical boxes that were 4 to 6 inches deep on the bottom skid plate of the unit. This unit was place directly under the 1A unit belt. Management had to know about the placement of this unit and that it could be susceptible to coal fines build up around electrical components. This mine has also been put on notice regarding the high number of 75.400's which have been issued this inspection quarter.

There is no dispute that a water pump had been installed directly beneath the unit 1A conveyer belt. Experienced MSHA Inspector, Scott Lee testified that there were fine coal accumulations on the top cover of the pump ranging from 4 to 8 inches deep covering the 10 1/2 foot by 4 foot length and width of the pump. According to Lee, there were also accumulations "underneath the unit down where the electrical motor and things were present" 4 to 6 inches deep.

Union President, Greg Fort accompanied Lee during the subject inspection. According to Fort, the cited water pump "had accumulated quite a bit of coal fines around the top of it and around the external part in the sides."

Respondent's Safety Manager, Mike Davis, also accompanied the inspection party but disagreed as to the amount of coal on top of the pump. He testified that there had been five rock dust bags placed on top of the pump and there was "not over an inch or so" of coals spillage on top of that. Davis also testified that there was "a lot of gob pushed up" on the bottom skid plate. Respondent's shift manager, also testified that he observed coal dust on top of the water pump. Certainly to the extent that there is corroborated evidence that at least a layer of coal accumulations existed on top of the water pump. I find that the Secretary has met her burden of proving the violation as charged.

I further find that the Secretary has met her burden of proving that the violation was "significant and substantial." While there is disagreement regarding the amount of the accumulations cited, I find that credible evidence from the testimony of Inspector Lee corroborated by eyewitness Greg Fort supports a finding that it was a significant accumulation not only on the water pump but also along the entire 500-foot 1A beltline (See Order No. 6683088). The hazard was aggravated by the presence of an ignition source about 150 feet away from the pump. While the solid- state electrical components on the pump itself were not an ignition source the belt rubbing on a damaged bottom roller caused belt shavings to be torn off the belt. Respondent's expert, Chad Barras, also testified that hot lubricant from damaged rollers can also provide a source of coal ignition. Under the circumstances, I find that the Secretary has sustained her burden of proving that the violation herein was "significant and substantial" and of high gravity.

I further find that the violation was the result of Respondent's unwarrantable failure and high negligence. The amount of accumulations on and around the pump were extensive and, due to the presence of a nearby ignition source, were hazardous. In addition, the report of the examination by Mr. Diaz earlier on January 26th placed management on notice of potentially hazardous conditions along the 1A belt. Finally, the history at this mine of 118 violations of the standard at issue in the 15 months prior to the instant order clearly placed the mine on notice that greater efforts were required to maintain the subject belt. Under the circumstances, Order No. 6683087 is affirmed.

Order No. 6683088, issued on January 26, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:

> Accumulations of combustible material in the form of coal float dust (1/8 to 1/4 inches deep) and coal fines under bottom rollers (4 to 8 inches deep) were allowed to accumulate. This condition was present rib to rib on the mine floor and was also present in the take-up and drive areas of the belt. This condition was present in the mine record books but was written

under remarks instead of hazards. This mine has already been put on notice regarding the high number of 75.400's which have been issued this quarter.

During the same inspection on January 26, 2009, Inspector Lee observed float coal dust accumulations black in color along the entire 500-feet-long beltline rib-to-rib and underneath the belts rollers 4 to 8 inches deep. Accumulations in the take up and drive motor areas were also 4 to 8 inches deep. Lee's testimony was corroborated by Union President, Greg Fort who also observed black accumulations of float coal dust and coal fines along the entire belt. I find Inspector Lee's testimony to be credible and fully supported by Fort. This evidence clearly supports a finding that the Secretary has met her burden of proving the violation charged herein.

The Secretary also maintains that the violation was "significant and substantial". I agree that the Secretary has sustained her burden of proving each of the four elements set forth in *Mathies.* The violation has been proven as charged. Moreover, based on the credible testimony of Inspector Lee, corroborated by Union President Fort, I find that the coal fines and float coal dust accumulations were extensive and the Secretary has established that an ignition source was present. The ignition source was the friction and heat generated by the 1A belt rubbing against the bottom roller. Both Inspector Lee and Union President Fort testified credibly that the damaged bottom roller on the 1A belt had rubbed so hard against the belt that belt shavings had been torn off the belt. Should a fire occur, it is reasonably likely to result in serious injuries and fatalities from smoke inhalation, carbon monoxide poisoning and/or burns.

Respondent argues that the Commission has rejected testimony, such as Inspector Lee's, that an event such as a fire "could" occur in evaluating the reasonable likelihood of an event under the *Mathies* criteria. See *Texasgulf Inc*., 10 FMSHRC 498 at 500-01 and *Zeigler Coal Co.*, 15 FMSHRC 949 at 953-54(June 1993). However, in this case, Respondent's own expert witness, Chad Barras, confirmed that hot lubricant from damaged rollers and hot rubber and metal particles from a conveyor belt are a source of coal ignition.

The Secretary also alleges that the violation was the result of Respondent's unwarrantable failure. I have found the Secretary's evidence credible that the cited accumulations were obvious and extensive. Indeed the evidence shows that the accumulations were so extensive that it took more than three hours to abate the conditions. I find that the report in the record book that the beltline was dark in color, also placed management on notice of a potentially hazardous condition along the cited belt. Finally, I note that Big Ridge had received 118 citations and orders for violations of the cited standard in the 15 months preceding the issuance of the order at bar. I find that Big Ridge was therefore on notice that greater efforts were required to comply with the cited standard. Within this framework of evidence, I conclude that indeed the violation was the result of Respondent's unwarrantable failure and high negligence. Under the circumstances, Order Number 6683088 is affirmed.

Order No. 6683089, also issued on January 26, 2009, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.1725(a) and charges as follows:

> The 1A belt was not being maintained in a safe operating condition. At 5 ½ cross cut the bottom belt was rubbing hard on one side of a bottom roller which had been dropped out on one side. This belt has already been cited this inspection shift for accumulations of combustible material. Management should have been made aware of this condition , but there was no record of it in the mines record books. The roller was flagged, so it appears that the condition was present for at least one shift. The belt was removed from service. This mine has already been put on notice regarding the high number of 75.1725(a) issued this quarter regarding belts rubbing structure .

The cited standard, 30 C.F.R § 75.1725(a), provides that "mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The Commission has long held that in deciding whether machinery or equipment is in a safe operating condition, the alleged violative condition under 30 C.F.R. Section 75.1725(a) is to be measured against the standard of whether a reasonably prudent person familiar with the circumstances surrounding the allegedly hazardous conditions and any facts peculiar to the mining industry, would recognize a hazardous condition warranting corrective action within the purview of the applicable standard. *Alabama By-Products Corp.* FMSHRC 2128, 2129, (December 1982). Inspector Lee credibly testified that a defective bottom roller on the 1A belt had been rubbing hard against the belt to the extent that it had worn a flat spot. Union President, Greg Fort corroborated Lee's testimony that the damaged bottom roller was obvious and that the roller rubbed so hard against the belt that belt shavings from pieces of the belt had torn off. Both Lee and Fort testified that the ignition source created by the damaged roller together with coal accumulations on the 1A belt created a hazard. Respondent's expert witness Chad Barras, also testified that rubber and metal shavings from a conveyer belt would be hot enough to ignite coal. Within this framework of credible and corroborated testimony, I find that clearly there was a violation of the cited standard.

I further find that the Secretary's allegations that the violation was "significant and substantial" are also supported by credible evidence. While, as I have noted before, Lee's testimony that an ignition "could" happen is insufficient in itself to conclude that a fire would be reasonably likely, I find that Lee's testimony in addition to that of union president Fort and the testimony of the Respondent's expert witness, Chad Barras, combines to provide an ample basis to find a reasonable likelihood of an ignition of the coal accumulations and a reasonable likelihood of serious or fatal injuries from smoke inhalation, carbon-monoxide poisoning and/or burns. I conclude therefore that the violation was "significant and substantial"within the framework of *Mathies* and of high gravity.

I further find that the violation was the result of Respondent's unwarrantable failure and high negligence. I first note that it is undisputed that a red ribbon or warning flag noting the existence of a hazardous or dangerous condition was hanging within 20 inches of the damaged roller. There is no dispute that mine examiners typically use such ribbons as a way of posting hazards and dangerous conditions. It may therefore reasonably be inferred that an agent of the operator was aware of the defective roller. I note that Respondent's Safety Manager, Mike Davis, opined that the ribbon looked old because it had rockdust and "stuff" on it and that it was not uncommon for such flags not to be removed after a roller has been repaired or changed. However, because of the close proximity of the ribbon to the position of the defective roller, i.e., only 20 inches away, I give Mr. Davis' speculation but little weight. I further find that the defective roller, for the reasons previously stated, presented a high degree of danger as an ignition source for the extant coal accumulations. Finally, based on 30 previous citations and orders issued to Respondent for violations of the standard at issue herein, I conclude that Big Ridge had notice that greater efforts were required to comply with the cited standard.

Within this framework of credible evidence, I conclude that, indeed, the violation charged in Order Number 6683089 was the result of unwarrantable failure and high negligence. The Order is therefore affirmed.

Order No. 6683090, also issued on January 26, 2009 pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.362(b) and charges as follows:

> An inadequate exam was performed on the 1A belt on day shift 1/26/2009. A flagged bottom roller at 5 ½ cross cut was not recorded in the mine record books. The roller had been dropped out on one side and the belt was rubbing hard on the side still connected to the structure. This condition had to have been present for at least one shift due to the presents [sic] of the flag. This order also includes a hazardous condition being placed in remarks instead of hazards in the mine record books. This belt was cited this inspection shift for accumulations of combustible material in the form of coal float dust and coal fines. This condition was present in the mines record books, but was identified in remarks instead of hazards.

This order alleges two separate violations, i.e., (1) that the examination performed on the 1A belt conveyer on the day shift of January 26, 2009 was inadequate because a flagged bottom roller at the 5 ½ crosscut was not recorded in the mine record book and (2) the failure to report a hazardous condition in the "hazard" section instead of "remarks" section of the mine record book. I find that the Secretary has failed to have met her burden of proving either of the violations alleged. The most recent onshift examination prior to Inspector Lee's finding of a violation at 6:45 p.m. on January 26, 2009 was conducted by Mr. Diaz at approximately 8:00 a.m. earlier on the same day. There is insufficient evidence as to when that roller was found to be defective and flagged. Moreover, I find credible the testimony of Mr. Diaz that he walked the entire belt and recorded and observed other hazards and conditions, but did not observe any defective rollers or a flag. His examination was, of

course also some 10 hours before the violation was cited. The Secretary has simply failed to sustain her burden of proving that the conditions cited by Inspector Lee had existed at the time of Diaz's examination.

Moreover, the existence of accumulations found by Inspector Lee some 10 hours after the examination by Mr. Diaz, does not itself establish that the same conditions had existed at the time of Diaz's examination. While Diaz indicated in the mine record books that the beltline was dark in color he did not report that condition as a hazard because the material was paper-thin. Diaz explained that he had been taught that a "hazard" for purposes of reporting is an immediate problem such as rollers turning in coal. In any event, the Secretary has failed to sustain her burden of proving that the conditions Inspector Lee found at 6:45 a.m. on January 26th had existed some 10 hours earlier when Diaz conducted his examination.

Whether the material constitutes "accumulations" and whether that material constitutes a "hazard" rather than a "condition" to be reported in the mine record books is also a matter clearly left to the sound discretion of the mine examiner. The fact that this examiner reported that the beltline was dark in color does not necessarily mean that it must be reported in the record books in any particular column. The condition found by Diaz was reported as a condition requiring attention by management and that is what is required.

Even assuming, arguendo, that the Secretary is now interpreting for purposes of reporting in the mine examiners record books that a belt that is black in color must be listed as a "hazard" she has provided no notice of that interpretation. At hearings, the undersigned requested that the Secretary produce an official statement by the Secretary concerning what constitutes a "hazard" for reporting purposes, but she failed to do so. Mine Examiner Charlie Diaz testified moreover that he could not get MSHA to give him a straight answer as to what constitutes a "hazard" for reporting purposes. I find under the circumstances, that the Secretary has failed to provide fair notice of her interpretation of the term "hazard" for purposes of reporting in mine examiners' books and that therefore, due process also requires that Order No. 6683090 be vacated. See *Energy West Mining Co.,* 17 FMSHRC 1313, 1317-18 (Aug. 1995); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *Gates & Fox Co v. OSHRC*, 790 F. 2d.154, 156 (D.C. Cir. 1986); *General Electric* 53 F.3d, 1324 at 1333-34 (D.C. Cir. 1995)

Order Number 6683968

This order, issued on January 29, 2009, pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:

> An accumulation of combustible materials, in the form of coal fines and loose coal, is present at the operating 2C conveyor belt tail piece. The accumulations range from 1 to 18 inches in depth by approximately 6 feet in width by 15 feet in length and the rotating belt is in contact with the dry, ground up coal fines and there are coal fines built up on the frame work

of the tailpiece to the angle of repose. The belt was removed from service by management when notified by MSHA.

Inspector Morris credibly testified that on January 29, 2009, he observed black accumulations of coal fines and loose coal on the operating 2C conveyer belt tailpiece. Morris estimated that the accumulations ranged from 1 to 18 inches deep by about 16 feet long at the tailpiece. On the mine floor, they were wet and damp but at the tail roller, they were dry and powdery. Brad Champley, Respondent's section foreman, testified that he observed what he opined was a fresh pile that had spilled off at the scraper by the tail piece. He estimated the material to be up to 3 feet by 4 feet in size. I find in either case that the cited material was of significant size and amount.

Respondent argues that the cited material was non-violative "spillage" and not a violative accumulation, citing *Old Ben Coal Company*, 1FMSHRC 1955 (December 1979) and *Utah Power and Light v. Sec. of Labor*, 951F.2d 292 (10th Cir. 1991). As previously noted, the Commission stated in *Old Ben* that some spillage of combustible materials may be inevitable in mining operations but "whether a spillage constitutes an accumulation under [30 C.F.R §75.400] is a question, at least in part, of size and amount". In addition, the Circuit Court in *Utah Power and Light* noted that "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenience speed." *Utah Power and Light at* 295 n.11.

In this case, I find that the combustible material was significant in size and amount, i.e., Inspector Morris credibly testified that the coal accumulations was 1 to18 inches deep and about 6 feet wide and 15 feet long. I find that whether the material has been cleaned up with reasonable "promptness with all convenient speed" depends in part on the knowledge that the mine operator has regarding the recent history of spillage at the cited location. Here, there is no dispute that the Respondent's section foreman, Brad Champley, was aware of frequent coal spillage on the 2C tailpiece and had to frequently clean it. Indeed, he had already cleaned the tail piece twice that day before the order was written. Champley, had also previously reported to higher company officials that "we were having a nuisance with coal coming back on the bottom belt at the scraper" Champley also testified that "it was nothing more than constantly observing [he bottom belt at the scraper]and shoveling it back up. It is further noted that the order at bar was issued around 9:00 a.m. and that the tailpiece had already been cleaned at around 7:00 a.m. and then again around 8:00 a.m. Champley therefore knew that they had a serious spillage problem at the tailpiece that needed constant attention. Under the circumstances even if the spillage had existed for only 30 minutes to an hour I find that it constituted a violative "accumulation." The violation cited in Order Number 6683968 is accordingly affirmed.

I further find that the violation was "significant and substantial" within the framework of *Mathies.* As previously noted, I accept Inspector Morris' credible observations regarding the size, dryness and blackness of the material. I also find credible the testimony of Inspector Morris that the

rotating conveyer belt and metal tail roller were in contact with the combustible material. It may be reasonably inferred that this condition was then an ignition source or would become an ignition source upon continuing normal mining operations. Again, while the evidence shows that the cited material probably had not been present for more than 30 minutes to an hour, since mine management knew of a continuing problem at that location, this relatively short time period is significant in determining the "reasonable likelihood" of a belt fire. There is additional evidence that the belt had become misaligned. With continuing normal mining operations, that misaligned belt would likely have created metal or rubber shavings hot enough to ignite coal. That such shavings are an ignition source is confirmed by Respondent's expert Chad Barras. I find that should a fire occur, injuries could reasonably be expected to be severe or even fatal from smoke inhalation, carbon monoxide poisoning and/or burns. Under the circumstances, I find that the violation was indeed "significant and substantial" and of high gravity.

I also find that the violation was a result of unwarrantable failure and high negligence. The violation was serious and obvious. In addition, because of the recent history of significant spillage at the tailpiece, it was incumbent upon the Respondent to maintain greater vigilance at that location. In addition, Respondent had a long history of violations of the cited standard. In the 15 month period preceding the issuance of the subject order, the mine had received 118 final citations and orders for violations of the cited standard. Under all the circumstances, I find that the violation was the result of Respondent's unwarrantable failure and high negligence. Order No. 6683968 is accordingly affirmed.

Order Number 6683972

This order, also issued on January 29, 2009, pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.202(a) and charges as follows:

> An area of roof, on the Unit #2 (MMU-002) working section, between Rooms #3 and #4 in the last open cross cut, are not being supported or otherwise controlled, where persons work or travel, to protect persons from hazards related to falls of the roof. The area measures approximately 12 feet by 6.5 feet. This area is recorded in the third shift examiner's record books on 01/28/2009 and countersigned by the foreman and mine manager. A perimeter cut has been made inby this area on the day shift. This is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R § 75.202, provides as that: "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

This order is supported by Inspector Morris' testimony that on January 29, 2009, he observed an area of unsupported mine roof in the crosscut between rooms 3 and 4 in the number two working section. The area of unsupported roof measured 12 feet by 6 ½ feet. The inspector observed two loose roof bolts hanging 6 inches down from the roof. The roof bolts were not secured against the

roof. The roof in the cited was also composed of "stack rock" described as thin, unconsolidated and layered rock. It is undisputed that the subject mine had experienced multiple roof falls in areas comprised of stack rock and, in recognition of this hazard, the approved roof control plan required additional roof support in such areas.

Indeed, there is no dispute that the unsupported roof cited by Inspector Morris existed, that the area of unsupported roof was recorded in the third shift mine examiner's record book on January 28, 2009 and that the book entry was countersigned by section foreman Brad Champley and the mine manager. Champley personally observed the loose bolts hanging down. In addition, there is no dispute that in spite of the hazard having been reported in the record book, the hazard was not abated prior to work being performed in the area.

From the undisputed evidence noted above, I find that the Secretary has met her burden of proving the violation as charged. I also find that the violation was "significant and substantial" within the framework of the *Mathies* decision. The violative condition exposed miners to an identifiable and discreet safety hazard i.e. the danger of a roof fall from an area of unsupported roof. The failure to immediately correct the hazard together with assigning miners to work and travel in the cited area contributed to a risk of injury. Indeed, a roof fall was reasonably likely because of the presence of unstable rock strata prone to collapsing. Indeed, there is no dispute that the mine had experienced multiple roof falls in areas of stack rock and hence the approved roof control plan required additional roof support in stack rock areas. Should a roof fall occur, there can be no doubt that serious injuries and fatalities would likely result. It is also undisputed that Respondent's employees worked and traveled near the area of unsupported roof when miners made a perimeter cut inby the cited area on the day shift of January 29, 2009. A miner operator and a ram car-operator worked in the cited area to produce and load coal. Under the circumstances, the Secretary has clearly met her burden of proving that the violation was "significant and substantial" and for the same reasons that the violation was of high gravity.

I also find that the violation was a result of Respondent's unwarrantable failure. There is no dispute that Respondent was aware of the cited unsupported roof since the hazard was recorded in the mine examiner's book and countersigned by section foreman Brad Champley and the mine manager. The area of unsupported roof was also obvious since the two loose roof bolts were hanging down about 6 inches from the roof. Since the loose bolts were also in an area of dangerous stack rock, the condition was also extremely dangerous.

In reaching this conclusion, I have not disregarded Respondent's argument that the fact that Champley sent miners to work and travel in the area of unsupported roof, was a result of an inadvertent error and therefore not the result of its unwarrantable failure. Champley explained that when he was copying the conditions reported in the examiners book into his notebook, he mistakenly wrote that the bolts were located between rooms 2 and 3 rather than 3 and 4. Therefore, when he assigned work to the roof bolters, he inadvertently sent them to the wrong location. This error was corroborated by the fact that the miners had actually installed bolts between rooms 2 and 3 rather than 3 and 4. I find, however, that Champley's actions nevertheless showed a "serious lack of

reasonable care" and that therefore those actions constituted unwarrantable failure and high negligence. Under the circumstances, Order No. 6683972 is affirmed.

Order Number 6683973

This order, also issued on January 29, 2009, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.363(a) and charges as follows:

> A hazardous condition, in the Unit #2 (MMU-002) working section, was found on the third shift of 01/28/2009 by the pre-shift examiner and was recorded in the pre-shift examiner's record book, countersigned by the foreman and mine manager. The condition referenced in citation #6683972 hazard was not corrected prior to work being performed in the area. A hazardous condition shall be corrected immediately, or the area shall remain posted until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area. This is an unwarrantable failure comply with a mandatory standard.
>
> The cited standard, 30 C.F.R § 75.363(a) provides as follows:
>
> Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104 (c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

Respondent argues that there was no violation as alleged in the order at bar because the area had been posted with a ribbon as a warning flag. It is undisputed that there was a red or pink ribbon lying on the mine floor beneath the cited condition. According to Inspector Morris, the examiner had flagged-off the area by hanging the ribbon from surrounding roof bolts. Morris testified that he was satisfied that the endangered area had been posted correctly (Tr. 686). I find accordingly that there was no violation as charged in Order Number 6683973. The order must accordingly be vacated.

CIVIL PENALTIES

Under section 110(i) of the Act, in assessing civil monetary penalties, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the affect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good-faith of the person charged and attempting to achieve rapid compliance after notification of the violation. Big Ridge is a large business with a significant history of violations. There is no evidence that even the proposed penalties would affect its ability to remain in business. There is no dispute that the violations were abated promptly and in good faith. The negligence and

gravity of the violations herein have been previously discussed. Considering the factors set forth in section 110(i) of the Act, I find that the civil penalties ordered herein are appropriate.

ORDER

Order Numbers 6683084; 6683686; 6683966; 6683090 and 6683973 are hereby vacated. Order Numbers 6683824; 6683965; 6683968; 6683972; 6683087; 6683088 and 6683089 are hereby affirmed. Big Ridge Inc., is directed to pay the following civil penalties (totaling $153, 700.00) for Order Numbers 6683824 $50,000.00; 6683965 $20,300.00; 6683968 $50,000.00; 6683972 $7,700.00; 6683087 $17,300.00; 6683088 $17,300.00; 6683089 $9,100.00 within 40 days of the date of this decision.: Contest proceedings Docket Numbers LAKE 2009-274-R; LAKE 2009-276-R; LAKE 2009-278-R; LAKE 2009-279-R; LAKE 2009-310-R and LAKE 2009-311-R are hereby granted and Contest Proceedings Docket Numbers; LAKE 2009-277-R; LAKE 2009-280-R and LAKE 2009-312-R are hereby dismissed.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Facsimile and Certified Mail)

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/to