

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 27, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-814
Petitioner,	:	A.C. No. 05-04591-144842
	:	
v.	:	
	:	Bowie No. 2 Mine
BOWIE RESOURCES LLC,	:	
Respondent.	:	

**DECISION**

Appearances:           Matthew B. Finnigan, Esq, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
                                  R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before:                    Judge Manning

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 (“MSHA”), against Bowie Resources LLC, (“Bowie”) 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”). The parties introduced testimony and documentary evidence at a hearing held in Grand Junction, Colorado, and filed post-hearing briefs.

Bowie operates a large underground coal mine in Delta County, Colorado. The case involves one section 104(d)(2) order of withdrawal alleging a violation of 30 C.F.R. § 75.400. The Secretary contends that the order should be assessed as a flagrant violation under section 110(b)(2) of the Mine Act and she proposes a penalty of \$220,000.

**I. BACKGROUND**

On September 24, 2007, Inspector Brad Allen (“Allen”) issued Order No. 6684382 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400 as follows:

Combustible materials in the form of very dry, loose coal, coal fines, float coal dust and bug dust were permitted to accumulate in the 1st East Mains active mining section #3 entry, crosscut 15 to 16. An area approximately sixty-six feet long by eighteen to twenty feet wide (the entire width of the entry) was observed where combustible materials had been allowed to accumulate on the mine floor ranging from approximately one inch to twelve inches deep. The area began approximately seventeen feet in by the centerline of crosscut number 15 and

extended toward crosscut #16, #3 entry. Samples were collected to substantiate this violation.

The dry float coal dust was easily suspended in the mine air when liberated. The accumulations provided substantial fuel to propagate a mine fire or explosion should one occur and such propagation would be reasonably likely to result in death or serious injury. This condition was extensive and obvious to anyone concerned with safety. Date, time and initials were present in the #3 to #4 entry, crosscut 15 at the energized power center located in close proximity that showed: 09/24/07 SLM 3:20 a.m., and the on-shift record at the same location indicated 09/24/07 SS 7:30 a.m. This condition creates a fire/explosion hazard. This mine liberated an average of 1,204,543 cubic feet per day of methane gas during the last year (and this number does not include methane liberated through de-gas boreholes used at this mine site.) Miners are required to frequently work or travel in the area throughout the shift.

The mine operator has been cited for 75.400 sixty-one times since 10/18/2005 (fifteen of which were issued to a contractor working for the mine operator). The mine operator was put on notice that greater efforts need to be made to address coal and other combustible material accumulations on 1/31/06. This notice was reiterated on 8/28/07 in the condition/practice portion of two citations issued on that day. There was no work observed to correct the accumulations of combustible materials. The section foreman was standing in the #3 area. The mine operator displayed a serious lack of reasonable care by continuing to mine coal while an accumulation of combustible material hazard existed. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector determined that an injury was reasonably likely and that a fatal accident could occur. He further determined that the violation was of a significant and substantial nature (“S&S”) and the operator’s negligence was high. (Ex. G-2). Section 75.400, entitled “Accumulation of combustible materials” provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400. The Secretary designated the alleged violation as “flagrant” and proposed a penalty of \$220,000.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Brief Summary of Testimony

Inspector Allen testified that during his inspection on September 24, 2007, Ernal Shaw (“Shaw”), the safety manager, accompanied him. (Tr. 20). While conducting the inspection Allen observed “a lot of accumulation on the mine floor,” consisting of a windrow of black coal, coal dust, and bug dust that was “very dry.”<sup>1</sup> (Tr. 27). According to Allen, the ribs and roof, were adequately rock-dusted. (Tr. 28, 74). The inspector observed the accumulations between crosscuts 15 and 16 at the Bowie No. 2 Mine, 1<sup>st</sup> East Mains Section, Number 3 Entry. (Tr. 23, 26; Ex. GX-6). Allen testified he took measurements of the accumulations as referenced within the order. (Tr. 29; Ex. GX-2). Allen also collected samples of the accumulations for testing, which determined that roughly between 69-77% of the material was highly combustible. (Tr. 31; Ex. GX-7). While collecting samples Allen visually observed that coal dust was easily suspended in the air when disturbed. (Tr. 31). Allen noted that no Bowie employees had been in the process of shoveling up the conditions while he was in the area. (Tr. 41). Based on the above information, Allen issued Order No. 6684382. Allen additionally testified that if he had seen employees rock-dusting the entry without cleaning up the accumulations, the order might have still been issued.

In September of 2007, Bowie No. 2 Mine was on a five-day spot inspection cycle because the mine liberated an average of 1.2 million cubic feet of methane per day; liberation of 1 million is the threshold for enhanced inspections. (Tr. 17-18). According to Allen, at the time of inspection, the record books showed a trace amount, two-tenths of one percent, of methane measured at the face, about 600 feet from the accumulations. (Tr. 21, 32, 35-36). Specifically, Allen testified that methane becomes combustible in the range of around 5 to 15 percent, but this percentage may be lower with the presence of float coal dust. (Tr. 21, 44). Allen noted several ignition sources in the area. A power center, without any visible defects, was located right around the corner, roughly 30 feet from the accumulation. (Tr. 35, 37, 50) There was a shuttle car nearby that had energized trailing cables, also without any visual defects. (Tr. 35, 37). Allen, however, testified that defects in trailing cables arise frequently. (Tr. 37). In addition, at the face of the mine, a continuous miner and roof bolter were in operation. (Tr. 36). Allen further testified that for an explosion to occur, a fuel source, either methane or coal dust, oxygen, and an ignition source must be present. (Tr. 40). At the time of the order, Allen testified that eight people were in the section, a few were operating the roof bolter at the face, Steve Shelton (“Shelton”) was at the power center, and a few others were performing other work. (Tr. 58).

Allen also testified that he issued a termination order for the alleged violation the same day. (Tr. 66) He stated that it took around two hours and eight minutes for five to six miners to clean up the accumulations and rock-dust the mine floor, though he did not observe the clean up. (Tr. 66). Additionally, Allen testified that the miners applied about a pallet of rock dust, which is about 40-50 bags weighing 50 pounds each. (Tr. 68). Allen testified that he believed that a

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<sup>1</sup> “Bug dust” is a form of coal dust that is larger than coal fines but smaller than loose coal. (Tr. 34).

significant amount of material had to be cleaned up and it was one of the longer termination times that he had personally observed. (Tr. 69-70).

Allen determined that the violation was reasonably likely to result in a fatal injury due to the significant amount of accumulations in the crosscut. (Tr. 42). He reasoned that a fire could occur causing a significant amount of smoke, disorienting and trapping miners, or an explosion could occur causing a concussion, resulting in blunt force trauma to miners. (Tr. 42-43). Additionally, Allen designated the violation to be a result of the operator's high negligence because Shelton, the section supervisor, was standing around the corner of an open and obvious safety condition. (Tr. 49).

Allen further determined that the violation was S&S due to the likelihood for a serious injury to result from the condition. (Tr. 58). He reasoned that the "accumulations provided substantial fuel to cause a serious injury." (Tr. 59). The violation was also determined to be an unwarrantable failure by Allen because of the operator's negligent conduct. (Tr. 59). Allen reasoned that negligent conduct was present due to Shelton's standing at the "obvious" hazard location with no perceived effort to eliminate the condition. (Tr. 59-60). Additionally, Bowie continued to mine coal instead of correcting the hazard. (Tr. 59). Moreover, Allen testified that Bowie had a history of violations and was put on notice for heightened awareness. (Tr. 59). Finally, Allen also determined, after he left the mine, that the order should also be appropriately classified as a flagrant violation. (Tr. 63, 66). Allen reasoned that Bowie had previously been issued 61 citations and orders and had been put on notice to address the repeated section 75.400 violations. (Tr. 64). Furthermore, Allen testified that the severity levels of the citations were increasing in the months preceding the order at issue. (Tr. 64).

Allen, on cross-examination, stated that he personally has never investigated a face ignition or shuttle car trailing cable fire at Bowie No. 2 mine and has not studied reports on face ignitions. (Tr. 75, 98). Allen additionally agreed that section 75.400 is a broad standard that includes accumulations of a wide range of materials. (Tr. 78). Allen testified, that section 75.400 is the most frequently cited underground coal mine standard. (Tr. 82).

Shelton, a section supervisor for Bowie, testified that he had observed the crosscut referenced in the citation and determined it needed to be rock-dusted. (Tr. 125). Before going underground, Shelton was told that a new stopping was built by the prior shift in the Number 3 Entry of the 1<sup>st</sup> East Mains. (Tr. 113-14). Shelton stated that during his onshift exam he found methane, up to four-tenths of one percent, located at various high spots along the 1<sup>st</sup> East Mains. (Tr. 119-20; Ex. GX-12). Additionally, Shelton noticed during his onshift that the Number 3 Entry needed rock-dusting between crosscuts 15 and 16 and spoke with Blake Kinser ("Kinser") about bringing a pallet of rock dust after restocking the roof bolter. (Tr. 121, 125-26; Ex. G-11). Shelton then went back to the power center to prevent any miners from entering the affected area. He was at the power center when Inspector Allen and Shaw approached the area. (Tr. 127). Shelton testified that the area was not dangerous, reasoning that there were no ignition sources in the area and nobody was traveling in the area. (Tr. 123). On cross-examination, Shelton testified that the termination order took two hours and eight minutes because the crew had to shut down and back out the mining equipment at the face, gather shovels and bring water down to the area, unload the bolting materials that were in the bucket of the loader, shovel and

haul the accumulations out of the area, and finally spread rock dust. (Tr. 147). The bucket, measuring eight to ten feet wide by two feet high and four feet deep was full but not “heaped over” with the accumulations that were removed, according to Shelton. (Tr. 152-53, 155).

Kinser, a utility person for Bowie, testified that before the order was issued, Shelton had asked him to get a pallet of rock dust after he restocked the roof bolter. (Tr. 160). Kinser stated that he saw “some” material on the floor and “rib sloughage.” (Tr. 158, 161). Kinser also testified that it took two hours and eight minutes to completely abate the order. (Tr. 157). This work included notification of the issuance of the order, emptying bolter supplies from the scoop bucket, watering down the area, shoveling the accumulations, and rock-dusting by hand. (Tr. 162-63, 167).

Shaw testified that float dust has to be suspended in air for it to be considered an explosive concentration and the quantity needs to be around 2.4 pounds per cubic yard. (Tr. 180). Such a concentration is so thick that there would be limited visibility and the air would be unbreathable. (Tr. 180). Shaw stated that miners did not finish cleaning up after installing the stopping during the previous shift. (Tr. 182). He reasoned that most of the material on the floor came from the construction of the stopping. (Tr. 182). Additionally, Shaw testified that the potential for a face ignition to propagate back to the crosscut was “completely unlikely,” due to the fact that everything in between was well rock-dusted. (Tr. 182-83). Shaw also stated that the power center was not reasonably likely to catch on fire. (Tr. 188). Regarding the termination order, Shaw testified that the quantity of accumulations cleaned up were more than he would like to see, but “not extreme” in nature. (Tr. 190).

### **B. Violation of § 75.400**

The parties present opposing views of the evidence in this case. Bowie first argues that no violation of section 75.400 occurred. Bowie reasons that some spillage is permissible because of mining’s inherent nature and the record establishes that the stopping line was built during the previous shift and materials from this construction were still in the entry. Additionally, Bowie argues that some of the material was located along the rib and should be considered rib sloughage; therefore, removal is not required because the rib may be destabilized and rock-dusting is permitted in lieu of cleaning up the coal.

The Secretary responds that Allen properly issued the order to Bowie because the evidence presented at trial established that combustible materials were permitted to accumulate, in violation of section 75.400. The Secretary reasons Bowie did not produce any evidence to refute this proof. Bowie’s employees confirmed the violation by admitting to the accumulations and testifying that a 64-cubic-foot scoop bucket was filled with the accumulations.

It is important to understand that Kennedy stoppings were recently installed across the entries of the 1<sup>st</sup> East Mains because Bowie was developing rooms to be connected to the 2nd East Mains for the next set of longwall panels. (Ex. G-5). Thus, the continuous miner was developing what essentially were entries to the left of the 1<sup>st</sup> East Mains. (Ex. G-6). These “entries” had been developed a distance of about 600 feet from the No. 3 entry of the 1<sup>st</sup> East Mains at the time Inspector Allen issued the order. The intake air made a 90-degree left turn to

ventilate the working face. Thus, the part of the No. 3 entry between Crosscuts 15 and 16 containing the accumulation functioned as a crosscut in relation to the area of active mining. (Ex. G-6).

I credit the testimony of Bowie's witnesses that the stopping across the No. 3 Entry had been built during the previous shift. The stopping was installed in the entry just outby crosscut 16. Thus, a miner could no longer pass through the No. 3 Entry between the Nos. 15 and 16 crosscuts because the stopping blocked such passage. Before the subject stopping was installed, the cited area of the entry was used as a roadway for shuttle cars and other vehicles.

When a Kennedy stopping is installed, the ribs, roof, and floor of the mine are cleaned up where the stopping will be installed to make the area as smooth as possible so that the seal around the stopping will be tight and there will not be any gaps after the foam sealant is applied. Accumulations of coal and coal dust are created in the process. Once the stopping is installed, the crew typically cleans up the area, removes any leftover supplies, and applies rock dust. I credit the testimony of Bowie's witnesses that the previous shift ended before the crew could perform these cleaning activities. As a consequence, when Shelton arrived at the beginning of his shift he saw the accumulations that had been created between the Nos. 15 and 16 crosscuts in the No. 3 Entry when the stopping was installed, he observed supplies that had been left in the entry near the stopping, and he saw that the floor of the entry had not been rock-dusted.

For the reasons set forth below, I find that the Secretary established a violation of section 75.400. Section 75.400 states that "combustible materials shall be cleaned up and not be permitted to accumulate in active workings." "[T]he language of the standard makes accumulations impermissible." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979). The Commission held that "a violation of . . . 30 C.F.R. § 75.400 occurs when an accumulation of combustible materials *exists*." *Id.* at 1958 (emphasis added). The Commission recognized that "some spillage of combustible materials may be inevitable in mining operations;" however, the size and amount of spillage determines whether spillage will constitute accumulations. *Id.* Accumulations were further defined by the Commission to "exist where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980). "There is no bright line between acceptable accumulations of combustible materials and accumulations that violate section 75.400." *Mountain Coal Company*, 26 FMSHRC 853, 861 (Nov. 2004). The issue is "whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the safety standard seeks to prevent." *Id.*

I credit the evidence presented by Inspector Allen as to the accumulations he observed. Allen measured the accumulations to be about 66 feet long, around 18 feet wide, and between 8 and 12 inches deep in some places, which Bowie did not refute. (Tr. 29, 123). I also credit the testimony of Shelton and Kinser, who testified that the accumulations filled a scoop bucket approximately 8 to 10 feet wide, 2 feet high, and 4 feet deep, though the accumulations did not "heave over" or "overflow" the bucket. (Tr. 139, 152-153, 161). I find that the volume of material cleaned up from the hazard is significant. The accumulations that were cleaned up included rib sloughage. Furthermore, testing of the accumulations revealed that the samples

were above the allowable limit of 60% combustible material. (Tr. 154). I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the safety standard seeks to prevent. On that basis, I find that the Secretary established a violation of section 75.400.

### **C. Significant and Substantial**

Bowie further argues that the S&S designation was improper because there was no reasonable likelihood of injury resulting from the violation. Specifically, Bowie is challenging the third element of the *Mathies* test, which states “a reasonable likelihood that the hazard contributed to will result in an injury.” (Bowie Br. 10). Bowie relies on the facts that the condition was about to be corrected that morning, the propagation of an explosion was unlikely, and Shaw was standing in the area restricting access to miners. Bowie contends that finding a fire or explosion “could occur” is not sufficient for finding that such a result is reasonably likely to occur.

The Secretary argues that Allen, using his 14-year experience, properly considered both the mine’s characteristics and Bowie’s conduct when designating the violation as S&S. The Secretary reasons that underground mining is inherently dangerous and Allen properly detailed a variety of hazards that were reasonably likely to occur.

Bowie first attacks the Secretary’s conclusion that a fire or explosion at the face was reasonably likely to occur. On September 24, 2007, there were no elevated methane levels at the face. (Bowie Br. 10). Furthermore, there have been no face ignitions at Bowie because of good mining practices and the presence of a coal floor within the mine, rather than a floor containing quartz-bearing rock. (Bowie Br. 11). Bowie reasons that an ignition at the face is unlikely due to these conditions. Bowie argues that even if a face ignition of methane were to occur, it would not propagate back to the accumulations 600 feet from the mine face because the entries between were properly rock-dusted. (Bowie Br. 13). On the other hand, the Secretary contends that Bowie No. 2 is a “gassy mine” in which methane is capable of accumulating quickly. (Sec’y Br. 20). Bowie was actively mining at the face, and face ignitions are an inherent danger in coal mining. (Sec’y Br. 21-22). With methane able to accumulate quickly and the possibility of a face ignition, the Secretary argues that the possible resulting explosion would result in placing the float coal dust into suspension further propagating the explosion. (Sec’y Br. 20-21). Additionally, the Secretary notes that Bowie has had to cease production eight or nine times due to dangerous methane levels, though this occurred in a different coal seam. (Sec’y Br. 21).

Bowie additionally attacks the Secretary’s conclusions that other ignition sources, separate from the face, existed and were reasonably likely to cause an explosion. Bowie notes that there is no evidence that the power center was defective or that the trailing cables attached to the power center were defective. The cables were encased in thick insulation. (Bowie Br. 12). The Secretary argues that electrical equipment can serve as an ignition source without any apparent defects. (Sec’y Br. 21). Trailing cables, additionally, are prone to defects that arise quickly because of the nature of shuttle car driving. (Sec’y Br. 23). Bowie also refutes the Secretary’s claim that bumps or bounces could serve as an ignition source. Bowie notes that Shaw testified that no bounces had occurred at the mine prior to the contested order and, if the

roof does fail in a bounce, it is unlikely to ignite methane. (Bowie Br. 13). The Secretary contends that bounces can disrupt ventilation and production, increasing the likelihood of an explosion. (Sec’y Br. 23-24).

An 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 of illness or 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).

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 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 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).

I find that the Secretary did not establish that the violation was S&S. The Secretary established the first, second, and fourth element of the *Mathies* test. I find, however, that it was not reasonably likely that the cited accumulations contributed to a hazard that would result in an injury, the third element of the *Mathies* test. Oxygen and a fuel source were present in the cited

entry. Inspector Allen testified that a fire or explosion with resulting injuries, including fatal injuries, could occur due to several possible ignition sources within the area of the accumulations. I agree that such an accident could occur, but it was not established that it was reasonably likely to occur. I credit the testimony of Bowie's witnesses that Shelton recognized the potential hazard when he arrived on the section, took steps to have rock dust delivered to the entry, and remained in the area to keep miners out of the entry.

The Commission provided the following guidance for accumulation violations:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

*Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997).

Although about a full scoop of accumulations was removed, the accumulations were confined to one area between two crosscuts. Some of the accumulations were rib sloughage and some were from the construction of the stopping during the previous shift. The area had been a roadway prior to the construction of the stopping so accumulations in the area may well have been ground down by the traffic and pushed to the side in windrows. As stated above, I find that it was unlikely that the accumulations would have been ignited by any of the potential ignition sources identified by Inspector Allen. The mine does not have a history of face ignitions because, in part, the mine floor is made of coal. While a face ignition was possible, it was unlikely that such an ignition would propagate an explosion of the cited accumulations because the areas between the face and the accumulations were fully rock-dusted. The power center located near the accumulations showed no signs of defects and there is no evidence that it was no longer in permissible condition. There was no evidence that the trailing cables attached to the power center were defective. Assuming continued mining operations, the accumulations would have been fully rock-dusted and rendered incombustible within a few hours. It is unlikely that any of these potential ignition sources could spark a fire or propagate an explosion.

I credit the inspector's testimony noting that active mining at the face of a gassy mine along with bumps and bounces can serve as an ignition source that suspends accumulations further outby. I find that such an event was unlikely given the history of this mine and the remedial actions being taken by the operator. Although methane can develop quickly in a gassy mine, this mine has no history of methane rapidly accumulating over a large area. I find that there was not a confluence of factors present that made a fire or ignition reasonably likely.

I contrast the facts of this case with the facts set forth in my decision in *Twentymile Coal Co.*, 32 FMSHRC 1431 (Oct. 2010) (Pet. for disc. rev. granted by Comm., Nov. 24, 2011). In that case, float coal dust had been allowed to accumulate along a belt line for a distance of about 3,400 feet. Float coal dust was present along the belt entry, on the ribs, roof, and floor, on the

belt structure, pipes and hoses, and electrical control boxes. *Id.* at 1439. No action had been initiated to rock-dust the area and I determined that the float coal dust had accumulated over several shifts. *Id.* at 1447. The Secretary cites that case to support the inspector's S&S determination in the present case. Under the facts of the present case, however, the accumulations were a combination of rib sloughage and coal material that had been left in the area at the end of the previous shift following the installation of a stopping. Moreover, Bowie was in the process of mitigating the hazard. Although the Secretary presents a number of catastrophic events that could occur at the Bowie Mine, invoking the disasters at the Sago and Upper Big Branch Mines, I find that the facts presented at the hearing demonstrate that such catastrophic events were highly unlikely and that this case has little in common with the facts that led to those disasters or with the facts presented in *Twentymile*.

I recognize that the Commission has held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 178-79 (Dec. 1998); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7<sup>th</sup> Cir. 1995). I reach my conclusion that the violation was not S&S after careful consideration of the evidence of record and continuing mining operations.

#### **D. Unwarrantable Failure**

Additionally, Bowie argues that the violation was not the result of an unwarrantable failure because no aggravated conduct was present. Bowie contends that Allen failed to take into consideration Shelton's actions to address the accumulations. (Bowie Br. 17). Moreover, the condition had only existed for a short period of time. (Bowie Br. 17). Bowie also contests the finding of unwarrantable failure based on prior section 75.400 violations the mine had received. Bowie argues that for it to be on notice based on past violations, the past violations must be similar to the current violation. (Bowie Br. 18). Furthermore, Bowie argues that it had taken steps to address section 75.400 violations. (Bowie Br. 19-20). Both Shelton and Shaw testified that they had discussed accumulations with miners during preshift and safety meetings.

The Secretary contends that the violation of section 75.400 was an unwarrantable failure because Bowie's conduct is considered aggravated as defined by *Lopke Quarries*. (Sec'y Br. 27-28). First, the Secretary argues that the accumulations existed for at least a shift and Bowie had previously received repeated warnings regarding accumulations of combustible materials. (Sec'y Br. 28). Second, the accumulations were extensive because of the volume cleaned up and the time it took to finish the termination order. (Sec'y Br. 28-29). Third, the accumulations were "open and obvious" according to Allen. (Sec'y Br. 29). The Secretary argues that while accumulations are not uncommon in underground coal mining, accumulations are dangerous, but easily remedied, and Bowie favored coal production, ignoring the accumulations. (Sec'y Br. 29). Fourth, prior section 75.400 violations, 46 citations and orders with 15 designated S&S in the two years prior, put Bowie on notice for greater efforts to comply. (Sec'y Br. 30). Allen personally discussed his concerns about accumulations with Shaw prior to the issuance of the subject order. (Sec'y Br. 30-31). Additionally, in the weeks preceding Order No. 6684382 Bowie was issued two unwarrantable failure orders. Finally, the Secretary argues that Bowie made no effort to abate the accumulations, the accumulations posed a high danger, and Bowie was aware of the accumulations. (Sec'y Br. 32-33).

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated the law applicable to determining whether a violation is the result of an 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).

Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as 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 are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses 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); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

I find that the Secretary did not establish that the violation was the result of Bowie’s unwarrantable failure to comply with the safety standard. Its conduct was not aggravated. I credit testimony from both Shelton and Kinser that Shelton was aware of the condition and was taking steps to remedy the situation before Inspector Allen arrived. The accumulations cited in the violation were primarily from the construction of a stopping during the previous shift and from rib sloughage. Shelton noticed the accumulations during his onshift examination and asked Kinser to bring a pallet of rock dust to the entry. It is not entirely clear how long the accumulations had been present. The accumulations created by the installation of the stopping had existed only since the end of the previous shift. The rib sloughage may have been present longer but there is no reliable evidence on that issue. The accumulations were present in a discrete area between Crosscuts 15 and 16.

Bowie was on notice that greater efforts were necessary to comply with the safety standard; however, Shelton demonstrated his efforts to address this particular violation. Shelton requested another miner's assistance and stood outside the accumulations to ensure no one would enter before the accumulations were addressed. Bowie's employees did not disregard the accumulations and Shelton was taking the actions he believed to be reasonable. Given the volume of accumulations present, a better course of action may have been for Shelton to bring in the scoop to remove at least some of the accumulations from the mine. Nevertheless, Bowie was in the process of making reasonable efforts to address the hazard. The accumulations would not have remained in the same state for much longer. In sum, the record establishes that Bowie was aware of the condition and was taking steps to neutralize the hazard. The company's conduct did not amount to "reckless disregard," "intentional misconduct," "indifference," or even a "serious lack of reasonable care." I find that Bowie's actions did not amount to aggravated conduct and the order is modified to a section 104(a) citation.

#### **E. Flagrant**

Finally, Bowie argues that the Secretary failed to establish that the violation should be deemed to be flagrant. Section 110(b)(2) of the Mine Act sets forth the parameters for concluding that a violation is flagrant and provides for the assessment of enhanced civil penalties:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

In *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011), Commission Judge Alan Paez addressed the issue of flagrant violations. He held that section 110(b)(2) is ambiguous because neither the statutory language nor the legislative history set forth a clear statement of Congressional intent. *Id.* at 801. I agree with the analysis of Judge Paez on this issue and incorporate his discussion in section III A. through III C. by reference. 33 FMSHRC 798-802. As a consequence, under *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984), interpretation of the statute is reserved for the courts. In *Stillhouse Mining*, Judge Paez held that to establish a flagrant violation, the Secretary must prove four elements: (1) reckless or repeated failure to make reasonable efforts to eliminate, (2) a known violation of a mandatory health or safety standard, (3) that substantially and proximately cause or reasonably could have been expected to cause, (4) death or serious bodily injury. I agree with Judge Paez's analysis.

One of Bowie's principal arguments in the present case was not presented to Judge Paez in *Stillhouse Mining*. Bowie maintains that a penalty for a flagrant violation may only be assessed when an operator fails to correct a previously cited violation. (Bowie Br. 22). Bowie contends that the phrase in section 110(b)(2), "[v]iolations under this section," refers specifically

to section 110(b)(1). Therefore, “a violation cannot be deemed to be flagrant until a citation has been issued and the operator has failed, either recklessly or repeatedly, to make reasonable efforts to eliminate the violation for which the citation was issued.” (Bowie Br. 23). Thus, flagrant violations are limited to situations in which an operator fails to abate a condition for which a citation has already been issued under section 104(a) of the Mine Act. Bowie further reasons that the language of the statute is clear and the court should apply the plain meaning of the statutory language. (Bowie Br. 23). Its argument is based in large part on the placement of the flagrant violation provision within section 110(b) of the Mine Act.

Because Bowie’s position was described in detail for the first time in its brief, the Secretary did not directly address this precise issue in her simultaneously filed brief. The Secretary maintains that she is not required to demonstrate that the operator repeatedly failed to eliminate a violation that occurred in the same location. (Sec’y Br. 10-11). She argues that nothing in section 110(b)(2) establishes such a limitation and that, if adopted, such a limitation would severely limit the application of the statutory provision.

I reject Bowie’s argument on this issue. The language of section 110(b) is not an example of the clearest legislative drafting. However, it cannot be reasonably interpreted to mean that the failure to correct a cited condition within the time limits set forth in a citation is a prerequisite to a finding that the violation is flagrant. Congress passed the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) amending the Mine Act as a response to the high number of mining fatalities that occurred in the early part of 2006. S. Rep. No. 109-365, at 2 (2006). The broad purpose of the MINER Act was stated as “further[ing] the goals set out in the [Mine Act] and to enhance worker safety.” *Id.* at 1. To accomplish this purpose Congress intended to “improve safety-related procedures and protocols and increase enforcement and compliance to improve mine safety.” *Id.* Congress, by adding a flagrant designation, is increasing civil penalties for safety violations to serve as a deterrent for habitually neglecting worker safety. Limiting the scope of section 110(b)(2), as proposed by Bowie, would frustrate the main purpose expressed by Congress to enhance worker safety. Section 110(b)(1) already provides an incentive for operators to abate citations within the time permitted by the MSHA inspector. It currently mandates a penalty of \$7,500 each day that an operator fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act. There is a built-in incentive for an operator to rapidly abate a withdrawal order because mining operations cannot resume until the cited condition is abated. There is no indication in the statute or the legislative history that Congress intended to add a second financial incentive for operators to rapidly abate cited conditions. I conclude that operator’s failure to correct a violation under subsection 110(b)(1) is not a prerequisite to the establishment of a flagrant violation.<sup>2</sup>

Bowie argues that, even if the court rejects its argument that section 110(b)(2) only covers a failure to correct cited conditions, the company’s actions do not otherwise meet the requirements necessary to establish a flagrant violation. (Bowie Br. 29). Bowie reasons that Shelton was already in the process of addressing the condition before the order was issued and,

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<sup>2</sup> Judge Paez reached the same conclusion on a related issue raised in *Stillhouse*. He concluded that the “known violation” at issue in a flagrant case need not have been previously cited by MSHA. 33 FMSHRC at 807.

because the condition resulted from the construction of a stopping during the previous shift, his actions were neither reckless nor repeated. (Bowie Br. 30).

The Secretary contends that Bowie violated each of the five elements contained in the statutory definition of flagrant. (Sec’y Br. 4). First, Bowie repeatedly failed to comply with section 75.400 with 46 violations in the previous fifteen months leading up to Order No. 6684382. (Sec’y Br. 5-6). Second, Bowie did not make reasonable efforts to eliminate coal accumulations because of the continued disregard for accumulations after numerous violations. (Sec’y Br. 7). Third, Bowie knew of the accumulations cited because coal accumulations are inherent to mining and the safety director would address accumulations on “almost a daily” basis. (Sec’y Br. 8). Fourth, section 75.400 is a mandatory health or safety standard. *Id.* Finally, the violation of section 75.400 could have reasonably been expected to cause death or serious bodily injury. *Id.* The Secretary reasons that the accumulations were significant enough to cause an explosion or fire leading to serious miner injuries. (Sec’y Br. 8-9).

In *Stillhouse Mining*, the parties agreed that the alleged violations were isolated incidents, as opposed to repeated occurrences of similar past conduct. 33 FMSHRC at 802-03. In the present case, the issue is whether Bowie repeatedly failed to make reasonable efforts to eliminate a known violation of a safety standard. Nevertheless, the discussion in *Stillhouse Mining* is helpful. Judge Paez found that “‘reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard’ occurs when, in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury.” *Id.* at 805. Judge Paez, however, did not address how the phrase “repeated failure” should be interpreted in this context.

The Secretary argues that the evidence demonstrates that Bowie has repeatedly violated section 75.400. She argues that, using the plain meaning of the term “repeated,” there can be no dispute that Bowie’s 46 violations of section 75.400 constitutes a repeated failure to comply with the standard. The Secretary maintains that loose coal, coal dust, and float coal dust cited in this case are the most common form of accumulations prohibited by section 75.400. Although other combustible materials may accumulate in a mine, the approach to cleaning them up does not vary. “Given the substantial similarity between the violation detailed in Order No. 6684382 and the forty-six violations of section 75.400 in the prior fifteen months . . . , Bowie’s failure to comply with section 75.400 was unquestionably a ‘repeated failure.’ ” (Sec’y Br. 6).

Bowie approaches the question from a different perspective. It maintains that the court must look at the conduct of the operator with respect to the violation at issue when determining whether there was a repeated failure to correct a condition. It asserts that the facts in this case establish that Shelton, when he arrived on the section, “made the determination, supported by MSHA policy, to rock-dust the rib sloughage crosscut 15 to 16 in the Number 3 Entry.” (Bowie Br. 30). He was in the process of addressing this before Inspector Allen arrived. “For that very reason, there was no reckless or repeated failure to correct a known violation.” *Id.* The accumulation resulted, in part, from the building of a stopping during the previous shift. Bowie’s

conduct did not rise to a repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard.

The difficulty in grappling with this issue in the manner suggested by the Secretary is that section 75.400 is the most frequently cited safety standard in underground coal mines. It can be stated that every underground coal mine has repeatedly been issued citations and orders for violations of section 75.400. As a large underground coal mine, it is not surprising that the Bowie Mine had been issued many citations and orders for such violations in the 15 months before September 27, 2007. In addition, section 75.400 covers a wide range of situations including, but not limited to, accumulations of trash on a section, accumulations of hydraulic oil on equipment, accumulations of coal debris on equipment, as well as the accumulations of coal, coal dust, and float coal dust along an entry or in a crosscut. I believe that the Secretary cannot establish the “repeated failure” element in section 110(b)(2) by simply introducing a computer printout showing that there have been multiple violations of the cited safety standard at the mine. Such statistics do not establish that the mine operator has repeatedly failed to make reasonable efforts to eliminate a known violation.

The Secretary also relies on the fact that Bowie received two 104(d) orders for violating section 75.400 in the seven weeks before September 24, 2007.<sup>3</sup> (Exs. G-15, G-16). Order No. 6684367, August 29, 2007, was issued for allowing hydraulic oil mixed with coal to accumulate on a roof bolting machine. (Ex. G-15). Order No. 6684274, August 8, 2007, was issued for float coal dust on the floor, roof, ribs, and belt structure along a belt line and for other conditions. (Ex. G-16). The Secretary contends that the seriousness of section 75.400 violations had been increasing in the months prior to September 2007. Shelton testified that Bowie had taken steps to address these problems. He said that he regularly discussed citations and orders issued for violations of section 75.400 with his crew and he regularly told his crew that it is important to avoid accumulations of combustible materials. (Tr. 142-43, 186-87).

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<sup>3</sup> The parties stipulated that the Secretary based her flagrant designation “on the policy set forth in Procedure Instruction Letters I06-III-04 and I08-III-02.” (Stip. 7). The stipulation goes on to state that such “designation is based on such policy as it relates to ‘repeated’ unwarrantable failure violations of the same standard.” In pertinent part, the letters provide that, for violations that are the result of “repeated failure” to make reasonable efforts to eliminate a known violation, the Secretary may rely on the fact that “[a]t least two prior ‘unwarrantable failure’ violations of the same safety or health standard have been cited within the past 15 months.” The stipulation provides that Bowie “is not stipulating to the validity of such designation as flagrant or the validity of using such Procedure Instruction Letters as a basis of a flagrant designation.” For the reasons set forth below, I have not relied on these letters in this decision.

Although there may be circumstances in which an increasing history of S&S and unwarrantable violations of section 74.400 would be sufficient to establish a “repeated failure to make reasonable efforts to eliminate a known violation” of the safety standard, resolving this issue is not necessary to determine whether a flagrant penalty should be assessed in this case.<sup>4</sup>

I find that the Secretary did not establish that the violation at issue in this case reasonably could have been expected to cause death or serious bodily injury. Judge Paez framed the issue as follows: “Based on the plain meaning of the statute’s terms, for the purpose of establishing a flagrant violation, an operator’s conduct ‘reasonably could have been expected to cause death or serious bodily injury’ when, based on all of the facts and circumstances surrounding the operator’s reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard, the operator’s conduct was likely to bring about death or serious bodily injury.” 33 FMSHRC 808. I find that the operator’s conduct in this case was not likely to bring about death or serious bodily injury to miners working at the mine. My analysis on this issue is similar to, but not necessarily the same as, the S&S analysis. I agree with Judge Paez that the risk of death or injury need not be immediate or imminent. *Id.* at 815-16.<sup>5</sup> The issue is whether the cited condition created an environment that made death or serious injury likely. *Id.* For the reasons discussed above, I find that Bowie’s conduct was unlikely to bring about death or serious bodily injury. As a consequence, the Secretary’s flagrant determination is vacated.

#### **F. Gravity and Negligence**

I find that the evidence establishes that the conditions cited in the order created a serious violation of section 75.400. Although an injury or illness was not reasonably likely, if an accident were to occur, serious injuries or fatalities could result. The eight miners on the section could have been affected.

I find that Bowie’s negligence was moderate. Although Bowie was taking steps to address the hazard, it could have done more. For example, Shelton could have assigned several crew members to remove and/or rock-dust the accumulations before other mining operations commenced.

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<sup>4</sup> Indeed, any conclusion of law that I might reach on this rather complex issue of first impression would be *obiter dictum*. If this case is reviewed by the Commission and this issue is remanded to me for decision, I would then have the benefit of the Commission’s ruling on the myriad legal issues that are lurking in section 110(b)(2), which will help direct a resolution.

<sup>5</sup> In *Stillhouse*, Judge Paez determined that citation and orders at issue in that case were S&S.

### III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports. (Ex. G-1). Bowie had about 382 paid violations at the Bowie No. 2 Mine during the 24 months preceding September 24, 2007. It was issued about 132 S&S violations during this same period. Bowie is a large mine operator. The violation was abated in good faith. The penalties assessed in this decision will not have an adverse effect on Bowie's ability to continue in business. The gravity and negligence findings are discussed above. Based on the criteria in section 110(i) of the Mine Act, I find that a penalty of \$10,000.00 is appropriate for this violation.

### IV. ORDER

For the reasons set forth above, Order No. 6684382 is **MODIFIED** to a section 104(a) non-significant and substantial citation with moderate negligence. The flagrant penalty allegation brought by the Secretary under section 110(b)(2) of the Mine Act is **VACATED**. Bowie Resources, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$10,000 within 40 days of the date of this decision.<sup>6</sup>

Richard W. Manning  
Administrative Law Judge

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RWM

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<sup>6</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390