

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 04 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2013-1180
A.C. No. 46-09163-327526-01

Docket No. WEVA 2014-375
A.C. No. 46-09163-338106-01

Docket No. WEVA 2014-376
A.C. No. 46-09163-338106-02

v.

ELK RUN COAL COMPANY
Respondent.

Mine: Roundbottom Powellton Deep Mine

DECISION AND ORDER

Appearances: Pollyanna E.F. Hampton, Esq., U.S Department of Labor, Office of the Solicitor, Arlington, VA for the Secretary

Eric L. Silkwood Esq., Hardy Pence PLLC, Charleston, WV for Respondent

Before: Judge Steele

STATEMENT OF THE CASE

These cases are before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Elk Run Coal Company ("Respondent" or "Elk Run") pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Charleston, West Virginia on January 9 and 10, 2014. The parties subsequently submitted post-hearing briefs.

PROCEDURAL HISTORY

On April 18, 2013, MSHA inspector Jack Dempsey conducted an inspection of Roundbottom Powellton Deep Mine ("Powellton Mine") and issued several citations.

Respondent contested many of these issuances, four of which (three citations and an order) were placed in three civil penalty dockets (WEVA 2013-1180, WEVA 2014-375, and WEVA 2014-376).¹ The total assessed penalty for the three citations and orders was \$197,386.00. On January 9 and 10, 2014 a hearing was held on these remaining citations.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.² Those stipulations include the following:

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Federal Mine Safety and health Act of 1977 ("the Act").
2. Roundbottom Powellton Deep Mine, located in Boone County, West Virginia, is where the citations and orders at issue in this matter were issued.
3. Roundbottom Powellton Deep Mine was operated by Elk Run on April 18, 2013.
4. Roundbottom Powellton Deep Mine is a mine as that term is defined in section 802(h) of the Act.
5. Elk Run was an "operator" as defined in Section 3(d) of the Act at the coal mine at which the citations and order at issue in this proceeding were issued.
6. Elk Run is considered a large mine operator and Roundbottom Powellton Deep Mine is considered a large mine for purposes of 30 U.S.C. 820(i)
7. The products of the mine at which the citation and order at issue in this matter were issued entered commerce, or the operator or products therefore affected commerce, within the meaning and scope of Section 4 of the Act.
8. Operations of Elk Run at the coal or other mine at which the citations and orders at issue in this proceeding were issued are subject to the jurisdiction of the Act.
9. The penalty which has been assessed for these violation pursuant to 30 U.S.C. § 820 will not affect the ability of Elk Run to remain in business.

¹ WEVA 2014-376 also included four citations (Citation Nos. 8156352, 8156059, 8156062, and 8156063), that were not issued on April 18, 2014 and were unrelated to the instant matters. On March 31, 2014 Chief Judge Lesnick severed these four citations from WEVA 2014-376 and placed them in a new docket, WEVA 2014-749. That docket will be disposed of separately.

² Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

10. The individual or individuals whose signatures appear in Block 22 of the citations and orders at issue in this matter were acting in their official capacity and as an authorized representative for the Secretary of Labor when the citations and order were issued.
11. None of the exhibits the parties intend to offer into evidence and that were exchanged prior to hearing will be subject to objection as to authenticity. This stipulation does not mean that either party stipulates to the truth of any allegation in the exhibits but merely to their authenticity.
12. True copies of the citations and order at issue in this matter, with any and all modification and abatements, were served on Elk Run or its agent as required by the Act.
13. The citation and order at issue in this matter, along with any and all modifications and abatements, were issued on the dates stated therein and were issued by a duly authorized representative of the Department of Labor, MSHA.
14. The citations and order at issue in this matter contained in Exhibit A attached hereto are authentic copies of the citations and order at issue in this matter, including any and all modifications and abatements.
15. The information contained in Exhibit A attached to the Secretary's Petition for Assessment of Civil Penalty regarding the mine tonnage of Elk Run accurately reflects tonnage production at Roundbottom Powellton Deep Mine.
16. The citations at issue in this matter were timely abated.
17. The citations and order at issue in this matter, along with any and all modifications and abatements, may be admitted into evidence, without objection, although Respondent may dispute specific allegations contained within the citations and order.
18. The approved roof control plan in effect on April 18, 2013 required entries to be a maximum of 20 feet wide in the area at issue in Citation No. 8154925.
19. The approved roof control plan in effect on April 18, 2013 required spacing between roof bolts to be a maximum of 60 inches in the area at issue in Citation No. 8154925.
20. The mesh screening panels at issue in Order No. 8154928 measured five feet by twelve feet and were provided to Elk Run by Jennmar.

Joint Exhibit 1 (*see also* Transcript I, at 8).³

³ Hereinafter the transcript will be cited as "Tr." Followed by the page number. There are two volumes of transcript here so, the first volume will be denoted "Tr. I," and the second, "Tr. II,"

Citation No. 8154925

I. ISSUES

With respect to Citation No. 8154925, the issues to be determined are whether Respondent's alleged violation of the Act on April 18, 2013 was significant and substantial ("S&S"), whether it was reasonably likely to result in fatal injury to 14 miners, whether it was the result of high negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

MSHA Inspector Jack Dempsey conducted an inspection of Roundbottom on April 18, 2013.⁴ (Tr. I, 20). He was accompanied by Safety Representative Terry Peterson.⁵ (Tr. II, 30-31, 35, 60). Dempsey had already been inspecting the mine for two weeks.⁶ (Tr. I, 115).

⁴ At hearing Jack Arnold Dempsey appeared and testified for the Secretary. (Tr. I,14). Dempsey graduated from High School in 1972 and attended more than three years of college. (Tr. I, 14-15). He started in the coal industry for Cannelton Coal in 1974. (Tr. I, 15-16). He worked at Bethlehem Steel Corporation in 1977 to October 1992 as certified electrician. (Tr. I, 16-17). He was a certified electrician underground, surface, and prep plants and was certified for surface and underground mining. (Tr. I, 16, 18). He worked as a scoop operator, shuttle car operator, roof bolter operator, continuous miner operator, ran a motor, and acted as a general laborer. (Tr. I, 17). He also worked for a coal transportation company. (Tr. I, 17). From March 2009 until the hearing, Dempsey worked for MSHA as an inspector. (Tr. I, 14). He received classroom training at the Mine Academy and on-the-job training from seasoned inspectors. (Tr. I, 18). This training included instruction on roof control, ribs, and ventilation. (Tr. I, 19). As an inspector, Dempsey would travel airways, conduct and examine rock dust surveys, conduct noise surveys, examine equipment, observe work practices, and review records. (Tr. I, 20). He was not a certified foreman and had never conducted or assisted with an examination. (Tr. I, 114).

⁵ At hearing, Peterson was present and testified for Respondent. (Tr. II, 20). He had worked in the industry for 37 years, starting in 1974. (Tr. II, 20-21). He had acted as a roof bolter, run miners, run cars, and worked on longwalls. (Tr. II, 20-21). In his career, he acted as section boss, mine foreman, superintendent, fire boss, airway examiner, and safety representative. (Tr. II, 21). Peterson received 2 years of mine technology training from Community College. (Tr. II, 21). He was certified as a limited instructor by the government, taught classes at Elk Run, had annual retraining, and was certified as a foreman. (Tr. II, 21-22). Training would include instruction on areas where equipment was run, MMUs, ventilation, roof control plans, and first aid. (Tr. II, 23). He was involved in the UBB investigation, checking airways and working areas for the investigation team. (Tr. II, 24). In April 2013, Peterson was a safety representative and in would travel with the MSHA inspector, double check the work of examiners, and do paperwork. (Tr. II, 24-25, 28). When the inspector was not present, he would look for areas out of compliance. (Tr. II, 27-28). Peterson also worked with the anonymous complaint system, known as "Running Right". (Tr. II, 25). Both Peterson and Phillip Saunders testified at length regarding this anonymous safety reporting system. (Tr. II 25-27, 77-79).

⁶ Earlier, Dempsey inspected the secondary escapeway (track entry) and found no violations,

Dempsey began inspecting Roundbottom when he was in training. (Tr. I, 20). However, the April 2013 quarter was his first assignment there. (Tr. I, 114). When Dempsey arrived at the mine he informed the operator, reviewed the books and mine maps, considered possible hazards, and reviewed plans where he will travel that day.⁷ (Tr. I, 19, 21, 119). He would look at the roof, ribs, bolt spacing, entry widths, and the general condition. (Tr. I, 19). He also tried to coordinate with the safety representative to ensure they were able to get as much done as possible in the least amount of time. (Tr. I, 20-21, 119, 121). The mine had three active sections and two portals. (Tr. I, 115). Another inspector, Andy Sparks, was also inspecting the mine and had entered the mine that day from another portal. (Tr. I, 115-116).

Dempsey and Peterson entered the mine from the portal but did not make it to the working section.⁸ (Tr. I, 26, 29, 31). During an inspection, the inspector must travel each air course in its entirety and using a ride expedites the process.⁹ (Tr. I, 25). However, vehicles cannot fit in some overcasts, so in those areas the inspector must walk. (Tr. I, 25).

From the portal, they traveled in the entry toward a set of double doors. (Tr. I, 26, II, 30-31). No citations or hazards were observed on the way to the doors. (Tr. II, 36). These doors led to the primary escapeway. (Tr. I, 26, 122, II, 31). This was the first day Dempsey inspected the primary escapeway. (Tr. I, 116). The primary escapeway is the main exit from the mine for miners in the event of a disaster.¹⁰ (Tr. I, 30). In case of smoke or fire, the primary escapeway contained a lifeline with directional cones leading to the surface and SCSRs. (Tr. I, 30). This area should be clear of hazards as miners' lives depend on it. (Tr. I, 30).

despite looking for them. (Tr. I, 116-118, 121-122).

⁷ At hearing, Dempsey reviewed the mine map (GX-7), showing the airways traveled during the inspection. (Tr. I, 22). A map is produced each quarter by the operator. (Tr. I, 22). Dempsey took a copy of the map with him to keep track of areas inspected. (Tr. I, 22). He used a color-coded legend to show different kinds of entries and the details of the examination. (Tr. I, 22-23). On the map, the numbers mark where citations occurred. (Tr. I, 22-23). No. 1 was Citation 8144925, No. 2 was Citation No. 8154926, and No. 3 was Order No. 8154928. (Tr. I, 24, 42-43). The green line showed Dempsey's path that day in the escapeway. (Tr. I, 24, 27). The pink line was the return air course. (Tr. I, 27). The blue line was the mine track, which is usually the secondary escapeway. (Tr. I, 27-28). The yellow line was the secondary escapeway. (Tr. I, 28). The orange line was the beltlines. (Tr. I, 28).

⁸ There was a panel to the right of the portal called the McAllister Mains. (Tr. I, 29). A roof fall had occurred in this area indicating pressure. (Tr. I, 29).

⁹ The four-wheel vehicle is a golf cart with a metal frame and no top. (Tr. I, 26). The vehicle used on the day the instant citations were issued was nicknamed Ethel. (Tr. I, 26).

¹⁰ Earlier, Dempsey inspected the secondary escapeway (track entry) and found no violations, despite looking for them. (Tr. I, 116-118, 121-122).

The four instant violations were issued in this escapeway. (Tr. I, 24, 31). Citation No. 8154925 was issued between the No. 23 and No. 24 crosscuts.¹¹ (Tr. I, 33-34, 43). The first condition cited was an entry that was 23 1/2 feet wide for a distance of 8 feet. (Tr. I, 34, 124, 130-131, II, 31, 36-37, 60). According to the roof plan the entry should have been no more than twenty feet wide. (Tr. I, 35, 39). The area had been timbered with 6-inch posts on the right side facing outby, spaced 4 or 5 feet apart. (Tr. I, 34-36, 131, 156 II, 36). The 23 1/2-foot width was measured from the rib on the left to the timbers, meaning the area was wide even with the timbers. (Tr. I, 35, 37-38, 131, 135 II, 31). The timbers stretched the entire block but the wide area was in the center. (Tr. I, 37). There was 3 to 4 feet of open space between the timbers and the rib, meaning the original cut in 2008 was 27-28 feet wide. (Tr. I, 36, 124, 262, II, 7). Dempsey hoped the timbers were placed when the area was cut, but he was not sure. (Tr. I, 124-125). The block of coal where this wide area was located was probably sixty feet square. (Tr. I, 122-123).

Generally, roof control plans determine the width of entries.¹² (Tr. I, 204). According to that plan, Respondent was permitted to mine some belt entries and slopes 22 feet wide, but not this entry. (Tr. I, 125, 151-152, II, 113). Dempsey did not recall any mine where entries were wider than 25 feet. (Tr. I, 152). He never required an operator to add a shelter hole in a track entry or slope. (Tr. I, 152). Some safeguards allow such shelter to be 5 feet in excess of the track entry.¹³ (Tr. I, 153-154). Phillip Saunders testified that some mines have 3 1/2 foot wide, six foot deep shelter holes.¹⁴ (Tr. II, 112-113). He stated that small areas where the roof exceeds the plan are permitted. (Tr. II, 113).

¹¹ Dempsey reviewed Citation No. 8154925 (GX-1) and the notes he took that day (GX-5). (Tr. I, 31-32). His notes included the weekly examination record for the week of the citation, a record of a fire drill in the area April 15 and April 16, 2013, and a small map. (Tr. I, 32-33).

¹² Roof control plans are mine specific. (Tr. I, 153-154, 204). Before a roof control plan is made, an engineering study is used to determine ground cover, the seam, and the types of pressure applied. (Tr. I, 204). Weight is determined using a computer program. (Tr. I, 204). The weight is used to create a safety factor. (Tr. I, 204). For example, a safety pillar of 2.0 means the pillars are capable of supporting twice the weight that is being applied. (Tr. I, 205). In a situation like Roundbottom where there is multiple seam mining, another computer program is used to determine the different loads. (Tr. I, 205). Then, roughly every six months, the roof control department or an inspector will determine if the plan is adequate. (Tr. I, 204).

¹³ Safeguards are directives issued to a mine concerning transportation at that mine. (Tr. I, 203-204). A safeguard allowing wider entries had not been used since the 1990's. (Tr. I, 203).

¹⁴ At hearing Phillip Saunders appeared and testified for Respondent. (Tr. II, 71). Saunders worked at Alpha Natural Resources as a Vice President of Operational Improvements, a job he held from July 2012. (Tr. II, 71, 73). Saunders began working in the coal industry in 1994 for Massey Energy and worked several engineering jobs. (Tr. II, 71-73). Saunders had a professional engineering license in West Virginia, mine foreman's papers, and AMT card, mine rescue certification, MSHA trainer's card, and a PE license a black hat. (Tr. II, 71-73). He had worked as section foreman, mine foreman, examiner, superintendent, and then over to management for various projects at Massey. (Tr. II, 72-73). Saunders was at Roundbottom on

Peterson and Saunders testified that the timbers were placed in this area to narrow the wide entry so it would comply with the roof control plan. (Tr. II, 36, 70). They also noted that if an area is timbered, the examiner would assume it was the proper width. (Tr. II, 37, 113-114).

Dempsey believed the condition, several extra feet of width in the entry, would be obvious. (Tr. I, 137). This was because there were additional bolts and timbers in this area. (Tr. I, 38, 129, 137, II 60). There was not simply an additional row of bolts; instead each row of bolts in this particular area had an additional bolt. (Tr. I, 127-128). There should have been four bolts in each row, but there were five to six. (Tr. I, 38-39, 129). The extra bolts and timbers were installed during development, therefore the operator knew about the condition. (Tr. I, 127-128, 137, II, 70). However, even after the timber was added, the entry was still too wide and obvious. (Tr. I, 137-138).

Harding never noticed the condition before and did not think it was obvious. (Tr. I, 266, II, 19). He learned from the citation that there was an 8-foot area that was too wide. (Tr. I, 266). He knew timbers indicated a wide entry, but he did not set any additional timbers. (Tr. II, 12).

The hazards associated with the cited condition would include roof fall resulting in fatal accident. (Tr. I, 39). The cited standard is one of the "rules to live by" that is a root cause of fatal injuries. (Tr. I, 40). There was also danger of total collapse. (Tr. I, 39). However, the additional bolts and the timbers provided additional beam support for the entry. (Tr. I, 132).

Dempsey was not sure how long this condition had existed. (Tr. II, 47). He believed it had been some time because the timber had begun to decay. (Tr. I, 37, 47). Further, moss had grown on the timbers. (Tr. I, 37, 47). The timbers had not recently been placed. (Tr. I, 48). The area was developed in 2008 or 2009. (Tr. I, 36, 124, 139).

The second condition cited in this area was one bolt spaced 70 (rather than the required 60) inches from another bolt.¹⁵ (Tr. I, 34, 39-40, 126, 268). In a 60-foot entry, 26-27 feet wide;

April 18 to supervise an operational improvement team. (Tr. II, 74). They had been at the location for five weeks. (Tr. II, 75). The goal of the team was to improve compliance, safety, and productivity. (Tr. II, 75). During trips, Saunders liked to discuss violations, condition changes, things at the face, and training with mine management. (Tr. II, 75). The team observed activity at the face like loading of coal, cut depths, dust procedures, ventilation, processes for supplying equipment operators, bottom conditions, communications, and practices at the mine from start of the shift to the end. (Tr. II, 76-77). They ask for 15 to 20 minutes at the start of the shift to talk to the crews, give them updates on changes conditions, ensure they are going over the methane dust control plan, the roof control plans, and make sure everyone knows what the plans are. (Tr. II, 77). The crew provides hands-on training in the face area. (Tr. II, 77).

¹⁵ Harding testified that torque tension bolts were used in this area (and in most of the primary escapeway). (Tr. I, 265). The plan requires 4-foot resin bolts. (Tr. I, 265). The torque tension bolts were longer and provided more support than the required bolts. (Tr. I, 265-266). All of the bolts in this entry would have been installed on advance. (Tr. I, 266).

Dempsey would expect bolts every four feet, with no more than five feet between rows. (Tr. I, 126-127, 129). This condition could be fixed by setting a timber. (Tr. I, 266-267).

The condition was somewhat obvious. (Tr. I, 40). Dempsey noticed it because he was alerted by the wide entry and was measuring. (Tr. I, 40). Examiners were trained to look for this kind of condition, so it was obvious. (Tr. I, 40). Examiners and inspectors had missed this condition since the area was developed. (Tr. I, 140).

Only one set of bolts was found over-spaced. (Tr. I, 268). Harding testified that one over-spaced bolt would be difficult to see. (Tr. I, 267, II, 19). There were roughly 1,200 bolts between this area and the location of the final citation issued. (Tr. I, 267-268).

The hazards associated with the bolt spacing would include being crushed by a roof fall. (Tr. I, 41). A fatal roof fall injury occurred at Kingston Resources No. 1 when the bolt spacing was just inches off. (Tr. I, 41-42). Dempsey conceded that one bolt spaced 10 inches too wide did not, by itself, make an accident likely. (Tr. I, 134-135). However, it might lead to an injury based on geological conditions. (Tr. I, 135). Here, the top appeared solid without skin issues, straps, or pie pans at the time of the citation. (Tr. I, 135). The pillars were stable. (Tr. I, 135).

This condition had existed since the area was bolted, as bolts were set during the mining cycle. (Tr. I, 48). It had been years since mining occurred in this area. (Tr. I, 48). Other than this one area, there were no other problems with bolt spacing. (Tr. I, 133).

The final condition in this area was loose draw rock. (Tr. I, 34, 29-30, 128, II, 38, 60). Draw rock is generally slate that breaks loose from the roof. (Tr. I, 133, II, 40, 83). Most of the roof is solid sandstone. (Tr. II, 39). Different kinds of stone do not stick together well, so if there is a layer of shale "skin" a few inches deep below the sandstone, then draw rock develops. (Tr. I, 133, II, 38-9, 82-83). It is caused by temperature, barometric pressure, seasonal change in the mine, drying conditions, and the velocity of intake air. (Tr. I, 236, 261, II, 38, 40-41). Draw rock occurs all the time and can change daily or from entry to entry. (Tr. II, 40-41). This mine had draw rock everywhere. (Tr. I, 133). Areas under a stream or hollow, as the cited area was, can produce draw rock quickly. (Tr. I, 265, II, 83-85). When draw rock is found it must be scaled (pulled down) or dangled off and supported. (Tr. I, 236-237, II, 39).

The citation did not state whether one location or many needed scaling. (Tr. I, 128). It also did not say where this spot was in relation to the other conditions. (Tr. I, 128). Harding testified that this condition was not present during his examination. (Tr. II, 19).

The condition was obvious; there was draw rock on the bottom and some draw rock on the top that needed to be scaled. (Tr. I, 34, 39, 42). Dempsey and Peterson would not proceed past the condition. (Tr. I, 34). They stopped and scaled, measured, and evaluated. (Tr. I, 34). The number of bolts in the area indicated roof control problems. (Tr. I, 34). The mine had a history of draw rock issues in intakes and returns. (Tr. I, 42). However, other than this area, there was only minor sloughage during the inspection. (Tr. I, 130).

The hazard associated with draw rock is that it can fall and pull down the lifeline or break the lifeline, which can constitute a hazard when smoke is present. (Tr. II, 115). It can also be a tripping hazard, which would be important in an emergency escapeway. (Tr. I, 248-249, II, 115). Finally, the draw rock itself can be a striking hazard. (Tr. I, 42, II, 116).

With respect to all three conditions, miners would work or travel in the area. (Tr. I, 43). An examiner would travel this air course weekly. (Tr. I, 43). The last examination occurred a day before the citation. (Tr. I, 44). The area would also have to be available in case of an emergency. (Tr. I, 43-44). Further, quarterly evacuation drills were conducted at the mine for all three shifts. (Tr. I, 43, 242-243). The drills alternated escapeways, so miners would evacuate this area twice a year. (Tr. I, 43, 154, 242). A lifeline went directly through this area, though Dempsey could not recall where. (Tr. I, 44-46). He did not believe it ran under the draw rock. (Tr. I, 47). In Dempsey's experience, when miners evacuate they walk side by side. (Tr. I, 46). On April 15, 2013, 14 men, including a supervisor, participated in a fire drill here. (Tr. I, 45). On April 16, 2013, 12 men, including a supervisor, did so. (Tr. I, 44). Therefore examiners and drill participants were exposed to the cited conditions. (Tr. II, 45-46). However, the fact that the fire drill occurred two days before this citation was a coincidence. (Tr. I, 154). The citation would not have been issued in the same manner if the drill had not just occurred. (Tr. I, 154).

Harding testified that other than the weekly exam, no one would be in the cited area for two months or more. (Tr. I, 242-243). He did not believe miners normally worked or traveled in this area, it was not a "main track." (Tr. I, 243). He also testified that during fire drills he would hold onto the lifeline. (Tr. II, 15-16). However, in his deposition testimony (GX-10) he conceded that he did not hold onto lifelines during fire drills. (Tr. II, 17). Saunders testified that goal of a fire drill was to make a life-like simulation. (Tr. II, 109-111).

This condition was marked S&S because it violated a safety standard, the violation contributed to a hazard, and there was a reasonable likelihood that the hazard would cause injury. (Tr. I, 51-52). There was exposure to the condition from miners traveling in the area regularly. (Tr. I, 52). The injury would be significant, perhaps fatal crushing injuries. (Tr. I, 52).

Dempsey believed an injury would be reasonably likely, assuming continued mining operations. (Tr. I, 52). The entry was wide, there were widely spaced bolts, the pillar size was reduced and there was draw rock in the area that could result in a roof collapse. (Tr. I, 52, 151). Wide entries cause the beam to stretch over a wider area. (Tr. I, 151). However, Dempsey did not do any analysis to determine whether the pillars could hold the roof. (Tr. I, 151). A wide entry is automatically a hazard. (Tr. I, 151). The likelihood is not based on odds, instead it is based on the fact that it is known that fatal roof falls in the mining industry are caused by wide entries and therefore the "reasonably likely" finding was appropriate. (Tr. I, 155-156, 200-201). Also, coal is 80 pounds per cubic foot and rock is 120 pound per cubic foot, so it would not take a large roof fall to weigh hundreds of pounds. (Tr. I, 52-53).

The cited condition would affect 14 persons because the drill record showed that 14 miners were exposed to a total collapse of the entry during an escapeway drill. (Tr. I, 53, 155-156).

This citation was marked for high negligence; however Dempsey struggled with the negligence determination. (Tr. I, 53, 142, 145). At first, he believed Respondent displayed moderate negligence because there was an attempt made to correct the condition and because it was not overly obvious. (Tr. I, 53, 55, 143-144). Dempsey's notes show that, "some efforts were made by timbering but found that effort was improperly performed. (Tr. I, 144). This was based on the examination Jesse Harding conducted the day before.¹⁶ (Tr. I, 49, 54-55, 119-120, 259-260, II, 7-8). That record stated that the top was scaled, a wide bolt found, a rib to bolt was wide, timbers were set, areas dangered off, and the lifeline was repaired in several places. (Tr. I, 49, I, 232-233). Dempsey also noted that he did not deem the condition "high or reckless." (Tr. I, 144).

However, he then reconsidered his negligence determination and no longer believed there were mitigating circumstances. (Tr. I, 144-145, 56-57). Dempsey did not see any indication that the correction noted by Harding actually occurred. (Tr. I, 51, 53, 57, 148). The record did not indicate where scaling occurred, where the lifeline was worked on, where new timbers were set, the width of the entry, or if the wide bolts were corrected. (Tr. I, 50-51, 53). Also, Dempsey did not know where timbers were dangered off. (Tr. I, 50). There was an incomplete effort to repair, but only a full repair would be sufficient. (Tr. I, 57, 145, 148). The partial repair indicated that there was awareness of the cited condition. (Tr. I, 57). The use of timbers in other areas of the mine did not mitigate the lack of effort here. (Tr. I, 57, 149). At hearing, Harding could not recall which areas were scaled. (Tr. I, 264).

Dempsey also considered the mindset of an examiner and realized he should be looking for things that were not overly obvious. (Tr. I, 55-56, 142, 145). Harding was trained and should have been alert. (Tr. I, 55, 142). Further, management knew the condition existed as extra bolts and timbers were added. (Tr. I, 56). The condition had existed for some time (though Dempsey could not verify the time). (Tr. I, 142).

¹⁶ Jesse Glen Harding was present at the hearing and testified for Respondent. (Tr. I, 217). Harding started in the mining industry in 2007 and worked for Performance Coal and Logan's Fork on longwalls before Respondent. (Tr. I, 217). At Roundottom and worked on the move crew, production, shuttle car, in that capacity he examined gas levels, roof, ribs, trip hazards, roadways, and ventilation controls. (Tr. I, 218-219). He then worked as outby foreman and did so at the time of the citations. (Tr. I, 218, 220). In that position, he conducted pre-shift examinations, added mesh or support, set belt heads, checked belts, checked the track, check wide entries, checked bolt spacing, and checked the roof and ribs. (Tr. I, 219, 224, II, 6-7). Harding took care of any hazards outby to ensure safe work and travel. (Tr. I, 219, 224). If he identified a hazard he dangered it off and recorded it in the exam book. (Tr. II, 6-7). Harding had a West Virginia foreman, mining, gas, and dust cards and had conducted examinations since he was an apprentice. (Tr. I, 220-221, II, 6). He received annual refresher training, including an eight-hour class on plans, roof control, MMUs, violations, accidents, escapeway methods, and rescuers. (Tr. I, 221-222). He received foreman recertification every other year where law, plans, and violations were discussed. (Tr. I, 222-223). Further, Alpha had an examiners class that included instruction on the law and a mine simulator. (Tr. I, 223). He received step-by-step instruction on bolts, roof, ribs, trip hazards, and lifelines. (Tr. I, 223). The course also covered pre-shift, weekly, and supplemental examinations. (Tr. I, 223).

In addition, Dempsey felt Respondent's history of roof falls should have provided warning that roof control problems occurred at this mine. (Tr. I, 202-203). Respondent should have had heightened awareness to the dangers posed by the cited conditions. (Tr. I, 203). Respondent was lucky no roof falls had occurred here, it was a matter of time. (Tr. I, 203).

The fact that there was an inadequate examination did not effect the high negligence designation. (Tr. I, 154). However, Dempsey conceded that if the condition had existed since 2008 and this area was a primary escapeway since that time, then the high negligence finding would be undercut. (Tr. I, 142-143). Harding testified that this area had been the primary escapeway since 2008 because the location allowed miners to walk in fresh air. (Tr. I, 262, II, 11-12). Dempsey also conceded that a wide entry is not *per se* high negligence. (Tr. I, 149).

Dempsey also noted that Peterson did not offer any mitigating circumstances at issuance. (Tr. I, 57). To mitigate the condition without correcting it, Respondent could have hung danger tags, noted the condition in the exam book, or made marks for new timbers. (Tr. I, 150). The danger tags would inform miners that the condition existed. (Tr. I, 150). The tags could have been placed where the area was wide and where the bolts were misplaced. (Tr. I, 150).

The condition was abated when the draw rock was pulled down and the timbers were reset between the left rib and the right timber line. (Tr. I, 57-58). No timbers were moved, two or three were added where the entry and bolts were too wide. (Tr. I, 54, 156-157). The abatement occurred between the issuance and noon on April 23. (Tr. I, 58).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the Administrative Law Judge has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the Administrative Law Judge has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Administrative Law Judge's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 C.F.R. §75.202(a) Was Violated.

On April 18, 2013, Inspector Dempsey issued a 104(a) Citation, No. 8154925, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The Operator has failed to properly support the primary escapeway to the #1 working Section. Between #23 and #24 xcuts adjacent to #9 beltline the following conditions exist: 1) Entry is 23.5' wide for a distance of 8', 20 Bolt

pattern measures 70" between bolts in one spot at this location, 3) Loose draw rock is present that needs scaled.

Standard 75.202(a) was cited 73 times in the two years at mine 4609163 (73 to operator, 0 to contractor).

(GX-1).

The cited standard, 30 C.F.R. § 75.202(a) ("Protection from falls of roof, face and ribs"), provides the following:

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

30 C.F.R. § 75.202(a).

The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. (Tr. I, 34, 29-30, 39-40, 124, 126, 128, 130-131, 268, II, 36-38, 60). In its brief, Respondent acknowledges the existence of the violation. (*Respondent's Post-Hearing Brief* at 19). In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. The Violation Was Reasonably Likely to Result in a Fatal Injury And Was Significant And Substantial In Nature

Inspector Dempsey marked the gravity of the cited danger in Citation No. 8154925 as "Reasonably Likely" to result in "Fatal" injury to 14 persons. (GX-1). These determinations are supported by a preponderance of the evidence.

The Mine Act requires that "gravity of the violation" be considered in assessing a penalty. 30 U.S.C. §820. The Secretary has promulgated a three-factor inquiry to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

[T]he likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

30 C.F.R. § 100.3(e).

The event against which the instant standard, 30 C.F.R. § 75.202(a) is stated directly in the language of the rule. Specifically, the standard is designed to protect miners from the "hazards related to falls of the roof, face or ribs and coal or rock bursts." Those hazards include crushing injury from rock fall or roof collapse, disorientation during an emergency from the severing of a lifeline, or tripping injury from fallen rock. (Tr. I, 39-42, 248-249, II, 115-116).

Inspector Dempsey credibly testified that the cited conditions (the wide entry, the improperly spaced bolt, and the draw rock) made these hazards reasonably likely. Specifically, Dempsey testified that miners worked and traveled in this area regularly. (Tr. I, 43-44, 52). Those working in the area would include the examiner and also miners from the section using the escapeway during a fire drill or actual emergency. (Tr. I, 43, 242-243). In fact, Dempsey testified that these conditions occurred near the lifeline, the area where miners would be most likely to move. (Tr. I, 44-46). Therefore, the undersigned finds that miners were reasonably likely to be exposed to the cited condition.

Dempsey also credibly testified that this exposure would be reasonably likely to result in injuries to no fewer than 14 miners. He testified that the cited condition could have caused rock falls or roof collapse to harm miners during a fire drill or actual emergency. (Tr. I, 53, 155-156). Dempsey testified that that fatal roof falls in the mining industry are known to be caused by wide entries and therefore the “reasonably likely” finding was appropriate. (Tr. I, 155-156, 200-201). Also, he noted that coal is 80 pounds per cubic foot and rock is 120 pound per cubic foot, so even a small roof fall could weigh hundreds of pounds, increasing the chances of a fatality. (Tr. I, 52-53). With respect to the person affected, the evidence shows that as many as 14 miners participated in fire drills or would actually be working on the section in the event of an emergency. (Tr. I, 45, 53, 155-156). Dempsey credibly testified that in the event of a roof fall or collapse, all of these miners would be affected. (Tr. I, 53, 155-156). Therefore, the Administrative Law Judge finds that the preponderance of the evidence supports the Secretary’s gravity designations.

Respondent argued that this citation (as well as Citation No. 8154927 and Order No. 8154928) should not have been marked as affecting 14 persons. This argument is not supported by the evidence.

Respondent argued that the cited entry was an escapeway, rather than a regular travelway for the section crew, and that only one miner (the examiner) would regularly be in this area. (*Respondent’s Post-Hearing Brief* at 31). The uncontested testimony supports a finding that up to 14 miners would be in this area no fewer than twice a year, during fire drills. (Tr. I, 43, 45, 154, 242). More importantly, this area would always be available to miners in the event of an emergency. The area must be available for use every day because at any given time an event might occur that would require its use.

The Administrative Law Judge finds this situation to be analogous to the situation in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (2011). In that case, the Commission held that with respect to emergency standards, when a violation is issued, “presumably no emergency exists at the moment...if an emergency does occur, it is imperative that the requirements of the evacuation standard be met at that time.” *Id.* at 2367. While it is true (as Respondent notes) that the cited standard was not an “emergency standard,” those standards are meaningless if the escapeway entry is not safe. Miners cannot use a lifeline or breathe through an SCSR if those items (or the miners) are trapped under a collapsed roof. Furthermore, this entry would not have been set aside or inspected if not for the fact that it was to be used in an emergency.

Respondent also argued that, even if this violation is considered in light of the emergency standards, that all 14 miners would not be affected because a roof fall would not harm everyone. (*Respondent's Post-Hearing Brief* at 32-33). It argued that the testimony of the inspector to the contrary was "pure speculation." (*Id.*). The undersigned found the Inspector's testimony to be credible. In the event of a massive roof fall or entry collapse, all of the miners would be affected and injured by the fall. Further, if the fall occurred during an emergency miners could be trapped in treacherous conditions without the ability to escape. Therefore, the cited condition affected 14 miners.

Respondent also offered several arguments asserting that an injury was unlikely. However, as Respondent discussed those arguments in relation to the S&S designation, they will be discussed *infra*.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

In 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).

With respect to the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. § 75.202(a).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – Inspector Dempsey credibly testified that the violation contributed to the safety hazard of a miner be crushed or struck in a roof fall or collapse. (Tr. I, 51-52). The inspector testified that each of the individual conditions at issue here would contribute to some hazard.

Specifically, the wide entry increased the chances of roof fall and added to the danger of a total collapse. (Tr. I, 39-40, 52, 151). The condition contributed to this danger because wide entries cause the support "beam" of the roof to stretch over a wider area, creating additional stress. (Tr. I, 151). Therefore, a wide entry is automatically a hazard. (Tr. I, 151). *See United Mine Workers of America v. Dole*, 870 F.2d 62, 559 (D.C. Cir. 1989)(Holding that roof falls pose one of the most serious hazards in the mining industry); *see also Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984), *Eastover Mining Co.*, 4 FMSHRC 1207, 1211 n. 8 (Jul. 1982), and *Halfway Incorporated*, 8 FMSHRC 8, 13 (Jan. 1986) (noting the inherently dangerous nature of

mine roofs). Dempsey also noted that this condition was one of the “rules to live by” that has been found by MSHA to be the root cause of fatal injuries. (Tr. I, 40). The wide bolt also contributed to crushing injury from roof fall. (Tr. I, 41). Dempsey noted a fatal roof fall injury occurred at Kingston Resources No. 1 when a bolt was spaced just inches off the approved roof plan. (Tr. I, 41-42). Finally, the draw rock contributed to the hazard of tripping or severing the lifeline, which could cause fatal injury in an emergency. (Tr. I, 248-249, II, 115). The draw rock was also evidence that rock was falling from the top, creating a striking hazard. (Tr. I, 42, II, 116). In addition to these individual hazards, the cumulative effect of the conditions heightened the contribution. (Tr. 52, 151). In light of these facts, the Administrative Law Judge finds that the cited condition contributed to a discrete safety hazard.

Respondent argued that this condition did not contribute to a safety hazard. However, this argument was not compelling. Specifically, Respondent asserted that the cited conditions did not contribute to a hazard because, despite their existence for seven years, the entry showed no signs of instability. (*Respondent's Post-Hearing Brief* at 21). Respondent noted the fact that the area was lined with properly spaced roof support timbers and roof bolts to ensure stability. (*Id.*). Further, it noted that the cited conditions were in the center of the entry, rather than at the intersection, where stress is the greatest. (*Id.* at 21-22). It argued that these supplemental measures withstood roof stresses for numerous years without incident and therefore did not contribute to a hazard. (*Id.*)

The fact that a roof fall had not occurred in this area does not mean that the condition did not contribute to the hazard of a roof fall. *See, e.g. Rushton Mining Company*, 9 FMSHRC 800, 810 (Apr. 1987)(ALJ Broderick) (“The fact that an injury did not occur here is hardly evidence that the violative practice did not contribute to a hazard likely to result in injury.”) As discussed *supra*, Inspector Dempsey credibly testified as to the ways that the cited conditions made a roof fall more likely. While these conditions did not guarantee that a roof fall would happen, they contributed to the possibility of that hazard. Further, the Administrative Law Judge is not as sanguine about the conditions in the cited area as Respondent. In addition to the wide entry and wide bolt, draw rock was found uncontrolled in this area. (Tr. 34, 29-30, 128, II, 38, 60). Perhaps more importantly, several months after the citation was issued, a rock fall occurred in this same entry. Further, as discussed with respect to the number of persons affected, this entry would be used in the event of an emergency. It is reasonable to believe in such a situation that usual or extreme pressure would be placed on this area, exacerbating the hazard. The Administrative Law Judge finds this to be persuasive evidence that the cited entry was less stable than indicated by Respondent.

Furthermore, the existence of the roof control plan attests to the fact that the cited conditions contributed to a hazard. Inspector Dempsey credibly testified regarding the procedure by which operators, and MSHA, determine the maximum width of entries and the spacing of bolts. (Tr. I, 153-154, 204-205). There is no question that the operator exceeded these limits. (Tr. 34, 124, 130-131, II, 31, 26-37, 60, JX-1). Presumably, if it were safe for entries in Roundbottom to be 23 ½ feet wide or for bolts to be spaced 70-inches apart, the plan created by the Respondent and approved by MSHA would reflect those distances. That the plan dictates entries of 20 feet and bolts spaced at 60-inches indicates that the cited conditions are inherently

unsafe and would contribute to the hazard of a roof collapse or fall. Therefore, the second prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury.

The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”) (affirming an S&S violation for using an inaccurate mine map). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, it clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

If the hazard contributed here were realized, specifically if a roof fall or total roof collapse were to occur, an injury would be reasonably likely. If the roof fell, miners could be struck by extremely heavy falling material and could even be crushed. (Tr. I, 39-42, 248-249, II, 115-116). As miners worked or traveled in this area (both examiners and miners evacuating in a drill or emergency) there was exposure to the hazard. (Tr. I, 43-44, 52, 155-156). There is no question that miners being struck or crushed by rock would be injured.

Respondent also argued that the hazard contributed to created no likelihood of an injury. However, this argument was not compelling. Specifically, Respondent asserted that the cited conditions created no likelihood of injury because the condition had existed for a long time and was stable. (*Respondent's Post-Hearing Brief* at 21). It noted that under continued normal mining operations that the ribs and roof were competent and that there was no evidence or stress or that the hazard would contribute to an event that would lead to an injury. (*Id.* at 22).

As noted *supra*, the Administrative Law Judge found that the cited condition would contribute to a roof fall. As further noted, there is no question that a roof fall would be reasonably likely to result in an injury. The issue at this stage of the inquiry is whether the hazard contributed to by the violation, in this case a roof fall, would result in injury. The third element presupposes that the roof fall is realized and asks whether an injury would be expected to result. See *PBS Coals* at 1280-81 see also *United Taconite, LLC*, 2014 WL 1010076, *12 (Feb. 2014)(ALJ Lewis)(explaining that the third element of *Mathies* presupposes the hazard is realized). Respondent’s argument does not aid the Administrative Law Judge in determining whether a roof fall or collapse would, or would not, result in an injury.

Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.”

Mathies Coal Co., 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). It cannot be credibly argued that an injury caused by a roof fall or mine collapse would be anything other than serious. In fact, a fatal injury is the most likely result.

As a result of these factors, the undersigned finds that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Did Not Display "High" Negligence.

In the citation at issue, Inspector Dempsey found that the operator's conduct was highly negligent in character. (GX-1).

Standard 30 C.F.R. § 100.3(d) provides the following:

(d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. § 103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is served for situations where there are "considerable" mitigating circumstances.

The Administrative Law Judge finds that while Respondent should have known about the violation, there were mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. See *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) see also 30 U.S.C. § 802(e) (an agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine.").

With respect to the instant violation, the evidence shows that Respondent had some knowledge of at least one of the cited conditions, the wide entry. Specifically, evidence shows

Respondent was aware of the fact that the entry was wide at development, because it had put in timbers and extra bolts. (Tr. I, 36, 124-125, 262, II, 7). For some reason, in placing the timbers Respondent only narrowed the entry to about 23 feet, rather than the required 20 feet. (Tr. 36, 124, 262, II, 7). However, that does not change the fact that Respondent, at one time, knew the condition existed. Perhaps more importantly, Respondent should have known the condition was present. The wide entry and the widely spaced bolt had existed for around 7 years. This area was inspected weekly by Respondent's agent and had been inspected by Harding just the day before the instant citation. (Tr. I, 43-44, 49). Harding and the other, previous examiners were tasked with finding just the types of conditions found here. (Tr. I, 55-56, 142, 145). Therefore, Respondent should have known about the cited condition.

While the Administrative Law Judge affirms the inspector's finding that Respondent was negligent, the evidence does not support a finding that this negligence was high; there were mitigating circumstances.

Inspector Dempsey noted that one of the reasons he found the cited conditions to be the result of high negligence was that the cited conditions were obvious. However, he also noted that he struggled with this determination and that he initially did not believe the condition was obvious. (Tr. I, 53, 55, 143-144). The Administrative Law Judge finds that the Inspector's initial determination was better supported by the evidence. The cited condition occurred in a relatively small area, an eight-foot area in the center of an entry. (Tr. I, 34, 124, 130-131, II, 31, 26-37, 60). Further, the earlier, incomplete attempts to correct the condition (setting timbers, adding additional bolts) probably masked the fact the condition persisted. (Tr. I, 144, II, 37, 113-114). Perhaps most importantly, this area had been the primary escapeway since it was developed in 2008. (Tr. I, 262, II, 11-12). That means that the condition was inspected weekly by examiners and quarterly by MSHA inspectors. No examiner had ever noticed these conditions and no inspector had ever cited it. *See Virginia Drilling Company, LLC*, 2013 WL 1856608 (Mar. 2013) (holding that the fact that Respondent had not been cited in the past could be a mitigating circumstance). Even inspector Dempsey stated that if the area had always been the primary escapeway, his determination regarding the obviousness of the condition and Respondent's negligence would be undermined. (Tr. I, 142-143). As a result, the evidence supports a finding that the condition was less than obvious.

Furthermore, evidence suggests that Respondent made some efforts to correct the cited condition. Respondent had installed additional bolts and had installed a row of timbers in the area to provide support and narrow the entry. (Tr. I, 144, II, 37, 113-114). While these repairs were incomplete, they showed that Respondent had made some effort to control the condition. An operator's reasonable attempts, even if not totally adequate, to correct or prevent a violative condition constitute a mitigating factor with respect to negligence. *Hidden Splendor*, 2012 WL 7659707 (Dec. 2013)(ALJ Manning).

In light of these mitigating circumstances, Respondent's actions are best characterized as showing "Moderate" rather than "High" negligence.

The Secretary argued that there were no mitigating circumstances in this case. However, this argument was not compelling. The Secretary noted improper efforts to correct a condition

did not constitute a mitigating circumstance. (*Secretary's Post-Hearing Brief* at 28 citing *Peabody Coal*, 14 FMSHRC 1258, 1261-64 (Aug. 1992) and *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997)).

As noted supra, the Administrative Law Judge found that Respondent efforts to correct the cited condition mitigated Respondent's negligence. Respondent had seen that it developed the condition too wide and made some effort to eliminate the hazard. However, even if this were not a mitigating circumstance, the evidence would still support a finding of moderate negligence. The Secretary's own witness, Inspector Dempsey, testified that if this area was a primary escapeway since 2008 that the condition was not obvious and the high negligence designation was undermined. As it was shown at hearing that the area had been an escapeway, all of the witnesses at hearing agreed that there was at least one mitigating circumstance. A high negligence designation is inappropriate where there are any mitigating circumstances. Therefore, a finding of moderate negligence is warranted.

4. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of \$63,000.00 for Citation No. 8154925. A recent Commission decision, *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) reaffirmed that neither the ALJ nor the Commission is bound by the Secretary's proposed penalties. (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). However, the Commission in *Performance Coal* also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). The ALJ finds that a substantial deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – The evidence shows that Respondent had an extensive history of §75.202(a) violations.¹⁷ (GX-1)(GX-9).

¹⁷ Following the conclusion of the hearing, Respondent filed a "Motion to Supplement the Record" to include evidence regarding the mine's history. Specifically, Respondent wished to include evidence regarding Alpha Natural Resources purchase of the Elk Run Coal Company on July 1, 2011. (*Respondent's Post-Hearing Brief* at 34). Respondent argued that it had changed ownership on July 1, 2011 and that considering evidence regarding history before that point punished Alpha Natural Resources for the wrongs committed by the previous owner, Massey Energy. The Secretary opposed this motion because this information was not submitted before the hearing concluded. (*Secretary's Opposition* at 1-4). In the interest of fully addressing all of the issues at play in this case, the Administrative Law Judge considered Respondent's proffer of evidence.

However, that evidence did not change the ultimate determination of the operator's history. Most importantly, the operator in this case, Elk Run Coal Company, has been in operation at this location since 2006. (*Secretary's Opposition* at 5). While the controller has changed, the operator has remained the same. The relevant history is the Operator's, not the controller's.

(2) The appropriateness of the penalty compared to the size of the Operator's business – The parties have stipulated that Respondent is a large operator and Powellton is a large mine. (JX-1).

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than the high negligence cited by the Secretary.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in fatal injuries to 14 persons.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The parties stipulated that the condition was abated rapidly and in good faith. (JX-1)

In light of the Administrative Law Judge's decision to modify the negligence from "High" to "Moderate" and to eliminate the unwarrantable failure designation, a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$45,000.00 with respect to this violation.

Citation No. 8154926

I. ISSUE

With respect to Citation No. 8154926, the issues to be determined are whether Respondent's alleged violation of the Act on April 18, 2013 was the result of high negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

The next Citation, No. 8154926 (GX-2), was issued 15 feet in by the No. 18 crosscut in the primary escapeway, around six crosscuts from the previous citation. (Tr. I, 58-59, 64-65, 70). There, Dempsey saw a piece of draw rock measuring 7.5 feet long, 2 feet wide, and 4 inches thick had gapped down over the lifeline. (Tr. I, 59, II, 41-42, 61). Peterson believed it

Therefore, Elk Run's history is open to scrutiny; even if it had been controlled by Massey for some of that time and even if some management changes were made along with the change in controller. Further, the amount of time between the purchase of Elk Run and the instant citations was 22 months and 18 days. Therefore, the vast majority of Elk Run's history dealt with the period during which it was controlled by Alpha Natural Resources (specifically, the period in contention here is roughly six week). Finally, the Administrative Law Judge is not bound by the Secretary's proposed penalty; the assessed penalty is based on the totality of the factors at issue, of which history is only a small part.

was two to four inches thick. (Tr. II, 41). The dimensions cited were taken after it was pulled down, so it may have been longer or shorter. (Tr. II, 42).

The only thing preventing the rock from falling was a 1-inch thick, 6-inch wide fly board that was oriented across the entry and sagging under the weight of the rock. (Tr. I, 59-61, II, 42, 61). About $\frac{3}{4}$ of the rock was lying on the fly board. (Tr. II, 43). The 7 $\frac{1}{2}$ foot portion of the draw rock ran the same direction as the fly board. (Tr. I, 159). The draw rock extended over both sides of the board for a total of 18 inches to 2 feet. (Tr. I, 61-63, 159, II, 61).

Dempsey did not believe the board was supporting the draw rock because it was not intended to hold up heavy items or support rock; it was used to hang ventilation curtains. (Tr. I, 60, 63, 158-160). However, at that time it was keeping the rock from falling. (Tr. I, 159, 162). Peterson believed that the board was supporting the rock. (Tr. II, 43). He had to break the board to get the rock to fall. (Tr. II, 42). Harding testified that if he had encountered the condition during his examination he would have tried to pull it with a slate bar or dangled it off. (Tr. I, 260). He also would have moved the lifeline. (Tr. I, 260).

The fly board was bolted to the roof. (Tr. I, 63). Dempsey did not recall any part of the draw rock being bolted. (Tr. I, 161). Peterson testified that one bolt was through the draw rock attaching it to the top. (Tr. II, 41-43, 61). The bolt had a little bit of the rock. (Tr. II, 43).

Dempsey did not issue any other citations regarding the top or bolting. (Tr. I, 161-162).

Dempsey felt the cited condition was obvious and that a casual observer would see it. (Tr. I, 60, 259-260). Harding was not sure where the fly board was located. (Tr. I, 260).

The hazard associated with the cited condition was crushing injury from rock fall if the board broke or the rock tilted. (Tr. I, 60). Dempsey believed that despite the board, these hazards could have happened at any time. (Tr. I, 63). Rock is 120 pounds per cubic inch. (Tr. I, 63-64). Here the draw rock was 5 cubic feet or roughly 600 pounds. (Tr. I, 64).

Dempsey believed that it would take some time for the draw rock to separate from the roof and lay down gently on the board in a way that prevented a fall. (Tr. I, 66-68). Dempsey estimated the cited condition had existed before the last exam based on the way the rock was laid on the board, visual observation, and experience. (Tr. I, 66, 69, 162). If it had occurred all at once during the last shift it would have fallen to the side. (Tr. I, 68). Dempsey believed it had occurred more than 2 weeks earlier and would have been present during the escapeway drill. (Tr. I, 166-167). Harding testified that he did not see the rock during his examination. (Tr. I, 259). It could have developed from one day to the next. (Tr. I, 260-261). Peterson saw dust on the rock and concluded the rock was on the fly board for awhile. (Tr. I, II, 43-44).

Miners were exposed because the drills and examinations passed through this area. (Tr. I, 65-66). Also, Dempsey believed the lifeline passed directly under the draw rock. (Tr. I, 66). Peterson believed the rock was to the side of the lifeline. (Tr. I, 41).

The cited condition was S&S because there was a violation of a mandatory safety standard, there was a hazard contributed to by this violation (a draw rock falling on an individual), and a reasonable likelihood of significant injury. (Tr. I, 68).

The cited condition was reasonably likely to cause crushing injuries, which can be fatal. (Tr. I, 68-69). Eventually, the sagging rock would gap onto the board, cause the board to sag, and then break through or roll to the side. (Tr. I, 160-161). The rock had not yet reached the floor, but this did not make a fall unlikely. (Tr. I, 205-206). Only one person would have been injured if this particular rock fell, even if 14 miners were walking through the area. (Tr. I, 69).

The citation was marked as “high” negligence because the area was examined by an agent of Respondent and the examiner should have a heightened awareness as a result of the roof falls in the intake entries and this area. (Tr. I, 69, 162, 164-165). Further the condition was obvious, extensive, and existed at the last examination. (Tr. I, 69, 166). Dempsey believed Harding should have sounded the roof and observed the gap. (Tr. I, 163). While he recognized that an examiner may miss a hazard without automatically being highly negligent, there is no “human error” allowance for one citation. (Tr. I, 165-166). There were no mitigating circumstances and Peterson did not mention any. (Tr. I, 69-70).

Abatement took ten minutes and involved Peterson pulling down the rock (Tr. I, 71).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That § 75.202(a) Was Violated.

On April 18, 2013, Inspector Dempsey issued a 104(a) Citation, No. 8154926, to Respondent. Section 8 of that Citation, Condition or Practice, reads as follows:

The mine operator has failed to protect miners from loose draw rock in the primary escapeway for the #1 working section. 15' in by the #18 xcut adjacent to #9 beltline a section of draw rock measuring 7.5' long and 2' wide and 4" in thickness is gapped down immediately over the primary escapeway lifeline. The only thing holding up this draw rock is 1" fly board which is sagging under the weight of the rock.

Standard 75.202(a) was cited 74 times in the two years at mine 4609163 (74 to operator, 0 to contractor).

(GX-2).

The cited standard was, again, 30 C.F.R. § 75.202(a).

The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. (Tr. I, 59, II, 41-42, 61). In its brief, Respondent did not contest the

validity of the violation. (*Respondent's Post-Hearing Brief* at 22-23). In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. The Violation Was Reasonably Likely to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature

The Secretary presented credible evidence to support a finding that the cited condition was reasonably likely to result in fatal injury to a miner. (Tr. I, 68-69). Further, the Secretary supported the contention that the violation was S&S. (Tr. I, 68).

In its brief, Respondent did not argue against the inspector's gravity and S&S designations in Citation No. 8154926. The Administrative Law Judge finds that Respondent conceded that it violated the standard. In light of this fact, and the evidence presented, the Administrative Law Judge finds that the preponderance of the evidence supports the Secretary's gravity and S&S designations.

3. Respondent's Conduct Did Not Display "High" Negligence

Respondent knew or should have known about the cited condition. There is no question that a piece of draw rock measuring 7.5 feet by 2 feet, by 2-4 inches was hanging directly over the lifeline. (Tr. I, 59, II, 41-42, 61). Further, there is no question that at the time of the inspection, the condition was obvious. (Tr. I, 60, 259-60). Inspector Dempsey credibly testified that the cited condition was only supported by a fly board. (Tr. I, 59-61, II, 42, 61). He also credibly testified that the condition would have developed over time, perhaps over the course of two weeks. (Tr. I, 66-68, 166-167). Respondent's agents, namely the airway examiners, were in this area as the condition developed. (Tr. I, 65-66). As a result, Respondent should have been aware that the condition was present and should have corrected it. Therefore, Respondent was negligent.

While the Administrative Law Judge affirms the inspector's finding that Respondent was negligent, the evidence does not support a finding that this negligence was high; there were mitigating circumstances. Specifically, Harding credibly testified that the condition was not obvious the day before during the airway examination. (Tr. I, 259). An Administrative Law Judge has a duty, if possible, to resolve conflicts in the testimony without determining that a witness committed perjury. *See The American Coal Company*, 2013 WL 6529525, FN 29 (Sept. 2013)(ALJ Lewis). The most likely explanation is that the condition existed for roughly two weeks, the draw rock slowly separating from the roof and then settling onto the fly board. However, the condition did not become obvious until April 18, when the slab of rock gapped fully away from the top and settled where it was discovered by the Inspector. This explanation would conform both Dempsey's and Harding's observations. It would also accord with Harding's testimony that he did not see the condition on April 17 and would also follow Dempsey's testimony that the condition occurred gradually.

Therefore, the Administrative Law Judge finds that the condition, while present, was not obvious during the April 17, 2013 examination. Therefore, a finding of high negligence is not appropriate. A finding of moderate negligence is best supported by the evidence.

4. Penalty

The ALJ finds that a substantial deviation from the Secretary's proposed assessment of \$21,422.00 is warranted herein and will evaluate the factors contained in 30 U.S.C. § 820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – As discussed previously, Respondent had a long history of these types of conditions.

(2) The appropriateness of the penalty compared to the size of the Operator's business – As discussed previously, Respondent is a large operator and Roundbottom is a large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than the high negligence cited by the Secretary.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in fatal injuries to one person.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The parties stipulated that the condition was abated rapidly and in good faith. (JX-1).

In light of the Administrative Law Judge's decision to modify the negligence from "High" to "Moderate" and to eliminate the unwarrantable failure designation, a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$15,000.00 with respect to this violation.

Order No. 8154928

I. ISSUE

With respect to Order No. 8154928, the issues to be determined are whether Respondent's alleged violation of the Act on April 18, 2013 was significant and substantial ("S&S"), whether it was reasonably likely to result in fatal injury to 14 miners, whether it was the result of high negligence and an unwarrantable failure, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

Dempsey reviewed Order No. 8154928 (GX-4). (Tr. I, 71). The cited condition was outby the overcast near the No. 8 head in the escapeway.¹⁸ (Tr. I, 72). This condition was found ten crosscuts from the condition observed in Citation No. 8154926. (Tr. I, 93).

Before the Order was issued, Respondent had identified draw rock issues in this area. (Tr. I, 167-168). The order was issued because the operator failed to protect miners in the escapeway from draw rock. (Tr. I, 71-72). Specifically, wire mesh designed to control the draw rock was bowed, sagging, and separated under the weight of a large amount of rock and was failing to protect miners. (Tr. I, 72, 74-75, 80-81, 92, II, 45, 61).

Mesh is commonly used in mines to control draw rock and bolt it to the roof. (Tr. I, 80, 246). The mesh was inadequate because it was not pressing against the roof, the parts of the mesh did not overlap, and the installation used substitute material, like tie wires. (Tr. I, 174, 178). Together, these conditions create a greater hazard. (Tr. I, 174-175). This particular mesh installation would not hold much more rock and it was already failing. (Tr. I, 184). The mesh was separating because it was loaded with rock. (Tr. I, 185, II, 45, 54). There was lots of draw rock of various sizes, some of which had fallen to the bottom. (Tr. I, 73, 80, 177, II, 45). As more rock collected, more wires would break and the structure would fail. (Tr. I, 185). It could have failed at any time. (Tr. I, 176-178). Peterson's first thought upon seeing the mesh was that some corrective action needed to be taken. (Tr. II, 61-62).

Respondent's witnesses believed the draw rock was controlled by the mesh and that miners passing under the mesh would be protected. (Tr. II, 46, 50, 62, 100-101). Saunders testified that it was time to change the mesh because the material had recently fallen, but the mesh was still protecting miners. (Tr. II, 106-107). They conceded the center of the entry was impassable. (Tr. II, 46).

If an operator has trouble with draw rock, wire mesh installation is a good method of control. (Tr. I, 102, 168). Mesh is put up to control localized draw rock, not to support main top. (Tr. II, 95). There are several ways to properly install mesh. (Tr. I, 82, 206-207). Operators have set up beams, installed false roofs with roof cribs, sealed the roof, and rebolted roofs. (Tr. I, 102, 206). Every manufacturer of mesh will provide the product with an installation manual. (Tr. I, 183-184). However, if a different method of installation provided the same level of protection as the manufacturer's method, it is proper. (Tr. I, 184). Most of the time, mesh is installed by the roof bolter during the cycle. (Tr. I, 82, II, 14-15, 47, 96). If it is installed off the cycle, a machine can be brought in and the mesh can be hung with push plates.¹⁹ (Tr. I, 82-83, II, 47, 95). The mesh should have an overlap of one square of mesh, or four inches.

¹⁸ An overcast is an area where one air current is allowed to pass over another. (Tr. I, 72). They are constructed of cinderblock and have a roof. (Tr. I, 72). There are usually some beams across it and some tin. (Tr. I, 72). The top is lower here. (Tr. I, 72).

¹⁹ Off cycle means that an area has been mined and the machinery has been moved to another place. (Tr. I, 83). It does not make sense to move the mining equipment back to install the mesh, so another machine is brought in to perform the work. (Tr. I, 83).

(Tr. I, 83, 77, 184). Peterson testified that if the push plates could not be installed, the mesh was to be overlapped and tied together. (Tr. II, 47).

Dempsey would not say that he would prefer that this area be scaled rather than meshed; that was not his role as inspector. (Tr. I, 175, 182). As long as the hazard is removed any method was fine. (Tr. I, 175-176).

Dempsey did not believe the mesh in the cited location was properly installed. (Tr. I, 91, 93, 99). However, he conceded that in some areas of the mine, mesh was installed properly. (Tr. I, 102). On the other hand, Peterson testified he was not sure if the mesh was properly installed, while his deposition testimony stated that it was improper. (Tr. II, 66-67).

An open seam in between mesh panels was held together with a clevis. (Tr. I, 74, II, 67, 102). Dempsey testified that clevises were not appropriate for connecting panels because it allows the mesh to sag and add additional draw rock and weight. (Tr. I, 89-90). Further, the edges of this seam did not overlap, there was a gap. (Tr. I, 75-76, 79, 83). Lack of overlap is improper installation because it does not support the draw rock. (Tr. I, 83-84, II, 15). There was some overlap in other areas, but not at the seam. (Tr. I, 77). There was no push plate near the seam. (Tr. I, 76). Saunders testified a clevis was used because a plate could not be used. (Tr. II, 102).

Clevises are generally used for light duty lifting work and are not rated for the load placed on it here. (Tr. I, 85, II, 103). Dempsey did not know how much weight these clevises could hold but they were small compared to the screen. (Tr. I, 169). They are used to lift something very small from an anchoring point. (Tr. I, 85).

Clevises were not included by the mesh manufacturer for installation. (Tr. I, 85). Saunders had been to seminars about the correct way to use mesh to control draw rock and read material on proper installation. (Tr. II, 116). However, he testified that mines do not necessarily follow the manufacturer guidelines. (Tr. II, 107). The cited location would be difficult to reach with a roof bolter, so the clevis would be easier. (Tr. II, 107-108). He stated that while using clevises was not the best installation method but it serviced the purpose. (Tr. II, 106). However, he conceded that the use of clevises was not recommended by the manufacturer. (Tr. II, 117).

With respect to loads, there are barrel-type and screw-type clevises and they range in strength from 3/4 of a ton to 4 or 5 tons. (Tr. II, 103). A document provided by Respondent showed that a 3/4-inch clevis could hold a vertical load of 4 3/4 tons. (Tr. I, 179). However, the cited clevises were less than 3/4-inch so the load limits are irrelevant. (Tr. I, 179, 207). Dempsey believed that it was a 1/4 inch or 3/16 inch clevis as measured from the diameter of the pin. (Tr. I, 170-171). Harding had not measured the clevises, but had looked at them before and saw the stamp for their size, though not at this time. (Tr. II, 13-14). Peterson did not measure the clevises but he had used them before and they were 1/4-inch. (Tr. II, 67-68).

Regardless of the size, a clevis can lift the greatest load when vertical. (Tr. I, 86). Changing the angle of the hoist requires a load reduction. (Tr. I, 86, 103-104). The clevis here was on its side, meaning that the load would have to be reduced from the manufacturer's direct

during his examination. (Tr. II, 13)(GX-6, p. 4). Peterson testified that this installation was used because the roof bolt's thread had broken and therefore would not accept a plate. (Tr. II, 53-54).

Tie wire is generally used to hold roof bolts in place and hold other materials together, like gluts or wedges. (Tr. I, 84, II, 65). Tie wire was not supplied by the mesh manufacturer for installation. (Tr. I, 84, II, 65). Manufacturers provide information about proper installation because they have liability. (Tr. I, 84-85). The tie wire here was old, a little rusty, and broken apart. (Tr. I, 84). The mesh itself had some rust on the surface. (Tr. I, 91). Peterson testified that the purpose of tie wire is to support areas where mesh overlaps and no push plate can be installed. (Tr. II, 52-53). The ties keep the edges from rolling back where they could hit someone in the face. (Tr. II, 53).

If the clevises and tie wires were used as they were here, but the seams had not burst, there would still be a violation. (Tr. I, 98-99). The installation ensured that the roof would fail. (Tr. I, 99). This was like having an unsupported roof; the rock was uncontrolled. (Tr. I, 99). Saunders conceded that this was not proper installation and that clevises and tie wires were not supposed to be used. (Tr. II, 117).

Rather than clevises or tie wires, push plates should have been placed where they would support the screen and hold it against the roof. (Tr. I, 183). These kinds of plates are installed over the bolts that had extended threads. (Tr. I, 183). In fact, some bearing plates were present in the cited area. (Tr. I, 77, 82, 172). Peterson and Saunders testified that there were seven or eight push plates in the cited mesh. (Tr. II, 48, 90, 96). Neither Dempsey nor Harding was sure of the number. (Tr. I, 169, 189, 258). However, there were no push plates in the center of the entry. (Tr. I, 171-172, II, 49). Respondent's witnesses testified that there was no plate because the threads on the end of the bolt had broken off. (Tr. I, 254, II 102). Peterson did not recall seeing push plates directly over the lifeline but believed that the area was supported. (Tr. II, 48). Saunders believed most of the plates were along the life line. (Tr. II, 90). However, he arrived at the overcast after they cut down the mesh. (Tr. II, 89-90, 94).

Harding and Saunders testified that the push plates were rated for 6,000 pounds (Dempsey was not sure). (Tr. I, 171, 252, II, 95-96). Dempsey did not see any evidence that any push plates had loosened, failed, or stopped performing. (Tr. I, 171). But, because of the cited condition, he could not get near the push plates to observe closely. (Tr. I, 171-172). Peterson did not see any plates that were stressed or over-weighted. (Tr. II, 56-57).

In addition to using the proper materials, the mesh was supposed to be installed tight to the roof to prevent the air from cutting more draw rock. (Tr. I, 174, 178). Here Dempsey believed the mesh was not tight, allowing more rock to fall and add unsupportable weight to the mesh. (Tr. I, 174, 178). However, Respondent's witnesses testified that the mesh above the lifeline was still tight to the roof and that only the area opposite the lifeline was loose. (Tr. I, 254-255, 258, II, 45-46, 100).

Dempsey did not know how much rock was in the mesh. (Tr. I, 179-180). According to Peterson, when they cut the mesh down, the loose rock was about four feet in diameter, most of it small. (Tr. II, 55). Based on that measurement, Dempsey determined there was 1,507 pounds

of rock. (Tr. I, 208-210). Peterson testified that the amount of rock in the mesh would be enough to fill a wheel barrow or a little bit more. (Tr. II, 55). He believed it weighed 300 rather than 1,500 pounds. (Tr. II, 55-56). He was not concerned that the amount of rock would cause a failure of the mesh. (Tr. II, 57-58). The wire mesh is not designed to hold up the mound, it is just to collect the loose material that falls off to prevent it from reaching the bottom. (Tr. II, 57-58).

Dempsey believed the hazard associated with this condition was falling draw rock. (Tr. I, 92). If the condition were allowed to continue, other portions of the roof would deteriorate, fall, and break through the seams in the mesh. (Tr. I, 92). Ultimately the entry where miners work and travel would fail. (Tr. I, 92). He did not believe that the fact that the rock was caught and suspended indicated that miners were protected from falling rock. (Tr. I, 181). In fact, the mesh made the area more dangerous as it was gathering rocks. (Tr. I, 92, 168). The screen was being loaded with more stone every day and all the weight would fall at once when the mesh failed. (Tr. I, 168, 182). Further, if the mesh were gone, individual rocks could be spotted and pulled down; the gob of rocks prevented observation and understanding of the roof. (Tr. I, 181-182). However, Dempsey conceded that without the mesh, each piece of rock would have fallen to the floor and could have hit a mine (if not scaled). (Tr. I, 168-169).

Peterson testified that the only hazard was where the mesh had separated because someone could walk into it. (Tr. II, 58). If Peterson had been the airway examiner he would have recommended that someone tighten the gap. (Tr. II, 58). He would have also recommended cutting the mesh and letting some rock fall out and then resetting. (Tr. II, 58-59).

According to Dempsey, the cited condition existed for "quite a while" because of the deterioration that had taken place. (Tr. I, 94, 187). The metal had oxidized and time would be needed for the cited rock to accumulate. (Tr. I, 94). The condition had existed since the mesh was installed, which was more than a week ago and probably before November 2012. (Tr. I, 95, 245-247). It was possible that there was a time when pieces falling did not weigh enough to separate the seam. (Tr. I, 181). It would be hard to tell when the different pieces of rock had fallen. (Tr. I, 180-181).

The day before the instant citation, Harding traveled from the surface to the section. (Tr. I, 188-189). At the time of issuance, Harding stated that, "it was not like that yesterday." (Tr. I, 178, 187, 251). Dempsey replied that he found it hard to believe that the sagging mesh had not been present the day before. (Tr. I, 187-189). Harding testified that on April 17th the wire mesh was not sagging and that there was maybe 50 pounds of rock in the mesh. (Tr. I, 244-245, 247-248, 253, II 12, 18). Further, the mesh was not separated from the seam and there was no draw rock under the lifeline or mesh. (Tr. I, 248-249, 253). He believed the rock was controlled. (Tr. I, 248). On the day of the citation, Harding and Peterson believed most of the rock in the mesh was fresh. (Tr. I, 255-256, II, 51, 55). Old rocks that are exposed to the air appear lighter, dry, and dusty while fresh rocks are dark and wet. (Tr. I, 255-256, II, 51-52, 86-87). The rock here was dark gray and wet. (Tr. II, 52, 100-101). The cited material would have struck Harding in the nose and neck, meaning it would be hard for an examiner to walk under it. (Tr. I, 188-189, 245). If he had seen this condition, he testified that he would have remedied it but it was not present. (Tr. I, 245, 249, 254).

This condition was in the primary escapeway where the fire drill occurred. (Tr. I, 93). There must be six feet of travel area to accommodate a lifeline, in case a disabled miner would need to be transported to the surface on a stretcher. (Tr. I, 94). The lifelines passed directly under the mesh panels. (Tr. I, 77, 94). If the condition of the mesh existed on the 15th or 16th, Dempsey would have expected one of the men to report the condition. (Tr. I, 186). However, Dempsey did not recall talking to any of the miners. (Tr. I, 187). Further, a weekly examiner would have traveled in this area on the 17th. (Tr. I, 93-94).

The citation was marked S&S because there was a violation of a mandatory safety standard, the violation contributed to the hazard of draw rock, and there was a reasonable likelihood that this hazard would result in a substantial injury to a miner. (Tr. I, 95).

This citation was marked "fatal" because draw rock can crush a person. (Tr. I, 96). The mesh had not yet completely failed, but this did not make a fall unlikely. (Tr. I, 206). Also, the 14 miners in the fire drill would be affected as they all could have been killed. (Tr. I, 96, 182).

The condition was cited for "high" negligence because it should have been observed and repaired long before the inspection. (Tr. I, 96). Someone recognized that there was a problem, but the mesh was installed incorrectly. (Tr. I, 96-97). Respondent also knew that the mesh was held together with tie wire. (Tr. I, 96). Further, this area was examined and supervisors passed through. (Tr. I, 96). Dempsey did not believe there were any mitigation circumstances because the installation was improper, it was set up to hurt people rather than help. (Tr. I, 97). Further, when a supervisor directs a miner to do work, he is required to examine the work and ensure that it is done correctly and protects health and safety. (Tr. I, 99).

Dempsey did not see any mitigation and Respondent did not bring any up. (Tr. I, 97). In fact, Dempsey stated that Peterson agreed with the citation. (Tr. I, 100-101). The mesh was not a mitigating factor because it made matters worse rather than better. (Tr. I, 183).

Dempsey believed this conduct was an unwarrantable failure. (Tr. I, 72). A UWF can be intentional or be the result of indifference. (Tr. I, 97). The cited condition was obvious, extensive, had existed for a while, and it had been examined by Respondent's agent. (Tr. I, 97-98). The cited condition was plainly visible as it hung down below the edge of the overcast. (Tr. I, 72-73). The rock was hanging and suspended from the mesh. (Tr. I, 73). Any observer (trained or not) should have seen this condition. (Tr. I, 91). Dempsey described the situation as a "bomb" that would fall on someone and he did not want to walk under it. (Tr. I, 91-92, 98).

As a result of this condition, a D-Order was issued, pulling the miners out by the 9-head. (Tr. I, 249-250). The order was issued at 11:00 and was terminated at 1:10. (Tr. I, 101). It took 15 miners to make the repairs. (Tr. I, 101). The condition was abated when Respondent took down the wire mesh, cleaned the draw rock, and set two rows of roof jacks in the area. (Tr. I, 101, 251, II, 69). Respondent cut off the mesh at the corner with a grinder, let the rocks fall, raked them off the mesh, and threw everything away. (Tr. I, 257, II, 49). Peterson testified that if there had been a lot of rock they would not have used a grinder because it would have been hazardous. (Tr. II, 59). Dempsey did not observe or direct the repairs. (Tr. I, 101-102, 179).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That § 75.202(a) Was Violated.

On April 18, 2013 Inspector Dempsey issued a 104(d)(1) Order, No. 8154928, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The operator has failed to protect miners who travel the intake/primary escapeway from the fall of roof material (draw rock). The primary escapeway is deemed unsafe to travel in the area immediately outby the overcast near #8 head. Wire mesh has been used to control draw rock. This wire mesh is bowed and separated under the applied load. Several points were secured w/simple tired wire which will not support the applied load. The operator has engaged in aggravated conduct constituting more than ordinary negligence. The violation is an unwarrantable failure to comply with a mandatory standard.

Standard 75.202(a) was cited 75 times in the two years at mine 4609163 (75 to operator, 0 to contractor). The violation is an unwarrantable failure to comply with a mandatory standard.

(GX-4).

The cited standard was, again, 30 C.F.R. § 75.202(a).

The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. (Tr. I, 71-75, 80-81, 92, II, 45, 61). In its brief, Respondent did not contest the validity of this Order. (*Respondent's Post-Hearing Brief* at 24-26). In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. The Violation Was Significant And Substantial In Nature And Reasonably Likely to Result in Fatal Injuries to 14 Persons

Inspector Dempsey marked the gravity of the cited danger in Order No. 8154928 "Reasonably Likely" to result in "Fatal" injury to 14 person. (GX-9). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. § 75.202(a), was directed, as stated in the standard, are "hazards related to falls of the roof, face or ribs and coal or rock bursts." Those hazards include being struck by falling rock as well as walking into the mesh used to control the draw rock. (Tr. I, 92, II, 58). In the instant location, Inspector Dempsey credibly testified that the wire mesh was improperly installed, creating the possibility that the rocks collected therein would fall on miners. (Tr. I, 72, 74-75, 80-81, 92, 184, II, 45, 61). The mesh was improperly installed because it used devices other than those provided by the manufacturer, namely tie wires and clevises. (Tr. I, 72, 74, 76-78, 90, 172-713 II, 62, 67, 102). Tie wire was also used, instead of the recommended push plates, to attach the mesh to the top.

(Tr. I, 78, II, 53-54, 62). Also, the pieces of mesh were not overlapped, as is best practice. (Tr. I, 75-76, 79, 81-84, II, 15). Finally, the installation did not keep the mesh close tight to the roof as required. (Tr. I, 174, 178). As a result, rock filled the mesh, caused it to bow out and then split. (Tr. I, 185, II, 45, 54). This allowed some rock to fall and created the likelihood that the entire mesh structure would fall. (Tr. I, 185). As discussed *supra*, rock falls are inherently dangerous. Therefore, a preponderance of the evidence supports the Inspector's finding that a fatal injury was reasonably likely.

For the same reasons as discussed with respect to Citation No. 8154925 *supra*, this was an area miners worked and traveled, especially during fire drills or emergencies. Therefore, a preponderance of the evidence supports the Inspector's finding that 14 miners would be affected in the event of a massive roof fall.

Respondent provided several arguments asserting that an accident was unlikely. As Respondent addressed those arguments as they related to the S&S designation, they will be discussed *infra*.

Order No. 8154928 was marked by Inspector Dempsey as S&S. (GX-4). It has already been established that the first element of the *Mathies* S&S analysis, the underlying violation of a mandatory safety standard, has been established with respect to this order. As discussed *supra*, Respondent violated 30 C.F.R. § 75.202(a).

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, is also met. The preponderance of the evidence shows that the cited condition, an improperly installed wire mesh, contributed to the hazard of a roof fall. The wire mesh suspended several pieces of rock above the escapeway floor and, upon failure, would have allowed hundreds of pounds of rocks to fall. (Tr. I, 185, 208-210, II, 55-56). The evidence suggests that there were several safer ways to control draw rock in the area. Inspector Dempsey credibly testified that, if installed correctly, the mesh would have prevented a rock fall. (Tr. I, 102, 168). Further, there were several other methods of roof control that would have made a roof fall very unlikely. (Tr. I, 175-176). Therefore, the improperly installed mesh made a roof fall more likely and contributed to a hazard.

Respondent argued that this condition did not contribute to any hazard. However, this argument is not persuasive. Respondent argued that the mesh did not contribute to a safety hazard, but was installed to prevent and remedy a safety hazard related to falling material and tripping hazards. (*Respondent's Post-Hearing Brief* at 26). It argued that the mesh prevented material from falling to the ground. (*Id.*). There is no question that properly installed mesh will prevent a hazard, rather than contribute to one. (Tr. I, 102, 168). However, Inspector Dempsey credibly testified that the condition of the cited mesh actually increased danger. Rather than allowing Respondent to see and then scale draw rock (as it would if there was no mesh), the mesh obscured visibility. (Tr. I, 92, 168, 182). And rather than hold the rock (as it would if the mesh were improperly installed), the mesh created a "time bomb" that would eventually go off when the weight of the mesh proved too great to hold. (Tr. I, 91, 92, 98). Therefore, it is possible that the condition was less safe than if Respondent had completely ignored the area. Rather than smaller pieces of rock falling occasionally (still a considerable hazard), the mesh

created the probability of a large collapse. Therefore, the Administrative Law Judge finds that the second prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also met. In the event of a split or collapse in the mesh, there is no question that a massive rock fall would occur. All the witnesses agree that there was rock in the mesh and that it posed a danger. (Tr. I, 72, 74-75, 80-81, 92, II, 45, 61). I credit the testimony of Inspector Dempsey that over 1,500 pounds of material was caught in the mesh. (Tr. I, 185, 208-210). Further, more might have collected in the mesh before the ultimate failure. For the reasons discussed *supra*, I find that miners were exposed to this condition. As a result, I find that in the event that the mesh failed, injuries would be reasonably likely.

Respondent argued that this condition did not contribute to any hazard. However, this argument is not persuasive. Respondent cited to Judge Zielinski's decision in *Ohio County Coal Co.*, for the proposition that in order to find an injury causing event was likely, both the likelihood of both a miner being in the area and a roof fall occurring at the same time must be considered. 31 FMSHRC 1486, 1491 (2009)(ALJ Zielinski). Judge Zielinski's decision was issued before the Commission clarified the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, *supra*. The issue is no longer whether there could simultaneously be a roof fall and a miner in the area. Instead, the roof fall is presumed to happen and the question is whether anyone was exposed. For the reasons discussed *supra*, the Administrative Law Judge found that miners regularly worked and traveled in this area, including miners on regular fire drills or in an emergency. Therefore, there was exposure and, if there was a roof fall, injuries would be reasonably likely.

The fourth element - a reasonable likelihood that the injury in question will be of a reasonably serious nature – is also met. As discussed with respect to Citation No. 8154925, injuries resulting from a rock fall would be serious. Therefore, the cited condition was S&S.

3. Respondent's Conduct Displayed "High" Negligence And Was The Result Of An Unwarrantable Failure To Comply With the Standard.

In the citation at issue, Inspector Dempsey found that the operator's conduct was highly negligent in character. (GX-4). The preponderance of the evidence supports this finding.

With respect to knowledge, the evidence shows that Respondent knew, or should have known, about the cited condition. Inspector Dempsey credibly testified that the wire mesh had been improperly constructed since it was first installed. (Tr. I, 91, 93, 99). The evidence is not clear on when the mesh was installed, but it was at least several months before the instant citations. (Tr. I, 95, 245-247). Therefore, Respondent's examiners had been traveling through the area weekly and should have noticed that the installation was inadequate and taken steps to correct the problem.

Further, there were no mitigating circumstances. Inspector Dempsey testified that he did not see any mitigating factors and that Respondent did not offer any at issuance. (Tr. I, 97). According to Dempsey, Peterson agreed with the issuance of the order. (Tr. I, 100-101). The

Administrative Law Judge finds that Respondent should have known about the cited condition and did nothing that would constitute a mitigating factor of that negligence.

Respondent presented several putative mitigating factors with respect to this order. However, none of those arguments were compelling.

First, Respondent argued that the area had been previously identified as being susceptible to draw rock and it had installed steel mesh to alleviate the hazard. (*Respondent's Post-Hearing Brief* at 25). Further, Respondent argued that the mesh was achieving the goal of preventing draw rock from falling to the ground. (*Id.* at 26). While identifying areas that experience draw rock is positive, Respondent's actions here were not a mitigating circumstance. Inspector Dempsey testified that the mesh actually made conditions in the area worse and therefore, was not a mitigating circumstance. (Tr. I, 183). As discussed *supra*, the inspector credibly testified that the nature of the installation made the condition a "time bomb" rather than a protective measure. (Tr. I, 191). Therefore, the installation of the mesh was not a mitigating factor.

Next, Respondent argued that it did not know and had no way to know that the condition was present. It argued that the mesh panels had been in place for a year and that no one (including MSHA inspectors) indicated that the installation method was hazardous. (*Respondent's Post-Hearing Brief* at 25). I credit the testimony of Inspector Dempsey who stated that cited condition was obvious. (Tr. I, 97-98). Unlike with respect to Citation No. 8154925, Inspector Dempsey did not qualify his determination of obviousness based on how often the area was examined. I find that the condition, mesh panels installed directly over the head of the examiner that were loose from the top and held together with tie wires and clevises would have been obvious. This is not a mitigating circumstance.

Next, Respondent argued that the mesh over the lifeline was secured to the roof with push plates (which were rated to hold 6,000 pounds each). (*Respondent's Post-Hearing Brief* at 25). The Administrative Law Judge does not believe the evidence would support such a finding. The only witness who stated that there were push plates life line was Saunders. (Tr. II, 90). However, Saunders arrived at the overcast after the mesh had been cut down. (Tr. II, 89-90, 94). He did not see the condition as it appeared when the order was issued. Further, Peterson, Respondent's only witness who was at the overcast when the order was issued, testified that he did not recall seeing push plates over the lifeline. (Tr. II, 48). The Administrative Law Judge credits this testimony, as well as the testimony of Inspector Dempsey who stated that the cited mesh was not supporting the top. (Tr. I, 71-75, 80-81, 92, II, 45, 61). This is not a mitigating circumstance.

Next, Respondent argued that push plates were used on all roof bolts that would accept them and that clevises were used when they would not. (*Respondent's Post-Hearing Brief* at 25). It also noted that these clevises were designed to hold nearly the same weight as the push plates. (*Id.*). The exact number of push plates used was unclear. Peterson and Saunders testified that there was seven or eight. (Tr. II, 48, 90, 96). Neither Dempsey nor Harding was sure. (Tr. I, 169, 189, 258). It is uncontested that there were no plates in the center of the entry. (Tr. I, 171-172, II, 49). Further, it is unclear how many clevises were used and how much weight they could hold. However, the Administrative Law Judge is certain that the clevises did

not hold as much weight as the push plates. The statistics used by Respondent to prove the strength of the clevises all dealt with larger clevises being used properly as hoisting devices. (Tr. I, 179-180, II, 67-68). The clevises used here were much smaller and were being used as clamps or tie wires. (Tr. I, 88-89, II, 67-68). While it is unclear how much the clevises could hold, it was clearly less than proposed by Respondent.

Regardless of the number of plates or the strength of the clevises, it was clear from the result support was insufficient. In essence, the proof is in the pudding. Respondent's installation had failed to control the draw rock. Even Peterson stated, upon seeing the mesh when the order was issued, that something needed to be done. (Tr. I, 100-101, II 61-62). If the clevises and the push plates had been sufficient to control the roof, the mesh would not have been leaking rock and been on the verge of collapse. This is not a mitigating circumstance.

Next, Respondent argued that the tie wire was used for "cosmetic purposes" to keep the ends of the mesh panel from rolling down or becoming a hazard to walk into. (*Respondent's Post-Hearing Brief* at 25). The Administrative Law Judge credits the testimony of Inspector Dempsey that there was at least one seam on the mesh that was held together by tie wire. (Tr. 72, 76-78, 90, 172-173, II, 62). The photographic evidence supports this testimony. (GX-6, photographs 2, 3, & 5). Far from being cosmetic, this installation using materials not provided by the manufacturer was one of the reasons the roof conditions were so hazardous. This is not a mitigating circumstance.

Finally, Respondent argued that most of the rock was fresh and the seam and split apart since the previous examination. (*Respondent's Post-Hearing Brief* at 26). The Administrative Law Judge credits the testimony of Inspector Dempsey that the rock had been present for some time. (Tr. I, 187-189). However, even if that were not the case, this would still not constitute a mitigating circumstance. The roof was not controlled because the mesh was improperly installed. Even before the rock began to collect in the mesh, the panels were held together with tie wires and clevises in a way that prevented the mesh from maintaining its position close to the top. When the rock fell, it made this improper installation more obvious, but the rock itself was not the cited condition. The rock was the *result* of the improper installation, the danger that the mesh should have prevented. This condition would have been a violation even if no rock had fallen. Even if the rock had fallen just five minutes before the order was issued, the improper installation had occurred months earlier. Therefore, this is not a mitigating circumstance.

In light of the foregoing, the Administrative Law Judge affirms the inspector's finding of "high negligence."

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was "seemingly at odds.") *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard,

intentional misconduct, indifference, or serious lack of reasonable care. *Id.* at 2004; *see also* *Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered. The Administrative Law Judge will consider each of those factors in turn:

1. Extent Of The Violative Condition

This particular condition was a large piece of mesh, around 240 square feet, that was improperly installed. It covered the entire width of the entry. Therefore, it was extensive.

2. The Length of Time of the Violation Existed

While the exact date of the installation is not clear from the record, there is no question that it was there for several months. (Tr. I, 95, 245-247). Inspector Dempsey credibly testified that the mesh was rusty, indicating that installation was not recent. (Tr. I, 91). Therefore, the cited condition had existed for quite awhile.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue here was obvious and posed a considerable danger. As discussed *supra*, this condition was reasonably likely to result in fatal injuries to 14 miners. I credit the testimony of the inspector that the condition was obvious and should have been observed by a trained or untrained observer. (Tr. I, 91-92).

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

The evidence suggests that Respondent had problems with roof falls in this mine. (Tr. I, 42, 202-203). In fact, several months after these citations were issued a roof fall occurred in the cited entry. (Tr. I, 107). Further, Respondent had an extensive history of § 75.202(a) violations. Therefore, Respondent had meaningful notice that roof conditions were a serious problem in the mine. Respondent should have taken action to correct this condition.

5. The operator's efforts in abating the violative condition

The parties stipulated that the condition was abated quickly and in good faith. (JX-1).

6. Operator's knowledge of the existence of the violation

"It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition." *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure

determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing (REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). As discussed above, the preponderance of the evidence shows that Respondent should have known of the condition. Harding, and other examiners, traveled through this area and actively searched for violative conditions. These examiners should have seen the condition and corrected it.

In light of the size of the violation, the length of time it had, the obviousness and high degree of danger posed by the condition, the notice Respondent received regarding the need to control the top, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as "high" negligence, the Administrative Law Judge finds that this violation was an unwarrantable failure on the part of the operator.

4. Penalty

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$70,000.00 with respect to this violation.

Citation No. 8154927

I. ISSUE

With respect to Citation No. 8154927, the issues to be determined are whether Respondent's alleged actions on April 18, 2013 were a violation of §75.364(a)(1) and, if so, whether that violation was significant and substantial ("S&S"), whether it was reasonably likely to result in fatal injuries to 14 miners, whether it was the result of high negligence and an unwarrantable failure, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

Citation No. 8154927 (GX-3) was issued because Respondent failed to conduct an adequate weekly examination of the intake/primary escapeway. (Tr. I, 102-103, 268). Specifically, between the No. 26 crosscut to the overcast near the No. 8 belt, three obvious and extensive conditions were found. (Tr. I, 103, 190). There was only about 1,200 feet, from the first citation to the order. (Tr. I, 190). However, Dempsey already considered that this have been an inadequate examination after the second condition.²⁰ (Tr. I, 195).

Weekly examinations are conducted to ensure that hazardous conditions are identified and corrected. (Tr. I, 104). Examiners must look for the standards in the examination books as

²⁰ Citation No. 8154927 was issued five minutes before Order No. 8154928. (Tr. I, 104-105). After seeing the fly board Dempsey told Peterson that if he saw another condition he would issue a citation for an inadequate examination. (Tr. I, 104-105). Once he saw the third condition, it did not matter which violation he issued first. (Tr. I, 105). Peterson did not recall Dempsey commenting about a possible inadequate examination after the second citation. (Tr. II, 44-45).

well as roof and rib conditions. (Tr. I, 104-106, 134, 219-220, II, 79). Examiners must be familiar with the roof control plan. (Tr. I, 106). Examiners must have experience and training to identify hazards like wide entries, draw rock, rib sloughage, damaged bolts, and rib rolls, rib sloughage, and bottom pressure. (Tr. I, 106, 134, 219-220, II, 24, 79-80). An examiner should sound the top, take measurements, check the lifeline (including tripping hazards), check the SCSR caches, refuge chambers, examine stoppings, check ventilation control, and spend additional time on suspicious areas. (Tr. I, 134, 219-220, II, 79-81). With the lifeline, he would look for cones (facing the proper direction and properly spaced), proper connections, proper location, reflector spacing, balls for the mandoor signs, and the signs themselves so miners can use the lifeline if there is no visibility. (Tr. I, 220, II 79-80). Examiners focus on things that changed from the previous week. (Tr. II, 114). However, it is possible for some conditions to be missed on an examination and for that examination to be adequate. (Tr. I, 196, II, 113).

When an examiner sees a condition, he should immediately report it and correct it. (Tr. I, 106, 227, II, 81). If a condition cannot be corrected, it should be dangered off. (Tr. I, 106, II 28, 81). To danger an area off, a marker board or danger tape is hung at eye level around the hazard. (Tr. I, 237). If there is a lifeline in the area, it is moved to where conditions are safe. (Tr. I, 237-238). Then he would let management know about the condition so it could be corrected. (Tr. II, 28). There is no situation where an examiner must identify a hazard but is not required to correct the condition. (Tr. I, 106). If no hazard is found, that is also entered in the book. (Tr. I, 227). As a result, all weekly examinations are recorded. (Tr. I, 227).

At the mine, it was Peterson's job to follow-up on recorded hazards and to double check airway examinations. (Tr. II, 28-29). In order to double check airway examinations, Saunders would look at footprints on the bottom. (Tr. II, 81). Footprints should zig-zag and be near crosscuts and doors. (Tr. II, 82). He would know someone was making corrections if he saw re-bolts, draw rock piled down, rib sloughage removed, material moved from under the life line, new signage and new timbers. (Tr. II, 81-82). In short, he would look at everything that the examiner would inspect and then check the book to see if it matched. (Tr. II, 82).

At the time of the instant citations, there were five day examiners. (Tr. I, 225). All of the examiners were qualified to examine airways. (Tr. I, 226). Work was divided between these examiners with each airway assigned on a specific day. (Tr. I, 225-226). Harding had inspected the primary escapeway on April 17. (Tr. I, 226, II, 11).

Harding testified that when preparing to make an examination, he would review the books for the prior examination and discuss it with management. (Tr. I, 238, II, 8). He did this to determine if there were any changes in conditions or to look at anything that was added. (Tr. I, 238). The previous week's information allowed him to make a more detailed exam. (Tr. I, 239). Sometimes things on prior examinations would alert him to hazards. (Tr. I, 238-239). He knew that there were draw rock issues at the time. (Tr. II, 8).

On the day of the examination, Harding traveled 2.5 miles from the portal through the primary escapeway at issue. (Tr. I, 240, II, 8). He walked from the portal inby to the double doors. (Tr. I, 39, II, 8). Some of the exam would be walked, but the rest would be on a ride. (Tr. I, 241). The area where the citations were issued was walked. (Tr. I, 233-234, 241-242).

Harding traveled to all of the areas where conditions were cited in Citation Nos. 8154925, 8154926, and 8154928. (Tr. II, 8-9). All of his notes were in the record for the week ending April 20, 2013. (Tr. II, 9-10). He examined the seals, refuge chamber, and caches. (Tr. II, 9). Harding carried a "pry bar" to sound the top and pull down draw rock. (Tr. I, 233-234). When sounding the top, he listened for a drumming or hollow sound. (Tr. I, 234). A hollow sound meant an area needs to be scaled. (Tr. I, 234, 236). Harding also examined the roof for damaged bolts. (Tr. I, 234-235). As he inspected the escapeway, he moved in a zig-zag pattern looking at the lifeline, roof, and ribs near the lifeline. (Tr. I, 235-236). He also looked at the ventilation controls at each crosscut. (Tr. I, 236). When inspecting mesh, Harding checked to make sure that nothing was lying in the mesh that could cause leaks of a fall. (Tr. I, 257). At the area with the timbers, Harding checked to see if the timbers were tight, if any had fallen, and made sure there was no draw rock. (Tr. I, 261-263). He also looked for signs of stress and cracks in the roof and ribs and for sloughage. (Tr. I, 263-264).

An examination of the primary escapeway would take 1.5 to 2.5 hours. (Tr. I, 240-241, II, 9). Harding was given as much time as necessary to complete it. (Tr. I, 270). Some days it takes substantially longer than others due to conditions discovered. (Tr. I, 270). Harding had the necessary resources to remedy any condition observed or, at least, to danger it off. (Tr. I, 270-271). Harding took examinations, including the examination on the 17th, very seriously because in case of an emergency, he is responsible for the safety of every man in the mine. (Tr. I, 270).

On the 17th, Harding had no concerns about men using the area during a fire drill, the lifeline was intact. (Tr. I, 256-257, 270). Further, before a fire drill, the foreman would make a supplemental examination of the entire area the miners would travel. (Tr. II, 111). The foreman would look for conditions that could affect miners during a fire drill. (Tr. II, 111). An extra examination might also be done if a crew were going to work in the area. (Tr. II, 112). Dempsey would not expect an extra exam before a fire drill. (Tr. I, 167).

Dempsey stated that the number of conditions that Harding failed to find that made this examination inadequate.²¹ (Tr. I, 191). Citation No. 8154925, Citation No. 8154926, and Order No. 8154928 were not included in the examination record. (Tr. I, 108-109). Any casual observer could have seen a majority of the problems, and a trained examiner should have seen the rest. (Tr. I, 109). However, Dempsey conceded that no citations were issued for lifelines, ventilation controls, cones on safety lines, or mandos in the 1,200 feet between the first citation and the order. (Tr. I, 193-194). Also, the roof bolt spacing was in the single area. (Tr. I, 194).

Harding reviewed his examination record. (Tr. II, 10). That record did not show that the entry was wide as cited in Citation No. 8154925. (Tr. II, 10-11). It also did not show that the bolts were widely spaced or that there was draw rock in the area. (Tr. II, 11). The record also did not show that there was draw rock on the fly board as cited in Citation No. 8154926. (Tr. II, 11). Finally, the record did not note the mesh panels cited in Citation No. 8154928. (Tr. II, 11).

²¹ Dempsey conceded that he was not an examiner and had never conducted an airway examination, but as an inspector it was not his job to do a workplace examination. (Tr. I, 202).

After the citation, Saunders walked the rest of the escapeway, from the mesh to the portal, to determine if there were any other causes for concern. (Tr. II, 90-91). He looked for water accumulations, dust, foot prints, and date boards. (Tr. II, 92). Some date boards were signed more than required by law. (Tr. I, II, 92-93). He saw old and new timbers, footprints zigging and zagging, and good signage. (Tr. II, 93). The lifeline indicators were good, there were several rebolts, fallen rock was thrown away from the lifeline or the lifeline itself was moved to avoid hazards, and the dusting was good. (Tr. II, 93). No other citations were issued. (Tr. II, 93). Saunders believed that the walkway had been very adequately examined. (Tr. II, 94). It looked like there was good examinations with good follow up. (Tr. II, 94).

Dempsey believed all of these conditions existed at the time of the examination on the 17th. (Tr. I, 109). However, he could not say for sure what day Harding examined the cited escapeway because Respondent varied areas. (Tr. I, 195-196). His analysis of the time was based on his mining and MSHA experience and mine conditions. (Tr. I, 110).

The wire mesh condition had existed for a considerable time. (Tr. I, 109). Harding failed to find the improperly installed mesh and accumulated draw rock, creating a "time bomb." (Tr. I, 191). Dempsey had no doubt the condition existed when Harding was in the area. (Tr. I, 197). Harding testified he did not observe this condition. (Tr. I, 269-270). Had he seen it he would have corrected it. (Tr. I, 270). He did not believe the condition existed the previous day. (Tr. I, 244-245, 247-248, II, 12, 18). Further, Harding and Peterson believed most of the rock in the mesh was fresh. (Tr. I, 255-256, II, 51, 55). Finally, the cited material would have struck Harding in the nose and neck, meaning it would be hard for an examiner to walk under it. (Tr. I, 188-189, 245).

The draw rock on the fly board eased down over time. (Tr. I, 109). Dempsey believed that condition was present at Harding's exam. (Tr. I, 195). Harding should have sounded the roof and pulled down the rock here. (Tr. I, 109-110, 191). Harding testified that he did not observe this condition and that it was not present. (Tr. I, 259, 269, II, 18). It could have developed from one day to the next. (Tr. I, 260-261). Peterson saw dust on the rock and concluded the rock was on the fly board for a while. (Tr. I, II, 43-44). Harding would have dangered it off and fixed it if it had been present. (Tr. I, 269).

The wide entry, improperly spaced bolts, and draw rock had "without a shadow of a doubt," existed when the exam was made; the bolts and entry had existed for years. (Tr. I, 110, 191, 195, 197). However, it is possible for draw rock to occur in the hours after an examination. (Tr. I, 191-192). The amount of time it takes for draw rock to become apparent varies; it is hard to make generalizations. (Tr. I, 192-193). Dempsey believed this draw rock had been in the cited location since the day before because it gapped down and had fallen. (Tr. I, 192). Harding testified that he did not observe or ignore this condition. (Tr. I, 268-269). Harding was looking for many things and this could cause a condition to be overlooked. (Tr. I, 269).

All of the conditions that led to the issuance of this citation occurred in the primary escapeway.²² (Tr. I, 106-107). The lifeline traveled through each of the areas. (Tr. I, 107). Dempsey testified that miners work and travel there. (Tr. I, 110). Harding did not believe miners normally worked or traveled in this area, it was not a “main track.” (Tr. I, 243).

The citation was marked S&S because there was a violation of a standard that contributed to a hazard. (Tr. I, 110-111). The intent of the examination is to correct conditions and this was not done. (Tr. I, 111). There was a reasonable likelihood of a significant injury. (Tr. I, 111).

The citation was marked as “fatal” because rock falls could cause crushing injuries. (Tr. I, 111). Also, the 14 miners in the fire drill would be affected. (Tr. I, 111).

The citation was marked as “high” negligence because the conditions were obvious, extensive, examined by an agent and supervisor, and there was a degree of risk to the miners. (Tr. I, 111-112). Dempsey believed there were no mitigating circumstances. (Tr. I, 112). Dempsey could not recall a situation where an examiner missed something and he did not feel there was high negligence. (Tr. I, 196).

This condition was an unwarrantable failure, or aggravated conduct. (Tr. I, 112, 197-198). The standard was similar to what Dempsey looked for in high negligence. (Tr. I, 112). It was inexcusable to allow the conditions to exist in an escapeway that miners depend on for their lives in an emergency. (Tr. I, 112). The condition was obvious, extensive, had existed for a long time, and should have been caught. (Tr. I, 198). Dempsey maintained that the wide entry was open and obvious even though his notes stated it was not overly obvious. (Tr. I, 914). The area with the wide entry condition would have had 280 weekly examinations since development. (Tr. I, 198). The obviousness is not undercut because this may not always have been the primary intake. (Tr. I, 198-199). Even if it was always the primary intake, Dempsey believed the condition was easy to spot. (Tr. I, 199).

Dempsey conceded that before the instant inspection, he had no reason to question the adequacy of examinations at Powellton. (Tr. I, 117). The previous inspector at the mine did not express any concern over this issue. (Tr. I, 117-118). Dempsey does not recall any earlier roof control citations, S&S, or “high” negligence citations. (Tr. I, 118).

Dempsey also conceded that some examination was performed because he saw a signed date board. (Tr. I, 120-121) He had no reason to question whether it was performed. (Tr. I, 120). Harding’s notes state that he set timbers, scaled the top, and repaired a lifeline. (Tr. I, 120-121). These are to some extent the notes Dempsey would expect, but he wanted to see the areas correctly identified. (Tr. I, 120).

Harding testified he had been accompanied by MSHA inspectors (Hartenstein, Dishman, and Van Dulan) during previous examinations (Tr. I, 271). During those inspections the mesh, the wide entry, and the wide bolt would have been present. (Tr. I, 271-272). None of these

²² A roof fall occurred in this area on 8/21/2013. (Tr. I, 107, II, 69). This roof fall was caused by bad roof. (Tr. II, 69). Efforts were taken to strengthen this area by setting cribs, posts, and narrowing down the area. (Tr. II, 69).

inspectors stated that the condition of the mesh was unsafe or that it was installed improperly. (Tr. I, 273). Further, Peterson was present for the “close-out” conference the prior quarter with inspectors Bane and Dishman. (Tr. II, 29). They were concerned about the roof, and corner bolts. (Tr. II, 29-30). They went over the violations written that quarter. (Tr. II, 30). They did not discuss specific issues with the primary escapeway or the installation of mesh. (Tr. II, 30).

Dempsey could not say if another inspector should have issued a citation earlier because it was possible this entry was not formerly the primary escapeway. (Tr. I, 125, 138). He did not know the function of this particular air course in the four or five years after development. (Tr. I, 126, 138). If the entry was not being used, no one would inspect it. (Tr. I, 147). It is also possible the condition was not discovered. (Tr. I, 125). If this area was a primary escapeway since development, then it would have been examined weekly since 2008 and inspected quarterly by MSHA inspectors. (Tr. I, 136). If that were the case, the condition went unnoticed by examiners and MSHA inspectors. (Tr. I, 139-140, II, 19). Dempsey would expect his fellow inspectors to notice the condition. (Tr. I, 136, 140, 146-147). However, they were not highly negligent, an inspector sometimes misses conditions. (Tr. I, 141). He noted that even if MSHA missed conditions in the past, Respondent was still required to follow the law.²³ (Tr. I, 202). Harding testified that this area had been the primary escapeway since 2008 because the location allowed miners to walk in fresh air. (Tr. I, 262, II, 11-12).

This condition was abated when a supplemental examination was conducted by Peterson on the primary escapeway from the section to the surface. (Tr. I, 112, 251). It was conducted immediately, but Dempsey did not fill out the form until he saw the examination record. (Tr. I, 112-113). Harding was not ordered to be re-trained as part of abatement. (Tr. I, 197).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That § 75.364(a)(1) Was Violated.

On April 18, 2013, Inspector Dempsey issued a 104(d)(1) Citation, Citation No. 8154927 to Respondent. Section 8 of that Citation, Condition or Practice, reads as follows:

The Operator has failed to conduct an adequate examination of the intake/primary escapeway for the #1 working section. Between #26 xcut along #9 beltline to the overcast near #8 Belt head 3 obvious and extensive violations were found. These violations include, 1) a wide entry w/excessive bolt spacing and loose draw rock, 2) 20 unsupported broken draw rock held up by a 1” fly board, and 3) Wire mesh bowed down by the weight of draw rock it is supporting @ overcast near #8 head (Portions of the wire mesh are secured with tie wire instead of the proper plates. This violation is an unwarrantable failure to comply with a mandatory standard.

²³ According to Dempsey, Harding’s role as the examiner and agent of Respondent was to ensure that the escapeway was safe if needed in an emergency. (Tr. I, 146). MSHA role when conducting an inspection is to look for hazards, ensure the company is doing adequate examines, and ensuring the safety of employees who may work or travel in the area. (Tr. I, 146). Those roles are similar with respect to examining the primary escapeway. (Tr. I, 146).

(GX-3).

Standard 30 C.F.R. §75.364(b)(1) (“Weekly Examination”) provides the following:

(b) Hazardous conditions and violations of mandatory health or safety standards. At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations:

(1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. §75.364(b)(1)

Examinations are of “fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (1995). Examiners are required to examine for roof conditions, rib conditions, wide entries, draw rock, sloughage, damaged bolts, rib rolls, bottom pressure, problems with the top, issues with the lifeline (including tripping hazards and directional symbols), SCSR caches, refuge chambers, stoppings, ventilation controls, and suspicious areas. (Tr. I, 104-106, 134, 219-220, II, 24, 79-81). With respect to the instant citation, there is no question that Respondent’s examiner, Harding, conducted a weekly examination the day before the three conditions at issue here were found. (Tr. I, 226, II, 11). Therefore, the only question is whether that examination was adequate.

The hazardous conditions cited in Citations/Order Nos. 8154925, 8154926, and 8154928 were all located in the primary escapeway that Harding inspected on April 17. (Tr. I, 226, II, 11). For the reasons stated *supra*, all of those issuances were upheld as valid and S&S. However, these conditions were not included in the weekly examination record. (Tr. I, 107-109). In fact, Examiner Harding confirmed that these conditions were not included in the record. (Tr. II, 10-11). For the reasons already given *supra*, these conditions (particularly the improperly installed mesh) were at least somewhat obvious. The Administrative Law Judge credits the testimony of the inspector that those conditions should have been included in the record of the weekly examination. (Tr. I, 103-104). Therefore, the preponderance of the evidence shows Respondent’s weekly examination was inadequate.

Respondent presented several arguments for the proposition that the examination was adequate. However, those arguments were not supported by the record.

First, Respondent argued that the mesh condition was not obvious because the draw rock was fresh and had not been sagging the previous day. (*Respondent’s Post-Hearing Brief* at 29). As noted in the discussion of that order, Inspector Dempsey credibly testified that the condition was obvious. (Tr. I, 97-98). Further, the issue was the inadequate installation, not necessarily the time at which the rock fell. The inadequate installation had been obvious since the mesh was installed. Therefore, it should have been noted in the weekly examination.

Next, Respondent argued that the piece of draw rock was not present the day before. (*Respondent's Post-Hearing Brief* at 29). As discussed previously, Inspector Dempsey credibly testified that the condition existed for some time before the citation was issued. (Tr. Tr. I, 66-68). It might have been less obvious than at the time of the citation. However, an examiner still should have known the condition was present and corrected it or dangered it off.

Finally, Respondent argued that the wide entry and misplaced bolt were not obvious and that other examiners, including MSHA inspectors, did not notice this. (*Respondent's Post-Hearing Brief* at 29). Respondent also notes that Inspector Dempsey was not a certified examiner. (*Id.*). As noted in the discussion regarding the underlying citation, this condition was not overly obvious. However, Inspector Dempsey, despite his lack of examining credentials, noticed this condition (which Respondent concedes existed). Therefore, someone with all of the proper training should have seen the condition and noted it in the examination record.

Therefore, the Administrative Law Judge finds that the instant citation was validly issued.

2. The Violation Was Significant And Substantial In Nature And Reasonably Likely to Result in Fatal Injury to 14 Miners

Inspector Dempsey marked the gravity of the cited danger in Citation No. 8154927 “Reasonably Likely” to result in “Fatal” injury to 14 persons. (GX-12). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §75.364(b)(1) is contact by miners with correctable hazards. For the reasons discussed with respect to each individual citation, the hazards present here posed a reasonable likelihood of fatal injury to miners. Further, for the reasons discussed with respect to Citation No. 8154925, up to 14 miners would be exposed to these hazards.

Citation No. 8154927 was also marked as S&S. (GX-12). It has already been established that the first element of the *Mathies* S&S analysis, the underlying violation of a mandatory safety standard, has been established with respect to this citation. As discussed *supra*, Respondent violated 30 C.F.R. §75.364(b)(1).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, the preponderance of the evidence shows that the violation created a tripping hazard. The Commission has recognized examinations as “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal*, 17 FMSHRC at 15; *see also Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Chairman Jordan and Commissioner Marks have referred to the preshift inspection requirement as “the linchpin of Mine Act safety protections.” *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (August 1996) (Jordan and Marks, concurring and dissenting in part). MSHA requires several layers of examinations, including on-shift, preshift, and weekly examinations, in order to ensure miner safety. “These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or

unsafe conditions in the mine.” *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ Andrews).

While much of the reasoning in these cases discusses pre-shift, rather than weekly, examinations, they are sufficiently analogous for our purposes here. The Commission has been clear that examinations act as first line of defense with respect to hazards. Here, the failure of Respondent to conduct an adequate examination contributed to the miners’ exposure to the hazards discussed with respect to Citations/Order Nos. 8154925, 8154926, and 8154928

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also met. In the event that any or all of the hazards at issue here were realized, miners would be fatally crushed by falling roof material. (Tr. I, 110-111).

Respondent argued that there was no evidence that an injury could result from this violation. Specifically, it argued that the underlying conditions were not likely to result in injury for the same reasons discussed with respect to each citation or order. Once again, with respect to the third element of *Mathies*, the issue is whether someone would be injured if there was a roof collapse in this area. As discussed with respect to each of the underlying issuances, in that event injuries would occur.

The fourth element - a reasonable likelihood that the injury in question will be of a reasonably serious nature – As noted *supra*, rock fall injuries are inherently severe.

3. Respondent’s Conduct Displayed “High” Negligence And Was The Result Of An Unwarrantable Failure To Comply With the Standard.

The instant citation was marked as “high negligence.” Inspector Dempsey credibly testified that this determination was made because the three underlying conditions were obvious, extensive, and were examined by an agent and supervisor. (Tr. I, 111-112). Therefore, Respondent knew or should have known that the condition existed. For the reasons discussed above, Respondent was either highly or moderately negligent with respect to all three of the

Dempsey also credibly testified that there were no mitigating circumstances. (Tr. I, 112). He believed that any time an examiner missed these sorts of conditions it should be high negligence. (Tr. I, 196). One of the underlying issuances, Order No. 8154928, was affirmed as having no mitigating factors for the reasons discussed *supra*. Therefore, the Administrative Law Judge finds that there were no mitigating circumstances here.

Respondent argued that there were several mitigating factors. (Respondent’s Post-Hearing Brief at 28-30). This argument was not supported by the evidence.

Respondent asserted that all of the arguments it made with respect to validity were equally persuasive with respect to high negligence and unwarrantable failure. Specifically, it argued that none of the conditions (the entries, the wide bolts, the draw rock, or the improperly installed mesh) were obvious. For the reasons set forth in the discussion of validity, the evidence does not support this contention. There were not mitigating factors.

The evidence presented also supported the Secretary's determination that Respondent's actions were an unwarrantable failure. With respect to that determination, the Administrative Law Judge will consider each of the *IO Coal* factors in turn:

1. Extent Of The Violative Conditions

The evidence, as discussed at length above, shows that three reasonably likely, fatal, S&S conditions existed in a quarter mile area of the mine. These conditions affected the entire width of the entry in places. Therefore, the preponderance of the evidence shows the condition was extensive.

2. The Length of Time of the Violation Existed

The conditions missed by the examiner existed for widely variable amounts of time. The wide entry and misplaced bolts had existed for years. (Tr. I, 110, 191, 195, 197). The draw rock had existed for quite a while (though that condition might not have been overly obvious until the day of the citation). (Tr. I, 192). Finally, the improperly installed mesh had existed for at least several months and maybe longer. (Tr. I, 95, 245-247). Therefore, Respondent had conducted inadequate examinations for several years, with conditions deteriorating further over time.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue here posed a considerable danger. As discussed *supra*, this condition was reasonably likely to result in fatal, injuries to 14 miners. The inadequate examination failed to notice or correct these conditions. Further, for the reasons discussed extensively, the conditions were obvious, especially the mesh. Therefore, the inadequate examination should have noted these conditions and corrected them.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

Respondent had an extensive violation history with respect to §75.202(a). Further, it was well known that this mine had trouble with draw rock. (Tr. I, 42). Respondent also had history with roof falls. (Tr. I, 42, 202-203). Therefore, Respondent was on notice that its examinations of these conditions should have been thorough and focused on roof control.

5. The operator's efforts in abating the violative condition

The parties stipulated that the condition was abated quickly and in good faith. (JX-1).

6. Operator's knowledge of the existence of the violation

As discussed at length, Respondent knew or should have known about the underlying conditions. Therefore, it knew or should have known that its examinations were inadequate.

In light of the size of the violation, the length of time it had, the obviousness and high degree of danger posed by the condition, the notice Respondent received regarding the need to control the top, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as "high" negligence, the Administrative Law Judge finds that this violation was an unwarrantable failure on the part of the operator.


4. Penalty

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$42,944.00 with respect to this violation.

ORDER

It is hereby **ORDERED** that Citation/Order Nos. 8154925, 8154926, 8154927, and 8154928 are **AFFIRMED** as modified herein.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$172,944.00 within 30 days of the date of this decision.²⁴


William S. Steele
Administrative Law Judge

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/tjb

²⁴ 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