FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 23, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1000
Petitioner,	:	A.C. No. 46-09086-178774-01
	:	
v.	:	Docket No. WEVA 2009-1306
	:	A.C. No. 46-09086-181457-01
BRODY MINING, LLC.,	:	
Respondent.	:	Mine: Brody Mine No. 1

DECISION

Appearances: J. Matthew McCracken, Esq., United States Department of Labor, Solicitor's Office, Arlington, VA, for the Secretary of Labor
Amos H. Presler, Esq. USDOL, United States Department of Labor, Solicitor's Office, Arlington, VA, for the Secretary of Labor
Jason M. Nutzman, Esq. Smith, Moore, Leatherwood, LLP, Greenville, SC, for the Respondent
George J. Oliver, Esq., Smith, Moore, Leatherwood, LLP, Raleigh, NC, for the Respondent

Before: Judge L. Zane Gill

Procedural History

This case consolidates WEVA 2009-1000 and WEVA 2009-1306 and arises from petitions for civil penalties filed by the Secretary of Labor under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq., (the "Act").[1] The petition charges Brody Mining ("Brody") with eight violations of mandatory standards and seeks civil penalties for those violations, as summarized in the following table.

[1] This penalty assessment case was originally filed as WEVA 2009-1000 and WEVA 2009-1001 on or about May 18, 2009. The two cases were consolidated initially and assigned to me. WEVA 2009-1000 subsumed two previously filed contest cases, WEVA 2009-0813-R and WEVA 2009-0814-R. On or about June 7, 2010, counsel for the Secretary filed a motion to sever WEVA 2009-1000 from WEVA 2009-1001 and to consolidate WEVA 2009-1000 with WEVA 2009-1306, which had been assigned to Judge Feldman. The severance and consolidation motion was granted on June 25, 2010, resulting in the paring of WEVA 2009-1000 and WEVA 2009-1306 for purposes of this decision.

Cit/Ord No.	Date Issued	Inspector	Standard	Docket No	Action	Penalty	Negligence
8075863	January 15, 2009	Ward	75.370(a)(1)	WEVA 2009-1000	104(d)(2)	$5,211	High
8075864	January 15, 2009	Ward	75.360(b)(3)	WEVA 2009-1000	104(d)(2)	$7,774	High
8079178	January 22, 2009	Jackson	75.380(d)(1)	WEVA 2009-1000	104(d)(2)	$56,929	Reckless Disregard
8079179	January 22, 2009	Jackson	75.400	WEVA 2009-1000	104(d)(2)	$70,000	Reckless Disregard
8068033	October 8, 2008	Ward	75.1403	WEVA 2009-1306	104(d)(2)	$4,099	High
8075874	February 11, 2009	Ward	75.370(a)(1)	WEVA 2009-1306	104(d)(2)	$4,440	High
8075906	March 3, 2009	Ward	75.1722(a)	WEVA 2009-1306	104(d)(2)	$4,000	High
8079224	February 26, 2009	Jackson	75.400	WEVA 2009-1306	104(d)(2)	$70,000	Reckless Disregard

The general issue before me is whether Brody violated the standards as alleged and, if so, what the appropriate civil penalty is for those violations. Additional specific issues are addressed as noted. No objection was raised in the pleadings or during the trial to the jurisdiction of this court over the case.

The case was heard on December 16 and 17, 2010, at the National Mine Academy in Beckley, West Virginia.

Common Legal Standards

Concepts of negligence and gravity apply to all citations and orders under the Mine Act, irrespective of whether the Secretary pursues enhanced enforcement. They are codified and reduced to table form at 30 C.F.R. § 100.3 and form a defined and integral part of the penalty assessment mechanism used by MSHA and its inspectors**.** The concepts of "significant and substantial" and "unwarrantable failure" are applied, primarily to 104(d) orders[2], as part of the enhanced enforcement mechanism set forth in the Mine Act.

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(I). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs. The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *Southern Ohio Coal Co.*, 4 FMSHRC at 1463-64. See also *Nacco Mining Co.*, 3 FMSHRC at 848, 850-51 (April 1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company*, 5 FMSHRC 13, (January1983).

[2] The Mine Act also contemplates that "any citation given to the operator under this Act" may form the basis for enhanced enforcement if the elements of "significant and substantial" and "unwarrantable failure" can be proved. 30 U.S.C § 814(d)(1)

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required […] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." Id. High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Gravity ("Seriousness")

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). See *Quinland Coals Inc.*, 9 FMSHRC, 1614, 1622, n.1 (September 1987).

Gravity is "often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained that:

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

Id. at 3-4. In *U.S. Steel Mining Co.*, Inc., 7 FMSHRC 1125 (Aug. 1985), the Commission held:

> 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."... 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.

Id. at 1129 (internal citations omitted) (emphasis in original). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC.* 195F.3d42 (D.C. Cir. 1999)

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act and, taken together with "significant and substantial," creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability, if a pattern of violations is eventually proved. Existing Commission authority is less than clear in defining the terms and tends to imply that they refer simply to more serious conduct by an operator in connection with a violation.

In *Emery Mining Corp.*, 8 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). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The

Commission has also examined the operator's knowledge of the existence of the dangerous condition. e.g., *Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

It is clear in the Mine Act that since negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and "more," when talking about "significant and substantial" and "unwarrantable failure." The Secretary must prove negligence and gravity for all citations and orders and, in order to invoke the enhanced enforcement plan in Section 104(d), also must prove that the circumstances of the violation satisfy both the "significant and substantial" and "unwarrantable failure" standards**.** If the Secretary fails to prove both, there can be no enhanced enforcement. The Secretary has to prove four distinct elements[3] when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure." As a result of this, I generally treat the two groupings and each element in each grouping separately. In the interest of clarity, I see no advantage in blurring the distinctions between and among the concepts, the groupings, or the elements.

Findings of Fact - Conclusions of Law

The orders in this case arise from MSHA inspections of Brody's No. 1 mine, MSHA ID No. 46-09086, located in Boone County, WV.[4] The contested citations were written by MSHA Inspectors, Charles H. Ward[5] and James Jackson on six different dates between October 8, 2008, and March 3, 2009, as shown in the table above.

Dockets

[1.0] **WEVA 2009-1000**

Docket WEVA 2009-1000 comprises four citations/orders listed below as 1.1 through 1.4.

[1.1] **Order No. 8075863** reads as follows:

"The Approved Ventilation Methane and Dust Control Plan for the 009-0 MMU is [sic] not

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[3] The Secretary must also prove the existence of the underlying strict liability violation of a health or safety standard.

[4] According to the public data maintained by MSHA on its website, Brody No. 1 mine is operated by Brody Mining, LLC, and the operation is owned by the Brody Trust.

[5] Ward assumed the duties of MSHA Health Specialist in December 2008. (Tr.15:22-16:21)

been complied with. The approved plan requires 3,00[0][6] CFM behind the line curtain in all idle faces. When using an approved calibrated anemometer behind the line curtain in the No.6 working face, the air measured 1,974 CFM. [At] [t]he No.5 working face behind the line curtain, the air measured 1,462 CFM. The operator was placed on heighten [sic] alert during this inspection. The mines [sic] liberates 1.5 million cube [sic] feet of methane in [a] 24 hour period.

This citation is unwarrantable failure to comply with a standard. Mine management has engaged in aggravated conduct by failure to take actions on this hazard."

Exhibit S-2

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for five persons and as significant and substantial (S&S). The S&S designation was dropped by the Secretary at the hearing. (Tr. 12:6-13) It was written as a 104(d)(2) order, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "high", and the proposed fine is $5,211.00. (Petition for Assessment of Penalty)

The Standard

30 C.F.R. § 75.370(a)(1) states: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in §75.371 and the ventilation map with information as prescribed in §75.372. Only that portion of the map which contains information required under §75.371 will be subject to approval by the district manager."

The Evidence

Ward inspected the Brody No. 1 Mine on January 15, 2009. He wrote the order in Exhibit S-2, No. 8075863. (Tr. 25:15-24) He testified that he wrote the order because he found that the fly pads[7] at the No. 5 and No. 6 faces were being blown straight out by the ventilation airflow. As a result, the air was not going where it was intended. Instead of being diverted and directed by the fly pads, it was going under and through them at the last open break and exiting the section. Ward measured 1,462 CFM of airflow at the No. 5 face and 1,974 CFM at the No. 6 face. The ventilation plan for this mine calls for at least 3,000 CFM behind the line crew. (Tr. 26:15-27:8)

Brody asserted at trial that there should be a substantive distinction drawn between airflow

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[6] Trial testimony makes it clear that this number should be 3,000 and not 3,00. (Tr. 39:23-40:24)

[7] Fly pads are temporary, semi-clear plastic airflow control devices hung like curtains from the ceiling to direct ventilation air. They are about four feet wide and overlapped so as to be passable by equipment while still directing airflow. (Tr. 34:16-35:3 and 291:7-18)

volumes at "idle" vs. "active" faces. (Tr. 69:19-72:1)[8] Brody also intimated in its questioning of witnesses that the focus of this order should have been whether the airflow, regardless of the measurable volume, was effective in removing methane from the faces rather than whether the airflow volume was at least 3,000 CFM, as required by the mine ventilation plan. On cross examination, Ward agreed that if there is no methane present, there is no chance for a methane ignition. (Tr. 76:20-77:2) And, the evidence showed that in January 2009, after this order was written, the ventilation plan was changed to focus more on whether the ventilation effectively removed methane rather than on the actual measurable volume of air at the faces. (Tr. 49:24-51:1; 74:6-23; 358:14-359:8)[9] But, there is no dispute that the ventilation plan in place when this order was written called for measurable airflow volume of at least 3,000 CFM at all faces. (Tr. 74:6-23; 379:15-380:3) There is also no dispute that Ward obtained reliable airflow readings of 1,462 CFM at the No. 5 face and 1,974 CFM at the No. 6 face while the 3,000 CFM requirement was in place. (Tr. 380:9-381:11) Finally, it is clear that those two measurements were not in compliance with the ventilation plan in place at that time. (Tr. 381:12-18)

The Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Id.* at 1636.

Accordingly, I conclude that the Secretary has proved a violation of the standard, as alleged in Order No. 8075863.

Significant and Substantial.

The Secretary stipulated that Order Number 8075863 was not a significant and substantial violation of 30 C.F.R. Section 75.370(a)(1).

Negligence.

The Secretary alleges that the conditions described in Order No. 8075863 and the evidence relating to them constitute "high" negligence, as that term is used at 30 C.F.R. §100.3(d) (Table X). High negligence describes a situation in which the operator knows or should know of a violative condition or practice, and there are no mitigating circumstances.

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[8] The distinction between "idle" and "active" is of no import in relation to the issue of strict liability under the regulations. The regulatory standard relevant to this order requires ventilation airflow of at least 3,000 CFM at any face. Anything less than that constitutes a strict liability violation. It does have relevance as to the degree of negligence, as discussed further below.

[9] With the change in the ventilation plan that happened in January 2009, this event would not have been a violation. The plan now focuses on whether there is any detectable methane above 1% behind the line curtain and not on the volume of airflow. (Tr. 85:12-24; 50:15-21; 86:3-9)

Brody addresses this point on two fronts: (1) A distinction should be drawn on the basis of whether the faces in question were "idle". The implication is that there should be a substantive difference in the way the standard is applied based on whether the area is being actively mined at the time of the inspection, even though the regulations are silent with respect to this distinction[10]; and/or (2) The fact that there was no detectable methane at either face proves that it was not guilty of "high" negligence. This is, in effect, the "no harm – no foul" argument. This argument moves the focus from the unambiguous requirement in the mine ventilation plan that there be airflow of at least 3,000 CFM at all faces to whether the underlying purpose for the airflow requirement has been effectively addressed. The argument is that negligence should be lower because the ends (no detectable methane) take precedence over the means (the exact amount of airflow). (Tr. 386:11-387:17) This is an appropriate issue in the context of mitigating circumstances, which are, in turn, relevant to the degree of negligence to be assessed.

Mitigation is but one prong of a two-prong negligence analysis. The other element is whether the operator knew or should have known of the violating condition. The violating condition in this analysis is the low airflow at the faces, not the fact that this mine is considered "gassy." There is no dispute between the parties that this is a "gassy" mine. Ward was aware that the mine liberates approximately 1.5 million cubic feet of methane per 24 hours. He felt that even though this area was arguably idle at the time, with that volume of methane, there is always a danger of explosion in any part of the mine that is not adequately ventilated. (Tr. 28:16-29:10) Jay Heiss, a Brody third shift move boss at the time of this violation, also testified that this mine is known as a "gassy" mine and produces around 1.5 million cubic feet of methane per day. (Tr. 318:16-21)

Although Ward considered the low volume of ventilation air to be the hazard rather than the relative concentrations of methane and oxygen (Tr.75:23-76:19), he considered it more than a simple violation that Brody failed to follow its ventilation plan, even though there was no methane/oxygen hazard. (Tr. 77:3-78:13) Ward's review of the pre-shift examination report showed him that there was no measurable methane. (Tr. 69:3-18) He took methane readings at all of the mine faces that day; there was zero methane and 20.8% oxygen, which is normal. (Tr. 75:3-19; 80:3-82:9) Ward considered this mine to meet the definition of a "gassy" mine under Section 103(i) of the Mine Act,[11] which to him meant that there was increased risk of a methane explosion which justified increased vigilance on the part of the inspector and the operator. (Tr. 28:16-30:23) It appears that Ward thought the low airflow measurements justified the assignment of high negligence, at least in part, just because this is a gassy mine.

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[10] The CFR does not have a definition for "idle face." It does have one for "working space." Ward's definition for "idle face" is a place in a mine where there are no miners present and coal is not being presently extracted. Ward is not certain, but he cannot say that there was anyone working at the No. 5 or 6 face. In his deposition six months earlier, he said there were no men working in those areas. (Tr. 69:19-72:1)

[11] "For purposes of this subsection, 'liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period." 30 U.S.C. 813(i)

However, the fact that this mine is gassy is not a violation of the standard. It also appears that Ward decided to make more of the gassy nature of this mine than the fact that there was no measurable methane present when he chose to charge this at the level of "high negligence." For example, at the hearing he testified that, even though these orders had been negotiated to eliminate the S&S designation as originally charged, the danger was still there. In his view, the fact that the mine liberates 1.5 million cubic feet of methane per twenty-four hours justifies a charge of "high negligence."

I find that this violation did not result from "high negligence." The definition of "moderate negligence" in 30 C.F.R. §100.3(d) fits these facts more closely. According to 30 C.F.R. §100.3(d) (Table X), moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Brody is attributed with knowledge of the low airflow at the faces, but the lack of any measurable methane is a mitigating circumstance which justifies a finding of moderate negligence.[12]

Unwarrantable Failure

In order to establish unwarrantable failure under the Commission's case law, there must be a showing of aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) at 2003-04. Other relevant factors to consider include the length of time a violating condition has existed, the operator's efforts to abate the condition, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the operator's knowledge of the violating condition (or lack thereof), and whether the violation poses a high degree of danger. See *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

Ward issued the order under Sec. 104(d) for unwarrantable failure to comply with a mandatory safety standard. (Tr. 26:15-27:8) He wrote this order as "unwarrantable" because, in his experience a mine like this[13], should have ventilation of at least 3,000 CFM at the idle faces. He wrote a series of 104(a) citations over the six months that he had been inspecting this mine. He was concerned about the lack of airflow at the 3,000 CFM level in the plan and had put management on alert that he would consider future violations of the 3,000 CFM limit an unwarrantable failure. (Tr. 29:15-30:23) Ward concluded from the timing of events that the fly pads were blowing up at the time of the pre-shift report, even though the report does not mention anything about them. (Tr. 72:6-24) He concluded that the fly pads were not properly constructed or hung, viz they were

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[12] I am aware that Ward claims to have put Brody on notice that he would be more aggressive in his enforcement of this standard based on his opinion that this being a gassy mine justified stricter enforcement, and I am aware that Ward wrote several other similar citations during his tenure as MSHA inspector for this mine, but I am not persuaded that his announcement of his intentions is enough to make this strict liability violation subject to enhancement for the reasons stated above. (Tr. 31:10-32:19; 33:21-34:15)

[13] Ward referred to this mine as a "103-I methane mine".

only a single layer thick. When they were corrected in response to this order, they were doubled and tripled. When the fix was done, the airflow rose to 4,368 CFM at the end of the line curtain. (Tr. 73:6-22)

As mentioned above regarding mitigation and the "high negligence" standard, the fact that there was no detectable methane is a mitigating factor. It should be noted that there is no evidence, other than a possible inference, that this was the result of the operator's care or diligence – it appears to be a fortuitous circumstance. The violating condition was the low airflow and defectively deployed fly pads. It is appropriate to attribute to Brody knowledge of the low airflow and how to properly deploy fly pads. It is also clear that Brody was aware of the gassy mine issue that weighed on Ward's mind. However, the fact that there was no measurable methane, whether it is attributable to anything Brody did or not, does act to mitigate.

It is quite apparent that Ward placed more emphasis on the airflows than the resulting methane levels. It is fair to conclude from these facts that Ward was more interested in addressing the potential for an ignition in this gassy mine than the facts relevant to the low airflows that underlie this order.[14] The back-and-forth between MSHA and Brody evident in the changes in the ventilation plan and Ward's role in it are evidence of this. Brody was clearly aware of the gassy nature of this mine, but that is not the appropriate focus of this analysis. The issue is whether Brody knew or should have known of the low airflows, not whether it knew that this was a gassy mine. Ward, on the other hand, placed more emphasis on the form of the regulation (the airflow measurements) and less on the substance (the lack of measurable methane). So, in this regard, the fact that there was no "harm" does affect the assessment of the "foul." In sum, there are two elements that mitigate negligence and weigh against a finding of unwarrantable failure: (1) Ward's personal emphasis on airflow rather than the result of the airflow; and (2) the lack of any measurable methane. The fact that there was no measurable methane is relevant and material, and Brody is correct to argue that absence of measurable methane is one of the ultimate objectives of requiring adequate airflow at the faces. Although Brody cannot take direct credit for the fortuitous lack of measurable methane under these facts, it also cannot be penalized by Ward's emphasis on the potential of a methane ignition in a gassy mine. I conclude that this violation did not arise from an unwarrantable failure on Brody's part.

Gravity

For the reasons stated above, I conclude that the facts do not support the Secretary's gravity allegation, i.e., that these conditions are "reasonably likely" to result in "lost workdays or restricted duty" for five persons. The gravity designation is modified to "unlikely" to result in lost workdays or restricted duty for five persons.

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[14] This is not an inappropriate issue for a MSHA inspector to take into account. However, placing extra emphasis on a "potential" condition when addressing actual events cannot bridge the gap between these facts and the quantity and quality of facts needed to prove unwarrantable failure.

Summary and Decision for Order No. 8075863

The Secretary alleged that Brody was strictly liable for violating 30 C.F.R. § 75.370(a)(1) because measured airflows behind the line curtain at the No. 5 and 6 working faces at Brody Mine No. 1 were less than 3,000 CFM, as required by the Approved Ventilation Methane and Dust Control Plan in place at the time. The evidence establishes the strict liability violation.

The Secretary also alleged that Brody's violation constituted an unwarrantable failure to comply with 30 C.F.R. § 75.370(a)(1), that there was "high" negligence, that the violation was reasonably likely to result in lost workdays or restricted duty for five persons, and that the violation was significant and substantial (S&S). The evidence does not support these allegations for the reasons stated above. I conclude that this violation is the result of moderate negligence, and the violation is "unlikely" to result in "lost workdays or restricted duty" for five persons.

The proposed penalty is $5,211.00. In reference to Sections 105(b) and 110(i) of the Mine Act and 30 C.F.R. §100.3(d), I conclude that the penalty should be reduced to $350.00.

[1.2] **Order No. 8075864** reads as follows:

"An inadequate pre-shift examinations [sic] was conducted on the active 001-009 MMU, No. 1 Section for the day shift on this date. The person conducting the pre-shift examination shall examined [sic] for hazards. The appropriate ventilation plan requires 3,000 CFM in all idle faces. Citation is issued for low air in the No. 5 and 6 working face. The condition of the line curtains and controls were [sic] very obvious that the each [sic] working face to the most casual observer did not contain 3,000 CFM behind the line curtain at the working faces. The operator was placed on heighten [sic] alert during this inspection. The mines [sic] liberates 1.5 million cube [sic] feet of methane in [a] 24 hour period. This citation is unwarrantable failure to comply with a standard. Mine management has engaged in aggravated conduct by failure to take actions on working faces by a certified person."

Exhibit S-4

The gravity was assessed as reasonably likely to result in lost workdays or restricted duty for 14 people and as S&S.[15] It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "high," and the proposed fine is $7,774.00.

The inspector alleged that Brody failed to perform an adequate pre-shift examination on the 001-009 MMU because the line controls in the No. 5 and No. 6 faces did not have 3,000 CFM behind each line curtain. The inspector alleged that the condition was reasonably likely to cause an injury resulting in lost workdays for fourteen persons.

[15] The S&S designation was dropped by the Secretary at the hearing. (Tr. 12:6-13)

The Standard

Section 75.360(b)(3) of the Department's regulations, 30 C.F.R. § 75.360(b)(3), requires that a coal mine operator must, prior to every shift, examine every working area for potential hazards. "The scope of the examination shall include the working places, approaches to worked out areas and ventilation controls on these sections and in these areas. 30 C.F.R. §75.360(b)(3) (emphasis added). The Commission has recognized that the preshift examination requirements are "of fundamental importance in assuring a safe working environment underground." *Secretary of Labor (MSHA) v. Buck Creek Coal Co.,* 17 FMSHRC 8, 15 (Jan. *1995); see also* 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) ("The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.").

The Evidence

On January 15, 2009, Ward wrote an order for failure to conduct a thorough and accurate pre-shift examination on the 001-009 MMU, because the line controls in the No. 5 and No. 6 faces did not have 3,000 CFM behind each line curtain. (Exhibit S-4, Order No. 8075864)[16] Ward concluded that the operator could not have done a competent pre-shift examination because he concluded that: (1) The fly pads at the No. 5 and No. 6 faces had been pushed out for the entire shift, including the time when the pre-shift examination should have been done. (Tr.41:14-43:11); (2) The airflow readings were below ventilation plan specifications when he checked them, implying the likelihood that they were low at the time of the pre-shift examination as well[17]; and (3) The pre-shift examination report for January 15, 2009, (Exhibit S-5) did not mention anything about defective ventilation controls or low airflows, indicating, in light of items (1) and (2), that the pre-shift examination could not have been conducted in compliance with the standard. (Tr. 43:15-24)

Ward tested for methane when he checked the airflow for three orders, No. 8075863, No. 8075864 (the present order), and No. 8075874. In each instance, he got zero methane readings. Ward's view is that there is still a danger with low airflows, even in the absence of methane. Adequate airflow is required to evacuate methane if it should be present. (Tr. 48:13-49:10)

Prior to issuing Order Number 8075864, Ward reviewed Brody's pre-shift report for the section where the No. 5 and No. 6 faces were located and confirmed that no hazards were noted. (Tr. 69: 3-11) Prior to issuing Order Number 8075864, Ward confirmed that Brody's pre-shift, daily, and on-shift reports, examiner's dates, times, and initials were present, which indicated that this pre-shift examination was completed. (Tr. 80:4-9 and Exhibit R-2)

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[16] This order is related to the fly pad violation covered in Order No. 8075863.

[17] See the discussion of Order No. 8075863 for details about the condition of the fly pads.

Jay Heiss, Brody's third shift move boss, testified that as part of his pre-shift examination, he checked that the section was clean and rock dusted in the faces, that the curtain was hung properly, that there was proper airflow behind the curtains and proper airflow through each of the last open breaks, and checked for methane in every face. (Tr. 290:17-291: 1) According to Heiss, Brody hangs fly pads in the intersections to push air towards the faces. (Tr. 291:7-12) There are approximately five fly pads on each board which can be doubled or tripled to hold the air back depending on the air pressure. (Tr. 291:20- 23)

Heiss testified that at the time he completed his pre-shift examination on January 15, 2009, proper ventilation controls were in place. (Tr. 301:16-18)

According to Heiss, if Brody's scoop operators are running behind cleaning and rock dusting the faces of sections, they will complete those tasks after the pre-shift examination is completed. (Tr. 300:17-301: 3) It is possible that a scoop could have come by after the pre-shift examination and bumped the fly pad, causing it to lift up. (Tr. 301:6-11) When completing the cleaning and rock dusting process before the start of the new shift, the No. 5 and No. 6 faces are normally the last faces to be rock dusted. (Tr. 309:8-15)

According to Heiss, Brody management informed its miners to keep a close eye on ventilation to make sure that everything was correct in the faces. (Tr. 318:8-15)

Carl Blankenship, the Safety Manager for Brody Mining, testified that fly pads being blown straight out like this is a sign that there is a lot of airflow in the area. But, he agreed that it could also indicate that there may not be adequate airflow where it is needed, e.g., at the face area.[18] Ward suspected as much, checked the airflow at the face, and found that it was below the amount called for in the ventilation plan. (Tr. 384:11- 386:10) Blankenship also speculated that the fly pads were knocked out of place by a piece of equipment after the pre-shift examination was conducted, but before the end of the prior shift. (Tr. 358:3-13) However, no coal had been mined during the prior shift. The prior shift was a non-production, maintenance shift. (Tr. 42:13-23)

Discussion

I conclude from the preponderant evidence that Brody's pre-shift examination did not satisfy the requirements of 30 C.F.R. § 75.360(b)(3). It is appropriate to consider the fact that three[19] of the eight order/citations comprising this consolidated docket deal with the ventilation plan, alleging either that airflows were inadequate or that conditions relating to the airflow controls constituted violations of their respective standards. This weighs against the argument that this was a one-off event that is not representative of how Brody operates this mine. Brody's argument rests on two pillars: (1) The records of the pre-shift examination contradict Ward's allegations; and (2) It is possible that the condition of the fly pads and the resulting low airflows were caused by an event after

[18] According to Blankenship, it is not out of the ordinary to see a fly pad lifted up a little by the airflow. That is just evidence of good air volumes. (Tr. 360:11-17)

[19] Orders No. 8075863, 8075864, and 8075874,

the pre-shift examination was conducted and recorded. The first of these arguments deserves more attention than the second. However, in order to give it sufficient decisional weight, I would have to place considerable reliance on the speculation that something intervened after the pre-shift report to create the conditions Ward observed and on which be based this order. I cannot go this far. I give more weight to Ward's observations. I cannot join in Brody's speculation that there was an intervening event, nor am I convinced that the pre-shift examination described the conditions in the mine at the time.

Violation / Negligence

The standard found at 30 C.F.R. § 75.360(b)(3) requires that a coal mine operator must examine every working area for potential hazards, including ventilation controls, prior to each shift. In this instance, there is a significant disconnect between Ward's inspection findings and Brody's pre-shift examination records. There is no evidence to challenge the accuracy of Ward's inspection findings or the method he used to test the airflow. Brody's witnesses suggested that some intervening cause might have accounted for the discrepancy between their pre-shift reports and Ward's inspection results, but I cannot agree, with nothing more than speculation for support. I find and conclude from the evidence that Brody's pre-shift examination, as reflected in their pre-shift report records, did not satisfy the requirements of 30 C.F.R. § 75.360(b)(3).

The negligence attributable to Brody's failure to adequately conduct its pre-shift report does not derive from the negligence allegation of Order No. 8075863. Failure to conduct and document an effective pre-shift report carries its own potential consequences and does not depend on the conditions described in the related low airflow order. I can infer from the defective condition of the fly pads that the condition existed at the time of the pre-shift examination and report.

I have found that the violation alleged in Order No. 8075863 had moderate negligence, but that conclusion was the result of taking into account the mitigating effect of the underlying conditions relating to the faulty fly pads. In this instance, there is nothing to mitigate the deficient pre-shift examination or related report. The fact that there was no detectable methane does not mitigate the fact that the examination and report missed the fly pad problem. As a result, the knowledge attributed to Brody for the violation in Order No. 8075863 carries over to this violation, but not the mitigating effect of no detectable methane. The failure here is not with how the fly pads degraded the ventilation plan, it is with the thoroughness and reliability of the examination process. I conclude, therefore, that Brody's negligence in relation to this violation was high.

Gravity

The Secretary alleges that the same facts that support the underlying fly pad violation should support the faulty pre-shift report violation. There is no separate allegation or separate proof that the faulty pre-shift examination itself was likely to cause injury to miners independent of the underlying fly pad violation. The gravity of a faulty examination and report must derive from the hazard the examination missed. Therefore I conclude that the gravity ruling for Order No. 8075863 applies here as well. The gravity designation is modified to "unlikely."

Significant and Substantial.

The Secretary stipulated that Order No. 8075864 was not a significant and substantial violation of 30 C.F.R. Section 75.370(a)(1).

Unwarrantable Failure

Here, too, the Secretary alleges that the same facts that support the underlying fly pad violation should support the faulty pre-shift report violation. This alleged violation derives from the underlying fly pad violation in Order No. 8075863. There is no separate allegation or separate proof that this faulty pre-shift examination order was anything more than a derivative action based on the deficient pre-shift examination report related to Order No. 8075863. Therefore I conclude that the unwarrantable failure ruling for Order No. 8075863 applies here as well. I conclude that this violation did not arise from an unwarrantable failure on Brody's part.

Summary and Decision for Order No. 8075864

On January 15, 2009, inspector Charles Ward issued Order Number 8075864, a 104(d)(2) order alleging high negligence and a violation of 30 C.F.R. Section 75.360(b)(3). Specifically, the inspector alleged that Brody failed to perform an adequate pre-shift examination on the 001-009 MMU because the line controls in the No. 5 and No. 6 faces did not have 3,000 CFM behind each line curtain. The inspector alleged that the condition was "reasonably likely" to cause an injury resulting in lost workdays to fourteen persons. The Secretary proposed a fine of $7,774.00.

For the reasons stated above, I conclude that Brody's negligence was high, that the conditions underlying this violation were unlikely to cause injury amounting to anything more than lost workdays or restricted duty for fourteen persons, that the violating condition was not significant and substantial, and that Brody's actions did not constitute an unwarrantable failure to comply with the standard. The penalty will be adjusted to $1,400.00.

[1.3] **Order No. 8079178** reads as follows:

"The primary escape way on the No. 3 section at Break 7 to Break 8 is not maintained in a safe condition to assure passage of anyone including disabled persons. Water covers the entry for approximately 175 feet, rib to rib, and was measured 12 to 20 inches deep in one area. The water is black to brown in color and is not transparent. The coal and rock under the water makes [sic] travel perilous. This condition is obvious, extensive, has existed for numerous shifts and was known by the foreman and examiners, who recorded it as 'Water at Break 7 in the primary escape way'. This is more than ordinary negligence and the operator displayed aggravated conduct in allowing persons to work with only one escapeway. This is unwarrantable failure to comply with a mandatory standard."

Exhibit S-8

The gravity was assessed as reasonably likely to result in fatalities for eight people and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a

mandatory standard. The operator's negligence level was assessed as "reckless disregard", and the proposed fine is $56,929.00.

The Standard

30 C.F.R. §75.380(d)(1) provides: "Each escapeway shall be -- (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons."

The Evidence

On January 22, 2009, inspector James Jackson issued Order Number 8079178, a 104(d)(2) order with reckless disregard, alleging a violation of 30 C.F.R. Section 75.380(d)(1), which provides:

> Each escapeway shall be—
>
> (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons.

Inspector Jackson alleged that Brody failed to maintain the primary escapeway on the No. 3 section at Break 7 to Break 8 because of presence of water in the entry for approximately 175 feet and 12 to 20 inches deep. He also alleged that the condition was reasonably likely to cause a fatal injury to eight persons. The Secretary assessed a penalty of $56,929.00.

James Jackson is an MSHA mine inspector in Region 4 out of the Madison, WV Field Office. (Tr. 104:18-105:1) Jackson assisted Inspector Ward with some of the Brody mine inspections relevant to this order. Jackson was coming on as a new inspector for this mine at the time relevant to this order. (Tr. 33:1-20) This order arises from Jackson's inspection of the Brody No. 1 mine on January 22, 2009.[20] He wrote the order for the blocked escapeway in question here. Jackson was accompanied by a trainee inspector, Elmer Borne. (Tr. 107:15-23 and Exhibit S-8)

Prior to issuing Order No. 8079178, Jackson and Borne reviewed Brody's examination records which noted water at Break 7 in the primary escapeway of the No. 3 Section. (Tr. 108:4-21; 130:3-6 and Exhibit S-9) Brody's weekly examination for the week ending January 24, 2009, for the No. 3 section revealed that water existed at Break 7 on January 21, 2009. (Tr. 166:8-14 and Exhibit R-3) The water condition was first noted, according to the weekly examination report, on Wednesday, January 21, 2009. (Tr. 195:3-12 and Exhibit R-3) Brody's daily and on-shift examination for January 22, 2009, revealed that it was pumping water at this location. (Tr. 169:1-7 and Exhibit R-3)

Jackson and Borne went to Section 3. Jackson attended to the lifting of another citation, and Borne went to Break 7 to check on the water. Borne returned and reported to Jackson that

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[20] Jackson was on Section Number 3 on Wednesday, January 21, 2009, but did not issue a citation or order to Brody for accumulations of water in this escapeway. (Tr. 188:10-19)

there was water 12"-20" deep covering about 175 feet from rib to rib. Jackson testified that the bottom was uneven and the water was too cloudy to see the bottom. Jackson concluded the area was unsafe to travel through. The inspectors instructed the foreman to withdraw his miners from that area. (Tr. 109:12-110:12)

Jackson measured the water with a metal rule. (Tr. 111:15-17; 131:10-14) He did not travel the entire distance of the water accumulation to determine how deep it was, to see if the accumulations were black in color, or if the floor was smooth or passable for the entire distance of the accumulations. (Tr. 132:3-16) Jackson estimated that the area covered by water was 175 feet by counting the rows of roof bolts. There is a row of bolts every four feet. (Tr. 111:20-112:1)

Glenn Fields, has been Brody's Mine Superintendent since 2006. (Tr. 184:4-7) Fields is not required to by law, but he does review all of Brody's examination record books on his own. (Tr. 184:8-21) Fields traveled with Jackson on the day Jackson wrote the order for the water in the escapeway. Fields saw Jackson measure the water with a ruler close to the pump. (Tr. 185:14-186:1) However, Fields disputes that Jackson went into the water to the level of twenty inches. (Tr. 186:2-7) Exhibit R-3 states that the water was twelve to twenty inches deep. Fields testified that it was only twelve inches deep. (Tr. 211:23-212:5) Fields did not see Jackson measure the water with a ruler. But, he also did not challenge Jackson's intention to write a citation by showing him that the water was only twelve inches deep by walking out into it. (Tr. 212:6-214:2) Fields cannot dispute the record notation (Exhibit. R-3) that the water hazard covered an area approximately 175 feet long and from rib to rib. (Tr. 211:13-22)

Prior to Jackson's issuing Order No. 8079178, Brody had already placed a pump in the primary escapeway. (Tr. 113:7-13; 129:23-130:2; and 191:20-22) According to Jim Epperly, Brody's General Mine Foreman, Brody had completed a section move on the prior shift and moved the cable line supplying power to the pump. (Tr. 178:21-179:4) According to Glenn Fields, Brody's Superintendent, as part of the section move, Brody's miners have to travel approximately one and a half miles to pull the power off of the power center, lock and tag out the cable, pull the cables up with the section move, and then return to the power center to hook the power back up. (Tr. 191:5-16) After the section move, the cable that went to the pump had not been moved up because there was not enough cable on it. (Tr. 191:17-19) According to Jim Epperly, at the time the inspector issued Order No. 8079178, Brody was in the process of adding additional cable to the pump in order to continue pumping the water out of the section. (Tr. 180:12-15) At the time of this order, all equipment in the area was energized, except the pump. (Tr. 214:3-216:21)

Brody had tried to pump the water, but it was too soupy. They also tried to scoop it up, without success. So, they built a bridge over it. (Tr. 112:5-16) Jackson noted in his records that the pump found in the area was not energized and did not have a drain line attached. Jackson testified that miners told him that they had been using the pump until the mining advanced beyond it. When they moved the power center to stay with the advance, they did not have enough cable to reach the pump, so they just left it where it was. (Tr. 113:4-13)

The area in question was a primary escapeway. Jackson explained that in the event of a mine accident, this is the way miners would exit the mine. Jackson and Borne tried to walk through it, but determined they could not. (Tr. 110:13-111:3) Aubrey Hartman, Brody's Day Shift

Foreman, testified that he did not have any trouble walking through the accumulations in the escapeway. (Tr. 245:8-24) Jackson testified about Hartman walking through the flooded area as well. He observed that Hartman walked through the water. Jackson's version is that it was hard for Hartman to walk through. When he came out on the other side, he was wet to his waist. (Tr. 111:4-14)

At the time Jackson issued Order No. 8079178, the secondary escapeway was the most direct route out of the mine from the section. (Tr. 133:14-16; 171:15-22; 196:21-197:1) The secondary escapeway was clear and did not contain any hazards. (Tr. 197:13-17) Also at this time, Brody was driving Section No. 3 (the section in question here) in order to connect with two bore holes – one of which was a de-watering hole. (Tr. 159:8-24) This mine has always been very wet. (Tr. 186:20-23) The predominant purpose of driving Section No. 3 was to develop a borehole in order to remove the water from the mine from its lowest point. Coal mining in this section was secondary to this purpose. (Tr. 186:8-19; 187:12-14)

Although Exhibit S-8 shows that the water in the escapeway is noted under the heading "Hazard," Fields argued that it was a not a real hazard. (Tr. 216:22-217:18)

Jackson determined that this violation was S&S because, if there were a need to evacuate the mine, the miners could not use this primary escapeway. According to Jackson, it would have been too hazardous for an injured miner to exit through the water. If they had done a four man stretcher test, the stretcher would have been in the water. When they are in escape mode, the men are all tethered together - if one goes down, they all go down. The escapeway has to be usable by an injured miner by regulation. The stretcher test is one way of checking that possibility. (Tr. 113:19-114:20) In order to abate the water situation, Jackson ordered Brody to remove all the miners who were inby the water and move them outby, which meant in the area of Break 7. (Tr. 190:11-191:2)

Jackson considered this "reckless disregard" because the situation was noted in the log books, but Brody went ahead and mined in that area without abating the hazard. Upper management had counter signed the log books. (Tr. 114:21-115:7) Jackson's notes show that Jim Epperly, the mine foreman, and Eddie Lester, the mine manager, had apologized to Jackson for "dropping the ball" on "D" orders relating to the intake escapeway. They acknowledged that it was their fault, and they would do better. (Tr. 115:8-24) Brody had abated this "D" order by the next workday. (Tr. 116:2-5)

Discussion

Violation

The thrust of Brody's protest of Order No. 8079178 hinges on the argument that, even if the water obstructed the primary escapeway, it is of no effective consequence because: (1) the secondary escapeway remained open, unobstructed, and useable; and (2) miners used the secondary escapeway more than the primary anyway, even in the absence of any obstruction. This argument may pertain to the penalty issues arising from this violation, but not to the issue of whether the regulation was

violated. The violation alleged by the Secretary is proved by preponderant evidence.

The regulation is clear. It requires that all escapeways be kept free of any obstruction that would impede travel of miners through the area, including an injured or incapacitated miner. Travel through the escapeway involved in this order was impeded by water accumulation for a distance of approximately 175 feet, rib-to-rib. The water's opacity prevented a view of the bottom, making it impossible to see the floor surface and making it even harder to travel this area safely and expeditiously. The fact that there was an alternate escapeway is irrelevant to the existence of the violation. The regulation requires more than one escapeway in a situation like this, and both escapeways must be kept free of obstruction, irrespective of whether the other escapeway is obstructed. *Sec'y of Labor and UMWA, vs. Maple Creek Inc*., 27 FMSHRC 555, 561 (Aug. 2005)

> We also reject Maple Creek's suggestion that the judge erred in ignoring the existence of an alternate escapeway. The regulation is clear that the maintenance requirement of section 75.380(d)(1) applies to "each" escapeway. More than one escapeway is required, not in recognition that conditions routine to the mine might prevent use of one of the escapeways, but rather because the emergency condition that causes the need to evacuate the mine may prevent use of one of the escapeways. The Senate Committee which was responsible for drafting the Coal Act explained the two-escapeway requirement in the following manner: Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a salt mine lost their lives because a travelable second escapeway was not provided.

S. Rep. No. 91-411, at 83 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 209 (1975).

Gravity

The Secretary alleges that this violation involves a reasonable likelihood of fatal injury to eight miners. The operator contends that the existence of a second escapeway mitigates the gravity of the violation. I find that there is a reasonable likelihood of fatal injury to eight miners.

All escapeways must be kept free and open to travel. The fact that a secondary escapeway was available is fortunate in the abstract but irrelevant in the specific. The language of the standard is clear and unambiguous. It requires "each" escapeway to be "maintained in a safe condition to always assure passage of anyone, including disabled persons." Had there been any intent to allow for an adjustment of either the liability or the penalty assessment in this regard, it would have been included in the regulation (and addressed in precedent). Although the evidence of record does allow for some dispute as to whether the inundated area was totally impassible, it is clear enough that in an emergency situation requiring use of this passage as an escapeway in the true sense of the word, the amount of water present here, whether twelve inches or twenty, could render the passage impassible for a disabled person or those assisting a disabled person. The analysis must focus on the most restrictive provision in the standard, otherwise the legislative intent to require a reasonable opportunity for safe exit from a mine in an emergency situation would be undercut. I agree with Judge Barbour's

analysis of a similar issue involving the distinction between a primary and secondary escapeway in *Knox Creek Coal Corp. v. Secretary of Labor*, 2010 WL 5619977, VA 2010-0081-R, December 27, 2010. The designation of "primary" or "secondary" is of no legal significance. The standard does not allow that distinction to be drawn since it unambiguously refers to "any" escapeway.

Significant and Substantial

The Secretary alleges that the violation associated with Order No. 8079178 is "significant and substantial." (Exhibit S-8) By Commission precedent, there are four elements that must be proved in order to establish a "significant and substantial" violation: (1) The underlying violation of a mandatory standard; (2) The existence of a discrete safety hazard 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. *Secretary of Labor v. Mathies Coal Company*, 6 FMSHRC 1 (January 1984).

In *U.S. Steel Mining Co.*, Inc., 7 FMSHRC 1125 (Aug. 1985), the Commission held:

> 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."... 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.

Id. at 1129 (internal citations omitted) (emphasis in original). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

First, the facts in this record establish an underlying violation of 30 C.F.R. § 75.380(d)(1), as discussed above. Second, the water accumulation presented a discrete safety hazard in that it hindered unobstructed use of the passage as an escapeway in the event of an emergency mine evacuation. Third, the hazard created by the obstructed escapeway was reasonably likely to cause or contribute to an injury. The Mine Act requires more than one unobstructed escapeway in anticipation of a worst case scenario in which miners must evacuate a mine to escape harm or death. Conditions in an escapeway must not hinder safe evacuation in any significant way. If conditions as obvious, long standing, serious, and easily remedied as those in this case do impede evacuation, the very purpose of this portion of the Mine Act is compromised, i.e., to prevent injury to miners in emergent circumstances. Rather than prevent injury - the very purpose of requiring multiple clear escapeways - these conditions increased the likelihood of injury to miners by rendering one escapeway unuseable. Fourth, there was a distinct probability that these conditions would contribute to serious injury. During an evacuation, it is presumed that the miners are trying to move from danger to safety. Anything that disrupts or thwarts the evacuation, by definition, subjects the miners to the very dangers they are fleeing. The flooded escapeway here did that and more. It created the additional danger that miners would be injured in the process of evacuating or that rescue operations would be compromised.

The crucial third element of the *Mathies* test guides us to consider the way the violation contributed to either the cause or effect of a hazard in order to determine whether the violation can be considered significant and substantial. As mentioned in the previous paragraph, this violation tended to thwart one of the primary purposes of the Mine Act as it created a new and complicating hazard. This violation could have both caused and increased injury to miners. It was significant and substantial.

Negligence / Unwarrantable Failure / Reckless Disregard

The Commission has held that "unwarrantable failure" on the part of a mine operator in relation to a violation of the Mine Act connotes something more than ordinary negligence. *Secretary of Labor v. Emery Mining Corporation*, 9 FMSHRC 1997 (December 1987). "Unwarrantable failure" may be characterized by such conduct as "reckless disregard", "intentional misconduct", "indifference", or a "serious lack of reasonable care".

The formulations of what constitutes unwarrantable failure present a range of aggravating circumstances from the egregious, e.g., “intentional misconduct”, to the dangerously careless, e.g., “reckless disregard”, to careless, e.g., “serious lack of reasonable care”, to sloppy execution, e.g., “indifference.” These factors do not describe the underlying negligence as such, but rather the circumstances beyond negligence which may justify enhanced enforcement action in the context of a 104(d) order, i.e., potential withdrawal orders or pattern of violation enhancement. The facts of this case place the aggravating circumstances at the lower end of that continuum - somewhere between careless and sloppy. If Brody had restored power and a drain line to the pump they had used in the escapeway until the section move, they would have demonstrated reasonable care. The fact that they restored power to all other equipment in the area, but not to the pump, is an aggravating circumstance. Despite the claim that Brody was driving this section with the primary purpose of connecting to ventilation and water removal shafts, their priorities are clear. All other equipment was restored to power, but not the pump in this escapeway. This supports a finding of unwarrantable failure to comply with the standard.

It is also consistent with a finding of “moderate” negligence. “Moderate” negligence is described at 30 C.F.R. § 100.3, Table X as a situation in which the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances. This is where the existence of a second escapeway inures to Brody’s benefit. There is no question that strict liability requires a finding that there was a violation of 30 C.F.R. § 75.380(d)(1) and that Brody’s allowing or causing this situation to occur justifies a finding of unwarrantable failure to maintain both escapeways in a safe condition. However, the fact that there was an alternate escapeway in a safe condition and that Brody promptly remedied the violating condition mitigate the degree of negligence to “moderate.” This draws an appropriate and fact-supported distinction between concepts of negligence, severity, and enhancement without inappropriately double-counting any individual factor.

Summary and Decision for Order No. 8079178

Order No. 8079178 was written as a Section 104(d)(2) violation alleging S&S and an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as “reckless disregard,” and gravity was assessed as reasonably likely to result in fatalities for

eight people. The proposed fine is $56,929.00.

The Secretary alleged that Brody was strictly liable for violating 30 C.F.R. §75.380(d)(1) because it failed to maintain the primary escapeway on the No. 3 section at Break 7 to Break 8. Specifically the Secretary alleged that Brody allowed water to accumulate in the entry covering an area approximately 175 feet long, rib-to-rib, and 12 to 20 inches deep.

The evidence establishes the strict liability violation. I find that there was a reasonable likelihood of fatal injury to eight miners. I find that this exhibits an unwarrantable failure to comply with the standard and that the violation is significant and substantial. However, for the reasons stated above, I conclude that Brody's negligence is more appropriately characterized as "moderate."

The proposed penalty is $56,929.00. In reference to Sections 105(b) and 110(i) of the Mine Act and 30 C.F.R. §100.3(d), I conclude that the penalty should be reduced to $ 18,750.00.

[1.4] **Order No. 8079179** reads as follows:

"Accumulation of combustible material in the form of loose coal, coal dust, and float coal dust is allowed to accumulate at the No. 3 Section tail piece. The front roller and the tail roller on the tail piece is [sic] completely gobbed out and turning in dry compact coal. The conveyor belt is running over top of compacted coal that measured 31 feet in length, 6 to 17 inches deep, and 4 feet wide on the off side of the belt. This condition is visible to the most casual observer. This mine has a history of 75.400 violations, and 29 of these violations have been cited in the last 4 months. This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct constituting more than ordinary negligence."

Exhibit S-10 and R-4

The gravity was assessed as reasonably likely to result in fatalities for eight people and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "reckless disregard," and the proposed fine is $70,000.00.

The Standard

30 C.F.R. § 75.400 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."

The Evidence

On January 22, 2009, inspector James Jackson issued Order No. 8079179, a 104(d)(2) order alleging a violation of 30 C.F.R. § 75.400. Jackson alleged "reckless disregard" and that Brody failed to maintain the No. 3 Section tail piece by allowing combustible loose coal, coal dust, and float coal dust to accumulate. (Exhibits S-10 and R-4)

After dealing with the blocked primary escape way in Order No. 8079178, Inspector Jackson and Glenn Fields, a Brody representative, went to the secondary escape way to withdraw the miners. As they did, they came across a belt line tail piece that was congested ("all gobbed up") with coal accumulations. (Tr. 116:15-117:7) Jackson testified that he observed coal accumulations thirty-one feet long, four feet wide, and from six to seventeen inches deep under the belt line. In Jackson's experience, this is a lot of accumulation. (Tr. 118:5-11) The accumulations were on the off-side of the belt.[21] (Tr. 199:2-5)

There are two rollers on the tail piece. One is used to tension the belt, and the other to keep the belt elevated. Jackson testified that he observed coal touching the bottom of the belt and the rollers. The coal appeared dry from touching the rollers. The coal around the front "holdup" roller had turned gray to white in color, which, to Jackson, indicates heat and a potential fire hazard. (Tr. 119:23-120:11)

Jackson characterized this as an S&S violation because belt friction can cause an ignition and fire that could fill the area with smoke and flames, causing danger to the miners and the need to evacuate the area. (Tr. 120:12-19) Jackson also characterized this as "reckless disregard" because one of the miners told him that Brody had mined only thirty feet of coal on that shift, which, according to his experience, was not enough mining to account for that much coal accumulation. He determined that the belt had operated for a longer time because of the amount of accumulation. (Tr. 120:20-122:1) Another reason Jackson gave for the "reckless disregard" allegation was the fact that this mine had a history of 75.400 violations - 29 in the preceding four months. (Tr. 122:2-18)

Jackson felt there was a fire hazard despite the fact that this was a very wet area of the mine.[22] He determined this because the coal fires he observed during his years of mining experience were due to friction with rollers on belt lines. (Tr. 122:20-123:7) Jackson also felt the hazard was greater because of the flooded escapeway covered by Order No. 8079178. If there were a fire due to the coal accumulation on the tail piece, the miners would have to exit through the flooded primary escape way. (Tr. 123:8-15)

Fields explained how a typical belt line is configured. When the belt line is moved up, the new area is first dusted with rock dust. (Tr. 209:3-24) There is fire suppression equipment on the feeder over the top of the tail piece. There is 500 feet of fire hose. There is an air regulator across from the tail piece that brings ventilation air in, across the face, an then outby. There is a gob switch at the head that will shut the line down if too much material accumulates there. (Tr. 200:7-14;199:8-200:14) Fields testified that if the belt had been completely "gobbed out," the belt line would have shut down automatically. (Tr. 206:19-22) Jackson confirmed that the mine had fire

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[21] According to Inspector Jackson the off side of the belt is the area where people do not normally travel or work. (Tr.143:14-17)

[22] It is in the same area as the flooded escapeway mentioned above in relation to Order No. 8079178.

suppression systems at the belt head, a water line beside the belt, a fire hose outlet every 300 feet, and fire extinguishers near the tail piece. (Tr. 140:14-17; 141:21-23)[23] Fields testified that there were carbon monoxide detectors at the belt head and at the tail piece in question. (Tr. 207:1-8)

According to Fields, Brody performs belt examinations as part of its pre-shift examination in order to determine if any hazards exist along the belt-lines. (Tr. 202:20-203:5) The day before Order No. 8079179, Brody cleaned and rock dusted[24] the tail piece. (Tr. 204:13-19; 209:3-24 and Exhibits R-4 and S-10) According to Fields, Brody applies rock dust every day. (Tr. 210:1- 3) During Brody's last belt examination report between 4:00 AM and 7:00 AM on January 22, 2009, before Jackson issued Order No.8079179, it was reported that the tail piece needed spot cleaning. (Tr. 206:7-15 and Exhibits R- 4 and S-10)

On cross examination Jackson testified that the rock dust used in this mine is black, not gray. When pressed about the gray portions of the coal accumulations he testified about earlier, Jackson stated that the fact that the coal dust material was black only underscored his conclusion that the gray accumulations he observed had turned gray due to friction and heat. (Tr.142:15-24) Fields, on the other hand, testified that rock dust is white. He opined that it is possible that Brody's men got some rock dust on the line when they were dusting below the line, and this is what Jackson saw and thought was dry coal accumulation. However, the coal accumulation was completely saturated with water. (Tr. 200:22-201:5; 210:4-10) Coal that is being mined is not sprayed with rock dust unless some gets on it unintentionally. (Tr. 217:19-219:21)

Fields testified that one shuttle car can carry between nine and ten tons of coal (Tr. 198:9-14); that because a shuttle car can carry that much coal, it is possible for one shuttle car load to cause the accumulations cited by the inspector (Tr. 201:18-21); and that this could happen in a matter of minutes. (Tr. 210:11-8)

According to Fields, when he and Jackson approached the belt line, he could detect no smoke, he could see no dust, and he could feel no heat on or near the accumulations. (Tr. 200:15-18)

30 C.F.R. § 75.400 is the most cited standard in the United States and could be issued for a number of different factual circumstances. (Tr. 143:18-144:16)

Discussion

Violation

Brody does not dispute that there were coal accumulations or that the amount of accumulations were essentially as described in Jackson's testimony and related exhibits. Nor does it

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[23] Counsel intimated in questioning that coal loaded on the belt line would be wet from spray at the feeder, but Jackson did not agree. He did not recall if the feeder's spray mechanism was operating. (Tr. 140:23-141:9)

[24] Rock dust is used to keep float coal dust down to prevent an explosion. (Tr. 209:3-14)

dispute that the accumulations were in an area considered "active workings." It does dispute when and how the accumulations got there and whether there was evidence of a potential ignition. The fact that accumulations existed is sufficient to support a finding that the standard was violated. The standard does not designate what quantity of coal accumulation constitutes a violation, it merely mandates that any accumulation "in active workings" be cleaned up.[25] I conclude that the Secretary has proved a strict liability violation of 30 C.F.R. § 75.400 buy a preponderance of the evidence.

Negligence / Unwarrantable Failure / Reckless Disregard

I refer to the prior discussion of the elements of "unwarrantable failure." There is no basis to discount Brody's evidence that it conducted an effective pre-shift examination as reflected in Exhibits R-4 and S-10. However, I cannot conclude that the accumulations Jackson saw were the result of spillage from the limited mining that occurred in the time between the pre-shift report and his inspection, as Brody argued. Although there is more inferential support for this than for the contrary view advocated by the Secretary, the weight of the evidence is still not convincing. Without more convincing evidence, and given that it is the Secretary's burden to prove this point, I cannot conclude that Brody's actions reflected an unwarrantable failure to abide by the standard. The evidence and reasonable inferences do not support a finding of "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care."[26] I conclude, for purposes of this 104(d)(1) order that there was no unwarrantable failure.

I also conclude that the degree of negligence must be adjusted downward. I refer to the prior discussion of the elements of the various degrees of negligence addressed in the regulations. All levels of negligence allow for consideration of the operator's knowledge of the violating conditions and related mitigating circumstances.[27] See, 30 C.F.R. § 100.3, Table X. The most significant mitigating circumstance here is the fact that the mine in general and the specific area where this violation occurred are both considered wet. This fact is disputed by no one. Wet material is less likely to combust. Jackson noted in Exhibit S-10 and R-4 that he observed the tail roller turning in dry, compact coal. Further, in testimony, Jackson stated that the coal he observed touching the bottom belt and rollers appeared dry. (Tr. 119:23-120:11) Most of the evidence on this point dealt with the appearance of the accumulations. Moreover, there is no evidence that Jackson, or anyone else, actually felt the material to confirm that it was as dry as it looked or hot. This, taken with the

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[25] Brody's evidence and argument is pertinent to the related issues of negligence and gravity.

[26] I am aware that Jackson decided to cite this violation as an "unwarrantable failure" because: (1) miners told him that they had only mined thirty feet on that shift (Tr. 120:20-122:1); (2) Brody had received thirty-nine other 75.400 citations in the prior four-month period (Tr. 122:2-18); and the primary escapeway was flooded, increasing the risk of serious consequences should a fire occur from these accumulations. (Tr. 123:8-15) These items also fail to convince that Brody's actions constituted an unwarrantable failure.

[27] The category of "No Negligence" in Table X corresponds to the concept of strict liability and recognizes that an operator can be held strictly liable for violating a standard even though it cannot know of the violating condition by exercising reasonable diligence. Strict liability is not based on a finding of negligence.

evidence that the rock dust used in the area was white or gray - similar to how Jackson described the dry accumulations - reduces the convincing value of Jackson's observation. This significantly mitigates the degree of Brody's negligence.

According to 30 C.F.R. § 100.3, Table X, all degrees of negligence include knowledge of the violating condition as a factor. Jackson alleged reckless disregard based on Brody's history of being cited for similar incidents, inferring that a pattern existed from which one can further infer that the operator actively avoided "knowing" about violating conditions. I have already dealt with this issue above. Thus, based on the facts in this case, the difference between low, moderate, and high negligence hinges on the degree of mitigation, not on the element of knowledge. I turn then to whether the mitigation I discussed above fits better with low, moderate, or high negligence.

A finding of high negligence requires a finding of no mitigating circumstances. I have found that there are mitigating circumstances. For the reasons discussed above, the mitigation here is more than what is required to find low negligence. A finding of moderate negligence is more appropriate on these facts.

Gravity / Significant and Substantial

The Secretary alleges that this violation results from negligence at the level of "reckless disregard" and gravity at the level of reasonable likelihood of fatal injury to eight miners. (Exhibit S-10) The Secretary also alleges that this violation was "significant and substantial" for purposes of the 104(d)(1) order. The operator asserts three points in defense: (1) The accumulations occurred in the short period between the pre-shift report and Jackson's inspection, thus there was no notice of or opportunity to avoid the violation; (2) Jackson misinterpreted the appearance of the accumulations when he concluded they had become discolored from friction and heat from the moving belt line; and (3) The accumulations were too wet to be a potential ignition source.

I refer to the prior discussion of the elements of "significant and substantial." First, the facts in this record establish an underlying violation of 30 C.F.R. § 75.400, as discussed above. Second, the coal accumulations described by Jackson create a discrete safety hazard. There is an articulable and credible danger that even wet coal accumulations can be heated by belt friction to the point of ignition. However on the third point, the evidence fails to convince that there is a reasonable likelihood that the coal accumulations described here will result in an injury. The evidence of a dedicated water spray fire suppression system along the belt line, carbon monoxide detectors, and secondary fire hose system at regular intervals leads to the conclusion that in the event of a fire or smoke caused by belt friction in coal accumulations, the likelihood of resulting injury is remote.[28] As a result of this conclusion, the fourth *Mathies* element is moot. I conclude that this violation was not significant and substantial.

For the same reasons, I conclude that it is "unlikely" that an injury or illness would occur, and any injury that might occur would be limited to "lost workdays or restricted duty." To hold otherwise, I would have to engage in significant speculation beyond reasonable inference and give full credit to

[28] The Secretary produced no evidence that the redundant fire control systems would not work as designed.

Jackson's conclusions about what the appearance of the coal accumulations meant, a point that is discussed elsewhere in this decision. There is no reason to modify the number of persons potentially affected by the violation.

Summary and Decision for Order No. 8079179

The Secretary alleged that Brody was strictly liable for violating 30 C.F.R. § 75.400 because Inspector Jackson alleged that Brody failed to maintain the No. 3 Section tail piece by allowing combustible material in the form of loose coal, coal dust, and float coal dust to accumulate. Gravity was assessed as reasonably likely to result in fatalities for eight people. Regarding 104(d) enhancement, the Secretary alleged unwarrantable failure and S&S. The operator's negligence level was assessed as "reckless disregard," and the proposed fine is $70,000.00.

I find that it is "unlikely" that an injury or illness amounting to "lost workdays or restricted duty" would occur, that there was no unwarrantable failure to comply with the standard, and that the violation was not significant and substantial. For the reasons stated above, I conclude that Brody's negligence is more appropriately characterized as "moderate."

In reference to Sections 105(b) and 110(i) of the Mine Act and 30 C.F.R. §100.3(d), I conclude that the penalty should be reduced to $4,450.00.

[2.0] **Docket WEVA 2009-1306**

Docket WEVA 2009-1306 comprises four citations/orders listed below as 2.1 through 2.4.

[2.1] **Order No. 8068033** reads as follows:

"Safeguard at this mines [sic] requires all employees working in the underground portion of this mine to wear safety goggles or eye shields while traveling in any open type transportation vehicle in this mine. Observed an open type man trip exiting the mine at the top of the slope with 14 miners on board and 5 miners without safety goggles or eye shields being used. One of the miners was the foreman, which [sic] is an agent of the operator being transported on this open type man trip. This citation is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct by failure to allowed [sic] this hazard to existed [sic]."

Exhibit S-1

Gravity was assessed as reasonably likely to be "permanently disabling" for five people. It was written as a Section 104(d) violation, alleging a "significant and substantial" violation and an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "high," and the proposed fine is $4,099.00.

The Standard

30 C.F.R. § 75.1403 states:

"Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

The Evidence

On October 8, 2008, inspector Charles Ward issued Order Number 8068033,[29] a 104(d) order, alleging a violation of 30 C.F.R. Section 75.1403.[30] Ward alleged that the violation was significant and substantial and constituted unwarrantable failure for purposes of 104(d) enhancement. He assessed gravity as reasonably likely to be permanently disabling for five people because the miners were reasonably likely to incur a permanently disabling injury from a scratched cornea. He also determined that the operator showed a high degree of negligence, because the foreman, who is supposed to set an example and is a member of mine management, participated in the violation by not wearing his safety glasses or insuring that the other miners wore theirs. (Exhibits S-1 and R-5) The Secretary assessed a penalty of $4,099.00. (Exhibit S-13)

Ward traveled with Aubrey Hartman, the mine foreman, on this day. They were going to enter the mine down the one-way slope entrance. (Tr. 228:5-6) They had to get clearance from a dispatcher. (Tr. 228:7-19) A mantrip was exiting the mine; they had to wait for it. (Tr. 59:22-60:4) Ward saw a miner at the front of the mantrip without safety goggles. He confirmed this with Hartman. Hartman spoke to the foreman on the mantrip, Robert Hill, and asked him where his glasses were. Foreman Hill told Ward that one of the men on his section had lost his glasses, so Hill had given him his. (Tr. 20:3-21)

The mantrip that the miners were traveling in on October 8, 2008, could hold 14 miners – two in the front (driver and passenger) facing the direction of travel; four in the middle of the mantrip facing the direction of travel; four in the middle facing the back of the mantrip; two at the back facing the direction of travel; and two in the back facing the back of the mantrip. (Tr. 230:12-231:4) Of the fourteen miners riding on this mantrip, five were not wearing safety glasses. One of the five miners not wearing safety goggles was Robert Hill, the foreman. In addition, there were three miners in the middle of the mantrip with no glasses and one at the back. None of the five men had safety glasses on their person. (Tr. 17:18-19:18) One of the men in the middle of the mantrip was facing backwards. The others were all facing the direction of travel. (Tr. 62:1-17)

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[29] Order Number 8068033 was admitted into evidence as Exhibits R-5 and S-1.

[30] Inspector Ward cited this as a violation of 20 C.F.R. § 1403. He could have cited this as a violation of 20 C.F.R. § 75. 1720(a) Section 75, which explicitly requires the wearing of goggles or safety glasses in situations where the eyes need protection from airborne particles.

The order alleges that the five miners were riding in an open mantrip and were not wearing safety goggles or eye shields. It further alleges that this was reasonably likely to cause an injury resulting in a permanent injury to five persons. (Exhibit S-1; Tr. 16:22-17:17) Ward's rationale in issuing this order was that failure to wear safety glasses while riding in a mantrip can result in eye injury because the mantrip traveled through entries where the airflow was high. Ward measured the airflow at the mine entrance. It was over 200,000 CFM. (Tr. 21:3-18) He testified that this can create a whirlwind effect, which can cause dust, or water droplets containing dust or rust particles, to get into the miners' eyes if left unprotected. (Tr. 20:22-22:24)

The mantrip in question was covered on top and in the back. (Tr. 20:22-21:2; 59:18-2; 231:13-20; 241:21-242:23) The mantrip canopy is made out of sheet metal between 1/32 and 3/32 of an inch thick. (Tr. 232:6-13) At the back of the mantrip is an expandable metal sheet with holes no larger than a finger. (Tr. 233:4-14) There are no holes on the top of the mantrip. (Tr. 232:23-234:3) The mantrip does not have mud flaps because the wheels are set under the body. (Tr. 235:3-7) A loaded mantrip can travel only six or seven miles per hour. (Tr. 229:22-230:3) If miners were sitting on the mantrip facing the direction of travel, the air coming out of the mine would first hit the expandable metal sheet on the back of the mantrip and then hit the miners in the back of their heads. (Tr. 236:6-11)

Ward asked the miners if they had eye protection that day. They all said they did not. He did not ask them if they left it underground. (Tr. 65:12-66:23) Ward concluded that the men had entered the mine and worked the shift without safety glasses. (Tr. 19:19-20:2; 24:6-23) According to Ward, when he asked the miners where their eye protection was, some of them acted a little sheepish as if they knew they were in trouble, not only with MSHA but with Aubrey Hartman, their foreman. (Tr. 95:3-18)

The entry slope was 1,487 feet long with a grade of eleven degrees. (Tr. 227:22-228:4) There was water dripping off the roof of the mantrip which Ward alleged could have contained dissolved rust and other potential eye irritants. His theory is that the air could have blown these irritants into the miners' eyes. (Tr. 22:3-24:5)

In his thirty-three years of mining experience, Aubrey Hartman, has never heard of anyone being injured by something dripping off the ceiling or flipping up from the floor and getting in someone's eye. (Tr. 241:17-20) Ward also has never seen a miner get an eye injury from something dripping off the ceiling in his eight years as an inspector. He testified from personal experience that water dropping into the eyes can carry abrasive material that can scratch the cornea. (Tr. 67:2-68:4) In 35 years in the mining industry, Ward had only had one experience, either personally or as an inspector, where water dropped into someone's eye while riding on a mantrip. (Tr. 67:20-68:7)

Hartman appeared upset that these miners were not wearing eye protection in light of the fact that Brody has a policy and trains miners to always wear goggles when they are riding in a moving piece of equipment. (Tr. 68:11-19; 243:2- 11) Brody supplies its miners with safety goggles and requires all miners to wear them when riding in mantrips. (Tr. 237:6-15) All of the men

riding on the covered mantrip in Exhibit S-1 were wearing hard hats with bills. (Tr. 61:20-24)

Discussion

Violation

Either of the safety standards mentioned above could serve as the basis for this order. They both reasonably comprehend the conditions Inspector Ward had in mind when he wrote it. There is no dispute that five miners, including a shift supervisor, traveled up the entry slope to the mine opening in a covered mantrip and that none of them was wearing eye protection. There is little to gain from debating whether a coal mine entry slope is an environment in which airborne dust and other eye irritants are common. Although there is no evidence specifically showing the type and amount of airborne dust and irritants, it is a matter of common sense that a coal mine is a dusty place in general, and that any volume of perceivably moving air can carry such irritants. This is also consistent with the fact that Brody had a company policy, independent of the safety directive in question here, that required its miners to wear eye protection at all time in the mine. In addition, although it is less obvious, any water dripping from a mine roof could contain suspended irritant particles. As a result, the preponderant evidence, reasonable inferences arising from it, and common sense support a conclusion that these conditions violate 30 C.F.R. Section 75.1403. The miners and their supervisor should have been wearing eye protection.

Negligence / Unwarrantable Failure

I refer to the discussion of negligence above. Inspector Ward alleged here that Brody's actions and omissions constituted high negligence as that term is defined at 30 C.F.R. §100.3(d) Table X. "High negligence" is roughly defined as a situation in which the operator knew or should have known of the violative condition and there are no mitigating circumstances. If there are any mitigating circumstances, a finding of "high negligence" is not appropriate. The definitions of all other levels of negligence include some degree of mitigation.[31]

The weight of the evidence here supports a finding that Brody knew of the violating conditions, particularly in light of the fact that a management employee was among the group of miners observed not wearing eye protection. (A foreman or superintendent is held to a higher standard of care. *Secretary of Labor (MSHA)* v. *S&H Mining, Inc.,* 17 FMSHRC 1918, 1923 (Nov. 1995)).

Mitigating circumstances are generally defined as actions taken by the operator to prevent or correct hazardous conditions or practices. See, *Rochester & Pittsburgh Coal Co.*, 9 FMSHRC 2069 (December 1987). Guided by that concept, it appears that Brody did some things affirmatively to address the danger underlying this order and was the beneficiary of some happenstance that also tended to reduce the danger. In the former group: (1) The mantrip was substantially enclosed. It had a roof, a windscreen in front, a rear passenger compartment guard, and its wheels were under the body.

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[31] The category of "no negligence" corresponds to the fact that a violation can be based on strict liability.

(2) Brody had in place a policy requiring the use of eye protection in this circumstance, it provided its miners with appropriate eye protection, and it trained to its policy. (3) The mantrip was traveling at a slow speed. (4) The miners were all wearing hard hats that afforded some degree of eye protection from above. (5) Traffic to and from the surface was restricted to one-way only and was regulated by a dispatcher, thus reducing the risk of debris being thrown up by other traffic. In the happenstance group: (1) No one was injured. (2) No witness had any personal experience over decades of mine experience that would confirm the likelihood of an injury. (3) The inspector did not observe any actual condition that would increase the likelihood of an injury, other than the fact that there was a substantial volume of airflow moving out of the mine and hitting the mantrip from behind.[32] In sum, these items are mitigating factors which undercut a finding of "high negligence" and support a finding of "moderate negligence" under the operative definitions. An argument could be made for a finding of "low negligence" based on the list of mitigating facts, but I find that the miners had been without eye protection for the entire shift, and given that fact, there was ample time for protective eye wear to be brought into the mine for the men.

I refer to the discussion of unwarrantable failure above. A violation of a standard means that someone has failed to comply. The standard concepts of negligence and gravity as set out in 30 C.F.R. § 100.3 are applied to assess an appropriate penalty for a violation. To establish "unwarrantable failure" it is necessary to prove something more than what is needed to prove the violation and penalty. This is consistent with the notion of enhanced enforcement found in Section 104(d). For purposes of proving a violation and an appropriate penalty the focus is on culpability and severity. For purposes of justifying the enhanced enforcement of Section 104(b) the focus should be on why the operator violated the standard not if the standard was violated or how serious the violation was. It is sometimes difficult to avoid overlap between these areas, but careful analysis requires greater care to separate them.

There is a range of aggravating circumstances which justifies enhanced enforcement under Section 104(d), as discussed above. These factors do not describe the underlying negligence and gravity as such, but rather the circumstances beyond negligence and gravity which may justify enhanced enforcement action in the context of a 104(b) order, i.e., potential withdrawal orders or pattern of violation enhancement.

The facts of this case prove the existence of sufficiently aggravating circumstances to justify enhanced enforcement. One of the group of five unprotected miners was the shift foreman, Robert Hill. Not only is his status important for purposes of imputing knowledge of the violating condition to the operator, which is more relevant to determining the degree of negligence, but it is also important for enhancement purposes. The foreman is charged with knowledge of the relevant health and safety standards. He also had full and immediate knowledge of the violation, since he was one of the unprotected miners. He was in a position to make an on-the-spot management decision to effectively

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[32] Without more detail in the evidence, it is impossible to be more specific about the volume of air involved here. There was no estimate of exiting air speed, and without information about the diameter of the exit slope (among other related factors) it is impossible to begin to calculate how fast the air was moving or whether it could carry with it anything likely to be an eye irritant.

remedy the situation. However, Mr. Hill allowed the condition to persist the entire shift, adding to the likelihood of something untoward. This was an unwarrantable failure.

Gravity ("Seriousness")

The inspector assessed gravity as reasonably likely to be permanently disabling for five people. I concur with the inspector's assertion that five people could reasonably be affected by this violation. I also agree with the inspector that it is "reasonably likely" that this violation could result in some injury to miners. However, the facts do not convince me that the severity is as dire as predicted by the inspector. First, there was no specific evidence directed to the issue of severity. Second, the evidence on this issue is limited to inferences from the environment, the layout and construction of the mantrip, and the volume of air through the area in question. I am comfortable inferring that an injury involving "lost workdays or restricted duty" is possible under these conditions, but I cannot press the inference any further. This is consistent with common sense and the fact that Brody itself saw fit to adopt a policy requiring the use of protective eye wear in its mines, to provide its miners with such eye wear, and to train miners about prevention of eye injuries in general. For these reasons, I conclude that the severity designation should be reduced to "lost workdays or restricted duty."

Significant and Substantial

I refer to the discussion of S&S above. The existence of a violation has been established. I find that the lack of protective eye wear in these circumstances and for this length of time contributed to the potential of eye injury to the miners involved. I also find that there is a reasonable likelihood that the lack of protective eye wear could contribute to the discrete hazard of eye injury. Finally, I find that an eye injury from airborne dust or other irritants could be of a reasonably serious nature, potentially resulting in a loss of workdays or restricted duty. I conclude that this violation was significant and substantial.

Summary and Decision for Order No. 8068033

On October 8, 2008, inspector Charles Ward issued Order Number 8068033, a 104(d) order, alleging a violation of 30 C.F.R. Section 75.1403. Ward alleged that the violation was significant and substantial and constituted unwarrantable failure for purposes of 104(d) enhancement**.** He assessed gravity as "reasonably likely" to be "permanently disabling" for five people. He also determined that the operator showed a "high" degree of negligence. The Secretary assessed a penalty of $4,099.00.

For the reasons stated above, I conclude that Brody's negligence was "moderate," that these circumstances reflect an unwarrantable failure to abide by the standard, that gravity is consistent with a reasonable likelihood of "lost workdays or restricted duty" for five miners, and that the violation was S&S. The penalty will be reduced to $1,050.00.

[2.2] **Order No. 8075874** reads as follows:

"The Approved Ventilation Methane and Dust Control Plan for the 007-0 MMU is not been complied with. The approved plan requires 3,000 CFM behind the line in all idle faces. The No. 4

working face that is idle, using an approved anemometer behind the line curtain 1,050 CFM was measured behind the line curtain [sic]. The operator has been placed on heighten [sic] alert during this inspection and has been cited for this condition. The mines [sic] liberates 1.5 million cube [sic] feet of methane in a 24 hour period.

This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct by failure to take action on this hazard."

Exhibit S-6 and R-6[33]

The gravity was assessed as reasonably likely to result in lost workdays or restricted duty for five people and as S&S.[34] It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "high," and the proposed fine is $4,440.00.

The Standard

30 C.F.R. § 75.1403 states:

"The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in §75.371 and the ventilation map with information as prescribed in §75.372. Only that portion of the map which contains information required under §75.371 will be subject to approval by the district manager."

The Evidence

On February 11, 2009, inspector Charles Ward issued Order Number 8075874, a 104(d)(2) order with high negligence, alleging a violation of 30 C.F.R. Section 75.370(a)(1). Specifically, Ward alleged that Brody did not comply with its approved ventilation methane and dust control plan for the 007-0 MMU. He alleged that the airflow measured 1,050 CFM behind the line curtain in the No. 4 face, and that the condition was reasonably likely to cause an injury resulting in lost workdays to five persons.

Ward conducted his examination of the No. 4 working face on the 007MMU on February 11, 2009, in the presence of Carl Blankenship, Brody's Safety Manager. It appeared to Blankenship as if the crew had just "scooped" before he got there. In doing this, they pushed

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[33] Order Number 8075874, including Brody's pre-shift, daily, and on-shift reports, were admitted into evidence as Exhibit R-6.

[34] At the hearing, the Secretary stipulated that Order Numbers 8075863, 8075864, and 8075874 were non- S&S violations. (Tr. 12:2-11)

loose material out into the face area causing a restriction of the airflow behind the line curtain. The mine's ventilation plan called for a minimum airflow of 3,000 CFM behind the line curtain at an idle working face. (Tr. 47:22-49:10) Ward tested the airflow and found 1,050 CFM. He explained to Blankenship that he was issuing a 104(d) order for unwarrantable failure and that he had warned Brody representatives several weeks earlier ("high alert") that he would use the more aggressive citation in the future. (Tr.44:12-46:18; 47:22-48:12 and Exhibit S-6)

The No. 4 face was empty of men and equipment at the time Ward inspected for this order. (Tr. 83:8-14; 362:5-12)

Ward tested for methane when he checked the airflow. He got a zero methane reading and oxygen at 20.8%. (Tr. 83:18-22; 361:1-362:4) According to Ward, there is still a danger with low airflows, even in the absence of methane. The airflow is required to evacuate methane if it should be present. Ward explained that unless there is a sufficient amount of airflow, methane will not get flushed out of the mine and can accumulate. A methane buildup can lead to an explosion, which can result in death or serious injury to miners. (Tr. 48:13-49:10) Since this mine expels approximately 1.5 million cubic feet of methane every twenty-four hours, Ward believed it imperative that Brody adhere to its ventilation plan and insure that it meet the plan's minimum airflow requirements. (Tr. 34:16-35:18) Ward agreed that when there is 0% methane and 20.8% oxygen, there is no chance of a methane explosion. (Tr.86:10-13)

Brody had a history of thirty-one citations for violating its ventilation control plan between October 28, 2008, and January 15, 2009, a ten week period . (Tr. 32:-34: 4 and Exhibit S-13)

Ward reviewed the pre-shift report. There was no mention of any hazard. (Tr. 83:23-84:6)

The cause of the low airflow at the No. 4 face was lack of space and obstruction behind the curtain. There was gob at the face that restricted the airflow. Blankenship did not remove the gob, he just moved the curtain back from the face a little while Ward was standing there. He moved it to the next row of roof bolts to create more space between it and the face. (Tr. 84:14-21; 390:1-391:1) Ward took another air reading. It showed airflow of 3,408 CFM and again, zero methane. (Tr. 84:14-21; 362:17-363:15; 387:18-390:7) The order was abated in six minutes. (Tr. 46:20-21; 84:7-13; 362:13-16)

Ward testified that the gob that restricted the low air in the No. 4 face was near the fly pad for no longer than one shift, even though Carl Blankenship testified that there was no gob at the face. (Tr. 47:15-21; 362:21- 23)

Blankenship argued that there was adequate airflow behind the line curtain, regardless of what the ventilation plan required, because there was no methane there. He agreed that the measured airflow was less than required by the ventilation plan in effect at the time. (Tr. 391:2-9)

Prior to Inspector Ward starting his inspection at the Brody mine, there was a different methane and dust control plan in place. In January 2009, the plan was changed at the request of Inspector Ward. According to Ward, if he encountered the condition cited in this order today, he

would not find a violation. (Tr. 50:4-21) The plan in effect at the time of this order focused on whether there is any detectable methane above 1% behind the line curtain and not on the volume of airflow. (Tr. 85:12-24)

Discussion

Violation

There is no dispute that the mine ventilation plan in place at the time relevant to this order called for a minimum of 3,000 CFM of airflow at all idle faces. The No. 4 face was idle at the time of this order. Ward took valid readings of the air flow at face No. 4 and detected only 1,050 CFM of air flow. This is sufficient to prove a strict liability violation of 30 C.F.R. Section 75.370(a)(1) and the portion of the mine's ventilation place that requires 3,000 CFM at all idle faces.

I take note of the "no harm, no foul" argument raised by Mr. Blankenship, but as I discussed above in relation to order No. 8075863, such an argument is of no avail with regard to whether a violation has occurred in a strict liability environment. It is relevant and will be considered in relation to other issues.

Negligence / Unwarrantable Failure

Inspector Ward alleged "high negligence" in Exhibit S-6. "High negligence" describes a situation in which the operator knew or should have known of the violative condition and there are no mitigating circumstances. If there are any mitigating circumstances, a finding of "high negligence" is not appropriate, according to the categories of negligence shown at 30 C.F.R. § 100.3 Table X. The definitions of "low negligence," "moderate negligence," and "high negligence" all include some degree of mitigation.

With few departures, I adopt and repeat my analysis of negligence and mitigation in relation to order No. 8075863 above. Here again Brody raises two points: (1) A distinction should be drawn on the basis of whether the face in question was "idle"; and/or (2) The fact that there was no detectable methane mitigates against a finding of "high" negligence, again the "no harm – no foul" argument.

The evidence shows that the condition causing the low airflow was the presence of gob between the No. 4 face and its line curtain. The only evidence pertinent to whether Brody had knowledge of the low airflow is the pre-shift report which made no mention of it. As a result, the weight of the evidence supports a finding that Brody did not have actual knowledge of the low airflow. There is no evidence that would show that Brody should have known that gob was restricting the airflow at face No. 4 prior to Ward's inspection. Nothing was presented to call into question Brody's thoroughness, accuracy, or diligence in performing its examination and pre-shift report. The Secretary argues, in broad strokes, that Brody's history of prior violations of the same standard should be considered as evidence of knowledge. However, her argument has little traction with this evidence. The low airflow in this instance has a clear cause which has nothing to do with any reasonable inference to be drawn from Brody's violation history. The evidence fails to show any deficiency in the

examination or pre-shift report, despite Brody's history of accused noncompliance. I find that Brody did not know and is not imputed to know of the condition causing the low airflow in this instance.[35]

This does not affect my finding of a strict liability violation of the standard, but it is important vis-a-vis negligence. All degrees of negligence summarized at 30 C.F.R. § 100.3 Table X require a finding that the operator knew or should have known of the violating condition. The only category of liability associated with a lack of culpable knowledge is that for a strict liability violation. I find that this violation did not result from "high negligence." The definition of "no negligence" in 30 C.F.R. §100.3 fits these facts more closely. According to 30 C.F.R. §100.3(d) (Table X), "no negligence" is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." I conclude that Brody was not negligent in relation to this strict liability violation.

The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. E.g., *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

One of the various factors relevant to unwarrantable failure is whether the operator has been placed on alert that greater compliance efforts are required. There is evidence of heightened alert in this record. However, there must be a nexus between the actions relevant to a given violation and MSHA's having put the operator on heightened alert. A heightened alert must be shown to have a specific point of connection to the facts of an alleged violation. A general statement of heightened alert cannot substitute for the Secretary carrying her burden of proof. With all alleged violations, it is the Secretary's burden to prove all elements necessary to support the violation, the proposed penalty, and any enhanced enforcement consequences. The fact that an operator is on heightened alert about violations of its ventilation plan in general does not change the Secretary's burden of proving anything. The Secretary cannot bootstrap a violation up to the level of enhanced enforcement consequences without proving a convincing connection between the circumstances giving rise to the heightened alert and the specific circumstances of the violation. The Secretary has not proved the nexus in this instance. The fact that Brody was on heightened alert from its prior history of ventilation

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[35] I repeat my treatment of the "gassy" condition of this mine from above as to the facts, analysis, and conclusion. As above, the fact that this mine was gassy was not a violation of the standard.

plan violations is inapposite to the issue of unwarrantable failure on the facts of this order. Had there been evidence that the physical obstruction that disrupted the airflow existed for a longer period of time, or evidence of methane buildup, an argument could be made that the heightened alert that Inspector Ward noted when he wrote this order had a connection to the facts giving rise to the violation. But, such evidence is not in this record. The heightened alert that Ward refers to relates to the effectiveness of Brody's ventilation actions, in general, not to this one-off and very short-term airflow obstruction. To find that the heightened alert in this case had a bearing on this violation would bypass the very important requirement that the Secretary prove a nexus between her theory of generalized compliance laxity and the specific facts of this violation. The nexus has not been proved; the theory remains unconnected to this violation.

Another relevant factor is knowledge of a dangerous condition. The Brody mine is known as a gassy mine. Depending on the facts of a case, this could be a relevant and dangerous condition and could support a finding of unwarrantable failure. The low airflow in this case was caused by debris between the face and the line curtain that obstructed flow. As soon as the curtain was repositioned to provide a larger area for the air to flow through, the airflow reading increased to approved levels. There is no evidence to suggest that Brody knew or could have known that this otherwise innocuous circumstance could affect the airflow, nor was there any evidence that the condition existed for long enough to become apparent. Despite this being a gassy mine, the reading detected no methane, so its being gassy has no connection to any real danger. The condition did not exist long enough to put Brody on notice. Had there been evidence showing that Brody could have and should have anticipated that such an accumulation of gob would occur, and that it would likely cause an airflow disruption, or that this type of airflow obstruction was foreseeable with any amount of gob obstruction when the line curtain is placed so close to the face, the Secretary's argument that Brody had the type of actionable knowledge necessary to apply this precedent would be much stronger. I am not able to find that Brody had knowledge of this type of dangerous condition such as would be needed to elevate this situation to the level of an unwarrantable failure.

Another of the factors mentioned in precedent that can support enhanced enforcement is the existence of a high degree of danger. Nearly all activity in a mine is attended by some danger. There is no debate that given the right mixture of oxygen and methane, a devastating explosion is a possibility. But, in order to have the advantage of this common knowledge for purposes of penalty enhancement, the Secretary has to prove the existence of the conditions likely to likely to cause an explosion. It is not enough to ask the fact finder to agree that, in the abstract, a disaster is possible. There must be some evidence capable of taking the fact finder from the abstract possibility to a distinct likelihood. In other words, the Secretary has to prove by a preponderance of the evidence that the conditions reflected in the evidence are, in reality, reasonably likely to pose a high degree of danger. The evidence here does not go that far, in fact it falls quite short. Despite these violations of the extant ventilation plan, there was never any measurable methane detected. It is impossible to infer a high degree of danger with this evidence.

Finally, it bears mention that the fix for the violation took only six minutes. It is hard to argue that a short-term condition that has the effect of obstructing airflow to a level in violation of the plan is serious enough to warrant enhanced enforcement treatment when the fix is so immediate and when, despite the violation, no methane has accumulated. This weighs against a finding of unwarrantable failure.

In sum, none of the various factors cited in precedent as a basis for finding an unwarrantable failure avails here. I conclude that Brody's violation of its ventilation plan was not an unwarrantable failure.

Gravity

Gravity was assessed as "reasonably likely" to result in "lost workdays or restricted duty" for five people. I conclude that there is no likelihood that any loss of workdays or other greater consequence would result from these conditions. I base this conclusion on the analysis in the previous section. Under these facts, I must also conclude that with no likelihood of occurrence, there is "no likelihood" of any workdays or anything more dire. As a result, I also conclude that with no likelihood of any injury or lost work, no miners are involved.

Summary and Decision for Order No. 8075874

On February 11, 2009, inspector Charles Ward issued Order Number 8075874, a 104(d)(2) order with "high" negligence, alleging a violation of 30 C.F.R. Section 75.370(a)(1). Ward alleged that Brody did not comply with its approved ventilation methane and dust control plan for the 007-0 MMU. He alleged that the air measured 1,050 CFM behind the line curtain in the No. 4 face, and that the condition was "reasonably likely" to cause an injury resulting in lost workdays to five persons. The Secretary assessed a penalty of $4,440.00.

For the reasons stated above, I conclude that Brody has no negligence, that the violation is not an unwarrantable failure to abide by the standard, that there is "no likelihood" of any loss of workdays for any miners, and that the parties stipulated that the violation was not S&S. The penalty will be reduced to $100.00.

[2.3] **Order No. 8075906** reads as follows:

"Mechanical equipment guards that exposed moving machine parts which may be contacted by persons shall be guarded. The Joy High Land shuttle car Co. No. 4, Ser. No. 2006-04-1001 being used on the 005-0 MMU, No. 2 Section is missing a guard that exposed an opening 1 foot by 1 foot to the cable reel sprocket. The guard was laying [sic] in the operator compartment. The operator stated that the guard has been missing for at least 2 weeks.

This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct by failure to act on this hazard."

Exhibit S-7

The gravity was assessed as "reasonably likely" to be "permanently disabling" for one person and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "high," and the proposed fine is $4,000.00.

The Standard

30 C.F.R. § 75.1722(a) states:

"Gears; sprockets; chains; drive, head, tail, and take up pulleys; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The Evidence

On March 3, 2009, Inspector Ward issued Order No. 8075906, a 104(d)(2) order, alleging a violation of 30 C.F.R. Section 75.1722(a)[36] and high negligence. The inspector alleged that a missing guard on a shuttle car exposed an opening of one foot by one foot to moving parts. The inspector alleged that the condition was "reasonably likely" to cause a "permanently disabling" injury to one person. (Tr. 51:8-19 and Exhibit S-7)

Accompanied by Carl Blankenship, Ward traveled down to the No. 2 Section where he observed the mining of coal. Ward and Blankenship walked across an entry to where a continuous miner was digging coal. A shuttle car came up to the continuous miner to retrieve some coal, and Ward, standing on the offside of the shuttle car, noticed that the reel unit wheel sprocket compartment was missing a guard plate. (Tr. 52:5-53:9) He pointed it out to Blankenship who promptly ordered the operator to shut the car down. Ward and Blankenship walked to the shuttle car. Ward asked the shuttle operator, Mr. Lambert, where the 12" x 12" guard plate was. Lambert told him it was under his feet in the cab compartment. (Tr. 53:10-13)

According to Scott Watkins and Carl Blankenship, the operator's compartment on a shuttle car is small. It would be annoying and possibly in the way to have a 12" x 12" guard plate rattling around in the cage. (Tr. 340:19-341:11)

Ward asked Lambert how long the plate had been missing. According to Ward, Lambert answered, "Two weeks." (Tr. 53:5-21; 89:7-23)

Ward testified that he was concerned that someone approaching from the offside of the shuttle car, as he and Mr. Blankenship had just done, could slip, fall, and accidentally thrust a limb into the unguarded wheel sprocket which could cause a serious injury. (Tr. 56:6-57:12) Consequently, Inspector Ward issued a 104 (d) Order, for failure to guard exposed moving machine parts.

Ward testified that Scotty Ray Watkins, the electrician who came to repair the guard plate, told him that he had reported the missing plate two weeks earlier. Watkins took a notebook out of his pocket and showed Ward a notation to that effect. (Tr. 54:3-24; 89:7-23)

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[36] Order Number 8075906, including Brody's electrical examination reports, were admitted into evidence as Exhibits R-8 and S-7.

The guard was located on the left side of the shuttle car, opposite the driver, on the same side as the cable reel and toward the dumping end. (Tr. 86:17- 87:3; 99:5- 101:15; 336:1-11; 364:3-365:13) It was about waist high. It covered an opening about 12" x 12" over a six inch chain sprocket wheel. It was part of what is called the "leveling wind." There was about three inches of clearance from the sprocket wheel to the plate opening. (Tr. 55:1-21) According to Ward, anyone walking on the left side of the shuttle car could trip over loose material, throw out a hand to catch his fall, and have it wind up inside the sprocket housing. (Tr. 90:9-91:11)

Ward also testified that the shuttle operator cannot reach around from the operator's compartment and put his hand in the cable reel sprocket. (Tr. 88:6-9) For the shuttle operator to come into contact with the cable reel sprocket, the operator would have to get out of the shuttle car and walk around to the other side of the car (off side). (Tr. 327:23-328:10) There is a panic bar in the operator cage that shuts the vehicle off if the operator leaves the cage. (Tr. 405:24- 409:1)

Brody has a policy that forbids anyone walking on the off side of the shuttle car while it is in operation. (Tr. 329:20-329:2) Because of the gear ratio, the shuttle car would only have to move a little for the sprocket wheel to turn enough to catch a hand. Despite the company policy, Ward concluded there was still a danger of an injury with the plate missing. (Tr. 55:22-57:7) Brody developed evidence at the hearing that despite the company policy to the contrary, during this inspection, Ward and Blankenship were on the off side of the shuttle car while it was operating. (Tr. 57:8-12)

When the operator of a shuttle car exits the compartment, he is trained to turn the machine off and de-energize the equipment. (Tr. 328:14-18; 407:21-408:4)

Ward did not observe any debris that would create a tripping hazard or any men working on the off-side of the shuttle car. (Tr. 88:10-24; 367:8-11)

Regulations require the mine operator to do a weekly mine equipment inspection and note any hazards in a log book. Ward did not review that log book. (Tr. 92:4-16; 364:3-365:13)[37] Ward was on the Brody premises on March 3, 2009, to test for respirable dust, not airflow. He was not looking for anything not related to dust testing. However, when he saw the missing guard plate, he felt he had a duty to write it up. According to Ward, that is one reason why he did not review the company examination records regarding the missing guard plate. Ward testified that if he had known that the examination records did not mention the missing plate, and had learned from the miners what he did about the plate, he would have written them up for a violation of an additional standard.[38] Ward stated that he had failed in his duty with respect to this. (Tr. 98:1-24)

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[37] According to counsel, Brody's records for the shuttle car for the four weeks prior to this order did not show any hazard. This is not evidence. (Tr. 89:4-11)

[38] Although the record is silent as to what additional or different standard Ward would have used as a basis for the hypothetical second order, I take from context that he would have cited Brody for failing to note the missing guard plate in its examination records.

Based on his experience, Ward has seen situations where coal "humps up" on the feeder system so the shuttle car driver cannot see anything on the off-side. So, even though a company may have a policy prohibiting miners from being on the off-side of a shuttle car in operation, if someone violates the policy by being where he shouldn't, the operator cannot always see someone over there. (Tr. 99:5-100:1)

In March 2009, Scotty Ray Watkins was a troubleshooter on the day shift working in the Brody mine. (Tr. 323:7-326:7) He was present when Ward wrote citation No. 8075906. Watkins testified that Ward noticed that the guard plate was missing. Shuttle operator Lambert reached inside the operator's deck and pulled the guard out. Lambert said, sarcastically: "The guard has been off for two weeks. I told them to fix it, and they just disregard it." Kevin Webb, Brody's day shift mine foreman, was in on the last of this exchange. Webb told Watkins to fix the problem. (Tr. 333:18-335:3) Watkins got the service scoop and came back and fixed the guard plate. The repair was done the same shift; it took about ten minutes. (Tr. 51:21-54:50; 335:4-11; 349:10-12; 366:23-367:2)

According to Watkins, the guard plate covered an opening about one foot square, not large enough to get a foot into. (Tr. 335:12-24)

According to Watkins, the examination report for the shuttle car for the most recent examination before this order was February 28, 2009. It does not show anything related to the guard plate. There was no report of any problem with the cable reel on the shuttle car for the two weeks prior to the order. If the guard plate had been missing during any of the prior examinations, the shuttle operator has a legal obligation to note it in the records and to get it fixed. (Tr. 336:12-340:18; 329:21-23; 366:15-22) During the two weeks prior to the order, the shuttle car would have been inspected several times. (Tr. 342:10-343:6)

Kevin Webb described how frequently a shuttle car is examined and what a typical examination entails. If an operator finds something wrong with the shuttle car, he shuts it off and reports it to management. (Tr. 409:7-410:21) Webb reviewed the documents in Exhibit R-8 and noted that they do not talk about any problem with a missing guard plate. (Tr. 410:22-412:11)

Brody operated this shuttle car on two production shifts with two different miner operators. (Tr. 330:18-23) Brody performed a weekly permissibility check by a certified electrician once a week on shuttle cars and a physical examination of the equipment two times per day (Tr. 330:2-331:1 and Exhibit R-8)

Brody cleaned and washed the shuttle car on February 16, 2009, and did not note any hazards on that date. (Tr. 331:18-21 and Exhibit R-8) Brody performed a ground continuity check on February 20, 2009, which included checking the cable reel. (Tr. 332:1-4 and Exhibit R-8) Brody cleaned and washed the shuttle car on February 23, 2009, and did not note any hazards on that date. (Tr. 332:19-21 and Exhibit R-8) Brody performed a ground continuity check on Saturday February 28, 2009, which included checking the cable reel. (Tr. 338:17-22 and Exhibit R-8)

Watkins testified that the bolts on the guard plate had been sheered off, which would have taken more force than just prying on it. It would take something like an impact with another piece

of equipment to do it. One of the bolts looked like it had just been broken. The other one had been broken long enough to rust a little. (Tr. 341:12-342:9)

The notes on page 14 of Exhibit S-7 indicate that Watkins showed Ward his notes where it states that Watkins had reported that the guard plate was missing. Watkins denied this in his testimony. (Tr. 344:20-346:21) At his deposition, Watkins conceded that he may have "possibly" written something in his personal work notebook about the missing guard plate. When pressed on this point, Watkins stood firm on his denial that he wrote anything about this in his notebook. (Tr. 345:13-349:4) Watkins was keeping a personal notebook at work and had been doing so for some time prior. (Tr. 348:7-349:4)

As shown in Exhibit R-8, Carl Blankenship was with Ward when this order was written. In his testimony, Blankenship described the dimensions of a shuttle car and Brody's policy regarding what an operator must do to inspect the vehicle before using it. He also explained the "off side" rule about miners not working around a shuttle car. (Tr. 364:3-365:13) Blankenship saw the guard plate missing. He saw that there was a bolt missing on the guard plate. (Tr. 367:5-7) He did not measure it. Both he and Ward were off side while they looked at the missing plate. The shuttle car was not energized, so he felt it was nothing of any consequence. (Tr. 365:14-366:14; 419:5-7)

According to Blankenship, it is not realistic to believe that someone could get their foot or hand inside the guard plate opening and be injured. (Tr. 367:8-368:1) Blankenship does not believe it would be prudent to operate the shuttle car with the guard plate rattling around inside the operator cage. (Tr. 369:8-19)

Blankenship goes over the daily and weekly examinations Brody reports does on each shuttle car. (Tr. 369:1- 9) If anyone had been aware of the guard plate issue, it would have been fixed immediately. (Tr. 369:10- 13) Blankenship does not believe that the guard plate could have been missing for two weeks. (Tr. 369:14-370:6)

Regarding the apparent conflict between Ward's recollection and notes about Lambert's purported statement that he had notified Brody maintenance people about the missing plate two weeks prior to this order, Blankenship stated that a miner would make up a story about the plate missing for two weeks to cover his own failure for not reporting it sooner. A miner would have been written up for this. (Tr. 370:7-14)

Webb saw that the guard plate was missing. He did not remember any damage to the plate. Webb stated that it took Watkins 15 - 20 minutes to fix it. He also confirmed that it would be possible, but annoying, to operate the shuttle car with a loose guard plate in the operator's cage. (Tr. 412:12- 415:22)

Webb denied hearing Lambert say anything about the guard plate missing for two weeks. (Tr. 415:5-416:5)

Discussion

Violation / Negligence

There is no dispute that the shuttle car was missing a guard plate and that mechanical parts, including a sprocket wheel, were exposed. Brody does not dispute that the missing guard over the sprocket wheel on the shuttle car was a violation. (Brody's Motion for Summary Decision at 39, n. 9) The other element necessary to prove a violation of 30 C.F.R. § 75.1722(a) is whether a person might come in contact with the exposed moving parts. The parties dispute this second element. Brody raises four points in its defense[39]: (1) The opening was too small to pose a threat of "contact"; (2) In order for a person to be on the offside of the shuttle, where the plate should be while the shuttle is in operation, he/she would have to violate a company policy; (3) There was no trip and fall hazard that could result in a person falling into the mechanism; and (4) It would be impossible for the operator to come in contact with the moving parts while the shuttle is operating.

The "violation of company policy" defense is the least compelling vis-a-vis whether a violation occurred. Would that all that was required to avoid injury to miners was a company policy! It is easily foreseeable that a miner might violate a company policy, even one designed to protect him/her. The fact that Brody anticipated the likelihood of injury when miners work on the blind side (offside) of dangerous equipment shows how weak this defense is. There is no better evidence of the seriousness of a hazard than when a company implements a policy to avoid it - and no weaker defense for a violation. It avails them nothing to argue that they should be absolved of liability for a violation if a miner violates one of their policies.

On the other hand, the offside policy does help Brody when we consider negligence. Recognition of a hazard and implementation of a protective policy is evidence of due care that can be weighed with other evidence pertinent to negligence.

The arguments that the opening was too small and that there was no evidence of a trip-and-fall hazard are discussed in tandem.[40] The argument that the opening was too small to allow a miner's body to contact the moving parts under the guard is not convincing. Brody's evidence was primarily focused on whether a miner's boot would fit through the opening. Again, it is easily foreseeable that a miner (who is violating the offside policy) might fall toward the unprotected opening and throw out a hand to break the fall. There is no need for a special finding of a distinct trip and fall hazard. Falls at work (especially in mines) can occur in the absence of a specific trip and fall hazard. Other dangerous scenarios are easy to foresee, e.g., articles of clothing being drawn into the moving parts or objects that get into the gears and become missiles. The 12" x 12" opening is large enough to present a danger.

Finally, Brody contends that it would be impossible for the shuttle operator to come in contact with moving parts under the missing guard plate. This argument is strongest when considered as part

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[39] These defense issues are also relevant to the analysis of negligence, gravity, S&S, and unwarrantable failure.

[40] These two issues are relevant to the likelihood component of the gravity analysis.

of the gravity analysis, but it does tend to weigh against a finding of violation. However, since the shuttle operator is only one person among many who might come into contact with this dangerous situation, the fact that there are other miners potentially exposed to the danger of unprotected moving machine parts supports my conclusion that a violation of the standard occurred.

Inspector Ward alleged "high negligence" with this order. Three of the four defense issues just addressed can be recast as mitigation issues, which become relevant for the negligence assessment: (1) There was a company "offside" policy; (2) A shuttle operator could not contact moving parts under the missing guard plate; and (3) There was no trip-and-fall hazard.[41]

The "offside" policy argument arises from actions purposely taken by Brody that are directed, if not at this specific instance, at circumstances very similar to these. The fact that Brody had a policy relevant to this circumstance can legitimately be considered in mitigation of its negligence.

Brody did not build or design the shuttle car, so the fact that it is effectively impossible for the shuttle operator to come in contact with moving parts under the missing plate does inure to its benefit, but only slightly. However, the fact that Brody trains its operators to de-power the shuttle car when they leave the operator's cab, taken in conjunction with the design elements that are intended to prevent the parts from moving if the operator leaves the cab, does amount to mitigation.

The absence of an obvious trip-and-fall hazard mitigates against the likelihood of an injury, but not against the extent of Brody's negligence in allowing the guard plate to go missing for so long. I will consider the trip-and-fall issue again later.[42]

Brody's negligence is mitigated to "moderate" by the factors described above. Brody is imputed with knowledge of the missing guard plate due to the length of time the condition existed and the fact that at least two employees knew of it. The weight of mitigation here is quite low, but still sufficient to justify reducing the negligence assessment to "moderate."

Gravity / Significant and Substantial

The order alleged gravity at the level of reasonably likely to be permanently disabling for one person and constitutes a significant and substantial violation deserving of enhanced enforcement

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[41] The "small opening" defense is not realistically relevant to mitigation and is more pertinent to the likelihood analysis to follow.

[42] The Secretary argues that the guard plate was missing for at least two weeks. For reasons that will be more thoroughly discussed below, I agree with the Secretary on this point and find that the guard plate had indeed been missing for at least two weeks. This can be seen as an aggravating circumstance. Mitigating circumstances can be offset by aggravating circumstances, so it might seem to some that this would be the logical point to consider evidence of aggravation. However, I choose to treat aggravating circumstances in the context of the enhanced enforcement issues of S&S and "unwarrantable failure" to follow.

treatment. Brody asserts that the Secretary improperly assigned the gravity of the violation and that it does not rise to the level of S&S. Three issues are presented here: (1) Do the conditions underlying this violation present a reasonable likelihood of an injury to a miner? (2) Is the injury potentially permanently disabling? (3) How many miners were exposed to these conditions?

Starting with the last of the three gravity issues, I find nothing in the record to weigh against the Secretary's allegation that one miner would be potentially injured by these conditions. There is also nothing in the record to support a finding that more than one miner is potentially exposed to this hazard. I find that these conditions would subject one miner to a risk of injury.

Regarding the issue of reasonable likelihood, I take guidance from the Commission position that the Department's regulations require the guarding of machine parts that "may be contacted." 20 C.F.R. § 75.1722(a); *Secretary of Labor (MSHA) v. Thompson Brothers Coal Co.,* 6 FMSHRC 2094, 2097 (Sept. 1984). In *Thompson Brothers Coal Co.,* the commission reasoned:

> Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from *inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.*

Thompson Brothers Coal Co., 6 FMSHRC at 2097 (emphasis added).

The fact that the operator may not allow the equipment with the exposed moving parts to be operated while people are present is not inconsistent with a finding that the violation is reasonably likely to occur or amounts to S&S. See *Crimson Stone v. FMSHRC. 198* Fed. App. 846 (11th Cir. 2006) (court upheld an ALJ's finding that failure to guard machine parts in a plant was significant and substantial even though the equipment was not energized if anyone was near it).

Although Brody was prudent to have a policy of not allowing people around a shuttle car while it is operating[43], rules are not always followed by mine personnel. S*ee Thompson Brothers Coal Co*., 6 FMSHRC at 2097 (human carelessness a factor in determining occurrence of a violation for guarding standard). Case in point - both Blankenship and Ward approached the shuttle car in question from the offside while it was in operation. (Tr. 57:8-12)

Brody challenges the likelihood of injury by stressing the fact that the area exposed by the missing guard plate was only 12" x 12", too small for a miner's boot. This argument is too restrictive to have real weight. First, the opening was approximately waist high. At that height, it is much more likely that a smaller item, e.g., a hand or some loose equipment or clothing item attached to a miner, would come in contact with the exposed mechanism. Second, irrespective of the height, a 12" x 12" opening would accept the toe or heel of any boot, and definitely something as small as a hand. An opening of that size presents a real and significant hazard and supports a finding of reasonable

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[43] I considered Brody's offside policy as a mitigating element in the negligence assessment above.

likelihood of injury. Obviously, if the guard plate is in its proper place, there is no hazard of injury related to this condition. It follows that the missing guard plate violation does more than contribute to the hazard here, it creates the hazard. As such, the key element of the *Mathies Coal* S&S test, as clarified in *U.S. Steel Mining Co.*, Inc., 7 FMSHRC 1125 (Aug. 1985), is satisfied.

The final point of consideration is whether a potential injury could be permanently disabling, which for S&S purposes is an injury of "reasonably serious nature." Without cataloging all the possible injuries that could result from this hazard, suffice it to say that the loss of fingers, toes, a hand, or a foot is permanently disabling to some extent.

I refer to the prior discussion of the elements of "significant and substantial." As to the first of the four S&S elements outlined above, I have found that there was a violation of 30 C.F.R. § 75.1722(a). The second step is to determine whether the violation constitutes a discrete safety hazard. I have found that the missing guard plate creates an injury hazard that is reasonably likely to result in a permanently disabling injury. Third, this violation contributes to the cause and effect of an injury hazard. Fourth, there is a reasonable likelihood that the injury will be of a reasonably serious nature.

In sum, I find and conclude that the conditions underlying this violation are reasonably likely to be permanently disabling for one person. I find further that the violating condition is significant and substantial.[44]

Unwarrantable Failure

I refer to the prior discussion of the elements of "unwarrantable failure." There is considerable evidence in this record on the issue of whether two Brody employees, Scotty Ray Watkins and Mr. Lambert, had known about the missing guard plate, and in the case of Mr Watkins, kept notes about it, and shared their knowledge with Brody management. Inspector Ward testified, and his inspection notes in Exhibit S-7 confirm, that Watkins and Lambert both told him they knew the plate was missing for two weeks. This evidence is pertinent to several of the issues identified in the following cases as having probative relevance to the issue of unwarrantable failure. See*, Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). In addition to the basic and universal considerations of whether a violation has occurred, what degree of negligence is involved, and how serious or grave the violation is, the cited cases suggest the following as evidence of the aggravating circumstances that will support a finding of unwarrantable failure in the context of the enhanced enforcement objective of a 104(d) order: (1) how long the violating condition existed; (2) whether it is obvious; (3) whether the operator has been placed on notice that greater efforts are necessary for compliance; (4) the operator's efforts to abate the condition. This is not an exhaustive list of relevant factors.

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[44] Generally, a violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in a serious injury. *Nat'l. Gypsum Co.,* 3 FMSHRC 822, 825 (April 1981).

There is a clear conflict of evidence regarding whether Watkins told Ward he had noted the absence of the guard plate in a personal notebook and showed the notes to Ward on March 3, 2009. At the hearing, Watkins denied that he showed the notes to Ward. (Tr. 344:20-346:21) But, in an earlier deposition, Watkins allowed that he may have written something about the missing guard plate in his personal work notebook. (Tr. 345:13-349:4) Watkins also conceded that he had kept a personal notebook at work for some time prior to this incident. (Tr. 348:7-349:4) Ward's inspection notes, page 14 of Exhibit S-7, mention that Watkins showed Ward his notes about the missing guard plate. I conclude from this that Watkins did keep notes about the missing plate and showed them to Ward on March 3, 2009. Watkins is still employed by Brody, was called as a witness by Brody, and has an understandable motive to preserve an appearance of loyalty to his employer. I find his disavowal of his notes at the hearing unconvincing and lacking credibility.

In consideration of Watkin's notes, Lambert's blurted statement that he had known about the situation and reported it to management, Ward's entry in his inspection notes, and Brody's unconvincing general denial of knowledge about the missing plate, I find that the plate had been missing for at least two weeks and Brody either knew about it or had ample reason to know about it. Brody's regularly kept examination and maintenance records were silent about this missing plate. These two items are evidence of an aggravating circumstance that deserves enhanced enforcement consideration under the cited case precedent. Two weeks' knowledge of a violating condition without any effort to remedy is an aggravating circumstance. Brody was on notice, due to the fact this condition had been noted and reported to management, that corrective action was needed. Yet it did nothing. In light of all the facts of this violation, I find and conclude that Brody's failure to repair the missing guard plate was unwarrantable.

Summary and Decision for Order No. 8075906

On March 3, 2009, Inspector Ward issued Order No. 8075906, a 104(d)(2) order, alleging a violation of 30 C.F.R. Section 75.1722(a) and "high" negligence. The inspector alleged that a missing guard plate on a shuttle car exposed an opening of 12"x12" to moving parts. The inspector alleged that the condition was "reasonably likely" to cause a "permanently disabling" injury to one person, was significant and substantial, and constituted an unwarrantable failure to comply with Section 75.1722(a). The Secretary assessed a penalty of $4,440.00.

For the reasons stated above, I conclude that Brody's negligence was "moderate," that the conditions underlying this violation were "reasonably likely" to be "permanently disabling" for one person, that the violating condition is significant and substantial, and that Brody's actions constituted an unwarrantable failure to comply with the standard. The penalty will be adjusted to $450.00.

[2.4] **Order No. 8079224** reads as follows:

"Accumulation of combustible material in the form of loose coal, coal dust, and float coal dust saturated with hydraulic oil was allowed to accumulate on the Co. No. 602 Stamler feeder. This condition exists around the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses. The oil tank and filter area on the off side of the [sic] was hot to the touch. The accumulations were approximately up to 18 inches deep, and 12 feet long. The feeder was energized and the section crew was loading coal. Twenty three [sic] citations have been issued at this mine for violations of 75.400 in

the past 2 months.

This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct constituting more than ordinary negligence."

Exhibit S-11

The gravity was assessed as reasonably likely to be fatal for 14 persons and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "reckless disregard," and the proposed fine is $70,000.00.

The Standard

30 C.F.R. § 75.400 states:

"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."

The Evidence

On February 26, 2009, inspector James Jackson inspected Brody Mine No. 1 and issued Order Number 8079224,[45] a 104(d)(2) order alleging reckless disregard and a violation of 30 C.F.R. Section 75.400.

Inspector Jackson alleged that Brody failed to maintain the stamler feeder by allowing loose coal, coal dust, and float coal dust to accumulate. (Exhibit S-11) According to Jackson, the condition existed on the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses. Jackson also alleged that the oil tank and filter area on the off side of the feeder were hot to the touch. The accumulations were alleged to be up to eighteen inches deep and twelve feet long and saturated with hydraulic oil. Jackson was concerned that the heat from the oil tank, oil filter, and various electrical components could serve as an ignition source of the coal dust mixed with hydraulic oil. (Tr. 124:9-125:11) Jackson alleged that the condition was reasonably likely to cause a fatal injury to fourteen persons. (Exhibit S-11)

Jackson found coal accumulations on a Stamler feeder. A feeder is a stationary piece of equipment where shuttle cars dump coal to send down the belt line. (Tr. 254:13-22) The feeder acts like a funnel at the end of a belt line. Shuttle cars bring coal to the feeder and dump it in. The feeder connects to the tail piece and funnels the coal onto the tail piece and the belt line. Jackson found an accumulation of coal dust, loose coal, and coal float dust saturated with what he took for hydraulic oil. The accumulation was in the area of the oil tank, oil filters, a valve chest, and

[45] Order Number 8079224, including Brody's pre-shift, daily, and on-shift reports, were admitted into evidence as Exhibit R-7 and with Jackson's field notes as S-11.

electrical components. The feeder was energized and running, and the crew was actively loading coal into it. (Tr. 124:9-125:11)

The oil filters, hydraulic hoses, and valve chest will heat up when in use. Jackson observed these items to be hot to the touch. (Tr. 147:7-18 and Exhibit S-11, p. 9) The material was not dry because it was saturated with what Jackson believed to be hydraulic oil. (Tr.125:12-23)

Jackson also wrote a citation for an electrical cable splice on the feeder that was not done with the right type of connectors and issued Citation No. 8079225.[46] (Tr. 126:14-127:24 and Exhibit S-12) Jackson concluded that the faulty splice could have led to a spark, which in turn could have ignited the coal accumulations and started a fire. (Tr. 126:14-128:8)

According to Jackson, he wrote the order alleging "reckless disregard" because Brody had been cited twenty-three times within the previous two months for allowing combustible materials to accumulate and had been warned about running equipment under these conditions. Brody was on heightened alert as to the coal accumulations and dirty equipment but continued to operate without cleaning things up. Jackson felt the mine needed to be more vigilant. (Tr. 128:9-23)

Brody had water hoses, CO monitors, fire extinguishers, and other fire suppression near the stamler feeder on the No. 2 section. (Tr. 256:9- 21) There was a fire hose within as little as ten feet of the feeder. (Tr. 147:19-148:1)

The fluid Jackson took for hydraulic oil was not on top of the feeder; it was around the valve chest, the hoses, and the tank itself. Jackson did not test to determine if the substance around the valve chest, the hoses, and the oil tank was hydraulic oil. According to him, it is not likely that he mistook the fluid for water because water and hydraulic oil are different colors. (Tr. 145:13-146:7) Although Jackson believed that hydraulic oil is flammable, he cannot prove that it is. (Tr. 148:15-17)

Jamie Lester, Brody's Assistant Shift Foreman, testified that he did not observe hydraulic oil on the coal - only water. (Tr. 254:4-9)

According to Lester, Jackson did not take any measurements of the accumulations on the feeder. (Tr. 253:20- 22) Lester did not see any oil on the coal fines. He did not smell any oil. Jackson did not take any samples of the oil. (Tr. 258:8-15)

According to Brody's witnesses, the accumulations were loose, wet coal. It had not been there long enough to be compacted. (Tr. 266:6-13) The accumulated coal consisted of pieces of coal, each about 2 inches in diameter. (Tr. 266:16-22)

Lester testified that Jackson decided to write the order within one minute of looking at the machine. (Tr. 253:17-254:3)

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[46] Citation No. 8079225 is not part of this case. It was offered as evidence of another possible ignition source for the coal accumulations in Exhibit S-11.

Lester did not observe any smoke near the feeder. There are systems with detectors to alert the miners if smoke occurs. The law requires a dispatcher to send someone to check on smoke and CO sensors if there is an alarm. (Tr. 260:13-21) Prior to the issuance of this order, there were no reports of any CO monitor going off near the feeder. (Tr. 261:3-5)

Lester did not observe Jackson touching anything to determine whether the feeder was hot to the touch. Lester testified that if the feeder had been hot to the touch, he would have done something immediately and would definitely remember something like this. Lester testified he would have de-energized the feeder and sprayed it with water to cool it down. (Tr.257:17-258:7)

Each shuttle car can carry from ten to fifteen tons of material at a time. In a twelve-hour shift, from fifty to eighty shuttle car loads are dumped at the feeder. (Tr. 255:12-256:3)

There are conditions that can occur instantaneously that can cause coal to accumulate such as in this case. For instance, a large rock can block the pick breaker. (Tr. 258:16-259:13) The pick breaker has a mechanism that will sheer off a pin if it gets blocked by hard and big objects, but if it just gets overloaded, there is nothing that will shut it off to prevent spillage. (Tr. 259:15-260:3)

It is possible that the coal on the feeder could have accumulated to the extent alleged by Jackson during a single shift. But, according to Jackson, the coal dust with the hydraulic oil would have taken more than a single shift. It is on another part of the feeder, and there are covers over the area. It would have taken a lot longer for the material to have accumulated in the covered area. (Tr. 128:24-129:12)

There are also times when the shuttle operator cannot see what is happening with the feeder so that accumulations may happen even though he is there. (Tr. 260:4-12)

The area of the mine where the Stamler feeder is located is wet. In addition, the feeder has sprayers on it to wet the material down. The area was wet; the feeder was wet; the feeder was standing in about 6 inches of water from when the maintenance crew had cleaned it. (Tr. 263:2-264:7)

The feeder was cleaned by the second shift every day at the end of their shift by soaking it with water for ten to fifteen minutes. (Tr. 263:14-264:7) As part of Brody's regular maintenance, the feeder is greased and rocked dusted. (Tr. 264:8-17) Brody examines the feeder on a weekly basis. (Tr. 257:3-5 and Exhibit R-7) When Brody calls out the weekly report, it does so from a telephone located near the feeder. (Tr. 262:15-18)

If there had been any accumulations, they would have been called out as part of the pre-shift report process and included in the pre-shift report. There are no accumulations noted in the reports. (Tr. 261:6-262:22)

To abate the order, Brody personnel removed the accumulated coal from the feeder. The accumulations were loose, not compacted. They did not have to use a scoop to remove the accumulations, however they were dense enough that they had to be washed off, not just brushed away. (Tr. 146:8-147:2) The abatement was finished about one hour and fifteen minutes later. (Tr. 148:2-14) It took about fifteen minutes to remedy the situation. (Tr. 265:2-21)

Discussion

Violation

There is no dispute that Inspector Jackson found coal accumulations in the Brody Mine No. 1 on February 26, 2009, that measured up to eighteen inches deep and twelve feet long. The standard at 30 C.F.R. § 75.400 requires that coal dust and other combustible materials be cleaned up and not permitted to accumulate in active workings or on electric equipment. The area in question was an active working area, being actively mined at the time. The stamler feeder on which the accumulations were found is a piece of electrically powered equipment. All of the elements needed to prove a strict liability violation of the standard are present. I conclude that the coal accumulations observed by Inspector Jackson constituted a violation of 30 C.F.R. § 75.400.

Negligence

Inspector Jackson alleged that Brody exhibited reckless disregard by allowing the coal accumulations he observed on February 26, 2009 to occur. I address the following questions related to negligence: (1) Did the accumulations occur in a short time? (2) Were the accumulations saturated with water or oil? (3) Were there potential ignition sources in the area?

A scenario can be constructed from the facts in this case in which reckless disregard is the resulting finding. However, the evidence has to be convincing that the coal accumulations were saturated with oil and/or that they had been present for an extended period. Short of that, a lesser degree of negligence is more appropriate.

The most important disputed fact issue is whether the accumulations were saturated with oil instead of water. Obviously, a petroleum based substance can be presumed to be flammable and lend its flammable nature to something soaked with it. On the other hand, coal accumulations saturated with water are presumably less flammable than they would be in a dry state.

The strongest evidence tending to prove that the substance was oil is the proximity of the accumulations to a source of hydraulic oil, e.g., a hydraulic oil reservoir or hydraulic lines. That fact is established in this record. However, the evidence does not show convincingly that the fluid was oil instead of water even given the proximity. To the contrary, there is no dispute that the environment where this violation occurred was wet with water. Inspector Jackson did not smell the fluid; he did not feel its consistency; he did not sample it; he did not have it tested. The evidence is that he observed that the coal accumulations were saturated with something that did not look like water and that he felt the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses and determined that they were hot to the touch. In the space of a minute, Jackson determined that it was oil and proceeded to construct the order based on that conclusion. When pressed on cross examination, Jackson

conceded that he could not prove that the fluid was hydraulic oil.

I am guided by the knowledge that I can give an MSHA inspector a presumption of credibility due to his experience. But, that presumption is overcome by the evidence in total. Brody's witnesses testified that the accumulations appeared to be wet with water. There is nothing that compels me to discount that testimony. In fact, their description of the accumulations is more detailed and convincing that Jackson's. They testified that the area of the mine where the Stamler feeder is located is wet. It had sprayers on it to wet the material down. The area was wet; the feeder was wet; and the feeder was standing in about six inches of water from when the maintenance crew had cleaned it. The feeder was cleaned every day soaking it with water for ten to fifteen minutes. There is nothing implausible about these facts that would call them into question. In short, without additional evidence from the witnesses to bolster the notion that the fluid was oil, the evidence that it was water is more convincing. Under the circumstances, I am not inclined to bridge the gap between the evidence in the record and Jackson's belief at the time he wrote this order. The Secretary has failed to carry her burden to prove this point by a preponderance of the evidence.

The evidence of heat from the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses is consistent with a Jackson's conclusion that there was a potential ignition source, particularly given his belief that the soaking fluid was oil. There was another possible ignition source from an improper electrical splice in the vicinity, documented in Citation No. 8079225. But, the fact that the accumulations wet with water mitigates significantly against a potential ignition.

I am unable to resolve whether the coal particles accumulated in a short time. Brody put on credible evidence that it is possible that this volume of accumulations could have built up in very short order. To the contrary, the Secretary's evidence on this point focused on the likelihood that, if the soaking fluid was oil, it was also likely that it would have taken longer than a single shift to get to the condition that Jackson observed on February 26, 2009. The weakness of the evidence tending to prove that the fluid was oil undercuts the Secretary's position. At base, the evidence does not mitigate Brody's negligence greatly, but it also does not support the Secretary's position that Brody's negligence is at the level of reckless disregard.

I conclude from the foregoing that Brody's negligence is more appropriately characterized as "moderate." Even if the accumulations built up rapidly, Brody should have been more on top the situation than these facts reveal. The fact that the accumulations were wet with water is a mitigating factor, as mentioned already. These findings do not support a negligence determination lower than "moderate."

Gravity / Significant and Substantial

Jackson characterized the gravity as reasonably likely to be fatal for fourteen persons and as S&S. If the facts supported Jackson's conclusion that the accumulations were soaked with oil and that there was a possible ignition source in the immediate vicinity, his conclusion could be consistent with his gravity assessment. There is no dispute about the number of miners potentially affected by the violation. The issues to be resolved are whether the violation was reasonably likely to result in an injury and whether the potential injury could be a fatality, as alleged.

In order to consider gravity and S&S with some separation, I am guided by *Consolidation Coal Co*., 18 FMSHRC 1541, 1550 (September 1996): the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." The potential effect of a wet coal accumulation in the presence of an ignition source is not severe. In this instance, there is not much difference between a raw assessment of likelihood and a more nuanced analysis of the effect of the hazard. Whether one looks at simple likelihood or the potential effect of the hazard, the result is the same. The likelihood of an ignition is remote, and the potential of a serious injury is also remote.[47] There was no evidence of any heat from belt friction that could have dried out the wet accumulations; there was also no specific evidence as to how hot the oil tank and other heat sources were. I conclude that it was unlikely that an injury would result from these facts, and due to the fact that there was little likelihood of an event, there was also lower potential severity. I conclude that the severity level should be "no lost workdays."

I turn now to the question of whether this violation should be characterized as "significant and substantial." The Commission looks at a "confluence of factors" in determining whether or not an accumulation of coal or coal dust is likely to lead to a fire or explosion, and therefore constitutes a significant and substantial violation, including the extent of the accumulations and the presence of potential ignition sources. *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997). The Commission has found that friction from a belt line or roller, electrical equipment, and power cables can all serve as ignition sources, *Mid-Continent Resources, Inc.,* 16 FMSHRC at 1222 (June 1994). No matter what the relevant standard is, there must be evidence in the record sufficient to prove the various elements. The facts supported by the record must establish that the violation contributes to the cause and effect of a hazard, according to the Commission opinion in *U.S. Steel Mining Co*., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985), *citing U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984).

On these facts, this violation does not contribute to a discrete safety hazard. I am aware that the build up of coal accumulations wet with water could, with the right combination of additional causation elements such as be belt friction or other prolonged heat exposure sufficient to cause an ignition, contribute to a safety hazard. However, the Secretary did not prove the additional causation elements, and I cannot infer them. I conclude that this violation was not significant and substantial.

Unwarrantable Failure

The Secretary argues that Brody had also been repeatedly cited for allowing combustible materials to accumulate in violation of 20 C.F.R. § 75.400, and was therefore put on notice that it should employ increased measures to insure that coal and coal dust not accumulate. *Eagle Energy, Inc.,* 23 FMSHRC, 829, 838 (Aug. 2001) (prior citations put operator on notice of recurring problem); *IO Coal Company, Inc.,* 31 FMSHRC 1346, 1351 (Dec. 2009) (repeated violations of the

[47] It is easy to hypothesize a set of facts similar to these that would support a vastly different conclusion, however we react to proven facts - not hypotheticals.

same standards serve to put operator on notice that greater efforts are required for compliance). Brody had been cited for Section 75.400 violations twenty-three times in the previous two-month period. I find that Brody was on notice from this relevant and recent history that it should put forth greater effort to comply with Section 75.400. From this I conclude that Brody was generally indifferent to the requirements of Section 75.400 and that the facts of this violation constitute an unwarrantable failure to comply with the standard and that the penalty should be affected by Brody's indifference independent of the methodology reflected in 30 C.F.R. § 100.3, Table X.

Summary and Decision for Order No. 8079224

On February 26, 2009, inspector James Jackson inspected Brody Mine No. 1 and issued Order Number 8079224, a 104(d)(2) order alleging reckless disregard and a violation of 30 C.F.R. Section 75.400. The inspector alleged that the condition was "reasonably likely" to cause a permanently disabling injury to one person, was significant and substantial, and constituted an unwarrantable failure to comply with Section 75.1722(a). The Secretary assessed a penalty of $70,000.00.

For the reasons stated above, I conclude that Brody's negligence was "moderate," that the conditions underlying this violation were unlikely to cause injury amounting to anything more than "lost workdays or restricted duty" for fourteen persons, that the violating condition was not significant and substantial, and that Brody's actions constituted an unwarrantable failure to comply with the standard. The penalty will be adjusted to $7,000.00.

Order

It is ORDERED that Citation No. 8075863 be MODIFIED to reduce the negligence level from "high" to "moderate," the gravity level from "reasonably likely" to "unlikely," and to delete the unwarrantable failure designation.

It is ORDERED that Citation No. 8075864 be MODIFIED to reduce the gravity level from "reasonably likely" to "unlikely," and to delete the unwarrantable failure designations.

It is ORDERED that Citation 8079178 be MODIFIED to reduce the negligence level from "reckless disregard" to "moderate."

It is ORDERED that Citation No. 8079179 be MODIFIED to reduce the gravity level from "reasonably likely" to "unlikely," and to delete the significant and substantial and the unwarrantable failure designations.

It is ORDERED that Citation No. 8068033 be MODIFIED to reduce the negligence level from "high" to "moderate," and the gravity level from "permanently disabling" to "lost workdays and restricted duty.

It is ORDERED that Citation No. 8075874 be MODIFIED to reduce the gravity level from "reasonably likely" to "no likelihood," from "lost workdays or restricted duty" to "no lost workdays,"

to reduce the negligence level from "high" to "no negligence," and to delete the significant and substantial and the unwarrantable failure designations.

It is ORDERED that Citation No. 8075906 be MODIFIED to reduce the negligence level from "high" to "moderate."

It is ORDERED that Citation No. 8079224 be MODIFIED to reduce the gravity level from "reasonably likely" to "unlikely," and from "permanently disabling" to "lost workdays or restricted duty," and the negligence level from "reckless disregard" to "moderate."

It is further ORDERED that the operator pay a penalty of $33,550.00 within 30 days of this order. Upon receipt of payment, this case will be DISMISSED.

L. Zane Gill
Administrative Law Judge

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J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

Jason M. Nutzman., Esq., Smith, Moore, Leatherwood, P.O. Box 87, 300 E. Avenue, Suite 500, Greenville, SC 29602