FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 16, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-39
Petitioner	:	A.C. No. 46-07711-03660
v.	:	
	:	Mine No. 1
EAGLE ENERGY INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;[1]
David J. Hardy, Esq., Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondents.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor (the Secretary) against the respondent, Eagle Energy Incorporated (Eagle Energy), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a).[2] The petition seeks to impose a total civil penalty of $3,300.00 for three alleged violations of the Secretary's mandatory safety regulations.

This matter was heard on April 13 through April 16, 1999, and June 22 through June 23, 1999, in Charleston, West Virginia. Eagle Energy is a large mine operator that is subject to the jurisdiction of the Act.

After approximately two days of testimony, the parties agreed to settle Citation No. 7158529 that concerned an alleged non-significant and substantial (non-S&S) violation of the mandatory safety standard in section 50.10, 30 C.F.R. § 50.10, that requires an operator to immediately notify the Mine Safety and Health Administration (MSHA) in the event of an accidental ignition. Although the accidental ignition occurred at 10:00 a.m. on August 23, 1997, Eagle Energy did not notify MSHA until later that afternoon at approximately 4:45 p.m. The

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[1] Yoora Kim is no longer employed with the U.S. Department of Labor's Office of the Solicitor.

[2] Docket Nos. WEVA 98-45-R, WEVA 98-69 and WEVA 98-81 were severed from Docket No. WEVA 98-39 and stayed by Order dated July 8, 1999.

accidental ignition occurred while a cutting torch was being used to repair a section of track rail. Although a very brief flame emanating from a crack in the mine floor was observed by only one of several miners working on the track repair, several miners saw smoke coming from the vicinity of the crack after the flame presumably had extinguished. Eagle Energy did not report the incident immediately because it believed the ignition was caused by excess acetylene from the cutting torch rather than methane bleeding from the crack.

After hearing a substantial amount of testimony on Citation No. 7158529, the parties had a settlement conference. As a result of the conference, the parties agreed to settle Citation No. 7158529. The parties' agreement, that was approved on the record, resulted in reducing the initial $300.00 civil penalty proposed by the Secretary to a $50.00 civil penalty. The reduction in penalty was based on reducing the degree of negligence attributable to Eagle Energy from high to low.

At the hearing, the parties also agreed to settle Citation No. 7163240 that concerned an alleged non-S&S safeguard violation of section 75.1403, 30 C.F.R. § 75.1403, on September 2, 1997, because of water that had accumulated in depths of approximately two to five inches above the ball of the track between crosscuts 69 and 70 on the 10 Left track entry. The parties agreed to reduce the civil penalty from $500.00 to $300.00. The reduction in civil penalty was based on reducing the degree of Eagle Energy's negligence from high to moderate.

The remaining matter for disposition is 104(d)(1) Citation No. 7163242 that cited an alleged September 2, 1997, S&S violation of the mandatory safety standard in section 75.380(d)(1), 30 C.F.R. 75.380(d)(1), for several areas of extensive water accumulations in the 10 Left intake escapeway. Section 75.380(d)(1) requires each escapeway to be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons." The citation noted, "this condition was reported [in the escapeway book] on August 15, August 22 and August 29, 1997."

I. Statement of the Case

For the reasons discussed herein, the fact of the violation in 104(d)(1) Citation No. 7163242 is supported by the cited extensive water accumulations. The S&S designation is likewise affirmed because it is reasonably likely that such conditions would seriously interfere with both the passage of miners during emergencies, and the removal of disabled persons.

However, with respect to the issue of unwarrantable failure, Eagle Energy's No. 1 Mine is an extremely wet mine with recurring water problems. Eagle Energy has positioned over 100 pumps at locations throughout the mine where water chronically accumulates. The water pumping cycle is that water accumulates to levels significant enough to pump at which time the water pump is turned on. The pump remains on until the water is drained and the pump is turned off. Significantly, pumps cannot operate continuously because "dry pumping" would burn out

the pump motors. Thus, the normal process of pumping water requires waiting for accumulations to occur that are deep enough to pump. Tr. III 119, 146-48.[3]

Since the pumping of water in the Mine No. 1 is an ongoing process, for the reasons discussed herein, the evidence does not support the conclusion that the reference in Citation No. 7163242 to Eagle Energy's previous notations of water accumulations in its weekly escapeway book during the three weeks preceding September 2, 1997, refers to the same water observed on September 2, 1997. Although Eagle Energy obviously was on a heightened state of awareness with regard to its mine's water problems, a heightened state of awareness, alone, does not, as the Secretary suggests, render subsequent violative water accumulations unwarrantable *per se*. Rather, the question of whether a violation is attributable to an operator's aggravated or unjustified conduct must be resolved based on the particular facts surrounding the violation, including examining such factual issues as the duration of water accumulations and the reasons for their existence.

The primary means of pumping water to the surface from Eagle Energy's 10 Left intake escapeway is pumping water onto the moving beltline. Using this method, the water is absorbed by coal on the beltline and carried to the surface. However, the beltline in the 10 Left section was dismantled on July 9, 1997, when Eagle Energy ceased continuous mining operations to prepare for longwall operations. The secondary means of pumping water after the beltline had been dismantled on July 9, 1997, was converting the incoming fresh water line, normally used for dust and fire suppression during mining operations, to a discharge line.

However, on Labor Day weekend, Saturday, August 30, 1997, through Monday, September 1, 1997, the final stages of the longwall move were performed. Thus, at approximately 4:00 p.m. on Sunday, August 31, the discharge line was re-converted to a fresh waterline to facilitate longwall preparations in anticipation of longwall mining and normal beltline operations commencing at 7:30 a.m. on Monday, September 1, 1997. However, as a consequence of several unanticipated beltline breakdowns, operations did not begin until the afternoon of Tuesday, September 2, 1997, at which time the pumping of water on the beltline could resume. Thus, at the time the cited water conditions were observed during the early morning hours of September 2, 1997, it is undisputed that Eagle Energy had neither the primary, nor the secondary, means of pumping water available. Given these undisputed, significant mitigating circumstances, as well as additional mitigating factors, 104(d)(1) Citation No. 7163242 shall be modified to a 104(a) citation to reflect that the cited condition was not a consequence of Eagle Energy's unwarrantable failure.

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[3] The transcription service has prepared the transcript of this six day proceeding by volume rather than consecutive pages. Consequently, transcript references will note days one through six of the trial by Roman numeral followed by the page number.

II. Preliminary Findings of Fact

On August 31, 1996, Eagle Energy, a subsidiary of A.T. Massey Coal Company, acquired the Mine No. 1 from Eagle Nest, Inc., a subsidiary of Bethlehem Steel Corporation. Eagle Energy employs approximately 140 people at its Mine No. 1. There are about 84 miners who work underground in addition to 30 to 40 supervisors.

Eagle Energy's Mine No. 1 is a wet or damp mine. Water seeps out from the mine top and/or bottom, and accumulates in various locations throughout the mine. Water also accumulates during a heavy rainfall, flowing down to the underground mine from the surface. In addition water seeps into the mine from an adjacent abandoned mine that is inundated with water.

The 10 Left section was developed as a three entry system with the continuous mining machine. While the continuous miner was advancing in the section, the return air entry was the No. 1 entry, the No. 2 entry served as the conveyor belt and track entry, and the No. 3 entry was the primary escapeway intake air entry. The three entries were separated by stoppings. An incoming six-inch diameter fresh water line was installed in the No. 2 belt/track entry to bring fresh water to the working face and to provide fire protection along the belt. While the 10 Left section was being mined by the continuous miner, water was being removed from the section by pumping water onto the beltline through discharge hoses connected to pumps. The water was absorbed by the coal on the beltline and carried to the surface. Longwall mining was occurring in the 9 Left section while continuous mining progressed in the 10 Left section.

On July 9, 1997, continuous mining in the 10 Left section was completed and the section became "non-producing." The continuous miner was then moved to the 2 North section of the mine. In anticipation of bringing the longwall from the 9 Left section to the 10 Left section, on July 9, 1997, Eagle Energy began dismantling the 10 Left belt conveyor to move it from the No. 2 entry to the No. 1 entry. In dismantling the belt conveyor, Eagle Energy lost its ability to pump water out of the section.

On July 10, 1997, Mine Safety and Health Administration (MSHA) inspector Albert "Benny" Clark was at the Mine No. 1 conducting a regular "triple A" inspection. As part of his inspection that day, Clark traveled the 10 Left intake escapeway (the No. 3 entry) to determine if Citation No. 7160006 issued by MSHA inspector Andrew Nunnery on June 24, 1997, should be terminated. Citation No. 7160006 cited a non-S&S violation of section 75.380(d)(1) for water accumulations in the 10 Left No. 3 escapeway entry ranging "in depth from 1" to 14" with slick and muddy bottom at crosscut 49 to 48 for a distance of approx. 100 feet." Gov. Ex. 29. Nunnery characterized Eagle Energy's degree of negligence as "moderate" even though normal continuous mining operations were in progress, and, unlike this case, the beltline was operational and available for removing water from the entry.

Clark found there was water at the location cited in Citation No. 7160006. Believing it was the same water cited by Nunnery, Clark issued 104(b) Order No. 7163178 on July 10, 1997, for Eagle Energy's alleged failure to abate Citation No. 7160006. However, 104(b) Order No. 7163178 was subsequently vacated during a Health and Safety Conference on procedural grounds.

Inspector Clark also issued Citation No. 7163177 on July 10, 1997, citing an S&S violation of section for 75.380(d)(1) for water accumulations between 1 and 24 inches in depth between the 69 and 71 crosscuts for a distance of 200 feet. Clark testified that he believed the violation was due to Eagle Energy's unwarrantable failure because there were notations in the weekly examination book of similar water accumulations for the preceding five weeks. However, Clark testified he was persuaded by Safety Director Jeffrey Bennett and then Superintendent Stan Edwards to issue Citation No. 7163177 as a 104(a) citation rather than an unwarrantable 104(d) citation because of their assurances that future escapeway water problems would be prevented.

Although safety director Bennett Energy provided assurances that Eagle Energy's water problems would be addressed, it was apparent that Eagle Energy could not abate Citation No. 7163177 issued by Clark, as the normal method of pumping water from the section was no longer available because the beltline had been dismantled. Clark initially suggested that Bennett could run a discharge line approximately 1,000 feet to the Mudlick Mains discharge line. However, upon further reflection, Clark conceded that 1,000 feet was too long a distance to run a water line. Specifically Clark testified, "[Bennett and I] throwed (sic) it around. We was (sic) talking about ways of getting rid of [the water]. We discussed if we could run it over to Mudlick, and there was no way. It was too far." Tr. III 90.

As an alternative, Inspector Clark suggested that Bennett should convert the section's fresh water line to a discharge line. Bennett agreed to reverse the fresh water line. Citation No. 7163177 was terminated by Clark on July 11, 1997, after the cited water accumulations had been discharged through the fresh water line. Eagle Energy did not contest Citation No. 7163177, and it paid a civil penalty of $362.00. Clark testified that Eagle Energy continued to follow his suggestion after July 11, 1997, by continuing to use the fresh water line as a discharge line. Tr. III 124.

The primary escapeway route from the 10 Left section was the 10 Left intake escapeway into the Cook Mountain Mains. However, roof falls occurred in the Cook Mountain Mains on August 4, 1997, and August 22, 1997. The second roof fall was removed on August 29, 1997, the Friday before Labor Day. While the Cook Mountain Mains was impassable, the primary escapeway route was re-designated as the 10 Left intake escapeway into the Mudlick Mains. During this period when the Cook Mountain Mains could not be used as an escapeway, the cited areas of water accumulations in the 10 Left intake escapeway that led to the Cook Mountain Mains were not designated as an escapeway route. Thus, the cited areas of water accumulations were not in an escapeway route from August 22 until August 29, 1997, when these areas were

reestablished as the primary escapeway in preparation for the anticipated start of 10 Left Longwall operations beginning at 7:30 a.m. on Monday, September 1, 1997.

On August 13, 1997, while continuing his Triple A inspection, Clark issued Citation No. 7163218 citing another S&S violation of section 75.380(d)(1) for water accumulations in the 10 Left intake escapeway measuring 1 to 15 inches in depth with slick and muddy bottom at crosscuts 97, 98 and 99.[4] Significantly, Clark did not characterize this violation as attributable to Eagle Energy's unwarrantable failure, despite the fact that, also unlike this case, the fresh water line was available for use as a discharge line. The citation was terminated on August 14, 1997, after the water was pumped and discharged through the fresh water line. Eagle Energy did not contest Citation No. 7163218, and it paid the $362.00 civil penalty proposed by the Secretary.

Hourly miners did not work at Eagle Energy's Mine No. 1 on Labor Day weekend from Saturday, August 30 through Monday, September 1, 1997. On that weekend, the mine was staffed with 20 to 30 management personnel who had decided to complete the longwall move on their own. On Sunday, August 31, 1997, at approximately 4:00 p.m., the discharge line was converted back to a fresh water line to facilitate impending longwall operation. The fresh water line was needed to power up the shields for dust suppression, thus it could not be turned back to a discharge line without interfering with longwall start-up. When the water line was converted to fresh water, the pump lines in the 10 Left intake escapeway were re-directed to the belt conveyor that was now located in the No. 1 entry.

On Monday morning on September 1, 1997, Eagle Energy started the beltline. However, it pulled apart at several locations and had to be repaired. Thus, longwall operations were delayed until the following day. On Tuesday, September 2, 1997, at approximately 7:00 a.m., Eagle Energy once again attempted to start the belt conveyor, but it again pulled apart in several locations.

Shortly after the belt pulled apart for the second time, Clark, and Madison Field Office Supervisor Terry Price, arrived at the Eagle Energy mine at approximately 8:30 a.m. on Tuesday, September 2, 1997, to continue the Triple A inspection. After reviewing the preshift and on shift books, Clark and Price traveled by mantrip to the 10 Left section. Clark and Price were accompanied by Safety Director Bennett. Upon arriving in the 10 Left section Clark and Price noted general damp and wet conditions. The No. 1 belt entry had several water accumulations and was generally damp; the No. 2 track entry also contained several areas of water accumulations, soft ribs, and a hooved bottom in several places; and the No. 3 intake escapeway was damp to wet, had several water accumulations, loose ribs at different locations, and a hooved bottom in some locations.

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[4] Citation No. 7163218 states the violative water accumulations were in the 9 left section. Clark testified the reference to the 9 left section is erroneous, and that the site of the violation was in the 10 Left section. Tr. III 21-22.

After Clark terminated citations that previously had been issued at the longwall face, Clark, Price and Bennett started walking down the track entry. At crosscut 70, the inspection party came across a large water accumulation, which extended into the crosscut right up to the stopping between the track and intake entries. Based on the amount of water he observed in the vicinity of the 70 crosscut in the track entry, Clark knew there would be water at the 70 crosscut in the intake escapeway.

In order to get into the intake escapeway, the inspection party traveled along the edge of the rib to get past the accumulation in the track entry to the nearest mandoor between the track and intake entries. When they arrived at the 70 crosscut at the intake escapway, as expected, Clark observed water accumulations at this location as well. In fact, the water at the 70 crosscut in the intake escapeway and at the 70 crosscut in the track entry was one continuous water accumulation. The distance between the track entry and the intake escapeway is about 100 feet.

At crosscut 70 in the intake escapeway, Clark waded out into the water accumulation until the water was about ½ to 1 inch from the top of his boots. At that time Clark was wearing metatarsal boots that are approximately 13 inches in height. Clark reached out as far as he could with a straight arm and took several measurements of the water's depth with his retractable metal tape line. Clark held the tape line straight up and down and measured 15 inches of water. He did not try to go any further out into the water because the water was murky and the depth of the water was over his boots. Clark also observed that the water accumulation in the intake escapeway in the vicinity of the 70 crosscut extended from rib to rib (about 20 feet) and was about 110 feet from shallow end to shallow end. Clark testified that throughout his inspection of the intake escapeway, Bennett did not object to the method of measurement or in any way demonstrate that he disagreed with the measurements taken by Clark. Tr. II 214, 225, 237.

The inspection party started walking the intake escapeway in an outby direction. When they got to crosscut 60, Clark observed another sizeable water accumulation. Clark once again waded into the water as far as he could go without letting the water go over the top of his boots and measured 15 inches of water. Clark also observed water extending from rib to rib, 90 feet in length. Because he could not see the mine floor, Clark determined the accumulation was too hazardous to walk through. Instead the inspection party avoided the accumulation by backtracking to the nearest mandoor, traveling outby in the track entry to the next mandoor, and crossing back over into the intake escapeway.

Once back in the intake escapeway, the inspection party continued traveling in an outby direction. Between crosscuts 51 and 52, Clark observed another water accumulation measuring 12 inches deep. He observed the water extended from rib to rib, 40 feet in length. Clark determined the water accumulation was too hazardous to walk through, so the inspection party backtracked to the nearest mandoor, traveled outby in the track entry, and re-entered the intake escapeway through the next mandoor.

The inspection party continued walking the intake escapeway in an outby direction. About 20 feet inby crosscut 49, Clark observed a water accumulation which extended for about

120 feet in length to crosscut 48. Clark measured the water depth and determined the water was at least 15 inches deep. The inspection party did not walk through the accumulation. Instead, they backtracked to the nearest mandoor and traveled outby to the surface via the track entry.

In addition to the depths and extent of the water accumulations, Clark observed that loose coal from the ribs had rolled off into the water. Clark also noted the mine floor was slippery when he waded into the water accumulations and that it was uneven with slopes, potholes and hooves in some locations. The irregularities in the mine floor made it difficult for Clark to determine whether the water got deeper or more shallow and contributed to the potential hazard. There were also pieces of wood floating in the water, and coal deposits and discharge lines sticking out of the water. While they were still underground, Clark informed Bennett that he was going to issue a citation for the water in the escapeways.

Once the inspection party got back to the surface, Clark checked the weekly examination books for the 10 Left escapeway. The weekly escapeway book contains entries of firebosses that examine the escapeways on a weekly, rather than daily basis. Price stated that, with the exception of the area in the working section, examiners normally were not in the intake escapeway more than once per week. Clark found that water accumulations in the general vicinity of the water he had just observed in the 10 Left intake escapeway on September 2, 1997, had been noted by entries in the weekly examination book on August 15, August 22 and August 29, 1997. However, Clark did not see any indication on the weekly examination reports that any action (*i.e.*, pumping) had been taken to correct the hazardous condition. As a result, Clark concluded that no corrective action had been taken. Tr. V 344.

Clark's conclusion was, in part, based on his comparison of the entries for the 10 Left intake escapeway with the Mudlick intake escapeway. In this regard, Clark saw that entries of fireboss Reams reflected "water over the boots" in the Mudlick Intake on August 14, and action taken entries of water "being pumped" or "pumped down." In contrast, when Reams observed "water over boots" in the 10 Left intake, he reported his observation, but there is no report, either by Reams, or another fireboss, that any corrective action had been taken. Similarly, fireboss Fisher reported a hazardous water accumulation in the Mudlick Intake on August 21 and noted that the water was being pumped. In contrast, while Fisher noted water accumulations in the 10 Left intake on August 22, neither he, nor another fireboss, noted that any action was being taken to correct the hazardous condition.

After examining the weekly escapeway examination book, Clark looked at the daily preshift and onshift reports. Beginning with the third onshift report on August 29, 1997, water at crosscut 70 in the 10 Left No. 2 track entry was reported under the column marked "Violations and other Hazardous Conditions Observed and Reported" on nearly all of the preshift and onshift reports from August 29 to September 2, 1997. Although the condition was noted as "reported," there are no entries reflecting that action was taken to discharge the noted water before the discharge line was converted back to a fresh water line on August 31, 1997.

Although Bennett, who was with Clark while he was examining the reports, did not tell Clark that corrective action which was not listed in the books had been taken to pump the water out of the intake escapeway, Production Director John Adkins and Assistant Superintendent Harry Walker testified materials were stored in the intake escapeway and scoops traveled the escapeway during the longwall setup. Tr. III 76-77; Tr. IV 167-70; Tr. V 100-01. Walker and Adkins testified pumps were continually being turned on and off to discharge water accumulations. Tr. V 100-01; Tr. IV 141.

As a result of his observations underground and his examination of the books in the mine office, Clark concluded that the intake escapeway was not being maintained in a safe condition. Clark told Bennett that the citation was going to be issued as an unwarrantable failure violation because the hazardous condition had been repeatedly reported in the weekly examination books without any action being taken to correct the problem. Tr. III 120-121, 216. Consequently, Clark issued 104(d)(1) Citation No. 7163242, alleging a significant and substantial violation of 30 C.F.R. § 75.380(d)(1). Tr. III 34, 36, 39-40, 41-45.

Clark concluded that the violation was significant and substantial because the water in the accumulations was muddy, the mine floor could not be seen, even at the shallow end, and the bottom was slick. These conditions created a slipping or stumbling hazard to miners, especially to miners who may be hurrying to get out of the mine because of an accident or disaster. Tr. III 34, 39-40, 211. In addition, there was material floating in the water (*i.e.*, wood) and things sticking out of the water (*i.e.*, lumps of coal and discharge lines). Tr. III 211. The wood pieces observed floating or sticking out of the water looked like "half-headers" used for blocking or capping timber. Tr. III 217.

Clark concluded the violation was the result of the Eagle Energy's unwarrantable failure to comply with the standard because: management was aware of the hazardous water accumulations since the hazardous accumulations had been reported in the weekly examinations reports for at least three weeks prior to the inspection and there were no notations that corrective action had been taken; Eagle Energy had been warned on prior occasions about water in its escapeways; and Eagle Energy had a history of previous violations for the same violative condition. Tr. III 41, 233, 261, 266.

The belt was repaired by the afternoon of September 2, 1997, between 12:00 p.m. and 3:00 p.m. at which time the cited water accumulations could be pumped onto the moving beltline and transported to the surface. 104(d)(1) Citation No. 7163242 was terminated at 10:30 a.m. on September 4, 1997.

III. **Further Findings and Conclusions**

At the outset, it is a fundamental principal that the Mine Act imposes on the Secretary the burden of proving each element of 104(d)(1) Citation No. 7163242, *i.e.*, that the violation occurred, that it was significant and substantial, and that it was attributable to Eagle Energy's unwarrantable failure. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152-53. The

testimony of Inspector Clark and Supervisory Inspector Price was sincere and credible. Their testimony establishes that the fact of the violation, as well as its S&S nature, are self evident. While I am cognizant of MSHA's apparent frustration regarding Eagle Energy's repeated failure to control its water problems despite its assurances, the facts in this case, given the Secretary's burden of proof in the face of significant mitigating circumstances, do not support a finding of unwarrantable failure.

A. Fact of the Violation

104(d)(1) Citation No. 7163242 cites a violation of the mandatory standard in section 75.380(d)(1) that requires each escapeway to be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons." A mandatory safety standard must be enforced consistent with its intended purpose. Although Eagle Energy provided testimony that an injured miner on a stretcher ordinarily would be removed from the mine by the No. 2 track entry rather than the No. 3 intake escapeway, it is the No. 3 intake escapeway, rather than the track entry, that is the primary means of escape in the event of exigent circumstances such as a fire or explosion. Thus, the propriety of the intake escapeway's conditions with respect to the cited water accumulations must be viewed in the context of miners having to use the escapeway in emergency conditions when they are in a hurry to evacuate the mine.

The Commission has determined that the language in section 75.380(d)(1) is "plain and unambiguous" in that it imposes on an operator an obligation to maintain escapeways that pass the general functional test of "passability." *Utah Power and Light*, 11 FMSHRC 1926, 1930 (October 1989). Eagle Energy's assertion that the nature and extent of the cited water accumulations were not hazardous, or in violation of section 75.380(d)(1), is belied by its repeated entries of similar water conditions requiring corrective action in its weekly examination book. Moreover, Eagle Energy has not refuted the testimony of Clark and Price that reflects that they, as well as Bennett, repeatedly went through mandoors to circumvent areas of the intake escapeway that were impassable.

Finally, in denying the violation, Eagle Energy seeks to have it both ways. Eagle Energy admits it had no means of pumping water accumulations in the No. 3 escapeway from 4:00 p.m. on Sunday, August 31, 1997, when the discharge hose was converted to a fresh water line, until the morning of Tuesday, September 2, 1997, when the cited conditions were observed by Clark and Price in the presence of Bennett. In defending against the unwarrantable failure charge, Safety Director Adkins testified that, absent pumping, water rapidly accumulated at locations of chronic accumulations at depths of approximately eight inches in a 24 hour period. Tr. IV 175-76. If water quickly re-accumulated, as Eagle Energy contends, then it is unreasonable to argue an absence of significant water accumulations on Tuesday morning given Eagle Energy's inability to discharge water since Sunday afternoon.

In short, the evidence amply supports the conclusion that the cited water accumulations

were significant and extensive ranging up to 15 or more inches in depth and extending over areas over 100 feet in length. It is obvious that such water accumulations would impede the progress of miners during an emergency evacuation, particularly miners who are "disabled" by virtue of injury. Accordingly, the Secretary has demonstrated the fact of a section 75.380(d)(1) violation.

B. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

> 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.*, 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 Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

With regard to the first element of *Mathies*, the Secretary has demonstrated a violation of the cited mandatory standard. Turning to the second and fourth elements of the *Mathies* test, there is little doubt that the cited extensive water accumulations in areas of murky, slick and uneven bottom, created the discrete safety hazard of slipping and falling, particulary during an emergency evacuation, that was reasonably likely to result in injury of a reasonably serious nature.

The remaining element of Mathies requires an analysis whether there was a reasonable likelihood that the hazard of slipping and falling would result in injury. The Commission visited the issue of the significant and substantial nature of water accumulations in escapeways in *Eagle Nest, Incorporated*, 14 FMSHRC 1119 (July 1992). The *Eagle Nest* case involved the same Mine No. 1 that is the subject of this proceeding when the mine was operated by a predecessor of Eagle Energy. The Commission concluded, that while the exercise of caution by miners using an escapeway with violative water accumulations may lessen the chances of a slip and fall injury, the exercise of caution does not mitigate the hazard. 14 FMSHRC at 1123. Rather, it is the significance of the hazard and the contribution of that hazard to potential injury that is determinative of the S&S issue. *Id*.

The cited conditions created a significant likelihood of slipping on the slick escapeway floor as well as the reasonable likelihood of falling over a submerged obstacle, or stumbling in a pothole. Consequently, the Secretary has demonstrated that the cited violation was properly designated as significant and substantial.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.,* 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Without question, if the Secretary can demonstrate the cited water accumulations in the No. 10 Left intake escapeway are the same accumulations that had been repeatedly ignored without any remedial pumping after they had been repeatedly noted in the weekly examination book on August 15, August 19, and August 29, 1997, the cited violation is attributable to Eagle Energy's unwarrantable failure. Since Clark and Price do not have any personal knowledge concerning the condition of the No. 3 escapeway from August 15 until their September 2, 1997, inspection, the Secretary seeks to establish an unwarrantable failure based on circumstantial evidence.

The Commission has recognized that the Secretary may establish the elements of a violation by inference. *Mid-Continent Resources*, 6 FMSHRC 1132 (May 1984). However, the inference must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. Id. at 1138. Here, the Secretary relies on the repeated entries in the preshift examination book since August 15, 1997, without entries of corrective action, to support the inference that the cited water accumulations existed since August 15, 1997, without any efforts to remove these slip and fall hazards. Ordinarily, such circumstantial evidence would be compelling. However, this is no ordinary case.

As a preliminary matter, although the Secretary throughout this proceeding asserts that Clark and Price reached the firm conclusion that the water accumulations they observed in the No. 3 entry on September 2, 1997, was the same water, without any remedial pumping, as the accumulations noted in the weekly examination book during the preceding three weeks, an examination of their testimony supports no such conclusion. Clark's testimony that he concluded no pumping had been performed in the No. 3 intake escapeway from August 15, 1997, through the time of his observations during the morning of September 2, 1997, is inconsistent with his other testimony, inconsistent with his assessment of Eagle Energy's degree of negligence, and, inconsistent with Price's testimony.

Clark conceded he had no personal knowledge of the conditions in the No. 3 entry from August 15, 1997, until his September 2, 1997, inspection. Tr. III 104. Clark also conceded that the water accumulations he observed in the No. 3 entry were at locations where there were chronic water problems, and that water would re-accumulate in these areas after a pump had been turned off. Tr. III 147. Thus, in effect, Clark agreed that his September 2, 1997, observations of water accumulations at the same locations that were previously noted in the weekly examination book did not mean that those areas had not been recently pumped.

Finally, Clark testified that, if any pumping had been done despite the fact that it was not reported, the pumping was inadequate since the water kept accumulating. Tr. III 78; Tr. V 344. However, repeated accumulations of water was a fact of life at the Mine No. 1. As previously noted, accumulations of water could not be pumped until the degree of accumulations was adequate to warrant turning on a pump. The fact that water accumulations had returned, is not, as Clark concluded, evidence of an unwarrantable failure. In fact, Clark testified water accumulations at various locations were chronic and that he "had run into this before. Crosscuts 48 to 49 had been cited before with accumulation, and 70 had been cited before." Tr. III 146. Rather, it is the duration of the cited water conditions that is important in determining whether Eagle Energy committed an unwarrantable failure.

Significantly, Clark attributed the subject violation to Eagle Energy's high degree of negligence rather than a reckless disregard. It is difficult to understand why Clark would not characterize Eagle Energy's behavior as a "reckless disregard" if Clark had concluded Eagle Energy had, in fact, ignored repeated entries in its examination books over a period of approximately four weeks.

Moreover, Price conceded there must have been some efforts to discharge water accumulations at the cited locations in the No. 3 entry. Price testified that, "there may have been some pumping because they were hooked up," although he also believed "some of the water was the same water." Tr. IV 31. With respect to the question of reckless disregard, Price testified a reckless disregard requires evidence of an intentional failure to comply, and "that's not the case here." *Id.*

Finally, on August 13, 1997, Clark issued Citation No 7163218, not in issue here, for water accumulations in the No. 3 escapeway. The cited water accumulations on August 13, 1997, were not attributed to Eagle Energy's widespread failure to address pumping in that the violation was not attributed to Eagle Energy's unwarrantable failure. The Secretary has not provided any evidence to demonstrate that two days later, on August 15, 1997, Eagle Energy began a course of conduct wherein it repeatedly ignored water accumulations in its escapeway. To the contrary, Clark admitted Eagle Energy had continued to follow his July 10, 1997, recommendation that it discharge water through the fresh water line stating that "they felt it was a good way to do it." Tr. III 124.

Given the evidentiary facts at the time of Clark's September 2, 1997, inspection, consisting of recurring water accumulations, installed pumps, and a temporary inability to discharge water, the Secretary has failed to satisfy the *Mid-Continent* test that requires the evidence to support the ultimate inference that the No. 3 escapeway had not been pumped since August 15, 1997.

Having determined that the Secretary has not demonstrated Eagle Energy's longstanding failure, over a period of weeks, to discharge the cited water accumulations, we turn to the traditional inquiries for determining whether an operator's conduct evidences an unwarrantable failure. The Commission has identified the following relevant factors that may be indicative of unwarrantable conduct: (a) the extent of the violative condition; (b) the length of time that it has existed; (c) whether an operator has been placed on notice that greater efforts are necessary for compliance; and (d) the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992).

a. Extent

It is true that the water accumulations were extensive. However, the evidence reflects that, from approximately 4:00 p.m. on Sunday August 31, 1997, until the cited accumulations were observed by Clark and Price on Tuesday morning, September 2, 1997, Eagle Energy lacked both the primary means of discharging water on its beltline and the secondary means of discharging water by using its fresh water line as a discharge line.

On several prior occasions MSHA elected not to cite Eagle Energy for an unwarrantable failure for Eagle Energy's failure to keep its escapeway clear. For example, Eagle Energy lacked any discharge method for pumping water before Clark suggested using the fresh water line for

discharge when Clark issued Citation No. 7163177 on July 10, 1997, for escapeway water accumulations. Similarly, Eagle Energy's discharge line was operational when Clark issued Citation No. 7163218 on August 13, 1997, for escapeway water accumulations. In effect, MSHA now seeks to undo its previous restraint with respect to alleging an unwarrantable failure under circumstances where Eagle Energy temporarily had no means of pumping the cited water accumulations.[5]

b. Duration

The Secretary could still prevail on the issue of unwarrantable failure if she could establish, by a preponderance of the evidence, that the cited water conditions existed for a significant period of time prior to the August 31, 1997, conversion of the discharge line to fresh water. However, Clark and Price, as well as Eagle Energy witnesses Adkins and Walker, all testified that water accumulations chronically reoccur over a short period of time. Thus, the presence of accumulations alone, is inadequate to demonstrate an inexcusable delay in clearing the cited water conditions given Eagle Energy's short term inability to discharge water.

c. Notice

The Secretary's heavy reliance on similar previous citations, in addition to notations of water accumulations in examination books, as a basis for demonstrating that Eagle Energy was on notice only serves to establish the obvious. Adkins testified without contradiction that the Mine No. 1 was engineered to permit it to be located under an inactive mine. Therefore, entries and crosscuts run in directions that impede water drainage. Tr. IV 140-41. The fact that Eagle Energy knows that its Mine No. 1 is a wet mine does not make all violations for water accumulations unwarrantable *per se*. The issue of unwarrantable failure must be determined on a case-by-case basis. Here, the Secretary has not carried her burden of demonstrating that this is a case of unwarrantable failure.

d. Compliance Efforts

Finally, we turn to the question of Eagle Energy's compliance efforts. Significantly, Eagle Energy has over 100 pumps placed in areas of chronic water accumulation throughout the mine. There is no evidence that Eagle Energy failed to use its fresh water line for discharge in the No. 10 Left section since the line was converted on July 10, 1997, after the beltline had been dismantled. In fact, Price testified the pump lines had been connected to discharge water. As previously noted, the fact that Eagle Energy had no means of pumping water during the final interim stages of the longwall setup when the subject citation was issued on September 2, 1997, does not relieve it of its obligation to keep the escapeway clear. However, it does not follow that its failure to do so must be attributable to its unwarrantable failure.

[5] I am not suggesting that Eagle Energy did not have an obligation to keep the escapeway clear of hazardous water conditions on September 2, 1997. I am simply stating that its failure to do so was not a manifestation of aggravated or unjustifiable conduct given the compelling mitigating circumstances in this case.

Although the Secretary has failed to demonstrate the most common elements of unwarrantable behavior, it should be noted that there are additional mitigating circumstances in this case. The subject citation was issued on the morning after Labor Day weekend when Eagle Energy had not been staffed by regular hourly employees. In addition, there were two relevant roof fall events. The last roof fall that occurred on August 22, 1997, was not cleared until the late evening of Friday, August 29, 1997, when the Labor Day weekend began. Tr. IV 205-06. That roof fall diverted the attention of Eagle Energy management personnel who were already short-staffed on Labor Day weekend. Moreover, the roof falls resulted in temporarily altering the escape route to exclude areas containing the cited accumulations until the roof fall debris was removed.[6] Therefore, giving priority to clearing the roof fall is understandable. The roof fall problem is an additional mitigating factor.

[6] Without personal knowledge, the Secretary relies on conflicting deposition testimony, not introduced at trial, reflecting that the respondent's discharge line may have been converted to fresh water several days earlier than 4:00 p.m on Sunday, August 31, 1997. *Sec. Reply Br.* at 2-3. As a threshold matter, this evidence was not entered at trial and may not be considered. However, I note parenthetically, that the Secretary has not rebutted the fact that the escapeway was rerouted from August 22, 1997, when the second roof fall occurred, until the late evening of Friday, August 29, 1997, when the roof fall was cleared.

Thus, on balance, the evidence fails to establish that Eagle Energy's actions were so egregious that they constituted a reckless disregard, or, that its behavior otherwise evidenced aggravated or unjustifiable conduct.[7] Accordingly, 104(d)(1) Citation No. 7163242 shall be modified to a 104(a) citation thus removing the unwarrantable failure charge.

However, I am retaining the high degree of negligence attributed to Eagle Energy to reflect that, in the final analysis, despite mitigating circumstances, Eagle Energy was still responsible for maintaining escapeways in this wet mine in a passable condition, and, for ensuring that pertinent entries were made in the examination books to reflect actions taken to address hazardous conditions noted. Therefore, I am imposing the $2,500.00 civil penalty initially proposed by the Secretary for Citation No. 7163242 to reflect the serious gravity of the violation, Eagle Energy's history of failing to control water accumulations in escapeways, and Eagle Energy's admitted repeated failure to note corrective actions in its examination books.[8]

ORDER

ACCORDINGLY, IT IS ORDERED that 104(d)(1) Citation No. 7163242 **IS MODIFIED** to a 104(a) citation to reflect that the cited violation of section 75.380(d)(1) is not attributable to Eagle Energy's unwarrantable failure.

IT IS FURTHER ORDERED that Eagle Energy shall pay a $2,500.00 civil penalty in satisfaction of Citation No. 7163242.

IT IS FURTHER ORDERED, consistent with the parties' settlement agreements reached at trial, that Eagle Energy shall pay civil penalties of $50.00 in satisfaction of Citation No. 7158529, and $300.00 for Citation No. 7163240.

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[7] I am also not suggesting that high negligence can never provide a basis for an unwarrantable failure finding.

[8] I credit Clark's testimony that he had previously warned Bennett "about not showing any corrective action in the [examination] book[s]." Tr. III 77. Moreover, the essence of Eagle Energy's defense in this case is that it had pumped water where water hazards had been noted on examinations despite failing to note corrective action in the weekly escapeway and on-shift examination books.

IT IS ORDERED that Eagle Energy's total civil penalty of $2,850.00 shall be made within 40 days of the date of this decision. Upon timely payment of the $2,850.00 civil penalty, this matter **IS DISMISSED**.[9]

Jerold Feldman
Administrative Law Judge

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[9] I have also considered several post-hearing motions filed by the respondent, as well as the Secretary's responses thereto. The respondent's motions to strike evidence of Citation No. 7187806 issued on August 22, 1999, concerning a methane explosion, proffered as an attachment to the Secretary's proposed findings, and, the portions of the deposition testimony of Superintendent Stanley C. Edwards, proffered as an attachment to the Secretary's reply brief, **ARE GRANTED,** as these documents were not presented, or otherwise referred to, in the Secretary's case. The admission of these documents at this late, post-hearing stage would deprive the respondent of its right to cross examination.

The respondent also filed a motion to strike the Secretary's reply brief because the filing of reply briefs was not authorized when the post-hearing briefing schedule was discussed on the record at the culmination of the hearing. In view of the fact that the respondent was provided with the opportunity to respond, and, has responded, to the Secretary's reply brief, the respondent's motion to strike **IS DENIED**.

In addition, the respondent filed a motion seeking a show cause order requiring the Secretary to demonstrate why this matter should not be dismissed because of the Secretary's October 12, 1999, correspondence requesting that I consider the Commission's recent decision in *Windsor Coal Company*, 21 FMSHRC 997 (September 1999). I do not view the respondent's request for a show cause order as a serious proposal as the Secretary's October 12, 1999, correspondence only requested that I do what I am already obligated to do - - consider all relevant case law. Accordingly, the respondent's request for an Order to Show Cause **IS DENIED**.

Finally, the respondent has also requested attorney's fees for legal expenses associated with its post-hearing motions. Notwithstanding the fact that the respondent has not shown that it is a small entity eligible for reimbursement under the Equal Access to Justice Act, the respondent has failed to demonstrate that legal expenses associated with motions filed during a proceeding that clearly was justifiably brought by the Secretary are reimbursable. Moreover, it is noteworthy that several of the subject motions have been denied on the merits. Accordingly, the respondent's request for attorney's fees **IS DENIED**.

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