FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 18, 2011

EMERALD COAL RESOURCES, LP,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. PENN 2009-614-R
	:	Order No. 8008143; 06/15/2009
v.	:	
	:	Docket No. PENN 2009-615-R
	:	Order No. 8008144; 06/15/2009
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Emerald Mine No. 1
Respondent	:	Mine ID 36-05466
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-697
Petitioner,	:	A.C. No. 36-05466-192658
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	
Respondent	:	Mine: Emerald Mine No. 1

DECISION

Appearances: Patrick M. Dalin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, Paul Marone, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor;
Ralph Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Emerald Coal Resources, LP

Before: Judge Andrews

This case is before me upon the petition for assessment of a civil penalty filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (the "Act") charging Emerald Coal

Resources, LP ("Emerald") with violations of mandatory standards and seeking civil penalties in the amount of $71,862.00[1] for two safety violations. Both orders were section 104(d) actions. Section 104(d) of the Act provides as follows:

> (d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

A hearing was held on October 5, 2010, in the Federal Mine Safety & Health Review Commission's Pittsburgh, Pennsylvania, hearing room.

The general issues before me are whether Emerald violated the cited standards as charged and, if so, what are the appropriate civil penalties to be assessed for those violations. Additional specific issues are addressed as noted below.

Preliminary Matters

Motion to Amend

[1] The parties, by joint stipulation, agreed to a modification of order No. 8008144 to change the likelihood of injury from highly likely to reasonably likely, resulting in a §100.3 point total of 130, reducing the assessed penalty from $60,000 to $30,288. Citation No. 8008143 was assessed a penalty of $41,547.

Order No. 8008144 was issued on June 15, 2009. On September 17, 2010, the Secretary filed a motion to amend to change the provision of the regulations in Block 9.C. of Form 7000-3 from 75.363(a) to 75.360(a). There is no specific Commission Procedural Rule on motions to amend. Pursuant to Commission Procedural Rule 1(b), where the Commission's own Procedural Rules do not address the question presented, we are *guided so far as practicable* by the Federal Rules of Civil Procedure (Fed.R.Civ.P.). 30 C.F.R. §2700.1(b). emphasis added. Therefore, I will look to Fed.R.Civ.P. 15(a) for guidance. Emerald's opposition to the motion, filed September 27, 2010, was primarily on the grounds that the amendment was sought more than a year after the order was issued, and that Emerald would be prejudiced by granting an amendment only 2 ½ weeks prior to the hearing. At the hearing, Emerald limited their opposition to undue delay in moving to amend the Order. (Tr. 322).

The Condition or Practice written by the Inspector in Block 8 of the form clearly concerned a pre-shift examination, 30 C.F.R. § 75.360(a), rather than the posting of a danger sign, 30 C.F.R. § 75.363(a). In that narrative, both of these regulations were listed, in the context of reviewing the requirements with all of Emerald's Mine Examiners. The requested amendment merely conforms the Section of Title 30 in Block 9. C. to the actual Condition or Practice written in Block 8 by the Inspector. Listing 75.363(a) instead of 75.360(a) appears more likely to be a simple clerical error in copying a cite than a substantive determination of a controlling standard. *See*, 30 C.F.R. § 2700.79. For this reason, fairness requires that either the delay in requesting the amendment or the incorrect transposition of a citation must not become a basis for any argument that the order be vacated. Accordingly, the Secretary's Motion to Amend is GRANTED.

Admission of exhibits

Exhibit G-7, Mine Accidents. This was initially admitted without objection, (Tr. 99), but in the Joint Stipulations (#15) there was the objection by Emerald based on relevance to penalty criteria. The document itself is a public record, compiled and made public by the Mine Safety and Health Administration ("MSHA"), and is admissible. It was apparently offered to show ignitions at this mine, and does show a number in 2004, one in 2006, and two in 2009. However, in further testimony, it was shown that these reported ignitions were in the D-Mains section of the mine, well removed from C-Mains, where there has never been an ignition. Thus, while the agency record is admissible, the past ignitions do not appear to be relevant.

Exhibit G-9, Mine Citations, Orders and Safeguards. This is a public record from the MSHA website, therefore, the document itself is admissible. The objection by Emerald is to the use of any of the data beyond the 15-month period relevant to 30 C.F.R. § 100.3, for history of violations in penalty assessment. The data from the 15 month period is relevant for penalty assessment. The 24-month data is relevant to show past violations.

See Consolidation Coal Co., 23 FMSRHC 588, 595 (June 2001). Hence, the exhibit is admitted, and the data used as appropriate.

Exhibit G-10, Order No. 8007448. This order was issued on April 16, 2009 for a violation of 75.400. It was initially issued as a 104(a) citation but subsequently changed to a 104(d)(2) order, and refers to another order, No. 7069052, issued on October 2, 2007, also alleging a violation of 75.400. These violations were the basis for the history in the June 15, 2009 order. Emerald's objection was that order No. 8007448 remained unadjudicated. I conclude that order No. 8007448 should be admitted for the limited purpose of notice provided by the issuance, alone, of the prior orders. *See Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001); *Extra Energy, Inc.*, 23 FMSHRC 829 (Aug. 2001); *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992).

Discussion with Findings of Fact and Conclusions of Law

The Emerald Mine No. 1 is located in Greene County, Pennsylvania, and is an underground coal mine. (Tr. 38.) It liberates more than one million cubic feet of methane over a 24-hour period, which necessitates E02, 103(i) spot inspections. (Tr. 38-39.)

On June 15, 2009, Mine Safety and Health Administration ("MSHA") Inspector Joseph A. Vargo went to Emerald Mine No. 1 to perform an E02 spot inspection. (Tr. 38.) At the time of the hearing, Inspector Vargo had been employed by MSHA for three years and three months. (Tr. 35.) His experience in the mining industry began in 1977, and he worked for Consol Pennsylvania Coal Company at the Oakmont, Renton, and Bailey mines. (Tr. 35, 131.) For most of the time, about 25 years, he was a Mine Examiner at the Bailey mine. (Tr. 131.) At Consol, he participated in 8-hour annual retraining, and at MSHA he completed the 21-week Mine Academy course and 15 weeks traveling with seasoned Inspectors. (Tr. 37.) He received his AR card in July 2008, and then began inspections on his own. (Tr. 35.) In June 2009, he was still within the probationary period as a new Mine Inspector for MSHA. (Tr. 35-37, 131.)

Inspector Vargo arrived at Emerald Mine No. 1 at approximately 7:00 am. (Tr. 39.) He obtained a strip map from the Foreman's room, and reviewed the pre-shift report for the midnight shift. (Tr. 42.) He found that no violations, dangers, or hazardous conditions were reported for the C-Mains section, and the area was deemed safe to enter. (Tr. 39, 42, 120, Ex. G-11.) For the entire inspection, Inspector Vargo was accompanied by Jeff Stewart from the Emerald Safety Department and United Mine Workers ("UMW") walk around representative Dave Laporte. (Tr. 63.)

The inspection started at the C-Mains #1 entry, included all five faces in that section, and then proceeded to the C-3 section to include the four faces there. (Tr. 49.) The continuous miner was operating in the #2 entry, outby the #3 crosscut. (Tr. 49.) When Inspector Vargo came to the #3 entry, he found accumulations at the face. (Tr. 50.)

As he traveled from the #3 entry to the #4 entry, he found accumulations in the 4 to 3 crosscut. (Tr. 57.)

Order No. 8008143 (The accumulations)

Order No. 8008143, issued at 0930 hrs, alleges a violation of a mandatory safety standard, section 75.400, and states:

> [t]he mine operator was not following the cleanup program in the C-Mains section (MMU 029-0). Coal was permitted to accumulate on the previously rockdusted surface in the #3 entry of C-3, inby #3 crosscut. The accumulation was 34 feet in length, 2 to 3 feet high, and 15 to 16 feet in width, damp to dry, and black in color. There was also an accumulation of coal in the #4 to #3 entry at 3 crosscut of C-3, that was 33 feet in length, 2 to 6 feet high, and 9 to 16 feet wide, damp to dry, and black in color.

Inspector Vargo testified that the accumulations measured 34 feet back from the #3 face, were 16 feet wide, rib to rib, and 2 feet deep. (Tr. 50, 54, 55.) He found the material to consist of coal and fine coal, damp to dry, approximately 60% coal and 40% rock. (Tr. 56.) He also made notes. (Ex. G-1.) He observed the material closely, bending down, picking up some, and poking with his walking stick, and concluded there was more coal than rock. (Tr. 55, 56, 60, 90.) The color was black, and not rock dusted. (Tr. 96, 127.) A couple of 4-foot metal roof pins were also noted. (Tr. 57, 90, 91.)

Inspector Vargo found that the accumulation in the 4 to 3 crosscut was approximately 33 feet long, 9 feet wide, and varied in depth from 6 feet to 1 foot. (Tr. 57, 58.) The two accumulations were close in proximity and were connected by some additional material inside an installed air connection. (Tr. 82, 83, 84.) He estimated the composition as 80% coal and 20% rock, damp to dry, with one roof pin. (Tr. 60.) Again, he bent down, picked up some, and used his stick to dig down into the accumulation. (Tr. 59, 60.)

The size of the two accumulations is confirmed by the written statement of Foreman Jeffery Stewart issued on the same day. (Ex. G-25.) UMW walk around representative Dave Laporte observed Inspector Vargo use his stick and kick pieces of the material around "to see what was in there." (Tr. 189, 190.) Mr. Laporte described most of it to be dry, black and grey, and 45% coal. (Tr. 177, 179, 180.) Vargo testified that never in his 30 years of mining experience had he seen accumulations like these, and they should have been loaded out to the conveyor belt. (Tr. 70, 71.) Mr. Laporte was also of the opinion that they should have gotten rid of the material. (Tr. 182.) Although Mr. Stewart in his testimony attempted to characterize the accumulations as "70% rock," he acknowledged that he was not present for the loading out and this was just an estimate. (Tr. 262.)

30 C.F.R. §75.400 states:

> [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.

It is well accepted that "a violation of . . . 30 C.F.R. §75.400 occurs when an accumulation of combustible materials exists." *Old Ben Coal Company*, 1 FMSHRC 1954, 1958 (Dec. 1979). "[A]n accumulation exists where the quantity of combustible materials is such that, in the judgment of the [inspector,] it likely could cause or propagate a fire or explosion if an ignition source were present." *Old Ben Coal Company,* 2 FMSHRC 2806, 2808 (Oct. 1980).

Emerald argues that the material pushed up to the face was part of the active normal cleanup process, and therefore, not an "accumulation." (Resp. Posthearing Br. 8.) As noted above, accumulations exist when a certain mass of materials is present. I agree with the Secretary's argument that how the mass came to be is not relevant to the determination of whether an accumulation exists. (*See* Secy. Posthearing Rep. Br. 2.) The accumulations were so large that Inspector Vargo spotted them as soon as he walked toward the face. (Tr. 109.) He testified to the combustible nature of the accumulations. (Tr. 86, 87, 94, 95.) In his notes, written at the time of the inspection, Vargo recorded comments made by Section Coordinator Gary Bogumit that the accumulations were excessive, and he did not know why they had not been cleaned up. (Tr. 65, Ex. G-1.) Yet Mr. Bogumit testified that he did not recall saying that the material was excessive, and attempted to contradict the inspector's notes stating, "I'm sure I didn't make that comment." (Tr. 224, 225.)

Mr. Bogumit, as well as mine employees Mark Hanley and Thomas Nickel, testified to the effect that the accumulations were mostly all rock with a little coal mixed in. (Tr. 214, 215, 218, 246, 247, 273.) Mr. Hanley did describe loose coal as being present in his written statement. (Tr. 258, Ex. G-15.) Mr. Bogumit described the rock and dust as wet, (Tr. 218, 224), but this assessment was not shared by other witnesses. Manager William Schifko even testified that the material was not coal, but rock, (Tr. 305), despite the fact that he did not go into the mine until June 16th, after the 4 to 3 crosscut had been cleaned out and the #3 face rockdusted. (Tr. 307.) When compared to the direct, close, tactile, and even probing examination of the accumulations by Inspector Vargo, I am unable to assign any significant weight to the testimony of the company employees other than UMW walkaround representative Dave Laporte.

I place little value on the attempts to either maximize or minimize the amount of rock that fell from the roof, was "pushed up" and included in the accumulations. There were two areas where some "potting out" around roof bolts had occurred, (Tr. 76, 77,

146, 170, 171, Ex. G-2A, R-1), but the amount of such rock and its contribution to the composition of the accumulations were only estimates at best. The examinations of Inspector Vargo and the observations of Mr. Laporte are the best evidence of the coal and loose coal present and are accorded controlling weight, with the greater weight placed on the testimony of the Inspector. I find that the accumulations were very large, mostly coal and loose coal, damp to dry, black in color, and also contained rock. Where loose coal is present, the Commission has concluded that the 75.400 standard is violated. *Black Diamond Coal Mining Company*, 7 FMSHRC 1117, 1121 (Aug. 1985).

Therefore, Emerald violated the mandatory safety standard in section 75.400.

Significant and Substantial

This violation was designated as significant and substantial ("S&S") by the inspector. A violation is S&S when the violation is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. §814(d)(1). A violation is properly designated as S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish that a violation is S&S, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984); *see also*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc.* v. *Secretary*, 861 F.2d 99, 103-4 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

I have found a violation of the cited mandatory safety standard thereby meeting the first criterion. The accumulations did contain coal and loose coal, combustible material by definition, and a discrete safety hazard. As the MSHA Manual sets forth, loose coal is a potential fire hazard, especially with drying out and turning into float coal dust. Ignition sources include sparks from the carbide bits of the continuous miner, electrical arcs, and the operation of beltways and equipment in roadways. With such a source, combustion can occur with methane, (especially in a methane liberating mine), float coal dust, loose coal dust, and spillage of other flammable materials, such as hydraulic fluid. (Ex. G-6.) Therefore, the accumulations in this case did present a potential fire hazard. But our analysis does not end there.

An ignition source is also needed to start a fire or produce an explosion. "When evaluating the reasonable likelihood of a fire, ignition or explosion, the Commission [looks to] whether a "confluence of factors" were present based on the particular facts surrounding the violation." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997), *citing Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). These factors include "the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area." *Enlow Fork Mining Co.*, 19 FMSHRC at 9, *citing Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (Mar 1990); *Texasgulf, Inc.*, 10 FMSHRC at 500-3.

Inspector Vargo took no methane measurements on or in the accumulations. (Tr. 130, 131.) Although this is a methane liberating mine, such measurements as were made in the area did not reveal combustible concentrations of gas. (Tr. 129.) This reduces the idea of trapped methane pockets inside the accumulations to speculation. The ventilation was adequate throughout the area. (Tr. 137, 138.) The continuous miner was in another entry. (Ex. G-4.) The nearest belt drive was 300-400 feet away. (Tr. 173, 174.) No other equipment was operating at the piles, and no electrical cables were there either. (Tr. 149.) The record does not contain any evidence of spilled hydraulic oil. There was no active work by miners in the immediate area. (Tr.158.) No witness described float coal dust as being present.

The Secretary appears to rely on the potential for ignition, especially the return of mining activity to the #3 entry and the installation of conveyor belt assemblies. Inspector Vargo estimated the miner would return in 2 to 3 days. (Tr. 81.) He noted that fire suppression water sprays are installed on the miner. (Tr. 136.) Taking all of this into account, at the time of the inspection the danger of a catastrophic explosion from these accumulations is not shown. The ventilation was adequate, methane was minimal, and there were no ignition sources present. Therefore, applying the "confluence of factors" test of *Enlow Fork*, I find that the violation was not S&S. Further, I find that the likelihood of injury should be reduced from "reasonably likely" to "unlikely".

Unwarrantable Failure

The order was also designated as an unwarrantable failure, as set forth in section 104(d)(1) of the Mine Act, 30 U.S.C. §814(d)(1). Unwarrantable failure is conduct which is considered "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec, 1987). Unwarrantable failure is "characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care."" *Id*. at 2003-4; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-4 (Feb. 1991).

The Commission has set forth factors to be considered in making an unwarrantable failure ("UWF") analysis. They are: "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to

eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1548 (Sept. 1996), *citing Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994).

The violation was extensive. Inspector Vargo testified that from the moment he "walked up on it [he] noticed" the accumulations. (Tr. 109.) The accumulations were very large in size. Each measured over 30 feet in length, over 2 to 3 feet high, and over 9 feet wide. (Cit. 8008143, Tr. 50, 53-58.) The volume of material far exceeded any accepted practice of pushing up small amounts (3 to 4 feet in length, a foot in depth) left from the mining process to the face. (Tr. 62.) Whether considered individually or collectively, the masses of coal, loose coal and rock that had been created were certainly extensive.

The violative condition also existed for quite some time. The area had been examined for at least the prior five shifts. (Tr. 72, 109, 118, Ex. G-1, pp 12, 15, Ex. G-11.) While Emerald does have a cleanup program in which it is noted that "extra attention is needed to eliminate accumulation of loose coal and fine coal" (Ex. G-13), part of Emerald's normal cleanup process is to push excess material to the face. (Tr. 214, 216.) Despite testimony to the contrary, it does not appear that the mine's clean up program was being followed. (Tr. 293.) There is also evidence that the accumulations could have existed from June 9th until discovered on inspection. The potting out that occurred on June 8th was cleared by pushing the material to the #3 face on June 9th. (Tr. 154-159, 213,.214, Ex. G-4.) Certainly the coal, loose and fine coal, and rock were lying on the coal bottoms and in the crosscut long enough for drying out to be well under way. (Tr. 56, 60.) This supports the time estimate of Inspector Vargo, and is even suggestive of several more days.

Considering both the extent of the accumulations and length of time they existed, the opinions of Vargo and Mr. Laporte that they should have been loaded out of the mine are compelling. (Tr. 69-71, 182.) As to these two factors, Emerald displayed an indifference toward the standard violated.

Efforts on the part of the operator to timely abate the violation were lacking. There was a delay in the agreed upon abatement plan. (Tr. 163-64.) The credible evidence shows that Emerald did not place a priority on abatement of the violation, despite a favorable amendment of the order allowing for rockdusting without removing the accumulation at the #3 face and only loading out the accumulation in the crosscut. (Ex. G-5.) Despite testimony suggesting that the delays were caused by the need to unload a scoop containing supplies for the continuous miner, and the need to glue the roof in the #2 crosscut near the #3 entry, (Tr. 183, 184, 223, 252), it appears more likely that the abatement was subordinated to these other activities. The order to clean up was at 9:30 a.m., and should have taken about one and one-half hours. (Tr. 165.) But the

abatement was not completed until about 4:00 p.m. (Tr. 165.) Emerald did not exercise diligence when ordered to perform the agreed-upon abatement.

The mine has been on notice that greater efforts are necessary for compliance. Specifically, on April 16, 2009, Inspector Vargo issued Order No. 8007448 to Area Manager and Section Coordinator Gary Bogumit for a violation of 30 C.F.R. §75.400. (Tr. 114, Ex. G-10.) At that time, Vargo told Mr. Bogumit that he would not allow an accumulation that was similar to the #3 entry accumulation in the instant case. (Tr. 117.) Further, multiple prior orders have been issued to Emerald regarding section 75.400. (Ex. G-9.) In the 24 months prior to June 15, 2009, 77 citations or orders were issued to Emerald for violating 75.400. (Tr. 110, Ex. G-9.)

Mr. Bogumit testified that the standard process at Emerald mine is, after mining, to push to the face the coal left behind and not loaded out. (Tr. 211-213, 214, 216.) In this case, the accumulations existed through at least 5 pre-shift examinations. On the shift preceding the inspection, Foreman Thomas W. Nickel performed the preshift examination. (Tr. 268.) He encountered the material pushed up to the #3 face, and in the 3 to 4 crosscut. (Tr. 270, 279.) Emerald had actual notice of the accumulations at the #3 face and 3 to 4 crosscut, but took no action to clean them up until ordered to do so, and then did not act promptly on the order. This constitutes, at least, a serious lack of reasonable care.

Accordingly, based on the above analysis, I find that the violation was more than ordinary negligence and constitutes unwarrantable failure and high negligence.

Order No. 8008144 (Failure of pre-shift examination)

Order No. 8008144 alleges a violation of 30 C.F.R. §75.360(a)[2] and states that

> [t]he pre-shift examination conducted for the C-Mains section (MMU 029-0) entry on midnight shift, 6-15-09 for the on-coming day shift was not adequate in that the following hazards were not entered in the pre-shift examiners record book.
>
> Loose coal and coal was permitted to accumulate as stated in order No. 8088143.
>
> The requirements of CFR 75.363 (a) and 75.360 shall be reviewed with all mine examiners before this order is terminated.

[2] Citation No. 8008144 originally alleged a violation of section 75.363(a). Pursuant to the above discussion in the preliminary matters, the citation has been amended to correctly reflect a violation of section 75.360(a).

> This Federal Safety Standard has been cited 5 times at this mine in the last 24 months.

As noted above, the parties, by joint stipulation read into the record at the hearing, agreed to a modify order No. 8008144 to change the likelihood of injury from "highly likely" to "reasonably likely," resulting in a §100.3 point total of 130, reducing the assessed penalty from $60,000 to $30,288.

> 30 C.F.R. §75.360(a)(1) states:
>
> [e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

"The preshift examination requirement is of fundamental importance in assuring a safe working environment for miners." *Enlow Fork Mining, Co.,* 19 FMSHRC 5, 15 (Jan. 1997) (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). Additionally, "accumulations of combustible materials qualify as hazardous conditions that should be recorded by a preshift examiner when found." *Enlow Fork* 19 FMSHRC at 13, 15. "Preshift examinations assess the overall safety conditions in the mine . . . identify hazards . . . and through this identification facilitate correction of hazardous conditions." *Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 540 (D.C. Cir. 1997).

I have already found that the accumulations were present and they were considered potentially hazardous. As established in the discussion of order No. 8008143, above, the accumulations at the #3 face and in the 3 to 4 crosscut existed for at least five shifts. Both were large, mostly coal and loose coal, damp to dry, black in color, were not rockdusted, and did present a potential fire hazard. Inspector Vargo reviewed the June 15, 2009 midnight shift examination report before entering the mine and found no indication of any violation, danger, or hazard; it was deemed safe to enter. (Tr. 120.) However, when he came upon the accumulations that day, they were so extensive they could not have been overlooked. (Tr. 109.) Foreman Nickel performed the examination reviewed by Vargo before entering the mine. (Tr. 268, 269.)

Mr. Nickel testified that he did encounter the two accumulations. (Tr. 270, 279.) He did not consider the material to be a hazard, because it would be cleaned up at a later time. (Tr. 272.) That a hazard would be taken care of at a later time is irrelevant to the requirement to record the condition before the next shift begins. The record shows that Emerald's employees did, in fact, see the accumulations. Testimony by other company

employees was to the effect that the accumulations were not hazardous, and there was no need to record them. (Tr. 218, 224, 250, 251, 263, 264, 272, 279.) In view of findings already made that there was a fire hazard and that the clean up program was not being followed, this testimony is not found credible.

Therefore, I find the failure to record the large accumulations at the #3 face and in the 3 to 4 crosscut was a violation of 75.360.

Significant and Substantial

The Commission has held that a pre-shift violation was S&S irrespective of the absence of a specific hazardous condition disclosed upon the inspector's examination of the mine. *Kellys Creek*, 19 FMSHRC 457, 461 (Mar. 1997); *Buck Creek Coal Co*., 17 FMSHRC at 13-15 (Jan. 1995).

The fact of a violation has been established. There was a discrete safety hazard, considering the size of the accumulations, the combustible content, the small loose coal particle size, its dryness, and the length of time the accumulations were allowed to remain in the C-3 section without being recorded. This measure of danger to safety was contributed to by the failure of the pre-shift examiners to report the hazards before the next shift entered the mine.

The third question in the evaluation of the violation is whether there is a reasonable likelihood that the hazard contributed to will result in an injury. Where there is no advance warning that combustible accumulations are present in a working section of the mine, the danger to unwary miners is heightened, and the risk increased that the hazard contributed to by the lack of a report will result in an injury.

Finally, in the context of continued normal mining operations, should a fire event occur, it is reasonably likely that injuries would be of serious nature, and the fourth element of the S&S evaluation is also satisfied.

Accordingly, the violation of section 75.360 was "significant and substantial".

Unwarrantable Failure

The wide extent of the failure to record and report large accumulations containing combustible materials is revealed by the operator's stated position that pushing coal left from the mining process up to the face is standard operating procedure. After the potting out on June 8th was cleared by also pushing it to the #3 face, which had been mined with coal bottoms left in place, each pre-shift examiner thereafter found that the area was "safe to enter." (Ex. G-11, G-24.) There were at least 16 such examinations prior to the inspection on June 15th, with no notice provided to miners entering the C-3 section that there were potentially hazardous accumulations present in the 4 to 3 crosscut and

extending back 34 feet from the #3 face. The sheer volume of the piles would not be missed by any pre-shift examiner traversing the area.

Emerald's efforts to ensure accurate and complete pre-shift examinations were lacking. The Mine Examiners should have known that the clean up program requiring extra attention to eliminate accumulations of loose coal and fine coal when leaving coal bottoms was not being followed. (Ex. G-13.) The accumulations should have been well described on each pre-shift report after they were created, with loading out, or at least "dangered off" being the appropriate response. As evidenced by testimony, the operator had actual knowledge of these hazards.

There was also prior notice that the pre-shift examinations had to improve. The safety standard had been cited 5 times in the 24 months before the issuance of the order on June 15, 2009. Further, the pre-shift examiners, instead of ignoring the accumulations, should instead have been especially careful to discover and promptly report such violations of 75.400, which had been cited 77 times in the previous 24 months. Therefore, Emerald was on notice that greater efforts were required to ensure adequate pre-shift examinations.

This aggravated conduct was beyond ordinary negligence and did constitute unwarrantable failure and high negligence.

Penalty

Pursuant to section 110(i) of the Act, "[t]he Commission shall have authority to assess all civil penalties provided in this Act." 30 U.S.C. §820(i). The following six statutory criteria are to be considered:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Id. I have considered each of the statutory criteria in assessing the penalties. Additionally, the parties stipulated that the penalty will not affect Emerald's ability to continue in business. (Ex. JX-1.)

Order No. 8008143 is found to be non-S&S, with injury or illness unlikely. This results in a penalty reduction from $41,574.00 to $8,421.00.

Order No. 8008144, as modified by the parties, is properly assessed in the amount of $30,288.00.

ORDER

For the reasons set forth above, Citation No. 8008143 is **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely" and to delete the significant and substantial designation. Citation No. 8008144 is **AFFIRMED AS MODIFIED BY THE PARTIES ABOVE**. Emerald is hereby **ORDERED TO PAY** the sum of $**38,709** within 30 days of the date of this decision.[3] Upon receipt of payment, these cases are **DISMISSED**.

Kenneth R. Andrews
Administrative Law Judge

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