FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

June 17, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2009-1067 A.C. No. 46-07273-178983-01
v.	:	
INDEPENDENCE COAL COMPANY, INC., Respondent.	:	Mine: Justice #1

DECISION

Appearances: Ben Chaykin, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Carol Marunich, Dinsmore Shohl LLP, Charleston, West Virginia, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Independence Coal Company Inc., ("Independence") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The case involves one citation issued by MSHA under section 104(d) of the Mine Act at the Justice #1 mine operated by Independence Coal Company, Inc. The parties presented testimony and documentary evidence at the hearing held in Charleston, West Virginia on May 5, 2010. At the conclusion of the hearing, the parties made oral arguments, and a decision was rendered from the bench. This decision incorporates the decision issued from the bench, and adds to that decision. There is some minor editing of transcript pages 226 through 249, which is incorporated into this decision and set out below. For the reasons stated on the record, and as further explained below, Citation No. 8073156 is affirmed as issued and Independence Coal is ordered to pay the proposed penalty of $63,000.00.

The parties entered into certain stipulations that were accepted by the Court and entered as Exhibit 1 in the case.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Independence Coal Company, Inc., operates the Justice #1 Mine (the "mine"), an underground, bituminous, coal mine in Boone County, West Virginia. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Independence is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Ct. Ex. 1.

> In the matter of Independence Coal Company, Docket WEVA 2009-1067, I will enter the following order:
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> This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Independence Coal pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, the Mine Act. The case involves one citation issued by MSHA under Section 104(d) of the Mine Act at the Justice No. 1 Mine operated by Independence Coal. The parties presented testimony and evidence at a hearing held in Charleston, West Virginia, on May 5th, 2010.
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> At the beginning of the hearing, the parties introduced certain stipulations that were accepted by the Court and entered as Court Exhibit 1, which will be made a part of the file. These stipulations relate primarily to the jurisdictional issues in this case. Independence Coal Company operates an underground bituminous coal mine, the Justice No. 1 Mine[, located in] . . . Boone County, West Virginia. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration pursuant to Section 103(a) of the Act. As I mentioned, the parties stipulated that Independence is an operator as defined by the Act and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.

(Tr. 227-228).

On January 20, 2009, John Crawford, an MSHA inspector, conducted a methane spot inspection at the Justice No. 1 mine. The mine is on a five day spot inspection due to high liberation of methane. Crawford was accompanied during most of his inspection by Greg Neil, the mine foreman. While at the mine, Crawford issued the (d)(1) citation at issue.

a. Citation No. 8073156

Inspector Crawford issued Citation No. 8073156 to Independence for a violation of Section 75.380(d)(1) of the Secretary's regulations. The citation alleges that:

> [t]he secondary escapeway on the no. 9 track at Break 18 is not maintained in a safe condition to assure passage of anyone including disabled persons. Water covers the entry for approximately 150 feet (modified to 332 feet), rib to rib, and was measured 15 inches deep in one area. The water is dark and cloudy in color and not transparent. The track, ties, loose rock and coal under the water make travel perilous. This condition is obvious, extensive, has existed for numerous shifts and was known by the foreman and examiners, who recorded it as "water on track". Water marks on the mine ribs measure more than 12 inches above the current water levels. This is more than ordinary negligence and the operator displayed aggravated conduct in allowing persons to work with only one escape way. This is unwarrantable failure to comply with a mandatory standard. Persons were in the area to examine, set pumps and check the pumps. Crews were removed from the mine until two travelable escape ways were provided.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that forty persons would be affected, and that the violation was the result of reckless disregard on the part of the operator. The Secretary has proposed a civil penalty in the amount of $63,000.00.

1. The Violation

John Crawford, an MSHA mine inspector since April 2007, has worked in the mining industry since 1974. Crawford is an inspector in the Madisonville MSHA office.

Inspector Crawford testified that on January 20, 2009, prior to going underground, he was reviewing records of the Justice #1 mine when he overheard comments by Greg Neil, a mine foreman, about water in the escapeway. The primary escapeway in this mine is a great distance from the secondary and is very narrow, steep and wet. The second escapeway, the subject of the citation at issue, contains a track for travel along the escapeway.

When Crawford arrived at #9 headgate, he looked outby and observed water covering the escapeway from rib to rib. The water was cloudy, dark and non-transparent, obscuring the bottom. This particular entry is a track entry with an uneven bottom. The entry floor has rails, ties, and blocks to level the track, as well as loose coal and rock. Crawford credibly testified that he measured the depth of the water to be 15 inches, but that it got deeper as the escapeway progressed. He felt it was not safe to go on traveling through the water because he couldn't see what he was walking on. He originally estimated that the water went on for 150 feet, but later learned that it extended for more than 300 feet. There were higher water marks on the wall, i.e.,

at one point a water mark was more than 12 inches above the actual water level at the time of the inspection.

Crawford explained that it was not only unsafe to walk in that escapeway, it was also not safe to drive anything in that depth of water since the water could enter into the electrical part of the man-trip, cause a short, and result in miners being stranded in even deeper water while the vehicle blocked the passage of other miners behind it.

Once the citation was abated, and the water removed, Crawford was better able to observe the area. He observed the condition of the roadway and could see blocking of track, track ties and the uneven mine bottom. Further, he recalled areas that had an eight-inch ledge and blocked the outside rails. The escapeway sloped downhill after passing the area where he took the 15-inch water depth measurement and then gradually sloped back uphill. Crawford could see that the downhill portion was deeper than the 15 inches he measured. Neil explained that the deeper area is where water is pumped from and, in some instances, held when pumping from other parts of the mine.

The Respondent argues that there is no violation because miners would use a mantrip to get out of this area and would not have to walk on the uneven bottom. Further, it argues that there is another escapeway, and that the condition was not as bad as Crawford described. Neil testified that he could walk the area without stumbling or falling. Neil also testified that miners are trained in an emergency to move slowly and not panic and, therefore, they could pass through this area.

I credit Crawford's testimony that the area was not passable, especially in an emergency. Since miners would need to move quickly through the area, the water and obstructions would cause miners, especially stretcher bearers or others assisting disabled persons, to slow their egress, to slip and fall, or drop the stretcher, thereby hindering their ability to escape at all. I find that the escapeway was not maintained in a safe condition and that it would be difficult for miners, particularly disabled miners, to travel the escapeway. For those reasons, and reasons that follow, I find that a violation is established. At hearing, I read the following findings into the record:

> On January 20th, 2009, Inspector John Crawford conducted a methane spot inspection at the mine. This was a five-day spot inspection, which is the highest level due to the methane emissions at the Justice No. 1 Mine. He was accompanied during his inspection by Greg Neil, the mine foreman. While at the mine, Crawford issued the (d)(1) citation at issue here, which is Citation No. 8073156. Inspector Crawford issued the citation to Independence Coal Company for a violation of 75.380(d)(1) of the Secretary's regulations.

The citation alleges that the secondary escapeway on the No. 9 track at break 18 is not maintained in a safe condition to assure passage of anyone, including disabled persons. The inspector goes on to explain and testified that the water covered the entry for approximately 100 feet as he could initially see it. Later when he was able to measure it, he determined that it covered the entry for 332 feet, approximately, rib to rib and was measured 15 inches deep in one area. The water was dark and cloudy in color, not transparent. The track, ties, loose rock, and coal under the water made travel perilous. The condition is obvious, extensive, has existed for numerous shifts, and was known by the foreman and examiners who recorded it as "water on track." Watermarks on the mine ribs measured more than 12 inches above the current water levels.

This is more than ordinary negligence, and the operator displayed aggravated conduct in allowing persons to work with only one escapeway. This is an unwarrantable failure to comply with the mandatory standard. Persons were in the area to set pumps, examine, and check the pumps. Crews were removed from the mine until two travelable escapeways were provided.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that 40 persons would be affected, and that the violation was the result of reckless disregard on the part of the operator. The Secretary initially proposed a civil penalty in the amount of $63,000.

Mr. Crawford testified that he has been a mine inspector since April 2007. He worked in the mines since 1974. He's worked in various positions in underground coal mines and for a time was an EMT and paramedic.

Inspector Crawford testified that he went to the mine on January 20th, 2009. While he was looking at the books or the records, he overheard Mr. Neil talking about water in the escapeway. He talked a little bit about how narrow the primary escapeway is, that it's wet and steep. The area he issued a citation is the secondary escapeway.

Mr. Neil and Inspector Crawford went to the No. 9 headgate area, and as he looked outby, he saw water rib to rib -- Inspector Crawford did. The water was cloudy, dark, not

transparent. He could not see the bottom. This is a track entry, so it has rails, ties, blocks to level the track, coal, rock, and an uneven bottom.

He credibly testified that the depth was 15 inches in some places. He walked into the water until he thought it was no longer safe to go on. He measured it with a ruler and measured it to be 15 inches. He couldn't see under the water that was murky, so he decided to turn around and that it was not safe to go on through the escapeway at that time. He estimated the water to extend for about 150 feet, and, as I said, he later modified that to 332 feet when he had a chance to actually measure it. At one point, he noted a watermark on the wall that indicated the water level had at one time been approximately 12 inches higher than it was . . . [at the time of his inspection.]

Inspector Crawford testified that it was not safe to take anything into the water, to not walk in it, or to take the mantrip, as the water could enter into the electrical parts of the mantrip and cause a short, thereby causing the mantrip not to work and become stuck in the escapeway.

Inspector Crawford noticed that there was no action taken to remove the water, so he removed the crews from the mine. The fire boss shut off the water feeding the area and went to get a pump or a different pump. It took about four hours to remove the water from the entryway. At that point, he returned to the area and measured it to be 332 feet.

He observed the condition on the roadway and could see -- once the water was gone, he again observed the condition of the roadway, and he could see blocking of track, track ties, the mine rough bottom, and remembers in areas that there had been an 8-inch ledge blocking outside of the rails. The area went downhill at a location past where he took the 15-inch measurement, and then it went back uphill. At the downhill point, it was deeper than the 15 inches where there is a low spot.

The water accumulations created a tripping and stumbling hazard. If anyone had traveled the area, they could get fractures from falling, dislocation. If they struck their head, they could become unconscious and it would be fatal. If they were carrying an injured miner on a stretcher, that would multiply the risk. Inspector Crawford testified that the mine operator is required to

maintain the escapeway for travel of all persons and considered this to be a violation. He determined that it was unsafe to travel through the escapeway. 75.380(d)(1) requires that each escapeway shall be maintained in a safe condition to always assure passage of anyone, including disabled persons.

Inspector Crawford looked at the water, at the color. He couldn't see the bottom. He understood there were drop-offs, that there were rock, coal, tracks, and a number of tripping hazards under the water that could not be seen by walking in the water. The type of the bottom was rough, and it extended over a long area. This is an area where the roof is about 6 to 7 feet high. The water was rib to rib in many areas. Stumbling and falling is the primary hazard. Carrying a stretcher multiplies the hazard, and escaping in smoke and fire in an emergency, this would be a difficult place to travel. It's not safe for persons during an emergency evacuation.

As Inspector Crawford testified, the slip-and-fall hazard precluded swift passage. It would be difficult at best to negotiate the slippery, rocky bottom with the tracks carrying a stretcher. During an emergency, miners would likely need to move quickly through the area in order to seek safe passage away from what could be a dangerous underground environment. This would slow down the evacuation, if not prevent it altogether. So I credit the testimony of Inspector Crawford and find that there is a violation as he cited and for the reasons that he cited.

[The mine argues] . . . that there is not a violation because there is no hazard, that Mr. Neil traveled the area and didn't see a hazard . . . . He could walk through it, as he did after leaving the inspector. I disagree with Mr. Neil and, based on the testimony of Inspector Crawford, find that the conditions clearly presented a hazard in the escapeway.

There was a lot of testimony about methane behind the seals, ignition sources, and the fact that no other citations were issued that day that contributed to this hazard. However, I'm not required to find that there was the possibility of a methane or other mine fire, because this is an emergency situation and I look to the fact that the standard goes to an emergency, and I look at the emergency conditions in that case.

> I also relied upon several cases that are very similar to this: Maple Creek Mining, 27 FMSHRC 555 (August 2005), and Eagle Energy, Inc., 23 FMSHRC 829 (August 2001). Both are very similar to this case, and in both cases the Commission upheld the violation, the significant and substantial nature of the violation, and the unwarrantable failure. Although, obviously, I base it on the facts of this case, I do rely on the legal conclusions of the Commission in those two cases.
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> I would also mention with regard to the hazard that there was some discussion about evacuation during an emergency, and I certainly -- I understood Mr. Neil's testimony that he had been, in his experience, especially as an EMT -- had to negotiate difficult passages. However, I credit Inspector Crawford's testimony that, in reality, these miners try to escape quickly. If there's smoke in the area, they're disoriented by the smoke.

(Tr. 228-234).

30 C.F.R. § 75.380(d)(1) requires that "[e]ach escapeway shall be . . . [m]aintained in a safe condition to always assure passage of anyone, including disabled persons."

In *American Coal Company,* 29 FMSHRC 941 (Dec. 2007), the Commission held that an operator violates the requirements of Section 75.380(b)(1) to "provide" escapeways when its miners are "substantially hindered or impeded from accessing designated escapeways." In reaching this conclusion, the Commission stated the following regarding the purpose and legislative history of escapeways which is equally applicable to the case here:

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

29 FMSHRC at 948.

This case is very similar to *Maple Creek Mining Inc.,* 27 FMSHRC 555 (Aug. 2005), and *Eagle Energy Inc*., 23 FMSHRC 829 (Aug. 2001), in which the Commission found a violation of 30 C.F.R. § 75.380, where it was demonstrated that miners could not quickly and safely exit the mine in the case of an emergency.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of*

Respirable Dust Sample Alteration Citations, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary has met her burden of proving that, on the day of inspection, the escapeway was not maintained in safe condition. I find that the Secretary has established a violation.

2. Significant and Substantial Violation

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

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

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger associated with persons not being able to evacuate the area safely and quickly during an emergency. Third, I find that, in addition to the risks associated with not being able to safely and quickly evacuate the mine, there is also a slip-and-fall hazard, which can create injuries for anyone walking in the area. Fourth, I find that it is reasonably likely that any injury resulting from the aforementioned hazards would be serious or even fatal.

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

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

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In this case, the significant and substantial element must be considered in terms of an emergency. If there were a fire, smoke would be present, visibility would be poor, dust would be in the air and all lights would more than likely be out. Smoke causes miners to become disoriented and panic. Crawford, who has been in a mine accident, explained that, in an emergency, it is easy to forget the things you have been previously taught to do. When a miner's sense of sight is rendered useless during an emergency, it is reasonably likely that the condition of the subject escapeway would prevent escape. Miners would be left standing in cold water as the water level became higher and higher. This, in turn, may force the miners to look for another way out and be further hindered in their escape.

I credit Crawford's testimony regarding the likelihood of the slip-and-fall hazard that precluded swift passage out of the mine. The area would be difficult to negotiate given the slippery, rocky bottom, especially when carrying a stretcher. Neil testified on behalf of the operator that the area was passable, and that he had seen worse as an EMT. However, the evidence established that during an emergency, miners would likely need to move quickly through the area in order to seek safe passage away from what could be a dangerous underground environment. The condition of the escapeway, as cited by Crawford, would slow down the evacuation, if not prevent it. At hearing, I read the following findings into the record:

> I find that the Secretary has met the burden of proving all elements of the alleged violation by a preponderance of the evidence in this case, so I will now address the significant and substantial nature, and I have already addressed some of the factors I've relied on in finding that this violation is significant and substantial.

A significant and substantial violation is described, in Section 104(d)(1) of the Act, as a violation of such a nature as could significantly and substantially contribute to the cause and effect of the coal or other mine safety or health hazard. A violation is designated S & S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to or resulted in injury or illness of a reasonably serious nature, and that's the National Gypsum case . . . . [T]he Commission set out a four-part test in the Mathies case which I rely on here.

First, in order to establish the violation -- to establish S & S, I must find that there is a violation, and I have already done that in this case. Second, I must find that there is a discreet safety hazard, a measure of danger to safety contributed to by the violation, and as I have discussed above, I do find that there is a discreet safety hazard that existed as a result of this violation, the danger of persons not being able to evacuate the area safely and quickly during an emergency. In addition to that, I find that there is a slip-and-fall hazard separate and apart [from] . . . an emergency that is a hazard to anyone walking in the area.

The third part of Mathies is a reasonable likelihood that the hazard contributed to or resulted in an injury, and the hazards described by Inspector Crawford, the slip-and-fall hazard, the hitting-of-his-head hazard, and the failure [of] . . . being able to escape adequately during an emergency will result not only in an injury from the slip and fall, which would be a broken bone, or from a head injury, but could result in a fatal injury if the miners are not able to escape during an emergency, and tied together with that is a reasonable likelihood that the injury will be serious, and I think I've addressed that. It is very serious. The injuries would be very serious.

I understand that Mr. Neil testified that he thought it might be a -- the only injury he could see would be a twisted ankle or getting wet, but I credit Inspector Crawford's testimony that it's far more serious than that and that it could lead to a fatality, especially if there is an emergency evacuation and miners cannot get through this escapeway. Or even if they're slowed down getting through the escapeway, that's enough to cause a fatality.

The evaluation I have made is made with the consideration of the length of the time that the condition existed prior to the

citation, which was . . . five shifts and several days. And if it had continued to exist in normal mining operations, and I think it would have -- given the testimony of Mr. Neil that 15 inches he didn't consider a hazard, that it was routine for the mine, this would have [remained] . . . unabated unless Inspector Crawford had stepped in and done something about it.

I'm going to address the number of persons affected. Inspector Crawford relied on Mr. Neil to tell him how many miners were at the mine that day, and I understand that that number was 40 working underground. Inspector Crawford relied on that number, and I agree it's . . . accurate. I understand that the mine's argument is that not all 40 of them were working in the area, or maybe not all 40 of them would have used that escapeway. However, if there were a mine emergency and the primary escapeway was blocked, which is one of the reasons for a secondary escapeway, all of the miners would have had to maneuver through the secondary escapeway, and I agree with [Crawford] that 40 people would have been affected by that condition.

I think the fact that Inspector Crawford stepped into the water and decided that it was not safe to walk any further certainly shows that it was a serious hazard. I know that Mr. Neil said he did walk through it and that he wasn't injured; however, the case law does not require me to find that an accident has occurred, based on someone's actions on that day.

Crawford testified that the slip and falls in the muck could result in broken bones, leg and back injuries, and, of course, I've already addressed the injuries associated with the not being able to escape during an emergency. Any delay in miners evacuating the mine in an emergency increase the dangers posed by the emergency, and a delay would prevent miners from getting out alive.

There were at least two fires at this mine, one in 2008 and another in 2009. There is methane at this mine, as it is on a five-day spot inspection, and there are ignition sources in the mine. At the same time, on the same day, there was a citation issued in this same area for a lifeline violation, which also would have been related to anyone who was trying to escape at that time.

> I find that the preponderance of the evidence establishes that it was reasonably likely that the hazards present in the area cited would contribute to an injury in the event of an emergency evacuation, and even without an emergency evacuation, the slip-and-fall hazard would be there. I rely on the testimony of Inspector Crawford in reaching this conclusion. He believed that the hazards present were tripping and falling and not being able to escape during an emergency. [The various injuries would be the direct result of having to walk in 15, or more, inches of water on uncertain terrain filled with many hazards.] I credit his testimony that if the man-trip were used, it is not reliable, would stop if water reached the electrical parts of the man-trip. It would stall and further block the escapeway.
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> I have taken into consideration the ability of the miners to transport an injured miner out of the mine as the safety standard requires. And if I didn't mention that, I will mention that the safety standards require that I consider disabled persons, including the ability of someone to escape on a stretcher, and I think I addressed that. But given the uneven footing, the hidden obstructions, the murky water, it would make it reasonably likely that someone -- even more reasonably likely that someone carrying a stretcher would trip and fall and hinder the evacuation process.
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> Now, the evacuation process may be mitigated by the exercise of caution, the ability to walk cautiously on the part of miners, but the Mathies formula does not require me to evaluate the ability of the miners to walk cautiously, and I'm not sure they could do it, and if they could, this area would still slow them down if they had to stop and walk cautiously.
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> In addition, I credit Crawford's testimony that it is not likely, in an emergency situation, that someone can walk cautiously through smoke avoiding the necessary hazards. So I find that the Secretary has satisfied the four Mathies criteria and established the violation as S & S.

(Tr. 235-241)

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazards present in the subject area would contribute to an injury in the event of an emergency evacuation. I rely on the testimony of Inspector Crawford in reaching this conclusion. I have taken into consideration the ability of the miners to transport an injured miner out of the mine, as the safety standard requires. The uneven footing, the hidden obstructions, the murky water; all

these factors make it reasonably likely that a trip/fall would occur, and, during an evacuation, would result in slowing down or halting the exit of miners. Further, as mentioned previously, it is reasonably likely that these hazards would result in injuries of a reasonably serious nature.

3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353.

The day the subject citation was issued, Crawford described the condition as extensive, obvious and as existing for an extended period of time. He designated the negligence level as "reckless disregard" and found the violation to be an unwarrantable failure to comply with the mandatory standard. Crawford talked to management and learned that they knew that the escapeway was full of water and that it had been in that condition for some period of time. Crawford credibly testified to each and every factor used to determine unwarrantability. The violation was present for at least five shifts and little action was taken to abate the condition. Neil testified that he had requested that some pumping be done but that he had a limited number of pumps. This action was not enough. Neil agreed that the condition was obvious and extensive, but disagrees that it was unsafe. He agreed that the condition was known for several shifts but insisted that the mine was actively attempting to remedy it and, therefore, was the result of ordinary negligence, and not reckless disregard.

Based upon the preshift and onshift reports, and the testimony of all witnesses that the accumulation existed on January 18, 19 and into the 20th when the inspector arrived, I find that the mine did not approach the problem with the seriousness it demanded. While some records show "pumping" as a result of the water, others show no action at all. Ex. 3, 4.

This mine had been issued previous violations for accumulation of water in escapeways. Three citations in the three months prior to this one were issued for escapeways; one in December, one in November and one in October. In addition, prior to August 2008, the mine had received 25 escapeway violations in a little over a year. Ex. 14.

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. That's the Emery Mining Corporation, 9 FMSHRC 1997 and again in 2004. Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Aggravating factors include the length of time the violation existed, the extent of the violative condition, whether the operator had been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the condition was obvious, proposed a high degree of danger, and the operator's knowledge of the existence of the violation. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating factors exist.

In this case, . . . the mine has met all of the factors for unwarrantable failure. The length of time the condition exists was days. The extent of the violation was very extensive. I think Mr. Neil and Mr. Crawford agree on that point. Whether the operator had been placed on notice that greater efforts were necessary for compliance, I will address the history of violations that show that there have been many violations for escapeway issues. The operator's efforts in abating the violative condition, I understand that there was testimony that the mine tried to pump some of the water out, but I don't think it was enough. The efforts were not enough. Whether the violation was obvious, I don't think there is any question about that. Everyone agrees that it was obvious and extensive and posed a high degree of danger. I understand that Mr. Neil and that the mine operator disagree with the inspector's characterization as to the high degree of danger, and . . . I've already addressed that I credit the inspector's testimony that there was a high degree of danger, and the knowledge of the existence of the violation, which is borne out by the preshift and onshift reports in this case.

The day the subject citation was issued, Mr. Crawford described the condition as extensive, obvious, and existing for a period of time and marked the citation as reckless disregard. . . . When he first walked into the area, he saw that the problem was obvious. He had talked with Mr. Neil who clearly knew about the problem. It had been in the preshift books for a number of shifts, and although some of the preshift books mentioned that someone was working on it, given the depth of the water and the number of

times it continued to be in the preshift books, not much was being done about it.

The danger posed by this condition is found and is similar to the S & S findings, the slip-and-fall hazard posed by the condition, the consequences of an emergency, a stretcher team having to navigate through the escapeway. The stretcher team would be subject to the same slip-and-fall hazard, and, in addition, would unduly delay the provision of critical medical treatment to an injured miner and would delay the evacuation of the mine and endanger everyone, all 40 miners. Impeded, the evacuation could lead to the death of more than one miner and certainly could lead to the death of many miners.

Inspector Crawford found no mitigating circumstances, and I understand the mine's position that they could not have done more, that they were working on pumping the water, but my concern is this -- and I credit Inspector Crawford's testimony in this regard. The mine may have had some pumps in the area, and I think that was routine, and the fact, number one, that they thought 15 inches of water is routine and shouldn't really have much done with it causes me to think they were indifferent to the problem, to the problem of the water in the escapeway and the hazards that were caused by it, the fact that it was in the preshift and onshift for a number of shifts, that the preshift and onshift reports and the testimony of all witnesses that the accumulation existed on January 18th, 19th, and on the 20th when the inspector arrived. The company did not approach the problem with the seriousness it deserved. They had full knowledge of the condition and were not doing anything to make the escapeway safe. It had been that way for several shifts, and it was their decision not to stop what they were doing, turn off the water, and pump the area as they did once the inspector arrived. A number of the preshifts showed no action taken, but some did show some action was taken later, but it certainly wasn't enough, and it was taken seriously. The water was obvious and extensive. Everyone knew about it, and it had been known for several shifts.

The evidence shows that in the three months prior to this citation, there had been a citation issued each month that related to an escapeway, and 25 escapeway violations in a little more than a year prior to August 2008. That should put the mine on notice that they have issues with their escapeway and maybe it should be taken more seriously than they did in this case. Given their history

of methane and the fires that were reported in the mine, it's even more obvious in this case.

There were pumps in place. When they went down, did they replace them in a reasonable time? I think given the fact that once they stopped what they were doing, put the pumps in place, and turned the water off, it only took a few hours to abate the violation. It could have been much sooner, and the mine did not pay enough attention to get it done like they should have. There is really no excuse for waiting such a long time to make that escapeway travelable.

Mr. Neil did not convince me that he was diligently working on the water problem and getting it done or that he took the issue seriously. He said it was not a hazard and he could walk through it. I find that there are a lot of excuses at this mine about why something isn't done, but this seems like a simple thing that was known about and should have been done.

In addition, I find it curious that Mr. Neil agreed that there was a violation of safeguard, but had not done anything to correct that violation that he had believed was also there. It just contributes to the indifference that I saw at this mine.

The mine argues, of course, that they would use a mantrip and not walk through, that the mine is pumping and getting water out, and that these are mitigating circumstances, that they were doing all that they could. However, it's not borne out by the fact that once they focused on the job, it took only several hours to get it done, and that given the evidence, the water had reached a much higher level than it was at the time the inspector was there, and it still seemed not to concern anyone.

This case is very similar, as I said, to the Maple Creek Mining case where the Commission considered the obviousness and the danger posed by the blocked escapeway and the previous citations as aggravated factors in determining that the violation was unwarrantable. I find that the violation was unwarrantable, and I find that the facts [as stated in the citation] and the citation as issued by the inspector is correct, and I will uphold that citation . . . [as written and uphold all findings made by the inspector].

(Tr. 241- 247)

This case is nearly identical to *Maple Creek Mining Inc.,* 27 FMSHRC 555 (Aug. 2005) and *Eagle Energy Inc.* 23 FMSHRC 829 (Aug. 2001) with regard to the unwarrantable failure findings. In those cases, the Commission considered the obviousness of the condition, the danger posed by the water in the escapeway, and the previous citations as aggravating factors. Those same factors, and more, are present here.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R.§ 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size (large operator) and ability to continue in business. The violation was abated in good faith, and no evidence has been presented to the contrary. The history shows a number of escapeway violations in the months prior to this order, including the violations discussed above. I find that the Secretary has established that the negligence amounted to reckless disregard for the violation and that the gravity determined in the order is accurate. The total proposed penalty of $63,000.00 is appropriate in this case, given the statutory criteria.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $63,000.00 for this violation. Independence Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $63,000.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution:

Ben Chaykin, Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd. 22nd Floor, West, Arlington, VA 22209-2247

Carol Marunich, Sarah Korwan, Dinsmore & Shohl LLP, 215 Don Knotts Blvd. Suite 310, Morgantown, WV 26501

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