

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 17, 2026

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

PEABODY SOUTHEAST MINING, LLC

Docket Nos. SE 2023-0065
SE 2023-0102

BEFORE: Rajkovich, Chair; Jordan and Baker, Commissioners

DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) (“Mine Act” or “Act”), involve two orders issued to Peabody Southeast Mining, LLC (“Peabody”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). On appeal, Peabody challenges the orders’ unwarrantable failure designations.

The two orders originate from the same conditions. Order No. 9704796 alleges that Peabody allowed extensive amounts of coal to accumulate along a conveyor belt, in violation of 30 C.F.R. § 75.400. Order No. 9704803 alleges that Peabody failed to immediately correct those accumulations, in violation of 30 C.F.R. § 75.363(a). Both orders were initially issued under section 104(d)(2) of the Act, designated as significant and substantial (“S&S”), and attributed to high negligence and an unwarrantable failure to comply with the cited mandatory standards.¹ An Administrative Law Judge affirmed the violations, S&S findings, and unwarrantable failure designations for both orders. However, he modified both orders to section 104(d)(1) orders and reduced the negligence for Order No. 9704803 to the “high end” of moderate. 47 FMSHRC 454, 504 (June 2025) (ALJ).

¹ Once an order has been issued pursuant to section 104(d)(1) of the Act, successive unwarrantable failure orders are issued pursuant to section 104(d)(2) “until such time as an inspection of the mine discloses no similar violations.” 30 U.S.C. § 814(d)(2). The S&S and unwarrantable failure terminology is taken from section 104(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard” and establishes more severe sanctions for any violation caused by “an unwarrantable “failure of [an] operator to comply with . . . mandatory health or safety standards.” 30 U.S.C. § 814(d)(1).

Peabody filed a Petition for Discretionary Review challenging the Judge's findings of unwarrantable failure. The Petition primarily asserts that the Judge failed to properly consider Peabody's efforts to abate the violative conditions. PDR at 3, 15-18. It also challenges other elements of the Judge's unwarrantable failure findings, such as the duration and degree of danger posed by the violative conditions. PDR at 24-26, 31-32.

The parties subsequently filed a joint motion to settle the proceedings.² In light of the "legal and factual disputes in the case" and the "uncertainty for both parties" in continuing the appeal, the parties proposed removing the unwarrantable failure designations for both orders and reducing the negligence for Order No. 9704796 to moderate, with corresponding reductions in the assessed penalties. Jt. Mot. at 3.

For the reasons below, we deny the parties' settlement motion and affirm the Judge's findings of unwarrantable failure. We begin our discussion with the substantive unwarrantable failure issue, as it presents a more comprehensive overview of the case.

I.

Disposition on the Merits of the Proceedings

The only merits issue before us is whether the Judge properly designated the two orders as unwarrantable failures. An unwarrantable failure is aggravated conduct constituting more than ordinary negligence, as characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care. *IO Coal Co.*, 31 FMSHRC 1346, 1350 (Dec. 2009) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987)). Judges consider a variety of case-specific factors when determining whether conduct is aggravated, including the duration, extent and obviousness of the violative condition; whether the condition posed a high degree of danger; whether the operator had knowledge of and took efforts to abate the condition; and whether the operator had been placed on notice that greater efforts were necessary for compliance. *Id.* at 1350-57.

The Commission reviews Judges' factual determinations, including unwarrantable failure findings, under the substantial evidence standard. *E.g.*, *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2372 (Sept. 2016). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 n.9 (Aug. 2014) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). For the reasons below, substantial evidence supports the Judge's unwarrantable failure findings for both orders.

² On October 23, 2025, prior to filing the settlement motion, Peabody moved for oral argument. That motion is hereby denied.

A. Factual Background

The two November 9, 2022, orders arise from the same conditions along the slope belt in the dewater area of the Shoal Creek mine. This is a 4,800-foot belt that runs on an incline to the surface, with a flat tail area at the bottom of the incline. Tr. I:48-49, 219. Coal is primarily deposited onto the belt from an overhead surge bin. Peabody asserts that in November 2022, the gates that regulate the flow of coal from the surge bin were experiencing malfunctions, which resulted in all the coal in the bin depositing onto the belt at once. Br. at 4; Tr. I:228-29, 234-35.

Generally, two or three miners during each shift are assigned to clean and maintain the slope belt and tail area. The belt area is cleaned by washing material down the slope into three “muckers,” which collect the material in a trough and dump it onto the belt to be conveyed out of the mine. The tail area is cleaned by either hosing material into an adjacent sump or scooping with a Bobcat. Br. at 2-4 (citing Tr. I:230-33).

During a pre-shift examination early on November 7, 2022, the owl shift examiner discovered that legs on the slope belt had broken, resulting in considerable spillage. He shut down the belt, recorded the condition in the examination book, and notified the supervisor, who assigned three miners to clean the accumulations. 47 FMSHRC at 479; Br. at 5-6.

The belt remained shut down through the following day shift. Additional personnel were assigned to repair the structure and clean the belt, and the day shift supervisor testified that 10% of the accumulations had been cleaned by the end of his shift. Cleaning continued through the evening and owl shifts (at which point the belt was running), with the evening shift examination entry noting “miners working, needs more.” 47 FMSHRC at 479-80; Br. at 6-7; Tr. I:242-44.

Several miners continued to wash the slope and shovel accumulations during each shift on November 8, although a sump pump malfunction during the evening shift slowed cleaning efforts. The evening shift examiner noted that conditions had improved from the previous day but that the belt was “still in bad shape” (Tr. II:197), and the examination book ultimately noted that the area still needed more work. 47 FMSHRC at 480-81; Br. at 7-8.

Cleaning efforts continued during the early morning and day shift on November 9, with examiners noting improvement. 47 FMSHRC at 481, 489; Br. at 8-9. Peabody asserts that by this point the tail area had been fully cleaned down to the concrete. Br. at 9 (citing Tr. I:254-55). However, the evening shift supervisor testified that accumulations had increased again when he arrived. He tasked one miner with cleaning the tail and three miners with cleaning farther up the slope. Tr. II:31.

MSHA Inspector Miller Craig arrived at the slope belt around the start of the evening shift on November 9, 2022. 47 FMSHRC at 481. The belt was running at the time. *Id.* at 457. Craig observed substantial accumulations at multiple points along the belt. He first observed wet, soupy material in the clean room at the very bottom of the slope. Then, for the first 300 feet along the slope from the tail, he measured consistent accumulations of fine coal, 46 inches wide and 32 inches high. The material had piled up so high that it had worn flat from contact with the belt and started to spill out to the sides, and the belt’s bottom rollers were running in coal. While

the lower 8-10 inches of the accumulations were wet, the top 24 inches were dry, possibly due to friction with the belt. After moving farther up the incline to the catwalk area, he observed larger chunks of dry coal piled all the way to the top of the catwalk, approximately 6 feet high. The accumulations became more sporadic as he approached the surface, though there were still some rollers spinning in accumulations. 47 FMSHRC at 456-57, 461; Tr. I:49-64.

The evening shift supervisor informed Craig that several legs on the slope belt had broken a few days earlier, causing a spillage. Craig asked why no one was cleaning the tail area, and the supervisor explained that a miner had been assigned to the task but needed to retrieve a Bobcat to facilitate cleaning. 47 FMSHRC at 456-57; Br. at 10-11. Craig ordered the belt to be shut down and requested that additional miners be brought from other areas to clean the belt. Approximately 50-60 miners cleaned the belt during the remainder of the evening shift, and it ultimately took 1,250 manhours (20 miners per shift until November 11) to fully clear the accumulations. 47 FMSHRC at 458; Tr. I:130-31; Tr. II:44, 198.

B. Accumulation Violation

Order No. 9704796 describes “obvious and extensive” accumulations along the slope belt, measuring 300 feet long by 46 inches wide by 32 inches high in the tail area and ranging from 6-32 inches in depth farther along the belt, with material piled on the belt structure, including five rollers stuck in accumulations. 47 FMSHRC at 458-59. Peabody has not appealed the Judge’s finding that these conditions violated 30 C.F.R. § 75.400, which prohibits the accumulation of coal dust or other combustible materials in active workings. Peabody only asserts that the violation should not have been designated as an unwarrantable failure.

As discussed below, the Judge found that six of the seven *IO Coal* factors—obviousness, extensiveness, notice, degree of danger, operator knowledge, and duration—supported a finding of unwarrantable failure. He further found that Peabody’s efforts to abate the accumulations were a neutral factor. Accordingly, he concluded that the violation was properly attributed to an unwarrantable failure. Substantial evidence supports the Judge’s findings with respect to each factor, as well as his overall conclusion.

The Judge reasonably concluded that accumulations measuring 300 feet long by 46 inches wide by 32 inches high and requiring 1,250 manhours to remedy were obvious and extensive. 47 FMSHRC at 468. He also concluded that 75 violations of 30 C.F.R. § 75.400 during the preceding two years was sufficient to place Peabody on notice that greater efforts to comply with the cited standard were required. *Id.* at 471. These findings are not contested on appeal.

The Judge also logically concluded that a 300-foot span of belt, with damaged rollers, running in 32-inch-high accumulations of mostly dry coal, posed a “serious and heighten[ed]” danger of fire or explosion. 47 FMSHRC at 470. Although he did not explicitly give this factor special weight, he noted that the danger posed by a violative condition can be “so severe that, by itself, it warrants a finding of unwarrantable failure.” 47 FMSHRC at 469 (citing *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013)). The Judge also noted that the belt was running when the inspector arrived, and “the longer the violation went fully unaddressed, the greater

likelihood that a fire or explosion would occur resulting in serious injury during normal mining operations.” *Id.* at 470.

Peabody contests this finding. Significantly, however, the operator does not claim that the conditions posed no danger. Instead, it challenges the Judge’s statement that the conditions went fully unaddressed, noting that the mine had engaged in “continuous remedial efforts” over the preceding days. Br. at 26. This is more properly characterized as an abatement argument. Moreover, Peabody has missed the Judge’s point. Rather than waiting to resume normal operations until after the violative conditions had been fully addressed, Peabody *allowed the belt to run in extensive accumulations*, thereby increasing the risk of friction-induced combustion. Peabody has provided no rational basis to overturn the Judge’s finding that the violative condition posed a high degree of danger.

The record also establishes that Peabody knew or should have known of the violative condition. 47 FMSHRC at 469; *see IO Coal*, 31 FMSHRC at 1356-57. It is difficult to imagine how an operator could be ignorant of 32-inch-high and 46-inch-wide accumulations along a 300-foot stretch of active belt. We also note the testimony from the supervisor of the November 9 evening shift that, prior to the inspector’s arrival, he noticed an increase in accumulations and assigned four miners to cleaning duty.³ Tr. II:31.

The Judge properly rejected Peabody’s argument that corrective actions are relevant to an operator’s knowledge of violative conditions. 47 FMSHRC at 468-69; Br. at 25-26. Corrective actions are indeed relevant to unwarrantable failure *generally*. S. Rep. No. 95-181, at 31 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 619 (1978) (recognizing that miners should not be forced to work in the face of hazards “which the operator knew of or should have known of and had not corrected”). However, that consideration is already accounted for in a separate *IO Coal* factor. 31 FMSHRC at 1351. Operators are entitled to credit for their abatement efforts. They are not entitled to double (or triple) credit.

As the final factor weighing in favor of unwarrantable failure, the Judge found that the accumulations had existed for multiple shifts.⁴ He rejected Peabody’s argument that the cited accumulations must have been the result of another spillage event just before the inspection on November 9. 47 FMSHRC at 467-68. On appeal, Peabody claims substantial evidence does not

³ The Judge emphasizes that Peabody knew of the spillage event on November 7 (47 FMSHRC at 469) while Peabody claims the cited accumulations were the result of a second spill on November 9 (Br. at 24-25). For purposes of the knowledge factor, it is enough to conclude that Peabody knew or should have known of the *cited accumulations*, i.e., the accumulations as they existed during the inspection, regardless of their underlying cause or duration.

⁴ The Judge credited the inspector’s estimate that the accumulations had existed for days, but ultimately, he simply stated that they had existed “more than a few shifts.” 47 FMSHRC at 467-68. Apparently, the Judge found it unnecessary to determine the exact number of shifts, since duration of even a single shift may be sufficient to weigh in favor of an unwarrantable failure finding. *See id.* (citing *Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999)).

support the Judge's finding and reiterates its claim of a second spill. Br. at 24-25. While there is some support for Peabody's theory, the possibility of drawing two inconsistent conclusions does not prevent a Judge's finding from being supported by substantial evidence. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1173 (Sept. 2010) (quoting *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996)). Ultimately, as addressed below, a reasonable mind would find adequate support for the Judge's finding that the accumulations lasted multiple shifts. *E.g., Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989).

Accumulations from the November 7 spill clearly remained (with some improvement during each shift) through the morning of November 9. Tr. I:242-43, 253-55; Tr. II:23-24, 66-67, 131-35. The sticking point is whether they lasted into the evening shift of November 9, when the inspection occurred. Peabody emphasizes the day shift supervisor's testimony that all preexisting accumulations had been cleaned "down to the concrete" by the end of that shift and argues that, logically, the cited accumulations must have been the result of another spillage that occurred just before the inspector arrived. Br. at 24-25 (citing Tr. I:254-55).

Peabody theorizes that this second spillage was the result of a malfunction in the flow gates, as they were prone to malfunction around this time and such malfunctions would result in the entire contents of the surge bin depositing onto the belt all at once. Tr. I:234; Tr. II:15, 49. We question the wisdom of defending against an unwarrantable failure designation by asserting that the cited condition was the result of an *entirely different* recurring problem that was known to the operator, resulted in extensive and obvious accumulations, and had not yet been addressed. Regardless, we agree with the Judge that this second spillage remains "mere speculation." 47 FMSHRC at 467. None of the witnesses testified that such an event occurred on November 9.⁵ Moreover, no such event was recorded in the November 9 examination book or mentioned to the inspector, despite testimony from Peabody's witnesses that flow gate malfunctions cause "a big mess" and spillages so massive that "in 48 seconds, the whole slope literally looks like you've not touched it in a year." Tr. II:109; Tr. I:234.

To the contrary, when the inspector asked about the accumulations, multiple individuals mentioned the earlier spill from the broken belt legs. Tr. I:72, 179-81. The compliance foreman explicitly testified that he was aware of the mass spillage from broken legs earlier in the week, that he informed the inspector of the incident, and that they had "*start[ed]* the cleanup process." Tr. II:104-07 (emphasis added). While the mine's examination records are not definitive (noting accumulations but not their causes), they similarly suggest continuous work to remedy ongoing accumulations, rather than a completely cleaned belt followed by a new spill on November 9.⁶

⁵ Witnesses only testified that such malfunctions had been occurring around that time. Tr. I:234; Tr. II:15, 49. The day shift supervisor testified that on November 9, his crew cleaned accumulations from an *earlier* flow gate issue (Tr. I:265), but by his own testimony, those accumulations would have been completely remedied prior to the inspection (Tr. I:254-55).

⁶ The Judge also noted the extent of the accumulations as evidence of duration, asserting that accumulations requiring 1,250 manhours to abate could not develop in a single shift. 47 FMSHRC at 467-68. However, a flow gate malfunction could explain rapid development of

See generally Ex. P-7 (examination books noting carry-over tasks); Ex. R-2 (email summaries of shift work between November 7 and November 9).

The three witness statements that arguably support Peabody's theory are easily countered. The compliance foreman testified that the cited accumulations looked "pretty fresh" during the inspection. Tr. II:108-09. However, this indicated to him that "the material from where our legs had broke had been washed down into that area or – we had had trouble that week with our [flow] gates also." *Id.* The material's "fresh" appearance simply meant that it had occurred *that week*. The evening shift supervisor testified that accumulations increased between November 8 and November 9, but did not quantify the increase. Tr. II:31. We note that the belt was running and, unlike the November 7 spill, no one requested that it be shut down. This suggests a small increase due to normal mining operations rather than a rapid and massive spill from a flow gate malfunction. As for the day shift supervisor's testimony that the area was completely clear prior to the inspection, upon which Peabody's theory relies, other testimony brings his judgment into question: he stated that the area "looked good" by the end of the November 8 day shift, while the evening shift examiner stated that the area was "still in bad shape" at the end of the following November 8 evening shift. Compare Tr. I:242-43, 251, 254-55 with Tr. II:197. None of these statements fairly detract from the Judge's finding.

The inspector was repeatedly (and only) told of the November 7 event when he asked about the accumulations, the examination books suggest that cleaning efforts had carried over from previous days, and the compliance foreman testified that the cited material had likely accumulated that week and cleaning efforts were ongoing. Peabody's countering argument that a flow gate must have malfunctioned just prior to the inspection remains a largely unsubstantiated theory. Accordingly, substantial evidence supports the Judge's finding that the accumulations had existed for multiple shifts.

As detailed above, the Judge's findings regarding aggravating factors are either uncontested or supported by substantial evidence. The Judge found no mitigating factors. Rather, he concluded that Peabody's abatement efforts were *neutral*, weighing neither for nor against unwarrantable failure. He acknowledged that during the evening shift when the inspection occurred, three miners had been assigned to clean the slope belt and one to clean the tail area. However, he noted the inspector's testimony that no cleaning was actually occurring when he began his inspection. The Judge also acknowledged that Peabody had engaged in some abatement efforts during the two preceding shifts: two miners were assigned to clean during the owl shift, and the day shift crew washed and scooped accumulations. However, he ultimately concluded that "a couple of miners working on these extensive accumulations was inadequate." 47 FMSHRC at 471. He acknowledged that Peabody had taken other abatement efforts prior to November 9 but found them more relevant to Order No. 9704803. *Id.*

The record supports the Judge's finding that Peabody's abatement efforts leading up to the inspection were inadequate. The "level of priority that the operator places on the abatement of the problem" is relevant to the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356

extensive accumulations *if* such a malfunction occurred. Tr. I:234. The accumulations' extensiveness does not definitively support either theory.

(citation omitted). In the context of accumulation violations, it is reasonable for a Judge to consider whether the number of miners tasked with cleaning the accumulations was appropriate to the extent of accumulations. For example, we have found abatement efforts spanning several shifts to be inadequate, and therefore not a mitigating factor, where only one miner per shift was assigned to clean accumulations that stretched almost 300 feet and required over 64 manhours to fully remedy. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997).

This is a close case, as the Judge acknowledges. 47 FMSHRC at 470. Multiple miners *had* been assigned to clean the slope and tail area throughout November 9, including some extra workers. In the early morning, two miners “worked over” from the previous shift to help with cleaning efforts. Tr. II:76-77. During the day shift, the crew worked on washing the slope and three miners worked on the slope tail. Tr. I:253-55. During the evening shift, the supervisor tasked four miners (including two extra workers) with cleaning duties. Tr. II:11-12, 30-31.

Ultimately, however, at the time of the inspection, three miners were tasked with cleaning the slope and a single miner was tasked with (but had not yet started on) cleaning the *extensive* accumulations near the tail. We emphasize, these accumulations were 300 feet long by 46 inches wide by 32 inches high and ultimately required 1,250 manhours to fully remedy. A shift supervisor conceded that if the inspector had not shut down the belt and put 50-60 miners on the task, cleaning the belt “would’ve probably took a couple of weeks longer than it did.” Tr. II:198. Assigning only two extra miners per shift, such that the belt would have continued to run in accumulations for *additional weeks* (subjecting miners to a prolonged risk of danger) is reasonably characterized as inadequate abatement efforts.

Nevertheless, Peabody raises two arguments on appeal regarding abatement. The first is resolved quickly. It claims the Judge failed to appropriately consider efforts that were close in time to the inspection, such as the cleaning efforts that occurred during the November 9 day and evening shifts. Br. at 22-23. We disagree. The Judge *did* consider those efforts, he simply found them inadequate in light of the extent of the accumulations. 47 FMSHRC at 471.

More significantly, Peabody claims the Judge “unreasonably limited” his considerations to abatement efforts that were close in time to the inspection and failed to give sufficient weight to Peabody’s efforts over the preceding days.⁷ Br. at 21-23. We acknowledge that the Judge failed to explain his focus on the immediately preceding shifts. 47 FMSHRC at 471 (simply stating that Peabody’s earlier efforts were “more relevant” to Order No. 9704803). However, his rationale can be inferred from his unwarrantable failure analysis for the other order. There,

⁷ Peabody claims the Judge found its earlier abatement efforts “irrelevant” and therefore “exclude[d]” them from consideration entirely. Br. at 21, 23. More accurately, the Judge found those earlier efforts “more relevant” to the other order and chose to “focus” on those efforts that were closer in time to the inspection. 47 FMSHRC at 471.

We also note that Peabody’s argument here is inconsistent with its argument regarding duration. If the cited accumulations were the result of a second spillage event just before the November 9 evening shift, then any abatement efforts prior to that are irrelevant, as they were directed towards different accumulations.

he explains that the analysis for a section 75.400 violation is “wholly distinct” from the analysis for section 75.363(a) violation, as the former is focused on the hazardous condition itself, while the latter asks whether Peabody acted to “immediately correct” the hazardous condition. *Id.* at 496-98. Logically, a Judge analyzing a section 75.400 violation would be more interested in Peabody’s efforts to address the hazardous accumulations *as they existed when they were cited* (November 9), while a Judge analyzing a section 75.363(a) violation would be more interested in Peabody’s efforts to immediately address the hazardous accumulations *when they first appeared* (November 7).

Additionally, any error in this respect was harmless, as the Judge clearly would have reached the same conclusion even if he had considered the earlier abatement efforts. *Cf.*, *Chapman v. California*, 386 U.S. 18, 21-22 (1967) (defining harmless errors as “small errors or defects that have little, if any, likelihood of having changed the result of the trial”). As detailed above, the Judge found abatement to be a neutral factor because Peabody’s abatement efforts were inadequate for such extensive accumulations. While Peabody *initially* tasked quite a few additional miners to clean the slope and tail, it did not maintain those numbers, yet extensive accumulations remained.⁸

Moreover, even if the Judge had considered Peabody’s efforts over the preceding days *and found them to be adequate*, it likely would not have changed the outcome of this proceeding. Peabody emphasizes that the Judge found those earlier efforts to be a mitigating factor with respect to Order No. 9704803 but fails to acknowledge that the Judge *still attributed that order to an unwarrantable failure* given the extensiveness, obviousness, duration, and degree of danger posed by the violative condition. 47 FMSHRC at 498. For the order at hand, the Judge similarly found that the violative condition was extensive, obvious, of aggravated duration, and posed a high degree of danger. He also found that the operator had been placed on notice of its need to comply with the cited standard, *unlike* Order No. 9704803. Even if abatement were to be changed from a neutral to a mitigating factor, nothing suggests the Judge would suddenly find that single mitigating factor sufficient to outweigh the significant aggravating factors at play.

The Judge found numerous aggravating factors in support of a finding of unwarrantable failure. While we find each factor to be supported by substantial evidence, we also note that the extensiveness, obviousness and degree of danger posed by the violative condition are essentially uncontested and may be sufficient to justify an unwarrantable failure finding, even if Peabody’s theory of a second spillage event immediately preceding the inspection were to be adopted. *See Peabody Midwest Mining, LLC*, 44 FMSHRC 515, 525 (Aug. 2022), *aff’d*, 70 F.4th 602 (D.C. Cir. 2023) (finding the violative condition’s brief and intermittent duration insufficient to outweigh other aggravating factors, including a high degree of danger); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1573-74 (Sept. 1996) (affirming a finding that aggravating factors of extensiveness and notice outweighed a short duration).

⁸ The day shift had ten or more people cleaning the slope and tail area on November 7, five people on November 8, and three people on November 9. Tr. I:221, 247-49, 254-55. The numbers for evening and owl shifts were smaller but more stable. Tr. II:11-12, 28, 30-31, 189 (evening shift ranged between 2-4 miners); Tr. II:69, 76-77, 130, 189 (owl shift ranged between 2-3 miners).

Substantial evidence also supports the Judge’s finding that Peabody’s abatement efforts were inadequate and therefore did not weigh against unwarrantable failure. Insofar as Peabody argues that *more weight* should have been given to its abatement efforts, we note that Judges have discretion in weighing the unwarrantable failure factors, and the Commission does not reweigh those factors on review. *Northshore Mining Co. v. Sec’y of Labor*, 46 F.4th 718, 729 (8th Cir. 2022), *aff’g in part, rev’g in part*, 43 FMSHRC 1 (Jan. 2021).

For the reasons above, we affirm the Judge’s finding of unwarrantable failure for Order No. 9704796.

C. Failure to Correct Hazardous Conditions

Order No. 9704803 states that Peabody failed to correct multiple hazardous conditions listed in the pre-shift and on-shift examination books for the slope belt and slope tail. 47 FMSHRC at 482. This refers to the accumulations cited in the previous order. Peabody has not appealed the Judge’s finding that this violated 30 C.F.R. § 75.363(a), which requires that any hazardous conditions found by a certified examiner “shall be corrected immediately or the area shall remain posted [with a danger sign] until the hazardous condition is corrected.” As with the previous violation, Peabody only asserts that it should not have been designated as an unwarrantable failure.

Here, the Judge found that two factors—notice and abatement—weighed *against* a finding of unwarrantable failure. He nevertheless concluded that the “duration, extensiveness, obviousness, and significant degree of danger factors *heavily weigh in favor* of affirming the unwarrantable failure designation.”⁹ 47 FMSHRC at 498 (emphasis added). As discussed below, we find that substantial evidence supports the Judge’s conclusion.

As with the previous order, Peabody does not contest the extensiveness or obviousness of the violative condition. As the Judge explained, the accumulations (which were themselves obvious) were noted in the pre-shift examination books for eight shifts and yet had clearly not been dangered-off or immediately corrected. *Id.* at 495.

With respect to duration and degree of danger, both the Judge’s analyses and Peabody’s arguments echo the previous order. Accordingly, we again find substantial evidence to support the Judge’s findings. The Judge reasonably rejected Peabody’s argument of a second spillage event and concluded, based on the inspector’s testimony and notations in the examination books, that Peabody failed to immediately correct the accumulations for 3½ days. 47 FMSHRC at 494; Br. at 31-32; *see slip op.* at 5-7. The record also supports the Judge’s finding that failing to immediately correct accumulations that are extensive, mostly dry, and have several potential ignition sources posed a significant degree of danger. Peabody fails to offer evidence that the conditions were not dangerous, instead reiterating that the accumulations were not being ignored.

⁹ The Judge also briefly notes that Peabody “admits it had knowledge of the condition” (47 FMSHRC at 496) though he does not give great weight to this factor. Peabody does not appear to contest this finding with respect to Order No. 9704803.

As noted above, such an argument is more relevant to abatement. 47 FMSHRC at 494; Br. at 32; *see slip op.* at 4-5.

Notably, the Judge *fully credited* Peabody's abatement efforts here. He found that the operator's attempts to correct the accumulations in the days preceding the inspection constituted "good-faith mitigation" and weighed against a finding of unwarrantable failure for the violation of section 75.363(a). 47 FMSHRC at 496. The Judge noted that Peabody took its first remedial action promptly after discovering the spillage (when the examiner ordered that the belt be shut down) and that cleaning efforts continued through every shift, up to and including the November 9 evening shift when the examination occurred. *Id.* at 496-97. He simply found this insufficient to outweigh the several aggravating factors that favored unwarrantable failure. *Id.* at 498.

Insofar as Peabody would give *more weight* to this mitigating factor, we reiterate that Judges have discretion in weighing all relevant unwarrantable failure factors and that we do not reweigh factors on review. *Northshore*, 46 F.4th at 729. There is nothing to suggest the Judge abused his discretion in concluding that multiple aggravating factors outweighed Peabody's mitigating abatement efforts. *See, e.g., New Warwick*, 18 FMSHRC at 1573-74 (affirming the Judge's conclusion that aggravating factors of extensiveness and notice outweighed a short duration); *Manalapan*, 35 FMSHRC at 294 (noting that a sufficiently high degree of danger may, by itself, support a finding of unwarrantable failure).

We also reject Peabody's assertion that the Judge legally erred by treating unwarrantable failure and negligence as "wholly distinct" analyses. Br. at 27-30. Peabody refers to the Judge's statement that the two analyses are "wholly distinct and may result in different conclusions." 47 FMSHRC at 501-02. The Judge made this statement while explaining his decision to attribute the unwarrantable failure to moderate rather than high negligence. *Id.* (citing *Excel Mining, LLC v. Dep't of Labor*, 497 F. App'x 78, 79 (D.C. Cir. 2013) (noting that moderate negligence does not foreclose an unwarrantable failure finding)). While the Judge may have overstated the matter in calling them *wholly* distinct, we have long recognized that negligence and unwarrantable failure are not identical and require separate analyses. *E.g., Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 186 (Feb. 1991). We find no legal error in the Judge's abatement analysis (which, again, *favored* Peabody), or alternatively, that any such error was harmless.

Where a Judge's factual findings are supported by substantial evidence and his overall weighing of factors is reasonable, a Judge's finding of unwarrantable failure should be affirmed. *See Peabody*, 44 FMSHRC at 525. Here, the Judge's findings that the violation was obvious, extensive, and highly dangerous are effectively uncontested, and the Judge reasonably concluded that those aggravating factors outweighed Peabody's mitigating abatement efforts.

Accordingly, we affirm the Judge's finding of an unwarrantable failure for Order No. 9704803.

II.

Denial of Settlement Motion

We turn next to the parties' Joint Motion to Approve Settlement and Dismiss Appeal of these proceedings. At the outset, we note the unusual procedural posture of the settlement motion at issue here. The vast majority of cases filed with the Commission settle. In nearly all of those cases, the settlement motion is filed prior to the Judge's decision on the merits. Only in very rare instances do parties decide to settle after a decision has been rendered by a Judge and while the case is pending on appeal before the Commission. *See, e.g., Emerald Coal Res., LP*, 36 FMSHRC 2409 (Sept. 2014) (approving a settlement at the statutory maximum penalty after the Judge increased the penalty above that threshold); *Sec'y of Labor on behalf of Barnes & Hall v. Warrior Met Coal Mining, LLC*, 47 FMSHRC 788, 789 (Sept. 2025) (discussing the settlement of discrimination cases on appeal before the Commission).

In light of the rarity of these circumstances, we emphasize that the same standard of review that applies to settlement motions before Commission Administrative Law Judges applies when review is conducted by the Commission itself. That is, the Commission reviews proposed settlements to determine if they are "fair, reasonable, appropriate under the facts, and protective of the public interest." *The American Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016) (*AmCoal I*). However, we note that unlike in settlement agreements prior to hearing, when we consider a settlement on appeal the judge has already made certain findings of law and fact, and those findings which have not been appealed are the law of the case.

Turning to the case at hand, the Judge issued a decision on June 26, 2025. In that decision, the Judge found in favor of the Secretary on every contested issue (except for the "high" negligence designation for Order No. 9704803, which he modified to the "high end" of moderate) and assessed a combined penalty of \$80,000 for the two orders. 47 FMSHRC at 455.

On January 22, 2026, the parties filed a Joint Motion to Approve Settlement and Dismiss Appeal of these proceedings. They propose removing the unwarrantable failure designations for both orders and modifying the negligence for Order No. 9704796 from "high" to "moderate," with corresponding penalty reductions. They propose an approximately 76% reduction in the total penalty amount, from \$80,000 to \$18,892. The parties assert that this compromise "fairly reflects the legal and factual disputes in the case, and the uncertainty for both parties in continuing this appeal." Jt. Mot. at 3.

We find that this proposed settlement is not reasonable and appropriate under the facts. First and foremost, the negligence designation for Order No. 9704796 that the parties seek to modify *was not appealed*. PDR at 20. It is therefore the law of the case and not subject to any litigation uncertainty. Regardless of the outcome of the appeal, it would remain attributable to high negligence. A proposed settlement that not only grants one party a full victory for all issues on appeal but also changes a settled issue in that party's favor does not reflect the "uncertainty for both parties in continuing the appeal." Jt. Mot. at 3. The parties' proposed justification does not support this modification.

As for the proposed removal of the unwarrantable failure designations, the motion fails to describe disputes that would make the outcome of litigation uncertain. First, the parties dispute the Judge's "weighing of the evidence" for the accumulation violation, particularly with respect to Peabody's corrective actions. Jt. Mot. at 3. As explained more thoroughly in the Petition for Discretionary Review, Peabody claims the Judge should have considered Peabody's efforts in the days preceding the inspection in his unwarrantable failure analysis (as he did for the other violation) rather than focusing only on those efforts close in time to the inspection. PDR at 15-16. However, as explained in the merits section above, even if the Judge had explicitly considered those earlier abatement efforts *and found abatement to be a mitigating factor* as Peabody wishes, the Judge would still have found an unwarrantable failure. Slip op. at 9.

Second, the parties dispute whether a moderate negligence finding is incompatible with an unwarrantable failure designation. Jt. Mot. at 3. This echoes Peabody's argument on appeal that the Judge legally erred by treating unwarrantable failure and negligence as "wholly distinct" analyses. Br. at 27-30. As explained above, we have long recognized that negligence and unwarrantable failure are not identical and require separate analyses. *E.g., Eastern Assoc. Coal*, 13 FMSHRC at 186. Consistently, the D.C. Circuit explicitly held that "a finding of 'moderate negligence' does not foreclose a finding of an 'unwarrantable failure.'" *Excel Mining, LLC*, 497 F. App'x at 80 .

The Secretary also more broadly claims that the proposed settlement would preserve crucial enforcement-related designations. Specifically, he asserts that it would preserve the S&S designations for both orders. Jt. Mot. at 4. When reviewing a proposed settlement, we may consider the potential future enforcement value of preserving orders as written. *The American Coal Co.*, 40 FMSHRC 983, 989 (Aug. 2018) (*AmCoal II*). However, the unusual procedural posture here must be considered. The parties seek to settle these proceedings on appeal, and the Judge's S&S findings *were not appealed*. The enforcement value of the S&S designations will be preserved regardless of the outcome of the litigation. Furthermore, as discussed above, the parties seek to *remove* a high negligence finding that was not appealed. The proposed settlement has no enforcement value compared with allowing the matter to proceed on the merits.

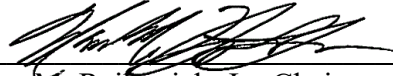
Finally, the Secretary claims the proposed settlement would serve the public by avoiding further delay in the payment of the civil penalties. Jt. Mot. at 4-5. We acknowledge the public's general interest in the prompt resolution of disputes. *E.g., McDermott v. Palo Verde Unified School Dist.*, 638 F.App'x 636, 638 (9th Cir. 2016). In this instance, however, the issue is moot. The Judge's decision ordering Peabody to pay the penalties assessed by the Judge is hereby affirmed, without further delay.

The parties have not shown that the proposed modifications are fair, reasonable, appropriate under the facts or in the public interest. Accordingly, the parties' motion to approve settlement is denied.

III.

Conclusion

For the reasons above, we deny the parties' settlement motion and affirm the Judge's findings of unwarrantable failure for Order Nos. 9704796 and 9704803.



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