

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 1, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-490
Petitioner	:	A.C. No. 11-03054-183603-01
	:	
	:	Docket No. LAKE 2009-491
	:	A.C. No. 11-03054-183603-02
	:	
v.	:	Docket No. LAKE 2009-531
	:	A.C. No. 11-03054-186350-01
	:	
	:	Docket No. LAKE 2009-532
	:	A.C. No. 11-03054-186350-02
	:	
BIG RIDGE, INC.,	:	Mine ID: 11-03054
Respondent	:	Mine: Willow Lake Portal

DECISION

Appearances: Tyler McLeod, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur Wolfson, Jackson Kelly, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Big Ridge, Inc. (“Big Ridge”), at its Willow Lake Portal mine (the “mine” or “Willow Lake”), 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”). This matter involves four separate docket numbers, which include 78 total alleged violations, and a total proposed penalty of \$481,148.00. As set forth more fully below, the parties have agreed to resolve all but nine of the violations, leaving those for decision here. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana, that commenced on December 1, 2010.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Big Ridge, Inc. operates the Willow Lake Portal Mine, an underground, bituminous, coal mine, in Saline County, Illinois. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Big Ridge is the operator of the mine, that its operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Ex. 1. Willow Lake is a large, bituminous, coal mine requiring at least two inspectors to timely complete a quarterly inspection. (Tr. Vol. I, 20). The mine utilizes the room and pillar system of mining and is a gassy mine subject to a five day spot inspection. (Tr. Vol. I, 20,50)

Docket No. LAKE 2009-490

a. Order No. 6683136

On March 12, 2009, Inspector Scott Lee issued Order No. 6683136 to Big Ridge for a violation of section 75.400 of the Secretary's regulations. The order alleges the following:

The accumulations of oil and coal saturated with oil (due to oil leaks) ranging in depth from ½ to 4 inches deep was known to management. This condition was observed in the pump motor compartment on the unit 3 (013/003) section feeder, while the feeder was running. Immediately below this compartment was a pool of oil approximately 3 ft. in diameter and 3 to 4 inches deep, which appeared to have accumulated from cited location. Management informed this inspector that they knew they had a problem in the pump motor compartment and had a part on order to repair it. The cover for this compartment had been left leaning on the adjacent rib which indicated to this inspector that work was still ongoing in this compartment. This same condition was cited in this compartment on 3/6/2009 for accumulations of oil.

The inspector found that an injury was reasonably likely to occur, that the injury could reasonably be expected to result in lost workdays or restricted duty, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$14,743.00.

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

1. The Violation

Scott Lee, an MSHA mine inspector, has worked for the Mine Safety and Health Administration for nearly 11 years. He has worked in the mining industry since 1975 and has operated nearly every piece of equipment used in mining. He has held a variety of positions in coal mines and holds a MA degree with a specialty in mining. (Tr. Vol. I, 15-19).

On March 12, 2009, Lee conducted an inspection of the belt line and the feeder of unit 3. As he looked down the back side of the belt, i.e., the side least traveled, he noticed a large pool of oil on the ground next to the feeder, as well as a steady stream of oil coming from the pump motor compartment. He also observed that the cover of the pump motor compartment had been removed and was sitting on the ground. He could see a steady stream of oil coming off the fitting in the motor compartment and then forming a large pool of oil on the mine floor. (Tr. Vol. I, 27-29). Lee dipped his walking stick into the oil and determined that 3-4 inches of oil had pooled in the area. In addition, a considerable amount of oil had already saturated the coal on the mine floor. He was accompanied by Ronnie Hughes, a company representative, as well as a walk around representative from the union. He saw no other miner in the area at the time. Since the cover was off of the compartment, Lee believed that the mine knew they had a problem. Later, he was told that a part was on order to repair the oil leak.

This mine operates three shifts, with the midnight shift being the maintenance shift. The inspector believes that the mine was trying to “nurse” the feeder to get it through the production shift until it could be repaired on the last shift when production was normally at a stand still. This feeder was on the last belt set up. The coal was dumped into the feeder, then onto the belt and conveyed out of the mine. In Lee’s view, the mine did not want to shut down the feeder while waiting for parts to repair the motor compartment because it would essentially shut down production on the shift.

James Kielhorn, the maintenance foreman for Willow Lake, testified that, when he arrived at the mine for the afternoon shift, he learned that a part had been ordered to repair a control module for a hydraulic pump. (Tr. Vol. I, 134). After examining a work order for the pump control, Big Ridge Ex. C, he testified that the part had been ordered at about 1:24 p.m. that day and had arrived at the mine prior to the time his shift began at 4:00 p.m. Kielhorn took the part to the feeder and repaired the oil leak problem by installing the part. In Kielhorn’s view, the part of the pump control module he repaired was not the same as the valve bank area that was cited a few days earlier by Lee. (Tr. Vol. I, 138).

Kielhorn recalls that he went underground around 4:00 p.m. It took him approximately 30 minutes to travel to the area, and another 30 minutes to install the part. The feeder was not running when he arrived but was probably operating during the shift before he arrived. (Tr. Vol. I, 142). Inspector Lee testified that he discovered the violation at 6:20 p.m., an hour after Kielhorn believes he repaired the leak. Brandon Williams, the section mechanic, also testified on behalf of the mine and agreed that there was an oil leak and a part had been ordered to repair such. Williams further testified that a member of his crew remained at the feeder during the shift to monitor the feeder so that it would not shut down if overloaded with coal. (Tr. Vol. I, 146). He was aware of the oil leak but did not see much accumulation and, in his view, the crew

member present at the feeder would have been monitoring the leak. Williams doesn't recall who was standing at the feeder and he was not present when the inspector arrived. (Tr. Vol. I, 148).

Based upon the uncontroverted testimony that oil was leaking from the motor compartment and pooling in the box and on the floor, I find that the Secretary has established a violation.

2. Significant and Substantial Violation

Initially, Lee designated this violation as significant and substantial ("S&S"). However, at hearing, he indicated that, upon further review, that the 4 volts present in the motor compartment would not likely serve as an ignition source. As a result, the likelihood of an event that would cause an injury or illness is little to none. Based upon Lee's testimony, the Secretary agreed that the violation is not S&S. I also agree.

3. Unwarrantable Failure

The term "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," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The day the subject citation was issued Lee described the condition as extensive, obvious and as existing for a period of time. When Lee arrived in the area, he immediately noticed the leak, saw that the oil was not only pooled in the compartment but also on the mine floor. In addition, he noted that the oil had time to soak the coal and coal fines on the floor. He observed the cover off of the compartment, which indicated to him that the mine knew of the problem. In his view, the mine avoided a shut down of production by waiting to repair the leak on a later shift.

Lee was also concerned about the length of time that the accumulations existed, i.e., for at least the entire length of the shift. According to Lee, the leak had been there long enough to drip onto the floor and soak the coal and coal fines for some distance. In *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cr. 1995), the Seventh Circuit addressed the length of time

factor as it relates to an unwarrantable failure finding for accumulation violations. The Court concluded that extensive accumulations that were present at least one shift, and not removed after one pre-shift examination, provided an adequate basis to establish an unwarrantable failure finding. *Id.*; see also *Windsor Coal Co.*, 21 FMSHRC 997 (Sept. 1999).

Lee further testified that the mine was aware that greater efforts were necessary for compliance with accumulations, as the mine had been issued numerous violations prior to this one. Moreover, one citation had been issued by Lee just days before for oil leaking in this same motor compartment.

The history of assessed violations for this mine indicates that the mine was cited 150 times or more in a 15 month period for accumulation violations. Sec'y Ex. 31. The Commission, in examining an unwarrantable failure finding related to section 75.400, has recognized the following:

[P]ast discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has recurring safety problem in need of correction and the violation history may be relevant in determining the operator's degrees of negligence. *Peabody*, 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMSHRC 588, 595 (June 2001).

Based upon the credible evidence, the Respondent knowingly allowed an obvious and extensive oil leak in the motor compartment to go uncorrected for an extended period of time, which in turn allowed large amounts of oil to accumulate. I agree that the violation is an unwarrantable failure. Further, the credible evidence established that the mine was aware of the continuing problem of oil leaks and the continuing issue of accumulations at the mine. I find that ordering a part does not take away from the unwarrantable nature of the violation. I credit Lee's testimony that, apparently, no one was monitoring the leak as the belt continued to operate. Based upon all of the evidence, I assess a penalty of \$15,000.00 for the violation.

Docket No. LAKE 2009-491:

This docket contains 38 violations with a total proposed penalty of \$195,967.00. The parties have agreed to settle 37 of the violations, leaving one citation for decision here. The settlement of the 37 violations is set forth in Sec'y Ex. 32, incorporated herein and addressed more fully below.

a. *Citation No. 8414037*

On March 12, 2009, Inspector Larry Morris issued Citation No. 8414037 to Big Ridge for a violation of section 75.380(d)(7)(i) of the Secretary's regulations. The citation alleges the following:

The alternate escape way, at cross cut #146 along the North travel way, is not provided with a continuous durable directional life line or equivalent device that shall be installed and maintained throughout the entire length of each escapeway. The life line is missing for approximately 20 feet at cross cut #146.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that forty persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$48,472.00.

The cited standard requires that "[e]ach escapeway shall be . . . [p]rovided with a continuous, durable direction lifeline or equivalent device that shall be . . . installed and maintained throughout the entire length of each escapeway" 30 C.F.R. § 75.380(d)(7)(i).

1. The Violation

Inspector Larry Morris has been with MSHA for four years and has 36 years of mining experience. After viewing the directional lifeline in the escapeway, he cited a violation of 30 C.F.R. § 75.380(d)(7)(i).

Morris was at Willow Lake conducting a spot inspection on March 12, 2009. As he was traveling along the main north travelway, i.e., the primary means of travel into the north side of the mine and its three units, he happened to look up at cross cut #146 and immediately noticed that the lifeline was missing for approximately 20 feet. (Tr. Vol. II, 110-111). He observed that someone had taken the time to tie an "S hook" on both ends of the line and re-attach the ends onto the roof bolt plates. Morris attempted to take the line from the roof bolts and connect the two "S hook" ends, but the ends would not extend far enough to be reconnected. (Tr. Vol. II, 112).

As indicated on the map submitted as Sec'y Ex. 12, at the time the citation was issued mining was taking place in three locations near the area of the missing lifeline. The cited entry is the secondary escapeway and is next to a belt entry and, therefore, air flows in the same direction in both entries, i.e., out toward the main portal. (Tr. Vol. II, 121). The purpose of the secondary escapeway is to have a separate and different aircourse from the primary escapeway in the event ventilation is disrupted. A secondary escapeway offers an alternative route in such a situation and makes it more likely that miners will be able to leave the mine quickly in the event of an emergency. The lifeline, as Morris explains, is in place to "help miners effectively escape." Its use is absolutely necessary in the case of smoke or heavy dust, where vision is

impaired. *Id.* There were at least 40 miners in the working area that would use this escape route in the event of an emergency.

The area where the lifeline was missing is a heavily traveled area at a crosscut. Miners travel this road throughout the shift. (Tr. Vol. II, 124). There is equipment traveling in the area throughout the shift and a mechanic's shop is directly across from the belt drive. In addition, there is a rock dust station and a beltmen's area with tools in the area.

If smoky conditions exist, miners are taught to find and grab a lifeline and slide their hand along the line in order to use it to guide them out of the mine. Miners trained to use the lifeline often hook themselves together in an effort to ensure that no one is left behind. According to Morris, when escaping miners reach an area without the lifeline, they often stop because they don't know where to go in order to continue the trip out of the mine. In his experience, Morris explained, it is easy to get disoriented in an emergency. Getting lost will result in wasting precious time that should be used to quickly and safely exit the mine. The presence of the conveyor belt would contribute to the thickness of the smoke in the cited area. Morris testified that, based upon his experience, the smoke would be so thick from the rollers of the conveyor belt that you would not be able to see your hand in front of your face. (Tr. Vol. II, 129). He was once in a fire near a belt and he described how difficult it was to find his way out. Miners become disoriented, and self-rescuers make it difficult to see and communicate. In an intersection, as was the case here, there is no rib line to help find the way and there are other wires and cables that may be confusing when looking for a missing lifeline. (Tr. Vol. II, 131).

According to Morris, miners, even after training on emergency evacuation, often get excited or panic during an emergency. Miners are in a hurry to exit the mine. Moreover, there are tripping hazards which further add to the confusion and chaos. This mine has a history of accumulation violations, many of them along the belt lines. (Tr. Vol. II, 132-133). In addition to the accumulations and ignition sources, this is also a gassy mine. Morris has issued citations on the belt drive near the cited area for a faulty fire suppression system and a faulty alarm. He has also issued accumulation violations around the belt drive a number of times. This mine has had a belt fire, as well as equipment fires and some face ignitions. (Tr. Vol. II, 134).

Brad Champley, a member of the Willow Lake safety department, accompanied Morris on his inspection and agreed that the lifeline was not continuous across the entry. Champley and Morris failed in their attempt to re-connect the lifeline and, as a result, Morris stated that he ought to have everyone evacuated. Instead, they quickly retrieved additional lifeline material and replaced the missing piece. Champley remembers the lifeline being frayed and looking like it was severed. He testified that the frayed ends were hanging down, possibly several feet down from the roof. (Tr. Vol. II, 157-158). The roof is 6 feet or lower and it is not uncommon for a mantrip or other equipment to hit the roof and sever the lifeline. (Tr. Vol. II, 158-159).

According to Champley, the miners are trained to use the primary escapeway first, if possible, and then the secondary escapeway only if necessary. The lifeline is used in the event there is heavy smoke or something that prohibits good sight when using the escapeway. The

lifeline would only be needed in case of a fire and, in his opinion; a fire was not likely on the day of the inspection. (Tr. Vol. II, 161-162).

Martin, the mine examiner, testified that he conducted a preshift examination in the morning, prior to the inspector's arrival, and did not see the missing length of lifeline that was cited. The record of examination shows that he conducted a preshift of the lifeline in a different area, the primary escapeway, but does not reflect an examination of the lifeline in the secondary escapeway that was cited. However, he testified that he does in fact examine the lifelines when he conducts an examination. In his view, it is not uncommon for the scoop or tractor to come close to the roof and sever the lifeline. (Tr. Vol. II, 167-168).

Champley and Martin hypothesize that the line was cut by equipment traveling through the area, and they suggest that it was done shortly before the inspector arrived. Morris on the other hand, suggests that it occurred at an earlier time because the line was not only severed, but also, someone had taken the time to attach S hooks and reattach the ends to the roof bolts. Morris' testimony also indicates that whenever it was done, the person did not take the time to repair the rope and, rather, simply hung up the line with the 20 foot gap. I credit the testimony of Morris, who was far more specific in his recollection of the events.

Finally, Chad Barras, the Midwest Safety Director for Peabody Energy, testified regarding the training that is conducted every 90 days at the mines. (Tr. Vol. II, 175). In his view, the more likely escape route is the primary escapeway, or what he terms the "smoke free" way out. (Tr. Vol. II, 176-177). Barras explained the ventilation system of the mine in some detail. (Tr. Vol. II, 178-179). It is his opinion there would be no fire on the belt or equipment, and that there would be no ignition because the methane liberation is primarily from the seals. (Tr. Vol. II, 181). According to Barras, there is no likelihood of a belt fire, the mine has fire suppression systems that work, the ventilation is good, and the ignitions that have occurred in the mine do not relate to the hazards addressed by the inspector. (Tr. Vol. II, 177-179). Barras provided a long dissertation regarding what would have to happen for smoke to be in the escapeway, thereby necessitating the use of the lifeline. He concluded that it was unlikely the lifeline in this area would be needed.

The Commission has regularly disagreed with the opinion espoused by Mr. Barras. First, in *American Coal Co.*, 29 FMSHRC 941 (Dec. 2007), the Commission discussed the importance of escapeways and concluded that:

There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is "to allow persons to escape quickly to the surface in the event of an emergency." S. Rep. No. 91-411, at 83, Legis. Hist., at 209 (1975).

29 FMSHRC at 948.

Similarly, in rejecting the argument that a fire suppression system negates the importance of a clear escapeway, the Commission in *Maple Creek Mining Inc.*, 27 FMSHRC 555 (Aug. 2005), and *Eagle Energy Inc.*, 23 FMSHRC 829 (Aug. 2001), found a violation of 30 C.F.R. § 75.380, where it was demonstrated that miners could not quickly and safely exit the mine in the case of an emergency. In this case, the lack of a continuous lifeline would prevent miners from quickly and safely exiting the mine. Given that there is no dispute that the lifeline was missing for a length of 20 feet, I find that the Secretary has demonstrated the violation as alleged.

2. Significant and Substantial Violation

The primary dispute as to this citation is whether or not it is S&S. A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of being unable to quickly and safely escape the mine in the event of an emergency where smoke and/or fire are created by various scenarios, including fire on equipment, fire on the belt, or an explosion. The fact that there are safety measures in place along the belt does not take away from the fact that an incident is likely to occur in a gassy mine with many accumulation violations and a history of ignitions. Third, the hazards described, i.e., that of not being able to escape in smoke and fire, will result in an injury. Fourth, that injury will be serious, even fatal.

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the Mathies formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

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 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I address initially the issue of a likelihood of an explosion, fire or other emergency, which both parties agree must occur before the use of the lifeline becomes necessary. There are a number of mandatory standards that are designed to protect miners in the event of an emergency. Among those are the escapeway regulations and, specifically, the requirement that lifelines be installed and maintained. The Secretary urges that I “assume” the existence of an emergency in order to evaluate the likelihood of a reasonably serious injury. I do not find it necessary to make any assumptions in this case.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and reviewed in the context of continued mining. *Texasgulf, Inc.*, 10 FMSHRC 498. Thus, I address the likelihood of an emergency and, within the context of that emergency, whether the lack of the lifeline in an entry for a distance of 20 feet creates a reasonably serious hazard.

Morris addressed the likelihood of an accident or explosion when he testified that this is a gassy mine subject to a five day spot inspection. Additionally, he has cited the mine many times for extensive accumulations, including accumulations of coal dust and float coal dust along the belt line and other areas. His undisputed testimony is that this mine has had a number of ignitions. Morris took into account the number of ignition sources he has found during his inspections as well as the number of ventilation issues, including low air quantities in some areas. Given the continued course of mining, I am persuaded that an emergency is likely to

occur. It has been demonstrated that if a large gap remained in the lifeline, it would hinder the evacuation of the mine, thereby causing serious injury. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). The evacuation would include the 40 miners who were working nearby.

In reaching these conclusions, I have not disregarded Respondent's argument that a fire or explosion is not likely to occur, and even if it does, the nature of the ventilation plan, along with the fact that there is a primary escapeway available for use, will negate the use of the lifeline. I have also considered that the miners have been trained how to react in an emergency situation and that there are fire suppression systems in play. However, the Secretary has established a pattern of accumulation violations, ignition sources and ignitions, all of which contribute to the likelihood of a fire or explosion. I have also considered the testimony of Champley and Martin who, not surprisingly and without much basis, agreed that a fire would not occur. Finally, I have considered the testimony of Barras and, although his factual explanation of training and the ventilation system may be mostly accurate, I give his opinion and conclusions little weight. Based upon my observations, I find that Barras is simply not a credible witness in many respects.

I conclude that the preponderance of the evidence establishes that the lack of the lifeline in the escapeway is reasonably likely to result in an injury causing event and that the injuries sustained would be serious or fatal. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

3. Negligence

Inspector Morris found that the violation was the result of high negligence on the part of the mine operator. Morris testified that the violation was obvious and in a main travelway that was used daily by 40 or more miners as well as by shift inspectors, supervisors, managers and foreman. According to Morris, "virtually everyone that goes into that end of the mine has to travel past this area. It was in plain sight." (Tr. Vol. II, 135). Morris noticed the violation immediately as they passed the entry. Also, in Morris' view, someone would have had to hook the line onto the S hook and re-attach the line to the roof bolts, thereby negating the theory of the mine that the rope had only recently been cut by passing equipment. The line was evidently hooked up onto the roof bolts for a very specific purpose, i.e., to leave a 20 foot gap at the intersection. (Tr. Vol. II, 135). I am mindful that Champley described the line as hanging down on each end, with frayed edges. However, I credit the testimony of Morris, who had a much better memory of the events and who I find to be more credible. Therefore, I agree with Morris that the negligence is high and assess a \$50,000.00 penalty.

Docket No. LAKE 2009-531

This docket contains two orders, both for alleged accumulations; one of coal and float coal on the belt and one for oil on equipment. Both orders are discussed below.

a. *Order No. 6683161*

On April 6, 2009, Inspector Scott Lee issued Order No. 6683161 to Big Ridge for a violation of section 75.400 of the Secretary's regulations. The order alleges the following:

Accumulations of combustible material in the form of coal float dust on rock dusted surfaces (black in color) was present on the 4B belt. Accumulations ranged in depth from 1/8 to 1/4 inches deep from rib to rib and in adjoining crosscuts. This condition was present on the back side of the belt from the head to fifteen crosscut. The belts overall condition was being carried in remarks instead of hazards (citation will be issued). Based on this inspectors experience this condition had existed for at least 2 to 3 shifts. The belt was first described as light gray to black in color on 4/01/09. One of the examiner when interviewed stated that he thought he was doing management a favor by keeping condition in remarks instead of hazards. Management did know of its more serious condition since the examiner Charlie Hyers stated that he had previously informed Mine Manager Terry Ward about the belts condition. The belt was taken out of service.

Inspector Lee determined that an injury was unlikely to occur, but that any injury could reasonably be expected to result in lost workdays or restricted duty, that the violation was non S&S, that two persons were affected, and that the negligence was high. The Secretary has proposed a penalty of \$4,000.00. After the hearing, the Secretary moved to change the violation to S&S.

1. The Violation.

Lee testified that he issued this citation as he was traveling the area along the 4B belt. According to Lee, unlike most mine examiners who travel the belt on golf carts and look for hazards from the main travelway, he travels the back side, or opposite the side, of the belt while conducting his inspection. Shane Ralston, the miners' representative, and Brad Champion, a member of Willow Lake's safety department, accompanied Lee. While on the back side of the belt Lee observed accumulations of coal and float coal dust along the belt for a distance of approximately 1200 feet. (Tr. Vol. I, 53-55). The accumulations cited by Lee consisted of float coal dust on rock dusted surfaces. The accumulations were very black in color and 1/8 to 1/4 inch deep. In Lee's experience, because the accumulation of coal dust was black rather than grey or white, it was combustible and had been in place for some time. The area had been rock dusted, but these accumulations were on top of the rock dust throughout the entire length from the head of the belt to crosscut 15.

Lee reviewed the mine books, including the preshift examination books, back to April 2 2009, i.e., four days prior to his inspection. He noted on April 2, 2009, the examiner listed some

black and some grey accumulations in the areas cited by Lee. The next preshift entry, and the following ones through April 5th, also mention float dust in color from black to grey. Additionally, Lee believed that the mine examiner was incorrectly listing accumulations under the heading “conditions” in the report instead of under “hazards”. Lee explained that listing the accumulation under conditions instead of hazards gave the mine more time to deal with the problem, as only items listed under hazards are required to be remedied immediately.

Charles Hyers, the mine examiner, testified on behalf of Big Ridge. Hyers is an hourly employee who conducts preshift examinations and fills out reports to record the result of his examinations. He is charged with looking for hazardous conditions, recording them and, in some cases, immediately remedying those conditions. He explained that accumulations are a matter of judgment and if the belt is running in accumulations, then it is a hazard. If the belt is not running in the accumulations, then it is recorded as a condition in the remarks section of the preshift exam book so that management is put on notice of the condition. (Tr. Vol. I, 154-157).

On April 6, 2009, Hyers examined the 4B belt and noticed that there was a large amount of dust in the air. He encountered Terry Ward, the mine manager, shortly thereafter and explained that it was dusty near the belt and suggested that the water be turned back on. He did not observe the float dust that was later cited and did not record any hazards during that preshift inspection. Hyers later ran into Inspector Lee on the 4C belt line. When questioned by Lee about the accumulations Lee found earlier, Hyers attempted to respond to the questions but was not able to clearly hear or really understand what Lee was asking him. According to Hyers, Lee stated that Hyers wasn’t doing the company any favors by marking the accumulations in the books as a condition and not a hazard. (Tr. Vol. I, 157). Hyers did not say, as Lee alleges, that he was doing management a favor by marking it in such a manner. Lee interpreted the conversation to mean that Ward was told about the accumulations, and that Hyers routinely lists hazards as conditions so that management has a greater time to respond and take care of the condition. It is clear that the conversation was misunderstood by both parties. (Tr. Vol. I, 157-158). Therefore, I do not consider the conversation in reaching any conclusions as to this order.

Hyers did not agree that black coal dust existed along the belt. However, there may have been dust that was grey in color but, in his view, it was not combustible. (Tr. Vol. I, 158). On cross examination, Hyers agreed that, if there were large accumulations of black coal dust along the belt, it would be a hazard. (Tr. Vol. I, 160).

Terry Ward, the mine manager at Willow Lake, is in charge of daily production, ventilation and general matters on his assigned shift. He has been at Willow Lake a little more than 7 years but has a total of 25 years mining experience. On April 6, 2009, he was on the day shift, which starts at 7:00 a.m. He recalls talking to Hyers about the water sprays on the belt and the dusty conditions. Ward was not told anything about accumulations or the need for rock dust. (Tr. Vol. I, 165). Ward talked to Lee and learned of the accumulation along the belt. Ward believed that the area was not a hazard. Even though there was float coal dust, in his opinion, it was heavily rock dusted on the floor. He didn’t agree that the accumulation was black in color,

but he did agree that he was looking at and kicking the dust on the travel side, and not the side of the belt that was cited. (Tr. Vol. I, 169).

The Commission has addressed the issue of accumulations in conveyor belts a number of times. In *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), the Commission upheld the ALJ's finding that an extensive accumulation of loose, dry coal and float coal dust along a belt line was a violation of section 75.400. While the operator has offered a differing account of the type of accumulation in this case, I credit the clear testimony of Lee, who observed the black coal for a long distance on the "off side" of the belt. I find that the Secretary has demonstrated the violation as alleged and affirm the violation.

2. Significant and Substantial Violation

Lee did not mark this violation as S&S because, as he testified, he "did not have an ignition source," which, in turn, made it unlikely that an event would occur that would result in an accident or injury. The Secretary has, since the time of the hearing, suggested that the violation should be found to be S&S.

I note that the S&S nature and the gravity of a violation are not the same. The focus of the seriousness of a violation is not necessarily on the reasonable likelihood of an event occurring that will result in an injury, but rather on the effect of a hazard if it occurs. See *Quinland Coals Inc.*, 9 FMSHRC 1614 (Sept. 1987). Hence, a violation may be serious yet not be found to be S&S. Such is the case here. I find the accumulation of float coal dust to be a very serious violation and, therefore, a high penalty is appropriate. Lee credibly testified that the dust was dark in color, had little rock dust, and was extensive. In the event of an explosion, the coal dust would quickly propagate the fire and further the effects of the explosion.

The accumulations were found along the belt line in an active working area. As Lee explained, if an ignition were to occur, the float coal dust would be suspended and it would take little of the dust to ignite and perpetuate the explosion. It is often the case that rollers go bad, belts begin to rub, and sparks are created. Moreover, other heat sources may exist along the belt line that, in time, would ignite the coal. If this condition had been allowed to persist, as it obviously had here, it could have reasonably led to a fire or explosion. See *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). While I note the high gravity of the violation, I find that it would prejudice the Respondent if the Secretary were to be allowed to amend this violation to S&S after the hearing and, as a result, I deny the Secretary's request.

3. Unwarrantable Failure

The term "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," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been

placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Lee, in determining that the accumulation violation existed for a number of days, relies, in part, on the preshift reports. The reports show that examiners, including Hyers, found accumulations on the 4B belt from April 2 until the time of Lee issued his order on April 6. Sec'y Ex. 6. The examiners report refers to accumulations that are grey and black in a number of book entries. This belt normally operates 16 hours per day. The designation of "black" indicates to Lee that there was little, if any, rock dust in the float coal dust, making it highly combustible. (Tr. Vol. I, 62-63). In *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cr. 1995), the Seventh Circuit addressed the length of time factor as it relates to an unwarrantable failure finding for accumulation violation. The Court concluded that extensive accumulations that were present at least one shift, and not removed after one pre-shift examination, provided an adequate basis to establish an unwarrantable failure finding. *Id.*; *see also Windsor Coal Co.*, 21 FMSHRC 997 (Sept. 1999).

Lee further described the accumulations as extensive and obvious. He immediately noticed the accumulations when he entered the area. He credibly testified that they were extensive and that they had existed for 1200 feet. Since management reviews and signs the preshift examinations, management was made aware of the condition. In addition, the mine had been put on notice about an accumulation problem. Lee told the company in meetings, and in the prior quarter, about his concern for the number of accumulation violations issued. He addressed accumulations in general but, he argues, the company should have been more diligent based upon the conversations. This mine had over a 200% increase in accumulation violations in the one quarter. (Tr. Vol. I, 73-75).

The history of assessed violations for this mine demonstrates over 150 accumulation violations in the 15 months prior to this violation. Sec'y Ex. 31; (Tr. Vol. I, 81). The Commission, in examining an unwarrantable failure finding related to section 75.400, has recognized the following:

[P]ast discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has recurring safety problem in need of correction and the violation history may be relevant in determining

the operator's degrees of negligence. *Peabody*, 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMRSHR 588, 595 (June 2001).

I conclude that the Secretary has established that the violation is unwarrantable as alleged. Based upon the negligence and the gravity of the violation, along with the other factors addressed in the penalty section of this decision, I assess a penalty of \$10,000.00 for this violation.

b. *Order No. 6683186*

On April 21, 2009, Inspector Scott Lee issued Order No. 6683186 to Big Ridge for a violation of section 75.400 of the Secretary's regulations. The order alleges the following:

Accumulations of a combustible material in the form oil, due to oil leaks was allowed to accumulate. These accumulations ranged in depth from 1/4 to 3/4 inches deep on the floors of the pump motor and motor compartments. Management is aware that they have an ongoing problem with oil leaks. They have addressed the problem of removing the cited accumulations by washing, but have failed put a program in place to illuminate the root cause, oil leaks. Based upon the following history at this mine or its repeated violation of the 75.400 standard this order is being issued: 354 citations issued under this standard in the past 14 months. 88 or 25% or the citations issued have been S&S, also numerous meetings have been held with management regarding the repeated violation of the 75.400 standard. This condition was observed on the 870 ram car located in unit 1 (011/001).

Inspector Lee determined that an injury was unlikely to occur, but that if an injury did occur it could reasonably be expected to result in lost workdays or restricted duty, that the violation was non S&S, that two persons were affected, and that the negligence was high. The Secretary has proposed a penalty of \$4,000.00.

1. The Violation

Lee testified that he found the accumulation of oil on the ram car as he was inspecting equipment at the mine. At the time of the inspection, this mine had been experiencing a high number of accumulations of oil on equipment, such as the ram car cited here. Lee agreed that the mine had been washing the machines, but the mine was not repairing the leaks. Lee determined that washing the equipment was not enough to deal with the continued issue of accumulations. Lee had numerous meetings with persons at the mine about the condition of the equipment, specifically the oil leaks and the resulting accumulations.

Robert Hill, the Willow Lake mine manager, has 43 years of mining experience and he primarily delegates the work each shift. He accompanied Lee underground and remembers that Lee told him that he was going to inspect the equipment and that any accumulation violation would be issued as an order, due to the mine's history. (Tr. Vol. I, 172). He explained that a ram car carries coal from the miner to the feeder and operates 16 hours a day. The 870 ram car cited by Lee was part of an equipment inspection conducted by Lee. During the course of the inspection, the pump motor cover was removed and Lee could see accumulations of oil and floor clay. Hill didn't measure the depth of the accumulation but he testified that there was maybe 1/8 inch of oil, that it was not as much oil as Lee suggested, that it was not obvious, and that it was not a hazard. (Tr. Vol. I, 173). It was Hill's understanding that the ram car had been washed that morning on the day shift and had been subject to a weekly examination on April 16th, i.e., just five days prior to the order. The weekly examination found that it was dirty and had oil leaks. Big Ridge Ex. T; (Tr. Vol. I, 176). The equipment was washed and the fittings tightened. Hill agrees that they are constantly fixing oil leaks on the equipment but, in his view, it is the nature of mining. (Tr. Vol. I, 179).

Given the undisputed testimony of Lee, and the explanation provided by Hill that there was, without question, an oil accumulation on the ram car, I find that a violation is established.

2. Unwarrantable Failure

The citation was issued as an unwarrantable failure based upon the number of alleged accumulation violations found and the fact that MSHA had put the mine on notice about the accumulations of oil that persisted on its equipment. Lee addressed a number of aggravating factors in his testimony, i.e., length of time that the violation existed, the extent of the violative condition, that the operator has been placed on notice, that greater efforts were necessary for compliance, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

Lee discussed that he found high negligence due to the ongoing problem with the accumulations, specifically accumulations of oil on equipment at this mine. He noted many previous violations in the body of the citation. He also testified that there were ongoing discussions about the problem with mine management and how he had attempted to get the problem under control through meetings with the company. Still, the mine had failed to put a program in place to eliminate the cause. At a closeout meeting at the end of March, Lee prepared a list of citations which included the number of accumulation violations at the mine. According to Lee, what really stood out was the increase in accumulation violations of 230% from the first quarter to the second quarter. Most of the violations were related to mobile equipment and leaks. One month prior to the subject order, Lee told mine management that they needed to do better with the equipment, conduct better pre-operational checks, detect leaks, and immediately repair them. This order was issued three weeks after that closeout and Lee was still

finding these problems. In addition, Lee speaks to management every time he is at the mine and management assures him that they are taking care of the problem. In Lee's view, they have not taken care of the root cause, i.e., the oil leaks.

Hill disagrees with Lee and testified that the mine has been washing the equipment to eliminate the accumulations and that the weekly checks were being done. When a leak is found during those weekly examinations, it is repaired. He indicated that the mine is constantly repairing oil leaks and consequently the mine is doing what it should. This piece of equipment had been repaired after its last weekly check and had been washed the day before the inspection. However, I agree with Lee that the mine was not doing enough to eliminate the problem and that the unwarrantable designation is appropriate in this case. I affirm the proposed penalty of \$4,000.00.

Docket No. LAKE 2009-532

This docket contains 37 violations with a total proposed penalty of \$262,438.00. The parties have agreed to settle 32 of the violations as set forth in Sec'y Ex. 32, which is accepted and incorporated herein. The remaining five violations are addressed below.

a. Citation No. 6682879

On April 1, 2009, Inspector Marty Gayer issued Citation No. 6682879 to Big Ridge for a violation of 75.202(a) which requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The citation states that "[t]here is an area of unsupported mine roof at crosscut #49, in #4 entry, located on the #2C Travel Road. The area measured 6'3" X 7'3" feet from the last permanent support." Inspector Gayer determined that a fatal injury was reasonably likely to occur, that the violation was S&S, that one person was affected, and that the negligence was moderate. The Secretary has proposed a penalty of \$5,961.00.

1. The Violation

Gayer has been a mine inspector since 2007 and had 24 years mining experience prior to becoming an inspector. (Tr. Vol. II, 34). On the day he discovered the violation, Gayer was conducting a spot inspection and was traveling on the unit 2 travel road to the unit section working area. The travel road is the main route of travel into the mine and to the working section. Gayer observed a 6' 3" by 7' 3" area from the last permanent support that was not adequately supported. This is a dry rock or stack rock area and, given the mine's history of roof falls, the mine is required to provide extra support in an area such as this. (Tr. Vol. II, 37). This unit has a history of numerous roof falls, particularly roof falls in the stack rock areas. As a result of the problems, the roof control plan requires the mine to install roof bolts longer than usual or, alternatively, timbers as added support in stack rock areas. Gayer explained that the mandatory standard requires all areas where miners work or travel to be adequately supported.

The miners travel in this area when entering and leaving the mine. Although the roof was bolted, the material surrounding the roof bolts had fallen and the plate was no longer against the roof. In Gayer's opinion, other material was poised to fall. (Tr. Vol. II, 39). He measured from the last support to the next good support, in both directions, and discovered an area approximately six feet by seven feet that was not adequately supported. Gayer credibly testified regarding the location of the bad roof and explained that it was in an area where miners drive and walk daily. There was evidence that a 5 feet by 5 feet portion of the roof had already fallen directly under the bad bolt/plate.

Gayer believes that this violation is S&S and that the mine examiner who regularly travels this roadway should have noted and corrected the bad roof. (Tr. Vol. II, 41). Gayer learned that the area had been rock dusted a week prior to his citation so there was rock dust covering the top of the plate and, in his opinion, this was evidence that the condition had been in place for at least a week. The violation was obvious and, therefore, the negligence could have been high rather than the moderate negligence he attributed to the violation. (Tr. Vol. II, 43).

Champley, the operator's representative from the safety department who accompanied the inspector, testified that the inspector was looking at the top and stopped several times to examine the roof. Champley was a roof bolter for 4 years and understands that the mine uses fully grouted bolts designed to glue the layer of rock, creating a beam across the entry. (Tr. Vol. II, 96). He responded "no" when asked if a primary roof fall is more likely when one bolt is missing. (Tr. Vol. II, 97). Champley didn't recall seeing any draw rock but did observe that the rock area was white and the plate had moved. He did not see any slips, cracks, or over-wide cuts. (Tr. Vol. II, 99). He testified that he recalled the bad roof being closer to the rib line, but there is some confusion as to which citation Champley was addressing in his testimony. Given the confusion, I give little weight to much of his testimony. (Tr. Vol. II, 99-101).

The Secretary's roof-control standard in 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (*cited with approval in Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)). Gayer's testimony reveals that a reasonably prudent person would have required more support in this area given that the roof had already fallen where the bolts were loose and the plate moved. I credit the testimony of Gayer regarding the condition of the roof and the location that was affected by the bad roof. I affirm the violation.

2. Significant and Substantial Violation

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there

exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission set forth the test for S&S in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation; the danger of roof falling in an area that is routinely traveled by miners working in the mine. Third, the fall of roof will easily result in an injury and that injury will be serious or even fatal. Gayer credibly explained that the hazard created is the fall of a part of the roof and, in fact, part had already fallen, leaving loose pieces of rock hanging from the roof. The area that had already fallen which was 5 feet by 5 feet, was enough to cause fatal crushing injuries according to Gayer. (Tr. Vol. II, 44). This area is traveled regularly on each shift both in vehicles and on foot. It is also an alternate escapeway.

What the Commission said twenty years ago, that “[r]oof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining” and “remain the leading cause of death in underground mines,” is just as true today. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n.4 (Jan. 1984). Since any fall of roof would result in a serious injury or death, I find that there was a reasonable likelihood that the injury would be of a reasonably serious nature. I agree with Gayer that this violation is S&S and I assess a penalty of \$6,000.00.

b. Citation No. 6682881

On April 1, 2009, Gayer issued a second citation, Citation No. 6682881, for a roof control violation on the same travel road but in by the earlier violation and on the working section. He again cited a violation of 75.202(a) and stated in the body of the citation that “[t]here is an area of unsupported mine roof in #4 entry, at 53+85 survey station, located on the #2C Travel Road. The area measured 6.5 x 7.5 feet from the last permanent support. The unsupported area is in front of the Transformer #66 and dinner hole area, which is well traveled and open and obvious.” Inspector Gayer determined that a fatal injury was reasonably likely to occur, that the violation was S&S, that nine persons were affected, and that the negligence was high. The Secretary has proposed a penalty of \$56,763.00.

1. The Violation

After issuing two citations for bad roof, including the citation discussed above, Gayer traveled toward the working section. While traveling towards the working section he observed another area of loose roof located near the transformer and the “dinner hole”. Gayer explained that there was an inadequately supported area that he measured to be 6.5 feet by 7.5 feet, with two bolts damaged to such a degree that their integrity was compromised. The bolts were bent

and would no longer hold the roof in place and the plates were also damaged. In addition, the roof had several slips near the transformer and dinner hole area. (Tr. Vol. II, 47-48). Gayer testified that the roof he observed was a violation “because the integrity of the roof bolts [was] compromised, and they weren’t adequately supporting the roof.” (Tr. Vol. II, 51). He observed several slips and cracks in the roof. Given the location of the condition, the entire crew from the working section may be walking under or very near the bad roof. This is, like the area discussed in the previous citation, a stack rock zone. (Tr. Vol. II, 51).

Gayer described the area affected by the bad roof and drew an illustration of the area. Sec’y Ex. 34. The illustration shows the dinner hole area and the area between the dinner hole and the transformer; the intersection where the bad roof was located. Gayer described tools in the area that would need to be retrieved throughout the shift, as well as a first aid kit and mine maps. The area is accessed by repairmen, equipment operators, and foremen, as well as the mining crew.

Champley testified generally about the roof control violations and remembered that this violation was not in the location identified by Gayer. Instead he believes that it was closer to the rib. (Tr. Vol. I, 99-100). He did agree that it was near the “dinner hole” but he doesn’t remember a picnic table. (Tr. Vol. II, 101). In his opinion, the bad roof was not in a location where miners would sit or drive under it. (Tr. Vol. II, 102).

I find that the conditions observed by Gayer constitute a violation of the cited standard, and that a violation has been shown by the Secretary. I credit primarily the testimony of Gayer and his description of the roof condition and the area where the bad roof was located.

2. Significant and Substantial Violation

Gayer designated this violation S&S due to the slips in the roof, the cracks in the roof, the bad bolts, and the bad plates he observed. He further explained that all of those working on the section would travel or linger under this area during the shift. According to Gayer, it is reasonably likely that the roof will fall, thereby injuring anyone in the area. The injury would be a crushing injury that could be fatal. Based upon the Mathies criteria, discussed *supra*, I find that the violation is significant and substantial. I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of roof falling in an area that is routinely traveled by all working in the mine. Third, the fall of roof will easily result in an injury and that injury will be serious or even fatal.

Gayer credibly explained that the hazard created is the fall of a part of the roof in an area that is often traveled and accessed throughout the shift. Gayer observed the bad roof in the travel area and in a stack rock zone which calls for additional support. He explained that the hazard created by the condition of the roof is a fall of roof which could cause injuries ranging from broken bones to the fatal crushing of miners. Gayer considered the size of the area, the history of stack rock and instability at this mine, and the fact that the cracks and slips appeared to

be subject to failure. He credibly testified that, due to the size of the unsupported area, the history of the mine, the stack rock in the area, and the slips and cracks he observed, the roof was likely to fail. (Tr. Vol. II, 54). He further testified that the dinner hole area has a picnic table, tool box with tools, first aid box, mine map, and escapeway maps. Many miners keep dinner buckets at the dinner hole and may return to the area several times a day to retrieve things from their bucket or eat nearby. On the other side of the travelway is a transformer which supplies power to equipment on the unit. Equipment operators, foreman, and repairmen access the transformer to energize or de-energize all equipment from that point. There is exposure to the bad roof throughout the course of the shift, both on foot and in equipment. (Tr. Vol. II, 53, 56).

Champley observed slips of the roof over the transformer area, and noted that rock had fallen out when cut, but the area had been subsequently supported. He did not believe that the slip he observed compromised the roof. According to Champley, there was just one pin identified as being missing, but he spotted a couple bolts near it to support the roof. The citation was terminated by replacing the bolt with one of similar length. Champley explained that the area he described as the cited area was too close to the power center for any vehicle to pass under the unsupported roof. He testified that there are power cables on each side, but the bad pin could have exposed only one person.

I find Gayer to be an extremely credible witness based on both his detailed memory and notes about the violation. I find Gayer's recollection of the cited area and the condition of the roof far more credible than Champley's recollection. Champley was focused only on the area directly under the "bad pin" and not the extended area that Gayer believed was affected by the bad roof bolts and plates. I reject any suggestion that Gayer cited only a small area where a "bad pin" was located and that the pin had no effect on the remainder of the roof for some distance.

As stated above, the Commission has acknowledged that "[r]oof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining" and "remain the leading cause of death in underground mines." *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n.4 (Jan. 1984). I conclude that the Secretary has proven that this violation is S&S.

3. Negligence

Gayer designated this violation as high negligence because, in his opinion, the condition was open and obvious. This area, like the other areas he cited that day, had been rock dusted on March 24, a week before the citation. The location of the rock dust led Gayer to believe that the bad roof had existed at the time it was dusted. Management is constantly in the area and examiners are in the area to look for hazards. (Tr. Vol. II, 55). The roof condition was easily detected and Gayer was able to see it immediately upon entering the area. I conclude that the negligence is high and, therefore, based upon the negligence and gravity of this violation, along with the other penalty criteria discussed below, I assess a penalty of \$60,000.00 for the violation.

c. *Citation No. 6682883*

On April 1, 2009, Inspector Gayer issued Citation No. 6682883 to Big Ridge for a violation of section 75.360(b)(1) of the Secretary's regulations. The citation alleges the following:

An inadequate preshift examination was performed on the in that the hazardous conditions listed in Mine Citation numbers 6682879, 6682880, 6682881 and 6682882 was neither posted nor recorded in a book maintained for that purpose. All affected areas have rock dust present on the unsupported roof and on top of the roof bolt plates and the area was last dusted on 3/24/2009. Termination of this citation shall require that those miners required to perform preshift examinations be re-instructed in the requirements of the cited standard.

According to Gayer, all of the citations he issued that day were on the examiners route and all were open and obvious. (Tr. Vol. II, 57). He reviewed the examiner's books and found no notes to indicate that the examiner had observed the violations. He cited a violation of section 75.360(b)(1) which requires that "[t]he person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations: . . . [r]oadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift." The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that nine persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$42,944.00 this violation.

1. The Violation

Gayer's citation is based upon four other citations he issued on April 1, 2009, including the two roof violations discussed above. He also issued Citation No. 6682880 for unsupported roof in the travelway, and Citation No. 6682882, also for unsupported roof. He considered the four violations that were not recorded in the book maintained for the preshift results as a basis for the citation. All of the cited areas were areas of stack rock and had been rock dusted on March 24, 7 days prior to the citations. The roof violations were issued by Gayer at 8:00 a.m., 8:20 a.m., 9:55 a.m. and 8:40 a.m. The preshift would have been conducted between 3:30 a.m. to 6:30 a.m. (Tr. Vol. II, 70). In each case the roof problem was obvious. The roof had deteriorated, some had fallen to the ground, and roof and bolts were hanging and plates were no longer against the roof. Gayer expected that the preshift examiner would have observed the areas of bad roof as they were on his route of travel. He should not only have detected the bad roof, but should have recorded and subsequently repaired the area. Upon reviewing the books before entering the mine, Gayer found that the examiner had found no hazards in these highly

traveled areas. Gayer made no special efforts to see the violations, hence the examiner would have seen them just as easily. (Tr. Vol. II, 62-65).

Martin, a mine examiner for Willow Lake, has worked at the mine for two years and has ten years of mining experience. He testified that he conducted the preshift examination and recorded it on the examiner's report for unit 2 and unit 3 for April 1, 2009. Big Ridge Ex. L. As Martin traveled the roadway, he recalled that it was dusted, with the dust being white in color. When conducting a preshift, he scans the roof and takes note of the condition of the roadway. (Tr. Vol. II, 85-86). In the event there are cracks or unsupported roof he identifies it as a hazard on the report and places a tag on loose pins. (Tr. Vol. II, 87). He believes that he can view hazards if the area has been rock dusted or if roof has fallen. The entries are normally 18 feet, and there are 5 rows of bolts across the top, making it necessary to see a large number of roof bolts. If material had fallen out prior to the travel road being dusted, then it would be black where roof had fallen, or black on the floor, and he would have discovered the problem. If the plate is not secured or is hanging down, that is an indication that the roof is bad. He does note bad bolts from time to time and they are repaired. Martin did not testify specifically regarding his examination on the day of the citation and, instead, testified in general terms about preshift examinations.

Based upon Gayer's observations during his inspection, it may reasonably be inferred that bad roof existed in several locations at the time of the preshift examination. While Martin asserts that he would not have missed the roof violations, particularly if part of the roof had already fallen, I find it probable that he did. In Gayer's experience, because the roof was rock dusted over the roof bolt and the hanging roof, he was able to determine that it had been in place for at least a week and had not been noted by any examiner. Gayer further opined that the bad roof was located in four distinct areas along a regularly used travelway and, therefore, should have been obvious to anyone traveling the road, particularly a mine examiner trained to look for bad roof. Martin's testimony does nothing to refute the observations and opinions of Gayer. Since the preshift examination took place only hours before the violations were issued, and there were at least four roof violations noted by Gayer, I find that a violation has been proven as charged. The fact that Gayer found four violations of bad roof, with bent or hanging bolts, roof falls on the ground, and rock dust to indicate that the roof had been in the condition for a week, persuades me that the examiner was not doing an adequate job.

2. Significant and Substantial Violation

Gayer designated this a S&S violation because failure to note the hazards of the roof will result in miners will being exposed to such hazards. Miners rely upon the preshift examiner to find and correct conditions that can be a hazard. When an examiner fails to do so, it creates in miners a false sense of working in a safe environment. Gayer explained that, during the shift, all of those miners working on the section would travel or linger under the various areas of bad roof. According to Gayer, it is reasonably likely that the roof will fall, thereby causing a serious, or even fatal, crushing injury. Based upon the Mathies criteria, discussed *supra*, I find that the violation is significant and substantial.

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, the danger of miners unknowingly being exposed to unsupported roof that is likely to fall. Third, the fall of roof will result in an injury and that injury will be serious or even fatal. Gayer credibly explained that the hazard created is the exposure of miners to at least four areas of bad roof, all well traveled and accessed throughout the shift, that were left unreported by the mine examiner.

Gayer expressed his concern that failure to record hazards, and in particular the failure to record the four areas of bad roof, means the conditions are not brought to the attention of miners and not corrected prior to the miners beginning their work for the day. The fact that the conditions were not found and not corrected leads to the obvious hazard of roof falls. There were slips and cracks in the roof, hanging bolts and roof material, and roof had fallen to the ground, all leading to the likelihood that the roof would fall and cause a fatal crushing injury. The miners rely on the preshift examiner to look for hazardous conditions prior to their entry into the mine. Relying upon an inadequate examination may engender a false sense of security and cause the miners to pay less attention to their surroundings as they travel the roadway. The roadway is traveled each shift, both directions, both on foot and in uncovered vehicles. The entire working crew of at least nine miners was affected by the lack of adequate examination.

In support of the S&S finding made by Gayer, the Secretary submitted a data retrieval report, Sec'y Ex. 22, to demonstrate the number of mine accidents from January 5, 2006 until March 2009. The accidents are reported to MSHA by Willow Lake. During the three year period of the report, there were eighty-nine reported accidents due to the fall of roof or rock. Those falls resulted in fifteen miners sustaining injuries but there were no fatalities. As Gayer opined, it only takes one fall to cause a fatality. (Tr. Vol. II, 67-69).

Martin disagreed that the alleged lack of an adequate examination would lead to any injury. He said that most, but not all, vehicles traveling the road have canopies. However, the roof of the vehicle he drives does not protect against a roof fall and it would only keep the rain out. (Tr. Vol. II, 89).

In reaching my conclusion, I have not disregarded the arguments of Willow Lake that the lack of an adequate preshift does not create a hazard. Indeed, the Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan.1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). "The preshift examination is intended to prevent hazardous conditions from developing." 19 FMSHRC at 15. The preshift examiner must look for all conditions that present a hazard. *Id.* at 14. Given the obvious nature of the violation herein, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard herein, would have recognized that this hazard needed to be recorded in the preshift examination book. *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir. 1991). Accordingly, I find Respondent's argument to be without merit.

The mine argues that, like the roof control violations themselves, there is no danger of a primary roof fall in the areas cited by Gayer. However, I find that there was a likelihood of a roof fall and that the miners were exposed to a serious hazard due to Respondent's failure to record the roof conditions and either correct them or warn miners of the hazards. The miners on the oncoming day shift were not alerted to the presence of the dangerous roof. If mining operations were allowed to continue, the bad roof would have remained in place unreported. The violation was therefore significant and substantial.

3. Negligence

The Secretary argues that the Respondent's failure to record the hazards was the result of high negligence. The roof control violations were certainly obvious because of the number and location. In addition, the violations should have been obvious to the mine examiner and management because they occurred in areas of primary travel that had to be examined on a daily basis. *See Quinland Coals Inc.*, 10 FMSHRC 705, 708-09 (June 1988) (obvious nature of lack of proper roof support); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007, 2010-11 (Dec. 1987) (finding of unwarrantable failure where preshift examinations had been conducted but the roof control violations were not reported); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (violations not reported following preshift examinations).

The high negligence finding is also supported by the duration of the violation, which was determined by the inspector to have existed for weeks. *See Quinland*, 10 FMSHRC at 709 (poor roof conditions associated with section 75.200 violation had existed "for a considerable length of time"). The lack of a thorough inspection presented a high degree of danger to miners because of the threat of roof falls. Most significantly, the mine examiner is trained to find the very conditions that Gayer found. The examiner must find the conditions in order to protect the miners from hazards as they go about the work day. The only explanation offered by the mine is that the areas were rock dusted and difficult to see. Consequently, I conclude that the violations were the result of high negligence and assess a penalty of \$50,000.00.

d. *Citation No. 6680529*

On April 16, 2209, Inspector Keith Roberts issued Citation No. 6680529 for a violation of section 75.220(a)(1) of the Secretary's regulations. The citation alleges that "[t]he cross sectional area of the 4-way intersection of Entry 6, 22+25' station, Unit 1 is 71 feet. The maximum area approved in the roof control plan is 68 feet." The cited standard requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used in the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1). Inspector Roberts determined that a fatal injury was reasonably likely, that the violation was S&S, that one person was affected, and that the negligence was moderate. A penalty of \$5,080.00 has been proposed.

1. The Violation

Keith Roberts has been an inspector with MSHA for 11 years and is presently a roof control specialist. He has worked in coal mining since 1972 and has held different positions ranging from general laborer to mine foreman. He has worked on proposed rulemaking for MSHA and, in 1998, chaired the coal safety division for the mining association. (Tr. Vol. I, 186-191). On April 16, 2009, Roberts was at the Willow Lake Portal to conduct a five-day spot inspection. He was accompanied on the inspection by Terry Ward, for the company, and Greg Fort, the miners' representative. (Tr. Vol. I, 196-197). Roberts observed the violation of the roof control plan as he walked by the entry 6 area while traveling to the working section. Roberts observed that three of the corners were cut off in the entry and appeared to be wider than normal. He measured the area and recorded the measurements in his notes. Sec'y Ex. 30 p. 4. Three of the corners had been cut; one by the continuous mining machine while turning, and the other two were sheared down by the miner as it backed up. (Tr. Vol. I, 199-200).

The roof control plan provides that the maximum cross sectional width at an intersection shall not exceed a total of 68 feet, and that the maximum average diagonal distance at a four way intersection is 34 feet. Sec'y Ex. 25; (Tr. Vol. I, 194). The maximum cross sectional width is required by the plan because, in Roberts view, any time the pillar is reduced, it weakens the natural support structure and can be a significant contributor to roof failures. Diagonals must add up to 68 feet, and if the total width exceeds 68 feet then it is a violation of the roof control plan. If the width is exceeded, the plan calls for additional support. If the width is off by less than 2 feet, the plan allows for additional roof bolts to be installed. However, if the width is off by greater than two feet, then standing support, such as posts, jacks or cribs are required. (Tr. Vol. I, 202-203); Sec'y Ex. 25, p. 8, items 18-19. In this case, the width exceeded the total of 68 feet by nearly 4 feet, and the inspector was unable to identify any additional support, such as standing support in the intersection as required by the plan.

Terry Ward, the mine manager, accompanied Roberts when he issued the roof control violation. He agreed that the intersection looked wider than normal but felt that the ribs and roof were in good shape. (Tr. Vol. II, 6-7). In Ward's opinion, the cut corners were adequately supported by the roof bolts. Four and six foot bolts would have been used in that area. Ward agrees that the roof control plan requires 68 feet diagonal, but asserts that the slightly greater than three feet difference would not make it likely that a roof fall would occur. (Tr. Vol. II, 9). He does agree that most roof falls at this mine occur in the intersections.

The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans "to protect persons from falls of the roof or ribs."). The intent of the provision was "to afford comprehensive protection against roof collapse – the 'leading cause of injuries and death in underground coal mines.'" *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989) (citation to legislative history omitted). The Commission has relied upon the high degree of danger posed

by roof control plan violations as a basis for finding unwarrantable failure. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (Aug. 1994).

Chad Barras, the regional safety director denies that any violation of the plan existed. However, I credit the testimony of Roberts and affirm the violation.

2. Significant and Substantial Violation

In designating this violation as S&S, Roberts took into account a number of things. First, this mine has a significant roof fall history. Second, the type of roof strata at this mine, a mixture of weak shales that weather easily, is not always adequately controlled. The excessive widths, along with the type of roof, contribute to the hazard of a roof fall. This is a four-way intersection on a travel road where miners are exposed each shift. The road is used by the crew going in and out from the working face. Mechanics, examiners, and supervisors also use this road. The area is traveled by vehicles that have no canopy and is also used as an area to park vehicles. The Secretary provided a list of roof falls at the mine which contains 14 pages listing unintended roof falls from 2005 to the present. Sec'y Ex. 26. The exhibit shows 125 roof falls and, in reviewing the document, Roberts identified that the majority of the falls are at intersections. With this history, Roberts knows that an intersection like the one he cited is a major area of concern. (Tr. Vol. I, 205-208).

Roberts explained that the rock in the roof of the mines in this part of Illinois are a weak composition and, given everything he observed, it is highly likely this over-sized width will result in a roof fall in the intersection. When the roof fails it won't be a single rock but, rather, a large piece of roof that will cause fatal crushing injuries. The falls, such as the one expected in this intersection, are often 20 feet in length and result in the entire intersection collapsing. In previous roof falls, there was not an obvious defect prior to the fall. Based on such, Roberts determined that a roof fall is even more likely in an area where he can see that the area is too wide. He noted this violation as moderate negligence because no further defects were visible, but he opines that he should have indicated high negligence because management should have seen the over-wide intersection. There are two production bosses and mine managers who should have seen the turn of the corner and the significant cuts on the sides and made an effort to measure and repair the area. (Tr. Vol. I, 213).

Roberts did not note any roof defects at the time of the citation and the roof was bolted as required by the roof control plan. The mine uses fully grouted resin rebar bolts of varying length, e.g., 4 ft, 6 ft, and sometimes longer bolts. The bolts are 3/4 inch in diameter and spaced 4.5 feet apart. Since this diagonal was off by more than two feet, it was necessary, according to the plan, to install standing support. Roberts agrees that there is nothing to indicate that a diagonal greater than 68 feet is enough to cause a roof fall but, Roberts explained, roof falls do not always follow strict parameters. When the intersection diagonal exceeds the plan amount in a mine with a history of roof falls and the type of roof here, a fall is likely to happen. (Tr. Vol. I, 240).

Ward believes that the roof was in good condition at the intersection and that additional bolts were placed in the area. He said that the mine normally places five to six bolts in a pattern, and those bolts create a beam that helps support the roof. (Tr. Vol. II, 8-9). The total diagonal, according to Ward, was 71 feet, and 68 is required. According to Ward, the 3 foot difference does not make it likely that an accident will occur. He opines that the roof was adequately pinned and looked good. He discussed how the corners had been cut to create the longer diagonal; the miner will cut them to give extra room for equipment and, even though they should be 68 feet, the miner can easily make a mistake given the difficulty of judging the length as the corners are cut. Ward agrees that this area should have been subject to a preshift exam and that faults do occur at intersection.

Chad Barras is the area safety director for Peabody, i.e., the parent company of Big Ridge, and is responsible for 12 mines in the area. He has worked for Peabody since 2003, and has an engineering degree in mining. He is familiar with roof control plans, including those at the Big Ridge mines. (Tr. Vol. II, 21-22). He understands the plan to mean that, if one diagonal, required to be 34 feet, is found to be greater than 36 feet, then that triggers the need extra support. His review of the roof control plan, Sec'y Ex. 25 p. 8 ¶ 19, indicates that only one diagonal at 34 feet, not the sum of the two widths, must be longer than required in order to trigger a violation. He takes a much different approach to the roof control plan than does Roberts. Barras believes the plan refers to the average diagonal length, which in this case was 35.5 feet, and how there must be a more than a two foot difference before additional support is required.

Next, Barras believes that a roof fall will not occur. He bases his opinion on the fact that the extended width is small, Ward saw no cracks or problems with the roof, and the area is typically bolted with 4 foot bolts, or even 6 foot bolts in the "turned area". In his view, the plan does not require more than extra bolts. However, even if I determine that the plan called only for extra bolts as opposed to standing support, no one credibly testified, that there were such bolts in place. Barras assumed there were extra bolts, and Ward said there "probably are" extra long bolts, but he was not able to identify where they were placed. Further, the plan provides that bolts will be on two corners. Ward testified that bolts were only on one corner. After observing Barras and understanding that he had no direct knowledge of the area cited, I give his testimony no weight.

With regard to the first and second elements of the Mathies test – I have already found that there is a violation of section 75.220(a)(1), and I find that there is a discrete safety hazard, i.e., the hazard of a roof fall. On the issue of a discrete safety hazard, I credit MSHA inspector Roberts' testimony detailed above. With regard to the third element of Mathies, I again credit the testimony of Roberts that, given the location of the wide entry, the type of roof, the number of roof falls, and the absence of any additional support, the roof is likely to fall in the continued course of mining. In doing so, I agree that the roof fall will be a large one, in an area traveled daily by miners, and that, as a result, a serious injury will occur.

In *U.S. Steel*, the Commission addressed several defenses to the designation of a violation as S&S, including the operator's argument that its violation of a ventilation plan was not S&S because at the time of the violation the level of methane was low and not at explosive levels. In rejecting those defenses, the Commission explained that "the question [of whether the violation is S&S] must be resolved on the basis of the circumstances as they existed at the time the violation was cited and as they might have existed had normal mining operations continued." 7 FMSHRC 1125, 1130 (Aug. 1985). In a later case, the Commission further explained, "[t]he operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

In the current proceeding, the presence of adverse roof conditions may increase the likelihood of a roof fall, but the absence of such adverse conditions does not necessarily eliminate the possibility that a roof fall might occur when an operator fails to follow its roof control plan. Moreover, requiring the Secretary to prove a S&S violation by establishing that the mine roof is under a specific type of stress that could lead to a roof fall, as urged by the operator, places an onerous burden of proof on the Secretary. I find that the violation is significant and substantial and assess a penalty of \$10,000.00

e. Citation No. 6680534

On April 16, 2209, Inspector Keith Roberts issued Citation No. 6680534 for a violation of section 75.512 of the Secretary's regulations. The citation alleges the following:

Inadequate weekly examinations of the battery-powered Long Airdox/DBT coal scoops, Co. Nos. 511 & 512, were conducted during the week ending April 11, 2009 in that the conditions listed in Mine Citation Nos. 6680531, 6680532 & 6680533 were not identified nor corrected and recorded in a book maintained for that purpose. The coal scoops are in operation on Unit 1, MMU 001-0 & 011-0. Termination of this citation requires that all persons assigned to perform weekly examinations of electrical equipment be re-instructed in the requirements of the cited standard.

The cited standard requires the following:

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

30 C.F.R. § 75.512. Section 75.512-2 specifies that “[t]he examinations and tests required by §75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition.” 30 C.F.R. § 75.512-2. Inspector Roberts determined that an injury was reasonably likely to occur, that such an injury would result in lost workdays or restricted duty, that the violation was S&S, that one person was affected, and that the negligence was moderate. A penalty of \$4,329.00 has been proposed.

The underlying citations regarding the condition of the scoops were not contested by the operator. The three citations, Sec’y Ex. 28, were issued because the scoops had accumulations of oil: In each citation, Roberts lists the condition he observed that led to the oil leak and subsequent accumulation. (Tr. Vol. I, 217-219.) All were issued on April 16, 2009. Roberts testified that the condition of the scoops led him to believe that there was an inadequate examination of these three scoops. Roberts began by examining the weekly electrical examination records. Sec’y Ex. 29. There were no examination records after 4/11/09 that would indicate that someone had examined the condition of the scoops. (Tr. Vol. I, 221). Roberts explained that there is no requirement that the examination records be filled out at the end of the shift, although that is how it is routinely done. At hearing, Big Ridge provided examination records that demonstrated that the equipment had been examined after April 11, i.e., the date of the records that Roberts reviewed.

The examination books examined by Roberts at hearing included entries after April 11 and, specifically, noted that on April 15, the 511 scoop was repaired and washed. However, Roberts says, if it had been washed the day before, he would not have seen the oil accumulations that he cited. The books do show that the 511 and 512 scoops were examined on April 9, 2009, a week before Roberts issued his citations. (Tr. Vol. I, 224-225). The mine argues that the scoops had been inspected a week before, as required, and any problems that were noted, were repaired. The fact that Roberts found accumulations a week later does not support a finding that the examination was inadequate.

The mere fact that the conditions existed at the time of the inspection is insufficient evidence from which to infer that the conditions existed at the time of the weekly examination five days prior. The fact that the scoops had accumulations some days after the last weekly inspection is not enough to prove the inadequacy of the weekly inspection. *See Dumbarton Quarry Association*, 21 FMSHRC 1132 (Oct. 1999) (ALJ). There is insufficient evidence to link the inadequate examination with conditions a number of days later, particularly in light of the fact that the equipment was used for many hours after the examination but before the citation was issued. Therefore, the citation is vacated.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil

penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. 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).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator’s size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above. I assess the following penalties:

Order No.	6683136	\$ 15,000.00
Citation No.	8414037	\$ 50,000.00
Citation No.	6683161	\$ 10,000.00
Order No.	6683186	\$ 4,000.00
Citation No.	6682879	\$ 6,000.00
Citation No.	6682881	\$ 60,000.00
Citation No.	6682883	\$ 50,000.00
Citation No.	6680529	\$ 10,000.00
Citation No.	6680534	vacated
Total:		\$ 205,000.00

The parties have settled the remaining citations and orders contained in these dockets. I accept the representations and the modifications of the Secretary as set forth in the file and on the record in these cases. I have considered the representations and documentation submitted and I find that the modifications are reasonable. 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**.

The settlement amounts are as follows:

Docket Number LAKE 2009-491

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
8414025	Modify from Fatal to Permanently Disabling	\$4,689	\$2,107
6680175	Modify from S&S to Non S&S	\$1,530	\$309
8414027	N/A	\$2,901	\$2,321
8414028	Modify from Fatal to Permanently Disabling	\$4,329	\$1,945
8414030	Modify from 15 to 2 Persons Affected	\$3,143	\$874
6683122	Modify from S&S to Non S&S	\$1,304	\$264

Docket Number LAKE 2009-491 continued

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
6683125	Modify from High to Moderate Negligence	\$13,268	\$3,996
6683126	Modify from High to Moderate Negligence	\$13,268	\$3,996
6683127	Modify from S&S to Non S&S	\$5,961	\$1,203
6683128	Modify from S&S to Non S&S	\$3,996	\$807
6682871	Modify from 4 to 2 Persons Affected	\$3,689	\$2,678
8414035	Modify from High to Moderate Negligence	\$2,473	\$745
8414036	Modify from High to Moderate Negligence	\$2,678	\$807
6683132	Modify from High to Moderate Negligence	\$2,678	\$807
6683134	Modify from S&S to Non S&S, and High to Moderate Negligence	\$4,689	\$285
8414039	n/a	\$2,678	\$2,410
8414041	n/a	\$2,678	\$2,410
8414043	n/a	\$2,678	\$2,410
8414044	n/a	\$2,678	\$2,410
8414045	n/a	\$2,678	\$2,410
8414046	n/a	\$2,678	\$2,410
6683139	n/a	\$2,678	\$2,410

6683140	Modify from S&S to Non S&S	\$1,944	\$392
8414048	n/a	\$2,473	\$2,473
8414049	n/a	\$3,143	\$3,143
6683141	Modify from S&S to Non S&S	\$3,405	\$687
6683142	Modify from S&S to Non S&S	\$11,306	\$5,653
6683143	Modify from High to Moderate Negligence	\$2,678	\$807
6683144	n/a	\$2,678	\$2,410
6683145	n/a	\$3,996	\$3,397
8414054	Modify from S&S to Non S&S	\$1,795	\$363
8414055	Modify from High to Moderate Negligence and Number of People Affected from 50 to 2	\$10,437	\$874

Docket Number LAKE 2009-491 continued

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
8414056	n/a	\$2,678	\$1,875
6683147	n/a	\$3,996	\$3,397
6683148	n/a	\$2,678	\$2,410
6682875	n/a	\$2,473	\$2,473
6682876	n/a	\$2,473	\$2,473

Docket Number LAKE 2009-532

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
6682882	Modify from 6 to 2 Persons Affected	\$12,248	\$5,962
6680190	Modify from 18 to 6 Affected	\$2,901	\$1,530
6680193	n/a	\$4,689	\$4,689
6680194	Modify from S&S to Non S&S	\$3,996	\$807
8414066	n/a	\$2,473	\$2,226
6682889	Modify from 18 to 3 Persons Affected	\$4,689	\$1,530
6682890	n/a	\$2,678	\$2,678
6682891	Modify from High to	\$2,678	\$807

	Moderate Negligence		
6682895	Modify from 18 to 3 Persons Affected	\$4,689	\$1,530
6682897	Modify from High to Moderate Negligence	\$2,678	\$807
6683168	Modify from Fatal to Lost Workdays	\$1,657	\$500
6682899	Modify from 3 to 1 People Affected	\$2,282	\$1,796
6680208	Modify from 10 to 2 People Affected	\$10,437	\$2,902
6680209	n/a	\$2,678	\$2,678
6680530	Modify from 8 to 4 People Affected	\$7,578	\$3,996
6680531	Modify from High to Moderate Negligence	\$4,329	\$1,945
6680532	Modify from S&S to Non S&S	\$13,268	\$2,678
6680210	Modify from 16 to 6 People Affected	\$10,437	\$5,504

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6680211	Modify from 16 to 6 People Affected	\$10,437	\$5,504
6682904	Modify from High to Moderate Negligence	\$2,901	\$874
6682908	n/a	\$3,996	\$3,596
6683184	Modify from S&S to Non S&S	\$3,996	\$807
6683185	Modify from S&S to Non S&S	\$2,678	\$550
6682929	n/a	\$2,678	\$2,678
6680218	Modify from 10 to 6 People Affected	\$4,689	\$2,473
7594739	n/a	\$1,795	\$1,795
7594786	n/a	\$1,304	\$1,304
6680219	Modify from Fatal to Permanently Disabling	\$5,080	\$2,282
6682939	Modify from 14 to 2 People Affected	\$3,143	\$874
6682940	Modify from 18 to 6 People Affected	\$4,689	\$2,473
6682941	n/a	\$1,795	\$1,795
7594744	n/a	\$1,795	\$1,795
Settlement Total:			\$146,206.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$205,000.00 and assess the stipulated penalties in the amount of \$146,206.00. Big Ridge Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$351,206.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (First Class Certified Mail)

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