

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

June 18, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2002-116
Petitioner	:	A.C. No. 36-00970-04252
	:	
UNITED MINE WORKERS OF	:	
AMERICA, LOCAL 1248, DISTRICT 2,	:	
SUB-DISTRICT 5,	:	
Intervenor	:	
	:	
v.	:	
	:	
MAPLE CREEK MINING, INC.,	:	
Respondent	:	
	:	
STEVE BROWN, Employed by Maple	:	Docket No. PENN 2003-54
Creek Mining, Inc.,	:	A.C. No. 36-00970-04285 A
Respondent	:	
	:	
ALVY WALKER, Employed by Maple	:	Docket No. PENN 2003-55
Creek Mining, Inc.,	:	A.C. No. 36-00970-04286 A
Respondent	:	
	:	
GREG MILLER, Employed by Maple	:	Docket No. PENN 2003-56
Creek Mining, Inc.,	:	A.C. No. 36-00970-04287 A
Respondent	:	
	:	
	:	Maple Creek Mine

DECISION

Appearances: Maureen A. Russo, Esq., Mark V. Swirsky, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Leon J. Moscalink, Jr., Chairman, Mine Safety & Health Committee, Local Union 1248, United Mine Workers of America, Greensburg, Pennsylvania, for Intervenor;
Marco M. Rajkovich, Jr., Esq., Noelle M. Holladay, Esq., Wyatt, Tarrant & Combs, LLP, Lexington, Kentucky, for Respondents.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Penalty filed by the Secretary of Labor (“the Secretary”), through her Mine Safety and Health Administration (“MSHA”), against Maple Creek Mining, Incorporated (“Maple Creek”), and its employees Steve Brown, Alvy Walker¹ and Greg Miller, pursuant to sections 105(d), 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820(a) and 820(c). The petition respecting Maple Creek seeks to impose a civil penalty of \$9,500.00 for an alleged violation of the Secretary’s mandatory safety standards governing underground coal mines.² The petitions respecting Maple Creek’s employees seek imposition of individual penalties of \$1,000.00 against Brown, \$500.00 against Walker, and \$500.00 against Miller for allegedly authorizing, ordering or carrying out the violation for which Maple Creek is charged.

The United Mine Workers of America (“the UMWA”), Local 1248, District 2, Sub-District 5, was joined as an intervening party to the proceedings. A hearing was held in Pittsburgh, Pennsylvania. The parties Post-hearing Briefs and Respondent’s Reply Brief are of record. The UMWA waived its right to file a brief. For the reasons set forth below, I **AFFIRM** Order No. 7082507, and assess penalties against all Respondents.

I. Stipulations

The parties stipulated as follows:

1. The Maple Creek Mine is owned and operated by Respondent in this case, namely Maple Creek Mines, Inc.
2. The Maple Creek Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. A duly authorized representative of the Secretary served the order and termination of the order upon the agent of the Respondent at the date and place stated therein, and the order and termination may be admitted into evidence to establish their issuance.
4. The presiding Administrative Law Judge has jurisdiction over these proceedings pursuant to sections 105 and 110(c) of the Act.

¹ Respondent Walker’s name is incorrectly spelled in the Petition for Assessment of Civil Penalty as “Alvie.” Documents in evidence signed by Walker indicate that the correct spelling is “Alvy.”

² Docket PENN 2002-116 originally contained 12 citations/orders. By Decision Approving Settlement of August 11, 2003, settlement of 11 was approved. Consequently, only Order No. 7082507 is the subject of this hearing.

5. The parties stipulate to the authenticity of their exhibits, but not to the truth or the relevance of the matters asserted therein.

6. The imposition of the proposed civil penalty against Maple Creek Mining, Inc. will not affect Maple Creek's ability to remain in business.

7. Respondent Steve Brown has the financial ability to pay the proposed penalty of \$1,000.00.

8. Respondent Greg Miller has the financial ability to pay the proposed penalty of \$500.00.

9. Respondent Alvy Walker has the financial ability to pay the proposed penalty of \$500.00.

10. On August 9, 2001, water was present in the intake escapeway of the 4 West section in varied depths and extended for approximately 420 feet.

11. The water in the intake escapeway on the 4 West section had been present in varied amounts for approximately two weeks prior to August 9, 2001.

12. Respondent was aware that water in the intake escapeway in the 4 West section had been present in varied amounts for approximately two weeks prior to August 9, 2001.

13. In accordance with Respondent's assessed violation history, Respondent received 18 citations for violation of 30 C.F.R. § 75.380(d)(1) from August 1, 1999, through August 9, 2001.

II. Factual Background

Maple Creek owns and operates the Maple Creek Mine, an underground bituminous coal mine in Washington County, Pennsylvania. The mine is wet, with depressions that fill up with water percolating from underground, and seeping through the coal seam and the mine roof. Tr. 508, 632, 664-65. Between 1.2 and 2 million gallons of water are pumped from the mine daily. Tr. 742-43. On the 4 West section, the track entry, ventilated with intake air, is the primary escapeway. The adjacent travelway, ventilated with return air, is the secondary escapeway. During the time period relevant to this case, the track in the primary escapeway ended around crosscut 15 or 16. Scoops routinely traveled up and down the primary escapeway transporting supplies from the end of the track to the working face at about crosscut 30, creating holes or "ruts" in the travelway. Tr. 115, 124. Running along the right rib was a "cow path" no wider than about 12 inches, where the work crews walked from the end of the track to their work stations at the face. Tr. 119.

On July 30, 2001, Pennsylvania Mine Inspector Dennis Walker conducted a regular quarterly inspection of the Maple Creek Mine, accompanied by Steve Brown, section coordinator on 4 West. Tr. 31-32, 40. At 12:30 that afternoon, Inspector Walker issued a Compliance Order for water accumulation in the 4 West section between crosscuts 24 and 25, rib to rib, 12 inches in depth spanning 40 to 50 feet, that created slippery walking conditions. Ex. G-1; tr. 33-34. The Compliance Order required Maple Creek to remove the water or pump it to a reasonable depth by 8:00 the next morning. Walker did not actually make a physical inspection of the area for compliance, but was told by Brown and Greg Miller that the water had been removed by pumping. Tr. 37, 57-58. Accordingly, he terminated the Compliance Order on August 14, 2001. Ex. G-1 at 2.

On August 9, 2001, ten days after the Compliance Order had been issued, Mine Safety and Health Administration (“MSHA”) Inspector James Dickey conducted a regular Triple-A inspection at Maple Creek. While still on the surface, Dickey encountered MSHA Inspector George Rantovich in a discussion with UMWA safety committeemen Thomas Sutton and Jim Constable. Ex. G-3. The topic was the oxygen content in the bleeder entries and water in the mine. Sutton told the inspectors that the water problem had existed for some time, that it was not being recorded consistently in the preshift examination book, and that nobody was doing anything about it. Dickey agreed to take a look at the 4 West section. Tr. 67-68, 231-35. Dickey then reviewed the preshift and onshift record books for 4 West dating back, at least, to July 31, 2001. Tr. 235-39; ex. G-8. Dickey and the miners accompanying him, Paul Henry and Robert Maust, went down into the mine and traveled to 4 West. Tr. 105, 239-40. Upon entering the section through the air-locked doors on the track and proceeding inby, the men began to encounter water. Tr. 240-41. Initially using his walking stick, Dickey determined that the accumulation was extensive, deep, mucky, and very difficult to walk in. Tr. 240-41, 243. He took measurements across the entry as he continued out to the track, and determined the muck to be the consistency of pig slop, varying in depth up to 17 inches. Tr. 240-43. Consequently, he put the mine on notice that he would be issuing a withdrawal order. Tr. 243-44. Dickey and Henry, traveling the entry together between crosscuts 24 and 27, then out to the track, took extensive measurements and drew maps that were essentially identical. Tr. 249-50, 109-10. As a result of his observations, Dickey issued 104(d)(2) Order 7082507 at 1:15 that afternoon, withdrawing miners from the face and charging a violation of 30 C.F.R. § 75.380(d)(1), describing the violation as follows:

The intake escapeway on the 4 West section is not being maintained in safe condition to always assure passage of anyone, including disabled persons in that, there was an accumulation of black water and mucky water which measured 17 inches deep and extended for a distance of approximately 420 feet in length from just outby No. 24 crosscut to just outby No. 27 crosscut. This escapeway could not be traveled safely by miners on this section due to this water. There were also numerous large holes under this water at unknown locations which created hazards. These conditions would make travel with an injured miner on a stretcher impossible.

These conditions have existed for approximately 2 weeks and have been listed in the preshift examination record book for at least 1 week without being corrected. Management was aware of this condition and made very little effort if any to correct this condition. There was no visible work being done to correct this condition upon my arrival and discussions with various miners and officials on this section did not reveal any attempts to correct this condition”

Ex. G-9.³

It took Maple Creek approximately 16 hours to abate the condition, by building a six-foot wide bridge over the water, the entire length of the accumulation. Tr. 251-53. Dickey terminated the Order at 5:45 a.m. on August 10, 2001. Ex. G-9 at 3.

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F.R. § 75.380(d)(1) requires that “[e]ach escapeway shall be maintained to always assure passage of anyone, including disabled persons.”

The Commission, in looking to the legislative history of the Act for guidance in ascertaining the requirements for safe passage of miners, has relied upon Congressional recognition of the importance of maintaining separate and distinct travelable escapeways that are maintained in safe condition. *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). Consistent with Congressional intent, section 75.380(d)(1) requires that each escapeway be safely maintained to always allow for passage of anyone. The Commission has also determined that the language of section 75.380(d)(1) is “plain and unambiguous” and imposes on operators a duty to maintain escapeways that satisfy a general functional test of “passability.” *Utah Power & Light Company*, 11 FMSHRC 1926, 1930 (October 1989). In determining the ultimate question of whether the standard has been violated, each case must be examined on its own facts. *Harlan Cumberland Coal Co.*, 19 FMSHRC 911, 916 (May 1997); *Jim Walter Resources, Inc.*, 16 FMSHRC 1264, 1268 (June 1994).

_____The parties have stipulated that the water accumulation in the primary escapeway on August 9, 2001, varied in depth, extended approximately 420 feet, and had existed for approximately two weeks. Stips.10, 11. There is disagreement, however, as to whether the condition of the escapeway, between crosscuts 24 and 27, permitted safe travel for all miners. Maple Creek takes the position that the cited area was passable, since miners on every shift

³ Maple Creek’s “D chain,” not challenged by Respondent, began with 104(d)(1) Citation No. 7082131, issued on June 28, 2001, and 104(d)(1) Order No. 3670250, issued on June 29, 2001. Ex. G-12; tr. 801.

passed along the cow path, traveling to and from the face, and that a stretcher could have been carried through the escapeway. Resp. Br. at 4-5. It argues that it is in a constant battle with water in the mine and that, in its judgment, the cited accumulation did not pose a hazard. Furthermore, the company maintains that an injured miner could have been transported through the primary escapeway on a scoop rather than a stretcher, and that the return entry and beltline were accessible alternative routes.

The Secretary presented the testimony of several witnesses to establish the obstructed condition of the primary escapeway.

Inspector Dickey testified that the consistency of the accumulation was a mucky, sloppy mix that was difficult to walk in. Tr. 242-43; ex. G-10. He justified his reason for concluding that the water created a likelihood of a disabling injury by explaining that it was impossible to see the bottom of the entry through the thickness and depth of the muck, and that a miner could “twist an ankle, a leg, a hip, break a bone, tear a tendon, injure their back . . . a number of things that can happen to them just from walking through an area like this that contains this type of holes and other obstructions on the mine floor.” Tr. 257-58. Dickey characterized the condition that he encountered on 4 West as “one of the wors[t] conditions I had ever seen an escapeway in . . . any coal mine since I’ve been inspecting. I mean this was awful. There was absolutely no excuse for it . . .” Tr. 259.

Robert Maust was a continuous miner operator on the 4 West section during the period in controversy. Tr. 99. Maust testified that the water on the section had existed for close to a week prior to Dickey’s inspection, that he had no recollection of the water level receding during that time, and that the miners on the day shift had complained to section foreman Alvy Walker, to no avail. Tr. 104, 111, 134-35; ex. G-4. In fact, Maust stated, he had complained about the water to his safety committeeman. Tr. 131. Maust described the water on the section as mucky, and estimated it to have spanned 400 feet between crosscuts 21 to 24, from rib to rib for half that distance. Tr. 99-100, 117. Where the water reached the ribs, he stated, it was about 6 inches deep, except for where there were holes in the bottom. Tr. 119. He testified that his crew, including the foreman, would get to the working face each morning by traveling by car to crosscut 15 or 16 where the track ended, then walking 12 blocks or so inby to crosscut 30. Tr. 100-02. According to him, “there was only one way to get by there was just a little patch up along the rib. And you had to watch because your foot would slide down into one of the holes or into the water. And it wouldn’t be very pleasant. Some places it would be over your boots . . .” Tr. 103. Maust traveled with Dickey and Brown on August 9. He testified that when the inspection team came upon the water, he, Maust, walked along the rib, while Dickey walked through the center of the escapeway and stepped in several holes where the water level was over the top of his 15-inch boots. Tr. 107-08, 114-17. It was after Dickey took measurements of the water with a folding ruler, Maust stated, that he issued the withdrawal order. Tr. 108-09. Maust maintained that he had slipped in the mud a few times. He opined that it would not have been possible to carry a stretcher along the rib, and it would have been very difficult to have carried it through the middle of the escapeway because of the slippery conditions. Tr. 121-23.

Roof bolter operator John Gargala worked the midnight shift under foreman Greg Miller between July 30 and August 9. Gargala testified that miners had been dealing with water accumulation in the 4 West track entry for better than a week, and that it appeared to stay at the same level. Tr. 148-51; ex G-5. By his estimation, at the end of the shift on the morning of August 9, the water was roughly 17 inches deep, from rib to rib, causing the miners to walk along the rib in order to avoid water higher than the top of their boots. Tr. 137-38, 146. Gargala related that he sustained injuries to his wrist and back when he slipped and fell at the end of his shift. Tr. 138-39; ex. 16.

Trackman Gerald Kosco was a day shift roof bolter on 4 West during the relevant period. He testified that, for a week or more, the water at the end of the track was a slippery slurry that prevented viewing the bottom and stretched two or three blocks, rib to rib. To get to and from the face, he stated, the crew would walk along the cow path in order to avoid slipping and falling in the deep part of the water. Tr. 153-56; ex. G-6. He estimated the water to have varied in depth from 6 to 14 inches. Tr. 176-77. According to Kosco, miners complained daily to Alvy Walker, who responded that Maple Creek was working on it. Tr. 157. Kosco testified that he did not see the water go down during the time the miners were required to walk through it. Tr. 157-58. He described the uneven bottom as littered with coal that had sloughed off the ribs, posing a tripping hazard. Tr. 158-59. In his opinion, a stretcher could not have been carried along the cow path, and it was improbable that it could have been carried through the primary escapeway, because of the deep water and its slippery condition. Tr. 151-52.

Miner operator John Baluh worked on the midnight shift on 4 West between July 30 and August 9. He testified that, for at least a week, his crew was required to walk through water accumulation on the section that was "black and dirty, muddy," extended about three blocks, and varied in depth from 6 to 8 inches along the cow path to as high as his 25-inch boots. Tr. 197-201, 207, 209; ex. G-7. He stated that the water level stayed the same during that period, and described the bottom as having ruts made by equipment running through the area. Tr. 200, 203-04, 206, 208. The uneven bottom, he concluded, invisible through the muddy water, made for slippery walking conditions. Tr. 202. According to Baluh, he and other miners complained about the condition. Tr. 202-03. Finally, Baluh opined that the cow path was too narrow to accommodate men wielding a stretcher. Tr. 213.

Richard Cline, also testifying for the Secretary, expressed a contrary opinion of the conditions in the track entry. He testified that, as shift foreman, he was in charge of the entire mine and responsible for visiting every working section each day. Tr. 586. He stated that he was called to 4 West on August 9, because of Dickey's Withdrawal Order, but was unable to recall what the conditions looked like on that day. Tr. 582-83, 587, 590; ex. G-15. According to Cline, if the water level was not over the top of his 16-inch boots, he would not consider the accumulation to be hazardous. Tr. 598. In his opinion, a stretcher could have been carried safely through the primary escapeway under the cited conditions and, if a miner were severely injured, he would have hauled him on a scoop. Tr. 599-602.

Maple Creek's description of the water accumulation between crosscuts 24 and 27 did not vary substantially from the Secretary's, but the company's witnesses presented their view that the area was passable and not hazardous.

Steve Brown was fill-in section coordinator on August 9. He testified that he had traveled along the rib on 4 West to the face, where he learned from Inspector Dickey and face boss Alvy Walker that the section had been shut down. Tr. 491, 499-500, 508-09. Brown opined that he could have carried a stretcher through the cited area, but added that he would have used the alternate escapeway before traveling through the deep water on the track entry. Tr. 497-98. When asked whether he could have carried a disabled miner through the primary escapeway, Brown asserted that he would have transported the miner on a scoop. Tr. 506-07. Finally, Brown opined that, as long as the secondary escapeway is open, water, even slurry, is not a concern in the primary escapeway; it would have to be waist deep – two to three feet high – in his judgment, before he would consider it hazardous. Tr. 550-54.

Day shift section foreman on 4 West, Alvy Walker, explained that water constantly percolates from the bottom into the mine, and settles in the cited area because of a gradual elevation drop. Tr. 632-33, 664-65. In its best condition, he testified, there are two to three inches of water in the area; it is never dry. Tr. 665. Walker stated that he and his crew traveled along the right rib to the working face on the morning of August 9. He acknowledged that the bottom could not be seen along the affected area because it was "slurried up," and that there were holes in the mine floor. Tr. 659-60. He personally observed water seeping from the return back into the track entry, and sent two members of his face crew to repair one of the broken pumps in the return. Tr. 649-52. He stated that he learned of the Order when Inspector Dickey informed him at the face. Tr. 621-22. According to Walker, the cited area was "walkable," he had traveled through it numerous times and, because the entry was 9 ½ feet high, the water did not pose a hazard. Tr. 629-30. Walker opined that he would have put a miner injured at the face on a scoop, although a stretcher could have been safely carried through the muddy area with no problem. Tr. 630-31, 645, 660-61. He also acknowledged that he had received complaints from miners about the water. Tr. 645.

Production coordinator Greg Miller was the midnight shift section foreman on 4 West during the pertinent period. He testified that Maple Creek had been managing water on 4 West since mining had begun on the section. Tr. 678-79. He would not give his opinion as to the depth of water that would constitute a hazard since, he asserted, it is a judgment call that depends on the variable conditions surrounding the accumulation and the availability of the secondary escapeway. Tr. 689-94. He was adamant that the regulation does not specify to what degree water constitutes a hazard. Tr. 686, 692, 694, 711, 728-29. He testified that on August 9, he and his crew traveled together to and from the working face. Tr. 670, 674-75. In his opinion, carrying a stretcher or running a scoop through the accumulation from crosscuts 24 to 27 would not have been a problem. Tr. 671.

As Maple Creek's assistant mine foreman on August 9, Paul Henry accompanied Inspector Dickey during his inspection of the mine. He testified that he did not consider the water accumulation on 4 West between crosscuts 24 and 27 to be hazardous, because the miners were able to travel along the right rib. Tr. 734-35, 794; ex. G-17. He did state, however, that he was not pleased with the condition, which he described as a very thick, dark slop, from rib to rib in some areas, caused by equipment tramming through the travelway mixing fire clay and coal with the water. Tr. 741-42, 747, 770-71, 776. When asked whether a disabled miner could have been transported through the area, he responded that miners would have made it through, because they are pretty resourceful. Tr. 735. On cross-examination, Henry estimated that it takes two hours to walk through the primary escapeway from the face to the mouth of the mine, and conceded that the cited condition would have slowed a person down. Tr. 786-88.

A review of the record indicates that the primary escapeway on the 4 West section was not maintained in a safe condition that would permit passage of all persons. From the time of Walker's Compliance Order to Dickey's Withdrawal Order, despite pumping efforts alleged by Maple Creek, work crews were routinely forced to use the narrow cow path along the right rib, in order to avoid the 6-17 inch deep muck accumulated between crosscuts 24 and 27. It is not arguable that the primary escapeway was the fastest and safest way to evacuate the mine in an emergency, and the muck created a slip and fall hazard that precluded swift passage. It is obvious that the cow path was too narrow to accommodate a team with a stretcher. Moreover, negotiating a stretcher through the slippery, rutted bottom in the center of the escapeway would have endangered the safety of the carriers and delayed medical attention to an injured miner. Therefore, it is clear that the primary escapeway did not satisfy the passability test in *Utah Power*. I have taken into account earnest testimony from Maple Creek that its miners would make their way through any condition in order to get an injured coworker out of the mine. This level of brotherhood makes it all the more important that miners not be confronted with risking life and limb to come to the aid of each other. I reject Maple Creek's argument that a scoop could have been used to transport a disabled miner through the cited area, as no evidence has been presented that this is a safe means of transporting persons with injuries. In fact, Inspector Dickey suggested otherwise. Tr. 302-04. Because accessibility of the return entry and the beltline does not excuse Maple Creek's duty to maintain each escapeway in the safe, passable condition contemplated by the standard, I reject the company's reliance on those alternatives to the primary escapeway and find that section 75.380(d)(1) was violated, as alleged.

B. Significant and Substantial

Inspector Dickey determined that the violation was "significant and substantial" ("S&S"). Section 104(d) of the Act designates a violation S&S when it is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine or safety hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*,

3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’d* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

Applying the *Mathies* criteria to this case, I have found a violation and that Maple Creek’s failure to maintain the primary escapeway in passable condition deprived miners of the most effective means of evacuation and created a slip and fall hazard. Considering that fire or explosion is a constant danger in continued normal mining operations, it is apparent that there was a reasonable likelihood that the hazard contributed to – impeding swift evacuation – would result in injuries of a reasonably serious nature, ranging from sprains and strains to death. The record indicates that Maple Creek had been experiencing methane and ventilation problems in the mine when Dickey issued the Withdrawal Order. Tr. 370-73,789-90; ex. G-17. Furthermore, at the end of the midnight shift before the Order was issued, John Gargala had slipped and fallen in the cited area, sustaining a sprained wrist and strained back. Tr. 138-42. It is clear, then, that the availability of alternative escapeways does not moderate the S&S nature of the violation, especially since the primary escapeway is the fastest route out of the mine and is ventilated with intake air. Tr. 186. Accordingly, I find that the violation was S&S.

C. Unwarrantable Failure

“Unwarrantable failure” is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991); see also *Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test). The Commission has recognized the relevance of several factors in determining whether conduct is “aggravated” in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, the operator’s efforts in eliminating the violative condition and, whether the operator has been put on notice that greater efforts are necessary for compliance. See

Consolidation Coal Co., 22 FMSHRC 328, 331 (March 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994). The Commission has also considered whether the violative condition is obvious, or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (September 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44) (August 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (August 2001) (citing *Consol*, 22 FMSHRC at 353).

_____ Pennsylvania Mine Inspector Walker testified that on July 30, he encountered water accumulation on the 4 West section in the intake escapeway between crosscuts 24 and 25, rib to rib for approximately 40 to 50 feet, varying in depth up to 12 inches. Tr. 34-36. Ten days later, on July 9, MSHA Inspector Dickey encountered water in the same location, extending from crosscut 24 and 27, for approximately 420 feet. Stip. 10. The parties have stipulated that the water accumulation had existed in varying amounts for approximately two weeks prior to Dickey's inspection. Stip. 11. It is clear, therefore, that over the ten-day period between the state and federal inspections, the water accumulation had advanced two crosscuts and, when cited by Dickey, was extensive.

_____ Maple Creek contends that it had been actively maintaining its escapeways by use of a pumping system that utilized air pumps and a series of knee high sump pumps.⁴ Tr. 466-68. According to Steve Brown, four air pumps had been installed on 4 West, sometime in July 2001 after Walker's Compliance Order, to draw water off different areas of the section. He testified that one pump was situated at crosscut 26 on the beltline, another was at crosscut 26 in the return, and two pumps were situated at crosscut 27 in the return. See Tr. 386-410. On August 9, knee high sump pumps had been built at crosscuts 5, 12 and 19. Tr. 399-400. Brown testified that each shift has an outby boss and two-man crew whose sole duty is to "de-water" the section. Tr. 466-68. He stated that pumping and pump maintenance was a constant in the mine, and that each shift had been battling the water on the section from its inception. Tr. 421-68; ex. R-3. Brown maintained that, the morning following Walker's Compliance Order, he observed that the water had been pumped off the section. Tr. 504-05. So, too, had water been pumped off the section during the midnight shift preceding Dickey's inspection, according to Brown, but two air pumps had gone down during that shift, causing the water to run back onto the track entry; outby crews on the midnight and day shifts had been working on the pumps in the return. Tr. 411-19; 488-92. For the reasons that follow, I reject these assertions and conclude that, from the time of the Compliance Order to the Withdrawal Order, the water in the cited area remained at a level that continuously prevented safe travel by all persons through the primary escapeway.

⁴ Brown explained that knee high sump pumps consist of walls built knee high, projecting 8 to 18 feet from concrete stoppings, and extending across entire widths of crosscuts. They are designed to collect water pumped off the section. Electric pumps relay stored water from knee high to knee high in sequence, then to the outside main discharge line. Tr. 395-97.

Maple Creek relies on its construction and preshift books to demonstrate its diligence in addressing the water accumulation on 4 West. An examination of the preshift records, from July 30 to August 9, reveals scattered notations of water accumulations in the track entry which, presumptively, were significant enough to merit attention in the judgment of the examiners. Maple Creek argues that intermittent recording of water in the preshift book indicates periods when the water had been removed from the section or pumped down significantly. Had it not, it contends, the accumulation that Dickey encountered would have been much higher. Tr. 486-87. I reject this argument for two major reasons, and conclude that the water consistently remained at a high level. First and foremost, the collective testimony of management officials that the water, at its peak, constituted a mere “condition” rather than a hazard, causes me to be skeptical that the chronic water problem in the section was approached with the seriousness that it deserved. In fact, Brown testified that the accumulation would have to have been waist high before he would have considered it hazardous and, if the secondary escapeway were open in that situation, he would not worry about it. Tr. 550-53. The second reason is that I fully credit the testimony of the miners who traveled daily to and from the working face through the cited area, that the “muck” had consistently remained at a high level that prevented them from walking through it, for at least a week, possibly two. Indeed, preshift records indicate high water on the track entry at crosscuts 24 to 26 at approximately 1:00 p.m. on July 31, only a few hours after Maple Creek had been directed to abate the Compliance Order, and claims to have done so. Tr. 526-30. Even Alvy Walker testified that, on August 9 at 9:00 a.m., the conditions encountered by his crew were the same as they had been throughout the week. Tr. 642-43.

In reaching this conclusion, I have considered the evidence that running and maintaining the pumps on the section was a component of outby work performed on every shift. As Dickey pointed out, however, with Brown’s concurrence, air pumps do not have the capacity to pump slurry. Tr. 325-26, 402, 481. This may explain why Dickey did not observe any pumping during his inspection, and Maple Creek did not call his attention to any activity, even when he issued the Withdrawal Order shutting down the section. For Maple Creek to have operated its air pumps without clogging them up, clear water would have had to have been pumped from somewhere other than the track entry, where scoops constantly churned up the bottom. The evidence as a whole compels me to conclude that the pumping system employed by Maple Creek, at least from the time of Walker’s inspection to Dickey’s Withdrawal Order, was woefully ineffective. Furthermore, Maple Creek knew that its equipment could not handle the muck on the section. Simply stated, Maple Creek failed to control the water condition in the primary escapeway, especially in light of the 12-inch accumulation that it was duty bound to abate after the Compliance Order had been issued.

As has already been noted, Maple Creek constantly battles water in the mine. While the frequency of preshift notations of water in the track entry, and construction book entries of pump repairs should have put Maple Creek on notice that greater effort to eliminate the hazard was necessary, it was made abundantly clear by Walker’s Compliance Order. Ten days later, however, despite complaints from its employees, Maple Creek allowed the condition to expand two crosscuts.

Muck so thick that it is difficult to walk through, 12 to 17 inches deep in places, existing for two weeks in the primary escapeway is, of course, obvious. It is dangerous as well. Inspector Walker observed a miner slip and fall, and John Gargala injured his wrist and back when he also slipped and fell in the area. Obstructed evacuation of a disabled miner on a stretcher could delay critical medical treatment, subject the injured party to further injury if the stretcher were to fall into the muck, and cause sprains, broken bones or even worse to the carriers. In the case of fire or explosion, impeded evacuation through the fastest route out of the mine could result in death. I conclude, therefore, that Maple Creek's actions to abate the Compliance Order and control the water on the track entry reflect a level of indifference and serious lack of reasonable care that constitutes an unwarrantable failure to comply with the standard.

D. Section 110(c) Liability

Section 110(c) of the Act provides that, whenever a corporate operator violates a mandatory health or safety standard, an agent of the operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). In determining liability under section 110(c), the inquiry is whether the corporate agent knew or had reason to know of the existence of the violative condition. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1148 (citing *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997)). In order to establish liability under section 110(c), the Secretary need only prove that an individual acted knowingly, not that the individual knowingly violated the law. *Id.* (citing *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *Unites States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Id.* (quoting *Kenny Richardson*, 3 FMSHRC at 16). Section 110(c) liability is based on aggravated conduct that constitutes more than ordinary negligence. *Id.* (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

1. Steve Brown

I have made a finding that Maple Creek violated section 75.380(d)(1), and there is no dispute that Steve Brown was Maple Creek's agent when the violation occurred. As section coordinator, Steve Brown oversaw operations on 4 West, and was responsible for pumping activity and pump maintenance on the section. He testified that, from a production standpoint, he made walking examinations of the section at least once, sometimes twice daily. Tr. 482-84. He reviewed preshift and construction logs and, on occasion between July 30 and August 9, conducted preshift examinations of 4 West. Brown traveled with Inspector Walker during the July 30 state inspection, and was responsible for abating the Compliance Order issued that day. Tr. 535-36. Whatever active pumping took place by midday on July 31 was insufficient to abate

the condition and, by August 9, it had worsened. Brown used the cow path to travel through the cited area that day. Tr. 553-34. By his own testimony, he was aware that the air pumps set up to address the problem were incapable of pumping the muck churned up by the scoops operating in the escapeway. Despite the Compliance Order, Brown did not consider the area hazardous because the muck was below 2 ½ feet deep and the secondary escapeway was available. Had he known that John Gargala had injured his wrist and back, he would not have acted differently because, he testified, “I fall four times a day on average.” Tr. 564-65. Clearly, the Compliance Order put Brown on notice of the violative condition ten days prior to the Withdrawal Order. His failure to take expeditious, effective remedial action to protect the safety of miners who traveled daily through the primary escapeway, as well those miners who would have to evacuate the mine in an emergency, amounted to an aggravated lack of care that was more than ordinary negligence. Therefore, Brown is individually liable under section 110(c) of the Act.

2. Alvy Walker

Alvy Walker was day shift section foreman in charge of an 11-man production crew on 4 West and, therefore, Maple Creek’s agent. He typically traveled with his crew to and from the working face, which necessitated walking along the cow path in the cited area, in order to avoid the high accumulation of muck. There were occasions between July 30 and August 9 that Walker conducted the preshift examination of the area. He conducted the preshift examination on August 8, for example, recording water in the 25 to 27 crosscut on the track. Tr. 643; ex. G-8. Walker did not consider the condition of the primary escapeway to be hazardous, however. Tr. 639. He testified that, in order to preclude passage, the water would have to be 20 inches deep, rib to rib. Muck is a hazard, in his opinion, when you cannot move your legs through it. Tr. 635. Walker also stated that he had evacuated injured miners in worse conditions in other mines, and that the alternate escapeway was available on 4 West. Tr. 660-62. He, too, expressed his belief that slips and falls are a normal consequence of working in a wet mine. Tr. 637. He did acknowledge, however, that he had received complaints about the muddy conditions. Tr. 645-46. Clearly, Walker had actual knowledge of the violative condition and failed to effectively remedy the chronic water accumulation problem in the primary escapeway to ensure safe passage of all miners. Therefore, Walker demonstrated aggravated conduct that is more than ordinary negligence, and he is individually liable under section 110(c) of the Act.

3. Greg Miller

Greg Miller was the section foreman on the midnight shift on 4 West, and an agent of Maple Creek. He and his crew traveled as a team through the primary escapeway to and from the working face on a daily basis. Tr. 674-75, 696. He was well versed on the relay pumping system used on the section, and conducted some of the preshift examinations of the primary escapeway between July 30 and August 9. Tr. 695-96. In terminating the Compliance Order, Inspector Walker lists Brown and Miller as having reported that the water had been pumped off the section, although Miller did not recall making such report. Ex. G-1; tr. 722-23. He testified that he did not recall whether miners had complained to him about the wet

conditions, but did not deny that they could have done so. Tr. 675-77. He also did not deny that he reported to the safety office John Gargala's slip and fall injury that had occurred on August 9. Tr. 703-07; ex. G-16. He acknowledged that he was "under obligation in [his] area to keep everything under compliance, whether it be water, roof, ribs, whatever." Tr. 714. He was adamant, however, that the muck accumulated between crosscuts 24 and 27 was not a hazard. He emphasized that, since the regulation is non-specific, what depth of water constitutes a hazard is a judgment call. According to him, Dickey made a bad one on August 9. Tr. 685-86, 689. In fact, Miller stated, if he had to, he could get through water that is roof high. Tr. 690. It is obvious that Miller knew of the violative condition and his failure to take expeditious, effective action to maintain the primary escapeway in safe, passable condition constituted aggravated conduct. Therefore, Miller is individually liable under section 110(c) of the Act.

IV. Penalty

A. Maple Creek

While the Secretary has proposed a civil penalty of \$9,500.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Maple Creek is a large operator, with a two-year history of 18 violations for the standard at issue, which I find to be significant. Stip.13; ex. G-13. As stipulated by the parties, the proposed penalty will not affect Maple Creek's ability to remain in business. Stip 6. It is also my finding that Maple Creek demonstrated good faith in achieving rapid compliance, after notification of the violation.

The remaining criteria involve consideration of the gravity of the violation and Maple Creek's negligence in causing it. Respecting gravity, I find that failure to maintain the primary escapeway in condition that permits safe, unobstructed, swift passage of all persons, especially in emergencies where lives may be at stake, is a very serious breach of duty. I also find that Maple Creek's section coordinator and foremen, despite pumping efforts, were highly negligent in failing to effectively remedy and control the water accumulation in a timely manner, especially because the Compliance Order had put them on notice of the violative condition ten days before the instant Order was issued. Furthermore, because the pumping conducted by the company between July 30 and August 9 was grossly inadequate, I do not consider those efforts to be a mitigating factor.

Accordingly, having considered Maple Creek's large size, significant history of violations, seriousness of the violation, high degree of negligence, good faith abatement and lack of any mitigating factors, I find that a penalty of \$7,500.00 is appropriate.

B. Steve Brown

Applying the *Sellersburg* penalty criteria, by analogy, to individuals, the factors considered are an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, the individual's ability to pay, the individual's history of violations, and negligence. Findings on gravity of the violation and good faith abatement rest on the same record evidence used to assess the operator's penalty for the violation underlying the section 110(c) liability. See *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997).

The parties have stipulated that Steve Brown has the ability to pay the \$1,000.00 penalty proposed by the Secretary. Stip. 7. No evidence has been presented that Brown has a history of previously violating the standard. As section coordinator on 4 West and responsible for outby maintenance, Brown knew of the violative condition and was highly negligent in failing to expeditiously remove and control the water accumulation in the primary escapeway. As has previously been discussed, the violation was serious and Maple Creek abated it in good faith. Therefore, I find that a penalty of \$700.00 is appropriate.

C. Alvy Walker

The parties have stipulated that Alvy Walker has the ability to pay the \$500.00 penalty proposed by the Secretary. Stip. 8. No evidence has been presented that Walker has previously violated the standard. As day shift section foreman on 4 West, Walker knew of the water accumulation, traveled with his crew through it, and failed to expeditiously remedy the hazardous condition. Given the seriousness of the violation and Walker's indifference that amounted to aggravated conduct, I find that he was highly negligent. Therefore, I find that a penalty \$350.00 is appropriate.

D. Greg Miller

The parties have also stipulated to Greg Miller's ability to pay the \$500.00 penalty proposed by the Secretary. Likewise, there is no record evidence of a history of previous violations. As 4 West section foreman on the midnight shift, Miller also knew of the water accumulation, traveled with his crew through it, and failed to expeditiously remedy the condition, as did Brown and Walker. Miller also demonstrated aggravated conduct, in light of the seriousness of the violation, and I find that he, too, was highly negligent. Therefore, I find that a penalty of \$350.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that Order No. 7082507 is **AFFIRMED**, as issued, and that Respondent Maple Creek Mining, Incorporated **PAY** a civil penalty of \$7,500.00, within 30 days of this Decision.

Further, it is **ORDERED** that Respondent Steve Brown **PAY** a civil penalty of \$700.00, that Respondent Alvy Walker **PAY** a civil penalty of \$350.00, and that Respondent Greg Miller **PAY** a civil penalty of \$350.00, within 30 days of this Decision. Upon receipt of payment, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge
(202) 434-9987

Distribution: (Certified Mail)

Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630 E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Marco M. Rajkovich, Jr., Esq., Noelle M. Holladay, Esq., Wyatt, Tarrant & Combs, LLP, 250 W. Main Street, Suite 1600, Lexington, KY 40507

Leon J. Moscalink, Jr., Mine Safety & Health Committee, Local Union 1248, United Mine Workers of America, 609 Keystone Street, Greensburg, PA 15601-4329

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