

June 2025

TABLE OF CONTENTS

COMMISSION ORDERS

06-06-25	NR HAMM QUARRY INC.	CENT 2025-0082	Page 368
06-06-25	WAYNE J. SAND & GRAVEL, INC.	WEST 2024-0238	Page 372

ADMINISTRATIVE LAW JUDGE DECISIONS

06-18-25	WANDA PALO v. UNITED STATES STEEL CORPORATION	LAKE 2023-0202-DM	Page 378
06-26-25	PEABODY SOUTHEAST MINING, LLC	SE 2023-0020	Page 403
06-26-25	PEABODY SOUTHEAST MINING, LLC	SE 2023-0065	Page 454
06-26-25	RAIN-FOR-RENT	WEST 2022-0291	Page 505

Review was denied in the following case during the month of June 2025

Secretary of Labor v. American Tripoli, Docket Nos. CENT 2023-0180, et al.,
Judge Simonton (April 30, 2025)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

June 6, 2025

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

v.

NR HAMM QUARRY INC.

Docket No. CENT 2025-0082
A.C. No. 23-01889-590067

Docket No. CENT 2025-0083
A.C. No. 23-01889-591741

BEFORE: Jordan, Chair; Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair; and Baker, Commissioner

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On November 22, 2024, the Commission received from NR Hamm Quarry Inc. (“NR Hamm”) a motion seeking to reopen two penalty assessments, pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment in CENT 2025-0082 was delivered on

¹ The Commission hereby consolidates these above-captioned matters pursuant to Commission Procedural Rule 12 because they are “proceedings that involve similar issues.” 29 C.F.R. § 2700.12.

December 12, 2023, and that the case was closed by MSHA due to the operator's payment of the penalties on January 7, 2024. MSHA's records further indicate that the proposed assessment in CENT 2025-0083 was delivered on January 4, 2024, and that the case was closed by MSHA due to the operator's payment of the penalties on February 8, 2024. NR Hamm asserts that it inadvertently paid the penalties for all citations due to an "administrative error." It claims that, due to the relatively low penalty amount involved in these citations, it simply paid the penalties through administrative channels rather than having them reviewed by the safety department, and its accounting office was therefore unaware that four notices of contest for the citations were filed in 2023.² Counsel for NR Hamm learned of the payment only when the Commission issued its notice of intent to dismiss the contest proceedings on November 20, 2024. As such, the operator seeks reopening in these cases. The Secretary of Labor does not oppose the motion to reopen, but reminds NR Hamm to ensure that future contests are timely filed.

Having reviewed NR Hamm's request and the Secretary's response, we find that the operator has demonstrated that its failure to timely file a contest of the proposed penalty was the result of a mistake due to a miscommunication between the operator's administrative and safety departments. We note that the operator clearly indicated its intent to contest by filing a timely notice of contests for the citations. *See Carmeuse Lime & Stone, Inc.*, 45 FMSHRC 179, 180 (Apr. 2023) (crediting the operator for initiating contest proceedings as indicia of intent to contest). Moreover, NR Hamm promptly filed a motion to reopen upon learning of its mistake. *See Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 ("[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time").

² Commissioner Baker has previously stated that it is his position that the accidental payment of a civil penalty does not constitute excusable neglect. *See, e.g., Omya, Inc.*, 45 FMSHRC 131 (Mar. 2023). However, in light of the fact that the operator filed a timely contest to the underlying citation, Commissioner Baker would determine that in the instant case payment was not the result of an inadequate or unreliable internal processing system. *See Greenbrier Mineral, LLC*, 45 FMSHRC 822, 823 n.1 (Sep. 2023).

In the interest of justice, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, dissenting:

I write to disagree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

June 6, 2025

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

v.

WAYNE J. SAND & GRAVEL, INC.

Docket No. WEST 2024-0238
A.C. No. 04-01915-599216

BEFORE: Jordan, Chair; Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair; and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On December 2, 2024, the Commission received from Wayne J. Sand & Gravel, Inc. (“Wayne”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 7, 2024, the Chief Administrative Law Judge issued an Order to Show Cause in response to Wayne’s perceived failure to answer the Secretary of Labor’s June 7, 2024 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 7, 2024, when the operator had not filed an answer within 30 days.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a Judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge’s order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Wayne asserts that its office secretary is fairly new and unfamiliar with the process of contesting violations and inexperienced with the operator's new e-mail system. According to the operator, this caused her to miss information regarding the Petition and overlook the need to file an answer or response to the Order to Show Cause. Wayne's secretary acknowledges having received the Order to Show Cause on August 7, 2024, but further claims that she "was busy in the office" and that when she "opened the e-mail it was a cov19 [sic] Default order in red printing and [she] . . . didn't scroll down to see a PDF or [that] the message was titled 'Order to show cause of default [sic].'" WJS Mot. at 1. Wayne requests the case be reopened to continue litigating the citations.

The Secretary opposes the request to reopen. She argues that the operator's motion does not demonstrate an excusable mistake under Rule 60(b). According to the Secretary, the operator's delay from August 7, 2024 (the date of the Show Cause Order) to the filing of its motion to reopen on December 2, 2024 (117 days), is not explained. She also contends that the operator's failure to read and lack of understanding of the Order to Show Cause and Order of Default indicates a failure of its processing system, and that it should have been diligent in its efforts to understand the documents. The Secretary also points out that the operator has failed to respond to MSHA communications twice in two prior similar motions to reopen, in which the operator "failed to receive" issuances from the Mine Safety and Health Administration ("MSHA") and the Commission. The Secretary further argues that Wayne's motion to reopen should be denied due to its failure to provide adequate training to its employee handling contests, despite it having over 30 years of experience in mining operations.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment." *Marfork Coal Co., LLC*, 45 FMSHRC 463, 464 (June 2023); *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013) ("We have repeatedly and unequivocally held that a failure to contest a proposed assessment as a result of an inadequate or unreliable internal processing system does not establish grounds for reopening an assessment."). Not only did Wayne not monitor its email adequately, but there appears to have been no process in place to monitor the proceedings before the Commission. The operator failed to timely respond to the Secretary's petition and subsequently failed to respond to the Chief Judge's Order to Show Cause.¹

The Secretary's Petition for Assessment of Civil Penalty clearly explained that Wayne had an obligation to file an answer within 30 days. Furthermore, the Order to Show Cause clearly explained that the operator had to respond to the order within 30 days or would be in default. "It is an operator's responsibility to fully read any information provided by the Secretary in connection with a proposed penalty." *Mike Morgan Indus., LLC*, 46 FMSHRC 863, 865 (Oct. 2024) (citing *Stone Zone*, 41 FMSHRC 272, 275 (June 2019)). That is equally true of Order to

¹ We note that Wayne has operated its mine since May 16, 1994. The 30-plus years of the operator's experience weighs against there being an excuse for failing to properly respond to communications from MSHA and the Commission. *See Cooper Stone, LLC*, 46 FMSHRC 808, 809 n.3 (Sept. 2024) ("the operator's apparent ignorance of the proper procedure for contesting a proposed assessment *despite over 30 years of operation* may indicate further inadequacies with the operator's internal processing system.").

Show Cause. *See Las Vegas Paving Corp.*, 44 FMSHRC 249, 250 (Apr. 2022) (“[O]perators should take Show Cause Orders seriously and should adequately explain any delays in responding to such orders.”). The only explanation Wayne gave is that it did not scroll to the bottom of the Order to Show Cause PDF. This is not excusable neglect, in light of the operator’s obligation to “fully read information” and to take show-cause orders seriously. *Mike Morgan Indus.*, 46 FMSHRC at 864-65 (denying a motion to reopen because the operator’s failure to routinely check its spam email folder was not good cause).

Furthermore, we conclude that Wayne failed to provide any methods to improve its internal procedures. The Commission considers whether an operator’s “procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate” *Noranda Alumina, LLC*, 39 FMSHRC 441, 443 (Mar. 2017); *see also, e.g., Mammoth Coal Co.*, 45 FMSHRC 149, 149-50 (Mar. 2023) (granting a motion to reopen in part because the operator explained how it changed its processes); *The N.C. Granite Corp.*, 35 FMSHRC 303, 306 (Feb. 2013) (same). An operator’s failure to explain with specificity how it has changed its procedures weighs in favor of denying the motion. *See Morton Salt, Inc.*, 46 FMSHRC 15, 16 (Jan. 2024) (denying a motion to reopen with prejudice partly because “although [the operator] has stated that it will take action to prevent such a reoccurrence in the future, it has not identified the steps it will take”). Wayne did not provide any explanation of how it will timely respond to future communications received from MSHA and the Commission.

Accordingly, we deny Wayne’s motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, concurring:

I write to agree the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975, 977 (Dec. 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the operator received the final order. The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

June 18, 2025

WANDA PALO,
Complainant,

v.

UNITED STATES STEEL
CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. LAKE 2023-0202-DM
MSHA No. NC MD-2023-02

Mine: Minntac Mine
Mine ID: 21-00282

DECISION

Appearances: Daniel Gray Leland, Esq., Leland Connors PLC, Minneapolis, MN; for Wanda Palo, Complainant.

Michael P. Duff, Esq., United States Steel Corporation, Pittsburgh, PA; for United States Steel Corporation, Respondent.

Before: Judge Paez

This discrimination proceeding is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, (“Mine Act”), 30 U.S.C. § 815(c)(3). Complainant Wanda Palo (“Complainant” or “Palo”) filed her discrimination complaint with the Federal Mine Safety and Health Review Commission (“Commission”) against Respondent United States Steel Corporation (“Respondent” or “USSC”) on June 16, 2023, after the Mine Safety and Health Administration (“MSHA”) investigated Palo’s claims, and the Secretary of Labor (“Secretary”) declined to take action under section 105(c)(2) of the Mine Act.¹

This case revolves around Palo being reprimanded and ultimately discharged by USSC after she is alleged to have untimely reported an injury she sustained after a coworker hit or shoved Palo with a bag at the end of Palo’s shift. At first blush, firing an employee for reporting a workplace injury late seems extreme. However, Palo was on a Last Chance Agreement (“LCA”) at this time, whereby she agreed and understood that her failure “to follow any plant or corporate rules, policies, or procedures” would be a material violation of the agreement and “result in suspension subject to discharge.” Therefore, I need not determine whether USSC had

¹ In this decision, volumes one and two of the hearing transcript, the joint exhibit, the Complainant’s exhibits, and Respondent’s exhibits are abbreviated as “I Tr.,” “II Tr.,” “Joint Ex. #,” “Ex. C-#,” and “Ex. R-#,” respectively. The following exhibits were admitted into evidence: Joint Ex. 1, R-1, R-2, R-3, R-4, R-6, R-7, R-8, R-9, R-11, R-12, R-14, R-16, R-17, R-18, R-19, R-20, R-21, R-21A, C-23, C-24, C-25, C-26, C-27, C-30, C-32, C-33, C-35, C-37, C-38, C-39, C-42, C-46, C-68, and C-80.

appropriate grounds to discharge Palo, but only whether it had appropriate grounds to discipline her for not timely reporting her workplace injury, which is the crux of this case.

To prevail, Palo must prove by a preponderance of the evidence that (1) she engaged in a protected activity, (2) she suffered an adverse action, and (3) the adverse action was motivated in any part by her protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

I. STATEMENT OF THE CASE

On July 26, 2023, Chief Administrative Law Judge Glynn Voisin assigned me this matter. Prior to the hearing, I issued an Order of Assignment to Settlement Counsel on September 5, 2023, but the parties were unable to resolve their dispute. On January 23, 2024, Palo retained counsel for this matter. Thereafter, I held a hearing in Duluth, Minnesota, where Palo testified and both Palo and USSC presented testimony from the following witnesses: Mitchell John McDonald, Union Safety Chair; Joseph Bissonnette, Team Leader; James Melvin Aho, Team Leader; Chad Russell Hunt, Shift Manager; Nicole Koski, Company Labor Relations Representative (“Labor Relations Rep.”); Susan Wiirre Lindberg (“Susan Wiirre”), Senior Manager and Employee Relations (“Senior Manager”); and Steven John Bonach, Union President and Grievance Committee Chair (“Union President”). Additionally, the parties submitted documentary evidence. Per my request, Palo and USSC filed post-hearing briefs and reply briefs.

II. ISSUES

Palo argues that she engaged in protected activity on February 26, 2023, when she told her shift manager, Chad Hunt, that a coworker hit her shortly after it occurred. Palo also argues that she engaged in protected activity when she reported the incident and her resulting injury to her union representative, Steven Bonach, on February 27, 2023. Additionally, Palo asserts that she engaged in protected activity when she reported her work-related injury to Labor Relations Rep. Nicole Koski on March 2, 2023. Palo alleges that, in response to her protected activities, USSC retaliated against her by disciplining and ultimately discharging her on March 13, 2023.

USSC, in turn, argues that Palo did not timely report the “work-related” injury she sustained on February 26, 2023, because she did not officially report it until her meeting with Labor Relations Rep. Koski on March 2, 2023. USSC asserts that this untimely report of her workplace injury is a violation of USSC Safety Rules 1.7² and 1.8.³ Additionally, because Palo

² Safety Rule 1.7 states: “Report to your supervisor, as soon as possible, all incidents with or without injury.” (Ex. R-7.)

³ Safety Rule 1.8 states: “Report all injuries or hazardous exposures, however slight, to your supervisor as soon as possible. If you are injured, no matter how slightly, obtain first aid
(continued...)

was on a Last Chance Agreement with USSC at this time, USSC asserts that Palo’s violation of Safety Rules 1.7 and 1.8 was also a violation of her Last Chance Agreement. Accordingly, USSC claims it issued two discipline slips to Palo on March 7, 2023, and later discharged her on March 13, 2023, based on her failure to comply with Safety Rules 1.7 and 1.8. and, thus, her Last Chance Agreement. USSC further argues that even if Palo engaged in protected activity, its subsequent discipline of Palo was in no way motivated by her protected activity but rather was solely to address Palo’s failure to comply with Safety Rules 1.7 and 1.8 and the resulting violation of her Last Chance Agreement.

Accordingly, I determine the following issues are before me: (1) whether Palo has established by a preponderance of the evidence that USSC discriminated against her in violation of section 105(c) of the Mine Act; and (2) if so, what are the appropriate remedies.

III. FINDINGS OF FACT

A. Parties’ Stipulations

At the hearing the parties stipulated in a joint exhibit to the following items, verbatim:

1. Respondent is an “operator” as defined in § 3(d) of the Federal Safety and Health Act of 1977, as amended (hereinafter “the Act”), 30 U.S.C. § 802(d).
2. Minntac Mine is a “mine” as defined in § 3(h) of the Act, 30 U.S.C. § 802(h).
3. Minntac Mine is operated by the Respondent.
4. Operations at Respondent’s Minntac Mine (Mine ID 2100282) (hereinafter “Minntac”) are subject to the jurisdiction of the Act.
5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.
6. The Complainant, Wanda Palo (hereinafter, “Complainant”), was a “miner” at all times relevant to this matter.
7. Complainant engaged in a protected activity when she reported to Respondent’s management on March 2, 2023[,] that she had been injured four days earlier on February 26.

(Joint Ex. 1.)

³ (...continued)
treatment promptly. Neglecting minor scratches or cuts may result in serious infections.”
(Ex. R-7.)

B. Background

Wanda Palo began her employment with USSC on August 9, 2012. (I Tr. 24:5–9.) Palo was an Operating Technician at the Minntac Surface Mine, located in Mountain Iron, Minnesota, and worked in various positions, including mobile equipment operator and truck driver. (I Tr. 26:6–30:13.) During her employment, Palo experienced multiple serious workplace injuries, including a neck injury, a meniscus tear in her knee requiring surgery, and a hip injury requiring surgery. (I Tr. 31:21–33:9, 36:18–47:25.) Specifically, in or around the summer of 2020, Palo tore her meniscus while pushing the decelerator pedal on the CAT bulldozer during a night shift and needed surgery to repair it. (I Tr. 38:11–39:20, 40:13–16, 259:7–11.)

Palo’s hip injury developed over time from repeatedly pushing the decelerator pedal on the CAT bulldozer. (I Tr. 37:12–38:11.) Eventually, Palo’s sacroiliitis joint separated while at work in May of 2021 and she had to be taken to the hospital in an ambulance. (I Tr. 40:17–19, 42:11–43:24, 46:4–7.) In June of 2021, USSC ordered Palo to return to work, but her hip continued to flare up, so she only worked a few days in June and July despite USSC’s repeated demands that she return to work; in August her doctor ordered her not to work at all until her surgery. (I Tr. 44:25–45:13, 46:8–49:17.) In February 2022, Palo underwent surgery for her hip in which pins were placed through her sacroiliitis joint to stabilize it. (I Tr. 36:22–37:11, 43:14–20, 44:15–21.) Palo continued to experience soreness in her hip after the surgery, especially after performing manual labor at work. (I Tr. 87:3–88:12.)

On January 27, 2022, Palo and her union representatives entered into a Last Chance Agreement with USSC, which modified Palo’s discharge on April 28, 2020, for unsatisfactory work performance⁴ to a ten-day suspension. (Ex. R–1.) The Last Chance Agreement was to remain in effect for 36 months during which she was in active employment. (I Tr. 55:6–16; II Tr. 75:6–76:6; Ex. R–1.) The section of Palo’s Last Chance Agreement titled “Work Conduct” provides, in relevant part: “Employee understands that failure to abide by any of the conditions of this agreement or failure by employee to follow any plant or corporate rules, policies, or procedures shall be considered a material violation of this Agreement.” (Ex. R–1 (emphasis omitted).) Palo’s Last Chance Agreement further provides, in relevant part: “Failure by Employee to abide by ANY of the terms or conditions of this Agreement shall be considered to

⁴ While operating a CAT bulldozer during a night shift in April of 2020, the dump sloughed off, which Palo reported on the radio and then she took a break. (I Tr. 56:6–7.) Afterwards, Shift Manager Hunt talked to Palo and told her the control room operator was watching her go to the bathroom. (I Tr. 57:7–10.) In response, Palo testified that she asked for union representation. (I Tr. 57:10–14.) Palo stated that she also pulled a stop card, which USSC employees use to stop performing work they feel is unsafe. (I Tr. 57:15–57:17.) However, Palo testified that Hunt overrode her stop card and told her that he was not going to call union representation at night for her. (I Tr. 57:18–21.) Instead, Hunt ordered Palo to return to work. (I Tr. 60:12–14.) Hunt spoke with Palo again later that night and accused her of sleeping on the job, which Palo denies, but this accusation was the basis for her “April 28, 2020, discharge,” although Palo’s employment with USSC was never actually terminated due to the grievances her union filed on her behalf. (I Tr. 57:22–58:6, 60:20–25, 62:2–11, 153:23–154:20.)

be a material violation of this Agreement and shall result in suspension subject to discharge.” (Ex. R-1 (emphasis omitted).)

C. “The Incident” – Sunday, February 26, 2023

Palo and her co-worker Michelle Mesich had a well-known history of animosity and turmoil, such that USSC management told Palo and Mesich not to interact or travel together in vehicles. (I Tr. 184:20–185:5, 233:14–19.) When Palo first started working with Mesich, Mesich obsessively asked Palo to hang out, so much so that it made Palo uncomfortable. (I Tr. 79:5–18.) Palo reported Mesich’s behavior to Labor Relations Rep. Koski and subsequently had a meeting about it with Koski, Supervisor Todd Plackner, and Team Leader Thad Sweeney. (I Tr. 79:5–20.) Koski told Palo that she and Mesich “needed to be professional and they may encounter each other over the course of business, but that they did not have to be friends. And if there were any future things that happened, that we needed to know about it, that they needed to be reported.” (II Tr. 32:9–19.)

However, Palo’s troubles with Mesich persisted as Palo claims Mesich began hitting Palo with her gym bag filled with heavy tools. (I Tr. 72:22–74:10; II Tr. 143:18–23.) Palo estimates this occurred nearly a half dozen times. (I Tr. 72:22–73:2.) Palo told Shift Manager Hunt and Labor Relations Rep. Koski about these incidents and even went so far as to report Mesich’s behavior to the USSC ethics hotline. (I Tr. 72:22–73:2, 74:6–76:21, 78:18–79:4; II Tr. 143:21–23.) However, when Palo told Hunt about these incidents, she testified that he seemed indifferent and that he thought the situation was funny, with Hunt on at least one occasion saying, “What do you want me to do?” (I Tr. 75:17–76:7.) Similarly, Palo stated that Koski also failed to take any action to address Palo’s safety concerns. (I Tr. 75:9–75:16.)

On Sunday, February 26, 2023, at approximately 5:30 p.m., Palo finished her twelve-hour shift and prepared to go home. (I Tr. 24:5–13, 26:6–27:8, 28:23–29:1, 30:3–31:6, 70:9–72:9, 95:11–14.) As Palo was exiting the Minntac Mine Annex, she noticed Mesich coming down the hallway from the opposite direction, so Palo turned to the side to let Mesich pass. (I Tr. 70:9–72:16.) However, as Mesich passed her, Palo felt a “heavy” and “hard” blow from Mesich’s bag⁵ hitting her across her left shoulder and neck. (I Tr. 72:7–9, 138:8–10; Exs. R-16, C-80.) The blow was forceful enough to cause Palo to collide with the wall behind her and the pins in her hip to twist, which resulted in pain. (I Tr. 72:10–12, 139:6–139:7; Exs. R-16, C-80.)

Reeling from Mesich hitting her, Palo turned around and saw Mesich continue to walk away from her down the hallway. (I Tr. 72:10–16.) Palo turned around and went to the nearby entrance of the shift manager’s office, where Hunt, the shift manager for the oncoming shift, and Team Leaders James Aho and Thad Sweeney were present. (I Tr. 72:14–16, 79:21–80:2; Exs. R-16, C-38, C-46, C-80.) Palo said, “Did anybody just see that? She just hit me . . . I’m tired of getting hit with the bag.” (I Tr. 80:2–5; Exs. R-16, C-38, C-46, C-80.) While Aho and Sweeney heard Palo say that she was “hit” or “shoved,” Hunt only heard Palo say “Did you see that? [and]

⁵ Palo estimates that Mesich’s bag weighted roughly fifteen pounds as Mesich previously told her that her bag was filled with tools like crescent wrenches, hammers, and pliers, as well as duct tape and a thermos. (I Tr. 73:3–23.)

something about, ‘a push’ and ‘a bag.’” (I Tr. 219:2–6, 229:21–230:25; Exs. R–2, R–3, R–4.) Before anyone could respond, Palo left the building to drop off her work clothes and go home. (I Tr. 86:13–23, 135:22–136:6, 223:10–22, 255:25–256:10; Exs. R–2, R–3, R–4.)

Palo did not say anything about an injury to Shift Manager Hunt, Team Leader Aho, or Team Leader Sweeney because her “adrenaline was pumping” at the time and she was focused on alerting them to the incident that just occurred. (I Tr. 135:1–14.) Palo also acknowledged that while she may have felt some pain or discomfort, she had “just got off [her] shift and it’s not uncommon to feel sore when you are done with your shift.” (I Tr. 135:15–21.) Indeed, Union President Bonach knew of multiple instances where miners were injured and “didn’t feel it right away.” (II Tr. 150:3–5.) Instead, the miners “work through it.” (II Tr. 150:6–9.)

By the time Palo reached her vehicle to drive home her right foot was numb, however, she was unsure what caused the numbness. (I Tr. 103:17–25, 135:22–136:6; 136:18–21, 137:9–140:23, Exs. R–16, C–38, C–46.) Palo explained that she did not return to Shift Manager Hunt to report this numbness, because she hurts every night after finishing a twelve-hour shift and had experienced numbness before. (I 140:9–23.) Indeed, Union Safety Chair Mitchell McDonald referred to miners as “industrial athletes” because they perform “hard, physical work” and work long hours. (I 162:14–163:12.) McDonald explained that miners are therefore often sore and do not always formally report typical aches and pains. (I 163:13–164:11, 193:11–18.)

When Palo arrived home, she was experiencing general soreness and pain in her hip, which she frequently experienced after strenuous work, so she took her usual steps to relieve the discomfort by taking pain medication, icing her hip, and doing physical therapy exercises. (I Tr. 86:22–88:12, 143:8–14; Exs. C–46, R–16.)

D. Events Following the Incident

1. One Day After the Incident: Palo Informs Bonach

Throughout the evening of Sunday, February 26, 2023, Palo’s hip pain worsened, with her pain peaking at approximately 2:00 a.m. or 3:00 a.m. on Monday, February 27, 2023. (I Tr. 143:8–21.) Palo was not scheduled to work on Monday, February 27, 2023; however, via text at 10:09 a.m. she notified Union President Bonach of the incident with Mesich. (I Tr. 88:13–16, 97:11–98:6; Ex. C–80.) Specifically, Palo texted Bonach—

Hi. I [k]no[w] this isn’t your thing. But I just want to make a note. I did speak up to Chad [Hunt,] Thad [Sweeney,] and [Jim] Aho [who] were in the office. Yesterday when leaving I got shoved again by Michelle [Mesich]. See if they do anything. Or better yet ignore it. What I said [was] “Did anyone see that? I’m tired of getting hit or pushed every time I walk by her.” They just looked at me and said nothing. Also this time she caught me off guard and it twisted the pins in my hip as I [b]umped [into] the wall. [I]t was a bit painful. I had to c[o]me home and ice[] it. . . . I understand she might be retiring, but to let her go with a clean record is a[n]

insult. All the other garbage I have continued to just walk away from. But this is just wrong.

(Ex. C-80.)

Union President Bonach responded by text, saying, “I agree with you on that nobody should ever be touched in any way!! You told a manager[,] and he should react on it, you should make a call to Sue [Wiirre] or Nicole [Koski] or if you want me to talk to them, [I can].” (Ex. C-80.) In response, Palo texted, “I’ll leave it up to you. I guess my only concern is that it would escalate, if she is thinking to get one good hit in before she leaves or something.” (Ex. C-80.) Bonach then responded with the text, “I’ll deal with it.” (C-80.)

2. Two Days After the Incident: Bonach Informs Koski of the Incident & Palo’s First Shift Following the Incident

On Tuesday, February 28, 2023, at approximately 2:30 p.m.,⁶ Union President Bonach informed Labor Relations Rep. Koski that Mesich hit Palo with her bag on February 26 by showing Koski the text messages that Palo had sent him the previous day. (II Tr. 20:23–21:15, 22:9–23:2, 23:25–25:25, 83:11–25, 143:24–144:22; Ex. C-80.) Bonach asked Koski if she wanted him to take any action, to which Koski responded that she was unsure at the moment, prompting Bonach to tell her to “make a call, or [he] would deal with it.” (II Tr. 143:24–145:12.)

Palo’s first scheduled shift following the incident began later that evening at 5:30 p.m. on Tuesday, February 28, 2023, and was to last until 5:30 a.m. on Wednesday, March 1, 2023. (I Tr. 97:11–98:6; II Tr 47:16–17, 49:22–50:1.) Senior Manager Susan Wiirre confirmed that on February 28, 2023, she was aware of the incident between Palo and Mesich, yet she did “not have [a] discussion with Wanda [Palo] that day,” despite typically working until 9:00 p.m. or 10:00 p.m. (II Tr. 120:8–122:2.) Upon reflection, Wiirre admitted that USSC management “should have talked to Wanda [Palo] sooner.” (II Tr. 118:25–119:6.)

Upon arriving for her night shift, Palo informed her Team Leader, Joseph Bissonnette, and Shift Manager, Eric Meese, that she was sore, but she did not specify why. (I Tr. 81:24–82:6, 98:21–99:10, 146:16–147:3, 205:1–14; Exs. C-38, C-46, C-80.) Palo testified that she asked Bissonnette and Meese to check their computer to see if there were any supervisor notes about her, but did not specify what the notes would be about. (I Tr. 82:14–24, 98:21–99:10, 144:17–145:2, 146:19–147:3, 147:22–148:6; Ex. C-46.) In response, Bissonnette allegedly told Palo that there were no notes about her in the system, though Bissonnette denies that Palo asked him to check the system for notes about her. (I Tr. 82:14–24, 98:21–99, 144:17–145:2, 205:15–21, 206:4–10; Ex. C-46.)

⁶ Counsel for USSC admitted in his opening statement that Bonach informed Koski of the incident between Palo and Mesich at approximately 2:30 p.m. on February 28, 2023. (I Tr. 16:15–23.) While no witness at hearing testified to this statement, it is not disputed in any of the parties’ post-hearing briefs.

Palo then started her shift, but a few hours later she radioed the control room operator that she needed to step down. (I Tr. 99:12–100:4; Exs. C–38, C–46, C–80.) Palo testified that shortly after, she said she was not feeling well over the radio and in response Team Leader Bissonnette asked her if she wanted to go home, prompting Palo to respond, “that’s probably for the best,” as she had a muscle spasm in her leg and did not want to risk hurting anyone if her leg locked up while operating a machine. (I Tr. 98:21–100:4, 148:7–19; Exs. C–38, C–46, C–8.) However, Bissonnette testified that Palo only said, “I’m going home,” over the radio, to which he replied “okay,” and he then had another MEO equipment operator go relieve her. (I Tr. 206:11–207:1, 207:20–208:1; C–38.)

3. Three Days After the Incident: Koski Begins Investigation & Palo’s Second Shift Following the Incident

Labor Relations Rep. Koski began her investigation of the February 26, 2023, incident between Palo and Mesich on Wednesday, March 1, 2023, during her normal working hours of 7:30 a.m. to 4:00 p.m. (II Tr. 38:18–39:25, 49:16–19.) Koski gathered the swipe times of Palo and Mesich to determine when they were at work and contacted the area manager of the mine. (II Tr. 38:20–25.) Koski learned that Palo was scheduled to start a night shift that evening at 5:30 p.m., but she chose not to stay late to speak with Palo, preferring instead to arrive early the next morning on March 2 to meet with Palo at the end of Palo’s night shift. (I Tr. 100:13–15; II Tr. 39:8–19, 40:4–13, 49:22–50:1.) Koski also reached out to Shift Manager Hunt to inform him of the text messages that Union President Bonach showed her the previous day and asked about his recollection of what Palo said to him. (II Tr. 38:20–39:7.)

On Wednesday, March 1, 2023, Palo was worried that the pins in her hip had moved, so she scheduled an appointment with her doctor. (I Tr. 96:13–97:2.) After scheduling the appointment, Palo asked Union President Bonach over text whether “this [is] a new incident or does it fall under the old injury[]? I guess I’m thinking it’s part of the old. But they might view it as new. Any idea[]?” (I Tr. 96:2–12; II Tr. 150:12–151:2; Ex. C–80.) Bonach responded via text saying, “Your injury would have to be considered a previous injury unless you filed a recent injury report.” (II Tr. 150:21–151:2; Ex. C–80.) Bonach also notified Palo that she needed to attend a meeting at the end of her night shift the following morning that potentially concerned why she left work early the previous night. (I Tr. 100:13–101:4; Ex. C–80.)

Thereupon arriving for duty on the night shift beginning March 1, Team Leader Bissonnette also informed Palo that she needed to attend a meeting at the end of her shift on the morning of March 2. (I Tr. 100:13–24, 208:21–209:2.) Palo testified that she told Bissonnette she was still experiencing pain and asked whether there were any supervisor notes about her in the system, to which Bissonnette responded that there were none. (I Tr. 82:14–24; Ex. C–46.) However, Bissonnette denies that Palo asked him whether there were any notes about her in the system or told him that she was in pain. (I Tr. 205:15–21, 208:210.) Ultimately, Palo went to work, and the night was otherwise unremarkable. (I Tr. 100:16–101:25, 208:21–209:8.)

4. Four Days After the Incident: Palo's First Meeting with Koski

Shortly after Palo finished her night shift at 5:30 a.m. on Thursday, March 2, 2023, she met with Labor Relations Rep. Koski, Union President Bonach, Union Safety Chair McDonald, and two other individuals. (I Tr. Vol. 102:1–22, 168:2–24.) Koski began the meeting by asking Palo why she left work early the evening of February 28, 2023. (I Tr. 102:23–103:13; II Tr. 84:1–18; Ex. C–38.) In response, Palo explained that she left work early on February 28, because of the pain she was experiencing after Mesich hit her and then described to Koski what occurred on February 26. (I Tr. 103:10–104:17; II Tr. 26:1–23, 81:14–21, 84:12–85:2; Ex. C–38.) Furthermore, Palo explained that she told Shift Manager Hunt about the incident shortly after it occurred and added that she noticed numbness in her foot upon reaching her vehicle after the incident. (I Tr. 103:17–104:17; II Tr. 26:1–23, 81:14–21, 85:3–13; Ex. C–38.) Koski asked Palo why she did not go back inside to report the numbness in her foot to Hunt, prompting Palo to respond that “[she had] just talked to [Hunt]” and then noted that Koski’s question did not make sense to her because Hunt does not take reports. (I Tr. 104:1–104:5; II Tr. 85:3–13; Ex. C–38.) Palo also noted that this was not the first incident with Mesich, as Mesich had previously hit Palo with her bag several times before. (II Tr. 34:3–7.)

Labor Relations Rep. Koski asked Palo why she did not call a member of USSC management to report what had happened and the pain she was feeling when she got home. (I Tr. 104:6–13.) Palo testified that she responded by saying she “wasn’t going to call anybody at 2:00 in the morning.” (I Tr. 104:6–13, 143:14–21.) Koski told Palo that she “could have said something the next day,” to which Palo replied “I did [report it] to Steve [Bonach].” (I Tr. 104:14–17.) However, Koski testified that she asked Palo at least two times why she did not report her workplace injury to USSC sooner to which Palo had no response, and instead looked to Bonach, who stated that “a while back” he and Palo raised other issues she had to Shift Manager Hunt. (II Tr. 85:3–13; C–38.)

Labor Relations Rep. Koski eventually told Palo that she needed to go to the Plant Medical Dispensary,⁷ because Palo said she had been injured at work on February 26, 2023. (II Tr. 26:1–23.) In response, Union President Bonach told Koski that Palo needed to complete an incident report form and a safety investigation needed to occur. (I Tr. 166:14–168:24; II Tr. 26:20–27:12, 147:13–148:9, 151:3–13; Ex. C–38.) Although Koski testified that no argument occurred regarding whether Palo should fill out an incident report form and that she did not resist providing an incident report form to Palo, Palo testified that a heated discussion occurred between Koski, Bonach, and Union Safety Chair McDonald. (I Tr. 104:18–106:7, 166:14–169:19; II Tr. 26:1–23, 26:6–27:20, 85:14–22, 146:23–148:9, 151:3–9, 151:15–152:1.) In response to the union representatives’ request, Koski gave Palo an incident report form which Palo promptly filled out, detailing the events of February 26, 2023. (I Tr. 105:5–106:23; II Tr. 151:3–6; Exs. R–16, C–24, C–25.) Additionally, McDonald told Koski during this meeting that Palo would file a section 105(c) complaint against USSC, although Koski denies this. (I Tr. 107:5–13, 190:9–193:2; II Tr. 86:3–17, 154:12–155:12, 159:24–160:4.)

⁷ The Plant Medical Dispensary is a USSC facility in which injured USSC employees are evaluated and connected with a telemedicine health care provider. (I Tr. 108:11–25.)

5. Five Days After the Incident: Palo Visits her Doctor

Palo saw her doctor on Friday, March 3, 2023, and after having an X-ray done, she learned that the pins in her hip were in place. (I Tr. 97:3–10, 112:16–25.) Palo’s doctor wrote in his report that Palo most likely strained a muscle and could return to work with no limitations that same day. (Ex. C–23; I Tr. 112:3–113:9.)

6. Nine Days After the Incident: USSC Issues Discipline Slips to Palo

On Tuesday, March 7, 2023, Palo was issued two discipline slips by Labor Relations Rep. Koski who had determined the day before on Monday, March 6, 2023, that Palo violated USSC Safety Rules 1.7 and 1.8.⁸ (I Tr. 115:9–22; II Tr. 10:2–12, 86:18–87:2; Exs. R–17, R–18, R–19, C–27.) Palo received one discipline slip for “[f]ail[ing] to timely report an injury” and the other slip was for a “Violation of Last Chance Agreement.”⁹ (I Tr. 115:9–116:22; II Tr. 8:9–14, 10:21–11:16; Exs. R–17, R–18, R–19.) The discipline slips stated that Palo was suspended from March 7 to March 11, 2023, and was subject to discharge. (I Tr. 115:9–116:22; II Tr. 8:9–14, 10:21–11:16; Exs. R–17, R–18, R–19.)

7. Ten Days After the Incident: Palo Files Section 105(c) Complaint

Palo had contacted MSHA about filing a section 105(c) complaint, and in a letter dated March 7, 2023, from MSHA Investigator Wilbert Koskiniemi to Palo with copies to Labor Relations Rep. Koski and Shift Manager Hunt, Koskiniemi explained the discrimination complaint forms he was providing Palo. (Compl. at 26.) On March 8, 2023, Palo filed a discrimination complaint with MSHA using the agency’s Form 2000-123 and named USSC as the violator. (Ex. C–46.) MSHA later notified USSC of Palo’s discrimination complaint via letter dated March 16, 2023. (Compl. at 1.)

8. Eleven Days After the Incident: Palo’s 9-B Hearing

On March 9, 2023, USSC held a preliminary hearing (“9-B hearing”)¹⁰ to address Palo’s failure to timely report her workplace injury and the resulting violation of her Last Chance Agreement. (I Tr. 165:1–166:6; II Tr. 70:23–71:11, 89:21–23.) In advance of the 9-B hearing, on

⁸ USSC’s “Notification of Discipline” is a required step in its discharge and discipline process under the union’s basic labor agreement. (II Tr. 88:9–25; Exs. R–17, R–18.)

⁹ Koski issued the “Violation of Last Chance Agreement” discipline slip because she considered Palo’s “failure to timely report an injury” to be a material violation of the Last Chance Agreement. (II Tr. 87:15–21.)

¹⁰ A 9-B hearing is part of USSC’s discipline and discharge process in accordance with the union’s basic labor agreement that provides employees the opportunity to review and discuss the pertinent facts relating to their suspension, including any explanations or defenses the employees may have. (Resp’t Br. at 10 n.7; II Tr. 8:3–8.) Employees who receive a 5-day suspension subject to discharge have a right to request such a hearing. (II Tr. 7:25–8:8, 88:9–25.)

or around March 9, 2023, Labor Relations Rep. Koski asked Shift Manager Hunt and Team Leaders Aho and Sweeney to provide written statements describing their recollection of their interaction with Palo on February 26, 2023. (II Tr. 12:14–13:25.) Koski also interviewed Mesich about the incident for the first time on the morning of March 9, 2023, before the 9-B hearing. (II Tr. 35:18–25, 89:21–90:7.) During her interview, Mesich “denied any kind of contact or touching [Palo].” (II Tr. 90:8–14.)

Palo attended the 9-B hearing along with Union President Bonach, Union Safety Chair McDonald, Labor Relations Rep. Koski, Senior Manager Wiirre, and three other individuals.¹¹ (I Tr. 116:12–117:8, 165:1–166:6; II Tr. 70:23–71:11, 89:21–23.) The hearing began with Palo recalling the incident with Mesich on February 26, 2023, as well as the events that occurred during her next night shift on February 28 through March 1 when she left early. (I Tr. 116:2–117:23; II Tr. 159:24–160:1; Ex. C–38.) Koski asked Palo why she did not report the numbness in her foot to a supervisor to which Palo responded, “[i]t was Chad [Hunt]. He wasn’t going to do anything anyway,” and further explained that it was the end of her shift, and she wanted to go home. (II Tr. 91:1–92:10; Ex. C–38.) Koski then asked Palo if she tried to report the incident to any other supervisor besides Hunt to which Palo responded that she did not. (II Tr. 91:1–92:10; Ex. C–38.)

During the 9-B hearing, Union President Bonach read aloud the text message that Palo sent him on March 1, 2023, saying that she told Team Leader Bissonnette on February 28, 2023, that she was sore. (Exs. C–38, C–80; Resp’t Br. at 11.) Bonach and Union Safety Chair McDonald also presented evidence of various other cases in which USSC employees reported their workplace injuries “two days later, five days later, [ten] days later, and there was no discipline involved.” (II Tr. 158:11–159:12.) Additionally, McDonald brought up the topic of a section 105(c) complaint against USSC. (I Tr. 117:24–119:10; II Tr. 159:24–160:1). However, Labor Relations Rep. Koski denied that any discussion about Palo filing a section 105(c) complaint occurred during the 9-B hearing on March 9. (II Tr. 87:22–88:8, 93:7–12, 94:18–95:6; Ex. C–38.)

9. Fifteen Days After the Incident: Palo is Discharged

Labor Relations Rep. Koski testified that, in her view, Palo did not provide any information during the 9-B hearing to demonstrate that she reported her injury from the incident on February 26, 2023, to a supervisor as soon as possible or that she had not violated her Last Chance Agreement. (II Tr. 92:23–93:24.) As a result, on March 13, 2023, USSC converted Palo’s five-day suspension to a discharge “because it was determined that [Palo’s] failure to timely report her alleged injury was a violation of her Last Chance Agreement, which clearly states that any policy or rules violations . . . shall be subject to discharge.” (II Tr. 10:25–11:16, 93:13–24; Exs. R–19, C–30.)

¹¹ Palo testified that she attended a second meeting with her union representatives to discuss the incident with Mesich, and the discipline slips that she received on March 7, 2023. (I Tr. 116:2–120:9.) Based on the evidence presented and the testimony of Koski, Bonach, and McDonald, it appears that Palo is referring to the 9-B hearing that occurred on March 9, 2023. (I Tr. 116:2–117:23; II Tr. 70:23–71:11, 89:21–23, 159:24–160:1; Exs. C–38, C–80.)

IV. PRINCIPLES OF LAW

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

To establish a prima facie case of section 105(c) discrimination under the traditional *Pasula-Robinette* framework, the Secretary must prove by a preponderance of the evidence (1) that the complainant engaged in a protected activity, (2) the complainant suffered adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817–18 (Apr. 1981) (the “*Pasula-Robinette*” analysis).

A mine operator may rebut a prima facie claim of discrimination by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Sec'y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If a mine operator cannot rebut a prima facie case, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activities and would have taken the adverse action in any event based on the unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

The Commission has recognized that the *Pasula-Robinette* framework no longer governs in the Ninth Circuit. *Sec'y of Labor ex rel. Hargis v. Vulcan Constr. Materials, LLC*, 46 FMSHRC 523, 530 n.8. (Aug. 2024). Nevertheless, the Commission held that it would continue to apply the *Pasula-Robinette* framework in the remaining circuits. The dispute that gave rise to this matter occurred in Minnesota which falls under the jurisdiction of the Eighth Circuit.¹² As

¹² The Eighth Circuit recently evaluated a discrimination claim under the “but for causation” standard because “the Secretary [took] the position that the [C]ommission’s traditional approach indeed requires but-for causation. . . . So we will too.” *See Cont'l Cement Co. v. Sec'y of Lab.*, 94 F.4th 729, 732–33 (8th Cir. 2024). However, in the Secretary’s appeal (continued...)

this matter is “not within the Ninth Circuit” and “neither party has contested the application of the *Pasula-Robinette* standard,” I will review Palo’s claim of discrimination under the *Pasula-Robinette* framework. *Hargis*, 46 FMSHRC at 530 n.8.

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

USSC does not dispute that Palo’s discharge, not to mention the two discipline slips given to Palo on March 7, 2023, resulting in her five-day suspension, constitutes adverse action. Therefore, I must analyze: (1) whether Palo engaged in protected activity, and (2) whether the adverse action was motivated, at least in part, by Palo’s protected activity, or whether USSC would have taken the adverse action due to Palo’s unprotected activity alone.

A. Protected Activity

To establish a prima facie case of discrimination, the Complainant must first demonstrate that she engaged in a protected activity or activities under section 105(c) of the Mine Act. The record before me establishes that Palo engaged in the following potential protected activities.¹³

1. Report of Workplace Injury to USSC

Under the Mine Act, a miner’s complaint about a workplace injury to an operator is protected activity. 30 U.S.C. § 815(c)(1). The parties have stipulated that Palo “engaged in a protected activity when she reported to Respondent’s management on March 2, 2023, that she had been injured four days earlier on February 26.” (Compl’t Br. at 4; Resp’t Br. at 2; Joint Ex. 1.) Accordingly, I determine that Palo engaged in the protected activity of reporting a workplace injury when she reported to USSC management on March 2, 2023, the injuries she suffered as a result of Mesich hitting her on February 26, 2023.

2. Report of a Safety Concern to USSC

Section 105(c)(1) of the Mine Act provides that a miner filing or making a complaint to notify an operator “of an alleged danger or safety or health violation in a coal or other mine” is protected activity. 30 U.S.C. § 815(c)(1). Palo asserts that “[r]eporting hostile, aggressive and intimidating behavior of a colleague is protected activity under the Mine Act.” (Compl’t Br. at

¹² (...continued)

brief to the Commission in a related matter, the Secretary argued that the Eighth Circuit in *Continental Cement* misunderstood the Secretary’s argument regarding “but-for” causation and reaffirmed its position that *Pasula-Robinette* is the correct standard to apply in discrimination cases. *See* Docket No. CENT 2023-0251, Sec’y Resp. Br. at 31-32 (Oct. 28, 2024).

¹³ Palo briefly asserts that she engaged in the protected activity of stating her intent to file a section 105(c) complaint to USSC. (Compl’t Br. at 1.) While filing a discrimination complaint is protected activity under section 105(c)(1) of the Mine Act, I determine that Palo has not presented sufficient evidence to establish that USSC knew of her intent to file such a complaint.

24–25.) Workplace violence is a safety concern for miners, and therefore reporting incidents of workplace violence to a mine operator constitutes protected activity under the Mine Act. *See Keim v. Cordero Mining, LLC*, 36 FMSHRC 963, 971 n.5 (April 2014) (ALJ) (holding that reporting workplace violence or abuse that implicates concern for safe performance of work tasks may rise to the level of protected activity under section 105(c) of the Mine Act); *cf. Harris v. Duane Thomas Marine Contr., LLC*, No. 2:13-cv-00076-SPC-DNF (M.D. Fla. Feb. 5, 2013) (holding that under section 11(c) of the OSH Act of 1970, internal complaints to owner, or external complaints to OSHA, concerning workplace violence and verbal abuse constitute protected activity related to the OSH Act).

Palo notes that when Mesich hit her on February 26, 2023, she immediately alerted Shift Manager Hunt, Team Leader Aho, and Team Leader Sweeney of the incident. (Compl't Br. at 9–12.) Although USSC disputes that Palo's brief statement to Hunt, Aho, and Sweeney on February 26 constitutes reporting the incident to USSC management, it acknowledges that Palo officially reported the incident to management during the March 2 meeting. (Resp't Br. at 2; Resp't Reply Br. at 1; Joint Ex.1.) Therefore, in either circumstance, both parties acknowledge that Palo reported to USSC that Mesich hit her. Accordingly, I determine that Palo engaged in the protected activity of reporting a workplace safety concern when she reported to USSC that Mesich hit her.

3. Report of Safety Concern to Palo's Union Representative

Section 105(c)(1) of the Mine Act provides that no miner shall be discriminated against because the miner "filed or made a complaint under or related to this Act, including a complaint notifying the . . . the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine." 30 U.S.C. § 815(c)(1). Palo asserts that she engaged in protected activity on February 27, 2023, when she reported to her union representative and president, Bonach, that Mesich hit her the previous day, February 26, 2023, at work. (Compl't Br. at 25; Ex. C–80.) Accordingly, I determine that Palo has established that she engaged in the protected activity of reporting a workplace safety concern to her union representative when she reported to Bonach that Mesich hit her.

B. Motivation/Causal Connection

I now turn to the motivational nexus between the protected activity and the adverse action. As direct evidence of discriminatory intent is rare, the Commission has outlined the following common circumstantial indicia for determining whether a motivational nexus exists: "(1) [the mine operator's] knowledge of the protected activity; (2) [the mine operator's] hostility or 'animus' toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) [the mine operator's] disparate treatment of complainant." *Sec'y of Labor ex rel. Hargis v. Vulcan Constr. Materials, LLC*, 46 FMSHRC 523, 530 (Aug. 2024) (citing *Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)).

However, a complainant need not demonstrate all four of these factors to establish a motivational nexus. *See Chacon*, 3 FMSHRC 2508, 2511 (determining that only three factors

were sufficient to establish discriminatory motive). Additionally, in evaluating evidence supporting a prima facie case of discrimination, the Commission stated that “circumstantial evidence [of discriminatory motivation] and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” *Bradley v. Belva Coal Co*, 4 FMSHRC 982, 992 (June 1982) (citing *Sec’y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)).

1. Operator’s Knowledge of Protected Activity

USSC asserts that Shift Manager Hunt did not understand Palo’s statement to him about the incident on February 26, 2023. (Resp’t Br. at 22.) However, Palo told Bonach, her union representative, about the February 26, 2023, incident with Mesich and her resulting pain via text on February 27, 2023. (Ex. C–80; I Tr. 88:13–15, 95:15–96:1.) On February 28, 2023, Bonach showed Labor Relations Rep. Koski Palo’s text messages to him and Koski “saw that there was something about pain, something about being shoved and Michelle [Mesich].” (Resp’t Br. at 5; II Tr. 20:7–8, 22:9–25:19, 80:8–24, 143:24–144:22.) Additionally, Palo directly informed Koski that Mesich hit her, causing injury, during their meeting on March 2, 2023. (I Tr. 103:17–104:17; II Tr. 26:1–16; Joint Ex. 1; Ex. C–38.)

Therefore, USSC management was aware of Palo’s report of a workplace safety concern and report of a workplace injury, as well as her report of a workplace safety concern to her union representative, when it issued Palo two discipline slips on March 6, 2023, and subsequently discharged her on March 13, 2023. Thus, I determine that USSC had knowledge of Palo’s protected activities.

2. Coincidence in Time

On Sunday, February 26, 2023, Palo told Shift Manager Hunt and Team Leaders Aho and Sweeney that someone hit her immediately after it occurred. (I Tr. 79:21–80:13.) On Monday, February 27, 2023, Palo also reported the incident and her resulting injury to her union representative, Bonach, with the understanding that he would tell Labor Relations Rep. Koski or Senior Manager Wiirre about the incident. (Ex. C–80; I Tr. 88:13–19, 91:3–92:20, 95:15–96:1.) On Tuesday, February 28, 2023, Bonach showed Koski the text messages about the incident that Palo sent him the previous day, and Wiirre also learned of the incident. (II Tr. 20:23–21:15, 22:9–23:2, 23:25–25:25, 83:11–25, 120:8–122:2, 142:9–141:17; Ex. C–80.) Then on Thursday, March 2, 2023, Palo directly reported the incident and her resulting injury to Koski during their meeting. (I Tr. 102:1–104:17.)

Subsequently on Tuesday, March 7, 2023, Labor Relations Rep. Koski issued two discipline slips to Palo for failing to timely report her “workplace injury” and for violating her Last Chance Agreement which resulted in Palo’s five-day suspension. (II Tr. 10:7–11:16; Exs. R–17, R–18, C–27.) Furthermore, on March 13, 2023, USSC discharged Palo. (II Tr. 10:25–11:16, 93:13–24; Exs. R–19, C–30.) In light of the above timeline, I determine that a coincidence in time existed between Palo’s protected activities and USSC’s adverse actions against her.

3. Hostility or Animus Toward the Protected Activity

a. USSC's Dismissal of Palo's Past Reports of Workplace Safety Concerns

Palo claims that prior to February 26, 2023, Mesich had hit Palo with her gym bag nearly a half dozen times. (Compl't Br. at 27; I Tr. 72:22–74:10, 79:5–20, 184:20–185:5; II Tr. 143:18–23.) Palo asserts that she reported these incidents to Shift Manager Hunt and Labor Relations Rep. Koski and even went so far as to call USSC's ethics hotline to report the incidents. (Compl't Br. at 27; I Tr. 72:22–73:2, 74:6–76:21, 78:18–79:4.) Palo contends, however, that neither Hunt nor Koski took any action to address Palo's safety concerns or further investigate her reports. (Compl't Br. at 27; I Tr. 74:21–76:7.) Instead, Hunt laughed, apparently because he thought Palo's reports were funny and asked, "What do you want me to do?" (I Tr. 75:17–76:7.) Koski put the onus on Palo, telling Palo to "[s]tay away from her. Don't engage. Don't go near her. Don't talk to her." (I Tr. 75:3–16.) Indeed, Union President Bonach testified that Palo was nervous to formally report the February 26 incident because of USSC's handling of her prior complaints. (II Tr. 162:24–163:5, 164:17–23.) Palo argues that USSC's lack of response to her prior reports of Mesich hitting her demonstrates USSC's hostility and animus towards her protected activity of reporting a workplace safety concern. (Compl't Br. at 27.)

In response, USSC disputes that Palo previously reported any physical incidents with Mesich prior to the incident that occurred on February 26, 2023. (Resp't Reply Br. at 4–6.) Specifically, USSC points to Shift Manager Hunt and Labor Relations Rep. Koski's testimony that they did not recall Palo previously reporting that Mesich hit her prior to the February 26, 2023, incident. (Resp't Reply Br. at 4–5; I Tr. 233:20–234:12; II Tr. 32:2–5.) However, USSC concedes that Koski and Hunt were aware of the prior issues between Palo and Mesich. (Resp't Reply Br. at 4–5.) Specifically, Koski admitted that "[t]he two had prior animosity, that had been investigated and . . . I had told her that . . . if there were any future things that happened, that we needed to know about it, that they needed to be reported." (II Tr. 32:6–19.) Hunt also admitted that he was aware of Palo and Mesich's previous issues and knew that they were not supposed to interact at work. (I Tr. 233:11–19.) Additionally, Union President Bonach testified that Palo previously reported to Koski that Mesich had hit her prior to the February 26, 2023, incident. (II Tr. 143:18–23.) Thus, I determine that USSC's argument is unpersuasive, and I find credible Palo's assertions that she previously reported to USSC management that Mesich hit her prior to the February 26, 2023, incident and they did nothing to address her concerns.

The Commission has stated that "[i]t is the very definition of animus towards a protected activity when a miner makes a health or safety complaint or engages in protected activity that requires attention, and the operator chooses to ignore it and do nothing." *Hargis*, 46 FMSHRC at 531. Therefore, I determine that USSC's dismissal of Palo's previous reports of Mesich hitting her and lack of any significant action to address Palo's safety concerns demonstrates USSC's hostility and animus towards her protected activity of reporting a workplace safety concern.

b. Hunt's Response to Palo's Statement on February 26, 2023

Palo notes that she told Shift Manager Hunt about the incident with Mesich immediately after it occurred, yet he failed to take any measure of action in response. (Compl't Br. at 28,

Compl't Reply Br. at 2–3.) Palo asserts that “[i]t was Hunt’s responsibility to bring [her] in and ask her what had occurred, take a report, and investigate.” (Compl’t Br. at 28.) Palo argues that Hunt’s failure to respond to her complaint on February 26, 2023, is indicative of USSC’s animus towards her protected activity of reporting a workplace safety concern. (Compl’t Br. at 27–30; II Tr. 152:21–22.)

In response to Palo’s argument, USSC contends that Shift Manager Hunt did not understand that Palo was reporting an incident with injury. (Resp’t Br. at 22–23; Resp’t Reply Br. at 7.) USSC notes that Hunt claims he only heard Palo say: “Did you guys see that?” and something about “a push” and “a bag.” (Resp’t Br. at 22; I Tr. 229:21–230:5; Ex. R–4.) After Palo left, Hunt asked Team Leaders Aho and Sweeney “What was that?” and Aho replied, “How can we see anything with these walls here?” (I Tr. 230:6–12; Ex. R–4.) USSC also points out that Palo spoke to Hunt during a shift change, which was a busy time for him, and Palo left before he could ask her any follow-up questions. (Resp’t Br. at 22–23.)

Shift Manager Hunt clearly understood the steps he is supposed to take to respond to employee reports of workplace violence. (I Tr. 226:23–228:5.) Hunt stated that—

first of all, you question the person that’s reporting the incident [and] . . . find out the information that they are reporting. . . . [Then y]ou get the employee injury or incident report from their perspective. They write down their perspective of what . . . happened. Then you go on to writing up the incident, making phone calls, [and] sending out emails. Then if it’s an incident with injury, you get them help, whether you call emergency services and then they come to the scene to check that person out.

(I Tr. 227:1–22.)

Shift Manager Hunt explained that while “it would matter to me if Michelle [Mesich] had hit” Palo, “the way Wanda [Palo] reported it, she threw out a question and left. It [therefore] didn’t come across as an incident with injury.” (I Tr. 244:5–11.) Indeed, all Palo said to Hunt was: “Did anybody just see that? She just hit me . . . I’m tired of getting hit with the bag.” (I Tr. 80:2–5; Exs. R–16, C–38, C–46, C–80.) Palo did not identify who hit her or specify what exactly occurred. Then, before Hunt could respond to Palo, she left. (I Tr. 86:13–23, 135:22–136:6, 223:10–22, 255:25–256:10; Exs. R–2, R–3, R–4.) Thus, even if Hunt had heard Palo’s complete statement, it was reasonable for him not to take any action at that time as her brief, vague complaint likely does not qualify as a report of workplace violence. Accordingly, while I understand Palo had a challenging relationship with Hunt, I determine Palo has failed to establish that his alleged failure to respond to or investigate her statement on February 26, 2023, demonstrates USSC’s hostility or animus towards her protected activity of reporting a workplace safety concern.

c. Koski and Wiirre’s Investigation of the February 26, 2023, Incident

Palo notes that on Tuesday, February 28, 2023, both Labor Relations Rep. Koski and Senior Manager Wiirre learned of the February 26 incident and Palo’s resulting pain. (Compl’t

Br. at 28; II Tr. 20:23–21:15, 22:9–23:2, 23:25–25:25, 83:11–25, 120:8–122:2, 142:9–141:17; Ex. C–80.) Yet, Koski did not speak with Palo about the incident until Thursday, March 2, 2023. (Compl’t Br. at 28–30; I Tr. Vol. 102:1–22, 168:2–24.) Additionally, Wiirre never directly spoke to Palo about the incident even though she typically worked until 9:00 p.m. or 10:00 p.m. and therefore could have talked to Palo before Palo started her night shift at 5:30 p.m. on either Tuesday, February 28 or Wednesday, March 1. (Compl’t Br. at 28–29; II Tr. 103:17–104:10, 120:8–122:2.) Palo argues that Koski and Wiirre’s failure to adequately investigate and address the incident with Mesich on February 26, 2023, is indicative of USSC’s animus towards her protected activity of reporting a workplace safety concern and injury. (Compl’t Br. at 27–30; II Tr. 152:21–22.)

In response, USSC argues that Labor Relations Rep. Koski adequately investigated Palo’s claim that Mesich hit her with her bag on February 26, 2023. (Resp’t Br. at 23–24.) In support, USSC points out that on March 1, 2023, Koski spoke with Shift Manager Hunt on the phone about his recollection of what Palo said to him on February 26 and contacted the area manager. (Resp’t Br. at 24; Resp’t Reply Br. at 8–9.) USSC notes that Koski also looked up Palo and Mesich’s work schedules, which showed that Palo was scheduled to start another night shift that same day, March 1, 2023, at 5:30 p.m. (Resp’t Br. at 23; Resp’t Reply Br. at 8–9; II Tr. 38:20–39:25, 47:12–50:20.)

Palo argues that Labor Relations Rep. Koski therefore could have stayed late to speak with Palo on the evening of March 1, 2023, when Palo arrived for her night shift. (Compl’t Br. at 29.) However, Koski testified that she preferred to reach out to Palo the following morning and noted that she could not recall what she had going on in her personal or work life that day. (II Tr. 39:8–13, 40:4–41:13, 47:12–49:1.) Palo also argues that Koski could have called Palo during Koski’s normal work hours of 7:30 a.m. to 4:00 p.m. on March 1, 2023, while Palo was at home. (Compl’t Br. at 29; II Tr. 49:16–19.) However, Koski explained that she did not call Palo because of a policy prohibiting USSC management from contacting union-represented employees outside of work. (II Tr. 49:16–19, 52:18–25; Resp’t Br. at 24; Resp’t Reply Br. at 9.)

Ultimately, Labor Relations Rep. Koski spoke with Palo at the March 2, 2023, meeting, during which Palo told her about the incident with Mesich and her resulting injury. (I Tr. Vol. 102:1–104:17; II Tr. 20:7–21:15, 22:9–23:2, 23:25–25:25, 80:8–24, 83:11–25; Resp’t Br. at 24.) Palo asserts that during the meeting, Koski resisted giving Palo an incident report form after her union representatives requested that Koski do so, which reflects the animosity at issue. (Compl’t Br. at 29–30; Compl’t Reply Br. at 6–7.) Palo argues that Koski did not want to provide an incident report form to Palo “because she knew that it would reflect that [USSC] had not done what it was required to do by its own policies and what it should have done.” (Compl’t Br. at 29–30.) In response, USSC denies that Koski resisted giving Palo an incident report form. (Resp’t Reply Br. at 12; II Tr. 85:14–22.) Additionally, USSC argues that Koski would have no reason to prevent Palo from completing an incident report because Palo already verbally reported her injury to Koski during the March 2 meeting, which was sufficient to qualify as a report of workplace injury under Safety Rules 1.7 and 1.8. (Resp’t Reply Br. at 10, 12–13, 14, 16.)

USSC also notes that Labor Relations Rep. Koski spoke with Team Leader Bissonnette and Shift Manager Eric Meese and obtained written statements from Team Leaders Aho and

Sweeney as part of her investigation. (Resp't Br. at 24; Resp't Reply Br. at 9.) After Koski had issued discipline slips to Palo on March 7, 2023, she interviewed Mesich about the incident on the morning of March 9, 2023.¹⁴ (Resp't Br. at 24; Resp't Reply Br. at 9; I Tr. 185:13–187:1; II Tr. 10:7–12, 12:14–13:22, 35:18–25, 89:24–19:19; Exs. R–17, R–18, C–27.) Koski explained that March 9 was the first day Mesich returned to work since Koski started her investigation and noted the USSC policy preventing her from contacting union-represented employees outside of work. (II Tr. 13:16–22, 36:1–8, 52:21–25; Resp't Br. at 24; Resp't Reply Br. at 9.)

Based on the evidence above, it is worth noting that Palo never directly spoke to a supervisor about her injury from the incident until March 2—four days after the February 26 incident. (I Tr. 103:10–104:17; II Tr. 26:1–23, 81:14–21, 84:12–85:2; Ex. C–38.) Although Palo argues that Labor Relations Rep. Koski or Senior Manager Wiirre should have contacted her sooner, they only learned of the incident from Union President Bonach holding up his cell phone to Koski, who briefly read his text conversation with Palo. (II Tr. 20:23–21:15, 22:9–23:2, 23:25–25:25, 80:8–24, 83:11–25, 143:24–144:22; Ex. C–80.) Koski was not given a printout of the text or a screenshot. (II Tr. 22:9–23:2, 25:16–25.) Moreover, in her text conversation with Bonach, Palo noted, “it was a bit painful. I had to c[o]me home and ice[] it,” but then Palo later “leave[s] it up to [Bonach]” whether to raise the incident with Koski or Wiirre. (Ex. C–80.) Thus, the tone of Palo’s text messages was not one of urgency and they did not indicate that anything but a minor injury occurred. Indeed, Bonach waited a full day after his February 27 texts with Palo to contact Koski, lessening any sense of urgency. (II Tr. 20:23–21:6, 22:25–23:2, 23:25–24:6, 80:8–24, 83:11–25.) And Koski began her investigation the following day on March 1 by reviewing Mesich and Palo’s work schedules and contacting Palo’s supervisor. (II Tr. 38:18–39:25, 49:16–19.)

I therefore determine that while Labor Relations Rep. Koski and Senior Manager Wiirre could have spoken to Palo about the incident earlier, Koski ultimately conducted an adequate investigation into the February 26, 2023, incident between Palo and Mesich. Thus, I conclude that Palo has failed to establish that Koski and Wiirre’s investigation of the February 26, 2023, incident demonstrates USSC’s hostility or animus towards her protected activity of reporting a workplace safety concern and injury.

¹⁴ USSC notes that during Koski’s interview with Mesich, Mesich denied any kind of contact or touching of Palo and stated she could not recall if she had passed Palo in the hallway on February 26. (Resp't Br. at 24; Resp't Reply Br. at 9.) USSC argues that based on the information Koski received from Palo and Mesich, “Koski was not able to draw any conclusions as to what, if anything, happened between them on February 26.” (Resp't Br. at 24; Resp't Reply Br. at 9.) I do not find such a view credible, as it would be nonsensical for USSC to discipline Palo for failing to timely report an injury arising from an incident that possibly never occurred. (II Tr. 89:24–90:19; *see* Resp't Br. at 24; *see also* Resp't Reply Br. at 3, 9.) Yet, by the time Mesich was interviewed on March 9, Koski had established that Palo had not timely reported her injury that caused Palo to leave work early during her night shift on February 28. Thus, Koski trying to determine Mesich’s intent, if any, or giving Mesich any type of warning to keep away became moot.

4. Disparate Treatment

a. USSC Management's Violation of the Prevention of Workplace Violence Policy

USSC claims it discharged Palo because of her alleged failure to timely report her workplace injury, as required by Safety Rules 1.7 and 1.8. (Resp't Reply Br. at 13 n.11; II Tr. 11:17–12:13.) However, Palo notes that USSC has a comparable “Prevention of Workplace Violence Policy” which requires that:

You must report all acts of Workplace Violence, whether you are subject to the act or aware of an act of Workplace Violence involving others. Reports may be made to your direct supervisor, Corporate Security, Human Resources, the Legal Department, or the USSC Ethics and Safety Line.

Note: If the reporting employee does not notify the Security Department at his or her location, anyone receiving the report of Workplace Violence must immediately report the matter to Plant or Corporate Security at Headquarters.

(Ex. C–42; Compl't Br. at 32.) Palo asserts that Shift Manager Hunt, Labor Relations Rep. Koski, and Senior Manager Wiirre failed to report the February 26, 2023, incident to security as required by USSC's Prevention of Workplace Violence Policy, and that USSC did not discipline them despite supposedly taking allegations of workplace violence seriously and having a zero-tolerance policy for workplace violence. (I Tr. 170:11–12, 173:12–16, 177:9–24, 218:7–10, 226:14–16, 242:9–18; II Tr. 8:15–17, 34:8–10; Compl't Br. at 32; Compl't Reply Br. at 5–6.) Thus, Palo argues that USSC treated her differently than its own management employees when enforcing its reporting policies and rules. (Compl't Br. at 32.)

In response to Palo's argument, USSC contends that—even if Shift Manager Hunt, Labor Relations Rep. Koski, and Senior Manager Wiirre should have recognized that Palo's report that Mesich hit her constituted workplace violence and thus reported it to security—the purposes of the policy were still achieved. (Resp't Reply Br. at 18.) Specifically, USSC notes that security is typically notified of incidents of workplace violence to allow for intervention, but in this instance, the reported incident had already ended before Hunt, Koski, and Wiirre were made aware of it, and Mesich was not scheduled to return to work until March 9, 2023. (Resp't Reply Br. at 18–19.) USSC explains the other purpose of the policy is to spur investigations of reports of workplace violence, which Koski had already initiated in this case. (Resp't Reply Br. at 18.)

I agree with USSC that logically there was no need for Shift Manager Hunt, Labor Relations Rep. Koski, or Senior Manager Wiirre to report the February 26, 2023, incident to security, because the imminent threat had passed by the time each of them had learned of the incident and Koski initiated an investigation on her own accord. Therefore, I determine that Palo has failed to establish that USSC treated her differently than its members of management when enforcing its reporting policies and rules.

b. Other USSC Employees who were Discharged for Violating their Last Chance Agreements

USSC argues that Exhibits Nos. 21 and 21A demonstrate that USSC has discharged other employees, who did not engage in protected activities, for violating their Last Chance Agreements. (Resp't Br. at 29–30.) Exhibit No. 21, titled “Violation of LCA Disciplines Summary Chart,” is a compiled list of the thirteen USSC employees, including Palo, whom USSC discharged for “Violation[s] of LCA” from January 1, 2019, through March 7, 2023. (Ex. R–21.) Additionally, Exhibit No. 21A contains documents for each employee listed in Exhibit No. 21, such as the employees’ Last Chance Agreements and supporting documents that indicate the facts and circumstances surrounding their violations. (Exs. R–21, R–21A.)

Palo points out that all the USSC employees, aside from herself and one other employee (“Jacobson”), listed in Exhibit No. 21 were discharged because they violated their Last Chance Agreements for the same reasons USSC placed them on Last Chance Agreements. (Compl't Br. at 33.) In response, USSC argues “[t]he fact that eleven other employees happened to violate their Last Chance Agreements for the same reasons was coincidental and irrelevant.” (Resp't Reply Br. at 20.) USSC states that all the Last Chance Agreements address both prior offenses and additional compliance requirements, such as mandating that any violation—whether related to past offenses or not—is a material breach of the Last Chance Agreement. (Resp't Reply Br. at 20.) Likewise, USSC asserts that none of these Last Chance Agreements limited the employees’ compliance only to provisions relating to their preceding offenses or limited the material violations solely to those relating to their preceding offenses. (Resp't Reply Br. at 20.)

Palo’s Last Chance Agreement explicitly states that a “failure by [an] employee to follow any plant or corporate rules, policies, or procedures shall be considered a material violation of this Agreement” and a “[f]ailure by Employee to abide by ANY of the terms or conditions of this Agreement . . . shall result in suspension subject to discharge.” (Ex. R–1.) Palo’s Last Chance Agreement therefore did not limit her compliance only to provisions relating to her preceding offense of unsatisfactory work performance on April 28, 2020. (Ex. R–1.) Rather, Palo’s Last Chance Agreement clearly allows USSC to discharge her if she violates any plant or corporate rules. (Ex. R–1.)

Hence, it is plausible that USSC simply executed the terms of Palo’s Last Chance Agreement when it issued discipline slips to her and subsequently discharged her for violating it—i.e., by allegedly violating Safety Rules 1.7 and 1.8—regardless of Palo’s protected activity. (Ex. R–1.) Given the evidence, I determine USSC has established that it consistently enforced the terms of its Last Chance Agreements, and the fact that eleven of the thirteen employees listed in Exhibit No. 21 violated their Last Chance Agreements for the same reasons that USSC placed them on Last Chance Agreements, while Palo did not, is coincidental and unpersuasive.

c. Other USSC Employees who were Disciplined for Violating USSC’s Reporting Rules

USSC argues that Exhibit No. 20 demonstrates that it has disciplined other employees, who did not engage in protected activities, for violating its reporting rules. (Resp't Br. at 27–28.)

Exhibit No. 20, titled “Failure to Report Discipline Summary Chart,” is a compiled list of the seven employees, including Palo, whom USSC disciplined for “failure to report an incident” or “failure to timely report an alleged injury” from January 1, 2019, through March 7, 2023. (Ex. R–20.)

Palo counters that while the other six USSC employees listed in Exhibit No. 20 were disciplined for failing to report an incident all together, she is the only employee who was disciplined for failing to *timely* report an injury. (Compl’t Br. at 33; II Tr. 112:8–116:23.) In response, USSC argues that Palo “has not identified any similarly situated employee who did not timely report an incident (with or without injury) who was not disciplined.” (Resp’t Br. at 28.)

In her brief, Palo highlights Union Safety Chair McDonald and Union President Bonach’s testimony about the multiple instances of USSC employees who did not report their workplace injuries until several days after they were injured, yet USSC did not discipline them. (Compl’t Br. at 23; I Tr. 175:14–177:8; II Tr. 158:11–159:11, 166:6–168:1.) However, as USSC points out, Palo failed to provide any concrete evidence of the instances McDonald and Bonach referenced in their testimony or any specific details regarding when these incidents occurred, when the employees realized that they were injured and attributed their injuries to the workplace incidents,¹⁵ and when they reported the injuries to USSC. (Resp’t Br. at 19–20.) Rather, when investigating prior injury reports, McDonald testified that he simply looked “at the date the incident occurred and then the date it was reported,” and he therefore did not know when the employees realized they had suffered an injury from a workplace incident. (I Tr. 197:16–198:25.)

In light of the discussion above, I determine that USSC has established it consistently enforced its reporting rules, and Palo has failed to present sufficient evidence to establish that other USSC employees did not timely report their workplace injuries but were not disciplined.

C. Whether USSC’s Reporting Policy is Discriminatory on its Face

Palo also asserts that the terms of USSC’s injury reporting policies are discriminatory on its face when coupled with USSC’s policy that only members of management can distribute incident report forms. (Compl’t Br. at 30–31.) To determine whether an operator’s policy is facially discriminatory, “a complainant must show that *the explicit terms of the policy, apart from motivation or any particular application*, plainly interferes with rights under the Act or discriminates against a protected class.” *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 206–07 (Feb. 1994) (emphasis added) (holding that an operator’s policy requiring miners to report personal injuries by completing an injury report form was not facially discriminatory, because the policy’s explicit terms aligned with the Mine Act’s goal of encouraging miners to report accidents and injuries without punishing them for doing so).

¹⁵ McDonald and Bonach testified, and USSC acknowledged, that “the timeliness of a report under the Safety Rules depends on when an employee recognizes that he/she has been injured due to an event in the workplace.” (Resp’t Br. at 14; I Tr. 174:15–175:13, 194:8–195:4; II Tr. 165:19–168:1.)

The explicit terms of USSC's Safety Rules 1.7 and 1.8 do not discriminate against a protected class or plainly interfere with miners' rights under the Mine Act. Moreover, USSC points out that it has never taken the position that Palo, or any other employee, was required to complete an incident report form to comply with the reporting requirements of Safety Rules 1.7 and 1.8. (Resp't Reply Br. at 13.) Rather, under Safety Rules 1.7 and 1.8, reports can be made to a supervisor in any manner, including in person, by radio, phone, text, email, etc. (Resp't Reply Br. at 10, 14, 16.) Therefore, I determine that Palo has failed to demonstrate that the explicit terms of USSC's Safety Rules 1.7 and 1.8 are facially discriminatory.

D. Conclusion

Palo explains that while she felt pain after Mesich hit her on February 26, 2023, she was not immediately sure if the pain was caused by Mesich's bag hitting her or if it was just the typical pain she felt after finishing a twelve-hour shift. (I Tr. 135:1–21, 137:9–140:23, 143:8–14.) However, Palo's pain in her hip worsened throughout the evening of February 26 and into the morning of February 27, so much so that she notified Union President Bonach of the incident and her resulting pain that morning. (I Tr. 88:13–16, 97:11–98:6; Ex. C–80.) Bonach told Palo that she should call Labor Relations Rep. Koski or Senior Manager Wiirre to report the incident and her injury but also offered to do so on her behalf. (Ex. C–80.) Palo simply told Bonach, "I'll leave it up to you" and took no action of her own. (Ex. C–80.) On February 28, 2023, Bonach showed Koski the text messages that Palo had sent him the previous day. (II Tr. 20:23–21:15, 22:9–23:2, 23:25–25:25, 83:11–25, 143:24–144:22; Ex. C–80.)

As previously discussed, *see* discussion *supra* Part V.C, USSC explains that under Safety Rules 1.7 and 1.8, reports can be made to a supervisor in any manner, including in person, by radio, phone, text, email, etc. (Resp't Reply Br. at 10, 14, 16.) Thus, Palo could have simply texted or called Labor Relations Rep. Koski or Senior Manager Wiirre and communicated the information she shared with Union President Bonach on February 27 when her pain following the incident worsened, but she chose not to do so.

On the evening of February 28, 2023, Palo claims that before she started her night shift, she asked whether there were any supervisor notes about her in the computer system and learned there were not, indicating that USSC possibly did not have knowledge of her injury from the incident on February 26. (I Tr. 82:14–24, 98:21–99:10, 144:17–145:2, 146:19–147:3, 147:22–148:6) A few hours into Palo's shift that night, Palo developed a muscle spasm and was in such extreme pain that she needed to leave work early, yet Palo left work without reporting her injury to any member of USSC management. (I Tr. 98:21–100:4, 148:7–19; Ex. C–46.)

On March 1, 2023, Palo was still worried about her hip, so she scheduled a doctor's appointment to have it examined,¹⁶ yet she did not report the injury to USSC at this time. (I Tr. 96:13–97:2.) During her shift that night Palo was still in pain, but she did not report her injury to USSC. (Ex. C–46.) Ultimately, Palo herself never affirmatively reported her workplace injury to

¹⁶ When she saw her doctor a couple days later, he diagnosed her injury as a muscle strain, which likely explains the spasm she experienced the night of February 28. (Ex. C–23; I Tr. 112:3–113:9.)

USSC; she only shared this information with Labor Relations Rep. Koski during their meeting on March 2 to explain why she left work early on February 28. (I Tr. 103:17–104:17; II Tr. 26:1–23, 81:14–21, 84:12–85:2; Ex. C–38.)

One can appreciate that perhaps Palo was nervous about reporting her injury to USSC given her previous history of workplace injuries—indeed, Palo later asked Union President Bonach if her injury would be considered old or new. (I Tr. 96:2–12; II Tr. 150:12–151:2, 162:24–163:5, 164:17–23, Ex. C–80.) However, Palo was on a Last Chance Agreement, and hers explicitly states that a “failure by [an] employee to follow any plant or corporate rules, policies, or procedures shall be considered a material violation of this Agreement” and a “[f]ailure by Employee to abide by ANY of the terms or conditions of this Agreement . . . shall result in suspension subject to discharge.” (Ex. R–1.) Thus, regardless of Palo’s desire to keep quiet and avoid any issues, she needed to follow the rules, including Safety Rules 1.7 and 1.8, which she was clearly aware of at this time. (Exs. R–6, R–7, R–8, R–9, R–11, R–12, R–14; I Tr. 63:12–66:14, 68:14–69:5, 130:21–133:16, 134:4–15; II Tr. 78:22–79:9.) Additionally, Labor Relations Rep. Koski previously told Palo that “if there were any future things that happened [between Mesich and Palo], that we needed to know about it, that they needed to be reported.” (II Tr. 32:9–19.)

The language of USSC’s Incident Reporting Requirements is quite clear—

Safety Rule 1.7 - Report to your supervisor, as soon as possible, all incidents with or without injury.

Safety Rule 1.8 - Report all injuries or hazardous exposures, however slight, to your supervisor as soon as possible. If you are injured, no matter how slightly, obtain first aid treatment promptly. Neglecting minor scratches or cuts may result in serious infections.

Report All incidents to your supervisor immediately no matter how minor you may think the injury is. Sometimes it is those minor injuries that end up turning into major problems. Infections or other unforeseen problems may arise out of a seemingly harmless injury.

(Ex. R–7.) Thus, no matter how minor Palo believed her injury was, *she* was required to report it to a supervisor as soon as possible once she realized it was not her typical aches and pains from working. Indeed, the Commission has affirmed that an operator’s requirement that employees report injuries is “consistent with the Mine Act’s goal of encouraging miners to report accidents and injuries[, and u]nder the legislative history of the Act, the reporting of an injury is equally the miner’s responsibility as it is his right.” *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 206–07 (Feb. 1994). Hence, it was not only Palo’s right to report her workplace injury, but also her responsibility to do so consistent with USSC’s policy.

For all the reasons discussed above, I conclude that Palo did not prove, by a preponderance of the evidence, a prima facie case with regard to the adverse action being

motivated, in any party by the protected activity. Therefore, Palo has failed to establish that USSC discriminated against her in violation of section 105(c) of the Mine Act.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Complainant's discrimination claim under section 105(c)(3) is **DISMISSED**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 2025

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

v.

PEABODY SOUTHEAST MINING,
LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2023-0020
A.C. No. 01-02901-565027

Docket No. SE 2023-0060
A.C. No. 01-02901-566628

Mine: Shoal Creek Mine

DECISION AND ORDER

Appearances: Matthew McClung, Esq., U.S. Department of Labor, Office of the
Solicitor, Nashville, Tennessee for the Petitioner,

Arthur Wolfson, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania for
the Respondent.

Before: Judge McCarthy

I. STATEMENT OF THE CASE

These consolidated dockets are before me upon two Petitions for the Assessment of Civil Penalty filed by the Secretary through her Mine Safety and Health Administration (“MSHA”) against Respondent Peabody Southeast Mining, LLC (“Peabody” or “Respondent”), pursuant to section 105(d) of the Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The

two dockets originally comprised of eleven orders, two for SE 2023-0020, and seven for SE 2023-0060. At the close of the hearing, only three orders remained for disposition.¹

For the outstanding issues, the Secretary alleges Peabody violated 30 C.F.R. §§ 75.202(a), 75.360(b), and 75.400, when it failed to assure that loose ribs along a frequently traveled conveyor belt were supported or otherwise controlled, did not conduct an adequate pre-shift examination to discover the obvious and extensive roof control violations, and allowed coal material to accumulate posing a risk for a fire or explosion. The Secretary assessed a total penalty of \$61,661.00, \$50,000 for Order No. 9704127, \$6,368.00 for Order No. 9704128, and \$5,293.00 for Order No. 9704220.

A hearing was held in Birmingham, Alabama, on April 9 and 10, 2024. During the hearing, the parties offered testimony and documentary evidence.² Both parties filed their briefs on June 14, 2024. The issues presented are whether Peabody violated the cited standards, and if so, whether the S&S, unwarrantable failure, gravity, and negligence designations were appropriate, and what civil penalties should be assessed.

For the reasons below, I uphold the designations for Order No. 9704220. For Order Nos. 9704127 and 9704128, I reduce the degree of negligence from “high” to “moderate” on the “high end.” After considering all the facts and issues, I assess a total penalty of \$45,300.00.

II. STIPULATED FACTS

During the hearing, the parties stipulated the following:

1. At all times relevant to this proceeding, Peabody was the operator of the Shoal Creek Mine, mine ID number 01-02901 as the term operator is defined under section 3(d) of the Mine Act, 30 U.S.C. § 802(d). Tr. I, 8.

¹ On April 8, 2024, the parties filed a Joint Motion to Approve Partial Settlement, seeking to settle one order for SE 2023-0020, and six orders for SE 2023-0060. At hearing, the parties stipulated to this settlement, and the undersigned accepted their stipulation. Tr. I, 10-11. The Secretary in her post-hearing brief seems to misinterpret the undersigned’s acceptance of this stipulation as a Decision Approving Partial Settlement resolving the seven orders in these consolidated dockets. Sec’y Br. at 2, n.1. Such a decision was never formally issued.

Also, at hearing, Respondent withdrew its contest of Order No. 9704222, and the undersigned accepted this withdrawal and assessed a penalty of \$5,293.00. Tr. II, 101. The undersigned will issue a Decision Approving Settlement of these eight orders separately.

² In this Decision, “Tr. #” refers to the hearing transcript, with “Tr. I, #” and “Tr. II, #” referring to volume 1 and volume 2, respectively. “Ex. P-#” refers to the Petitioner’s exhibits and “Ex. R-#” refers to the Respondent’s exhibits.

2. Shoal Creek is a mine as defined under section 3(h) of the Mine Act, 30 U.S.C. § 802(h). Tr. I, 9.
3. At all times relevant to this proceeding, products of the Shoal Creek Mine entered commerce, or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803. Tr. I, 9.
4. A copy of the citations at issue were served on Peabody by an authorized representative of the Secretary. Tr. I, 9.
5. Peabody timely contested the citations. Tr. I, 9.
6. Payment of the total proposed penalties in this matter will not affect Peabody's ability to continue in business. Tr. I, 9.
7. Peabody is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission ("Commission") and the presiding administrative law judge ("ALJ") has the authority to hear this case and issue a decision. Tr. I, 9.

III. BACKGROUND OF PEABODY SHOAL CREEK MINING PROCESS

As relevant background for this case, I first discuss the dewater and sump system processes that are employed at the Shoal Creek Mine.³

1. Dewater Process

The dewater process starts in the north tower, which consists of a shaker system that dewateres the wet coal material. Tr. II, 17. The mine contains three main conveyor belts, which all lead to dumping their respective material into the north tower. Tr. II, 17. The coal is conveyed and dumped onto the Mother Belt, but before reaching that belt, the material is separated by a cutter blade at the North Main #1 discharge area. Tr. II, 18. The cutter blade, an angled piece of metal, is used to separate the wet material from the drier material by way of gravity. Tr. II, 18. When the heavier material contacts the cutter blade, it falls into the shakers while the dry material "flies" over the cutter blade onto the Mother Belt. Tr. II, 18. The drier material on the belt is then dumped into the surge bin, a collection point that is filtered through, so the material ends up on the slope belt below the Mother Belt. Tr. II, 19-20.

At the bottom of the surge bin, there are slide and flow gates that control the flow of how material is dumped onto the slope belt. Tr. II, 20. The gates operate by a scale system. Tr. II, 20. Not all the material that is discharged from the Mother Belt ends up in the surge bin. Tr. II, 20.

³ At hearing, the undersigned incorporated by reference the testimony provided by Jim Mace, Peabody's day-shift foreman, focusing on the background of the dewater and sump system at the Shoal Creek Mine to two other *Peabody* dockets: SE 2023-0065 and -0102. Tr. II, 10. This background section accordingly is incorporated into my decision for *Sec'y of Labor v. Peabody Southeast Mining, LLC*, Docket Nos. SE 2023-0065, -0102 (June 2025) (ALJ) at * 4 n.2.

Another cutter blade is located at the top of the surge bin to catch 90% or more of the wet material that ends up in the dewater system. Tr. II, 20-21, 43. The system is underneath a tube at the surge bin and the Mother Belt near the back of the slope belt. Tr. II, 21. It consists of a three-shaker system and a sump. Tr. II, 23. When the material comes out of the tube and lands on the dewater chain, it is carried up to two shakers, number 5 and number 6, that drop it into pans or on the ground as it is carried into the dewater sump. Tr. II, 23. The wet material falls down through the shakers and the drier material ends up on the dewater belt, which connects to the slope belt. Tr. II, 24. The dewater belt discharge is under the surge bin, and the dry material that is conveyed out of the mine up the slope belt. Tr. II, 24. The slope belt marks the end of the dewater process and is the final belt underground that carries the coal material to the surface. Tr. II, 16. The other material that ends up at the surge bin moves through the slide and flow gates, onto a different conveyor belt until it reaches a preparation plant. Tr. II, 21, 49.

The wet material that is picked up from the cutter blade at the North Main #1 discharge is deposited into a two-shaker system. Tr. II, 22. The system shakes the material to remove as much water as possible. Tr. II, 22. The water and coal fines pass through a screen into drip pans, or on the ground underneath the shakers down the hill to the mother sump. Tr. II, 22, 23, 40. Any dry material is shaken off onto the Mother Belt underneath and proceeds with the rest of the process. Tr. II, 22, 41.

2. Sump System

The mother sump is located at the bottom of the hill about two-cross cuts in length from the north tower. Tr. II, 25, 44. The sump collects water, wet material, and coal fines that are dropped out from the number one and number two shakers at the north tower. Tr. II, 25. The material is then pumped out by a 30 horsepower Stancor or Toyo machine, to the number six shaker within the dewater system. Tr. II, 26.

The dewater system, located at the bottom of the slope belt and tube of the surge bin, contains a dewater sump. Tr. II, 27. That sump also receives water, wet material, and coal fines from the overflow of the surge bin. Tr. II, 27. If the material overflows when landing on the dewater chain, it overflows into the dewater sump and is later picked up. Tr. II, 27. Material may also originate from the hill from the number five, six, and seven shakers. Tr. II, 27. The material is picked up by the same 30 horsepower Stancor or Toyo and is scooped out using a loader. Tr. II, 27. The material is then dumped onto the dewater chain and the pump moves it to the number seven shaker. Tr. II, 28. The material that was dumped onto the chain runs up to the number five and number six shakers to be shaken again. Tr. II, 28.

The mine has a dedicated dewater crew. Tr. II, 29. Starting at the Mother Belt, there is an attendant, responsible for cleaning the north tower by washing down the material that ends up on the ground near the mother sump. Tr. II, 29. The attendant uses one-inch or inch-and-a-half hoses to move the material and clean the belt. Tr. II, 30-31. Next, the dewater attendant maintains the dewater system and ensures that material that ends up on the ground is moved to the dewater sump, where it can be properly picked up. Tr. II, 29. The rest of the crew consists of two to three miners who clean the slope. Tr. II, 29. Any water that is used by the crew in its cleaning process ends up at the main sump. Tr. II, 31.

The main sump is where all the water in the mine is pumped to the surface. Tr. II, 31. The water is picked up by two pumping systems that pump it to the outside. Tr. II, 31. The radius sump was designed to serve as the bottom of the slope track. Tr. II, 32. It is approximately five crosscuts away from the Mother Belt. Tr. II, 44. There is a chute that comes off the slope belt, where the miners are washing the material down the slope. Tr. II, 32. The material is washed down the chute and is dropped into the radius sump. Tr. II, 32-33. The water, wet material, and coal fines from the radius sump are then picked up by the 30 horsepower Stancor or Toyo and are pumped to the dewater system at the number seven shaker and then pumped to the main sump. Tr. II, 32, 33.

IV. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this case, Inspector Benjamin D. Adams issued two 104(d)(2) orders, the first for failing to assure loose ribs were supported or otherwise controlled, and the second for failing to adequately conduct a pre-shift examination that discovered the violative roof conditions. *See* Order Nos. 9704127, 9704128. A few weeks later, Inspector Sammy Elswick issued another 104(d)(2) order to Peabody for allowing coal, coal fines, and block coal to accumulate on and around the Mother Belt conveyor. *See* Order No. 9704220. To uphold these Orders, the Secretary must prove the cited violation and any related findings by a preponderance of the credited and relevant evidence. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006). This burden of proof requires the Secretary to demonstrate that the “existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

In the succeeding sections, I apply this standard to fully analyze the Orders in turn, starting with the alleged roof control violation and related inadequate pre-shift examination.

Roof Control and Pre-Shift Examination

1. Findings of Fact

On August 22, 2022, MSHA Inspector Adams traveled to Shoal Creek Mine to conduct a regular E-01 inspection and terminate previously issued citations. Tr. I, 23-24. Adams, a metal/nonmetal inspector, has worked with MSHA for fifteen years. Tr. I, 22. Paul Moore, Peabody’s Safety Supervisor, accompanied Adams underground. Tr. I, 80. They walked inby along conveyor belt three, and Adams began inspecting the ribs and promptly noticed instances where the rib had separated from the mine wall. Tr. I, 25, 28, 97. When he saw a loose rib leaning out around six to eight inches, he cited it. Tr. I, 28. Adams estimated that this first section of rib likely weighed over a thousand pounds and would cover an entire walkway if it fell. Tr. I, 28-29. He measured the section to be nine feet long, seven feet high, and fifteen inches thick. Tr. I, 28. He also testified that miners were required to be in this area along the conveyor belt at least once per shift to clean, provide belt service, or complete other required tasks. Tr. I, 33, 85-87, 98.

As Adams and Moore walked up the conveyor belt and passed the head drive, Adams identified more loose ribs on the left side of the walkway. Tr. I, 89. He informed Moore that the area needed additional timber. Tr. I, 89. At that point, Moore placed a red danger tape to flag the

condition and indicate where timber needed to be placed. Tr. I, 90. Adams also told Moore that a small piece of rock had to be scaled down inside the crosscut area. Tr. I, 93. Moore then pried it down himself using a broken shovel handle. Tr. I, 93. Moore testified, however, that he did not correct the other area because he did not have the proper tools. Tr. I, 112, 123.

Adams eventually cited the mine for a total of five separate sections of loose ribs expanding approximately 150 feet. Tr. I, 30. He explained that the sections extended the entire crosscut and may have even started into a second crosscut. Tr. I, 30. The ribs along these sections consisted of loose rock, ranging from a few inches thick to approximately ten inches thick, that had separated from the wall about three to ten inches, allowing the rock to overhang in the walkways where miners worked or traveled. Ex. S-1. Adams estimated the mine's height to be around twelve to fourteen feet. Tr. I, 29.

At the hearing, inspector Adams testified that if a piece of the roof rock fell, it would cover the entire walkway and fatally injure any miner who was traveling or working near the area. Tr. I, 29. The measurements he recorded are as follows:

- The first section of loose rib measures 9 feet long by 7 feet high by 15 inches thick and is separated from the rib 1 to 3 inches.
- The second section measures 43 inches long by 49 inches high by 9 inches thick and is gapped open 2 to 3 inches.
- The third section measures 30 inches long by 7 feet high and 15 inches thick and is gapped open 8 inches on the tail piece end and 3 inches on the head drive end.
- The fourth section measures 7 feet long by 4 feet high by 7 inches thick and is gapped open 6 inches wide.
- The fifth section measures 8 feet high by 10 feet long by 8 inches thick and is gapped open 5 inches.

Ex. S-1. Based on his experience, Adams concluded that these sections of loose ribs lasted at least a few shifts. Tr. I, 36-37, 43. As background, about a week before his August 22 inspection, Adams issued a violation for accumulations of combustible materials. Tr. I, 32. When he returned to terminate the citation, he provided Peabody with additional time to implement corrective action. Tr. I, 57. The corrective action necessary to terminate the violation included removing the accumulations and rock dusting the area. Tr. I, 70.

Adams testified that he could estimate how long the loose ribs existed by observing the rock dust that settled in the gaps between the wall and the rib. Tr. I, 31. As documentary support, the Secretary submitted photograph 11, which depicts the mine floor as a dark color. Ex. S-11. Adams, when explaining the photograph, stated that if the area had been recently rock dusted, then it would have looked like a fresh layer of snow rather than mud. Tr. I, 43. He also pointed out the numerous footprints on the ground, which suggested that the area had been well-traveled since any rock dusting occurred. Based on this photo and his observations, Adams believed that

the last rock dusting of the area took place approximately six shifts before his inspection. Tr. I, 36, 43, 44-45. Because of this estimation, Adams issued his second order alleging that the pre-shift examiner had failed to conduct an adequate examination since the time Peabody rock dusted. Tr. I, 41-42. Before his inspection, he reviewed the mine's examination records from the previous pre-shift and on-shift examinations and found no notes regarding the conditions of loose ribs or timbers. Tr. I, 24, 41, 60.

Moore and Joshua Boulger, the general mine foreman, testified for Peabody as to the measures that the operator implemented to address rib control and what qualifies as an alleged hazardous loose rib. Tr. I, 79, 143, 149. Moore explained that to offset a hairline crack located outby crosscut no. 58, Peabody set a timber in front of it. Tr. I, 88-89; Ex. R-4 at 808. He further determined that the outby portion of the rib was bolted in compliance with the mine's MSHA-approved roof control plan with roof bolts installed five feet apart. Tr. I, 97-98, 107, 114, 124. This area had been rib bolted eighteen years ago by a rib-bolting machine that was new back then. Tr. I, 127, 147. When characterizing these bolts, Moore stated "solid. They were good." Tr. I, 99. Photo 343 reveals that the rib bolts were installed at 45-degree angles upward into the rock. Tr. I, 121, 125, 145-47. These six-to-eight-foot rib bolts held the slab of rock back from falling. Tr. I, 121, 124. The inby portion of that same rib was also protected and supported with properly installed vertical timbers. Tr. I, 101, 102-03; Ex. R-4 at 201, 133. The timber's purpose was to provide roof support for any loose or missing rib bolts. Tr. I, 101, 148.

Boulger testified that the presence of a crack does not automatically mean a rib is loose. Tr. I, 144. He explained that a "crack" is where the different rocks are joined together. Tr. I, 143-44. When looking underneath the cracked area, Boulger noticed no further cracks or fractures, and concluded that such a small cracking had no effect on the overall competency of the rib. Tr. I, 143, 149, 177. The cracks were also above the actual rib located in the roof rock and Boulger testified that none of the areas cited constituted loose ribs. Tr. I, 143, 144, 148. He also explained that pursuant to the roof control plan, the roof should be supported by wedges. Tr. I, 116, 128. These wedges would tighten if the timber was to give in or become loose, which would then reset the timber in its proper place. Tr. I, 116, 128.

Boulger further testified that he noticed timbers knocked over and rib bolts that required fixing. Tr. I, 180, 183-84. Boulger explained that when a timber was knocked over, it could have been dislodged by equipment used to clean accumulations or by being bumped or knocked loose. Tr. I, 164. He did not believe that the knocked timbers were caused by a rib roll or loose ribs and attributed the knocked timbers to the heavy equipment moving around the cited area. Tr. I, 180. Moreover, he explained that if a roof bolt becomes ineffective, another remedy is to set another timber or replace the rib bolt. Tr. I, 180, 183. Inspector Adams voiced his concern with a particular timber photographed in photo 11. Ex. S-11. Adams testified that the timber in the photo was likely not tight enough to protect or support the roof since at the top of the timber, there was a little gap. Tr. I, 37; Ex. S-11, photo 11. These small gaps indicated to him that the timbers were not set properly. Tr. I, 37, 138. Adams explained that the timber was loose enough that "if this rib lets go, it's going to knock [other] timbers over." Tr. I, 37.

Boulger also testified that he carried the responsibility of ensuring that all mining shift examinations were properly recorded. Tr. I, 140. The conveyor belt had been examined pre-shift

and on-shift every eight hours. Tr. I, 33, 151. During those examinations, the examiner is tasked with notating any hazardous conditions or violations of a mandatory health and safety standard. Tr. I, 34-35, 153-54. Then, whoever takes corrective action in response to the examination note, initials the record to indicate that the condition has been corrected. Tr. I, 34-35, 154. Adams characterized the examiners as a frontline defense of safety who identify, record, and take corrective actions against hazards that exist where miners work or travel. Tr. I, 35.

In the days preceding the inspection, Peabody examiners detected rib control-related issues, including:

- On August 18, 2022 (4:00-7:00am) – timbers were knocked at crosscut nos. 61, 62, and 68. Those timbers were reset. Tr. I, 164; Ex. R-6.
- On August 19, 2022 (4:00-7:00am) – four missing bolts were detected between crosscut nos. 59 and 60 and knocked timbers were detected at crosscut no. 62 and between nos. 68 and 69. The condition was corrected. Tr. I, 165; Ex. R-6.
- On August 19, 2022 (12:00-3:00pm) – rib bolts were out, and timbers needed to be set at crosscut no. 59½ and timbers were set to correct the condition. Tr. I, 166; Ex. R-6. Another timber was reset at crosscut no. 66 ½. Tr. I, 170; Ex. R-6.
- On August 19, 2022 (8:00-11:00pm) – knocked timbers were detected at crosscut nos. 67 to 68 and 66 to 67 and those timbers were reset. Tr. I, 170-71; Ex. R-6.
- On August 20, 2022 (4:00-7:00am) – three missing rib bolts and four knocked timbers were detected, and timbers were either set or reset. Tr. I, 171; Ex. R-6.
- On August 22, 2022 (4:00-7:00am) – the shift that preceded the subject inspection, four knocked timbers were detected and reset. Tr. I, 173-74; Ex. R-6.

Boulger explained that any of the examination notes referring to a rib pin meant a rib bolt. Tr. I, 165. Again, corrective measures for a loose rib bolt involved replacing or setting a timber. Tr. I, 164. Boulger further testified that at times the examination notes are unclear on whether they are to a loose rib or plate. Tr. I, 165-66. This is important because it could be a loose bolt, or the plates could be too old and start to rot and rust out, causing it to no longer function properly. Tr. I, 166. At the hearing, it was revealed that there were no time stamps for when any relevant corrective actions were taken for the shift during the subject inspection. Tr. I, 168.

After noticing the roof control issues, including the knocked timbers, large sections of loose ribs, and inadequate rib bolts, Adams issued Order No. 9704127 for a violation of section 75.202(a) regarding protection from falls of roof, face, and ribs. Ex. S-1. He also determined that the pre-shift examiner for August 22, 2022, failed to conduct an adequate examination. Adams therefore also issued Order No. 9704128 for a violation of section 75.360(b) requiring such examinations to discover any hazardous conditions present at the mine before a miner works or travels in the area.

2. Findings of Violations

a. Order No. 9704127

Order No. 9704127 states that:

The mine operator has failed to assure that the ribs along the Company #3 North mains conveyor belt where miners work or travel, are supported or otherwise controlled to protect persons related to hazards related to falls of the roof, face or ribs.

The walkway side of the #3 North Mains conveyor belt has obvious hazardous conditions that have been allowed to exist with no corrective actions taken. The ribs along this 150' section of the mine have loose rock, ranging from a few inches thick, up to approximately 10" thick that has separated from the wall approximately 3"-10", allowing the rock to overhang in the walkway where miners normally work or travel.

The first section of rib is beside of the belt cross under just behind the #3 Head roller. This section of loose rib measures 9' long by 7' high by 15" thick, and is separated from the rib 1"-3" at this time.

The second section of loose rib is on the corner of the cross cut at the #3 drive, it measures 43" long by 49" high by 9" thick, and is gapped open 2"-3" at this time. This section of rock has now been pulled down as needed.

The third section of loose rib is in beside the take-up. This loose rib measures 7' high by 30' long and is 15" thick. This extremely large section of loose rib is gapped open 8" on the tail piece end and 3" on the head drive end.

The fourth section of loose rib is directly beside the take up, this section measures 7' long by 4' high and is 7" thick. This rock is gapped open 6" wide at this time.

The fifth section of loose rib is directly over top of the take up hydraulic unit, it measures 8' high by 10' long by 8" thick, and is gapped open 5". This section of rib has 3 timbers between the rib and the hydraulic take up unit, but all three can be moved by hand without any tools. None of the timbers installed here are tight, nor would they hold this rib if it were to roll out on top of the power pack or a miner working in this area.

The overall mining heigh in this area is 12' – 14', the walkway width is approximately 6'-9' wide through the cited area. Should a loose rib fall out into the walkway, it would cover the entire walkway and go under the conveyor belt. Miners work and travel through this area on a daily basis, if normal mining continues without corrective action taken, a serious to fatal accident would be expected to occur if any of these loose rocks were to fall on a miner.

The mine operator has engaged in aggravated conduct constituting more than ordinary negligence in allowing these loose ribs to go unnoticed and uncorrected while both hourly and management employees work and travel through these areas.

Standard 75.202(a) was cited 53 times in two years at mine 0102901 (53 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1. Inspector Adams concluded that the alleged facts for this Order violated 30 C.F.R. § 75.202(a). That regulation requires that “[t]he roof, face and ribs of areas where persons work or travel [] be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. § 75.202(a).

The Commission has explained that, to establish a roof control violation, an ALJ must apply the reasonably prudent person standard. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987), *Helen Mining Co.*, 10 FMSHRC 1672, 165 (Dec. 1988)).⁴ More specifically, that standard holds that “the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided...to meet the protection intended by the

⁴ In *Canon Coal*, the Commission determined that the language of 30 C.F.R. § 75.200, the predecessor to 30 C.F.R. § 75.202(a), raised fair notice issues because it was broadly worded. 9 FMSHRC at 668. To determine whether fair notice exists, the Commission applies an objective standard inquiring into “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Id.* (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).) In *Helen Mining Co.*, the Commission also adopted this standard when reviewing the predecessor language in 30 C.F.R. § 75.200. 10 FMSHRC at 165.

The Commission later adopted this exact approach for 30 C.F.R. § 75.202(a) finding that the Secretary’s updated roof control standard was also broadly worded. *Harlan Cumberland*, 20 FMSHRC at 1277. In that case, the Commission applied the reasonably prudent person standard to a violation in a situation where a roof fall had not actually occurred. *Id.*

I note that the Commission’s recent *Jim Walter Resources* decision held that in cases under § 75.202(a), the Secretary need only prove “(1) that the roof fall occurred in an area where persons work or travel and (2) that the roof was not supported to protect persons from hazards related to falls.” 37 FMSHRC 493, 495 (Mar. 2015). However, this test seems to apply only in cases where a roof fall has occurred as stated under the first element. Nonetheless, the issue of which test to apply under section 75.202(a) is presently before the Commission on review in *Canyon Fuel Co., LLC*, 45 FMSHRC 328, 340-41 (May 2023) (ALJ). The Commission decision in that case may further explain the circumstances in which this *JWR* test applies versus when the reasonably prudent person test applies.

standard.” *Id.* The Commission has further stated that this test “contemplates an objective—not subjective—analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.” *Canon Coal*, 9 FMSHRC at 668 (citing *Great Western Electric Co.*, 5 FMSHRC 840, 842-43 (May 1983), *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)). Such factors include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator’s mine. *BHP Minerals Int’l, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996).

Here, it is undisputed that the area along the Company #3 North main’s conveyor belt is a location where miners work or travel. Tr. I, 33. Inspector Adams testified that miners are required to be at this location at least once per shift to clean, provide service, or perform other required tasks. Tr. I, 33, 85-87, 98.

The parties dispute whether the reasonably prudent person test is satisfied. Respondent argues that there is no violation of 30 C.F.R. § 75.202(a) because the evidence shows that Peabody was addressing rib control, and such measures complied with its roof control plan. Resp’t Br. at 15; Tr. I, 79. As support, Moore explained that Peabody set a timber in front of a hairline crack located outby crosscut no. 58. R-4 at 808; Tr. I, 88-89, 92. He further testified that the outby portion of the rib inby that same crosscut had been bolted with roof bolts five feet apart, complying with the mine’s roof control plan. Tr. I, 97-98. In his opinion, these bolts were “solid. They were good.” Tr. I, 99. The inby portion of that rib had also been protected with vertical timbers. Tr. I, 101; R-4 at 201, 133. The vertical nature of the timbers indicated to Moore that they were standing properly. Tr. I 102-03. In Peabody’s view, this suggests that it adequately complied with its roof control plan and had properly set timbers.

Respondent further alleges that the rib was not loose, and any roof cracking had been confined to a specified area and the rib remained “competent” underneath. Tr. I, 97, 143, 149, 177. As support, Boulger testified that, in his experience, the presence of a crack does not necessarily mean a rib is loose. Tr. I, 144. He focused on the rest of the rib underneath the cracked area, which revealed no additional cracks or fractures. Tr. I, 144. Because of this, he found that the cracking had no effect on the overall competency of the rib to support the roof or protect miners from falling material. Tr. I, 143, 149, 177. I disagree with the Respondent’s argument suggesting that, because rib control measures were being addressed, that must mean that there would be no violation. I commend the Respondent for recognizing that in some areas the roof had cracks or was unsupported, and for attempting to fix those areas, but that does not necessarily shield Respondent from liability.

On the other hand, the Secretary maintains that there is a clear violation of 30 C.F.R. § 75.202(a) because of the five sections of loose ribs along the #3 North Main’s walkway, which were present for at least several shifts, and each section weighed over a thousand pounds and covered the width of the walkway. Sec’y Br. at 4; Tr. I, 28-29. I ultimately agree with the Secretary and find Inspector Adams’ testimony credible and convincing.

When applying the reasonably prudent person standard in the roof-fall context, the Commission emphasized that the Secretary must provide evidence that objective signs existed that would alert a reasonably prudent person of a hazardous condition. *See e.g., Canon Coal Co.*,

9 FMSHRC at 668. As Inspector Adams walked up to the first section of loose rib, he immediately observed where the rib had separated from the top of the wall about six to eight inches. Tr. I, 27-28. He measured that section near the number 3 head roller to be nine feet long, seven feet high, and fifteen inches thick. Tr. I, 28. He also estimated the section to weigh over a thousand pounds and to cover the entire walkway. Tr. I, 28-29.⁵ Inspector Adams testified that, in total, the sections of loose rib extended the entire crosscut and might have even started into the second crosscut, for an estimated 150 feet. Tr. I, 30. Given the dimensions and the weight of each of loose section of rib, I find adequate “objective signs” that would alert a reasonably prudent person of a hazardous condition.

Inspector Adams further discerned, based on his years of specialized experience examining mine roofs and upon his observation of the dark-colored mine floor, that the loose ribs had been present for several shifts. Tr. I, 36-37, 43. Photo 11 located at Ex. S-11, reveals the mine floor as a dark color, but according to Adams, the area should have looked like a fresh layer of snow if it had been recently rock dusted. Ex. S-11. The mine floor, however, looked as if it were already covered in mud, with the coal rock dust settled on top of it and behind the loose rib. Tr. I, 43. The photo further shows many footprints on the ground which suggests that the area had been well-traveled since the rock dusting occurred. Tr. I, 36-37. The dark color coupled with the footprints convinced Adams that the rock dusting occurred several shifts prior to his inspection. Tr. I, 36, 43. The record further reveals that some of the rock dust settled behind the loose ribs and the openings, which suggests that the openings likely existed at the time of the rock dusting several shifts earlier. Given the obvious nature of the timbers separating from the roof and the openings between the loose ribs, I conclude that these conditions also satisfy the objective signs that would alert a reasonably prudent person of a hazardous condition.

Next, I consider whether the Respondent’s compliance with its roof control plan and installation of timbers fell within the realm of what a reasonably prudent person would employ to satisfy the protective purpose of the standard to prevent a roof fall and fatal injury. As background, the mine’s roof control plan is approved by MSHA. Tr. I, 98. According to Moore, the area at issue was rib bolted eighteen years ago by a rib-bolting machine that was new back

⁵ Inspector Adams made similar measurements and estimates for the other sections of loose rib:

- The second section near the three drive, measured 43 inches long, 49 inches high, and nine inches thick, and hung two to three inches from the wall. Tr I, 29.
- The third section behind the take up near the conveyor belt measured 30 inches long, seven feet high, and fifteen inches thick, and had a gap of eight inches on one end and three inches on the other. Tr. I, 29.
- The fourth section measured seven feet long, four feet high, and seven inches thick and gapped open around six inches. Tr. I, 30.
- The fifth section measured ten feet long, eight feet high, and eight inches thick, and gapped open five inches.

then. Tr. I, 127, 147. There is no evidence that this entire area had been further roof bolted since 2006. Moore also testified that he observed timbers that were vertical, which suggested to him that they were properly set. Tr. I, 116. However, Moore failed to address whether there were any openings between the vertical timbers he observed.

Another portion of the roof control plan required that the roof be supported by wedges, so that if the timber were to give in, the wedges would tighten to reset the timber upright again. Tr. I, 116, 128. Boulger testified that in such circumstances, the mine operator would remedy the situation by either setting another timber or replacing the rib bolt. Tr. I, 180, 183. Boulger observed several instances in which timbers were knocked around and rib bolts needed to be fixed. Tr. I, 180, 183-84.

Again, I commend Peabody for following its MSHA-approved roof control plan, but I do not agree that such compliance automatically shields it from liability.⁶ In some circumstances, such as here, where there are five sections of loose ribs separating from the roof by several inches, a reasonably prudent person would employ roof control issues above and beyond those set forth in their plan to ensure the protection of the miners and prevent any fatal roof falls. The evidence shows that these areas had not been overhauled for bolting or timber for over eighteen years and some of these vertical timbers and rib bolts were insufficient. For instance, Inspector Adams explained that the second timber in Photo 11 was not tight enough to protect the roof as there was a little bit of a gap on the top of it. Tr. I, 37; Ex. S-11, photo 11. According to him, this timber was loose enough that “if this rib lets go, it’s going to knock those timbers over.” Tr. I, 37. So, even if I were to agree with Respondent that there were timbers installed, I credit Inspector Adams and Boulger’s testimony and the photo documentation that some of these timbers were not properly attached at the time the Order was issued.

For the above reasons, after applying the reasonably prudent person standard outlined in *Harlan Cumberland*, I conclude that the Respondent violated 30 C.F.R. § 75.202(a).

b. Order No. 9704128

The second Order, No. 9704128, states that:

The mine operator has failed to conduct an adequate pre-shift examination along the Company North Mains #3 conveyor belt. This section of walkway from the head roller of the belt to the crosscut out-by the take-up has a total of 5 loose hanging ribs, ranging from a few inches thick, and up to 15” thick, from approximately 40” long, up to 30’ long throughout this area. Any single of these loose ribs falling on a miner would result in fatal blunt force trauma injuries should a rib roll onto them.

The pre-shift/on-shift examination is the front line defense to identify, record and initiate corrective actions in the workplaces. Failing to complete an adequate

⁶ The Secretary is not citing a violation of a roof control plan, which falls under a different regulatory standard at 30 C.F.R. § 75.220.

examination in the work place exposes miners to unsafe conditions that should've been caught and corrected. These cited conditions along this travel-way are obvious to the most casual observer.

The mine operator has engaged in aggravated conduct constituting more than ordinary negligence in allowing these conditions to go uncorrected.

This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-3.

Inspector Adams determined that the alleged facts contained in this Order amounted to a violation of 30 C.F.R. § 75.360(b). That regulation requires that operators conduct a pre-shift examination in the three hours preceding the beginning of any 8-hour shift during which any person is scheduled to work or travel underground. 30 C.F.R. §75.360(a)(1).

The specific subsection cited requires the person conducting the examination to:

examine for hazardous conditions and violations of the mandatory health or safety hazards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations...(2) Belt conveyors that will be used to transport persons during the oncoming shift and the entries in which these belt conveyors are located...

30 C.F.R. § 75.360(b). Subsection (b)(11) further requires that the examiner identify any violations of two roof control standards: 30 C.F.R. §§ 75.202(a) and 75.220(a)(1). 30 C.F.R. § 75.360(b)(11)(i).

The Commission has explained that the pre-shift examination is intended “to prevent hazardous conditions from developing” in a mine. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997). The term “hazard” means a measure of danger to safety or health, a “possible source of peril, danger, duress or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Id.* at 14 (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 827 & n.7 (Apr. 1981)). The Commission has further determined that the requirement under this regulation “is of fundamental importance in assuring a safe working environment underground.” *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...[a] bad roof.”). Ultimately, conducting an adequate, careful pre-shift examination is critical because, “[m]iners rely upon the preshift examiner to find and correct conditions that can be a hazard. When an examiner fails to do so, it creates in miners a false sense of working in a safe environment.” *Big Ridge, Inc.*, 33 FMSHRC 689, 713 (Mar. 2011) (ALJ).

Unlike for violations of 30 C.F.R. § 75.202(a), there is no clear-cut test or standard for finding a violation of 30 C.F.R. § 75.360(b).⁷ For this reason, I review Commission case law and other ALJ decisions to determine several factors that are relevant for this analysis.⁸

In *Buck Creek*, the Commission explained that an examiner must look for all conditions that present a hazard. 17 FMSHRC at 14. This means that a violation of the pre-shift examination standard should include a finding of a hazardous condition that was overlooked by the examiner. *Id.*; see also *Eagle Energy, Inc.*, 22 FMSHRC 860, 870 (July 2000) (ALJ). Additionally, a careful pre-shift examination suggests that an examiner would not miss obvious, visible, or sizable violations. See e.g., *Alden Resources*, 37 FMSHRC 1015, 1037 (May 2015) (ALJ); *Eagle Energy*, 22 FMSHRC at 871; *JWR*, 27 FMSHRC 757 (Nov. 2005) (ALJ). It is important to consider the obviousness of the hazardous condition. *Id.* Any finding of violation thus necessarily requires that a judge conclude that the hazardous condition was present during the pre-shift examination. See *id.* This typically includes an analysis of duration and how long the hazardous condition existed before the issuance of the related citation or order. See e.g., *Eagle Energy*, 22 FMSHRC at 871.

As a preliminary matter, I consider whether the conditions cited by Adams were “hazardous” roof control issues that required supplemental support. The five sections of loose

⁷ In another context, the Commission has determined that the appropriate test to determine the adequacy of an examination is the “reasonably prudent” miner test. *Sec’y of Labor v. Sunbelt Rentals, Inc.; LVR Inc.; and Roanoke Cement Co., LLC*, 38 FMSHRC 1619, 1626 (July 2016). In *Roanoke Cement*, the Commission interpreted 30 C.F.R. § 56.18002(a), which governs the examination of working places for surface metal and non-metal mines. 38 FMSHRC at 1625-26. However, the language of that regulation differs from § 75.360(b). In the latter, it requires a “certified person,” rather than a “competent person,” and does not discuss whether there should be prompt, corrective action. In *Roanoke*, the Commission reasoned that competency and prompt corrective actions meant that there should be some meaningful substance to the examination to help achieve the objective of identifying “conditions that may affect safety or health.” 38 FMSRHC at 1625-26. This case provides helpful guidance, but is not necessarily dispositive of which test or standard to apply.

⁸ I find both parties’ arguments for this violation unhelpful and unpersuasive. For starters, the Secretary argues that there is a violation because “Peabody failed to conduct an adequate examination of the ribs along the walkway.” Sec’y Br. at 5. As further support, she cites to *Mach Mining*, 40 FMSHRC 1, 11 (Jan. 2018) (internal citation omitted), without any factual bases. The cited section of *Mach Mining* focuses and interprets a wholly different standard at 30 C.F.R. § 56.18002 that excludes the “hazardous condition” language found in 30 C.F.R. § 75.360(b). Without more, I am unconvinced that I should apply that specific standard here.

On the other hand, Peabody recognizes that an examiner must examine for hazardous materials relating to rib control and roof falls but ultimately argues that there are no hazardous conditions here. For the reasons stated later in this decision, I find this argument lacks merit as there are clear hazardous conditions posed by the large and numerous sections of loose ribs throughout an area where persons regularly work or travel.

ribs are clearly hazardous near a conveyor belt because they increase the likelihood that miners would be subjected to a roof or rock fall in an area that is frequently traveled. Inspector Adams testified that if any of the loose rocks hanging from the roof, ranging from a few inches thick to ten inches thick, fell, any of the five sections of ribs would collapse, cover the entire walkway, and fatally injure any miners who were traveling or working in the area. Tr. I, 29. As further support that the cited conditions qualify as a “hazardous condition,” the regulation itself highlights roof control violations as ones that pre-shift examiners must be on alert to identify. 30 C.F.R. § 75.360(b)(11)(i). I thus conclude that this threshold issue is met.

After finding that the loose ribs constitute a hazardous condition requiring supplemental support, it follows that failing to note the visible and obvious loose sections during a pre-shift examination violates the cited mandatory safety standard at 30 C.F.R. § 75.360(b). Here, Inspector Adams checked the mine’s record of pre-shift examinations that occurred recently before his inspection, the most relevant being the August 22, 2022 exam from 4:00 a.m. to 7:00 a.m. Tr. I, 38-39; Ex. R-6. Upon his review, Inspector Adams found no hazards noted in the examination record. Tr. I, 39. More specifically, there was no mention of any loose rib in the section of the mine he had cited. Tr. I, 40.

The two remaining questions therefore are whether the hazardous condition was obvious and whether it was present or noticeable during the pre-shift examination.

In terms of obviousness, I find that inspector Adams’ testimony regarding his measurements of each of the five sections, which align with the measurements outlined in the Order, to be credible, conclusive and determinative. Tr. I, 28, 31; Ex. S-3. Inspector Adams also explained that the rock dust settled in the gaps between the loose ribs and the roof wall, which made the violation much more obvious. Tr. I, 64. In other words, the rock dust highlighted the hazardous condition. *Id.* I agree that it would be difficult to ignore sections of loose rib separating from the wall for a span of 150 feet. Tr. I 28-31, 41; Sec’y Br. at 10. The extent of the loose ribs also weighs in favor of a conclusion that the violative condition was obvious and present during the pre-shift examination.

For duration, I credit inspector Adams’ testimony that the violation existed throughout daily pre-shift examinations over the course of at least two shifts. I am, however, hesitant to agree with his guess that the violative condition lasted for over six shifts. Tr. I 43-44, 45. Inspector Adams credibly testified that the sections of loose ribs existed at the time of the pre-shift examination because the rock dust had settled between the loose rib sections and the mine wall, and there was evidence of foot traffic that occurred in the area after that rock dusting. Tr. I, 36, 43. In support of his conclusion, he referenced Ex. S-11, photo 11, which revealed the mine floor to be a dark color as if it were covered in mud. Tr. I 36. If it had been recently rock dusted, the floor would resemble a “fresh layer of snow.” Tr. I, 36-37. Because of the heavy foot traffic and the dark color of the floor, Adams estimated the condition to have lasted at least more than two shifts. *Id.* I have no reason to conclude otherwise. Therefore, this factor also supports a conclusion that the violative condition was present during the pre-shift examination.

Alternatively, another ALJ has found helpful guidance from the Commission’s reasonably prudent person test. *Sec’y of Labor v. Oak Grove Res., LLC*, 38 FMSHRC 957, 975 (May 2016)

(ALJ); *see also Sec’y of Labor v. Twentymile Coal Co.*, 32 FMSHRC 1431, 1450 (Oct. 2010) (finding that an obvious accumulations of coal dust meant that a reasonably prudent person would have recognized that the hazard needed to be recorded in the pre-shift examination book). In *Oak Grove*, the ALJ explained that pre-shift examinations must be adequate, rather than perfunctory and set forth a relevant test. The Judge asked whether “a reasonably prudent person, familiar with the mining industry and the protective purposes of [section 75.360(a)(1)]” would have a reasonable basis to believe that the subject pre-shift examinations were sufficiently thorough. (citation omitted). Given the extensive loose ribs that remained throughout the shift and the obvious nature of the underlying violation, I conclude that a reasonably prudent person, familiar with the mining industry, and the protective purpose of the standard, would have recognized these roof hazards should have been recorded in the pre-shift examination so that they could be adequately addressed.

Under these circumstances and given the importance of preventing an inadequately supported roof, Peabody should have discovered the large sections of loose rib and roof material during its pre-shift examination of the North Main’s #3 conveyor belt on August 22, 2022. Accordingly, Peabody violated 30 C.F.R. § 75.360(b).

3. Significant and Substantial

I next consider whether the Secretary properly designated both Orders as significant and substantial (“S&S”).⁹ A violation is properly designated as S&S only if, “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981)).

The Commission requires affirmative findings on the following elements to uphold an S&S designation:

(1) [T]he underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of the hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step from *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016), by explaining that it is the contribution of a violation to the cause and effect of a hazard that is “significant and substantial.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985)).

⁹ I note that the Secretary and Peabody both combine these Orders for their analyses of significant and substantial, unwarrantable failure, negligence, and gravity. Inspector Adams testified that the facts and circumstances outlined in both Orders were a mirror image because if an accident were to occur, it would affect both Orders. Tr. I, 40. For these sections, I will conduct a combined analysis for both Orders for clarity, conciseness, and judicial efficiency.

The Secretary bears the burden of establishing an S&S finding by a preponderance of the evidence. *See In re: Contest of Respirable Dust Sample Alterations Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995).

An S&S determination must be based on the particular facts surrounding the violation and on the assumed continuation of normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987); *see also Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)) (“A determination of ‘significant and substantial’ must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease[.]”). The Commission has further observed that the opinions of an experienced MSHA inspector testifying that a violation is S&S are entitled to substantial weight. *Harlan Cumberland*, 20 FMSHRC at 1278-79.

Here, Peabody contests the S&S designations, arguing that the Secretary’s evidence failed to establish the second *Mathies* element. Resp’t Br. at 20. The Secretary maintains that all four *Mathies* elements were met. Sec’y Br. at 7-8. For the reasons below, I agree with the Secretary.

a. Mandatory Safety Hazard

The first element is met. 30 C.F.R. §§ 75.202(a) and 75.360(b) are both mandatory safety standards promulgated by MSHA, and as explained above, Peabody violated both regulations.

b. Reasonably Likely to Cause the Defined Hazard

The Secretary must also show that the violation was “reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed.” *Mathies*, 6 FMSHRC at 3. This factor requires that the ALJ define the hazard contributed to by the violation, that is, the prospective danger that the cited safety hazard is intended to prevent. *Newtown*, 38 FMSHRC at 2037-40. Requiring large sections of loose ribs to be adequately supported or rectified aims to prevent roof falls or any falling material that could strike and injure a miner. Similarly, the purpose of the regulation mandating pre-shift examiners to conduct an examination to specifically look for and discover roof control violations under § 75.02(a), is to correct or prevent a roof fall. Put differently, there is a tangible concern that the roof could collapse due to improper roof control left unaddressed by an examiner employing an inadequate examination.

The remaining issue is whether there is a reasonable likelihood that falling material from the roof in this case would strike a miner. Peabody adamantly argues that this element is entirely unsupported. It suggests that Inspector Adams failed to provide adequate testimony that this hazard was reasonably likely to occur. Resp’t Br. at 21. Peabody maintains that the evidence suggests that the ribs were not loose and were adequately protected by rib bolts and timbers. Resp’t Br. at 21. This argument contradicts the inspector’s findings and the photographic documentation provided by the Secretary. I am not convinced that the rib bolts and timbers were adequately updated as the record reveals that most had not been refined or replaced in over

eighteen years. The record further demonstrates that the vertical timbers and ribs were loose as the rock dust had settled behind the loose rib. Tr. I, 28-29.

I ultimately agree with the Secretary. The record shows that there were several sections of loose ribs, all large enough to cover an entire walkway, where miners frequently work or travel. Tr. I, 28-29, 30. According to inspector Adams' testimony, based on his credible opinion, estimation, and experience, each loose rib likely weighed thousands of pounds. Tr. I, 28-29. Adams further credibly testified that if the loose rock, ranging from a few inches thick to ten inches thick, fell, the section of rib would cover the entire walkway and fatally injure any miners traveling or working in the area. Tr. I, 29. The record also shows that some of the actions taken by Peabody to control the roof were inadequate. Tr. I, 37, 184. It is logical to conclude that if these timbers or loose ribs were not adequately corrected, there is a reasonable likelihood that an accident would occur with falling roof material striking and injuring a miner or miners, who worked in the area. *See e.g.*, Tr. I, 133. To adequately correct such roof control issues, there should be an adequate examination conducted that would have discovered them. Without such examination, the reasonable likelihood of a roof fall undoubtedly increases. Based on the measurements of the loose rib, their estimated weight, inadequate roof control mitigation and examination, and the experienced inspector's credible opinion as to this element, I conclude that the second *Mathies* element is satisfied.

c. Reasonably Likely to Cause Injury

Third, the Secretary must show that the occurrence of the hazard is reasonably likely to cause injury. *Mathies*, 6 FMSHRC at 3. This step involves assuming the occurrence of the hazard—not the violation—and determining whether, based on the facts surrounding the violation, the hazard is reasonably likely to cause an injury. *Newtown Energy, Inc.*, 38 FMSHRC at 2037-40; *Texasgulf*, 10 FMSHRC at 501. Peabody does not directly dispute this element.

Assuming the occurrence of the hazard for both violations, that is, a rock or roof fall, it is reasonably likely that rock, debris, or a section of loose rib that separated from the mine wall, would strike a miner who was traveling or working in the area. Inspector Adams credibly testified that the sections of loose rib spanned over the entire cross-cut ranging to around 150 feet. Ex. S-1; Tr. I, 30. Also, each individual rib section likely would cover the entire area of the walkway below. Tr. I, 28-29. Given these dimensions, if a miner were working or traveling through the area, which according to the evidence would occur at least once per shift, and the hazard were to occur, then that miner would likely be struck. Tr. I, 29, 36-37. It would nearly be impossible to avoid that section if the rib or roof were to collapse and a miner was in that vicinity. Because of the loose rib sections' size and weight, if it were to strike a miner, then it would likely cause an injury and the failure to conduct an adequate examination reasonable increased this likelihood because the obvious hazard was not recognized. Therefore, this element is satisfied.

d. Reasonably Serious Injury

For the final *Mathies* element, the Secretary must prove that there would be a reasonable likelihood that the potential injury in question would be of a "reasonably serious nature." 6

FMSHRC at 3. This does not require the Secretary to establish that the injury will lead to hospitalization, surgery, or a long period of recovery. *S&S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013). Muscle strains, sprained ligaments, and fractured bones fall under this category. *Id.* The primary focus of this element is therefore on the risk of injury created by the safety violation itself. *Sec’y v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018); *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313-14 (June 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

Commission precedent makes clear that mine roofs are inherently dangerous and that roof falls are a leading cause of death in underground mines. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211 & n.8 (July 1982) (explaining that one of Congress’s main concerns involving the 1969 Coal Act was to lessen the high fatality and injury rate caused by roof falls and that the legislative history references such falls as the prime cause of fatalities in underground mines); *see also Peabody Midwest Mining, LLC*, 41 FMSHRC 279, 284 n.6 (May 2019) (ALJ) (demonstrating how another ALJ took official notice of MSHA’s “Fatality Prevention – Rules to Live By” initiative that included 30 C.F.R. § 75.202(a) as one of the coal priority standards to prevent fatalities in mining). The Commission has recognized that even good roofs can fall and cause death or serious bodily harm. *Consolidation Coal Co.*, 6 FMSHRC at 3. This concern is buttressed by inspector Adams’ testimony and firsthand experience recovering people from mine roof collapses and knowing miners who have died from such collapses. Tr. I, 30-32.

Specifically, the evidence in this case reveals that the loose rib sections extend over 100 feet and by themselves cover enough surface area to fall on an entire walkway. Tr. I, 28-29. The loose ribs also were estimated to weigh over a thousand pounds. Tr. I, 29-30. Given the size and estimated weight of the loose rib sections and the documented Congressional concern for roof falls causing death, an injury resulting from a roof collapse in any of these areas would likely be fatal or reasonably serious. This conclusion is supported by inspector Adam’s testimony that if a rock fell from the estimated height of twelve or fourteen feet from the loose rib covering an entire walkway, then the accident would likely result in fatal crushing injuries. Tr. I, 33. Again, if the pre-shift examiner had conducted an adequate examination and discovered the loose ribs, and inadequate timbers, the operator would have been able to correct the conditions. The absence of such an examination adds to the likelihood of the injury which would be serious. This element is satisfied.

Because all four elements of *Mathies* are met for these Orders, I affirm the Secretary’s S&S designation.

4. Unwarrantable Failure

Peabody next contests the unwarrantable failure designations. In contrast, the Secretary maintains that the typical factors that are considered in an unwarrantable failure analysis all point to a proper designation. After considering all the factors, I ultimately agree with the Secretary.

“Unwarrantable failure” originates from section 104(d) of the Mine Act and refers to “more serious conduct” by an operator in connection with a violation. *IO Coal*, 31 FMSHRC

1346, 1350 (Dec. 2009) (citing 30 U.S.C. § 814(d)). The Commission has since determined that an unwarrantable failure is “aggravated conduct constituting more than ordinary negligence for a mine operator in relation to a violation of the Act.” *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987). It 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). Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC at 1350-51.

The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007) (citation omitted). Like S&S, the Secretary bears the burden of establishing the validity of an unwarrantable failure finding. *See Keystone*, 17 FMSHRC at 1838. In other words, “while an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge.” *Coal River Mining, LLC*, 32 FMSHRC 82, 88-89 (Feb. 2010) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Excel Mining, LLC*, 497 F. App’x 78, 79 (D.C. Cir. 2013); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (2001).

Lastly, in determining unwarrantable failure, the Commission has found that where a miner was acting as the employer’s agent at the time, intentional misconduct is imputable to the operator. *Rochester & Pittsburgh (“R&P”) Coal Co.*, 13 FMSHRC 189, 194-98 (Feb. 1991). When deciding whether a miner is an agent of an operator, the Commission has concentrated on the miner’s function and not job title, focusing on whether his responsibilities are crucial to the mine’s operation. *REB Enters. Inc.*, 20 FMSHRC 203, 211 (Mar. 1998); *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996). The Commission has also made clear that an examiner may constitute an agent of the operator when it is “charged with responsibility for the operation of...part of the mine.” *R&P Coal Co.*, 13 FMSHRC at 194-95, 198.

As directed, I consider in turn each of the following factors: (1) the length of time that the violative condition has existed, *i.e.*, duration, (2) the extent of the violative condition, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988).

a. Duration of the Violative Conditions

In deciding whether a violation should be attributed to an operator's unwarrantable failure, the Commission looks at the length of time or number of shifts that the violative condition existed. The Commission accepts direct and circumstantial evidence to establish duration. *Windsor Coal Co.*, 21 FMSHRC 997, 1003 (Sept. 1999); *Coal River*, 32 FMSHRC at 93; *see also Peabody Coal*, 14 FMSHRC at 1261 (affirming the judge's duration finding based primarily on the inspector's observation of the cited area).

The Secretary argues that there was significant duration to the violations included in the Orders. Sec'y Br. at 11. Peabody counters that the rock dusting that occurred was done to abate the citation previously issued regarding the removal of accumulations, so it must have been done close in time to when Inspector Adams was in the area. Resp't Br. at 25. Further, Peabody maintains that Inspector Adams' theory of how long the violations existed is not reliable nor definitive. *Id.*

Inspector Adams estimated that the violative roof condition likely lasted several shifts by inspecting the rock dust that settled in the gap between the loose ribs and the roof wall. He explained that approximately one week before, he had issued a violation for accumulations in the same area. Tr. I, 32. As a result of that citation, the mine operator removed the accumulations, and, at some point, rock dusted behind that area to terminate the citation. *Id.* Inspector Adams went on to explain that some of the rock dust settled in the gaps and openings between the loose ribs and the roof wall. Tr. I, 36. During his explanation, he referenced Ex. S-11, photo 11, which reveals the mine floor as a dark color likely covered in mud. *Id.* He concluded that the area was not freshly rock dusted as it should look like a fresh layer of snow, and that it likely had not been rock dusted for several shifts. Inspector Adams' conclusion is further supported by the footprints close to the rib that can also be gleaned from the photo. Tr. I, 36-37. Because of the heavy foot traffic over the rock dust, Adams estimated that the roof conditions existed for several shifts. He also surmised that the operator failed to adequately conduct a pre-shift examination and identify these hazards in the form of the loose rib sections, and rock dust settling in the gaps.

I conclude that the roof violation lasted for at least more than one shift and that the inadequate examination violation occurred at the beginning of the shift in which inspector Adams issued his Orders. I consider Inspector Adams' estimation that the conditions existed around six shifts or two days before his arrival and that an adequate examination had not taken place right before the inspection. Tr. I, 43-44, 45. As the Commission has done in the past, I credit the inspector's testimony to the extent that more than one shift had passed. Logically, if the roof control violation lasted for more than one shift, then an adequate examination to discover the underlying conditions of the roof control violation, had also not occurred for more than one shift. This is more than sufficient to satisfy the duration factor as weighing in favor of unwarrantable failure findings. *See generally Windsor*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (finding that a duration lasting more than one shift weighs in favor of finding an unwarrantable failure); *CAM Mining*, 38 FMSHRC 1903, 1909 (Aug. 2016) (upholding an unwarrantable failure finding since the operator's failure to abate the hazard exposed at least two shifts of miners to highly dangerous conditions).

I ultimately find the duration factor particularly important with respect to the violations established in this case. The longer the underlying roof control violation went unaddressed without an adequate examination, the more likely that a roof fall would occur. *Cf. Coal River*, 32 FMSHRC at 92 (finding that a longer duration of violation led to an increase in danger to miners). This factor thus weighs in favor of unwarrantable failure findings.

b. Extent of the Violative Conditions

When the Commission considers the extent of the violative condition, it evaluates the magnitude and scope of the violation, the number of persons affected, and the size of the affected area. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014); *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010); *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002). Peabody argues that the “totality of the cited location was not extensive.” Resp’t Br. at 23. As support, it suggests that all the potentially violative sections were confined to a discrete area since the third, fourth, and fifth sections were all located on the same rib between two crosscuts and the first two sections were in the same area of the inby corner of the rib between two crosscuts. *Id.*

I decline Peabody’s suggestion to minimize the extent of these violations. Even if the roof control violation was “confined to a discrete area,” that area still spans over 100 feet and five separate sections. Tr. I, 28-31. Though there were rib bolts and timbers present along the entire rib (Tr. I, 97, 101, 104, 105), some of the timbers were insufficient, and that does not negate the findings that there were loose ribs hanging several inches off the roof wall. Because of the large loose rib sections, the ribs separating from the wall by several inches, and the sections spanning about 150 feet long and covering an area the size of the walkway below, I find the violative roof condition extensive in magnitude, scope, and size.

For the inadequate examination violation, there had been no roof control hazards noted in the pre-shift examination record. Tr. I, 39-40. In fact, there was no mention of any loose ribs in the section of the mine the inspector cited. Tr. I, 40. The last relevant examination that had noted knocked over timbers occurred during the shift that preceded the subject inspection. Tr. I, 173-74; Ex. R-6. During that examination, the pre-shift examiner discovered four knocked timbers that were quickly reset. Tr. I, 173-74. However, the record still reveals no mention of loose ribs. Based on this, the extent of the inadequate examination at least covers two shifts.

This factor therefore weighs in favor of finding unwarrantable failures.

c. Obviousness of the Conditions

The Secretary stresses that several large sections of loose rib spanning over 100 feet were obvious, adverse roof conditions. Sec’y Br. at 10. Peabody argues that it employed rib control measures throughout the cited location with timbers and roof bolts, and that the issuing inspector failed to issue any citation or order for rib control when he had traveled the area at least three times before the instant inspection. Resp’t Br. at 24.

I find Peabody's arguments unpersuasive. A failure to issue a citation on the part of an inspector does not automatically mean that the condition was not obvious. Similarly, roof control measures in these areas do not take away from the obvious adverse roof conditions in the form of large, weighty sections of loose ribs with noticeable separation from the wall.

I credit Inspector Adams' testimony that the rock dust settling in the gaps between the loose ribs and the roof wall made the violation even more obvious. Tr. I, 64. I also credit the measurements he took, as there is no conflicting evidence regarding the size of the sections of loose ribs or the distance of separation between the ribs and the wall. Tr. I, 28-31. If an adequate examination had occurred, that examiner likely would have noticed the rock dust settled between the gaps, and the extensive size of the loose ribs that Adams observed and photographed. This factor thus weighs in favor of unwarrantable failure findings.

d. Knowledge of the Conditions

To assess this factor, the Commission considers whether the operator knew or should have known of the existence of the violation, which includes reviewing any reports and complaints from miners regarding the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (actual knowledge is not a necessary element to establish aggravated conduct for an unwarrantable failure finding); *Cyprus Emerald*, 20 FMSHRC at 813; *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1998). An operator's actual or constructive knowledge of the existence of a violation is relevant to the unwarrantable failure analysis and constructive knowledge may be established where the operator reasonably should have known of the violative conduct. *Coal River*, 32 FMSHRC at 90-92.

The Secretary focuses on Inspector Adams' testimony that the violative conditions likely persisted for several shifts, and because the mine operator has an affirmative duty to conduct a pre-shift examination, it should have known of these obvious, highly dangerous conditions. Sec'y Br. at 12. Respondent does not specifically address this factor.

I agree with the Secretary that this factor slightly weighs in favor of finding an unwarrantable failure. Adams testified that the pre-shift examination had been conducted, but that there were no hazards noted in the examination record. There were no notations of any violations on the pre-shift examination. Tr. I, 39. If Respondent's examiners had conducted an adequate examination, they should have known of these conditions, especially considering the extent of the violation and the rock dust settling between the loose ribs and the roof walls. Tr. I, 36, 43-44. Absent any probative, contradictory testimony or evidence, I credit Inspector Adams' conclusion for this factor. Given the extent and size of the loose ribs along with the separation between the roof walls, I find that these obvious, adverse roof conditions should have placed a reasonable mine operator and pre-shift examiner on notice of a hazardous condition that would potentially harm miners or others in the affected areas.

e. Degree of Danger Posed by the Conditions

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. See *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3522 (Dec. 2013) (citation omitted); *BethEnergy*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams “presented a danger” to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding a violation to be aggravated and unwarrantable based upon “common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment”); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were “highly dangerous”). In *Manalapan Mining Co.*, the Commission recognized that the degree of danger could be “so severe that, by itself, it warrants a finding of unwarrantable failure.” 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger has been considered a significant aggravating factor, but not a threshold requirement in an unwarrantable failure analysis. See e.g., *WM D. Scepaniak, Inc.*, 37 FMSHRC 1539, 1547-48 (July 2015) (ALJ); *Manalapan*, 35 FMSHRC at 294 (citation omitted). Lastly, the degree of danger “increases when there is a chronic problem that is ignored.” *Consol*, 35 FMSHRC at 2343.

The Secretary highlights that the sections of loose rib were very large and weighed several thousand pounds. Tr. I, 28. These facts and the fact that the loose sections were so wide as to cover an entire walkway if they fell, serve as the basis for the Secretary’s argument that this violation posed a high degree of danger to miners. Tr. I, 28-30. Peabody does not directly address this factor.

The violations at issue here were highly dangerous. As previously mentioned, the Commission has recognized that mine roofs are inherently dangerous and that roof falls are a leading cause of death in underground mines. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); see also *Independence Coal Co., Inc.*, 26 FMSHRC 520, 526 (June 2004) (ALJ) (concluding that the Commission’s recognition in 1984 “is just as true today.”). In this matter, the inspector observed five large sections of loose ribs along one or two crosscuts spanning over 100 feet, and testified that if any of those sections fell, it would result in fatal injuries. Tr. I, 33. Each section likely weighed over a thousand pounds and would cover an entire walkway where the miners were traveling or working below. Considering the size and estimated weight of the potential rock fall and the evidence of adverse roof conditions, I find that there was a high degree of danger posed by the violative conditions. Without an adequate examination that would have likely discovered these roof control issues and revealed the rock dust that had settled between the gaps, the degree of danger posed by the underlying condition is allowed to persist and arguably is heightened as time elapses. In other words, the danger attributed to an inadequate examination is coextensive with the high degree danger of the roof control hazards.

This factor strongly weighs in favor of finding unwarrantable failures.

f. Abatement Efforts

The Commission has stated that:

An operator's effort in abating the violative condition is one of the factors established by the Commission as determinative of whether a violation is unwarrantable. Where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. Previous repeated violations and warnings from MSHA should place on operator on "heightened alert" that more is needed to rectify the problem. *New Warwick Mining Co.*, 18 FMSHRC 1568,1574 (Sept. 1996). The focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.*

IO Coal, 31 FMSHRC at 1356. The focus of this factor is therefore "on those efforts made prior to the citation or order." *Id.* The Secretary argues that any abatement efforts made by the Respondent were inadequate to address the hazard presented by the extensive sections of loose ribs. Sec'y Br. at 12. Respondent only addresses this factor indirectly and briefly in its discussion on whether the rib conditions were obvious. Resp't. Br. at 24. As support, Respondent lists several actions taken before these Orders were issued, including employing rib control measures throughout the cited location by installing vertical timbers and rib bolts in compliance with its MSHA-approved plan. Tr. I 88, 92, 97, 101, 102-03, 105; R-4 at 808, 343, 201. With respect to the Order alleging an inadequate examination, neither party addresses any relevant facts that would constitute abatement efforts, such as adequate training on how to conduct an examination or identify violative conditions.

I recognize that the record reveals several abatement efforts to address some roof control issues that may weigh slightly against finding an unwarrantable failure. At hearing, Peabody presented testimony that the loose ribs were supported by some vertical timbers and rib bolts that had been bolted in compliance with its MSHA-approved roof control plan eighteen years ago. Tr. I, 98, 101-103. However, this is slightly offset by contradicting evidence also offered by Peabody. Peabody's own witness, Mr. Moore, testified that he encountered a section of loose rib and had to remove it with a broken shovel handle. Tr. I, 112. He explained that the rib bolts were only placed about chest high, meaning that the loose rib extended at least six feet above the bolts. Tr. I, 118. Most damaging, Moore testified as to instances where old rib bolts "gave up and rolled." Tr. I 190. In short, Moore's testimony does little to assist Peabody in demonstrating adequate abatement efforts. In addition, as previously noted above, according to Inspector Adams and his reference to photo 11 in Ex. S-1, several timbers were loose and not adequately supporting the ribs. Tr. I 27-30.

Though there are some abatement efforts present that address some timbers, I find them offset by contradicting evidence and testimony showing that such efforts were not adequate. Similarly, in the absence of any evidence related to abatement efforts to prevent an inadequate pre-shift examination, such as training, I cannot in good faith address whether that weighs in favor or against unwarrantable failure. Given this, I ultimately find this factor neutral.

g. Notice of Need for Greater Compliance Efforts

In *IO Coal* the Commission summarized this factor as follows:

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citation omitted); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) (“a high number of past violations of section 75.400 serve to place an operator on notice that it has a recurring safety problem in need of correction.”) (citations omitted). The purpose of evaluating the number of past violations is to determine the degree to which those violations have “engendered in the operator a heightened awareness of a serious . . . problem.” *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)). The Commission has also recognized that “past discussions with MSHA” about a problem “serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.” *San Juan*, 29 FMSHRC at 131 (quoting *Consolidation Coal*, 23 FMSHRC at 595).

31 FMSHRC at 1353. The Commission has further rejected the argument that only past violations, involving the same regulation and occurring in the same area, may be properly considered when determining whether a violation is unwarrantable. *San Juan Coal Co.*, 29 FMSHRC at 131. In other words, “even if a different area was cited, past violations may, nonetheless, provide an operator with sufficient awareness of an accumulation problem.” *Id.* (footnote omitted).

Neither party focuses on this factor and there are not many facts, other than the number of past violations, that assist me in weighing this factor. More specifically, the Secretary fails to address this factor in its post-hearing brief or at hearing. Respondent maintains that the Secretary adduced no evidence to demonstrate that Peabody was placed on notice of the need for greater efforts to comply with these specific regulations. I partially agree and disagree with the Respondent. Applying the reasoning in *Consolidation Coal*, I find that 53 past violations of section 75.202(a) place Peabody on sufficient notice that it has a recurring safety problem regarding roof control in need of correction. However, for section 75.360(b), the record reveals that the operator received 3 past violations, which I find by itself to be insufficient notice. Ex. S-32. Therefore, I conclude that this factor weighs in favor of an unwarrantable failure for the section 75.202(a) violation but that it weighs against an unwarrantable failure for the section 75.360(b) violation.

On balance, weighing all the factors, particularly the extent, duration, and high degree of danger posed by the obvious violative conditions, I conclude that the Secretary properly designated Order Nos. 9704127 and 9704128 as resulting from the operator’s unwarrantable failure. For purposes of the pre-shift examination violation, I find that the examiner acted as an agent when he had the duty of conducting section 75.360(b) examinations and failed to conduct an adequate examination. Such unwarrantable failure may be attributed to the operator under

R&P Coal Co., 13 FMSHRC at 194-98; *Twentymile Coal Co. v. Sec’y of Labor*, 32 FMSHRC 1431, 1447 (Oct. 2010) (ALJ); *see also Capitol Cement Corp. v. Sec’y of Labor, MSHA*, 229 F.3d 1141 (Table) at *5 (finding that the Commission did not err in imputing the misconduct of two supervisors to the operator for purposes of unwarrantable failure findings).

5. Gravity

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.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard 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, e.g., Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially affected. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Inspector Adams designated these Orders as reasonably likely to cause “fatal” injury or illness which would affect one person. Peabody does not contest the number of people affected; however, it contests the remaining findings in its argument against S&S. It maintains that the Secretary offered no evidence to establish that any hazard was “reasonably likely to occur.” It took issue with Inspector Adams’ alleged failure to explain why an accident would be expected to occur with serious to fatal injuries. As support, Peabody reinforces its position by highlighting that the timbers and rib bolts adequately protected any rib material and that no rib material was loose. Tr. I, 88, 89, 92, 97, 101, 143, 149; R-4 at 808, 343.

I find Respondent’s argument unpersuasive after considering the testimony and evidence provided at hearing. For starters, Inspector Adams clearly lays out the measurements and approximate weight for each section of loose rib. Tr. I, 28-29. He goes on to explain that the five sections of loose ribs expand approximately 150 feet across at least one crosscut. Tr. I, 30. Each rib contained loose rock, ranging from a few inches thick to approximately ten inches thick and had separated from the wall about three to ten inches, which allowed the rock to hang over walkways where miners normally worked or traveled. Tr. I, 28-30; Ex. S-1. Adams also provided an estimation of the mine’s height which was around twelve to fourteen feet. Tr. I, 29. Considering all of this, Inspector Adams concluded that “[i]f normal mining were to continue and these conditions were not corrected, an accident would be expected to occur with serious to fatal injuries.” Tr. I, 33. To further support his conclusion, Adams testified that if a rock falls from the height of the mine, which here is twelve to fourteen feet, and that rock or loose rib covers the surface area of an entire walkway, then there likely would be fatal, crushing injuries. Tr. I, 33. It is important to note that the “reasonably likely standard” does not require the Secretary to *prove* that the accident will occur, which is what Peabody seems to suggest.

Ultimately, I find that Inspector Adams' measurements, accounts, and testimony, grounded in years of experience and personal observations, to be credible and persuasive. I agree that the record reveals that these loose ribs and unsupported timbers could result in a roof fall accident potentially causing fatal injuries. As noted above, roof falls are inherently dangerous and are one of the leading causes of death in underground mines.

Given the foregoing, I affirm the assessed likelihood, severity of injury, and number of people likely to be affected.

6. Negligence

Negligence is not directly defined in the Mine Act, but the Commission has held that “judges may evaluate negligence from the starting point of a traditional negligence analysis” rather than based on the Secretary’s definition of negligence under 30 C.F.R. § 100.3(d). *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *JWR Res. Inc.*, 36 FMSHRC 1972, 1975 n. 4 (Aug. 2014) (explaining that the MSHA regulations are not binding in Commission proceedings). The Commission has further recognized that “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation . . . occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission’s negligence analysis asks whether an operator has met “the requisite standard of care – a standard of care that is high under the Mine Act.” *Brody Mining*, 37 FMSHRC at 1702. To determine whether an operator has met its duty of care, Commission ALJs consider “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Id.* (citations omitted). An ALJ, however, “is not limited to an evaluation of allegedly ‘mitigating’ circumstances” and should consider the “totality of the circumstances holistically.” *Id.* at 1702-1703; *see also* 30 C.F.R. § 100.3(d) (stating that operators must be “on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.”). Lastly, the Commission has recognized that an “operator’s knowledge (actual or constructive) is a key component of a negligence determination.” *Ohio Cty. Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018).

The Secretary’s regulation at 30 C.F.R. § 100.3 defines high negligence as when, “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” The Commission has defined high negligence as “an aggravated lack of care that is more than ordinary negligence.” *Brody Mining*, 37 FMSHRC at 1703 (citation omitted).

Here, Peabody challenges MSHA’s high negligence finding, but couches its argument in conclusory terms in its discussion of unwarrantable failure. Resp’t. Br. at 22. The Secretary also does not spend much time on this issue, so I look closely at the testimony regarding negligence. Sec’y Br. at 8-9.

When explaining his conclusion that Peabody's level of negligence was high, Inspector Adams testified that the pre-shift examiner failed to properly complete his job of identifying health and safety hazards. Tr. I, 34. Adams testified that the area was riddled with obvious, adverse roof conditions, including loose ribs spanning a length of 150 feet. Tr. I 34. If the examiner noticed these obvious conditions, he would have been tasked with reporting them, initiating corrective action, and notifying miners, who would work or travel the area, about them. Tr. I, 34-35. Inspector Adams further explained that, upon review of the mine's examination record, he did not see any examination notes regarding the conditions of loose ribs or loose timbers. Tr. I, 41, 60. Given this, the examiner was highly negligent in performing his job and failing to identify these clear and obvious violations.

The next issue is whether the examiner's negligence can be attributed to Peabody as the operator. The Commission has made clear that "where agents are negligent, that negligence may be imputed to the operator for penalty purposes." *Wayne Supply Co.*, 19 FMSHRC 447, 451, 453 (1997) *Southern Ohio Coal Co. (SOCCO)*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). In *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-95, 198 (1991), the Commission clarified that an examiner may constitute an agent of the operator when it is "charged with responsibility for the operation of...part of the mine." See also 30 U.S.C. § 802(e). In other words, when carrying out the required examination duties for an operator, an examiner may be viewed as being "charged with responsibility for the operation of part of a mine." *Id.* at 194. If the violative intentional misconduct is within the "scope" of the examiner's employment or authority as an agent, then negligence may be imputed. *Id.* at 196-97, 198. *R&P* holds that a mine examiner was an agent for the narrow purpose of conducting statutorily mandated weekly shift examinations. *Id.* at 194-96; see also *Pocahontas Fuel Co.*, 8 IBMA 136, 146-48 (1977), *aff'd sub nom. Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979).

On the other hand, if the miner at issue is "rank-and-file," his negligence generally cannot be imputed to the operator for the purposes of penalty assessment. *Wayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *SOCCO*, 4 FMSHRC at 1463-64. In those circumstances, the operator's negligence, fault, or lack thereof, must be determined by an examination of the operator's own conduct, which includes supervision and training. *SOCCO*, 4 FMSHRC at 1464-65; see also *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986).

Here, the pre-shift examiner is like the weekly examiner in *R&P* and is an agent of Peabody, who is charged with some responsibility operating part of the Shoal Creek Mine. Clearly, the pre-shift examiner conducted an examination, but he failed to properly fulfill his job duty of identifying obvious, adverse roof conditions. Tr. I, 34, 35. Identifying such conditions is within the scope of his employment as there is no dispute that the examiner was delegated the duty and entrusted the responsibility to conduct section 75.360(b) examinations. His authority to perform such tasks and his status as an agent is also not contested. Additionally, these safety examinations were statutorily mandated, so the operator had the ultimate duty to ensure that these examinations were adequately conducted by its examiners. The operator's own conduct of not ensuring an adequate examination also suggests some level of negligence. Therefore, the examiner's high negligence is imputable to Peabody.

For potential mitigating circumstances, I consider the testimony of Peabody safety supervisor, Paul Moore. Moore explained that the timbers were set per MSHA's approved roof control plan when the roof was rib bolted eighteen years ago. Tr. I, 98, 10, 114, 124. Moore emphasized that, since the timbers were upright, they were assumed to be properly set and supporting the roof. Tr. I, 116. This testimony provides slightly mitigating evidence. But following the roof control plan requirements does not necessarily mean that Peabody was not highly negligent in violating the separate roof control standard. Further, mine foreman Boulger explained that some of the "cracks" cited by Inspector Adams were not fractures but rather were where different rocks were joined together. Tr. I, 143-44. According to Boulger, none of the ribs had anything protruding over the top of the existing wall, which suggests that there was nothing dislodged. Tr. I, 144, 148, 149. Moore did, however, concede the presence of some knocked timbers in the examination records, but he suggested that those were likely caused by heavy equipment traffic, and that the common practice was to reset or replace those timbers. Tr. I, 180, 183. Overall, the testimony on the pre-shift, on-shift examination records consistently establishes that there were timbers or rib bolts that required fixing. For some of the shifts, the corrective actions noted that a few timbers had been reset or replaced. But for other shifts, including the one at issue, the corresponding notes fail to specify any corrective action. Such a response to resetting timber or roof bolts to strengthen the roof in the problem area, weighs in favor of some mitigation.

Notwithstanding the unwarrantable failure designation, and given the mitigating circumstances in this matter, I modify the degree of negligence from "high" to "moderate." Though, in my experience, it has been rare for an unwarrantable failure to be without a high negligence designation, the D.C. Circuit has made clear, after drawing on Commission case law, that "just as a finding of 'high negligence' does not *necessarily* compel a finding of an 'unwarrantable failure,' a finding of 'moderate negligence' does not foreclose a finding of unwarrantable failure." *Excel Mining, LLC v. Dep't of Labor*, 497 Fed.App. 78, 80 (D.C. Cir. 2013). The Commission has also drawn a distinction between "unwarrantable failure" and "negligence," explaining that the terms are not used synonymously in the Mine Act. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985). In *Black Diamond*, the Commission stated "[a]lthough the same or similar factual circumstances may be included in the Commission's consideration of an unwarrantable failure and negligence, *the issues are distinct.*" *Id.* (*emphasis added*).

Taken together, these cases stand for the proposition that unwarrantable failure and negligence analyses are wholly distinct and may result in different conclusions. I find that to be the case here, and conclude moderate negligence is warranted as this is not a circumstance where there are no relevant mitigating actions employed. However, I do note that this is likely on the high end of moderate negligence. *See e.g., Consol Penn. Coal Co., LLC*, 45 FMSHRC 558, 571 (June 2023) (ALJ); *Brody Mining, LLC*, 39 FMSHRC 2027, 2033 (Nov. 2017) (ALJ) (both recognizing that there can be a "high-end" or "low-end" of a negligence designation).

In sum, for Orders Nos. 9704127 and 9704128, I find violations, affirm the S&S, unwarrantable failure, and gravity designations, modify negligence from high to moderate on the "high end" and assess a penalty of \$28,000.00 for Order No. 9704127 and \$8,500.00 for Order

No. 9704128, for a combined civil penalty of \$36,500.00 as later calculated in the penalty section of this decision.

Accumulations of Combustible Materials

Next, I consider whether Peabody violated 30 C.F.R. § 75.400 for allowing accumulations of combustible material, specifically coal, coal fines, and block coal, to accumulate under and around the Mother Belt conveyor.

1. Findings of Fact

On September 8, 2022, Sammy Elswick, an MSHA field office supervisor, went to Shoal Creek Mine to assist with an E-01 inspection and terminate outstanding citations. Tr. I, 196. Elswick testified that he started his MSHA employment in 2011. Tr. I, 195. His inspection began around 9:00am and lasted until 1:30pm. Tr. I, 236-27. During the inspection, Elswick observed piles of coal, coal dust, and coal fines in various locations along the Mother Belt conveyor. Tr. I, 201. The Mother Belt is in the Dewater Area of the mine¹⁰, where as much water as possible is removed from the coal material and transported out of the mine. Tr. II, 16, 25, 45-46. The belt, which proceeds in an upward incline, spans 500 feet long and is 72 inches wide. Tr. II, 19, 30.

Upon arriving for his inspection, Elswick explained that no one warned him of any unusual events that occurred before his inspection. Tr. I, 259. Also, upon arriving, he immediately noticed accumulations and coal spillage around the tail piece of the conveyor belt. Tr. I, 201-202. Elswick observed a portion of the conveyor to be running in some coal material. Tr. I, 208; Ex. S-15. He also noticed the belt being lifted from the bottom rollers by a pile of coal. Tr. I, 209. Elswick noted that the top of the pile of coal had been flattened due to its contact with the moving conveyor. Tr. I, 209; Ex. S-16. This also caused the rollers to malfunction. Tr. I, 202-03. Elswick also described the presence of multiple fire hazards, including some damaged rollers, multiple chain hangers, and shackles laying against the conveyor belt, rubbing against it, and causing heat and friction. Tr. I, 202. Most concerning, he observed a damaged roller actively producing a small flame. Tr. I, 202; Ex. S-24. As for other damaged rollers, Elswick testified that he could feel heat radiating off them when he waved his hands nearby. Tr. I, 212.

As documentary support, the Secretary introduced several photographs of the accumulations and the cited areas about which Elswick testified. Tr. I, 203-14. One photograph depicts the return roller from an aerial view running in coal. Ex. S-10. Elswick described the area as damp and wet with coal fines. Tr. I, 204. Another picture shows the conveyor belt with material rubbing against the belt, and underneath the belt, there is black coal material up over the roller. Ex. S-11; Tr. I, 205. Elswick testified that the head end of the discharge conveyor had grease, oil, and coal accumulations laying around the bearing of the roller. Exs. S-12, S-13; Tr. I, 205-06. The steps leading up to the head end area had accumulations of coal fines and grease sticking out through the bottom of the chain-link fence guard on top of the floor. Ex S-14; Tr. I, 207. The walkway also was piled with accumulations. Ex. S-14; Tr. I, 207. The next photograph

¹⁰ The background section of this decision (section III above) goes into more detail about the dewater process.

shows a drip pan hanging from the conveyor, and a part of a chain in the center of the photograph hanging down to the left on the ground. Ex. S-15; Tr. I, 208. The chain had been cut in half by the belt running it over. Ex. S-15. Coal accumulations had also developed in the drip pan. Ex. S-15; Tr. I, 208; *see also* Ex. S-17. Under the conveyor belt, there were piles of coal that were worn flat due to the conveyor belt mashing the tops of them. Ex. S-16; Tr. I, 209; *see also* Ex. S-25. Exhibit S-24 reveals the bearings on a fallen roller being worn out flat. There was grease inside the roller and the roller was so dismantled that the bearing was completely gone. Ex. S-24. Elswick explained that the roller had broken and that there was a small flame or fire at the bottom of the roller. Tr. I, 209-10.

Jim Mace, the day shift foreman for September 8, testified that he had been informed that an inspector was writing citations for accumulations. Tr. II, 13. As the shift foreman, Mace is responsible for planning the shift and controlling the tasks for both the production and outby sides. Tr. II, 13. Supervisors and union employees directly report to him and the examiners notate any accumulations in the pre-shift examination that is then provided to Mace. Tr. II, 13, 87. However, an examiner would not be expected to notate any issues with the air pressure or airline. Tr. II, 90-91. Mace testified that the Shoal Creek Mine uses longwall and developmental sections, which include conditions that make the mine generally wet. Tr. II, 33.

Mace further explained that the material observed during Elswick's inspection resulted from an airline that failed the previous day. Tr. II, 56, 59-60. He testified that Eugene Faught, the evening shift's dewater supervisor, informed him that an airline had broken on the south main roadway. Tr. II, 53-54. Mace explained that an airline is a six-inch steel pipe where air is pumped underground by compressors on the surface for the dewater and north main area. Tr. II, 54. The airline provides air pressure for a wiper system that scrapes the coal off the beltline. Tr. II, 55. The wiper system is comprised of two kinds of wipers, operated mechanically and by air pressure. Tr. II, 59-60, 89. A mechanical wiper does not rely on air pressure and is controlled by the pressure on the belt depending on the weight of the material accumulated. Tr. II, 89.

When the main airline is broken, the wiper systems at the Mother Belt are affected adversely. Tr. II, 58-59. If the airline is working improperly, then the wipers lose pressure and separate from the beltline. Tr. II, 56. This means that the wipers will not wipe the belt so the material will come back to the bottom belt and will be scrapped off and fall to the concrete below. Tr. II, 62. If the system works properly, then the wipers would catch the material. Tr. II, 57. When explaining this process, Mace stated, "[a]s long as we're producing coal, there are coal fines being scraped off into the drip pan, there's coal fines being deposited on the sloped concrete surfaces at the north tower and the mother belt tail. It's a constant cleaning process. Three shifts, every day, all day." Tr. II, 98.

To fix the airline, Faught informed Mace that he planned to assign one person to clean the Mother Belt and three others to help him fix the airline. Tr. II, 63, 135. The airline was repaired in a matter of hours. Tr. II, 92, 103, 133. After the airline was fixed, Peabody discovered accumulations on the Mother Belt and started cleaning the belt. Tr. II, 64, 135. Miners sprayed the belt with pressurized hoses for the remainder of the evening shift. Tr. II, 64, 65. Mace then informed the next shift's dewater supervisor, Joe Kennedy, of the required cleaning that

remained. Tr. II, 64, 65. Mace concluded that the accumulations Elswick cited were the type of accumulations that the wiper system would have prevented if it had been working properly. Tr. II, 92.

Faught, the evening shift's radius supervisor, is responsible for assigning tasks to the mine crew based on the hazards identified during the day. Tr. II, 125. During his shift, Faught discovered that the airline had broken, so he assigned his crew to fix it. Tr. II, 128, 131. Faught testified that the broken airline had allowed accumulations to develop on the belt and the rollers would throw them off instead of the wipers adequately catching them. Tr. II, 129-30. He similarly explained that when working properly, the airline would keep pressure on the wipers to clean the material off the belt. Tr. II, 129-30. By the end of his shift, his crew reduced material to the point that it was no longer touching the belt, but additional cleaning still needed to be done. Tr. II, 136, 142. He also testified that the accumulations cited by Elswick may have been present for at least two shifts. Tr. II, 135.

Kennedy, the owl shift dewater supervisor, began his shift by reviewing the belt examination records for the examination conducted during the previous shift. Tr. II, 152; Ex. S-20. The pre-shift examiner listed an accumulation in the drip pan of the Mother Belt from tag 12 to the bottom. Tr. II, 52-53. Kennedy testified that he had assigned miner Odell Richardson ("Odell") to maintain and clean the Mother Belt on September 7, 2022. Tr. II, 148. Odell's task was to clean out the drip pan, starting at the top, and wash the accumulations down to the sump pump using a pressurized hose. Tr. II, 161. Then, the water and coal material in the sump pump would be sent through the dewater system. Tr. II, 161. During the shift, Kennedy observed Odell working on the Mother Belt and at one point joined him to clean for three hours. Tr. II, 155-56. Kennedy explained that, by the end of his shift, the accumulations were cleared from the drip pan. Tr. II, 155. After the shift, Kennedy marked and initialed that corrective actions were taken regarding the accumulations and communicated with the day-shift supervisor about the remaining accumulations. Tr. II, 117, 156. He marked them as a "health and safety" concern, which is a condition that Respondent claims is not a hazard, but could become one if not adequately corrected or fixed. Tr. II, 154.

The rest of Kennedy's testimony focused on the photographic evidence submitted by the Secretary. After reviewing Ex. S-16, he testified that there appeared to be coal accumulations under the belt and explained that if he saw those accumulations, he would not have left them underneath the tail of the Mother Belt. Tr. II, 163. When referencing Ex. S-24, Kennedy noticed a "bad roller" with a small flame at the bottom. Tr. II, 165. Again, he stated that he would not have left the damaged roller in that condition with the small flame developing if he had seen it. Tr. II, 164, 165.

Lastly, Ryder Richardson ("Ryder"), the day shift dewater supervisor for September 8, testified that he was made aware of the accumulations that developed during the previous shift and was tasked with finishing the cleanup. Tr. II, 107, 117. He assigned the Mother Belt attendant, Cody Erwin, the responsibility of maintaining the Mother Belt. Tr. II, 196. Ryder accompanied inspector Elswick during the September 8 inspection. Tr. II, 113. Upon initially arriving at the beltline, Ryder observed that the area from the south to the north tower was cleared down to the concrete. Tr. II, 113. This indicated to him that Erwin had washed that area.

Tr. II, 113. But, when they arrived at the top of the Mother Belt, the inspection party encountered “soupy muddy” coal material. Tr. II, 115. Ryder described it as “[m]ashed potato maybe consistency with like really wet.” Tr. II, 115. Elswick then immediately shut down the belt and issued Order No. 9704220, citing a violation of 30 C.F.R. § 75.400 for allowing the accumulations of combustible material. Ex. S-5; Tr. I, 125; Tr. II, 119.

2. Finding of Violation

Order No. 9704220 states that:

The operator has allowed accumulations of a combustible material in the form of coal, coal fines, and block coal to accumulate under and around the Mother Belt Conveyor. When checked, the accumulations run from the tail roller all the way through to the head roller. The accumulations measure from a dusting to a depth of 24 inches. The conveyor belt was observed running in the accumulations in the tail roller take up area, at roller #32 and in the [midpoint] and the cross over structure. The accumulations were black in color and extensive in amounts. The float coal dust extends past the tail roller up through the area where the belt transformer is located.

- * This exact condition has been cited 70 times in 2 years.
- * This condition is obvious and extensive to the most casual observer by amount of material that has been allowed to accumulate on this conveyor.
- * The operator has engaged in aggravated conduct constituting more than ordinary negligence by putting miners in this area without correcting the condition.
- * This violation is an unwarrantable failure to comply with a mandatory standard.

Standard 75.400 was cited 70 times in two years at mine 0102901 (70 to the operator, 0 to a contractor).

Ex. S-5. Based on his observations of the alleged facts noted in this Order, inspector Elswick concluded that Peabody violated 30 C.F.R. § 75.400. That regulation requires that, “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, [] be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” 30 C.F.R. § 75.400.

The Commission has found that this section prohibits accumulations, but not mere spillages. *See Old Ben Coal Co. (Old Ben II)*, 2 FMSHRC 2806, 2808 (Oct. 1980) (recognizing that a non-violative spillage may result from normal mining operations). The Commission, however, has not set out a bright-line distinction between the two terms. Instead, it initially explained that “whether a spillage constitutes an accumulation...is a question, at least in part, of size and amount.” *Old Ben Coal Co. (Old Ben I)*, 1 FMSHRC 1954, 1958 (Dec. 1979). The Commission then clarified that an accumulation is, “[t]hose masses of combustible materials

which could cause or propagate a fire or explosion...” *Old Ben II*, 2 FMSHRC at 2808. Put together, a violation occurs “where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present.” *Id.* (footnote omitted); see *Black Beauty Coal Co.*, 703 F.3d 553, 558-59, 559 n. 6 (D.C. Cir. 2012) (explaining that, although spills may occur quickly, accumulations of combustible materials substantial enough to cause or propagate a fire are prohibited even if recent).

Over time, the Commission has adopted an objective test for this standard. To determine if an accumulation exists, a decisionmaker must ask whether “a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff’d*, *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292 (10th Cir. 1991) (citation omitted). The Commission has stated that this test “contemplates an objective—not subjective—analysis of the surrounding circumstances, factors and considerations bearing on the inquiry at issue.” *Canon Coal*, 9 FMSHRC 667, 668 (Apr. 1987) (citing *Great Western Electric Co.*, 5 FMSHRC 840, 842-43 (May 1983)); *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983). Some factors to consider include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator’s mine. *Webster Cnty. Coal, LLC*, 35 FMSHRC 2847, 2861 (Aug. 2013) (ALJ) (citing *BHP Minerals Int’l, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996)).

In defining “combustible,” the Commission has determined that even if an accumulation is “damp or wet” or mixed with normally non-combustible material, including rock or fire clay, it can still ignite, burn, explode, or propagate a fire. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). The Commission further explained that “wet coal accumulations pose a significant danger in underground coal mines,” because they can dry out through frictional contact with the belt or rollers and propagate a fire or explosion. *Mach Mining, LLC*, 40 FMSHRC 1, 3-6 (Jan. 2018) (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013)); *Black Diamond Coal Mining Co.*, 7 FMSHRC at 1120-21. Lastly, the Commission, after reviewing the legislative history, has concluded that “[t]he standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.” *Old Ben I*, 2 FMSHRC at 1957; see also *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on a reasonable time for cleaning or recentness of the spill). In other words, the amount of time that the accumulations have lasted is not necessarily determinative. See *id.*

Peabody challenges the inspector’s conclusion that it violated section 75.400 on two distinguishable grounds. First, it argues that it did not permit the “spillage” to accumulate into a violative condition. As legal support, it alleges that an operator is provided with a reasonable amount of time to clean such spillage. For factual support, Peabody points to the testimony provided by its shift foreman, James Andrew Mace II. In relevant part, Mace testified that “[a]s long as we’re producing coal, there are coal fines being scraped off into the drip pan, there’s coal fines being deposited on the sloped concrete surfaces at the [N]orth [T]ower and the [M]other [B]elt tail. It’s a constant cleaning process. Three shifts, every day, all day.” Tr. II, 98. To facilitate that “constant cleaning process,” Peabody installed scrapers or wipers that rub against

the belt to continuously remove as much coal material as possible. Tr. II, 55. These scrapers would then carry the material from the bottom belt into a drip pan system underneath the Mother Belt. Tr. II, 61.

At hearing, Peabody presented evidence that at least some of the material observed during Elswick's inspection resulted from an airline that failed during the previous evening shift. Tr. II, 56, 59-60. Mace testified that if the airline fails, the wiper system will not work properly as the wiper will not remain close to the belt, meaning that coal fines and other material will not be caught and will accumulate on the ground along or on the Mother Belt. Tr. II, 56, 131. Peabody became aware that material accumulated on the Mother Belt during the evening shift of September 7 and assigned personnel to clean the material. Tr. II, 53-54, 64, 106, 109, 128-29, 135-36, 155, 156. The airline was repaired in a matter of hours. Tr. II, 103. Ultimately, Peabody argues that because of the constant cleaning process that removes as much coal material as possible in an automatic manner, along with the unexpected failure of the airline, it could not be said to have permitted a violative accumulation. Resp't Br. at 38-39.

I find this first argument unpersuasive. Though the Commission has recognized that mere spillage of small amounts of coal or combustible material does not amount to an accumulation, that is simply not the case here. As I will detail below, the amounts of accumulations cited by the inspector were extensive and widespread, and cumulatively created a fire hazard. Additionally, the broken-down airline does nothing to change the strict liability nature of the Mine Act as Peabody attempts to suggest, especially when the D.C. Circuit has made clear that accumulations are prohibited "even if recent." *Black Beauty Coal*, 703 F.3d at 559; *see e.g., Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco*, 8 FMSHRC at 1634-36, *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). The airline and the related testimony, however, may be considered as mitigating factor for a civil penalty assessment. *Asarco*, 8 FMSHRC at 1636.

I dismiss Respondent's first argument based on Commission precedent and the legislative history which establishes that Congress intended to stop the accumulations in the first instance. *Old Ben I*, 2 FMSHRC at 1957; *see also Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on a reasonable time for cleaning, or recentness of the spill). Commission precedent and the legislative history further clarifies that the purpose of the regulation is to prevent, not merely minimize, any accumulation or mass of combustible material that can ignite, spark, or cause an explosion or fire. *See Black Diamond Coal Mining Co.*, 7 FMSHRC at 1120; *Old Ben I*, 1 FMSHRC at 1957. Specifically in *Prabhu*, the Commission rejected the respondent's assertion that a violation only can occur if an accumulation of combustible materials has built up over time. 16 FMSHRC at 1049. In rejecting that defense, the Commission relied upon several precedents that taken together conclude that Congress intended to proscribe "masses of combustible materials which could cause or propagate a fire or explosion." *Id.* (citations omitted).

Peabody next contends that the material cited in this Order was not combustible. Resp't Br. at 39. As testimonial support, it points to Ryder, the former day-shift supervisor. Tr. II, 102-103, 115-116. Ryder described the nature of the material as "soupy muddy water...[m]ashed potato maybe consistency with like really wet." Tr. II, 115. The wet nature of the material is

consistent with the fact that the material on the Mother Belt is moved by one-inch or inch-and-a-half water hoses operated by the attendant, whose job is to clean and maintain the Mother Belt at the north tower. Tr. II, 30-31. Given the exceedingly wet nature of the material, Peabody concludes that it was not combustible within the meaning of 30 C.F.R. § 75.400.

I disagree with this second argument, mainly because “damp, wet” material does not foreclose a characterization of combustibility. In fact, the Commission has found that damp and wet coal is still combustible as it can dry up and then propagate a fire or explosion. *See e.g., Mach Mining, LLC*, 40 FMSHRC 1, 3-6 (Jan. 2018) (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013)); *Black Diamond Coal Mining Co.*, 7 FMSHRC at 1120-21 (explaining that if a fire started elsewhere in the mine, the heat could dry out the wet coal, which could cause an ignition, fire, or explosion).

The Secretary argues that the testimonial and documentary evidence clearly establish a violation of the cited standard. The Secretary heavily relies on the fact that Peabody failed to submit any evidence contradicting inspector Elswick’s testimony. Sec’y Br. at 14. As further support, the Secretary points to the testimony of multiple Peabody witnesses, including shift foreman James Mace and dewater supervisors Ryder Richardson, Eugene Faught, and Joseph Kennedy, who admitted knowledge of the accumulations around the Mother Belt before the inspection. Tr. II, 65, 109, 135, 155; Sec’y Br. at 14.

I agree with the Secretary that Peabody violated 30 C.F.R. § 75.400. Here, the uncontradicted testimony of inspector Elswick establishes that there were substantial accumulations of coal, coal fines, and coal dust throughout multiple areas along the Mother Belt conveyor. Elswick began his testimony by describing his arrival at the Mother Belt area. Upon arriving at the cited area, he immediately noticed “accumulations of floating coal dust on the grounds, the ribs.” Tr. I, 201. He describes the area as “real dark, and black.” Tr. I, 201. In terms of the size and extent of the violation, he characterizes the scene with “coal accumulations, floating coal dust, piles of coal, coal spillage, *coal everywhere, everywhere you could see.*” Tr. I, 202 (emphasis added). Later in his inspection, Elswick recalled seeing a damaged roller with a “small flame coming out the lower end...” that was “really hot to the touch.” Tr. I, 202, 211-12. Similarly, he observed multiple chain hangers and shackles rubbing against the conveyor, which made them also “really hot to the touch.” Tr. I, 202. Near the damaged roller, he noticed that coal was “piled up under the bottom of the conveyor lifting the belt off the rollers. So, the rollers weren’t even working as they should be.” Tr. I, 202. Inspector Elswick ultimately concluded that these conditions all amounted to a fire hazard and issued an order, noting the measurements for the accumulations from a dusting to 24 inches deep. Tr. I, 203, 259; Ex. S-5; Ex. S-8, at 3.

The inspector’s account of the violative condition is largely corroborated by his contemporaneous notes and numerous photographs. The first referenced photograph reveals an area of “damp, wet” coal fines everywhere. Ex. S-10; Tr. I, 204. The next exhibit shows the conveyor belt from the bottom side view looking back to the belt, with black material pouring up over the rollers. Ex. S-11, Tr. I, 205. Exhibit S-12 depicts the area near the drive, or head end of the discharge conveyor, revealing grease, oil, and coal laying around the bearing on the roller surrounded by coal fines. Tr. I, 205-206. In support of Elswick’s testimony involving the chain

hanger, Exhibit S-15 shows a hanging chain that had become unfastened from the conveyor. To the right of the chain, there are accumulations of coal in the drip pan. Tr. I, 208.

The damaged roller that had a small flame or spark is depicted in Exhibit S-24. That exhibit shows the roller is dismantled, with the bearings completely gone, and there is a fire, or the “little white area” at the bottom of the roller. Tr. I, 209-11. Even Joseph Kennedy, the owl-shift radius supervisor, explained that the exhibit reveals “a bad roller.” Tr. II, 164. He also agreed that he would not have left the roller in this condition if he had seen it. Tr. II, 164. When asked if the bottom of the photograph revealed a small flame, Kennedy stated “[I] see something there, yeah.” Tr. II, 164. Referencing another photograph, Kennedy explained that he would not have left a coal accumulation underneath the tail of the Mother Belt at the north tower. Tr. II, 163; Ex. S-16. I find no reason to doubt Kennedy’s interpretations of these exhibits.

Applying the reasonably prudent person (“RPP”) standard, I conclude that based on the inspector’s uncontradicted testimony and the Secretary’s corroborative exhibits, there is no question that a reasonably prudent operator would have recognized these widespread conditions as hazardous and violative of the safety regulation regarding accumulations. The regulation intends to eliminate ignition and fuel sources for explosions and fires, including coal accumulations. *Black Diamond Coal*, 7 FMSHRC at 1120 (explaining that masses of combustible materials that “could cause or propagate a fire or explosion is what Congress intended to proscribe”). The Commission has also explained that Congress recognized such ignitions, explosions, and fires as major causes of death and injury to miners. *Old Ben I*, 1 FMSHRC at 195. In this case, the photographic evidence clearly reveals the amount of coal accumulations as extensive, a damaged roller on fire, and chain hangers with shackles rubbing against a conveyor causing friction that could potentially spark. Ex. S-10, 11, 12, 13, 15, 16, 24, 25, 26. These objectively qualify as hazardous conditions and as masses of combustible material under 30 C.F.R. § 75.400, and the type of hazard posed by these conditions is precisely what the regulation aims to prevent. I therefore conclude that the RPP standard is met, and that Peabody violated 30 C.F.R. § 75.400.

3. Significant and Substantial

Next, when inspector Elswick issued this Order, he designated it as significant and substantial. Tr. I, 217. Peabody contests the S&S designation and specifically challenges step three of *Mathies* in the context of accumulation violations. It explains that an ignition or explosion was unlikely because the cited material was exceedingly wet, like a thick soup of mashed potatoes, and a hose provided a constant source of water to wash the belt line. Resp’t Br. at 40-41; Tr. II, 30-31, 107, 113-14. Peabody also argues that the accumulations would have been cleaned up in the context of “continued mining operations,” and thus would not have been reasonably likely to cause injury had the inspector not intervened. Resp’t Br. at 41. The Secretary maintains that all *Mathies* elements are met and that there was a reasonable likelihood for a fire and resulting serious injury to occur. Sec’y Br. at 14-16. For the reasons below, I agree with the Secretary.

a. Mandatory Safety Hazard

In the preceding section, I determined that Peabody violated section 75.400, a mandatory safety standard, when it allowed for coal, coal fines, and block coal to accumulate in amounts ranging from a dusting to 24 inches deep under and around the Mother Belt conveyor in the north tower. This first element is therefore satisfied.

b. Reasonably Likely to Cause the Defined Hazard

Next, the discrete safety hazard against which section 75.400 is directed is a fire or explosion contributed to by accumulations of combustible materials. *See e.g., Black Diamond Coal*, 7 FMSHRC at 1120. Specifically, the key question is whether the accumulations of the “wet, damp” coal fines in this case would eventually dry out and ignite or cause an explosion. As I noted above, the Commission has consistently held that “accumulations of damp or wet coal, if not cleaned up, can dry out and ignite.” *Mid-Continent Res.*, 16 FMSHRC 1226, 1230 (June 1994). The Commission has explained that if it excluded wet coal, it would thwart Congress’ intent to remove dangerous fuel sources that could ignite in mines. *Id.* (citation omitted). In sum, the prospective danger of the cited safety hazard is intended to prevent a fire, ignition, or explosion.

Under the facts, there is a real concern that the coal fines, coal, or block coal would serve as an ignition source and explode or cause a fire. Tr. I, 202. I find that even wet coal remains a danger here as there are nearby frictional heat sources including damaged rollers, shackles, and chains, which would cause the coal to dry out. In the event of an explosion or fire near the Mother Belt, it is reasonably likely that at least one miner would be affected. Tr. I, 216-17. Inspector Elswick testified that there were coal accumulations on the conveyor that could burn, and that the Mother Belt rubbed against masses of coal for almost the length of the entire conveyor. Tr. I, 217. Given this testimony and no convincing contradictory evidence, I find that this element is satisfied.

c. Reasonably Likely to Cause Injury

For cases involving section 75.400, step three of *Mathies* is a bit more specific and is often lumped together with step two. *See e.g., Peabody Southeast Mining, LLC*, 42 FMSHRC 805, 814 (Oct. 2020) (ALJ). The Commission has found that in cases that involve violations which may contribute to the hazard of an ignition or explosion, the likelihood of an injury depends on the existence of a “confluence of factors” that could trigger the ignition or explosion. *Mach Mining, LLC*, 40 FMSHRC 1, 4 (Jan. 2018); *Texasgulf*, 10 FMSHRC at 501. Peabody argues that there is no confluence of factors given that the cited material was “exceedingly wet,” and the continuous hose and dewater system provided a constant source of water. Resp’t Br. at 40-41. Additionally, Peabody contends that the accumulations were a result of the broken airline that occurred the day before, which affected air-powered wipers along the Mother Belt. Resp’t Br. at 41. Peabody argues that it actively addressed the issue of the broken airline with prompt remedial action, resolved the issue as to the drip pan along the Mother Belt, and would have cleaned the coal material had an MSHA inspection never occurred. Tr. II, 98, 113-14.

Again, I disagree with Peabody's argument regarding wet conditions for the reasons stated in the previous section. I also find Peabody's other arguments unconvincing. Several of Peabody's witnesses testified that the repair work regarding the wipers and airline took a few hours and an entire crew. Tr. II, 92, 133. Since the repair work spanned several hours or an entire shift with numerous miners needed to effectively clean up, such extensiveness weighs in favor of finding a higher likelihood of an ignition, fire, or explosion. Also, as the Secretary highlights, Peabody's cleaning efforts primarily focused on the drip pan and not the other accumulations around the Mother Belt, including beneath and around the rollers. Tr. II, 153, 155, 159-62. I find the Secretary's position convincing and find that step three of the *Mathies* test is satisfied for the following reasons.

First, as mentioned above, numerous accumulations of coal were in contact with the belt and rollers in multiple locations, which constitute ignition sources or fire hazards. Tr. I, 202, 216-17. Inspector Elswick explained that the coal was "piled up under the bottom of the conveyor lifting the belt up off the rollers. So, the rollers weren't even working as they should [have] be[en]." Tr. I, 202. Inspector Elswick characterized this as a "fire hazard." Tr. I, 203. Second, even more damaging for Peabody is the presence of the damaged roller that had a "small flame coming out the lower end of the roller" and was "really hot to the touch." Tr. I, 202, 211-12. Elswick further voiced his concerns by testifying to the chain hangers and shackles that rubbed against the conveyor that were also "really hot to the touch." Tr. I, 202. These all serve as significant ignition sources. *See* Ex. S-24; S-27. Finally, with the rollers, shackles, and chain hangers providing significant heat sources, I conclude that was a "confluence of factors" that would trigger an ignition, fire or explosion, even if the coal was initially wet or damp. Therefore, this element is also satisfied.

d. Reasonably Serious Injury

For the fourth element, Commission precedent makes clear that ignitions, fires, or explosions are major causes of injury and death to miners. *Black Diamond*, 7 FMSHRC at 1120; *see also Buck Creek Coal, Inc. v. FMSHRA*, 52 F.3d 133, 135-36 (7th Cir. 1995) (explaining that a fire in an underground coal mine poses a significant risk of injury to miners). Congress intended for mandatory safety standards, including section 75.400, to reduce and eliminate ignition and fuel sources to prevent explosions or fires from harming miners. *Id.* Inspector Elswick's testimony on these points supports this fear as reality. He testified that if the conditions were allowed to persist with examiners and beltmen in the working area servicing the drive in the presence of grease and coal, there likely would be a small fire that would cause smoke inhalation or burns. Tr. I, 216. Based on his over thirty years of mining experience and acknowledgement of a belt fire that killed a few miners several years back, Elswick reasonably concluded that smoke inhalation or burns would be reasonably serious. Tr. I, 195, 216. By crediting Elswick's testimony with substantial weight in accordance with *Harlan Cumberland*, along with the evidence established in this case and relevant Commission precedent, I find that a mine fire, smoke inhalation, or burns would result in a reasonably serious injury. This element is met.

Since I conclude that the four *Mathies* elements are satisfied, I uphold the S&S designation for Order No. 9704220.

4. Unwarrantable Failure

Inspector Elswick also designated this Order as an unwarrantable failure to comply with a mandatory safety standard. Ex. S-5. Peabody argues that inspector Elswick's emphasis on other violations, including the inadequate guarding or damaged rollers, is inappropriate because the Mine Act's plain language mandates that an unwarrantable failure designation to be based solely on the violation at issue. Resp't Br. at 43. Peabody also highlights the following alleged factors: the remedial efforts taken to abate the violative condition; the short amount of time the cited condition existed; the wet nature of the material; the small quantity of the material; the low degree of danger; and the absence of adequate notice for greater efforts at compliance. Resp't Br. at 43-46. The Secretary argues that the factors described in *IO Coal*, ultimately weigh in favor of an unwarrantable failure finding. After carefully weighing each factor in turn, I affirm the unwarrantable failure designation.

a. Duration of the Violative Condition

First, Peabody suggests that the cited condition did not exist for an extended amount of time. Resp't Br. at 44. As support, it states that a crew cleaned the Mother Belt in previous shifts and that by the time the owl shift concluded, all the violative material was "out of the drip pan." Resp't Br. at 44. Respondent goes on to suggest that any material was "remnants." Resp't Br. at 44. Given the amounts of accumulations cited by inspector Elswick and presented throughout the photographs and exhibits offered by the Secretary, I find it difficult to believe that such material constitutes mere "remnants." Additionally, Peabody's argument focuses primarily on the drip pan, but Elswick's comprehensive and detailed inspection reveals that coal fines, coal, and blocks of coal were present all along the Mother Belt from the tail roller to the head roller, not just in or near the drip pan.

Since I find Peabody's position unconvincing, I move to the testimony of several witnesses as support for finding this factor satisfied. I reiterate that the Commission has allowed even imperfect evidence of duration to be considered by a decisionmaker. *Coal River*, 32 FMSHRC at 93. For instance, inspector Elswick testified that the accumulations had been "there for numerous shifts best I could tell by the amount and the location." Tr. I, 209. His estimate constitutes imperfect evidence, but his position is buttressed by Peabody's own witnesses. Mace explained that he noticed accumulations along the Mother Belt around 3:00pm to 11:00pm on the day before the inspection. Tr. II, 64. As noted in an earlier discussion, the Commission has found that a single shift or 8 hours is more than sufficient to satisfy this factor. Even so, Respondent witness Faught also stated that the accumulations were present for at least two shifts before the inspection. Tr. II, 135. Thus, I ultimately conclude that the cited violation likely existed for at least one shift and likely two shifts before Elswick's inspection. This weighs in favor of an unwarrantable failure designation.

b. Extent and Obviousness of the Violative Condition

Peabody next argues that the material present during the inspection was not extensive, and in turn, not obvious. Resp't Br. at 44. As support, it suggests that Erwin cleaned the drip pan from about the halfway point of the beltline to the north tower, so any material that remained

only existed from the halfway point to the discharge area. Tr. II, 113. The Secretary disagrees and contends that the accumulations of coal surrounding the Mother Belt were both extensive and obvious as supported by inspector Elswick's testimony and photographic evidence. Sec'y Br. at 18. I agree with the Secretary. Peabody's position again ignores that the cleaning efforts focused primarily on the drip pan and that the extensiveness of the coal depicted in the photographic evidence likely did not accumulate only in a few hours between the cleanup and the inspector's arrival.

Here, inspector Elswick described what he observed upon arriving at the Mother Belt. He first noticed "accumulations of floating coal dust on the ground, the ribs," that the area was "real dark and black," and there were "coal accumulations, floating coal dust, piles of coal, coal spillage, coal everywhere, everywhere you could see." Tr. I, 202. Based on this description, it is not tenable that Peabody adequately cleaned all these areas prior to the inspection. It may have been the case that Peabody cleaned the drip pan area, but neglected these other areas. In either case, I cannot ignore inspector Elswick's detailed description of the areas covered in accumulations, or the photographic evidence supporting his testimony.

Specifically, Ex. S-11 reveals the conveyor belt and black material up over the roller; Ex. S-12 shows grease, oil, and coal laying around a bearing on a roller near the drive area; and Ex. S-15 depicts accumulations of coal laying in the drip pan. Additionally, Ex. S-16 and S-26 are photographs with piles of black coal. Most damaging is Ex. S-24, which reveals a damaged roller with a small flame in the bottom of the roller. Tr. I, 209-11. Lastly, the Order itself describes the accumulations as extending from the tail roller to the head roller and measuring from a dusting to a depth of 24 inches. Ex. S-5. After reviewing inspector Elswick's testimony and the Secretary's exhibits, I find the violative condition both obvious and extensive in scope, magnitude, and size. This factor therefore weighs in favor of an unwarrantable failure finding.

c. Knowledge of the Condition

Peabody admits that it had knowledge of coal accumulations near the Mother Belt, however, it argues that its corrective measures should be considered when weighing this factor. The Secretary and I agree that Peabody's witnesses admitted actual knowledge of the accumulations near the Mother Belt, specifically in the drip pan. Sec'y Br. at 20. However, it appears from the record that Respondent may not have had actual knowledge of the other accumulations cited and photographed by the inspector. Regardless, constructive knowledge of those other accumulations is apt here. *See e.g., Coal River Mining, LLC*, 32 at 90-92 (finding knowledge may be established where an operator's awareness of predicate circumstances meant it reasonably should have known of the violation); *cf.*, former Commissioner Althen's dissent in the flagrant violation context in *Am. Coal*, 38 FMSHRC at 2099, 2103 (Aug. 2016). I disagree with Peabody regarding the relevance of its corrective measures as these actions are more applicable when dealing with the unwarrantable failure factor regarding abatement efforts.

Here, as noted, Peabody knew of coal accumulations around the Mother Belt. Mace, Ryder, Faught, and Kennedy all acknowledged awareness of accumulations at the Mother Belt before the inspection. Tr. II 64, 109, 135, 155. Even if they did not know of the exact location of the accumulations and only focused on the drip pan area, constructive knowledge applies. As

discussed in the previous factor, the obviousness and extent of the coal, coal fines, and block coal accumulations in the surrounding area, not only near the drip pan, satisfies any level of constructive knowledge. If they had surveyed these areas, they would have been aware of these accumulations and should have known of the violations. Kennedy even explained that if he had seen the damaged roller, he would not have left the roller in that condition with the small flame developing. Tr. II, 164. Similarly, Kennedy explained that he would not have left coal accumulations underneath the tail of the Mother Belt at the north tower. Tr. II, 163. Though his testimony may bolster Peabody's argument that it had no actual knowledge, Kennedy's testimony confirms or suggests Peabody, by leaving the damaged roller with a flame developing and accumulations underneath the Mother Belt, should have known those were violations upon a simple or cursory observation. Under *Coal River*, an operator's awareness of predicate circumstances, such as knowing that coal accumulations had been an issue around the Mother Belt over a span of several days, means it is reasonable to conclude that it should have known of the violations. Given this, I find that Peabody had sufficient knowledge or should have had sufficient knowledge of the violative condition and that this factor weighs in favor of an unwarrantable failure finding.

d. Degree of Danger Posed by the Condition

For this factor, Peabody points out again that the material was "exceedingly wet," which allegedly lowers the degree of danger. Resp't Br. at 45. The Secretary argues that the violative condition posed a high degree of danger to miners since there were significant amounts of coal accumulations that serve as multiple sources of ignition in various areas around the Mother Belt. Sec'y Br. at 19. I agree with the Secretary. Again, Peabody's position ignores the fact that wet, damp coal fines can eventually dry out due to friction, as caused by constant rubbing against the conveyor, hanging chains, or rollers. As confirmation, the Commission has consistently found that "wet coal accumulations pose a *significant danger* in underground coal mines" because they can dry out through frictional contact with belt or rollers, which can cause a fire or explosion. *Mach Mining, LLC*, 40 FMSHRC 1, 3-6 (Jan. 2018) (citation omitted).

Here, inspector Elswick testified that if a coal accumulation were to fuel a fire or explosion, a miner would suffer serious injuries from smoke inhalation to burns. Tr. I, 216. Additionally, I find the damaged roller amid the accumulations on the Mother Belt to be a serious source of danger. Inspector Elswick explained that the roller had produced enough heat that it dried the surrounding area and had a small flame protruding from it. Tr. I, 211; Ex. S-24. I conclude that the danger here is not so high that it alone warrants an unwarrantable failure given the constant source of water cited by Peabody, but it is sufficient for this factor to weigh in favor of the Secretary's designation of an unwarrantable failure.

e. Abatement Efforts

Peabody next argues that its remedial actions to address the material along the Mother Belt, immediately before the inspection, weigh against a finding of unwarrantable failure. Resp't Br. at 43. It states that the airline malfunctioned, which prompted remedial actions, such as supervisors manually washing the beltline. Resp't Br. at 44. The Secretary, in contrast, highlights inspector Elswick's testimony about a substantial number of accumulations and Peabody's

failure to clean the areas or remove hazards during his inspection. Sec’y Br. at 21. As additional support, the Secretary again cites the photographic evidence as well as Kennedy’s testimony that the cleaning efforts may have only focused on clearing out the accumulations from the drip pan. Sec’y Br. at 21. I agree with the Secretary.

Here, though I commend Peabody’s attempts at clearing the Mother Belt area following an unpredictable malfunctioning airline, unfortunately, Peabody’s cleaning efforts primarily focused on the drip pan, while neglecting other areas that also required correction. Kennedy testified that by the end of his shift, the area that was completely cleaned was the drip pan. Tr. II, 155. However, Elswick’s testimony and the photographic exhibits reveal that other areas along the Mother Belt were plagued with coal accumulations—not just the drip pan. Ex. S-12; S-15; S-16; S-26. Kennedy even admitted that he had not noticed that the tail of the Mother Belt had accumulations underneath the belt. Tr. II, 163; S-16. He confirmed that he would not have left that accumulation if he had personally observed what was depicted in Ex. S-16. Tr. II, 163. The testimony and record evidence support the finding that Peabody’s abatement efforts were not aimed properly at all areas affected by coal accumulations and may have been myopic in scope. For this reason, I find this factor weighs in favor of an unwarrantable failure finding.

f. Notice of Need for Greater Compliance Efforts

Lastly, Peabody argues that inspector Elswick’s testimony regarding the role that the mine’s history of violations played in his designation of an unwarrantable failure establishes that there was no notice of a need for greater compliance efforts. It also notes that the Secretary failed to produce any other evidence that would suggest Peabody was placed on notice. The Secretary counters by explaining that Peabody had been cited for the “exact condition” 70 times in the past two years. Tr. I, 221; Ex. S-5; S-32. The Secretary suggests that a high number of prior citations for the same condition and standard provides sufficient notice that additional efforts are needed to address related hazards. Sec’y Br. at 20. This factor is closer than the others, but I ultimately agree with the Secretary.

As mentioned in a previous section, the Commission has found that “[r]epeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard.” *IO Coal*, 31 FMSHRC at 1353 (citation omitted). It is important to note that the Commission has characterized repeated violations as relevant and not dispositive. *Id.* However, the Commission in *Consolidation Coal*, notes that “a high number of past violations of *section 75.400* serve to place an operator on notice that it has a recurring safety problem in need of correction.” 23 FMSHRC 588, 595 (June 2001) (citation omitted) (*emphasis added*).

Here, inspector Elswick confirmed that the mine’s history of violations regarding section 75.400 did not play a big role in his determination of an unwarrantable failure because it is a broad standard. Tr. I, 258. He further explained that a violation under that regulation could be from accumulations of oil or grease and not just accumulations of coal. Tr. I, 258. There is nothing in the record or testimony that suggests that the previous violations of section 75.400 were related to coal accumulations. But, under my reading of *Consolidation Coal*, if an operator receives a high number of violations of *section 75.400* in recent years, it is reasonable to

conclude that an operator would be on adequate notice of a “recurring safety problem in need of correction” regardless of what type of material is accumulating. The issue is about combustible materials accumulating and potentially causing an explosion or fire. Applying this principle to this case, I conclude that 70 violations in two years is a high number that effectively places Peabody on sufficient notice to satisfy this factor as weighing in favor of an unwarrantable failure.

Because all the factors weigh in favor of finding an unwarrantable failure, I conclude that the Secretary properly designated Order No. 9704220 as resulting from the operator’s unwarrantable failure to comply with 30 C.F.R. § 75.400.

5. Gravity

For the gravity assessment, inspector Elswick designated this Order as reasonably likely to result in “lost workdays or restricted duty,” which would affect one person. Peabody does not contest the number of people affected; however, it contests the remaining findings in its discussion arguing against a finding of S&S. Respondent essentially argues that there was no reasonable likelihood because the material was exceedingly wet as it was described as a thick soup of mashed potatoes. Resp’t Br. at 40. Additionally, Peabody notes that there was a constant source of water present through the continuous dewater system. Resp’t Br. at 41. For reasons already stated, I do not agree with Peabody that the wet nature does much to lower the likelihood of occurrence to none. I also note that even though the potential hazard could result in a fire, explosion, or ignition leading to death like the Aracoma incident, the inspector designated a lower level of gravity, specifically lost workdays. The Secretary argues that the inspector’s designations are supported by the evidence and the inspector’s testimony. I agree with the Secretary.

Initially, I credit inspector Elswick’s testimony as support to uphold his gravity designations. First, for reasonable likelihood, Elswick testified that “if the [conditions were to] exist—continue to exist, miners would definitely receive injury from smoke inhalation or burns from fire.” Tr. I, 216. As support, he points to the massive amounts of accumulations, the belt area, and the number of workers nearby. Tr. I, 216. As mentioned before, there were several instances where the inspector noticed hot or warm areas resulting from frictional sources. If the conditions were to persist with rubbing of the conveyors, chains, or coal accumulations along the belt, any wet or damp coal fines likely would dry out and result in a fire, explosion, or ignition. Tr. I, 208-09, 211, 259. These facts support a finding of reasonable likelihood, and I cannot in good faith find that there would be no likelihood just because there may be a constant source of water or that the material at the time was characterized as wet or damp. As noted above, the Commission has made clear that wet and damp coal fines can still be considered combustible and lead to fires or ignitions.

With respect to lost workdays or restricted duty, I also credit Elswick’s conclusion that “[i]t could’ve been deadly but [he] found it more reasonable from smoke inhalation or burns to be this level of gravity.” Tr. I, 216. Peabody does not seem to directly contest this finding, so I affirm the inspector’s designation. I also recognize that if a fire or explosion were to occur in the area given the size and scope of the accumulations, there is a high likelihood that any miner

affected would experience lost workdays or restricted duty from a few different types of injuries, including burns, smoke inhalation, or something more severe.

Lastly, I consider whether one person would be affected. Again, Peabody does not contest this specific finding, nor does it submit any evidence to show that no persons would be in the area surrounding the Mother Belt in case of an ignition or explosion caused by an accumulation of coal or coal fines. So, I credit inspector Elswick once more and have no reason to doubt his estimation. In fact, he states “[t]hat easily could’ve affected three or four due to, you know, there is occasionally more people in the area.” Tr. I, 218-19. At the time of the inspection, however, he only counted one person in the area stationed at the head end of the conveyor on the left-hand side. Tr. I, 218-19. In sum, I find that inspector Elswick’s credible and uncontroverted testimony supports the Secretary’s designation of gravity.

6. Negligence

With respect to this Order, Peabody also contests the high negligence designation. It argues that Elswick improperly based his high negligence finding on unrelated issues such as guarding and the damaged roller. Resp’t Br. at 43. Peabody also points out that the inspector specifically testified that this may not be a high negligence matter without the presence of those other conditions. Resp’t Br. at 42. The Secretary does not specifically address this issue, but she does mention in passing that the standard for high negligence is met. Sec’y Br. at 18. This is a close issue, but after careful consideration of the facts and testimony, I affirm the high negligence designation.

To support his designation of high negligence, inspector Elswick testified that there “were no mitigating circumstances. Nobody was cleaning on it, nobody else was trying to do anything to remove the hazards. They were obvious and extensive...” Tr. I, 219. As Peabody points out, Elswick explained that “if there had only been accumulations and nothing else, then you know maybe it wasn’t high negligence. Maybe they missed that. But with the number of other things I found in that short distance of area, guarding wasn’t correct, accumulations of coal, doors off electrical boxes, broken rollers. Just numerous things it led to the high negligence.” Tr. I, 219. I acknowledge Peabody’s argument and agree that the doors off electrical boxes and guarding may not be relevant to this analysis. However, the vast accumulations of coal and the broken rollers that were potentially caused by the coal accumulations, and the rollers that were lifted up from the conveyor due to the accumulations, are all relevant and support high negligence. Also, the inspector’s observation that no one in the area at the time was addressing these accumulations also shows that the operator was highly negligent. Tr. I, 219. Peabody’s own witnesses admit that they were aware of some accumulations in the Mother Belt area, but the record, as discussed above, suggests that they were neglectful of other areas. Tr. II, 64, 109, 135, 155. As a reasonable operator, it is important for all areas to be addressed not just a drip pan that became a focus of a cleaning effort only after notice of a broken airline.

Peabody elsewhere in its brief addresses potential mitigating circumstances, including its remedial effort to remove coal accumulations from the drip pan following the airline incident. Resp’t Br. at 43-44. However, as I mentioned above, these remedial actions were primarily focused on the drip pan area of the Mother Belt and not the other various areas that had extensive

accumulations as testified to by the inspector and as depicted in numerous photographic exhibits. The amount and extent of the coal and black areas in the photographs also suggest that these were not mere “remnants” of the clean-up that occurred during the owl shift. For this reason, I find insufficient relevant mitigating circumstances to reduce the high negligence finding.

In sum, for Order No. 9704220, I find a violation, affirm the S&S, unwarrantable failure, gravity, and negligence designations, and assess a civil penalty of \$8,800.00 as calculated in the following section.

V. PENALTY

Commission ALJs have the authority to assess civil penalties *de novo* for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that the ALJ consider the following six statutory penalty criteria in assessing civil monetary penalties:

(1) the operator’s history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator’s ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Peabody is a large operator as it had mined 134,149,006 tons of coal in 2021. Specifically, Shoal Creek Mine had mined 117,126 tons of coal. *See* Sec’y Pet., Ex. A.

Order No. 9704127

For this first Order, the penalty was specially assessed at \$50,000. Tr. I, 18. However, the record and testimony do not shed light on the reason for this special assessment. The Secretary’s representative in passing stated that the assessment was, “appropriate given the extensive and extremely dangerous nature of the rib and given that the condition had existed for quite some time.” Tr. I, 18. I find the absence of a narrative findings for a special assessment and any testimony on this issue as a reason to disregard this assessment. Nonetheless, Commission case law makes clear that ALJs make penalty determinations *de novo*. *Solar Sources Mining, LLC*, 42 FMSHRC 181, 183 (Mar. 2020); *Douglas R. Rushford Trucking*, 22 FMSHRC 616, 622 (May 2000).

Specifically for special assessments, under 30 C.F.R. § 100.5(a), “MSHA may elect to waive the regular assessment under §100.3 if it determines that conditions warrant a special assessment.” When MSHA determines that a special assessment is warranted, the proposed penalty simply must be based on the six criteria under section 100.3(a) but does not have to be calculated in accordance with the penalty conversion tables in section 100.3. 30 C.F.R. § 100.5(b). Rather the Secretary has discretion in proposing the penalty amount and she has no obligation to “prove h[er] decision to suggest a special assessment rather than a regular assessment” as “[t]hat decision is just part and parcel of the Secretary’s internal deliberations

about what penalty to *recommend.*” *Am. Coal Co. v. FMSHRC*, 933 F.3d 723, 727 (D.C. Cir. 2019); 30 C.F.R. § 100.5(a).

In *Solar Sources Mining, LLC*, the Commission clarified that Judges “must make an independent assessment based upon the facts and penalty criteria without using the special assessment as any sort of baseline or reference point.” *Solar Sources*, 42 FMSHRC at 197, 198 n.25, 200. In other words, Judges are not required to “explain their divergence from a special assessment.” *Id.*; *see Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016) (explaining that the Judge’s assessment must be independent and the Secretary’s proposal is not a baseline or starting point that the Judge should use). The Commission has further held that the procedures by which penalty assessments are proposed by the Secretary, including special assessments, are immaterial to a penalty assessment by the Commission or its ALJs. *Black Diamond Coal Co.*, 7 FMSHRC at 1121-1122; *Sellersburg Stone Co.*, 736 F.2d 1146, 1151-52 (7th Cir. 1984), *aff’g* 5 FMSHRC 287 (Mar. 1983) (“neither the ALJ nor the Commission is bound by the Secretary’s proposed penalties,” also, “neither the Act nor the Commission’s regulations require the Commission to apply the formulate for determining penalty proposals that is set forth in section 100.3”); *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Given this Commission case law, I conclude that I need not defer to the specially assessed penalty and so I conduct a *de novo* analysis of the six penalty criteria in accordance with section 110(i) of the Mine Act.

In the fifteen months preceding the issuance of Order No. 9704127, MSHA issued thirty-nine violations of section 75.202(a) to Peabody Southeast Mining, LLC, at its Shoal Creek Mine. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). The parties stipulated that payment of total proposed penalties in this matter will not affect Peabody’s ability to continue in business. Tr. I, 9. I determined Peabody’s negligence to be on the high end of moderate and that its violation of section 75.202(a) resulted from an unwarrantable failure. Regarding the gravity of the violation, I affirmed the designation as S&S and determined that it would affect one person and was reasonably likely to result in a fatal injury. Moreover, Peabody demonstrated good faith by promptly installing additional roof supports, timbers and steel jacks and adequately protecting the ribs from falling on miners in the future. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$28,000.00.

Order No. 9704128

For Order No. 9704128, the Secretary proposed a regular assessed penalty of \$6,368.00. In the fifteen months preceding the issuance of Order No. 9704128, MSHA issued four violations of section 75.360(b) to Peabody Southeast Mining, LLC, at its Shoal Creek Mine. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). Again, the parties stipulated that payment of total proposed penalties in this matter will not affect Peabody’s ability to continue in business. Tr. I, 9. As outlined above, I determined Peabody’s negligence to be on the high end of moderate and the violation as resulting from an unwarrantable failure to comply with section 75.360(b). Regarding the gravity of the violation, I found the violation as S&S, that it would affect one person, and that it was reasonably likely to result in a fatal injury. The severity of the potential injury along with the determination that there was an unwarrantable failure, supports a slight divergence from the penalty proposed by the

Secretary. I do recognize that Peabody demonstrated good faith by promptly installing roof support in the form of timbers and steel jacks. According to Adams, this sufficiently protected the ribs from falling onto miners. However, this does not necessarily have much bearing on ensuring an examiner's ability to conduct an adequate pre-shift examination. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$8,500.00.

Order No. 9704220

For Order No. 9704220, the Secretary proposed an assessed penalty of \$5,293.00. Under 30 C.F.R. § 100.4(b), "[t]he minimum penalty for any order issued under section 104(d)(2) of the Mine Act shall be \$5,293.00." Therefore, the Secretary proposed the statutory minimum for this violation. In the fifteen months preceding the issuance of Order No. 9704220, MSHA issued fifty-nine violations of section 75.400 to Peabody Southeast Mining, LLC, at its Shoal Creek Mine. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). This put them on more than sufficient notice that they had a recurring safety problem regarding accumulations. Again, the parties stipulated that payment of total proposed penalties in this matter will not affect Peabody's ability to continue in business. Tr. I, 9. I determined that the violation resulted from the operator's unwarrantable failure to comply with section 75.400 and that the operator's negligence was high. I also found the gravity of the violation to be significant and substantial, affecting one person, and reasonably likely to result in lost workdays or restricted duty. Peabody demonstrated good faith after the issuance of the Order by cleaning all the accumulations of combustible material and adequately rock dusting the area. Elswick terminated the Order after concluding that the conveyor was able to run without contact with any of the coal accumulations.

Considering the six criteria, I disagree that this violation warrants the statutory minimum penalty. Specifically, the unwarrantable failure and high negligence designations weigh in favor of an increased penalty. As previously stated, the cited accumulations were extensive in size and several ignition sources, including a damaged roller with a small flame, were present near coal accumulations in contact with the belt, and there were little to no relevant mitigating circumstances. I thus assess a penalty of \$8,800.00.

VI. CONCLUSION AND ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 9704220 be **AFFIRMED**, that Order Nos. 9704127 and 9704128 be **MODIFIED** to reduce the degree of negligence from high to moderate on the “high end”, and that Respondent pay a total civil penalty of \$45,300.00 within 30 days of the date of this Decision. Accordingly, this case is **DISMISSED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 2025

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

v.

PEABODY SOUTHEAST MINING,
LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2023-0065
A.C. No. 01-02901-568367

Docket No. SE 2023-0102
A.C. No. 01-02901-569908

Mine: Shoal Creek Mine

DECISION AND ORDER

Appearances: Elaine Abdoveis, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee for the Petitioner,

Arthur Wolfson, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania for
the Respondent.

Before: Judge McCarthy

I. STATEMENT OF THE CASE

These consolidated dockets are before me upon two Petitions for the Assessment of Civil Penalty filed by the Secretary through her Mine Safety and Health Administration (“MSHA”) against Respondent Peabody Southeast Mining, LLC (“Peabody” or “Respondent”), pursuant to section 105(d) of the Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary alleges Peabody violated 30 C.F.R. sections 75.400 and 75.363(a) when it allowed combustible material to accumulate along the slope belt and at the slope tail and failed to fully correct that condition when notated in the relevant pre-shift examinations. The Secretary assessed a total penalty of \$126,227.00, \$46,799.00 for Order No. 9704796 and \$79,428.00 for Order No. 9704803.

A hearing was held in Birmingham, Alabama, on April 11 and 12, 2024. During the hearing, the parties offered testimony and documentary evidence.¹ The parties timely filed their briefs on June 21, 2024.

The issues presented are whether Peabody violated the cited standards, and if so, whether the significant and substantial (“S&S”), unwarrantable failure, gravity, and negligence designations were appropriate, and what civil penalties should be assessed. For the reasons below, I modify the type of action for Order No. 9704796 from a “104(d)(2) order” to a “104(d)(1) order.” For Order No. 9704803, I modify the type of action from a “104(d)(2) order” to a “104(d) order,” and reduce the degree of negligence from “high” to “moderate” on the “high end.” I assess a total penalty of \$80,000.00, \$45,000 for Order No. 9704796, and \$35,000.00 for Order No. 9704803.

II. STIPULATED FACTS

The parties submitted the following joint stipulations:

1. Peabody qualifies as an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
2. Shoal Creek Mine is a “mine” as defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. The products of the Shoal Creek Mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803.
4. This case is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (“Commission”) and its designated Administrative Law Judges (“ALJs”) pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. § 801 *et seq.*
5. The individual whose name appears in Block 22 of the Orders in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Orders were issued.
6. The Orders at issue, as well as any modifications, were properly served by a duly authorized representative of the Secretary of Labor, through MSHA, upon an agent of Respondent on the date and place stated therein.
7. The Orders contained in “Exhibit A” attached to the Secretary’s petitions in these consolidated cases are authentic copies of the Orders with all the appropriate modifications or abatements, if any.

¹ In this decision, “Tr. #” refers to the hearing transcript, with “Tr. I, #” and “Tr. II, #” referring to volume 1 and volume 2, respectively. “Ex. P-#” refers to the Petitioner’s exhibits and “Ex. R-#” refers to the Respondent’s exhibits. “Jt. Ex. #” refers to joint exhibits.

8. Peabody Southeast Mining, LLC timely contested the Orders.
9. Payment of the total proposed penalties in these matters will not affect Peabody's ability to continue in business.

Jt. Ex. 1.

At hearing, the parties also stipulated that Order No. 9212662, not at issue in this proceeding, serves as the predicate 104(d)(1) order, and that Order No. 9212660, also not at issue here, serves as the predicate citation underlying Order No. 9212662. Tr. I, 166-67.

III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

For this case, Inspector Miller Cruz Craig issued two 104(d)(2) orders, the first for allowing accumulations of combustible material to develop along the slope conveyor belt and slope tail, and the second for failing to immediately correct or post against the accumulations, a hazardous condition. *See* Order Nos. 9704796, 9704803. To uphold these Orders, the Secretary must prove a cited violation and any related findings by a preponderance of the credited, relevant evidence. *Jim Walter Res. ("JWR")*, 28 FMSHRC 983, 992 (Dec. 2006). This burden of proof requires the Secretary to demonstrate that the "existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

In the succeeding sections, I apply this standard to fully analyze both orders in turn, starting with the allegedly violative coal accumulations described in Order No. 9704796.

Order No. 9704796

1. Findings of Fact

On November 9, 2022, MSHA Inspector Craig arrived at the Shoal Creek Mine to conduct a regular E-01 inspection. Tr. I, 40, 101. His inspection included the slope belt, which is in the dewater area of the mine.² The inspection of this area began at the slope tail's clean room, which was located at the bottom of the slope's incline. Tr. II, 103, 108, 231-32. In the clean room, Craig observed what the evening shift's supervisor described as wet, soupy material on the ground. Tr. II, 34, 108-09.

Before traveling up the slope's incline to inspect the rest of the belt, Craig conversed with Eugene Faught, the evening shift's radius and dewater supervisor. Tr. I, 126; Tr. II, 39. Faught informed Craig that three days earlier, several legs on the slope belt broke, causing coal spillage.

² During the April 10, 2024, hearing for SE 2023-0020 et al., I incorporated by reference Jim Mace's, Peabody's day-shift foreman's, testimony on the background of the dewater system at the Shoal Creek Mine for the dockets at issue in this Decision. Tr. II, 10. A discussion of the dewater system is found in my decision for *Sec'y of Labor v. Peabody Southeast Mining, LLC*, Docket Nos. SE 2023-0020, -0060 (June 2025) (ALJ) at * 3-4. It provides some helpful background about how Peabody's dewater and sump systems operates.

Tr. II, 139. Craig then asked Faught about the wet material on the ground of the clean room and why Craig did not see anyone cleaning the accumulations near the tailpiece area. Tr. II, 139. Faught explained that a miner, Hunter Isaacs, was assigned to clean the area, but that Isaacs needed to retrieve a piece of machinery, a Bobcat, to facilitate the cleaning. Tr. II, 35, 38. Craig then ordered the shutdown of the belt while still in the tailpiece area. Tr. II, 41, 110-11. Faught assured Craig that he had more workers cleaning the slope belt. Tr. II, 41-42. But, once they arrived at the slope belt, Faught stated that the miners went to the tailpiece area. Tr. II, 41-42. Craig asked Faught again why no one was cleaning the accumulations. Tr. II, 42.

During the inspection, Craig observed accumulations of coal and coal fines from the slope tail to the 633-belt structure mark. Tr. I, 49-64, 83; Ex. P-1-P-5. He measured the accumulations using a tape measure. Tr. I, 51. At the slope tail, he measured the accumulations to be around 300 feet long, 46 inches wide, and 32 inches deep. Tr. I, 49-59; Ex. P-1. Craig testified that the accumulations were piled up under the belt and were 32 inches deep and could not grow taller because of the belt. Tr. I, 49. The accumulations were also touching the valve of the belt and were worn flat. Tr. I, 50-51. Craig estimated that the top three quarters were dry coal fines, while the bottom quarter was more wet. Tr. I, 51. Craig theorized that the top was dry due to the frictional heat caused by the belt running in contact with the coal accumulations. Tr. I, 51. At the start of the inspection, the slope belt was running, so the coal accumulations were, at some point, in contact with the running belt for almost 300 feet. Tr. I, 45, 49-50.

From the slope tail, Craig continued to walk along the belt and observed accumulations of larger chunks of dry coal piled up to an elevated catwalk approximately six feet over the concrete. Tr. I, 60. The slope belt had harder coal fines and larger chunks of coal about the size of a baseball with a little bit of rock, and they were mostly dry. Tr. I, 60. Craig testified that as he walked, he did not notice any miners cleaning the accumulations along the belt. Tr. I, 70-71. As he walked outby along the belt, he observed coal accumulations around six to eight inches deep that were located directly under the belt or piled offside. Tr. I, 62, 63, 69, 70. At one point, he saw one of the offside rollers spinning in these coal accumulations. Tr. I, 70.

Craig further observed several fire hazards, including multiple rollers in the slope tail area covered in coal accumulations. Tr. I, 52-53. He characterized these same rollers as “bad” because some had locked bearings or were completely worn flat. Tr. I, 52-53. Craig testified that he could feel heat in the vicinity of a bad roller even though the belt had been shut off. Tr. I, 53-54. He further testified about his concern that he observed contact between coal accumulations and many bottom rollers in the slope tail. He found these bottom rollers to be covered in coal or “locked up.” Even some of the top rollers had accumulations around them, which also caused friction and heat. Tr. I, 55-56. Craig clarified that damaged rollers were not only at the slope tail, but also on the slope belt. Tr. I, 69; Ex. P-1. Taken together, he viewed these conditions as ignition sources and fire hazards. Tr. I, 52-54, 69.

At hearing, Craig introduced several photographs of his inspection. Exhibit P-3 reveals a damaged roller on the slope belt tail covered in accumulations. Tr. I, 75; Ex. P-3 at 1-4. Another photograph depicts a worn-out roller with coal accumulations over and under it. Ex. P-3 at 4; Tr. I, 77-79. Several photographs demonstrate that the rollers and the belt had been in contact with the accumulations. *See generally* Ex. P-3.

Upon observing the accumulations, the multiple fire hazards, and the absence of anyone cleaning the accumulations, inspector Craig issued Order No. 9704796 to Peabody for allowing accumulations of combustible material to exist on the slope belt and slope tail area. After this Order was issued and the belt stopped running, the mine was temporarily shut down. Tr. II, 198. Craig testified that after Order issuance, miners from other areas came to clean the belt in compliance with his Order. James Barnett, the evening shift's fire boss, estimated that around fifty to sixty miners were cleaning the belt at that time. Tr. II, 198. Eventually, Craig modified the Order to allow the belt to run and activate the mucker system,³ which cleaned and conveyed the material out of the mine. Tr. I, 211.

Eventually, after assigning twenty miners to clean during every shift thereafter, Craig terminated the Order on November 11, 2022. Tr. II, 44. Craig testified that he spoke to Peabody's management and discovered that it took 1,250 manhours, calculated by multiplying the number of miners cleaning on each 8-hour shift, to fully remove the accumulations. Tr. I, 30. Barnett testified that it would've taken a couple weeks longer to fully rectify the condition in the absence of Craig's Order. Tr. II, 198.

2. Finding of Violation

Order No. 9704796 states that:

The operator has allowed accumulations of combustible material in the form of coal, coal fines and block coal to accumulate on the Slope belt and Slope tail. When inspected the accumulations ran from the slope belt tail to the 633 belt structure mark and measured 6in to 32in in depth. The following conditions [were] found along the slope belt.

1. Slope belt tail area had accumulations of coal that was rib to rib and was in contact with the belt and the bottom belt rollers. The accumulations measured 300ft long x 46" wide x 32" high. The accumulations was also piled up on the belt structure.
2. Slope belt tail to the 633ft structure mark the accumulations coal ranged from 6" – 32" in depth and was rib to rib. The accumulations was in contact with the belt and the bottom belt rollers in multiple areas. The accumulations was also piled up on the belt structure in multiple areas.
3. At the slope tail there was (5) stuck rollers that were worn flat by the belt. The belt rollers was covered in dry coal fines when observed.

³ The mucker system involves using a pressurized hose to wash the coal accumulations down into a mucker that is shaped like a trough, and then onto the slope belt and eventually out of the mine. Tr. I, 229-231; Tr. II, 62, 71. If the belt is shut down, then the pumps cannot run, which prevents the mine from using the mucker system. Tr. II, 81-82.

4. There was multiple bottom belt rollers that was running in accumulations at the slope belt tail area.

The belt air flows inby where the slope miners work on a daily basis. This area also ventilates the South Main Seals. Miners are exposed to this condition multiple times a day on a daily basis. Miners would receive fatal injuries due to how extensive the amount of accumulations that [were] present which would allow the fire to propagate inby towards the miners working on the slope and slope tail allowing the miners to be exposed to a dangerous atmosphere consisting of smoke and other gases from a beltline fire. This area was last examined on 11/9/2022. This condition has been in the exam book dating back to 11/6/2022. An agent of the operator stated that they have known of the condition but had not been able to work on the accumulations at the slope tail due to man power. There was not anyone working on the accumulations at the slope tail where the accumulations [were] in contact with the belt and the bottom belt rollers. The belt was running at the time of the inspection.

* This exact condition has been cited 75 times in 2 years.

* This condition is obvious and extensive to the most casual observer by the amount of material that has been allowed to accumulate on this beltline.

* This operator has engaged in aggravated conduct constituting more than ordinary negligence by putting miners inby this hazardous condition by creating a fire hazard by the amount of accumulations.

Standard 75.400 was cited 75 times in two years at mine 0102901 (75 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-1.

Inspector Craig found that the alleged facts found in the Order, when taken as a whole, demonstrate a violation of 30 C.F.R. § 75.400. That regulation requires that “coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials, [] be cleaned up and not permitted to accumulate in active workings, or diesel-powered electric equipment.” 30 C.F.R. § 75.400.

The Commission has found that this standard prohibits accumulations but not mere spillages. See *Old Ben Coal Co., (Old Ben Coal II)*, 2 FMSHRC 2806, 2808 (Oct. 1980) (recognizing that a non-violative spillage may result from normal mining operations). The Commission, however, has not set out a bright-line distinction between an accumulation and spillage. Instead, in *Old Ben I*, the Commission explained that “whether a spillage constitutes an accumulation...is a question, at least in part, of size and amount.” *Old Ben Coal Co., (Old Ben I)*, 1 FMSHRC 1954, 1958 (Dec. 1979). *Old Ben II* clarified that an accumulation is “[t]hose masses of combustible materials which could cause or propagate a fire or explosion...” 2

FMSHRC at 2808. Put together, a violation occurs, “where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present.” *Id.* (footnote omitted); *see also Black Beauty Coal Co.*, 703 F.3d 553, 558-59, 559 n.6 (D.C. Cir. 2012) (explaining that, although spills may occur quickly, accumulations of combustible materials substantial enough to cause or propagate a fire are prohibited even if recent).

The Commission has adopted an objective test for this standard. To determine if an accumulation exists, an ALJ must ask whether, “a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (1990), *aff’d*, *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292 (10th Cir. 1991) (citation omitted). The Commission has stated that this test “contemplates an objective—not subjective—analysis of the surrounding circumstances, factors and considerations bearing on the inquiry at issue.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (citing *Great Western Electric Co.*, 5 FMSHRC 840, 842-43 (May 1983); *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)). Some factors to consider include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator’s mine. *Webster Cnty. Coal, LLC*, 35 FMSHRC 2847, 2861 (Aug. 2013) (ALJ) (citing *BHP Minerals Int’l, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996)).

The Commission has expressly rejected the argument that “accumulations of combustible materials may be tolerated for a ‘reasonable time’.” *Old Ben I*, 1 FMSHRC at 1957-58. After reviewing the legislative history, the Commission has concluded that “[t]he standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.” *Utah Power*, 12 FMSHRC at 968 (quoting *Old Ben I*, 1 FMSHRC at 1957). In other words, the amount of time that the accumulations have lasted is not necessarily determinative in finding a violation. *See id.*

Lastly, when defining “combustible,” the Commission has determined that even if an accumulation is “damp or wet” or mixed with normally non-combustible material, including rock or fire clay, it can still ignite, burn, explode, or propagate a fire. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). The Commission further explained that “wet coal accumulations pose a significant danger in underground coal mines” because they can dry out through frictional contact with the belt or rollers and start a fire or explosion. *Mach Mining, LLC*, 40 FMSHRC 1, 3-6 (Jan. 2018) (citation omitted).

Peabody challenges the inspector’s conclusion that it violated section 75.400 on three distinguishable grounds. First, it argues that the material amounted to a non-violative spillage rather than an accumulation. Second, Peabody suggests that the spillage was caused by a significant unpredictable condition, legs of the belt structure broke at frame nos. 751 to 802. Resp’t Br. at 23-24. The broken legs caused the belt to lean offside, which resulted in a “mass” or “bunch of spillage.” Tr. II, 104, 128. It further suggests that another incident occurred right before the subject inspection, i.e., the surge bin malfunctioning. Resp’t Br. at 25. As support, Respondent points to testimony that the slope tailpiece area had been cleaned on the day shift of November 9. Tr. I, 254-55; R-2 at 10. By the end of the day shift, the area was cleaned down to

the concrete. Tr. I, 254-55. But when Faught observed the area early in the evening shift, he determined that there was more material present than the day before. Tr. I, 31. Third, Peabody asserts that it consistently cleaned the material that developed along the slope belt and tail area. Such cleaning occurred on all shifts beginning when the legs broke on November 7, up until Craig conducted his inspection on November 9. Resp't Br. at 25.

The Secretary maintains that the testimonial and documentary evidence clearly establish a violation of the cited standard. The Secretary specifically reasons that because Craig observed extensive coal accumulations in multiple locations around, on top of, and below the slope belt tail and slope belt, along with numerous ignition sources, Peabody violated 30 C.F.R. § 75.400. Sec'y Br. at 6. I agree with the Secretary.

Here, inspector Craig's testimony establishes that a substantial amount of coal, coal fines, and coal dust accumulated and settled at multiple locations along the slope belt and tailpiece area, specifically from the slope tail to the 633-belt structure mark. Tr. I, 49-64, 83. For starters, when measuring the accumulations at the slope tail, inspector Craig found them to be approximately 300 feet long, 46 inches wide, and 32 inches deep, piled under the belt. Tr. I, 49-59; Ex. P-1. He testified that area consisted of fine coal material and at the bottom of the coal pile was eight to ten inches of wet material, while the top was twenty-four inches of drier material. Tr. I, 51. Craig theorized that the top material was dry due to the frictional heat and contact with the running belt. Tr. I, 51. He further explained that the accumulations could not rise any higher because they were touching the valve of the belt and were completely worn flat. Tr. I, 51. Some of the accumulations then started to work out from under the belt structure and those were measured to extend approximately six inches from both sides of the slope belt. Tr. I, 45, 51. As Craig continued along the slope belt, he observed more accumulations, but these consisted of harder coal fines and larger chunks of dry coal. Tr. I, 60. The amount and extensiveness of the coal weighs in favor of finding an accumulation rather than a spillage.

Craig's observation of several fire hazards, including multiple rollers in the slope tail area covered in coal accumulations, further supports that this hazard constituted a violative accumulation. Tr. I, 52-53. He characterized these bottom rollers as "bad" because some had locked bearings or were completely worn flat, which revealed that they were in contact with the belt and created friction or heat. Tr. I, 52-53. Even some of the top rollers had accumulations around them further causing friction and heat. Tr. I, 55-56. Inspector Craig observed these damaged rollers at the slope tail and along the slope belt. Tr. I, 69; Ex. P-1. These ignition sources described by Craig weigh in favor of an accumulation because they add to the combustibility of the coal material and raise the likelihood of causing a fire or explosion.

The aftermath and subsequent cleaning efforts also suggest a violative accumulation. Barnett testified that fifty to sixty miners were cleaning the belt while he conducted his onshift examination. Tr. II, 198. Faught testified that there were about twenty miners assigned to clean during every shift up until the Order was terminated. Tr. II, 44. Craig explained that he spoke to Peabody's management and discovered that it took 1,250 manhours to fully clear out the accumulations. Tr. I, 30. The number of miners and hours it took to fully clean these accumulations reveal the extent of the accumulations in both size and amount, which the Commission has found relevant in determining whether the condition is spillage or

accumulation. These facts weigh in favor of finding an accumulation, and I conclude that a non-violative spillage would likely not take that long to clean up nor would it require dozens of miners to do so.

Applying the reasonably prudent person (“RPP”) standard, I conclude that based on the inspector’s testimony and supporting exhibits, a reasonably prudent operator would have recognized these widespread and extensive accumulations as hazardous and violative of the cited regulation. The regulation seeks to prevent and eliminate ignition and fuel sources for explosions and fires, including coal accumulations. *Black Diamond Coal Mining Co.*, 7 FMSHRC at 1120. The protective purpose of the standard is therefore to prevent death and injury to miners caused by such ignitions, explosions, or fires. *Old Ben I*, 1 FMSHRC at 195.

In this case, the evidence clearly reveals the extensive amount and size of the coal accumulations, multiple damaged rollers, and bottom and top rollers rubbing against the slope belt causing friction, which could potentially spark. Tr. I, 45, 49-59, 60, 62-63, 68-71, 75, 77-79; Ex. P-1; Ex. P-3. This objectively qualifies as a violative condition under 30 C.F.R. § 75.400, because there were masses of combustible material, namely the float coal dust, and loose coal at the tail belt, and the type of hazard posed by these conditions is precisely what the regulation aims to prevent. I therefore conclude that the RPP standard is met, and that Peabody violated 30 C.F.R. § 75.400.

3. Significant and Substantial

After finding a violation, I next consider whether the Secretary properly designated this Order as S&S. A violation is properly designated as S&S only if, “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)).

The Commission requires affirmative findings on the following elements to uphold an S&S finding:

- (1) [T]he underlying violation of a mandatory safety standard;
- (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed;
- (3) the occurrence of the hazard would be reasonably likely to cause an injury; and
- (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) by explaining that it is the contribution of a violation to the cause and effect of a hazard that is “significant and substantial.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985)). Again, the Secretary bears the burden of establishing an S&S finding by a preponderance of the evidence. See *In re: Contest of Respirable Dust Sample Alterations Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995).

An S&S determination must be based on the particular facts surrounding the violation and on the assumed continuation of normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987); *see also Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)) (“A determination of ‘significant and substantial’ must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease[.]”). The Commission has further observed that the opinions of an experienced MSHA inspector testifying that a violation is S&S are entitled to substantial weight. *Harlan Cumberland*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

Peabody contests the S&S designation on two grounds. First, it argues that the testimonial evidence reveals an absence of a confluence of factors supporting a reasonable likelihood of a fire. Resp’t Br. at 29. Specifically, it points to the wet sloppy material, the constant cleaning and water source, and the absence of methane. Resp’t Br. at 29. Second, Peabody argues that the remedial action in progress would have continued notwithstanding the subject inspection, which it deems important because the evaluation of a reasonable likelihood of injury should be made assuming continued normal mining operations. It ultimately suggests that the “normal mining conditions” were the remedial actions being done. Resp’t Br. at 29.

I find both grounds unpersuasive because wet material can dry out and ignite, and remedial action is not a normal mining condition. First, the Commission has found that “wet” material is just as dangerous and could reasonably dry out and ignite. *Black Diamond*, 7 FMSHRC at 1117, 1121 (explaining that damp or wet material is still combustible); *Mid-Continent Res.*, 16 FMSHRC 1226, 1230 (June 1994). The Commission has also expressly rejected the argument that “accumulations of combustible materials may be tolerated for a “reasonable time,” which includes the time that remedial action is being pursued. *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957-58 (Dec. 1979); *see also Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1141 (May 2014) (rejecting a judge’s conclusion that a condition was being actively abated, because the Commission cannot assume that miners assigned to a task would have completed the clean-up before production resumed without the presence of an inspector to ensure timely abatement).

In opposition, the Secretary maintains that all four of the *Mathies* elements are satisfied, there is a confluence of factors, and that a fire or explosion was likely to occur resulting in injury. Sec’y Br. at 10-13. For the reasons below, I agree with the Secretary.

a. Mandatory Safety Hazard

The first element is easily met. In the preceding section, I determined that Peabody violated section 75.400, a mandatory safety standard, when it allowed for coal, coal fines, and block coal to accumulate to the size of 300 feet long, 46 inches wide, and 32 inches deep under and around the slope belt and tail areas.

b. Reasonably Likely to Cause the Defined Hazard

Next, the Secretary must establish that the violation was “reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed.” *Mathies*, 6 FMSHRC at 3. This first requires that the hazard to which the violation allegedly contributes is defined, that is the prospective danger the cited safety hazard is intended to prevent. *Newtown*, 38 FMSHRC at 2037-40. The discrete safety hazard against which section 75.400 is directed is a fire or explosion contributed to by accumulation of combustible materials, including coal and coal fines. *See e.g., Black Diamond Coal Mining Co.*, 7 FMSHRC at 1120. The prospective danger of the cited safety hazard is therefore intended to prevent a fire, ignition or explosion.

The remaining issue is whether there is a reasonable likelihood that these coal accumulations would ignite and start a fire or explosion. Under the facts, there is a real concern that the coal fines and coal accumulations in contact with the belt and damaged rollers would serve as an ignition source and explode or cause enough friction or heat to result in a fire. Tr. I, 112. Inspector Craig credibly testified that he designated this violation as “reasonably likely” because “all of the ignition sources that were present, heat sources, it was reasonable that this condition was to continue to exist that results in a fire and miners would sustain injuries or death from the fire...” Tr. I, 112. He explained earlier in his testimony that in some locations the accumulations measured about 300 feet long, 46 inches wide, and 32 inches deep. Tr. I, 49-59; Ex. P-1. His concerns about coal accumulations extended from the slope tailpiece area at the beginning of his inspection as well as along the slope belt area as he proceeded throughout the evening inspection. Tr. I, 49-59, 60, 70-71.

Peabody suggests that the presence of the bottom quarter of wet coal material bars a finding of an accumulation because it is not combustible or is not that likely to cause a fire or explosion. Resp’t Br. at 29. But, as the Commission has noted, even the “wet” coal at the bottom of the accumulations remains a danger especially when there are nearby frictional heat sources, including the rollers and valves, which would cause the coal to dry out and ignite. Tr. I, 111. Craig determined that there were several ignition sources, including rollers running in accumulations causing friction and heat, the locked-up rollers covered in accumulations, and the belt running against damaged rollers. Tr. I, 111. Another ignition source is highlighted by the top portions of the accumulations becoming worn flat due to the contact they were having with the belt structure. Tr. I, 50. Based on the measurements of the accumulations, and the inspector’s credible opinion as to the viability of the ignition sources, without any compelling contradictory evidence, I find that this element is satisfied.

c. Reasonably Likely to Cause Injury

Third, the Secretary must show that the occurrence of the hazard is reasonably likely to cause injury. *Mathies*, 6 FMSHRC at 3. This step involves assuming the occurrence of the hazard—not the violation—and determining whether, based on the facts surrounding the violation, the hazard is reasonably likely to cause injury. *Newtown*, 38 FMSHRC at 2037-40; *Texasgulf*, 10 FMSHRC at 501. For cases involving section 75.400, step three of *Mathies* is a bit more specific and is often lumped together with step two. The Commission has found that in cases that involve violations which may contribute to the hazard of an ignition or explosion, the

likelihood of an injury resulting depends on the existence of a “confluence of factors” that could trigger the ignition or explosion. *Mach Mining, LLC*, 40 FMSHRC at 4; *Texasgulf*, 10 FMSHRC at 501.

Here, as explained for element two, the overall evidence establishes a fire hazard as Craig observed extensive accumulations in various locations along the slope belt and tailpiece area, and in those locations, he also encountered several ignition sources, including the damaged rollers, worn flat accumulations, and several bottom rollers running in the accumulations and causing friction and heat. Tr. I, 111. In sum, with the damaged rollers and accumulations running into the belt, providing a significant heat and frictional source, I conclude that there is a “confluence of factors” that could trigger an ignition or explosion, even considering the fact some of the coal was initially wet.

Assuming the occurrence of the hazard, i.e., a fire or explosion, the Commission has found that the presence “of an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisfies the third *Mathies* element.” *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997). Here, Craig testified about the size of the accumulations ranging from 300 feet long, 46 inches wide and 32 inches deep, and to the presence of several damaged rollers and locations in which the accumulations were running against the belt and some of the rollers. Tr. I, 49-59, 111. It is therefore reasonably likely that if a fire were to occur, miners nearby would be affected by burns or smoke inhalation, as further discussed below. Accordingly, this third *Mathies* element is satisfied.

d. Reasonably Serious Injury

For the final *Mathies* element, the Secretary must prove that there would be a reasonable likelihood that the potential injury in question would be of a “reasonably serious nature.” *Mathies*, 6 FMSHRC at 3. This does not require the Secretary to establish that the injury will lead to hospitalization, surgery, or a long period of recovery. *S&S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013). Muscle strains, sprained ligaments, and fractured bones fall under this category. *Id.* The primary focus on this element is on the risk of injury created by the safety violation itself. *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313-14 (June 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

For this element, Commission precedent makes clear that ignitions, fires, or explosions are major causes of injury and death to miners. See *Black Diamond*, 7 FMSHRC at 1120. Congress intended for mandatory safety hazards, including section 75.400, to reduce and eliminate ignition and fuel sources to prevent such explosions or fires from harming miners. *Id.* Inspector Craig’s testimony on these points supports Congress’s fear as a reality. He testified that the amount of coal accumulations in the belt lines “could easily result in fatal injuries.” Tr. I, 127. He explained that a similar incident happened at Aracoma leading to a belt fire and two miners dying. Tr. I, 127. Based on his over fifteen years of mining experience and acknowledgement of the previous belt fire, Craig reasonably concluded that, “miners would receive burns and smoke inhalation due to a fire occurring in the belt line.” Tr. I, 157-58, 174. He further explained that there were eight miners on the dewater crew, who were in the vicinity of the slope tail and slope belt area. Tr. I, 158.

By crediting Inspector Craig's testimony with substantial weight in accordance with *Harlan Cumberland*, along with the evidence established in this case and relevant precedent, I find that a mine fire, smoke inhalation, or burns would result in a reasonably serious injury to at least one of the eight miners who were in the vicinity. Tr. I, 112. The final *Mathies* element is satisfied.

Since I conclude that the four elements of *Mathies* are met, I uphold the S&S designation for Order No. 9704796.

4. Unwarrantable Failure

Peabody next contests the Secretary's designation of the Order at issue as resulting from an unwarrantable failure. In contrast, the Secretary maintains that the factors typically considered in an unwarrantable failure analysis support the inspector's designation. After considering all the factors, I ultimately agree with the Secretary.

The Commission has determined that an unwarrantable failure is "aggravated conduct constituting more than ordinary negligence for a mine operator in relation to a violation of the Act." *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987). It 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). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007) (citation omitted). Like S&S, the Secretary bears the burden of establishing the validity of an unwarrantable failure finding. *See Keystone*, 17 FMSHRC at 1838. In other words, "while an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge." *Coal River Mining, LLC*, 32 FMSHRC 82, 88-89 (Feb. 2010) (*citing IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009)).

As directed, I consider in turn each of the following factors: (1) the extent of the violative condition; (2) the length of time that it existed; (3) whether the violation posed a high degree of danger; (4) whether the violation was obvious; (5) the operator's knowledge of the violation; (6) the operator's abatement efforts; and (7) whether the operator was placed on notice that greater efforts were necessary for compliance with the cited safety standard. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC at 1350-57; *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Duration of the Violative Condition

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *E. Assoc. Coal Corp.*, 32 FMSHRC 1189, 1198 (Oct. 2010). In deciding whether a violation should be attributed to an operator's unwarrantable failure, the Commission looks to the length of time or number of shifts that the violative condition existed. The Commission accepts direct and circumstantial evidence to establish duration. *Windsor Coal Co.*, 21 FMSHRC 997, 1003 (Sept. 1999); *Coal River Mining, LLC*, 32 FMSHRC 82, 92-93 (Feb. 2010) (explaining that even imperfect evidence of duration should be considered by the judge); *see also Peabody Coal*, 14 FMSHRC 1258, 1261-63 (Aug. 1992) (affirming the judge's duration finding based primarily on the inspector's observation and testimony of the cited area).

The Secretary suggests that there was a significant duration to the violation included in the Order. Sec'y Br. at 16. Peabody argues that after consideration of the week of November 7, there should be no finding that the cited condition existed for an extended duration because of Peabody's progress in cleaning up the "spillage" after several legs broke on the slope belt. Resp't Br. at 33-34.⁴ Respondent further suggests that another spillage incident likely occurred close in time to the subject inspection based on trouble with the flow gates of the surge bin and the freshness of the material observed by inspector Craig. Resp't Br. at 34. I find Peabody's position unconvincing. Nothing in the record or the testimony proves that another considerable spillage event occurred. The testimony that Peabody points to merely suggests that the material looked "pretty fresh." Tr. II, 109. If there had been another event like the surge bin malfunctioning or the legs breaking on the slope belt the day of the inspection, Peabody likely would have discovered it with more certainty than mere speculation. Peabody's first suggestion is also not persuasive. Nothing in the record or testimony suggests that the extensive accumulations present on November 7 were still present on November 9 or the day of the inspection. I ultimately agree with the Secretary that the record evidence and testimony establish that the violative condition lasted for a duration sufficient for this factor to weigh in favor of an unwarrantable failure.

For Order No. 9704796, inspector Craig testified that, "[i]t [lasted] approximately three and a half days." Tr. I, 128. He based this estimation on the pre-shift examination records, which revealed that the slope belt and slope tail accumulations had existed since November 7, 2022, when the broken legs on the slope belt were discovered. Ex. P-6; P-7. The weekly examination report also noted the presence of coal accumulations as early as November 5. Tr. II, 143-45. Craig further testified that a mine foreman told him the mine had knowledge of the accumulations for about three and a half days and were dealing with the conditions. Tr. I, 72, 127-28. The size and extent of the accumulations also suggest that the coal accumulations had been building up for more than a shift. After Craig issued the Order, Peabody sent over fifty to sixty miners to clean the belt over several shifts thereafter. Tr. II, 198. Craig testified that it took around 1,250 manhours. Tr. I, 30. The number of miners and hours it took to fully correct the violative condition reveal how massive these accumulations had become. It is unlikely that this amount accumulated in less than one shift as Peabody seems to suggest.

⁴ The second half of this decision goes into more detail about the events leading up to November 9, 2022.

As the Commission has done in the past, I credit the inspector's testimony and find that at least three or more shifts passed. It is reasonable to conclude that the violation likely lasted for more than a few shifts based on the evidence and inspector Craig's testimony. This is more than sufficient to satisfy this factor as the Commission has held that a duration lasting more than one shift can weigh in favor of an unwarrantable failure. *Windsor*, 21 FMSHRC 997, 1001-04 (Sept. 1999); *CAM Mining*, 38 FMSHRC 1903, 1909 (Aug. 2016) (upholding an unwarrantable failure finding since the operator's failure to abate the hazard exposed at least two shifts of miners to highly dangerous conditions).

I ultimately find the duration factor particularly important with respect to the violation established in this case. The longer the violation went fully unaddressed, the greater likelihood that a fire or explosion would occur. *Cf. Coal River Mining*, 32 FMSHRC at 92 (explaining that a longer duration of violation led to an increase in danger to miners). This factor thus weighs in favor of an unwarrantable failure finding.

b. Extensiveness and Obviousness of the Violative Condition

When the Commission considers the extent of the violative condition, it evaluates the magnitude and scope of the violation, the number of persons affected, and the size of the affected area. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014); *E. Assoc. Coal Corp.*, 32 FMSHRC at 1195. Peabody does not directly address these factors, but the Secretary argues that the violation was both extensive and obvious. I agree with the Secretary that both factors were present.

The record establishes that the accumulation violation along the slope belt and tailpiece area was extensive. Inspector Craig testified that he measured the accumulations in the tailpiece area to be approximately 300 feet long, 46 inches wide, and 32 inches deep, piled up under the belt. Tr. I, 49. He further suggested that the accumulations could have been deeper, but the accumulations could not get any higher because they were touching the belt valve and were becoming worn flat. Tr. I, 51. Because they could not rise any higher, the accumulations eventually started to work themselves out from under the belt structure and further accumulated off to the sides about six inches. Tr. I, 51-52. As mentioned for the previous duration factor, the 1250 manhours and the number of miners it took to fully correct the violative condition, also shows extensiveness. Ex. P-1 at 3; Tr. I, 130-32, 191.

Regarding the obviousness of the violative condition, Craig credibly testified that the accumulations were "so obvious and extensive that they were easily found and obviously were there." Tr. I, 128; Ex. P-1. The photographic evidence also reveals the obviousness of the accumulations. *See* Ex. P-3; P-08. I therefore find both factors to weigh in favor of an unwarrantable failure designation.

c. Knowledge of the Condition

Peabody admits that it had actual knowledge of the coal accumulations at the cited locations, however, it argues that its corrective measures do not support an unwarrantable failure finding. Resp't Br. at 32. The Secretary asserts that Respondent's admitted knowledge of the

accumulations around the slope tail and slope belt satisfy this factor. I agree with the Secretary primarily because I disagree with Peabody's suggestion that its corrective measures are relevant for this factor, since those are more applicable when weighing the abatement efforts as an unwarrantable failure factor.

Here, there is no material dispute as to knowledge. Inspector Craig testified that a mine foreman informed him that Peabody knew of the accumulations for over three days, as there was an incident involving broken belt legs that occurred on November 7, 2022. Tr. I, 72; Ex. P-1. Similarly, Faught explained to Craig that three days earlier, several legs on the slope belt broke, causing considerable coal spillage. Tr. II, 128, 139. Faught further explained that men were assigned to clean the slope belt and tailpiece areas, but that one needed to retrieve a piece of machinery to facilitate the cleaning. Tr. II, 38. Craig asked several times why no one was cleaning, and Faught stated that he had more workers cleaning the slope belt. Tr. II, 38, 42. The testimony suggests that Peabody knew of the accumulations and attempted to assign miners to clean the violative areas, but at the time of the inspection, inspector Craig observed no miners cleaning. Additionally, the pre-shift examination reports included notations for coal accumulations over multiple shifts and days and they were signed by mine management. Ex. P-6; P-7. After considering these facts, I conclude that Peabody had knowledge of the violative condition. This factor thus weighs in favor of finding an unwarrantable failure.

d. Degree of Danger Posed by the Condition

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals*, 10 FMSHRC 705, 709 (June 1998). In *Manalapan Mining Co.*, the Commission recognized that the degree of danger could be "so severe that, by itself, it warrants a finding of unwarrantable failure." 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger has been considered a significant aggravating factor, but not a threshold requirement, in an unwarrantable failure analysis. *See e.g., WMD. Scepaniak, Inc.*, 37 FMSHRC 1539, 1547-48 (July 2015) (ALJ). Lastly, the degree of danger "increases when there is a chronic problem that is ignored." *Consolidation Coal*, 35 FMSHRC 2326, 2343 (Aug. 2013).

Peabody argues that there is no high degree of danger because some of the material cited was wet, soupy, and had the consistency of muck. Resp't Br. at 34; Tr. II, 34, 109. Similarly, it contends that the presence of a constant water source from all the washing that had been done lowers the degree of danger. Resp't Br. at 34. The Secretary asserts that the violative condition posed a high degree of danger to miners since there were significant amounts of coal accumulations and several nearby ignition sources including damaged rollers in various areas around the slope belt and tailpiece area. Sec'y Br. at 17. I agree with the Secretary, and again, Peabody's position ignores the fact that wet, damp coal can eventually dry out due to friction, caused by rollers running in accumulations or the accumulations rubbing against the belt. As confirmation, the Commission has consistently found that "wet coal accumulations pose a *significant danger* in underground coal mines," because they can dry out through frictional contact with belts or rollers, which can cause a fire or explosion. *Mach Mining, LLC*, 40 FMSHRC at 3-6 (upholding the ALJ's recognition that wet coal remains a danger because of

frictional heat sources); *Mach Mining, LLC*, 38 FMSHRC 2229, 2242 (ALJ) (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-2330 (Aug. 2013)).

Here, inspector Craig testified that if some of the coal accumulations fueled a fire or explosion, a miner could suffer serious injuries from smoke inhalation or burns. Tr. I, 157-58. He also explained that the top three-quarters of the accumulations near the slope tail area was comprised of dry coal material, and only the bottom quarter was wet. Tr. I, 51-56, 59. In that same area, he observed damaged bottom rollers running in the coal accumulations. Tr. I, 52-53, 55-56. The accumulations were also piled up under the belt. Tr. I, 52. These conditions are serious and heighten danger. The extent and size of the accumulations also add to the level of danger, especially since they extended over 300 feet along the slope belt. Lastly, as mentioned in the duration factor, 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. As noted, the slope belt was running during the inspection until Craig ordered that it be shut down. Therefore, this factor weighs in favor of the unwarrantable failure designation.

e. Abatement Efforts

The Commission has stated that:

An operator's effort in abating the violative condition is one of the factors established by the Commission as determinative of whether a violation is unwarrantable. Where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. Previous repeated violations and warnings from MSHA should place an operator on "heightened alert" that more is needed to rectify the problem. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). The focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.*

IO Coal, 31 FMSHRC at 1356. The focus of this factor is therefore "on those efforts made prior to the citation or order." *Id.* Peabody argues that it took considerable and consistent actions to address the material on the slope belt and tailpiece area starting on November 7, 2022. It explains that miners were assigned to clean on every shift between the time the legs had broken and Craig's inspection. Resp't Br. at 32. In opposition, the Secretary maintains that any abatement efforts were entirely inadequate to address the hazard presented by the extensive coal accumulations and several ignition sources. Sec'y Br. at 18-19. This is a close issue.

I recognize that the record reveals several abatement efforts taken during several shifts before Craig's inspection that may weigh against finding an unwarrantable failure. However, I find those more relevant for Order No. 9704803, involving hazardous conditions listed in the pre-shift examination. The focus for this Order, in my view, is on the remedial efforts employed close in time before the inspection. At hearing, Faught testified that in preparation for the evening shift and before Craig's arrival, he assigned three miners to clean the slope belt and one miner, Isaacs, to clean the slope tail. Tr. II, 35, 38, 41-42. When Craig asked at the slope tail why no one was cleaning, Faught answered that Isaacs needed to retrieve a Bobcat to facilitate the

cleaning. Tr. II, 38. When asked along the slope belt, why no one was cleaning, Faught suggested that the three miners had gone to the tailpiece area as instructed. Tr. II, 41-42. Because of this, inspector Craig testified that he observed no remedial work in progress at either the slope tail or belt when he conducted his inspection. Tr. I, 114. He also found that the photographs he took during the inspection support his position that the accumulations had not been recently touched or partially cleaned. Tr. I, 114; P-3; P-8. The fact Craig observed no one working on the accumulations that expanded several hundred feet, weighs in favor of an unwarrantable failure designation.

The record suggests that in the shifts right before the inspection, Peabody employed some remedial efforts. During the owl shift, Joe Kennedy, the dewater supervisor, testified that one miner had worked on the slope around the 4000 area and another miner worked at the slope tail. Tr. II, 76, 77. Similarly, for the day shift, two miners were observed cleaning the offside of the slope tail. Tr. II, 169. The day shift dewater supervisor, Rider Richardson testified that his crew washed down the accumulations from the top of the slope to 3000 feet and from the clean room to the tail using shovels and wheelbarrows to clean all the way down to the concrete. Tr. II, 255. These two shifts reveal that some abatement efforts were being made, however, I find that a couple of miners working on these extensive accumulations was inadequate. Nonetheless, they weigh slightly against an unwarrantable failure finding.

Though there were some other abatement efforts made leading up to November 9, 2022, I find them more relevant to Order No. 9704803's abatement effort analysis. After considering the potentially relevant mitigating circumstances, I ultimately find this factor neutral weighing neither in favor nor against an unwarrantable failure finding.

f. Notice of Need for Greater Compliance Efforts

For this final factor, the Commission has found that “[r]epeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with the standard.” *IO Coal*, 31 FMSHRC at 1353 (citing *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citation omitted)). In particular, the Commission has acknowledged the importance of this specific regulation when it comes to compliance by stating that “a high number of past violations of section 75.400 serve to place an operator on notice that it has a recurring safety problem in need of correction.” *Consolidation Coal*, 23 FMSHRC 588, 595 (June 2001) (citations omitted).

Peabody argues that it had no notice of a need for greater compliance efforts because the Secretary failed to produce any evidence other than the number of times the standard had been cited in the last two years. Resp't Br. at 35. The Secretary counters by explaining that Peabody had been cited for the exact condition 75 times in the past two years. Ex. P-1 at 3. It suggests that a high number of prior citations for the same condition and standard provides sufficient notice that additional efforts are needed to address related hazards. Sec'y Br. at 18.

I ultimately agree with the Secretary. As the Commission noted in *Consolidation Coal*, a high number of past violations of section 75.400 places an operator on notice. I find seventy-five citations within the past two years to be a significant number of past violations and sufficient to

place Peabody on notice that greater efforts were necessary to comply with section 75.400. This factor thus weighs in favor of an unwarrantable failure designation.

Because most of the factors weigh in favor of finding an unwarrantable failure, I conclude that the Secretary properly designated Order No. 9704796 as resulting from the operator's unwarrantable failure.

Since I ultimately find an unwarrantable failure, the remaining inquiry is whether Order No. 9704796 is properly designated as a 104(d)(2) Order. To properly issue a 104(d)(2) order, there must be: (1) a valid underlying 104(d)(1) order; (2) a violation of a mandatory safety or health standard caused by an unwarrantable failure; and (3) no intervening clean inspection. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911 (Aug. 1984). Here, the first prerequisite is satisfied as the parties stipulated that an order not at issue in this proceeding, Order No. 9212662, serves as the predicate 104(d)(1) order while Order No. 9212660, also not in these dockets, serves as the predicate citation underlying the (d)(1) order. Tr. I, 167; P-12, at 5, 7. As I mentioned above, Order No. 9704796 resulted from the operator's unwarrantable failure to comply with the mandatory safety standard of section 75.400.

For the final prerequisite, the burden is on the Secretary to prove that there has been no intervening clean inspection and here, the Secretary does not provide sufficient evidence. The Secretary argues that "[t]he violation history in this matter proves not only the absence of a clean inspection, but additional unwarrantable failures by Peabody. MSHA issued...104(d)(2) orders in the year preceding the order at issue." Sec'y Br. at 19. Peabody does not address this specific issue.⁵ In light of Commission precedent, I do not find the Secretary's position ultimately convincing.

For starters, Commission precedent makes clear that it is the Secretary's burden to prove the third prerequisite by a preponderance of the evidence. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911-12 (Aug. 1984); *Kitt Energy Corp.*, 6 FMHSRC 1596, 1600 (July 1984), *aff'd sub nom. UMW v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985) (explaining that "[t]he burden of

⁵ It could be argued that if Peabody had the presence of a clean inspection, it would have brought it up as akin to an affirmative defense under Fed. R. Civ. P. 8. However, Commission precedent and the Mine Act make clear that it is the Secretary's burden to prove the presence of all three prerequisites. 30 U.S.C. § 814(d)(2); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1071-75 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Cyprus Cumberland Res. Corp.*, 21 FMSHRC 722, 728 (July 1999); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911-12 (Aug. 1984). If Peabody had been expected to raise the issue on its own, this would shift the burden in clear contradiction of Congressional intent. Peabody could have simply chosen not to expend resources bringing the issue forward when it knew the Secretary had to prove it.

A similar argument can be made for the Secretary; if the Secretary had evidence of no clear inspection, she would have brought it out on direct testimony and through convincing evidence with an inspection log. The dispositive difference is, the Secretary has the burden, the Respondent does not. Regardless, surmising the intent behind why neither party focused its energies on proving this prerequisite is much too speculative.

establishing the validity of such an order, necessarily including proof that an intervening clean inspection has not occurred, appropriately rests with the Secretary”). In *U.S. Steel Corp.*, the Commission confirms that an intervening clean inspection is not limited to completely regular scheduled inspections but may be composed of a combination of spot inspections, so long as, taken together, they constitute an inspection of the mine in its entirety. 6 FMSHRC at 1912. The Commission found fault in the insufficient, limited testimony on the issue of the clean inspection and concluded there was no substantial evidence. *Id.* at 1912-15. It additionally took issue with the inspector’s belief that only a regular quarterly inspection without similar violations lifted the d-chain, and then highlighted the absence of any testimony on whether a combination of regular or other inspections covered the entirety of the mine. *Id.*

Here, there is no direct testimony regarding an intervening clean inspection. *See* Tr. I, 163-65, 166-67. At the very least, the Secretary could have attempted to bring out this issue with questions directed to the inspector. *U.S. Steel’s* concern with such limited testimony applies with stronger force in this case with the complete absence of testimony. For this reason, I take guidance from the Commission’s remand instruction in *U.S. Steel* which sent the case back to the ALJ for proper modification of the 104(d)(2) order to an appropriate 104(d)(1) order or citation. *U.S. Steel*, 6 FMSHRC at 1914-15. The proper modification in this case is to a 104(d)(1) order.

Kitt Energy provides additional guidance and confirms my position. In that case, the Commission suggested that the Secretary could prove that an area remains to be inspected during the relevant time period by presenting records of all inspections at the mine and the extent of those inspections. *Kitt*, 6 FMSHRC at 1600. Similarly, the Commission has specifically stated that the Secretary may rely upon a log depicting all inspection activity at the mine. *Cumberland*, 21 FMSHRC at 728 n.7. Here, the Secretary makes no reference to a log presenting records of the mine’s entire inspection activity during the relevant time; she references the violation history, which is not synonymous. She seems to desire an inference that, because MSHA issued other 104(d)(2) orders, that must mean there had been no clean inspection. But such an inference, without more, is unreasonable. MSHA can issue 104(d)(2) orders but that does not automatically mean there was no intervening clean inspection. Such a conclusion would defeat the purpose of any meaningful judicial review of the validity of these orders and would make any 104(d)(2) order, as long as it is issued by an MSHA inspector, valid. The Secretary also desires an inference that because the violation history reveals additional unwarrantable failures that must mean there was no clean inspection. This inference is equally as concerning and speculative without more direct testimony or evidence. I refuse the invitation by the Secretary to make these inferences and ultimately conclude that the Secretary failed to carry her burden to prove this third prerequisite.

Because all three prerequisites are not met, I find that this Order should be modified from a 104(d)(2) order to a 104(d)(1) order.

5. Gravity

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.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983),

aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by considering the importance of the standard 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, e.g., Harland Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis primarily focuses on factors such as the likelihood of an injury, the severity of the potential resulting injury, and the number of miners potentially affected. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations without assuming the abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Inspector Craig designated this Order as reasonably likely to cause "fatal" injury or illness which would affect eight persons. Ex. P-1. Peabody does not contest the number of people affected; however, it contests the remaining factors in its argument against S&S. It maintains that the Secretary offered insufficient evidence to establish that a fire was "reasonably likely to occur." Resp't Br. at 29. As support, it provides that the material cited was "wet" and "soupy" and that there was a constant source of water because there was a hose continuously washing down the material. Resp't Br. at 29. It also points out that at the time of the inspection, Craig failed to note any presence of methane. Resp't Br. at 29. Additionally, Peabody argues that an injury was unlikely because remedial actions were in process and would have continued until the accumulations were cleaned entirely. Resp't Br. at 29. In opposition, the Secretary emphasizes that the inspector's testimony that the accumulations were near several ignition sources is persuasive and entitled to weight. Sec'y Br. at 10-11. She also argues that even if Peabody started remedial action, there should be no inference that the violative condition would have ceased. Sec'y Br. at 11. Lastly, the Secretary cites to the inspector's testimony about the type of injury and number of persons affected. Sec'y Br. at 12-13. I ultimately agree with the Secretary that the inspector's testimony regarding gravity was credible and entitled to considerable weight.

Here, inspector Craig testified that with "all of the ignition sources that were present, heat sources, it was *reasonably likely* that this condition was to continue to exist that results in a fire and miners would sustain injuries or death from the fire... (*italics added*)." Tr. I, 112. He went on to list some of the ignition sources, including the belt in contact with coal accumulations and some damaged rollers, rollers running in the accumulations causing friction and heat, and the locked-up rollers covered in accumulations. Tr. I, 111. As analyzed in the S&S section regarding the "confluence of factors," I conclude that the presence of extensive accumulations spanning over 300 feet near these ignition sources make it reasonably likely that a fire or explosion would occur during continued normal mining operations without the abatement of the violation.

Such a conclusion is supported by the evidence notwithstanding the source of water, wet material, and absence of methane. The Commission has recognized that wet material can contact a frictional or heat source and dry out, meaning that the conditions present here still pose a risk of combustibility. *Black Diamond*, 7 FMSHRC at 1121. The Commission has further found that the presence of low amounts of methane or the absence of methane, does not necessarily bar a finding of reasonable likelihood. *See e.g., Sec'y of Labor v. U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (Aug. 1985). As Craig testified "[m]ethane can accumulate at any point in time in different

areas of the mine...you still wouldn't want to compromise the [south main fields] with a flame because there is an unknown mixture of what could be behind the seals which would make a fire..." Tr. I, 122. A rapid buildup of methane thus could be reasonably expected. Tr. I, 122.

Any injury from a resulting fire or explosion likely would be reasonably serious or fatal. Inspector Craig credibly testified that, "I wrote it as fatal, [miners] would sustain fatal injuries from the burns and smoke inhalation kind of in resemblance to...the Aracoma mine fire that started on the belt line." Tr. I, 112. He also testified that if a fire resulted, "miners would sustain injuries or death from the fire." Tr. I, 112. As further support, the Commission has previously noted that Congress recognized that ignitions and explosions are major causes of death and injury to miners. *Black Diamond Coal Co.*, 7 FMSHRC at 1120; *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979). I thus uphold this fatality designation.

Lastly, I consider whether eight miners would be affected. For this designation, I again credit inspector Craig as I have no reason to doubt his estimation or testimony. He explained that he arrived at the number after looking at the operator's manpower sheets and speaking with some workers in the dewatering area. Tr. I, 112-13. Craig further testified that "[eight people] were in the dewatering area and there was like a tool shack area...and they were all kind of in that area. There wasn't anybody on the slope, but that general area was all ventilated with that same air force." Tr. I, 113, 174. When asked whether he could name the eight people affected, Craig stated that all the names were in the provided manpower sheet. Tr. I, 113, 174. Peabody does not contest this number, and so I credit Craig's testimony and find that he properly designated the number of persons affected.

Ultimately, I find that inspector Craig's observations and testimony, grounded in over fifteen years of mining experience, are credible and persuasive. I agree that the coal accumulations running up against the slope tail and belt areas near ignition sources could cause a fire or explosion, which in turn could cause fatal injuries. Given the foregoing, I affirm the assessed likelihood, severity of injury, and number of miners likely to be affected.

6. 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). Negligence is not directly defined in the Mine Act, so the Commission has held that "judges may evaluate negligence from the starting point of a traditional negligence analysis" rather than based on the Secretary's definition of negligence under 30 C.F.R. § 100.3(d). *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) (explaining that the MSHA regulations are not binding in Commission proceedings). The Commission has further recognized that "[e]ach mandatory standard...carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation...occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission's negligence analysis asks whether an operator has met "the requisite standard of care – a standard of care that is high under the Mine Act." *Brody Mining, LLC*, 37

FMSHRC at 1702. To determine whether an operator met its duty of care, Commission ALJs consider “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Id.* (citations omitted). An ALJ, however, “is not limited to an evaluation of allegedly ‘mitigating’ circumstances” and should consider the “totality of the circumstances holistically.” *Id.* at 1702-1703; *see* 30 C.F.R. § 100.3(d) (stating that operators must be “on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.”). Lastly, the Commission has recognized that an “operator’s knowledge (actual or constructive) is a key component of a negligence determination.” *Ohio Cty. Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018).

More specifically, 30 C.F.R. § 100.3 defines high negligence as when, “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” The Commission has similarly defined high negligence as “an aggravated lack of care that is more than ordinary negligence.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (citation omitted).

Peabody contests MSHA’s high negligence designation. However, it does not explain why it is challenging high negligence. It merely states, “[t]o the extent that any violation if found, the unwarrantable failure and *high negligence* designations for Order No[.] 9704796 [are] inappropriate.” Resp’t Br. at 30. However, in its unwarrantable failure analysis, Peabody makes clear that it took some remedial action during the time preceding the issuance of the Order. Resp’t Br. at 32-33. As I will discuss later, these remedial efforts are much more forceful for Order No. 9704803. That is primarily because for the accumulations order, the focus is on what actions were being done around the time of the inspection and immediately before it. The preceding days are therefore somewhat less relevant here. The Secretary maintains that Peabody was highly negligent and that its corrective actions on the day of the inspection were inadequate. This is a close issue, but I ultimately agree with the Secretary and affirm the negligence designation.

First, as previously determined in the unwarrantable failure analysis, the record demonstrates that Peabody had knowledge of the violative condition for at least the beginning of the shift and likely spanning three days prior. Tr. I, 72; Ex. P-1; Tr. II, 139. Additionally, the pre-shift examination records noted accumulations along the slope belt and slope tail carrying over for multiple days before the inspection. Tr. I, 40; Ex. P-7, at 9-17. The bad rollers were also flagged and noted in the examination record. Tr. II, 201. Based on this, I find Peabody had knowledge of the coal accumulations and ignition sources.

I next consider potential mitigating circumstances. As mentioned, the focus here is on the remedial efforts made right before the shift or during it. Faught testified that he recruited four miners to clean the slope belt and tailpiece areas. Tr. II, 38-41-42. However, during the inspection, Craig observed no miners cleaning the area. Tr. I, 114. This weighs against a finding of a mitigating circumstance, because if no miners were cleaning during the evening shift, the coal accumulations that were growing would be left uncorrected. Inspector Craig testified that some of the accumulations were starting to work out from under the belt structure and were

measured to extend approximately six inches from both sides of the slope belt. Tr. I, 45, 51. Craig further credibly testified that the accumulations could not rise anymore because they were in contact with the belt and were becoming worn flat. Tr. I, 49, 50-51. His testimony indicates that the accumulations were increasing in size and because they could not rise any, they were becoming wider and piling off to the side. So, if he noticed no one cleaning, even though men were “assigned,” its efforts during the shift do not serve as an effective mitigating circumstance.

On November 9, 2022, for the owl shift, a crew of two miners “cleaned and loaded at 4000” at the slope tail area. Tr. II, 77. And for the day shift, two miners were observed cleaning accumulations at the offside of the slope tail. Tr. II, 168-69. Rider Richardson, the dayshift dewater supervisor, testified that his crew washed down the top of the slope to 3000 feet, and from the clean room to the tail using shovels and a wheelbarrow to clean all the way down to the concrete. Tr. II, 255. At the end of that shift, Richardson said he saw no more coal material remaining in that area. Tr. II, 255. The record shows that cleaning had been done during the day shift and the owl shift of November 9, 2022, which weighs in favor of a mitigating circumstance. However, given the fact that it took 1,250 manhours and over a dozen miners for several shifts after the order was issued, assigning only two miners for each of those shifts was wholly inefficient and insufficient in correcting the violative condition. Tr. I, 30; Tr. II, 44. Though I find these efforts to be a mitigating circumstance⁶ and commend Peabody’s efforts in addressing the accumulations, this alone does not warrant lowering the degree of negligence.

Another potential mitigating circumstance is the wetness of the material. However, even though Faught testified that in the tailpiece area he observed wet, “muck” material, which potentially may reduce the effect or likelihood of a fire, the wetness does not significantly reduce Peabody’s required standard of care when complying with MSHA safety standards, especially ones that carry with it a high degree of danger as recognized by Congress. Tr. II, 34. As previously stated, wet material can still dry out when near ignition or frictional sources.

Considering the totality of the circumstances and the alleged mitigating circumstances, I determine that Peabody knew of the violative condition, and that this violation runs on the low end of high negligence. *See e.g., Consol Penn. Coal Co., LLC*, 45 FMSHRC 558, 571 (June 2023) (ALJ); *Brody Mining, LLC*, 39 FMSHRC 2027, 2033 (Nov. 2017) (ALJ) (both recognizing that there can be a “high-end” or “low-end” of a negligence designation). I therefore affirm high negligence for Order No. 9704796.

In sum, for Order No. 9704796, I find a violation of section 75.400, uphold the S&S designation, conclude that the violation resulted from the operator’s unwarrantable failure to comply with a mandatory health and safety standard, and affirm the assessed likelihood, severity of any potential injury, the number of persons to be affected, and high negligence.

I now turn to analyze the remaining Order, No. 9704803.

⁶ As I will go into more detail later, Peabody employed several other mitigating efforts in the days leading up to the inspection that tip the scale towards the “low-end” of high negligence a bit further.

Order No. 9704803

1. Findings of Facts

Inspector Craig issued Order No. 9704803 for Peabody's failure to take corrective actions for the hazardous conditions and violations of health and safety standards that were known prior to the inspection. Ex. P-4. To properly understand the order issued on November 9, 2022, a review of the pre-shift examination process and the days leading up to the inspection is helpful.

a. Pre-shift, On-shift Examinations

The slope belt and tailpiece area are subject to a pre-shift examination every shift. Each shift's fireboss or mine examiner conducts a pre-shift, on-shift examination during the last three hours of his shift. Tr. II, 102; *see generally* 30 C.F.R. § 75.360. The examination for this area of the mine begins at the top of the slope, then the examiner proceeds to walk inby along the beltline. The purpose of the examination is to look for hazardous conditions or health and safety violations for the current and oncoming shift. The examiner either takes corrective action immediately upon identifying a hazardous condition, or he notates and describes the condition in the examination book. Tr. II, 102, 152, 184.

That book is then reviewed by the oncoming shift foreman, who determines the work to be done by the oncoming shift. The foreman relays that information to the prospective supervisors in the different areas of the mine, who then allocates tasks to the miners. At the end of the oncoming shift, each supervisor notes any corrective actions taken or work that still must be completed in the examination book. Tr. II, 26.

The examination book includes frequently used terms. If a condition is marked as a "hazardous condition" (HC), then immediate corrective action to address the condition must be implemented. Tr. II, 185. These types of conditions are life threatening, so a supervisor must be posted at the area until it is corrected. Tr. II, 50, 121, 185. Four of Peabody's witnesses testified in agreement that hot belt rollers or coal accumulations in contact with a running belt can constitute a hazardous condition. Tr. II, 85, 87, 121, 153, 179, 202. However, there is disagreement as to whether those accumulations would be hazardous if wet. Tr. II, 121, 138, 150, 153, 179, 202.

When a condition is marked as a "health or safety" issue (HS), a condition that may rise to a larger issue, but does not pose a life-threatening danger, the examiner should notate the condition in the examination book for the oncoming shift to correct. Tr. II, 121, 185. Joe Kennedy, Peabody's owl-shift dewater supervisor, and Terry Yancey, day shift's fire boss, testified that an accumulation not in contact with the belt or a knocked timber constitutes a health or safety issue. Tr. II, 85, 87, 153. Lastly, the term "carryover" means that the intended work has begun, but is not completed, so the following shift should continue working on the task. Tr. I, 268; Tr. II, 46, 83, 126, 139, 158, 186.

b. November 7, 2022

The record suggests that the operator knew of the developing accumulations even before November 7, 2022, two days before Craig's inspection. Tr. II, at 127.⁷ Anthony Chamness, Peabody's owl-shift fire boss, testified that on November 7, he discovered broken legs on the slope belt and the slope belt was leaning and causing accumulations to build up on the offside⁸ under the belt and on the walkway side. Tr. II, 127-28; S-7. The legs hold the slope belt's rails in place, which helps hold the top and bottom rollers. Tr. I, 241. After observing the broken legs and considerable spillage on the sides of the belt, Chamness ordered the shutdown of the belt and contacted that shift's dewater supervisor, Mark Elwood, to bring a crew to check on the issue. Tr. II, 128-29.

Chamness signed off on the 4:00am-7:00am pre-shift examination for November 7, 2022, but noted that it was a HS issue rather than a HC issue because the belt was no longer running, and the accumulations were wet. Tr. II, 129, 130. In his examination record, under the "Actions Taken," Chamness wrote that the broken legs and structure were corrected and that miners were cleaning the spillage. Tr. II, 129-30; S-7. Once he left the area, he observed three miners cleaning the accumulations. Tr. II, 130-31.

Joe Kennedy, the typical owl-shift radius or dewater supervisor, had been on leave. He testified that Elwood emailed him at the end of the shift, noting that the crew "went to the slope belt to replace legs" and that there were "man headers." Kennedy explained that the email meant there was a crew on shift that went to the belt to fix the slope legs to prevent more accumulations and that a miner was stationed at the head of each belt on the slope to prevent further spillage, belt splices, or other issues. Tr. II, 64-66.

For the day shift, Terry Yancey, that shift's fire boss, noted that the legs had broken from number 751 to 802 and that there were accumulations around the same location as the broken legs, at 3100 to the bottom. Yancey testified that during his examination, he observed eight or nine men working to repair the legs and clean the slope while the belt was shut down. Tr. II, 161. He also noticed spillage on the offside and walk side of the slope, but ultimately marked the condition as HS because the belt was not running in contact with accumulations, nor was it creating friction or heat. Tr. II, 264.

Rider Richardson, the day-shift radius or dewater supervisor, testified that as he arrived at the area, he was advised that seventeen offside legs were broken causing major spillage. Tr. I, 241. At the time, the slope belt was still shut down and there were at least ten miners who came to change the slope legs. Given the size of the accumulations, Richardson requested additional help. Tr. I, 242, 245. Richardson testified that, at the end of his shift, eleven legs were fixed, and

⁷ Documentary evidence of the examination records from November 5 and 6, 2022, reveal that coal accumulations at the slope belt were present on those dates. Ex. P-7; Tr. II, 143-45.

⁸ In its post-hearing brief, Peabody explains that while walking inby down the slope, "offside" is on the left while "walk side" is on the right. Resp't. Br. at 7, n.8; Tr. II, 128.

that about 10% of the accumulations were cleaned after miners washed and shoveled them. Tr. I, 243-44.

By the evening shift, James Barnett, that shift's fire boss, noticed that the belt was still shut down due to broken legs and significant coal accumulations. Tr. II, 184. During his examination, he observed two miners working on the accumulations by washing, cleaning, and spotting rollers below the 2000 mark. Tr. II, 189-90. After his examination, he noted in the books that there were "coal accumulations 740 to the tail," but marked the condition as HS since the accumulations were not running against the belt. Tr. II, 195. Eugene Faught, the usual evening shift supervisor, testified that Michael McBee, who worked that evening, emailed him, noting the changing of six legs, ten braces, two top frames, and the washing of accumulations from marker 3200 down. Tr. II, 20. The note also stated, "men working, needs more." This meant that the accumulations were not all corrected. Tr. II, 53.

c. November 8, 2022

Chamness testified that the next morning, he noticed miners still working on cleaning up the accumulations. Tr. II, 131. At that point, the legs were corrected, and miners were shoveling and spraying off the accumulations. Tr. II, 131. He observed some workers around the 2250 to 4000, which is about halfway on the slope to the bottom. Tr. II, 132. Chamness explained that he spoke with two miners working on the accumulations between 3700 to 4000. Tr. II, 132, 148-49. After his examination, he marked the accumulations as HS because the accumulations were wet. Tr. II, 134. Joe Kennedy reviewed the previous examinations for hazards and saw the HS designation. Tr. II, 92. During Kennedy's shift, his crew washed and loaded the slope, dropped two bad bottom rollers, and spotted bad bottom frames and more broken legs. Tr. II, 70.

Yancey conducted the day shift examination and testified that the accumulations were an improvement compared to the day before. Tr. II, 165. He also noted that there were several men working on cleaning the accumulations. Tr. II, 165. Richardson testified that his crew washed the slope down four sizes. Tr. I, 247-48. One crewman washed the material towards the pumps, shoveled it into a wheelbarrow, and moved it out of the way. Tr. I, 249. Four men were assigned on the slope to wash the smaller accumulations down to the mucker and shovel the larger material onto the belt. Tr. I, 249. Once the shift ended, Richardson recapped in an email that the crew washed the slope, mucked out the material at 4000, corrected the old structure from the slope, pumped down the material, and completely emptied the dewater sump. Tr. I, 251.

For the evening shift, Barnett testified that he observed miners still working on the slope belt and that it was "still in bad shape." Tr. II, 197. The material had been washed further down and sprayed as compared to the previous day, which revealed to him that miners had been working on it. Tr. II, 199. He ultimately marked the condition as HS in his examination book because the belt rollers were not in contact with the accumulations and the accumulations were just lying on the bottom. Tr. II, 200. At the beginning of Faught's supervisory shift, the radius sump was out, and the crew could not set it up, so the dewater area flooded out. Tr. II, 27. This required a new cable for the radius pump, which slowed the cleaning process because the spraying of more water would exacerbate the situation. Tr. II, 28. At the end of the shift, Faught provided this information to Kevin Clore, the mine foreman, who wrote down in the examination

book that each slope tail “needs more,” indicating that the accumulations were still to be corrected. Tr. II, 29-30, 167.

d. November 9, 2022

For the next day’s owl shift, Chamness observed further improvement but, did not recall whether there were men working on cleaning the accumulations. Tr. II, 136. Kennedy testified that he sent an email indicating that one miner worked on the slope around the 4000 area and one at the slope tail. Tr. II, 76. His examination book notes that the crew “cleaned and loaded at 4000.” He explained that this meant cleaning the slope tail area. Tr. II, 77.

Yancey similarly noticed that the conditions had improved for his day shift examination. Tr. II, 168. He observed two new miners cleaning the offside of the slope tail. Tr. II, 169. Richardson again testified to what his crew completed, which included washing down from the top of the slope to 3000 feet, and from the clean room to the tail using shovels and wheelbarrows to clean all the way down to the concrete. Tr. II, 255. At the end of his shift, Yancey saw no more material remaining. Tr. II, 255.

e. November 9, 2022 Evening Shift and Craig’s Inspection

Inspector Craig met with Barnett at the start of the evening pre-shift examination. Tr. II, 200. At that point, Craig reviewed the pre-shift examination records for this section of the mine. Tr. I, 40. Those records noted accumulations along the slope belt and slope tail that were not corrected, but instead carried over multiple days before the inspection. They further referenced broken belt legs on the slope belt. Ex. P-7 at 9-17. Nonetheless, throughout the records, Craig noted that those accumulations were not designated as hazardous conditions, but rather as health and safety conditions. Tr. I, 138-39; Ex. P-6, P-7.

Barnett testified that Craig told him there were bad rollers, but did not mention any accumulations. Tr. II, 201. He further testified that Emery Cain, the union representative, advised him of the bad rollers, so he flagged them and noted them in the examination record. Tr. II, 201. Barnett explained that if the inspector never wrote the order, the accumulations would not have been cleaned up for a couple of weeks. Tr. II, 198.

Faught testified that he noticed more accumulations than he had the day before. Tr. II, 31. He characterized the material as “muck,” and as a wet and soupy material. Tr. II, 34. To clean up the accumulations, he recruited four miners, one on the slope tail and three up on the slope. Hunter Isaacs was assigned to the slope tail, but while he was cleaning, he explained to Faught that the sump was full at the slope tail so he needed to retrieve the Bobcat before he could continue spraying. Tr. II, 35.

When inspector Craig arrived around 4:30pm, Faught testified that he was in the back of the dewater area, Isaacs had gone to retrieve the Bobcat, and the other three miners remained at the slope around 700. Tr. II, 35, 53, 37. Craig eventually ordered the belt to be shut down and requested additional miners to be brought over to start cleaning. Tr. II, 41-42.

Ultimately, based on his observations, review of the pre-shift examination books beginning November 5, and awareness that the mine knew of the accumulations, Craig concluded that “hazardous accumulations” were present along the slope belt and slope tail for multiple days without corrective action or posting. Tr. I, 114, 138-56; Ex. P-4. Craig, acknowledging that the records revealed men had been assigned or worked on the accumulations, testified that men working, men assigned is not corrective action. Tr. I, 212. He explained at hearing that “[y]ou’ve got to show that they did something.” Tr. I, 156. One of Peabody’s own supervisors, Richardson, similarly stated that flagging something, assigning men to shovel or carry over the condition on examination records, does not constitute corrective action under the regulation. Tr. I, 226, 257. Because he found the accumulations to be hazardous without corrective action, Craig issued Order No. 9704803. Ex. P-4.

After Craig issued the order, Kennedy and his crew continued to work to abate the condition during the next owl shift. Tr. II, 78. Faught further testified that there were about twenty miners cleaning during every shift until the order was terminated on November 11, 2022. Tr. II, 44. Craig testified that he spoke to management and found out that it took 1,250 manhours to clean up the accumulations. Tr. I, 130-31, 191.

2. Finding of Violation

Order No. 9704803 states that:

The operator has failed to correct the hazardous conditions and violations of the mandatory health and safety standards that are recorded in the examination book for the Slope Belt and Slope Tail. When checked, the examiners have listed multiple hazardous conditions along with violations of the mandatory health and safety standards on multiple pre/on shift examinations for multiple days and nowhere does a corrective action show to have been done or recorded. As can be seen in citation numbers 9704802 and 9704797.

Men assigned and carried over is not a corrective action.

*The operator has engaged in aggravated conduct constituting more than ordinary negligence by not correcting the hazardous conditions found and recorded by the examiners.

* The hazardous condition is obvious and extensive and should have been found and corrected by the operator. Especially since an examiner found, reported and recorded in the examination book and the operator has read and countersigned the examination books on all shifts the hazards were recorded.

Standard 75.363(a) was cited 4 times in two years at mine 0102901 (4 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-4.

Inspector Craig concluded that the alleged facts for this Order resulted in a violation of 30 C.F.R. § 75.363(a) for Peabody's failure to correct hazardous conditions listed in the pre-shift examination books. Tr. I, 138. That regulation sets forth the applicable requirements governing the documentation and correction of hazardous conditions found by an examiner and states, in relevant part, that:

Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the areas shall remain posted until the hazardous condition is corrected...Any violation of a mandatory health or safety standard found during a preshift, supplemental, onshift, or weekly examination shall be corrected.

30 C.F.R. § 75.363(a).

In short, this regulation requires that any hazardous condition found during an examination must be posted and corrected immediately or remain posted or dangered off until it is corrected. *Id.*; see also *U.S. v. Gibson*, 409 F.3d 325, 333 (6th Cir. 2005) (explaining that the regulation establishes a duty on the part of the operator to post notices and keep records of hazardous conditions); *Coal River Mining, LLC*, 34 FMSHRC 1087, 1096 (May 2012) (ALJ) (“If at any time during preshift, on-shift, or weekly examination a hazardous condition is observed, a conspicuous danger sign must be posted and the condition must be corrected immediately, or everyone is to be withdrawn[.]”). Though the regulation’s language appears to be plain and clear, the Commission has not yet laid out an explicit framework or test to determine if a violation has occurred, so I look at Commission and ALJ case law for guidance.

Commission’s Approach

The Commission most notably addressed section 75.363(a) in *RAG Cumberland Res., LP*, 26 FMSHRC 639, 651-53 (Aug. 2004). In that case, the Commission focused on the regulation’s plain language and first determined whether the alleged condition was hazardous. *Id.* at 653. The Commission considered testimonial and documentary evidence regarding both the immediacy or urgency of the need to correct the condition and the danger posed by the condition. *Id.* Importantly, however, when applying the facts, the Commission did not explicitly define “hazardous condition.”

The Commission next considered whether the operator failed to immediately correct the hazardous condition, as it had previously found that posting was impractical as the condition arguably affected the entire mine. *Id.* The Commission primarily focused on the immediacy of any correction. It ultimately concluded that the operator did not immediately correct the condition but rather delayed, for 3 to 6 hours, in taking some measures “required to more fully correct the violative conditions.” *Id.* at 653-54. It also found that a small reduction did not satisfy the regulation’s requirement to “immediately correct” the condition. *Id.* at 654. That may suggest that a “fully corrected” condition is necessary to satisfy the regulation. *Id.* at 653-54.

The Commission's reasoning can be summarized into the following two-step inquiry: (1) determining whether a hazardous condition exists, as supported by testimony and other evidence; and (2) assessing whether the operator either posted or dangered off the condition or immediately corrected it. *Id.* at 651-54. I find this analysis and derived inquiry instructive in determining whether a violation of section 75.363(a) has occurred. However, in the next section, to secure further guidance, I analyze how other ALJs have addressed this regulation.

Other ALJ Approaches

Since the Commission has not specifically crafted an explicit test to determine a violation of this regulation, some ALJ cases follow a test posited by another ALJ in *Black Beauty Coal Co.*, 33 FMSHRC 1504 (June 2011) (ALJ), which may shed additional light on whether to find a violation. *See e.g., Peabody Midwest Mining, LLC*, 41 FMSHRC 340, 354-55 (June 2019) (ALJ) (adopting the test in *Black Beauty*, but also emphasizing that there must be a potential for immediate danger). The initial step for that test is for the Secretary to demonstrate that a "hazardous condition" existed at the time of the examination. *Black Beauty*, 33 FMSHRC at 1511. If that is proven, the Secretary must next show that the hazardous condition has not been immediately corrected, posted, or dangered off. *Id.* At that point, the focus shifts to the operator's actions, if any, that were taken to remedy the condition. *Id.* If no actions were taken, including immediately correcting the condition or posting, then a decisionmaker should find a violation of 30 C.F.R. § 75.363(a). *Id.*

Another ALJ has applied an objective standard inquiring into whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Big Ridge, Inc.*, 33 FMSHRC 2238, 2241 (Sept. 2011) (ALJ) (referencing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). In that case, the ALJ found the ultimate issue to be "whether the subject conditions were hazardous at the time of the examination taking into consideration the opinion of the inspector and the reasonably prudent person test." *Id.* The elements of this test are whether the alleged condition is hazardous by heavily weighing the inspector's opinion and what a reasonably prudent person familiar with the mining industry would consider hazardous. *Id.*

Parties' Arguments

Peabody challenges the violation on four distinct grounds. It first argues that the Inspector issued the order on the false premise that Peabody "didn't do anything." Resp't Br. at 19; Tr. I, 139. As support, Peabody points to the examination records that reveal work, cleaning, washing, and corrective actions were being done. Resp't Br. at 20, 26. It also refers to the testimony of Chamness, Yancey, and Barnett who, all confirmed that miners consistently worked on the area to improve the conditions. Resp't Br. at 20. Next, Peabody asserts that Craig wrongly believed that no one was working to improve the conditions at the slope belt and tail at the time of his inspection. Resp't Br. at 21. Faught had assigned three miners to clean the belt and Isaacs to clean the slope tail area. Resp't Br. at 21. Third, Peabody attacks the credibility of Craig's allegation that Faught had told him that Peabody had not corrected the conditions due to lack of manpower. Resp't Br. at 21. It ultimately contends that the statement was never made. Resp't Br.

at 21. Lastly, Peabody claims that Craig misunderstood the term “carryover” as meaning “[t]hey didn’t have time to mess with it, so they put it on the next shift on the next page.” Tr. I, 120. Peabody argues that Craig never encountered the term before and that he had no knowledge that Peabody defines it as the task being not yet completed, but that work was being done on the conditions. Resp’t Br. at 22.

In opposition, the Secretary first argues that the coal accumulations identified in violation of section 75.400 constitute a “hazardous condition,” and were present in the pre-shift examination for the day of the inspection and a couple days before. Sec’y Br. at 6-7. As support, Craig testified that his observations, review of the examination books for those days, and the fact that he was informed that the mine had knowledge of the accumulations but not enough manpower to correct them immediately, signaled to him that these coal accumulations and ignition sources were present along the slope belt and slope tail area for multiple pre-shift examinations over multiple days. Sec’y Br. at 7. Next, the record is devoid of any evidence that these accumulations were ever posted or dangered off. Sec’y Br. at 6. Lastly, even though some of the pre-shift examination records for the days leading up to the inspection revealed that men were assigned and had worked on the accumulations, this does not constitute the “immediate corrective action” that the regulation mandates. As support, the Secretary highlights Craig’s testimony that men working and men assigned are not corrective actions and Richardson’s testimony that flagging something, assigning men to work, or carrying over the condition to the next shift, does not constitute corrective action. Tr. I, 226, 256. Put together, the Secretary concludes that Peabody violated section 75.363(a) because it failed to post or immediately correct the hazardous coal accumulations along the slope belt and slope tail area.

I ultimately agree with the Secretary that the extensive accumulations satisfy a “hazardous condition,” that Peabody did not post or danger off the slope tail or slope belt area, and that Peabody did not “immediately correct” the condition. I therefore find a violation.

Analysis

From the Commission and ALJ case law, I derive the following test to determine whether there is a violation of section 75.363(a). First, a decisionmaker must determine whether the Secretary has carried her burden of proving that the alleged condition noted by a designated mine examiner during an examination was hazardous. *RAG Cumberland Res., LP*, 26 FMSHRC at 651-53; *Black Beauty Coal Co.*, 33 FMSHRC at 1511 (ALJ); *RAG Cumberland Res.*, 23 FMSHRC at 1257 (ALJ). For this element, the decisionmaker should consider the urgency or need to correct the condition, as well as the danger posed by the condition. *RAG Cumberland Res.*, 26 FMSHRC at 652. When considering the urgency, if the hazard is found to be an imminent danger, then miners other than those designated under the Act, must be withdrawn. 30 C.F.R. § 75.363(a); *RAG Cumberland*, 23 FMSHRC at 1257.

Second, if the Secretary proves that a hazardous condition existed, she must next demonstrate that the condition had not been posted with a conspicuous danger sign, dangered off, or immediately corrected. *Id*; see also *Black Beauty*, 33 FMSHRC at 1511; *RAG Cumberland Res.*, 23 FMSHRC at 1257. For this element, the decisionmaker should examine any actions the

operator employed and whether those actions sufficiently and fully corrected the hazardous condition at issue. *Black Beauty*, 33 FMSHRC at 1511.

In sum, section 75.363(a) is violated when: (1) the Secretary proves that the condition discovered by a mine official during an examination and listed in the examination book is “hazardous”, and (2) that hazardous condition was not posted, dangered off, or immediately corrected in its entirety. *RAG Cumberland Res., LP*, 26 FMSHRC at 651-53; *Black Beauty Coal Co.*, 33 FMSHRC at 1511 (ALJ); *RAG Cumberland Res.*, 23 FMSHRC at 1257 (ALJ).

A. Accumulations Constitute a Hazardous Condition

I first consider⁹ whether the Secretary sufficiently demonstrated that the accumulations at issue constitute a “hazardous condition.” The Commission, when interpreting “hazardous condition” under section 75.360(b), 30 C.F.R. § 75.360(b),¹⁰ approved the definition of “hazard” as a “possible source of peril, danger, duress, or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (citing *Webster’s Third New International Dictionary* 1041 (1971)). The regulation at issue in *Enlow Fork* required pre-shift examiners to “examine for hazardous conditions.” 30 C.F.R. § 75.360(b). Absent any evidence that the Secretary intended for the term “hazardous conditions” to have a different meaning across regulatory sections, I find that the Commission’s interpretation of “hazard” should be applied in this case. See e.g., *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (explaining that the presumption of consistent usage holds that identical words used in different parts of the same act are intended to have the same meaning, unless the text or context suggests otherwise); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 33-34 (2005) (construing the term “principal activity” in the same way when used in neighboring provisions).

Here, it is evident that the extensive accumulations cited and present during the inspection constitute a “hazard,” or “possible source of...danger.” To reach this conclusion, I primarily credit the inspector’s detailed observations of the accumulations and multiple fire hazards he discovered throughout his inspection.

Upon arriving at the inspection area, Craig observed accumulations of coal and coal fines ranging from the slope tail to the 633-belt structure mark and a running slope belt. Tr. I, 45, 49-64, 83; Ex. P-1, P-5. At the slope tail, the accumulations spanned 300 feet long by 32 inches high by 46 inches wide. Tr. I, 49-59. In that area, the coal accumulations were fine and the top three quarters of the accumulation were dry, while the remaining quarter was wet. Tr. I, 51. Craig reasoned that the upper layer was dry because of the frictional heat that was occurring as the belt ran in contact with the coal accumulations. Tr. I, 51. That contact also caused the top of the

⁹ It is undisputed that Chamness, Yancey, Faught, and Barnett all qualify as either a mine foreman or equivalent mine official or certified person designated by the operator for purposes of conducting examinations under subpart D. 30 C.F.R. § 75.363(a).

¹⁰ That regulation states, in relevant part, “[t]he person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section...”

accumulation to be worn flat. Tr. I, 50; Ex. P-1. He credibly testified that the accumulations were piled up under the belt and were in contact with the belt and therefore could not get any higher than 32 inches. Tr. I, 49; Ex. P-1. As he moved away from the slope tail area outby along the slope belt, he noticed more accumulations six to eight inches deep directly under the belt and piled on the offside, where he saw an offside roller spinning in coal accumulations. Tr. I, 63, 70; Ex. P-1.

On top of these extensive accumulations, Craig observed multiple fire hazards that could serve as ignition sources, including multiple rollers and the belt running in the coal accumulations. Tr. I, 52-53. After he ordered the shutdown of the belt, he could still “feel heat” near a bad roller in the vicinity. Tr. I, 53-54. He further testified that the bottom rollers were covered in coal or “locked up” and some of the top rollers were in contact with accumulations creating more friction. Tr. I, 55-56. These damaged rollers were present in both the slope belt and slope tail area. Tr. I, 69; Ex. P-3 at 1-4.

Taken together, the extensive accumulations and multiple ignition sources pose a significant danger, specifically a fire or explosion. Tr. I, 157. Several Peabody witnesses explained that they denoted the condition as “HS” either because the coal accumulations were wet, the belt was shut off, or the accumulations were not in contact with the belt. That may have been true, but at the time of Craig’s inspection, the belt was turned on and he observed multiple instances of the belt in contact with the coal accumulations. Additionally, the Commission has consistently found that “wet coal accumulations pose a significant danger in underground coal mines” because they “at best, delay[] combustion.” *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329 (Aug. 2013); *Amax Coal Co.*, 19 FMSHRC 846, 848-49 (1997) (citation omitted). The D.C. Circuit has similarly found a danger when wet coal was found near an ignition source—in that case, a running conveyor belt. *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1268 (D.C. Cir. 2016). So, even if the coal was “wet” that does not make it a non-hazardous condition.

The purpose of 30 C.F.R. § 75.400 sheds supporting light. The Secretary intended to remove and eliminate ignitions, fuel, and explosive sources as Congress recognized that ignitions and explosions were a major cause of death and injury to miners. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (quoting *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979)). In *Black Diamond Coal*, the Commission noted that excluding “loose coal that is wet” or “mixed with noncombustible materials, defeats Congress’ intent to remove fuel sources from mines and permits potentially *dangerous conditions* to exist.” 7 FMSHRC at 1121. In short, the Commission has found loose coal accumulations that can ignite or propagate a fire to be “dangerous,” which the Commission has found to be legally synonymous with “hazardous” when interpreting 30 C.F.R. § 75.360. Applying the presumption of consistent usage, that interpretation has forceful weight for section 75.363(a). The coal accumulations here are extensive and I strongly credit inspector Craig’s testimony that he felt heat coming from the turned off roller from a safe distance, and his observation of other ignition sources, including locked up rollers. Tr. I, 53-54, 111, 156.

The testimony, documentary evidence, and Congressional intent support a finding that these coal accumulations constituted a “hazardous condition” easily satisfying the Commission’s definition. The conditions cited by the inspector clearly “create or increase the possibility” of

loss, danger, or peril. I therefore find that the Secretary has adequately proven its first step, that a hazardous condition existed.

B. Not Corrected Immediately

I next consider whether the hazardous condition at issue had been immediately corrected, posted, or dangered off. As a preliminary matter, nothing in the record shows that any of the subject accumulations were posted with a conspicuous danger sign or dangered off. In fact, Craig testified that he had not observed any danger off areas in the slope belt or slope tail. Tr. I, 157. Thus, my primary focus is on whether Peabody took actions to remedy the condition and whether the condition was corrected immediately.¹¹

I find that Peabody took some actions to address the accumulations that began developing before November 7, 2022. Tr. I, 187, 188, 189, 190. For starters, on November 7, 2022, after discovering the broken legs on the slope belt and considerable spillage of coal over the sides of the belt, Chamness ordered the shutdown of the belt and corrected the broken legs and structure. Tr. II, 127, 128-30. As he left the area, he recalled that three miners remained to clean up the accumulations. The rest of that day, miners worked to prevent further spillage, repair belt splices, and replace broken legs. Tr. II, 64-66, 264; Tr. I, 243-44. Barnett testified that the belt had remained shut off during the evening shift due to broken legs and significant coal accumulations. Tr. II, 184. The examination book entry at the end of the day stated that each slope tails “needs more,” indicating that the accumulations had not yet been fully corrected. Tr. II, 30. The following day, similar actions were taken to clear up the accumulations and correct the remaining broken legs and recently discovered bad bottom rollers and frames. Tr. II, 70, 131. Again, at the end of that next day, the examination book denoted that each slope tail “needs more.” Tr. II, 30.

On the day of the inspection, during the owl shift, the examination book revealed that the crew “cleaned and loaded at 4000,” which meant the slope tail area was still being cleaned. Tr. II, 77. Richardson testified that at the end of his shift, he saw no more material remaining. Tr. II, 255. Overall, I commend the operator’s efforts in curbing the accumulations in the previous days, but as Richardson testified, flagging something or assigning men to work or carrying over the condition to the next shift, do not constitute corrective action. Tr. I, 226, 256.

¹¹ A plain reading of the regulation reveals the importance of the immediate correction of the hazardous condition in the absence of any posting or dangering off. The relevant language states “[a] hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected.” 30 C.F.R. §75.363(a). The whole point of this regulation is to immediately remove access to or the possibility of a miner encountering the hazardous condition.

As far as these actions from the previous days are relevant,¹² I find them to be insufficient to satisfy the requirement to immediately correct a hazardous condition. The most relevant pre-examination book is the one that occurred immediately prior to Craig's inspection. The other books shed some light on the actions taken by Peabody, including the designations of the previous accumulations as HS¹³. Tr. II, 195, 264, 92, 134, 200. However, the primary focus is on the records that Craig reviewed, which noted accumulations along the slope belt and slope tail that were not corrected. Ex. P-7 at 9-17.

The "corrective" action taken the day of the inspection is that four miners were assigned to clean up the accumulations. Tr. II, 31. One of the miners, Isaacs, was assigned to the slope tail, but went off to retrieve a Bobcat, so he was not present when Craig arrived. The other three miners remained at the slope at around 700. Tr. II, 35, 53, 37. Given that the accumulations were more extensive than the day before, and that the belt was still running with only three to four miners working on cleaning up the hazard, I find this insufficient corrective action. If the slope tail and slope belt area had been dangered off or posted, then the actions characterized as "corrective" by Peabody, inclusive of the actions taken the days prior, may have been sufficient so long as the area remained posted until the condition was completely corrected. *See* 30 C.F.R. § 75.363(a); Resp't Br. at 26-27 (explaining its alleged corrective actions). But no posting or dangering off occurred here. Tr. I, 157.

Under either avenue, *that is*, posting or immediately correcting the condition, there is a connotation in the plain language of section 75.363(a), that the condition must be *fully corrected* to satisfy the regulation. The facts show that the conditions were not fully corrected until Craig terminated the order on November 11, 2022. Tr. II, 44. Such failure to fully and immediately correct the condition may be attributed to Peabody's failure to shut down the belt on November 8 or November 9 to prioritize the complete cleanup of the coal accumulations. Tr. I, 139. This

¹² They arguably are not particularly relevant because the conditions observed by inspector Craig, including the running belt and rollers in contact with coal accumulations, the multiple ignition sources, "locked up" bottom rollers, and damaged rollers present in both the slope belt and slope tail area, are materially different than the ones that any of Peabody's witnesses mention when referring to November 7 or November 8. Tr. I, 52-53, 54, 55-56, 69, 157; Ex. P-1; P-3; P-4. However, because they were noted in pre-shift examinations that Craig reviewed, they are more relevant than they were for the previous regulation, 30 C.F.R. § 75.400.

¹³ In a footnote, Peabody states "[i]mportantly, the examiners listed the conditions they found between November 7 and November 9 in the relevant area as "health and safety," not hazardous conditions." Resp't Br. at 26 (citing Ex. S-7). However, just because a Peabody examiner notes a condition as "HS" rather than a "HC," does not mean it does not satisfy a "hazardous condition" under the Commission's definition. This is because Peabody defines HC as a condition that is "life threatening," which is a much higher bar than satisfying the Commission definition of "hazard" which as described above is "a possible source of...danger." *Enlow Fork*, 19 FMSHRC at 14 (internal citation omitted). The Commission has no obligation to defer to the pre-shift examiner's characterization especially when that characterization is not in line with the Commission's definition and precedent.

approach was suggested by inspector Craig, who testified that the pre-shift examiner “should have shut off the belt and they should not have turned it on until the conditions were corrected because those are immediate hazardous conditions.” Tr. I, 139. Regardless, assigning four men to clean ever-increasing accumulations, with Craig not observing any one of them cleaning the slope belt or tail area, is insufficient.

As further support for finding insufficient corrective action, Barnett testified that if Craig had not issued the order, the accumulations likely would have taken a few more weeks to be fully cleaned out. Tr. II, 198. His testimony suggests that, even though there were arguably some relevant actions taken to remedy the conditions, the operator failed to provide the hazardous conditions the priority they needed to be corrected immediately.

In sum, because there were clear hazardous conditions present, and Peabody failed to danger off, post, or immediately correct those conditions, I find a violation of section 75.363(a).¹⁴

3. Significant and Substantial

Next, when inspector Craig issued this Order, he designated it as significant and substantial. Tr. I, 156; Ex. P-4. Peabody contests the S&S designation and specifically challenges step two of the *Mathies* test in the context of evaluating the reasonable likelihood of a fire. It highlights the absence of a confluence of factors because the cited material was “wet and sloppy,” with the consistency of “muck,” there was a constant source of water, and no methane was detected. Resp’t Br. at 28-29. Peabody also argues that the third *Mathies* test is unsatisfied when evaluating the reasonable likelihood of an injury because assuming continued normal mining operations, the remedial and corrective action that was undertaken by Peabody would continue and the accumulations would eventually be cleaned up. Resp’t Br. at 29.

The Secretary disagrees and maintains that all four of the *Mathies* elements are met and that there was a reasonable likelihood for a fire or explosion and resulting serious injury to occur. Sec’y Br. at 10-13. For the reasons below, I ultimately agree with the Secretary and uphold the S&S designation.

¹⁴ Alternatively, the reasonably prudent person test is satisfied. The protective purpose of the standard is to prevent the development of hazardous conditions once observed during an examination. *See e.g., Big Ridge, Inc.*, 33 FMSHRC at 2241. If a reasonably prudent mine operator noticed the underlying violation of section 75.400 with the extensive coal accumulations ranging all along the slope belt and slope tail areas, that operator likely would take adequate corrective action by cleaning up the areas riddled with the accumulations. A reasonably prudent operator would not have left these accumulations to develop near ignition sources for multiple pre-shift examinations over several days given the probability that a fire or explosion would occur. Therefore, this test is satisfied.

a. Mandatory Safety Hazard

In the preceding section, I concluded that Peabody violated section 75.363(a), a mandatory safety standard, when it failed to immediately correct a hazardous condition, specifically accumulations of coal in contact with the slope belt, and nearby ignition sources that were discovered by examiners and notated in the pre-shift examination books. This first element is therefore satisfied.

b. Reasonably Likely to Cause the Defined Hazard

Next, the discrete safety hazard against which section 75.363(a) is directed is any condition that serves as a possible source of danger or peril, or a condition that increases the likelihood of the possibility of loss. *See e.g., Enlow Fork*, 19 FMSHRC at 14. In this case, inspector Craig issued the order out of fear of the likelihood that the extensive amount of accumulations of combustible coal material and the operator's failure to post or immediately correct the accumulations would result in a fire or explosion. In sum, the prospective danger that is intended to be prevented here is a fire, ignition, or explosion.

As previously stated, the Commission has held that “[w]here a violation poses a risk of fire or explosion, the likelihood is demonstrated by the presence of a ‘confluence of factors,’ including possible ignition sources, the presence of methane, and the equipment in the area.” *Excel Mining, LLC*, 37 FMSHRC 459, 465 (Mar. 2015). Here, there is a real concern that the coal, coal fines, or block coal would contact several ignition or heat sources, including the belt, bottom belt rollers, and the worn-flat, stuck, or locked up rollers at the slope tail. Tr. I, 111-12; Ex. P-1. As inspector Craig credibly testified, those ignition sources would serve as a “fire hazard.” Tr. 129. He further stated that with the multiple ignition sources present along with the large amounts of accumulations in contact with those sources, it was reasonably likely to cause a fire. Tr. I, 129-30; Ex. P-1; P-3; P-8.

I acknowledge that the record reveals the presence of wet conditions, absence of methane or low levels of it, along with an alleged constant source of water, which makes the risk of a fire or explosion less likely. Tr. I, 207-208, 209; Tr. II, 110, 30-31; Ex. S-7. However, I do not find that these factors take the risk of a fire or explosion out of the realm of reasonable likelihood given the extensive amount of the accumulations and the several frictional and heat sources present. In fact, even though methane was low when the order was issued, that does not bar a finding of reasonable likelihood. *See U.S. Steel Mining*, 7 FMSHRC at 1130. As Craig testified “[m]ethane can accumulate at any point in time in different areas of the mine...you still wouldn't want to compromise the [south main fields] with a flame because there is an unknown mixture of what could be behind the seals which would make a fire...” Tr. I, 122. Under his view, the rapid buildup of methane could reasonably occur. Tr. I, 122.

Additionally, any “wet accumulations” could dry out and ignite. *Mid-Continent Res.*, 16 FMSHRC 1226, 1230 (June 1994). As the Commission explained in *Black Diamond Coal*, “in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire.” 7 FMSHRC at 1120. In this case, when describing the accumulations in the slope tail area, Craig testified that the top three quarters were dry while the

bottom quarter was wet. Tr. I, 51. Applying the Commission's reasoning in *Black Diamond*, a fire could occur on the top layers and then dry out the bottom layer where the coal was wet.

Therefore, given the inspector's credible testimony supporting a conclusion that the combination of risk factors is at least reasonably likely to result in a fire, I find that this element is satisfied. In so finding, I attribute substantial weight to the opinion of Craig, an experienced MSHA inspector with over fifteen years of mining industry experience. *See e.g., Harlan Cumberland*, 20 FMSHRC at 1278-79. Tr. I, 20.

c. Reasonably Likely to Cause Injury

Assuming the occurrence of the hazard, that is, a fire or explosion, it is reasonably likely that the accumulations of coal would continue to contact the belt and pile up on the belt structure, and that the bottom belt rollers would continue to run in accumulations at the slope belt tail area, which would serve as a continuous ignition source for the fire to spread and cause injury to a miner. Tr. I, 111-12. Craig testified that "all of the large accumulations...and then all of the ignition sources that were present, heat sources, it was reasonable likely that this condition was to continue to exist that results in a fire and miners would sustain injuries or death from the fire." Tr. I, 112, 156-57. Craig further testified that eight miners were likely to be affected as those miners constituted the crew responsible for maintaining the dewater system. Tr. 112-13, 158, 174. Since there were at least eight miners in the nearby vicinity, if a fire or explosion were to occur, it is likely that at least one miner would be injured. Peabody does not contest that if a fire or explosion were to occur, that an injury would result, so I find this part of the S&S test to be satisfied.

Assuming continued normal mining operations, there is a reasonable likelihood of an injury. *See U.S. Steel Mining*, 7 FMSHRC at 1130. Peabody does argue that remedial, corrective action was ongoing and would have continued, even if the inspection had not occurred. Resp't Br. at 29. As factual support, Peabody points to Faught's testimony that he assigned three miners to clean the slope belt and one to clean the tail area. Tr. II, 31. Peabody also references its efforts to fix the broken legs and the clean up the accumulations the days prior. Resp't Br. at 29. I do not find Peabody's argument persuasive. The pre-shift examination books reveal that coal accumulations along the slope belt and tail areas had not been sufficiently corrected for days before Craig conducted his inspection. Tr. I, 144-56; Ex. P-5. Peabody also only shut down the belt for one day on November 7, 2022, to address the issue, but once Craig arrived the belt was running. Tr. II, at 128-29, 161, 242, 184; Tr. I, 52-53. Peabody's own witness, Barnett, testified that by allowing the belt to continue to run, rather than shutting it down and fully addressing the issue, the accumulations likely would not have been corrected for a few weeks. Tr. II, 198. Inspector Craig testified in agreement. He stated that the pre-shift examiner "should have shut off the belt and they should not have turned it on until the conditions were corrected because those

are immediate hazardous conditions.”¹⁵ Tr. I, 139. So, continued normal mining operations would have led to continuous buildup of accumulations, raising the likelihood of a fire or explosion, which in turn, makes an injury much more likely.

The record reveals that if a fire or explosion were to occur, an injury to a miner would be reasonably expected. *See e.g., Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997) (suggesting that the presence of an ignition source with large amounts of coal accumulations that could propagate a fire or fuel an explosion satisfies the third element). I therefore find this element satisfied.

d. Reasonably Serious Injury

For the fourth element, Commission precedent makes clear that fires, “ignitions, and explosions are major causes of death and injury to miners.” *Black Diamond Coal Mining Co.*, 7 FMSHRC at 1120. Inspector Craig testified that any injury from a fire would be “reasonably serious,” and states that the miners “would sustain fatal injuries from the burns and smoke inhalation.” Tr. I, 157-58. He also explained that two miners were killed from a mine fire started by a belt line at Aracoma. Tr. I, 158. His testimony is sufficient on its own to satisfy this element. *See e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2329 (Aug. 2013) (holding that nothing more is necessary to support an inspector’s “common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation”); *Harlan Cumberland*, 20 FMSHRC at 1278-79. Peabody’s failure to immediately correct the hazardous condition, namely the coal accumulations, worn off belt rollers, and locked bottom rollers, poses the same degree of risk of injury as the underlying hazard itself.

Since I conclude that the four elements of *Mathies* are satisfied, I uphold the S&S designation for Order No. 9704803.

¹⁵ I recognize that Peabody suggests in its post-hearing brief that shutting off the slope belt would result in ineffective cleaning. Resp’t Br. at 32-33. Peabody explains that the belt must run to clean it, because the material on the inclined portion of the belt is hosed to a mucker, which conveys it back to the belt and the material at the tail area is hosed into a sump, where it is pumped through the dewater system and back onto the belt. Resp’t Br. at 33. If the belt is off, this cleaning process cannot occur. Tr. I, 243. Peabody then states that such ineffectiveness was shown by “how many miners it took to clean after [] Craig ordered the belt to be shut down.” Peabody concludes that it took considerably more miners and more time to clean the cited areas than if normal operations proceeded. Resp’t Br. at 33; Tr. II, 45.

I ultimately do not find Peabody’s argument persuasive. The record shows that the accumulations when the belt was turned on continued to grow and that the accumulations were not being effectively removed over the past eight shifts. It was not until the belt was shut off that Peabody prioritized the cleanup of the accumulations so the termination of the Order could occur only two days after. Peabody’s own witness explained that if normal operations were to proceed, the accumulations would remain for weeks. Tr. II, 198. Two days is not “considerably more time,” than a few weeks.

4. Unwarrantable Failure

Inspector Craig also designated this Order as an unwarrantable failure to comply with a mandatory safety standard. Ex. P-4; Tr. I, 158-60. Peabody argues that considering the unwarrantable failure factors set forth in *IO Coal*, no aggravated conduct existed. Resp't Br. at 31. Peabody primarily highlights its continuous remedial efforts to address the coal material on the slope belt and tail area beginning November 7, the short amount of time the condition existed, the wet nature of the material leading to a low degree of danger, and its lack of notice of any need for greater efforts to comply with the standard. Resp't Br. at 32-35.

The Secretary contends that the factors described in *IO Coal* ultimately weigh in favor of an unwarrantable failure finding. Sec'y Br. at 15-18. As support, Craig explained that he designated it as unwarrantable failure "by just allowing it to exist by multiple mine management, allowing miners to work in that area knowing that condition was present...[they] allowed to exist for so many days." Tr. I, 159. Though I do not find Craig's testimony very supportive directly on this point, after weighing each factor in turn, I uphold the unwarrantable failure designation.

a. Duration of the Violative Condition

First, Peabody suggests that the cited condition did not exist for an extended amount of time when considering the events of the week of November 7. Resp't Br. at 33. It asserts that, on November 7, 2022, the legs broke, which resulted in considerable spillage along the slope belt and tail area. Tr. II, 127. After that, Peabody made progress the next few days and cleaned the tailpiece area to the concrete by the end of the November 9 day shift. Tr. I, 255. It presumes that "another spillage incident occurred close in time" to the subject inspection. Resp't Br. at 34; Tr. II, 109. However, Peabody does not provide an exact time or estimation of when that other spillage incident occurred. This is unpersuasive and Peabody's progress in cleaning up the area for several days is more appropriate for its efforts toward abatement.

To the contrary, the Secretary provides a measurable estimation as to duration. For her part, the Secretary highlights Craig's testimony that "[i]t was approximately three and a half days. It matched up with what the foreman told me and it matched right up with the exam book..." Tr. I, 128; Ex. P-6; P-7. Craig further testified that a mine foreman informed him that the accumulations lasted three and a half days. Tr. I, 72, 127-28. I find the inspector's estimate credible and accept it as sufficient evidence to establish duration. *Windsor Coal Co.*, 21 FMSHRC 997, 1003 (Sept. 1999); *Peabody Coal Co.*, 14 FMSHRC at 1261-63 (affirming the judge's duration finding primarily based on the inspector's observation and testimony of the cited area).

I find that this factor weighs in favor of finding an unwarrantable failure. The cited standard deals with the operator's failure to immediately correct, post, or danger off a "hazardous condition." Here, the Secretary provided sufficient evidence to show that coal accumulations had been an ongoing issue as noted in pre-shift examination books for at least three days. Ex. P-6, P-7. Regardless of the previous days, the duration of not immediately correcting the condition or

posting it *at least* lasted the day of November 9.¹⁶ Neither the owl shift nor the day shift examiner immediately corrected the hazardous accumulations, nor did they danger off the area with the multiple ignition sources and the coal accumulations running into contact with the belt. Commission precedent makes clear that even a few shifts is sufficient to satisfy this factor. *Windsor*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (finding that a duration lasting more than one shift weighs in favor of finding unwarrantable failure); *CAM Mining*, 38 FMSHRC 1903, 1909 (Aug. 2016) (upholding an unwarrantable failure finding since the operator's failure to abate the hazard exposed at least two shifts of miners to highly dangerous conditions).

The weight of the evidence in this case shows that there was a hazardous condition that was not immediately corrected or dangered off for at least two shifts. This weighs in favor of an unwarrantable failure finding.

b. Extent and Obviousness of the Violative Condition

Peabody does not specifically address these factors in its post-hearing brief. Resp't Br. at 32-35. However, the Secretary argues that the accumulations of coal in the slope belt and tail area were both extensive and obvious as supported by inspector Craig's testimony and the submitted photographic evidence. Sec'y Br. at 15-16. Without any convincing contrary evidence or argument, I side with the Secretary but for a different reason.

Here, the violative accumulations and ignition sources cited in the pre-shift examinations, which Peabody failed to immediately correct, post, or danger off, were obvious. Craig testified that he observed no signs that affected areas had been posted. Tr. I, 157. So, it is obvious that Peabody did not post or danger off the underlying hazardous conditions, specifically the coal accumulations and nearby ignition sources. It is similarly obvious that these conditions were notated in the pre-shift examination books yet not immediately corrected or dangered off. *See e.g.*, Tri. II, 30, 77, 195, 264, 92, 134, 200; Ex. P-7. These notations were extensive in that they dated back three and half days over a total of eight shifts. Because this unwarrantable failure analysis focuses on the 75.363(a) violation, there is no need to discuss in detail the extent or obviousness of the underlying coal accumulations. I therefore find the violative condition of failing to immediately correct, post, or danger off the hazardous accumulations and ignition sources to be obvious and somewhat extensive. This weighs in favor of finding an unwarrantable failure.

c. Degree of Danger Posed by the Violative Condition

For this factor, Peabody once again stresses that the material was "wet" and "soupy" with the consistency of "muck." Resp't Br. at 34; Tr. II, 34, 109. Based on that characterization, along with the continuous washing and cleaning that occurred, it reasons the degree of danger is quite low. The Secretary, in opposition, asserts that the hazard cited posed a high degree of danger to miners given the significant accumulations and multiple ignition sources that were allowed to persist. Tr. I, 160. As support, the Secretary cites to Peabody's description that any injury would

¹⁶ The Commission has allowed even imperfect evidence or estimation of duration to be considered. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010).

be fatal or reasonably serious. Tr. 112, 157-58. The Secretary also maintains that even “wet” coal can dry out and ignite to create a dangerous fire or explosion just like dry coal material. Sec’y Br. at 17. I ultimately agree with the Secretary.

As previously discussed, the Commission has held that even damp or wet coal poses a significant danger because it can dry out and ignite, especially when near or in contact with heat and frictional sources. *See e.g., Mid-Continent Res.*, 16 FMSHRC at 1230. The D.C. Circuit has agreed that wet coal near an ignition source, specifically a running conveyor belt, poses a notable danger. *Mach Mining, LLC*, 809 F.3d at 1268. Nonetheless, inspector Craig credibly testified that, during his inspection, he noticed that the top three quarters of the coal accumulations in the slope tail area were dry and worn off because of contact with the belt. Tr. I, 51-56, 59.

Ultimately, I find a high degree of danger created by Peabody failure to immediately correct the ever-growing accumulations and remove the several ignition sources found by inspector Craig. The more time that the accumulations developed along the cited slope belt and tail areas, the greater the increase in danger and risk of a fire or explosion. *Compare Consol*, 35 FMSHRC at 2343 (finding that the degree of danger “increases when there is a chronic problem that is ignored”). I therefore conclude this factor heavily weighs in favor of finding an unwarrantable failure.

d. Abatement Efforts and Knowledge of the Violative Condition

Peabody next argues that its remedial actions to abate the underlying hazardous condition, which demonstrates its attempt to comply with the specific regulation at issue, serves as good-faith mitigation weighing against an unwarrantable failure finding. Resp’t Br. at 32-33. Peabody admits it had knowledge of the condition but contends that such knowledge led to its efforts to correct the accumulations and should not weigh negatively against it.

The Secretary maintains that the record shows remedial work was not in progress on the slope belt or tail area when the inspection took place. As support, the Secretary cites Craig’s testimony that he did not observe any cleaning and submitted photographs that reveal no signs that the accumulations had been touched or partially cleaned. Given this, the Secretary argues that there was no evidence that the mine was trying to address the condition immediately. Sec’y Br. at 18-19. The Secretary also asserts that because it took 1,250 manhours to fully correct the conditions, Peabody’s efforts to immediately correct the conditions were entirely inadequate.

I tend to agree with the Secretary that Peabody’s efforts were inadequate to fully correct the condition, however, I do find that its consistent efforts the day of the inspection *and* the days prior to the inspection constitute sufficient abatement effort and good-faith mitigation. Thus, I ultimately side with Peabody on this factor.

Here, Peabody’s abatement efforts toward the section 75.363(a) violation include its considerable and consistent actions to address the coal material on the slope belt and tailpiece area on every shift beginning on November 7, 2022, which is when the legs broke leading to considerable spillage. In other words, Peabody acted in good faith to try and immediately correct the underlying hazardous condition. Though that does not prevent a finding that Peabody

violated the regulation, such good-faith remedial efforts are relevant in the unwarrantable failure analysis and are a factor weighing against such a designation. *See e.g., Cannelton Indus., Inc.*, 20 FMSHRC 726, 734 (July 1998) (citation omitted); *Peabody Midwest Mining, LLC*, 40 FMSHRC 87, 141 (Jan. 2018) (ALJ).

Peabody's first remedial action occurred when Chamness ordered the shutdown of the belt after observing the broken legs and considerable spillage on the owl shift of November 7, 2022. Tr. II, 127-29. Chamness testified that he notated under "Actions Taken" that the broken legs and structure were corrected and that a crew of miners were cleaning the accumulations. Tr. II, 130-31. For the following shift, Yancey testified that during his pre-shift examination, he observed eight or nine miners working to repair more broken legs and clean the slope while the belt was still shut down. Tr. II, 161. Richardson also explained that he requested additional help because he was advised seventeen offside legs were broken. Tr. I, 241. At the end of that shift, eleven legs were fixed and about 10% of the accumulations were cleared. Tr. I, 243-44. By the evening shift, Barnett observed two miners working on the accumulations by washing, cleaning, and spotting the rollers below the 2000 mark. Tr. II, 189-90. The record also shows that six broken legs, ten braces, and two top frames were replaced. Tr. II, 20. In the examination books, the examiners marked the conditions as "HS" and in good faith updated their records and made complete documentation of the efforts employed.

For November 8, 2022, Chamness testified that miners were still working on cleaning the accumulations and marked it again as HS. Tr. II, 131, 134. Kennedy reviewed that HS designation and during his shift, ordered his crew to wash, load the slope, replace two bad bottom rollers, and spot other damaged rollers. Tr. II, 70. For the day shift, Yancey conducted the examination and testified that the accumulations were improving and that several more miners were working on cleaning. Tr. II, 165. Once that shift ended, Richardson summarized the accomplishments as washing the slope, mucking the material at 4000, improving the old structure, pumping down the coal material, and completely emptying the dewater sump. Tr. I, 251. For the evening shift, Barnett testified that miners were still working on the slope belt, but admitted it was still in "bad shape." Tr. II, 197. Nonetheless, the crew continued to wash down the material. Tr. II, 199-200. At one point, Barnett marked the condition as HS and testified that the belt rollers were not in contact with the accumulations anymore. Tr. II, 200.

Lastly, Peabody employed some remedial actions right before the inspection. For the owl shift of November 9, 2022, the crew "cleaned and loaded at 4000." Tr. I, 76, 77. Yancey stated that the conditions had improved from the day before and that he observed two new miners cleaning the offside of the slope tail. Tr. II, 169. At the end of the day shift, the crew had washed down from the top of the slope to 3000, and from the clean room to the tail all the way down to the concrete. Tr. II, 255. Right before the inspection, Faught recruited four miners to continue cleaning the slope tail and belt. Tr. 34-35. Even though Craig had not noticed cleaning occurring right during the inspection, I credit Faught's testimony that there was a plan in place and that Isaacs needed to retrieve the Bobcat before he could continue spraying the tail. Tr. II, 35, 37. These constitute good-faith remedial efforts under this factor.

I ultimately commend Peabody's continuous, concerted efforts and attempts at abating the violative condition and conclude that they weigh against an unwarrantable failure finding. I

do note, however, that perhaps the easiest way to comply with this regulation would have been to post with a conspicuous danger sign or danger off the area until the accumulations were fully rectified. That would've been a clear indication of compliance with section 75.363(a). The avenue Peabody decided to take, to immediately attempt to correct the hazardous conditions, seems to prove much more difficult. *See* Tr. II, 198 (Barnett testifying that if Peabody had not issued the Order, it would have taken a few more weeks to fully clear the accumulations). So, even though I credit Peabody's abatement and remedial action here as weighing against the unwarrantable failure designation, that does not mean I find such actions as "corrective" or satisfying the "to immediately correct" requirement of section 75.363(a). I similarly stress that the analysis of this factor is different for Order No. 9704796, since that Order focused specifically on the coal accumulations and ignition sources that serve as the underlying hazardous condition for this Order. I emphasize that each of these analyses are wholly distinct.

e. Notice of Need for Greater Compliance Efforts

Lastly, Peabody argues that the Secretary failed to introduce any evidence that Peabody had been put on notice of the need for greater efforts to comply with section 75.363(a). It asserts that the Secretary must make more than just a passing reference to unspecified past violations to support an unwarrantable failure finding. For her part, the Secretary highlights that Peabody had been cited for violating this regulation four times in the last two years. Sec'y Br. at 18; Ex. P-4. The Secretary also emphasizes that Peabody was on notice to make additional efforts to address the hazard as the pre-shift examination reports noted the accumulations over multiple shifts and days without corrective action. Ex. P-6; P-7. I ultimately agree with Peabody.

Here, for section 75.363(a), the operator has been cited four times in the past two years. The Secretary does not provide any additional information other than just a passing reference to a few past violations. She does not explain whether those also involved coal accumulations, lack of posting, or a risk of fire and explosion. In other words, the Secretary has failed to prove that there are significant, "[r]epeated *similar* violations" that could have placed Peabody on notice. *IO Coal*, 31 FMSHRC at 1353 (citations omitted). For this factor to weigh in favor of finding an unwarrantable failure, there should be a "high number of past violations" or a number high enough to place an operator on a "heightened awareness of a serious problem." *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001); *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citation omitted). I do not find four unspecified violations over the past four years as a high number or enough alone to provide a sufficient heightened awareness of a serious problem. This factor therefore weighs against an unwarrantable failure finding.

Although Peabody demonstrated attempts at good faith mitigation and had inadequate knowledge of the need for greater compliance efforts, the duration, extensiveness, obviousness, and significant degree of danger factors heavily weigh in favor of affirming the unwarrantable failure designation.

Since I ultimately find an unwarrantable failure, the remaining inquiry is whether Order No. 9704803 is properly designated as a 104(d)(2) Order. Again, to properly issue a 104(d)(2) order, there must be: (1) a valid underlying 104(d)(1) order; (2) a violation of a mandatory safety or health standard caused by an unwarrantable failure; and (3) no intervening clean inspection.

U.S. Steel Corp., 6 FMSHRC at 1911. Here, the first two prerequisites are met since the parties stipulated that Order No. 9212662 serves as the predicate 104(d)(1) order, and the operator's failure to comply with section 75.363(a) resulted from its unwarrantable failure. Similar to the first order, the third prerequisite is not met because the Secretary failed to carry her burden of proof. Because all three prerequisites are not met, this Order is modified from a 104(d)(2) order to a 104(d)(1) order.

5. Gravity

Inspector Craig designated this Order as reasonably likely to result in "fatal" injuries, which could affect eight persons. Ex. P-4. Peabody does not contest the number of people affected; however, it contests the remaining findings in its analysis against S&S. It essentially argues that there was no reasonable likelihood of a fire because there was no confluence of factors present, as there was no methane, and the coal material was "wet", "soupy" and had the "consistency of muck." Resp't Br. at 28-29. Additionally, Peabody notes that there was a constant source of water through the continuous washing of the hose. Resp't Br. at 29. The Secretary also does not specifically address the gravity outside of its S&S analysis. Nonetheless, I uphold MSHA's gravity findings and mostly credit the inspector's testimony in affirming these designations.

First, as to reasonable likelihood, given the presence of ignition sources, specifically the damaged rollers, the belt in contact with coal accumulations, the extensiveness of the accumulations along the slope and tail, and the Respondent's failure to immediately correct the conditions or danger them off, it is reasonably likely that a fire or explosion would occur. As Craig testified, any number of ignition or heat sources, including the belt, bottom belt rollers, and the locked-up rollers at the slope belt, create a "fire hazard." I recognize Peabody's argument that the record reveals the presence of wet conditions, and no methane. However, as mentioned above, wet coal accumulations are just as dangerous and can dry out and ignite. *See Mid-Continent Res.*, 16 FMSHRC at 1230. Additionally, methane can accumulate at any time, so the absence of it does not necessarily bar a finding of reasonable likelihood. Tr. I, 122. Given these facts, Craig credibly testified that if the conditions were to persist, absent an immediate correction or dangering off, a miner would likely receive an injury from smoke inhalation or burns. Tr. I, 157-58. As support, he points to the massive amounts of accumulations around the belt area, and the number of workers nearby. Tr. I, 157-58. I find these facts support a finding of reasonable likelihood.

Second, with respect to the "fatal" designation, I similarly credit inspector Craig's testimony that miners "would sustain fatal injuries from the burns and smoke inhalation." Tr. I, 157-58. By failing to immediately correct the conditions or post or danger off the area, the operator allowed the accumulations to continue to exist and allowed miners to work in that area with knowledge of the accumulations and ignition sources. Tr. I, 159. This increases the likelihood of any fire or explosion and the likelihood that a fatal injury would occur. Additionally, the Commission has previously noted that Congress recognized that ignitions and explosions are major causes of death and injury to miners. *Black Diamond Coal Co.*, 7 FMSHRC at 1120; *Old Ben Coal Co.*, 1 FMSHRC at 1957. I thus uphold the fatal designation.

Lastly, I consider the number of persons affected. Again, Peabody does not contest this specific finding, nor does it submit any contradictory evidence. So, I credit inspector Craig once more and have no reason to doubt his estimation and observations. He explains that the eight persons affected “accounted for the [] dewater crew.” Tr. I, 174. Craig obtained the information regarding the dewater crew from the mine’s manpower sheet. Tr. I, 175; Ex. P-2 at 025. Craig further explains that the sheet revealed that, “[t]he affected Miners due to the accumulations [were] the following: Jacob Walker – Belt Cleaner, James Motes – Outby D-Water, Barren Blackmon – Outby Slope B, Bemetrius Levins – Outby Slope, Ben Richardson – Foreman, plus three Contractors.” Tr. I, 175; Ex. P- 2 at 025-26. With no meaningful contradictory evidence or argument from Peabody, I uphold the designation that eight miners likely were affected by the violation of failing to immediately correct or danger off the condition, as such a failure exposed those eight miners to a longer period of time to a risk of explosion or fire therefore increasing the likelihood.

Given the foregoing, I affirm the assessed likelihood, severity of injury, and number of miners likely to be affected.

6. Negligence

With respect to this Order, Peabody contests the high negligence designation. It does not provide any detail or argument as to why the high negligence designation is inappropriate. Resp’t Br. at 30. The Secretary maintains that Peabody was highly negligent, arguing that even a good-faith belief that a condition is not hazardous does not negate negligence if the belief is unreasonable. Sec’y Br. at 21. The Secretary then defers to her analysis and arguments for unwarrantable failure. This is a close issue, and I do not find either party’s position convincing or forceful. After consideration of the testimony and entire record, I conclude that there are sufficient mitigating actions to lower the negligence designation from “high” to “moderate.”

As explained above, for negligence, an ALJ must consider whether the operator has met its “requisite standard of care – a standard of care that is high under the Mine Act.” *See Brody Mining, LLC*, 37 FMSHRC at 1702. In making this determination, an ALJ considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the regulation.” *Id.* (citations omitted). More specifically, 30 C.F.R. § 100.3 defines high negligence as when, “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” The Commission has defined high negligence as “an aggravated lack of care that is more than ordinary negligence.” *Brody Mining*, 37 FMSHRC at 1703 (citation omitted).

Here, inspector Craig failed to explain why he designated the Order as “high” negligence. In passing, he mentioned the degree of negligence when discussing whether there was an unwarrantable failure on the part of the operator. Tr. I, 158. Craig specifically testified that he based his unwarrantable failure finding “on the negligence of just putting – of knowing the condition existed for an extended amount of time, but still allowing miners to work in and around the area that would be affected if there was a belt slide to occur on the slope plus that air

comes as an intake air slope...[i]t's reasonably likely that anybody in that general vicinity would be affected by that belt fire." Tr. I, 158, 159.

Importantly, Craig did not explain why it was high negligence, nor did he acknowledge whether there were mitigating circumstances, such as efforts to immediately correct the hazardous conditions noted in the pre-shift examination books. His testimony on this issue is therefore not particularly helpful and should not be accorded much weight. However, I do credit his concern that by not shutting down the belt and allowing miners to work in the area, the operator subjected those miners to the possibility of injury from a belt fire. In short, failing to immediately correct or danger off the accumulations, and thus exposing miners for a longer period of time to the risk of fire or explosion, may by itself rise to the level of high negligence. But in this case, there are mitigating circumstances, specifically the abatement efforts taken during the shifts before the inspection, as mentioned previously in this Order's unwarrantable failure analysis. To emphasize the importance of these remedial actions and to properly assess negligence, I quickly summarize a few pertinent facts again here.

For starters, after discovering the broken legs, Chamness immediately shut down the slope belt and called the on-shift crew to begin corrective actions. Tr. II, 127-28. At the end of his owl shift on November 7, 2022, Chamness explained that his crew corrected the broken legs, belt structure, and began cleaning the accumulations. Tr. II, 130-31. For the remainder of that day, miners worked to repair more broken legs, clean the slope, and identify other bad rollers. Tr. II, 161, 189-90; Tr. I, 241, 243-44. For the entries in the pre-shift examination books, each examiner marked the condition as "HS" and noted conditions that required additional work and cleaning to be fully corrected. Similarly, the next day, miners continued working on cleaning the accumulations, washing and loading the slope, replacing bad rollers, mucking the material at 4000, improving the old structure, and emptying the dewater sump. Tr. I, 251; Tr. II, 70, 131, 134, 165. The examiners continued to update the examination books and identify the ongoing issue with coal accumulations. Though Peabody's efforts could not immediately eliminate the accumulations, it still attempted to mitigate any further accumulation or development of additional ignition sources. Lastly, during the owl shift on November 9, 2022, the crew cleaned and loaded at 4000 and the conditions were improving. Tr. I, 76, 77; Tr. II, 169, 255. Also, right before the inspection, Faught devised a plan and recruited four miners to continue cleaning the accumulations on the slope tail and belt. Tr. II, 34, 35, 37.

Notwithstanding the unwarrantable failure designation, and given the mitigating circumstances in this matter, I modify the degree of negligence from "high" to "moderate" on the "high end." Though, in my experience, it has been rare for an unwarrantable failure to be without a high negligence designation, the D.C. Circuit has made clear, after drawing on Commission case law, that "just as a finding of 'high negligence' does not *necessarily* compel a finding of an 'unwarrantable failure,' a finding of 'moderate negligence' does not foreclose a finding of unwarrantable failure." *Excel Mining, LLC v. Dep't of Labor*, 497 Fed.App. 78, 80 (D.C. Cir. 2013). The Commission has also drawn a distinction between "unwarrantable failure" and "negligence," explaining that the terms are not used synonymously in the Mine Act. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985). In *Black Diamond*, the Commission stated "[a]lthough the same or similar factual circumstances may be included in the

Commission’s consideration of an unwarrantable failure and negligence, *the issues are distinct.*” *Id.* (emphasis added).

Taken together, these cases stand for the proposition that unwarrantable failure and negligence analyses are wholly distinct and may result in different conclusions. I find that to be the case here, and conclude moderate negligence is warranted as this is not a circumstance where there are no relevant mitigating actions employed. However, I do note that this is likely on the “high end” of moderate negligence. *See e.g., Consol Penn. Coal Co., LLC*, 45 FMSHRC 558, 571 (June 2023) (ALJ); *Brody Mining, LLC*, 39 FMSHRC 2027, 2033 (Nov. 2017) (ALJ) (both recognizing that there can be a “high-end” or “low-end” of a negligence designation).

Ultimately, I find Peabody’s actions to be sufficient mitigating circumstances warranting a modification of the degree of negligence from “high” to “moderate” on the “high end.”

7. Specially Assessed Penalty

For this Order, inspector Craig recommended that it be specially assessed. Tr. I, 159. To support his recommendation, Craig testified that he requested a special assessment “[b]ecause of the sheer extensiveness of the violation and of the mine management allowing miners – to just put miners in that amount of danger...due to the sheer negligence of the situation that I issued the order against.” Tr. I, 160. MSHA accepted his recommendation and specially assessed the penalty at \$79,428. Tr. I, 160-61; Ex. P-5. Peabody contests this penalty, arguing that it was not justified. Resp’t Br. at 35. As support, it cites Commission case law that explains ALJs are to make penalty determinations *de novo* and should not anchor their assessments in a proposed special assessment. Resp’t Br. at 36-37. Peabody further mentions that the Narrative Findings for a Special Assessment do nothing more than parrot the Order without any indication as to why a special assessment is necessary. Resp’t Br. at 37-38.

The Secretary makes only a cursory mention of this issue and states in her post-hearing brief, “Order No. 9704803 was specially assessed at \$79,428.” Sec’y Br. at 20. The Secretary goes on to address how the Commission addresses regularly assessed penalties, but does not argue in support of this specially assessed penalty other than to note that the Order was designated as S&S and an unwarrantable failure. Sec’y Br. at 21. I ultimately agree with Peabody and Commission precedent discussed below that there is no need for me to anchor myself in this specially assessed penalty and that I should conduct my own analysis and calculations in accordance with the six penalty criteria under section 110(i) of the Mine Act.

Under 30 C.F.R. § 100.5(a), “MSHA may elect to waive the regular assessment under §100.3 if it determines that conditions warrant a special assessment.” When MSHA determines that a special assessment is warranted, the proposed penalty simply must be based on the six criteria under section 100.3(a), but does not have to be calculated in accordance with the penalty conversion tables in section 100.3. 30 C.F.R. § 100.5(b). Rather the Secretary has discretion in proposing the penalty amount. 30 C.F.R. § 100.5(a). In *Solar Sources Mining, LLC*, the Commission clarified that Judges “must make an independent assessment based upon the facts and penalty criteria without using the special assessment as any sort of baseline or reference point.” *Solar Sources Mining, LLC*, 42 FMSHRC 181, 197, 198 n. 25, 200. In other words,

Judges are not required to “explain their divergence from a special assessment.” *Id.* The Commission similarly has held that the procedures by which penalty assessments are proposed by the Secretary, including special assessments, are irrelevant and immaterial to a penalty assessment by the Commission or its trial judges. *Black Diamond Coal Co.*, 7 FMSHRC at 1121-1122. Given this Commission case law, I conclude that I need not defer to the specially assessed penalty, and so, I conduct a *de novo* analysis of the six penalty criteria in the succeeding section of this Decision.

IV. PENALTY

Commission administrative law judges have the authority to assess civil penalties *de novo* for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that the ALJ consider six statutory penalty criteria in assessing civil monetary penalties:

(1) the operator’s history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator’s ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Order No. 9704796

For this first Order, the Secretary proposed a regular assessed penalty of \$46,799.00. In the fifteen months preceding the issuance of Order No. 9704796, MSHA issued seventy-five violations of section 75.400 to Peabody Southeast Mining, LLC, at its Shoal Creek Mine. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). The parties stipulated that payment of the total proposed penalties in this matter will not affect Peabody’s ability to continue in business. *Jt. Ex. 1, ¶ 9*. I determined Peabody’s negligence to be on the low end of high negligence and that the violation resulted from an unwarrantable failure to comply with section 75.400. Regarding the gravity, I found the violation as S&S, that it would affect eight miners, and was reasonably likely to result in a fatal injury. Peabody demonstrated good faith by removing all the accumulations after 1,250 manhours. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$45,000.00.

Order No. 9704803

For the second Order, as mentioned above, the Secretary proposed a special assessment of \$79,428.00. In the fifteen months preceding the issuance of Order No. 9704803, MSHA issued five violations of section 75.363(a) to Peabody Southeast Mining, LLC, at its Shoal Creek Mine. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). Again, the parties stipulated that payment of the total proposed penalties

will not affect Peabody's ability to continue in business. Jt. Ex. 1, ¶ 9. As outlined above, I determined Peabody's negligence to be moderate on the "high end," and resulting from an unwarrantable failure. Regarding the gravity, I found the violation as S&S, that it would affect eight miners, and was reasonably likely to result in a fatal injury. Peabody demonstrated good faith in attempting to clean the accumulations once notified of the violation. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$35,000.00.

V. CONCLUSION AND ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 9704796 be **MODIFIED** from a "104(d)(2) order" to a "104(d)(1) order," Order No. 9704803 be **MODIFIED** from a "104(d)(2) order" to a "104(d)(1) order" and to reduce the degree of negligence from "high" to "moderate" on the "high end," and that Respondent pay a total civil penalty of \$80,000.00 within 30 days of this Decision. Accordingly, this case is **DISMISSED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 2025

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

v.

RAIN-FOR-RENT,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2022-0291
A.C. No. 48-00086-557425-VVG

Mine: Kemmerer Mine

DECISION AND ORDER

Appearances: Erik Vande Stouwe, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Byron J. Walker, Esq., and Ty R. Bordenkircher, Esq., Rose Law Firm, A Professional Association, Little Rock, Arkansas for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before the undersigned Administrative Law Judge (“ALJ”)¹ upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor through her Mine Safety and Health Administration (“MSHA”) against Rain-for-Rent (“Rain” or “Respondent”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“Mine Act”), 30 U.S.C. § 815(d). This docket involves two citations, Nos. 9656124 and 9656125. Citation No. 9656124 alleges that Respondent violated 30 C.F.R. § 77.1102 by failing to post on its truck “[s]igns warning against smoking and open flames ... so they can be readily seen in areas where fire or explosion hazards exist.” MSHA modified that citation to non-S&S and reduced the gravity from “reasonably likely” to “unlikely” to result in a fatal injury, with one person affected because of moderate negligence. Citation No. 9656125 alleges that Respondent violated 30 C.F.R. § 77.1110 because Respondent did not record the date of the last examination “on a permanent tag affixed to the [fire] extinguisher.” That citation was written as non-S&S, unlikely to result in a permanent disabling injury, with one person affected and resulting from moderate negligence.

¹ Throughout the transcript, the court reporter incorrectly refers to the undersigned as an “arbitrator.” This case was originally assigned to another ALJ who retired before reassignment to the undersigned.

Before the hearing, the parties filed a Joint Stipulation of Facts and two separate pre-hearing reports. On May 18, 2023, Respondent filed a Motion for Spoliation Sanctions alleging spoliation of photographic evidence. On May 23, 2023, Respondent filed a Renewed and Supplemented Motion for Spoliation Sanctions. On May 31, 2023, Petitioner filed a response to the Motion for Spoliation Sanctions and a Motion in Limine to exclude testimony related to the MSHA camera used during the inspection. At the outset of the hearing, the undersigned denied Petitioner's Motion in Limine. Respondent's Motion for Spoliation Sanctions is denied for the reasons set forth herein.

On June 6, 2023, a virtual hearing was held in this matter over the Zoom for Government secured video conference platform. Witnesses were sequestered throughout the hearing. Petitioner introduced testimony from Tim Cook, the former MSHA inspector who issued the contested citations, and Peter Del Duca, assistant district manager for MSHA's Denver office. At the close of Petitioner's case, Respondent moved for a directed verdict. That motion was denied because it appeared that Petitioner met its burden of proof through credible testimony and probative exhibits. Respondent presented no witnesses. The parties jointly admitted documentary evidence² and filed post-hearing briefs instead of closing arguments.

Based on a careful review of the record, including the parties' post-hearing briefs, Petitioner and Joint exhibits, and the testimony and demeanor of Petitioner's witnesses,³ the undersigned finds that Respondent violated 30 C.F.R. sections 77.1102 and 77.1110. Former MSHA inspector Cook presented credible, uncontroverted testimony as to the existence of factual circumstances, substantiated in part by photographs taken by Respondent, which establishes the violations of the cited regulations. Application of the plain language of these standards to the credited facts as established by inspector Cook further support the violations. Contrary to Respondent's arguments, the standards provided Respondent fair notice as to what they required and were not applied arbitrarily or contrary to the Federal Mine Safety and Health Review Commission ("Commission") precedent.

Accordingly, Citation No. 9656124 is affirmed following MSHA's modification of gravity from "reasonably likely" to "unlikely," and the proposed penalty of \$133.00 is assessed after consideration of the criteria set forth in section 110(i) of the Act. Citation No. 9656125 is modified to reduce the likelihood of occurrence from "unlikely" to "no likelihood." Based on consideration of the criteria in section 110(i) of the Mine Act, MSHA's proposed penalty of \$133.00 is assessed.

² In this decision, "Tr." refers to the hearing transcript and "Jt. Exs." refers to Joint Exhibits. Jt. Exs. A-H were received in evidence. A-H, "P. Ex. #" refers to the Petitioner's exhibits. P. Exs. A-H were received into evidence. Tr. 25.

³ In evaluating inspector Cook's and assistant district manager Del Duca's testimony, the undersigned has taken into consideration the following: the nature of the questioning and any testimony or lack thereof given in response; demeanor; experience and credentials; evasiveness or forthrightness; interest in this matter; the inherent probability of testimony in light of other events; corroboration or lack of corroboration from other witnesses; consistency or lack of consistency vis-à-vis testimony and that of others; and the absence of rebuttal or any testimony from any witness for Respondent.

II. STIPULATIONS

The parties agreed to the following stipulations prior to hearing:

1. Respondent is an independent contractor within the meaning of 30 C.F.R. § 45.2, in that it is “a person, partnership, corporation, subsidiary of a corporation, firm, association, or other organization that contracts to perform services of construction at a mine[.]”
2. As an independent contractor, Respondent is an operator within the meaning of Section 3(d) of the Federal Mine and Safety [*sic*] Act of 1977 (“the Mine Act”) and 30 C.F.R. § 4.1.
3. As an operator within the meaning of the Mine Act, Respondent is subject to the Mine Act and the regulations promulgated thereunder.
4. MSHA inspector Tim Cook issued Citations No. 9656124 and 9656125 to Respondent at the Kemmerer Mine on March 4, 2022, following an inspection of Respondent’s vehicle, No. 1757.
5. Inspector Cook served Citations Nos. 9656124 and 9656125 on Stanley Floyd, an employee of Respondent.
6. At the time of inspection, Respondent’s vehicle No. 1757 contained at least one container used for the storage of oil.
7. At the time of the inspection, the only sign on vehicle No. 1757 related to fire hazards was a No Smoking decal on the driver’s side window.
8. Rain for Rent had at all relevant times a policy relating to safety practices and procedures involving fire extinguishers.
9. Rain for Rent had at all relevant times a policy relating to safety practices and procedures involving flammable materials.
10. Timothy Cook did not take any General Field Notes pertaining to the violations at issue in this case.

The parties agreed to two additional stipulations at the hearing. First, Respondent’s company engages in commerce within the United States (Tr. 13), and second, the ability of Respondent’s company to remain in business would not be affected if the proposed penalties were imposed. (Tr. 14).

III. FACTUAL BACKGROUND

Former MSHA inspector Timothy Joe Cook began work for MSHA in Laramie, Wyoming on January 20, 2019. He received National Mine Academy training but eventually left

MSHA near the end of July 2022. Tr. 36-39. In total, Cook had 20-plus years of mining experience. Tr. 38.

On March 4, 2022, Cook conducted a regular inspection at the Kemmerer Mine and inspected Respondent contractor's truck no. 1757, driven by Floyd. Tr. 39-40. During that inspection, Cook observed that the truck had no warning sign posted against smoking *and* against open flames. Cook found that several objects lying in the bed of the truck, including cans of penetrating fluid, starting fluid, and brake cleaner, could cause a fire hazard because of their flammability, and an explosion hazard because aerosolized compression cans, when exposed to fire or heat, could cause explosion of shrapnel and a permanently disabling injury. Tr. 42, 45-51. Cook did not physically examine or handle any of the pressurized containers and did not know whether they were empty or full, but he acknowledged on cross-examination that it would not be unusual for a truck driver to throw empty cans in the back of his truck. Tr. 131, 134. Several other cans of these fluids, which posed a fire or explosion hazard, were observed in separate drawers of the workbox on the side of the truck. Also, there was used and new motor oil (used for servicing pumps, light plants, and air compressors) in large containers in the truck bed. Tr. 43-44, 130.

After making the foregoing observations and conclusions, Cook spoke with driver Floyd, who told Cook that he had used the motor oil to service the generator for the light plant that was about 10 feet from the truck. Tr. 61-62.⁴ Cook and Floyd examined the truck. Tr. 53. Cook did not see any signs on the truck warning against no smoking and open flames so he wrote Citation No. 9656124 as "reasonably likely" that a fatal fire/explosion hazard would endanger the truck operator.⁵ Cook explained that he assessed moderate negligence because Floyd told him that he thought only DOT rules and not mining regulations applied to the subcontractor. Tr. 70-75. After a second conference between the parties, MSHA modified the citation to "unlikely." Ex. A at 51; Tr. 72.

During his inspection, Cook also examined the fire extinguisher in the truck. Although it was in good working order, it had a tag wired to it that was torn in half, and the tag did not show the date of the last inspection within the last six months, as required by 30 C.F.R. § 77.1110. Tr. 77-78, 82. Floyd told Cook that he had inspected the fire extinguisher at the beginning of his shift and the whole tag had been there. Tr. 78-79. Cook asked Floyd about the ripped tag and Floyd told Cook that he "didn't notice that it had been ripped off," and Floyd had just looked at

⁴ On cross-examination, Cook testified about what servicing the light plant entailed, and Cook confirmed, after talking with Floyd, that changing the oil was part of the regular, full service of the light plant, which Floyd was providing. Tr. 117-119.

⁵ On cross-examination, Cook testified that he did not see a "no smoking" sign on the driver's side door during the inspection. He further testified that the requisite sign warning against smoking and open flames had to be readily visible from all approaches, i.e., from all four sides of the truck. Tr. 123. Cook further testified on cross examination, that the exhaust pipe from the light plant a few feet away from the truck was an ignition source, and the tools in the truck, including the diesel-powered welder were ignition sources. The light plant was not running while Cook was present. Cook did not see anyone smoking or any hot work being done in the area, and the buildings and fueling areas prohibited smoking. Tr. 127-28, 138-43.

the gauge, which indicated that it was in good working order. Tr. 81, 83, 86. Floyd told Cook that he did not know how the tag had been torn off. Tr. 166. Cook concluded that Floyd did not know how to complete a full inspection of the extinguisher and therefore he had no way of knowing that the extinguisher was, in fact, in full working order. Tr. 87.

Cook then wrote Citation No. 9656125 alleging a violation of 30 C.F.R. § 77.1110 because at the time of the inspection, there had been no last examination date recorded “on a permanent tag affixed to the [fire] extinguisher.” As noted, that citation was written as non-S&S or unlikely to result in a permanent disabling injury (burns or smoke inhalation), with one person affected (Floyd) because of moderate negligence. Tr. 85-86; Ex. A. Tr. 90. Cook then told Floyd that he could drive the truck off the property, but he could not enter another mine site with the truck, until the cited items were fixed. Otherwise, he would risk a finding of higher than ordinary negligence during a subsequent inspection. Tr. 91.

Cook testified that he attempted to take photographs during his inspection using a digital camera provided by MSHA, and when he attempted that evening to pull them off the camera to do photo mounting, no pictures were there. Tr. 97-98; Ex. D at 59. Cook did not realize that there was a problem with the camera until he got back to his hotel that evening. Tr. 168, 172.

Cook testified that he attempted to take photos of the driver’s side of the truck, the inside of the truck bed, the passenger side of the truck, the truck location near the light plant, and the fire extinguisher. Tr. 100. When he attempted to take the pictures, he heard a noise (it beeped like it was taking a photograph), but Cook could not recall any images displayed on the camera. Tr. 101-102, 168. Cook did not review the attempted photographs while on site. Tr. 99.

Cook initially testified that it was cold that day, and he had frostnip on his ears. Tr. 103. On cross examination, Cook testified “that part of the inspection up there, I did get frostnip on my ears. It was very cold, maybe not on this day. I don’t remember for sure.” Tr. 176-77. Respondent introduced evidence from the National Weather Service that the temperature in Kemmerer, Wyoming on the day of the inspection (March 4) ranged from a low of 21 to a high of 51. Tr. 174; Ex. G.

Cook spoke with another inspector Corey Lynnstrom, who informed Cook that Lynnstrom had previously experienced a similar problem with a camera and “never could get to the bottom of it.” Tr. 98. Lynnstrom told Cook that cold temperature can affect the camera and that keeping the camera inside Cook’s safety vest pocket, as Cook had done, could also affect the camera. Tr. 103. Lynnstrom suggested that next time, Cook review any photos on site. Tr. 99.

When Cook was asked on cross examination whether there were any photographs in this case, he testified, “No sir. They did not take.” Tr. 114. Cook further testified, “I tried to take the pictures, and apparently they did not take on the camera or the camera lost them.” Tr. 114-115. Having carefully observed Cook during his testimony, I credit Cook and find that there were no photographs in this case that could be spoiled.

IV. PREHEARING MOTIONS

Prior to hearing, Respondent filed successive motions. In Respondent's Motion for Spoliation Sanctions, and subsequent Renewed and Supplemented Motion for Spoliation Sanctions, Respondent stitches together portions of former inspector Cook's deposition testimony to create a narrative of negligence at best and bad faith at worst. Spoliation in the context of evidence "refers to the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Secretary of Labor, MSHA v. N.J. Wilbanks Contractor, Inc.*, 39 FMSHRC 2069, 2070 n. 2 (Dec. 2017) (ALJ) (quoting *Oil Equipment Co. v. Modern Welding Co.*, 661 F. App'x 646, 652 (11th Cir. 2016) (internal quotation marks omitted)). The Commission has recognized that:

if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party. *McCormick on Evidence* provides that '[w]hen it would be natural under the circumstances for a party to . . . produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference.' 2 *McCormick on Evidence* §264 (6th ed. 2006) at 220-21." *IO Coal Co.*, 31 FMSHRC 1346, 1359 n.11 (Dec. 2009).

As a remedy for the alleged spoliation, Respondent requests either full dismissal of the case, an adverse inference that the evidence allegedly lost would have been unfavorable to MSHA, or the exclusion of inspector Cook's testimony. For the reasons explained below, Respondent's motions and requests are **DENIED**.

A. Respondent's Motion was improperly filed under Commission Procedural Rule 59, making the motion untimely.

The primary grounds for denial of Respondent's Renewed and Supplemented Motion is that its filing was clearly not in compliance with the Commission's Procedural Rule 59 governing the sanctions which can be imposed when a party fails to produce requested evidence in discovery. That rule states:

Upon the failure of any person, including a party, to respond to a discovery request *or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery.* If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

29 C.F.R. §2700.59 (emphasis added). To secure sanctions against a party for failing to produce some requested form of evidence, the Commission's requirements are clear. A failure of a party

to produce evidence, or a party's objection to producing requested evidence, must be addressed first and foremost by the filing of a motion to compel discovery with the judge. Only after a subsequently issued order to compel discovery of the requested evidence is ignored or refused by the requested party, is a judge then empowered to apply sanctions which are deemed "just and appropriate" for the situation.

In this case, Respondent requested in discovery that the Acting Secretary (Petitioner) produce any of the alleged photographs in MSHA's possession, an explanation for why the alleged photographs had not been "preserved" if unable to be produced, and the hard drive for inspector Cook's camera. The Petitioner objected to each of these requests. A motion to compel the Petitioner to produce the requested material was never filed.

These grounds alone compel denial of Respondent's motions. Without a proper motion and order to compel discovery, it would be improper and untimely under Commission Procedural Rule 59 to issue sanctions against a party for their refusal to produce evidence in discovery.⁶

⁶ The undersigned recognizes that there may be instances in which an ALJ may issue sanctions absent an order compelling discovery but ultimately concludes that is not the case here. The Commission Procedural Rules are silent on that question. Under Rule 1(b), "[o]n any procedural question not regulated by the Act, these procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. §§554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure). The D.C. Circuit explained that in the absence of a violation of an order compelling discovery, a court may not base a sanction on Rule 37(b) power. It may however impose a sanction based on its inherent power in extraordinary situations. But before doing so, the court must find by clear and convincing evidence that abusive litigation behavior occurred. *See e.g., Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1472, 1478 (D.C. Cir. 1995). The Second Circuit confirms this approach and has found that even absent a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002). The Tenth Circuit, which encompasses this Docket, has specifically recognized that spoliation sanctions may be appropriate under the Court's inherent power. *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc.*, No. 97-5089, 1998 WL 68879 at * 3-4 (10th Cir. 1998).

It is important to note, however, that federal courts may have this inherent power as they originate from Article III of the United States Constitution, but the Commission was created by statute, so it is prudent to remain within the jurisdictional authority granted by Congress. Another ALJ expressed this same concern and noted that it is unwise to exercise any inherent powers absent controlling Commission precedent. *Productos De Agregados De Gurabo v. Sec'y of Labor*, 38 FMSHRC 1077, 1078 n.2 (May 2016) (ALJ). There have only been a handful of cases in which the Commission exercised its inherent power primarily in cases where the litigants or counsel "willfully abuse[d] judicial processes." *See e.g., Local Union 2250, Dist. 12, UMWA v. Old Ben Coal Co.*, 3 FMSHRC 2793, 2796 (Dec. 1981). After extensive review of the Commission caselaw, there has been no exercise of inherent power to issue spoliation sanctions in the absence of an order compelling discovery. Therefore, the undersigned recognizes this potential power but declines to exercise it in the absence of direct Commission precedent.

B. The record evidence does not establish that any spoliation occurred. Respondent's burden of proof for the existence of the allegedly spoliated evidence in question has not been met.

While disposing of Respondent's motion on procedural grounds, I would be remiss to exclude other substantive grounds to deny Respondent's motions, even if it had been filed in a timely and procedurally correct manner.

As a general rule, the Tenth Circuit, has considered the evidentiary doctrine of spoliation and has held that the "bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction." *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997). It has further explained that spoliation sanctions are proper when "(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent; and (2) the adverse party was prejudiced by the destruction of the evidence." *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1023 (10th Cir. 2007). A sister circuit has defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The core premise underlying any allegation of spoliation is that the allegedly spoliated evidence existed at some point in time prior to being spoliated. As the First Circuit found, "[i]t is a proposition too elementary to require citation of authority that when there is no evidence to begin with, a claim of spoliation will not lie." *Gomez v. Stop & Shop Supermarket Co.*, 670 F.3d 395, 399 (1st Cir. 2012) (grocery store not subject to spoliation sanctions when no video of a person's fall in the store was saved/created in the first place, despite the store having an installed CC surveillance system); *see also Oldenkamp v. United American Ins. Co.*, 619 F.3d 1243, 1251 (10th Cir. 2010) (upholding a judge's finding that no spoliation sanctions were warranted when the party failed to produce evidence that any of the documents or recordings sought had ever existed).

Determining whether spoliation occurred is secondary to determining whether the allegedly spoliated evidence first existed. Thus, for evidence to be destroyed, significantly altered, or lost, due to a failure of a party to preserve the evidence, it must be established as a factual matter that such evidence existed in the first place before spoliation sanctions may be invoked. *See, e.g., Mannina v. Dist. of Columbia*, 437 F.Supp.3d 1 (D.D.C. 2020) ("[T]estimony that a record *should* exist is not, in itself, sufficient for this Court to conclude such a record *did* exist [to be later spoliated]."). In short, if no evidence was created, regardless of whether it should have been, there are no sanctionable acts for destroying, altering, or failing to preserve it.

Having thoroughly reviewed the instant record, I find insufficient probative evidence that the allegedly spoliated photographs ever existed. Former inspector Cook's admission that he believed at the time of inspection that he was taking photographs on his camera, and his testimony about the angles and frames he believed that he was capturing, is not sufficient to

establish that the camera was working properly, or the photographs *were actually ever stored on the camera*. Cook testified as follows:

Q. There are no photographs in this case, are there, that were taken by you?

A. No sir. They did not take.

[Judge]. What do you mean by “they did not take”?

A. I tried to take the pictures, and apparently they did not take on the camera or the camera lost them.

Tr. 114-15. No response surpassing uncertainty about the existence of the photographs was ever provided in Cook’s testimony—only that at the time of the inspection, Cook believed that he was taking photographs. Yet, Respondent collapses that distinction within their Renewed and Supplemented Motion, mischaracterizing Cook’s answers as support that the photos were in fact taken rather than accounting accurately for his testimony in context. *See* Resp’t Br. at 21 (claiming Cook took photos, when the transcript page cited to at Tr. 169, only has Cook agreeing to the question “Did you *attempt to take* the photographs as part of your investigation?”).

Respondent questions the reasonableness of Cook’s uncertainty about whether the attempted photographs made it onto the camera, arguing that digital cameras show pictures on the screen facing the camera taker, supposedly easily accessible and reflective of what photos are taken by the camera. However, even this circumstantial claim is unpersuasive because Respondent failed to establish that Cook ever saw digital screen shots. In fact, as noted above, Cook testified that he did not check for photos on site. In short, Respondent has not met its burden of establishing that the allegedly spoiled evidence ever existed.

C. Respondent has not established that sanctions for spoliation of evidence are warranted under Federal Rules of Civil Procedure 37(e).

Alternatively, even if the photographs existed at some point, there is another avenue to deny Respondent’s motion. The Secretary argues that Federal Rule of Civil Procedure 37(e) is dispositive. Sec’y Resp. to Mot. at 2 (citing 30 C.F.R. § 2700.1 which incorporates the Federal Rules of Civil Procedure as guidance for the Commission). As support, she states that Cook had no reason to anticipate his photographs would be used in litigation since he had not been previously called to testify as a witness for MSHA and these dockets involve two routine citations pertaining to safety signage. *Id.* at 2-3. Additionally, the Secretary contends that MSHA did not fail to take reasonable steps to preserve the photographs and that Rain provides no indication of what reasonable steps Cook could or should have taken. *Id.* at 3-4. Ultimately, she concludes that Respondent failed to meet its burden of proof.

Respondent argues that the prejudice it has suffered from the evidence disappearing cannot be cured so all it can do is dispute the course of events set forth by Cook. Resp’t Br. in Support at 17. It takes issue with Cook’s failure to preserve the photographs as it “compromises the ability to reach a fair determination of the case on the merits.” *Id.* Respondent then

emphasizes that exclusion of the evidence is appropriate in cases “when the spoliation deprives a party of an opportunity to inspect the evidence.” *Id.* at 19, 20 (citing *State Farm Fire & Cas. Co. v. Broan Mfg. Co.*, 523 F. Supp. 2d 992, 998 (D. Ariz. 2007) (citation omitted)). Alternatively, Respondent argues that “if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party.” *IO Coal Co., Inc.*, 31 FMSHRC1346, 1359 n.11 (Dec. 2009); Resp’t Br. in Support at 10, 18. For the reasons below, I agree with the Secretary.

Rule 37(e) states:

If electronically stored information [(“ESI”)] that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).⁷ The rule, under its plain language, creates a two-tiered sanctions regime. The first subsection provides for lesser sanctions while the second subsection involves more severe sanctions. *Compare* Fed. R. Civ. P. 37(e)(1) *with* 37(e)(2). Both subsections are governed by two preconditions: (1) “electronically stored information that should have been preserved in the anticipation or conduct of litigation” was “lost because a party failed to take reasonable steps to preserve it” and (2) that information “cannot be restored or replaced through additional discovery.” Fed. R. Civ. P. 37(e).

Here, even assuming the two preconditions were met, neither subsection (1) nor (2) applies. First, there is no lasting prejudice caused by the loss of information in the photographs. Rain-for-Rent exercised control over the contents and condition of the truck in question. It could have easily taken its own photographs, which it later did and submitted into evidence as Exhibit H. All of which corroborate and support, in part, Cook’s testimony and position that Respondent violated the cited regulations. *See* Ex. H (showing cans of flammable materials as discussed

⁷ Regarding the Court’s inherent authority as discussed briefly above in footnote 6, the Advisory Committee Notes for this Rule suggests that “[i]t...forecloses reliance on inherent authority or state law to determine when certain measures should be used.” *See* Fed. R. Civ. P. 37(e), advisory committee’s note to 2015 amendment.

below, an illegible sign for “no smoking” with no sign regarding open flames, and a ripped tag on a fire extinguisher with no date of inspection).

Respondent also declined to call Floyd as a witness, who was the driver of vehicle No. 1757. Tr. 8-11. Floyd could have provided some rebuttal testimony as to the contents and conditions of the vehicle during the date of the inspection, in turn, remedying any prejudice allegedly faced by Respondent. Another ALJ has taken a similar position in which she found that any prejudice inflicted on the Secretary could be cured since her own witness, an MSHA inspector, could testify to the content of his inspection logs. *N.J. Wilbanks Contractor, Inc.*, 39 FMSHRC 2069, 2070 n.2 (Dec. 2017); *see also 103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 989 (10th Cir. 2006) (upholding a district judge finding of prejudice by the destruction of evidence because there was no substitute). Similar to the inspector in *N.J. Wilbanks*, Floyd, who drove Rain-for-Rent’s truck at issue, could easily testify to the contents of the truck, including the ripped tag on the fire extinguisher. In other words, Respondent had a readily accessible substitute for the allegedly spoliated evidence, unlike the *103 Investors I* case from the Tenth Circuit. Therefore, any alleged prejudice to Respondent could have been cured and there is no warrant for the severe sanctions requested.

Second, there is no reason to doubt Cook’s credible testimony in which he asserts numerous times that he believed that he snapped photographs throughout his inspection. Tr. 97-98, 114-15, 169.; Ex. D, Dep. at 59, 85. His intent at the time he took the photographs was to support the citations with visuals. Tr. 169. Cook candidly acknowledged the importance of the photographs and that Respondent had a right to view them, if they had taken. Tr. 170-71.

Rain-for-Rent essentially is requesting that the undersigned find that since the photographs are missing, Cook must have intentionally deleted them to deprive Respondent of their use. The undersigned refuses that invitation especially when Rain-for-Rent provided no rebuttal testimony or contradictory evidence of its own. I find that Cook credibly testified about a potential reason that the photographs may not have been taken on the camera, i.e., because of the cold temperature on one of the days he inspected the mine, it “was very cold” and he “got frostnip.” Tr. 176-77; Ex. D at 60. He further testified that Corey Lynnstrom, a fellow inspector, told him that the “cold does have an [effect] on the cameras.” Tr. 103.

Respondent attempted to discredit Cook by submitting evidence of the climatological data as found in Exhibit G. However, that exhibit only shows the daily temperature of the highs and lows; Respondent does not even recognize that some of the data for that day is below freezing as the range is from around 20 degrees to 50 degrees Fahrenheit. *See* Ex. G. Just by submitting this exhibit to say that it was warmer than other days is not sufficient to rebut the possibility that the cold could have affected the photographs. Regardless, it is Respondent’s burden of proof to show intent on the part of Cook. I find that Respondent has failed to do so. Therefore, even if I found that the ESI should have been preserved in anticipation of litigation and that Cook failed to take reasonable steps to preserve the photographs, neither operative subsection of 37(e) applies.

For the three independent reasons above, Respondent’s Renewed and Supplemented Motion for Spoliation Sanctions is **DENIED**.

V. PRINCIPLES OF LAW

“The Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence. *See Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989).” *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). In describing the preponderance of the evidence standard, the Commission has stated: “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in civil law, simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

The Commission has recognized that the Secretary may establish a violation by inference. *Mid-Continent Resources*, 6 FMSHRC 1132 (May 1984). “Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC at 1138.” *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2152. The judge as primary fact-finder/trier of fact has “discretion to sift through the testimony presented and to base his decision on that [deemed] to be credible, relevant, and dispositive of the issues . . .” *Damron v. Reynolds Metal Co.*, 13 FMSHRC 535, 542 (Apr. 1991). “Because the judge ‘has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (*quoting Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Wolf Run Mining Co.*, 32 FMSHRC 1669, n.11 (Dec. 2010). Given that credibility determinations reside within in the unique province of the fact-finder, it is well-established that “a Judge’s credibility determination is entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981); *Consol Pennsylvania Coal Co., LLC*, 43 FMSHRC 145, 151 (Apr. 2021).” *Consol PA Coal Co.*, 44 FMSHRC ___, slip op. 4-5, n.8, No. PENN 2019-0094 (Dec. 20, 2022).

Congress has declared that “(a) the first priority and concern of all in the coal or other mining industry must be the safety and health of its most precious resource – the miner.” 30 U.S.C. § 801(a). The purpose of the Act is to “(1) . . . direct the . . . Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health or safety of the Nation’s coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards . . .” 30 U.S.C. §801(g). “A safety standard ‘must be interpreted so as to harmonize with and further . . . the objectives of’ the Mine Act. *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).” *Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994). “The ‘language of a regulation . . . is the starting point for its interpretation.’ *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). Where the language of a statutory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Dynamic Energy Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010).” *Peabody Midwest Mining, LLC*, 44 FMSHRC 515, 521 (Aug. 2022). When interpreting an administrative regulation, the Commission and federal courts apply the same rules used to statutes, “examining the plain language of the text, giving each word its ordinary

and customary meaning. If, after engaging in this textual analysis, the meaning of the regulations is clear, [the] our analysis is at an end. *Mitchell v. Comm’r*, 775 F.3d 1243, 1249 (10th Cir. 2015) (citations omitted).” *Peabody Twentymile Mining, LLC v. SOL*, 931 F.3d 992 (10th Cir. 2019).

When the language of the regulation is plain, fair notice issues do not come into play. Rather, the Commission will affirm the judge’s plain language application of a standard. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997); *see also Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171-72 (Sept. 2010); *Cactus Canyon Quarries, Inc. v. FMSHRC*, 2023 WL 2401588 (5th Cir. 2023) (unpublished) (finding adequate notice provided by clear regulation), *aff’g* 44 FMSHRC 289 (Apr. 2022) (ALJ). In *Bluestone*, the Commission held that where the language of a standard is clear and unambiguous, that standard provides operators with fair and adequate notice. 19 FMSHRC at 1031.

By contrast, if the regulation is ambiguous, courts have deferred to the Secretary's reasonable interpretation of it. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency's interpretation is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). The Secretary's interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[s] and ... serves a permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (quoting *Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991)). If issues of fair notice arise under an ambiguous regulation, the Commission applies a reasonable prudent person test, i.e., “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *see also Wolf Run Mining*, 32 FMSHRC 1669, 1682 (Dec. 2010). When deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors is relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency’s enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); *see Island Creek*, 20 FMSHRC at 24-25; *Morton Int’l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *see also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F. 3d 216, 224 (4th Cir. 1997).

VI. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 9656124

1. Findings of Fact

On March 4, 2022, MSHA inspector Cook traveled to the Kemmerer Mine to conduct a regular inspection. Tr. 39. Part of his inspection involved a Rain-for-Rent truck, no. 1757. Cook observed the truck and found no signs against smoking or open flames near various kinds of oil, penetrating fluid, starting fluid, and brake cleaners. Tr. 42; Ex. H. He determined that these

objects posed a fire or explosion hazard. Tr. 42. Specifically, Cook testified that brake cleaner presented a fire and explosion hazard due to its chemical makeup being very flammable. Tr. 45-46. He cited his personal experience working with brake cleaner during brake and axle jobs, explaining that if used on a hot surface it can ignite and has done so in the past. Tr. 48. He also recalled reviewing the label on the can for CRC Brakleen, where he observed a fire and explosion hazard warning. Tr. 46; 51-52. Concerning the explosion hazard, he testified that the can itself is under pressure meaning that if it is introduced to a fire, it can overheat and explode causing shrapnel to release. Tr. 47.

Cook next testified that Mac's starting fluid qualifies as a fire hazard as it is used to start engines, meaning it is very flammable. Tr. 48. Like the CRC Brakleen, he explained that this is an explosive hazard because it is in a compressed container. Tr. 48. From personal experience, he has observed Mac's combust and ignite when sprayed against a hot exhaust. Tr. 48. For the penetrating fluid, Cook determined it to be WD-40, which is a fire hazard. Tr. 49. In the past, Cook has used it to start small diesel engines. Tr. 49.

Cook expressed concern with aerosolized cans. He testified that they are a fire and explosion hazard since the can is compressed with gas. Tr. 49-50. When the product exits the can through a nozzle, the product is in an atomized form, and this leaves the aerosolized agent sometimes flammable. Tr. 50.

Cook further testified Floyd, the driver of the truck, informed him of the presence of new oil in the container with the silver lid, and used or waste oil in another container in the bed of the truck. Tr. 61-62. Floyd also explained to Cook that he just finished servicing the generator on a nearby light plant. Tr. 62. Such service includes changing the oil and filters. Tr. 62. Cook explained that the truck was located around six to ten feet from the side of the serviced light plant. Tr. 62. He also expressed concern with a hot exhaust from the light plant that had the potential to heat up if oil is on it. Tr. 63. The exhaust could also smoke and eventually combust. Tr. 63. Cook warned that oil presents a fire hazard due to its inherent flammable nature. Tr. 58. He drew on personal knowledge from using oil as a source of heat, and from working on engines. Tr. 59-60.

The Exhibit H photographs that were jointly submitted by the parties, support Cook's recollection of the truck's contents. Ex. H, at 4-5; Tr. 43. In the fourth photograph, there is a can of Mac's and WD-40. Ex. H, at 5. Cook explained that the red can that is visible is the Brakleen or brake cleaner. Ex. H, at 5; Tr. 51-52. In the first and second photograph, there appears to be a heavily worn decal that states "No Smoking." Ex. H, at 2-3; Tr. 68-69. Cook explained that he had not noticed this small sign when conducting his inspection. The rest of the photographs reveal no sign warning against an open flame. Tr. 69-70; Ex. H, at 2-5.

After noticing the several cans of penetrating fluid, starting fluid, and brake cleaner inside the truck with no warning sign against smoking and open flames, Cook issued Citation No. 9656124 for a violation of section 77.1102. Tr. 70; Ex. A, at 2.

2. Finding of Violation

Citation No. 9656124 states that:

The Rain For Rent service truck (Ford F-550 Company number 1757) did not have signs warning no smoking or open flames. The service body contained several cans of starting fluid, [p]enetrating fluid, and different kinds of oil. This hazard exposes miners to burns, smoke inhalation, and explosion type hazards [that] would result in fatal type injuries.

Standard 77.1102 was cited 4 times in two years at mine 4800086 (0 to contractor VVG).

Ex. A, at 2. Based on his observations as memorialized in this Citation, inspector Cook concluded that Rain-for-Rent violated 30 C.F.R. § 77.1102. That regulation requires that, “[s]igns warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.” 30 C.F.R. § 77.1102.

Regulatory Interpretation

The regulation’s language is clear enough to provide sufficient notice for what is necessary for its compliance, especially when taken in the context of the whole regulation. *See e.g., Bluestone Coal*, 19 FMSHRC at 1031. The following is required under 30 C.F.R. § 77.1102.

First, as a preliminary matter, to trigger the necessity of the signs, there must be an area or place where fire or explosion hazards exist. *Id.* The term “hazard” means a measure or danger to safety or health, a “possible source of peril, danger, duress, or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 827, n.7 (Apr. 1981)). Other sections of the C.F.R. shed further guidance on what “fire” and “explosion” hazards mean. The United States Supreme Court has made clear that “[s]tatutory construction... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes it meaning clear...” *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). *See also Pilot Life Ins. Co. v. Deadeaux*, 481 U.S. 41, 51 (1987) (“in expounding a statute, we [are] not... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy[]”).

Under 30 C.F.R. § 77.2(r), flash point refers to the “minimum temperature at which sufficient vapor is released by a liquid or solid to form a *flammable vapor-air mixture* at atmospheric pressure.” Elsewhere in the regulations for Surface Metal and Nonmetal Mines, flammable liquid means a liquid that has a flash point below 100-degree Fahrenheit, a vapor pressure not exceeding forty pounds per square inch at 100 degrees Fahrenheit. 30 C.F.R. §

56.2.⁸ In *Pennsylvania Glass Sand Corp.*, 2 FMSHRC 2930, 2939 (Oct. 1980) (ALJ), the administrative law judge considered evidence that the lubricating oil at issue had a flashpoint of 605 degrees Fahrenheit. The judge found that such a high flashpoint does not present a fire or explosion hazard. *Id.* For explosion hazards, the regulations define “explosive” as “any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. Explosives include, but are not limited to black powder, dynamite, nitroglycerin, fulminate, ammonium nitrate when mixed with a hydrocarbon, and other blasting agents.” 30 C.F.R. § 77.2(q). These regulatory sections and Commission case law provides some guidance on “fire and explosion” hazards.

Second, the use of the conjunction “and” between “smoking and open flames” clearly requires both types of signs, one against smoking, and another against open flames. 30 C.F.R. § 77.1102. The ordinary definition of “and” is “[t]ogether with or along with; in addition to; as well as.” The Am. Heritage, *Dictionary of the English Language* (4th ed. 2009).⁹ This interpretation of the regulation is not novel. In *Summit Anthracite, Inc.*, 29 FMSHRC 1062, 1081 (Nov. 2007) (ALJ), the judge found a violation of section 77.1102 after determining that “in addition to warning against smoking, the standard requires warning against exposure to open flames.” In another case, an inspector issued a notice citing a violation of this standard after observing a service truck with a sign warning against smoking, but not with one warning against an open flame. *Texas Utilities Generating Co.*, 1 FMSHRC 185, 205 (Apr. 1979) (ALJ). At the time of the inspection, the truck contained oil and diesel fuel. *Id.* Even though the parties ended up settling the matter, they both agreed that there was a violation. *Id.* Both cases stand for the proposition that the standard requires both warnings to satisfy the regulation.

Third, the signs must be “readily seen” when posted. 30 C.F.R. § 77.1102. Under the plain language, this requirement would necessitate that the signs be within view of where the defined or recognized hazards exist. As further guidance, the dictionary definition of “readily” includes a characterization of promptness and ease. *See* The Am. Heritage, *Dictionary of the English Language* (4th ed. 2009). A past ALJ case sheds additional guidance. *Rivco Dredging Corp.*, 10 FMSHRC 1195, 1197 (Sept. 1988) (ALJ). In that case, the judge found a violation when the operator stated that the sign was “not very legible” and that some of the diesel fuel storage tanks at issue were well-marked while others were not. *Id.* The sign in that case was “so

⁸ I recognize that this specific regulation focuses on flammable liquids rather than aerosols, like at issue in this case. I further recognize that this regulation involves a different part of the C.F.R. However, the regulation does provide a relevant baseline for what flashpoint is considered flammable by the Secretary and MSHA. Additionally, the part 56 regulations define “flash point,” the exact same, and flammable as “capable of being easily ignited and of burning rapidly.” 30 C.F.R. § 56.2.

⁹ In the absence of a regulatory definition, it is appropriate to consult a dictionary to assist in uncovering the ordinary meaning of operative terms. *See e.g., Am. Coal Co.*, 38 FMSHRC 2062, 2073-74 (2016); *Island Creek Coal Co.*, 20 FMSHRC 14 (1998); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996); *Nat’l Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472, 480 n. 10 (1979); *see also Peabody Twentymile Mining, LLC v. Sec’y of Labor*, 931 F.3d 992, 997 (10th Cir. 2019).

weathered as to be illegible.” *Id.* This case shows that “readily seen” should also be legible and not so worn out that a person would have to take time to try and read or understand. *Id.*

The three requirements are therefore: (1) an area or place must exist with fire or explosion hazards; (2) if those hazards exist a sign against smoking and open flames must be posted; and (3) that sign must be readily seen, promptly legible, and not worn out. These will be analyzed after careful consideration and review of the parties’ arguments.

Parties’ Arguments

Rain-for-Rent makes a few key arguments challenging this Citation. First, it argues that the citation should be vacated because the Secretary failed to meet its burden of proving by a preponderance of evidence that a violation of 30 C.F.R. § 77.1102 occurred, specifically because there was no evidence of a fire or explosion hazard. Resp’t Br. at 8. Rain-for-Rent points out that Cook never tested the contents, looked at the safety data sheets, nor verified that there were flammable liquids in the truck. Tr. 87. As explained above, an inference may be drawn if it is inherently reasonable with a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC at 1138. Here, Cook’s testimony was uncontroverted and buttressed by the jointly admitted photographs showing cans containing various types of brake fluids, penetrating oils, and starting fluid. Ex. H at 3-4. Under the inference doctrine, inspector Cook did not have to pick up every single can and inspect it, particularly when such familiar items as Mac’s, Brakleener, and WD-40 could allow for an inference based on his personal experience and knowledge. I ultimately find Respondent’s argument unpersuasive.

Second, Rain-for-Rent suggests that the application of the regulation and issuance of this citation by the inspector was arbitrary and capricious. However, there is no abuse of discretion to accept the conclusions and testimony that the inspector offered. *Pero v. Cyprus Mining Corp.*, makes clear that, “[a]buse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” 22 FMSHRC 1361, 1366 (Dec. 2000). That principle is inapposite here. To the extent that Rain-for-Rent is challenging the standard itself, by alleging that MSHA’s current enforcement is too vague or inconsistent to know what it requires,¹⁰ my conclusion and references to other administrative law judges’ cases establishing that the language is indeed clear and plain, disposes of that allegation. Resp’t. Br. at 16.

¹⁰ Even under the “arbitrary and capricious” standard itself Rain-for-Rent’s position fails. Under that narrow standard, the court must not substitute its judgment for that of the agency. However, it must examine the relevant data and articulate a satisfactory explanation for its action including “a rational connection between the facts found and the choice made.” Additionally, the court “consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Twentymile Coal*, 30 FMSHRC 736, 755 (Aug. 2008) (quoting *Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Here, the action is the citation, and the Secretary provides sufficient relevant facts, especially the absence of a no open flames sign, to satisfy a rational connection between the facts recited above and its choice to issue the citation.

Third, similarly, there is no fair notice issue when the language is plain. Resp't Br. at 12-15; *see e.g., Bluestone Coal*, 19 FMSHRC at 1031. Rain-for-Rent attempts to argue that there is no fair notice because of Cook's interpretation that any pressurized container, like Coca Cola or Axe Body Spray would need signage, and that Cook could not agree on a consistent and objective criterion for compliance. Resp't Br. at 14-15. Ex. D, 76-77, 82. However, Cook's interpretation is not necessarily that of the Secretary and Rain-for-Rent misstates or mischaracterizes Cook's testimony. Cook does not suggest that all pressurized containers pose such a hazard. In fact, he states, "[a]nd *sometimes* the aerosolized agent – the *compressed gas used, in itself*, is flammable." Tr. 50. Under his testimony, it depends on the compressed gas and chemical makeup used in the can itself. Elsewhere in the record, he explains that cited cans were flammable in nature based on their chemicals and intended purpose. Tr. 45-46, 47, 48, 49, 58. Thus, Respondent's fair notice argument also fails.

Fourth, Rain-for-Rent challenges the credibility of Cook. However, at hearing, I determined that he was an "extremely credible witness." Tr. 209. Another ALJ has explained that "credibility" means "the quality that makes something (as a witness or some evidence) worthy of belief." *Sec'y of Labor v. KenAmerican Res. Inc.*, 40 FMSHRC 1544, 1545 (Dec. 2018) (ALJ) (quoting *Credibility*, Black's Law Dictionary 448 (10th ed. 2014)). Here, his testimony regarding the cans and the signage is supported by Exhibit H. Such corroboration heightens his worthiness of belief. Cook also testified as to his personal experience, knowledge in the mining industry, and years of experience. Most damaging to Respondent's position is that it failed to present any witness to oppose or rebut Cook's testimony; it merely hopes that Cook's character would be doubted on some instances of potentially conflicting testimony. I decline that invitation and conclude that he provided strong testimony, he was mostly consistent in his responses, and he appeared to be honest and candid by admitting mistakes and acknowledging when he was not able to fully answer a question or remember a small detail. Tr. 209; Tr. 52, 54, 95, 119, 201,

The Secretary ultimately counters Rain-for-Rent's position by asserting that Citation No. 9656124 was properly issued as there is no dispute that there was no sign warning against open flames present anywhere on or near the truck. Sec'y Br. at 7-8. For the reasons below, I agree with the Secretary and find that she carried her burden of proving a violation.

Analysis of the Three Requirements

In this case, the Secretary established the requirements to prove a violation of section 77.1102. First, Cook provided extensive testimony as to the fire and explosion hazards that the aerosol cans and oil presented. In terms of explosiveness, he explained that aerosol or compressed cans place the liquid-vapor material under pressure, so if it is introduced to fire, any of the specified cans could overheat and explode. Tr. 47. The explosive hazard is the shrapnel from the combustible aerosol can that could cause injury. Tr. 47. Cook further stated that when the product is broken down to a smaller atomized structure, the aerosolized agent can become flammable. Tr. 50. For each one of the products, penetrating fluid, starter fluid, and brake cleaner, he goes on to explain that they pose a fire hazard, drawing from personal experience and reading some of the labels. Tr. 46-48. Starting fluid is used to start engines and is very flammable. Tr. 48. Specifically, Cook picked up the Brakleen and noticed that there was a fire and explosion hazard symbol on the label. Tr. 46-47. For the oil, Cook testified that it presents a

fire hazard because of its inherent flammable nature and use as a heat source. Tr. 59-60. Cook also explained that the cans that were stored on their side in confined spaces, could leak flammable vapors, which also presents a fire and explosion risk. Tr. 149. His testimony provides a sufficient basis for a concern that any number of these cans could pose a fire or explosive hazard. Also, Rain-for-Rent presented no evidence to contradict this testimony as it declined to call a witness, notably Floyd, who had been present during the inspection. Tr. 8-11.

Alternatively, as Rain-for-Rent suggests, the next consideration is whether the flashpoint of the materials is sufficient to qualify as “flammable.” This case is ultimately distinguishable from *Penn. Glass*, as the materials in Citation No. 9656124 all have flashpoints much lower than the lubricating oil’s 605-degree Fahrenheit threshold. As Rain-for-Rent points out, the Secretary failed to present any evidence as to the flashpoint of these materials. However, this is not dispositive in this matter. Past ALJs have taken judicial notice of safety manuals. *Petro Chemical Insulation Inc.*, 37 FMSHRC 2826, 2832 n.2 (Dec. 2015) (ALJ) (taking judicial notice of the publicly available service manual for the Genie S-60 manlift); *see also Consol Penn. Coal Co.*, 44 FMSHRC 182 (Mar. 2022) (ALJ) (explaining what types of facts can be judicially noticed). In *Consol Penn. Coal*, the ALJ cited to Federal Rules of Evidence 201 and explained that a Commission ALJ “may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and reasonably [be] determined from sources whose accuracy cannot reasonably be questioned.” *Id.* at 190-91; *see also Union Oil Co. of Cali.*, 11 FMSHRC 289, 300 n.8 (Mar. 1989). Here, the flashpoints are readily available in the safety manuals or product data sheets for each of the products at issue, except for the cited oil.

Accordingly, I take judicial notice of the following flashpoint measurements. For the CRC Brakleen Non-Chlorinated Brake Parts Cleaner, the product data sheet makes clear that the material is highly flammable and has a flashpoint of 0 degrees Fahrenheit.¹¹ The Mac’s starting fluid has a flashpoint of -19.2 degrees Fahrenheit, and the WD-40 penetrating liquid has a flashpoint of 147 degrees Fahrenheit.¹² It is clear that these flashpoints are much lower than the 605 degree Fahrenheit benchmark in *Penn. Glass*, so it would be imprudent to find that case dispositive. 2 FMSHRC at 2939. If the regulatory definition’s measurement is considered, the Mac’s starting fluid and the CRC Brakleen are flammable as they are below 100 degrees Fahrenheit. *See* 30 C.F.R. § 56.2. The record suggests that new diesel was present in the bed of the truck,¹³ but an analysis of the flashpoint for that “new and used oil” would be merely

¹¹ *See* CRC Industries, Inc., *Brakleen Non-Chlorinated Brake Parts Cleaner*, 14 Wt Oz (Apr. 9, 2021), [CRC Product Data Sheet for Brakleen® Non-Chlorinated Brake Parts Cleaner, 14 Wt Oz.](#)

¹² *See* WD-40 Co., *WD-40 Specialist Penetrant, Technical Data Sheet*, [ElzQtPoBg2m7p7p71fiWa21uyVsAy93hqP6RaPVR.pdf](#); NAPA, *Safety Data Sheet for NAPA Mac’s Premium Starting Fluid Spray*, NAPA Mac’s Premium Starting Fluid Spray - 11 Oz MAC 7216 | Buy Online - NAPA Auto Parts (also explaining how the aerosol is “extremely flammable”).

¹³ A potential oil that was present is diesel because Floyd informed Cook that he was on the mine site to service a light plant and as part of that service, was changing the oil on the plant’s diesel engine. Tr. 67, 142.

speculative without more information. However, if the oil was similar to the diesel oil in *Texas Utilities Generating Co.*, then it could be deemed flammable and violative. Regardless, at least two of the products, the Mac's and CRC Brakleen, in the service body of the truck could be considered flammable and potential fire hazards, which is sufficient to trigger the regulation's posting and signage requirements.

Second, the parties jointly stipulated that at "the time of the inspection, the only sign on vehicle No. 1757 related to fire hazards was a No Smoking decal on the driver's side window." Jt. Stip. ¶ 7. This coupled with Cook's credible testimony that he observed no sign on the truck warning against smoking and open flames, means that this case is like *Summit Anthracite* and *Texas Utilities Generating Co.* Tr. 42; 29 FMSHRC at 1082; 1 FMSHRC at 205. In both those cases, a violation was found because the operator only had a warning against smoking and not one against exposure to open flames. The evidence shows that Cook did not see any sign, but the parties jointly stipulated there was a no smoking decal. Tr. 42; Jt. Stip. ¶ 9. Rain-for-Rent provided no evidence to the contrary. In fact, the submitted photographs taken by Respondent at Exhibit H affirmatively reveal that there is only a "No Smoking" decal present. Nowhere on the truck is a no open flames warning depicted. Ex. H, 2-4. A no smoking sign is insufficient alone to comply with the standard. I thus find that Rain-for-Rent failed to satisfy the requirement to post warnings against both smoking and open flames.

Third, the warning against no open flames is not readily seen since it did not exist. Tr. 42; Ex. H at 2-4. For the "No Smoking" sign, the photograph depicts a small decal on the truck's side door. Ex. H at 2-3. When zoomed in, the sign is faded and hardly legible. Ex. H at 3. During his inspection, Cook explained that he did not even notice that sign. Tr. 68, 124-25. At hearing, he testified that it is not completely legible, but he believes it says, "no smoking." Tr. 69. I agree that the photographs show a small, worn-out decal. This case is like *Rivco Dredging*, where the judge found that the sign was not very legible, not well-marked, and thus violative of the regulation. 10 FMSHRC at 1197. I find *Rivco* persuasive and agree that a small, illegible or worn-out decal is not "readily seen," which is required by 30 C.F.R. § 77.1102. Alternatively, Cook explains, on cross-examination, that the sign is not "readily seen" as any sign should be "readily visible from all approaches," or "all four sides." Tr. 123.¹⁴ Here, the photograph only shows an illegible sign on the driver's side door, which is insufficient to satisfy the regulation. Because the Secretary established that all three requirements of the standard have not been satisfied, I find a violation of section 77.1102.

3. Gravity

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." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983),

¹⁴ At hearing, Cook affirmed his deposition testimony which was introduced into evidence as Exhibit D. Cook in his deposition testimony discusses the meaning of "readily seen" and states that it should be from "all approaches, look towards that vehicle, side, back, front, readily seen." Ex. D., Dep. at 19. He explained that it would mean a "minimum of four" signs. *Id.* at 20. Later, he states "[t]hat's what the readily seen is for. It's to protect people from walking up on a danger." *Id.* at 41.

aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard 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, e.g., Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially affected. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Inspector Cook designated this Citation as reasonably likely to cause "fatal" injury or illness which would affect one person. Tr. 71, 73, 75. Following a second conference between the parties, the citation was modified from "reasonably likely" to "unlikely." Ex. A at 51; Tr. 72-73. Rain-for-Rent does not seem to contest any of these gravity findings. Here, inspector Cook, given his years of mining experience, offered credible testimony that one person, Floyd, would be affected as he normally worked alone when servicing equipment and he was the only person in the immediate vicinity of the cited truck. Tr. 75. In the unlikely event of an explosion or fire occurring, inspector Cook also anticipated that possible injuries would be devastating on the human body and caused by shrapnel releasing from the pressurized and compressed aerosol cans. Tr. 73. For that reason, he characterized the potential injury or illness as fatal. Tr. 73.

Given the facts above and Rain-for-Rent's silence on this issue, I affirm modified likelihood and severity and number of people likely to be affected.

4. Negligence

Negligence is not directly defined in the Mine Act, but the Commission has held that "judges may evaluate negligence from the starting points of a traditional negligence analysis" rather than based on the Secretary's definition of negligence under 30 C.F.R. § 100.3(d). *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) (explaining that the MSHA regulations are not binding in Commission proceedings). The Commission has further recognized that "[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation ... occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission's negligence analysis asks whether an operator has met "the requisite standard of care – a standard of care that is high under the Mine Act." *Brody Mining*, 37 FMSHRC at 1702. To determine whether an operator has met its duty of care, Commission ALJs consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Id.* (citations omitted). An ALJ, however, "is not limited to an evaluation of allegedly 'mitigating circumstances' and should consider the 'totality of the circumstances holistically'." *Id.* at 1702-03. Lastly, the Commission has recognized that an "operator's

knowledge (actual or constructive) is a key component of a negligence determination.” *Ohio Cty. Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018).

The Secretary’s regulations at 30 C.F.R. § 100.3 define moderate negligence as when, “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” Here, Rain-for-Rent does not challenge inspector Cook’s designation of moderate negligence. In his determination, Cook explained that moderate negligence was appropriate because Floyd had reasonably not known that he was required to have the signage. Tr. 71. According to what Floyd told inspector Cook, Floyd believed that since he was only a subcontractor, only the DOT rules applied to him, not the C.F.R. However, Floyd also informed Cook that he received his miner training and annual refresher, which suggests that Floyd should have known of this regulation and requirement. Tr. 71. Nonetheless, Cook credited Floyd’s belief as held in good faith and Cook determined that high negligence was not warranted.

Considering the totality of the circumstances and Cook’s credible testimony, I conclude that MSHA’s designation of moderate negligence is appropriate.

In sum, for Citation No. 9656124, I find a violation of section 77.1102, and affirm the likelihood, severity of any potential injury, the number of people affected, and the moderate negligence designations. As further explained below, the assessed penalty of \$133.00 is upheld.

I now turn to analyze the remaining Citation, No. 9656125.

B. Citation No. 9656125

1. Findings of Fact

On March 4, 2022, inspector Cook also inspected Rain-for-Rent’s fire extinguisher. Tr. 77-80. While observing the fire extinguisher, Cook noticed a small tag wired to it. Tr. 78, 82. However, the tag was ripped in half and contained no reference to the last date of inspection. Tr. 78. Cook asked Floyd about the missing part of the tag, and Floyd claimed that the entirety of the tag had been present that morning at the beginning of his shift. Tr. 79-80. Cook explained that he wrote the violation because the tag did not meet his understanding of the standard, which required a showing of an inspection date within the last six months. Tr. 77, 85. When asked what constitutes a permanent tag, he stated, “a tag on the extinguisher that would take more than just pulling it to get off. Like wired to it with a piece of wire, zip tied to it, a sticker on the fire extinguisher.” Tr. 164.

Cook further testified that usually the date of the examination is “punched out” since there is a place where the inspector can either punch a knife through or mark the date with a permanent marker. Tr. 82. In this case, Cook found no discernable date on the tag, and even though Floyd claimed it was present earlier, Cook conducts a “snapshot in time” inspection. Tr. 92.

The photographic evidence submitted reveals a fire extinguisher with a blue tag stating, “[d]o not remove by order of the state fire marshal.” Ex. H, at 6. A small, wired tag is visible as

well. Ex. H, at 6. Cook maintained that the exhibit constituted a “fair representation” of the fire extinguisher at the time of the inspection. Tr. 84. From the photograph, Cook still could not determine the date of the last inspection. Tr. 84.

Cook confirmed that the fire extinguisher had been in good working order and correct operating condition, so it did not present a hazard, but explained that it could be a paperwork violation. Tr. 77, 164. However, he testified that without first knowing whether the fire extinguisher was in good working order, a miner would not know if the fire extinguisher was going to work when he went to use it, so in the time spent trying to figure out the last inspection date, the miner could suffer smoke inhalation or burns. Tr. 84. He suggests that those are the potential hazards present when a fire extinguisher does not have a recorded last date of inspection. Tr. 84.

2. Finding of Violation

Citation No. 9656125 states that:

The Rain For Rent service truck (Ford F-550 Company number 1757) did not have a tag permanently attached to the extinguisher showing the last date of inspection. The extinguisher did have a paper tag affixed to the top of the extinguisher but it was torn in half and had lost any identifiable marks as to when it was last inspected. This exposes miners to smoke inhalation and burn type injuries resulting in permanently disabling injuries.

Standard 77.1110 was cited 4 times in two years at mine 4800086 (0 to contractor VVG).

Ex. A, at 4. Based on his observations as memorialized in the citation, inspector Cook concluded that Rain-for-Rent violated 30 C.F.R. § 77.1110. That regulation requires that “[f]irefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.” 30 C.F.R. § 77.1110.

Like section 77.1102, this regulation’s language is plain and clear enough to provide sufficient notice to an operator of what is required for compliance. As relevant here, 30 C.F.R. § 77.1110 requires that the *date of the fire extinguisher’s biannual examination* be recorded on the tag that is attached to the extinguisher (*emphasis added*). Even if the language arguably could be clearer, the Commission case law allows for consideration of the standard or regulation’s purpose to assist in understanding the requirements. *See e.g., Ideal Cement Co.*, 12 FMSHRC at 2416; *see also Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (explaining that the safety standards “must be interpreted so as to harmonize with and further...the objective[s] of the Mine Act.”). The purpose of the standard is clear: to provide miners with a way of knowing whether the fire extinguisher is in good working order to effectively combat a fire that may occur. This is consistent with the overall purpose of the Mine Act to prioritize “the safety and health of [the mines’] most precious resource –the miner.” 30 U.S.C. § 801(a).

In this specific context, Commission ALJs have found a violation when the examination date was not present. *Margin Coal Co., Inc.*, 2 FMSHRC 1608, 1612 (June 1980) (ALJ) (finding a violation of section 77.1110 when a fire extinguisher on an explosives truck had no examination date); *Blackjack Coal Co., Inc.*, 2 FMSHRC 3353, 3364 (Nov. 1980) (ALJ) (finding a violation when portable fire extinguishers had not been provided with a permanent tag attached to the extinguishers showing the date of examination).

Rain-for-Rent primarily suggests that the focus of the issue is on the permanence of the tag. Resp't Br. at 17-18. It argues¹⁵ that there is no requirement that the inspection date be continuously maintained on the tag for it to be visible or legible. Resp't Br. at 17. As support, it adds that there is no evidence that it failed to attach a permanent tag with the date of the inspection at some point in time. Resp't Br. at 17. It lastly states that "permanent tag" is vague and does not provide fair notice.

The Secretary counters that the language of the regulation necessitates that the date of the last examination be present and recorded on the tag. Sec'y Br. at 12-13. If the tag was allowed to be destroyed or torn, then the miners would have no way of knowing if the fire extinguisher was in working order or correct operating condition. Therefore, under Respondent's approach, the purpose of the standard would be frustrated and unable to be achieved.

I agree with the Secretary. The determinative issue in this case is whether there was a recorded examination date on the tag at the time of the inspection. Any discussion of the permanent attachment to the fire extinguisher or interpretation thereof is a red herring when applied to the specific facts at issue here.

Here, the facts are simple. Cook wrote a citation because the date of the fire extinguisher's last examination was absent from the tag that was attached. The issue is not about permanence, or a tag being affixed to the extinguisher. Cook's citation and testimony confirm that there was in fact a tag permanently attached to the top of the extinguisher. Ex. A, at 4; Ex. H, at 6; Tr. 78. Regardless of whether the tag was affixed, there is no point in having such a tag affixed to the extinguisher if the date of the inspection is no longer present. The protective purpose of the regulation, which is to assist miners in recognizing which equipment would likely

¹⁵ Rain-for-Rent provides another argument explaining that when analyzing the standard, the relevant inquiry is whether the requisite inspection occurred, not whether the tag was torn off. Resp't Br. at 18-19. As support, it cites *North Idaho Drilling, Inc.*, 35 FMSHRC 2472, 2489 (Aug. 2013). This argument is not persuasive. For starters, the cited case addresses a wholly different standard at § 56.4201(a), which states, "Firefighting equipment shall be inspected according to the following schedules... (2) [a]t least once every twelve months, maintenance checks shall be made of mechanical parts..." Without going too much into an analysis, clearly the language for that standard is much different as it makes no mention of a tag. Rather, the *North Idaho* case focuses on whether an actual inspection occurred because that is what the underlying standard required. In short, that case is inapposite here. I note that Rain-for-Rent points to several other case illustrations in its post-hearing brief that are not relevant. For example, Rain also cites *Summit Anthracite*. But, that case deals with 30 C.F.R. § 75.1715 involving a check-in and check-out system. 24 FMSHRC 720, 763 (July 2002) (ALJ).

be in good working order to combat a fire hazard, would be hindered. *See e.g.*, Tr. 84. That is what occurred here. Cook noticed that the tag had been ripped in half so he could not tell the date, month, or even year that it was last inspected. Tr. 82. This provides a miner, who picks up the fire extinguisher, with little to no confidence that it would work. Tr. 84. Because the purpose of the standard would be hindered and the evidence reveals that the tag had been torn or ripped off leaving behind no last examination date, a violation of section 77.1102 occurred.

3. Gravity

Inspector Cook designated this Citation as unlikely to result in a permanently disabling injury, which would affect one person. Ex. A, at 4. Respondent does not contest any of these gravity findings. Cook, like for the other citation, explained that Floyd would be the only one affected as he was the sole person in the vicinity of the cited truck and extinguisher. Tr. 87-90; Tr. 75. For the severity of injury, Cook explained that any injury that would occur would result in smoke inhalation, exposure to any chemicals from the truck, and would be permanently damaging to the lungs. Tr. 86, 90. I conclude that Cook presented credible testimony on these two gravity findings.

However, there is no evidence that the “unlikely” designation is proper. Cook testified that after his inspection of the fire extinguisher, he determined it to be in good working order and correct operating condition. Tr. 87, 89; 77. Since it was in this condition, there would be no likelihood of injury. When asked at hearing to convince the ALJ why this should be “unlikely,” Cook provided unpersuasive testimony and at one point said, “I can’t.” Tr. 90. He also stated, “[i]f [Floyd] had picked the extinguisher up that morning, turned it upside down, done the full inspection on it, I would have rated it ‘no likelihood’ because the extinguisher...was in proper working condition. But without him knowing exactly how to do that full inspection...there was no way of knowing that it was...in full working condition.” Tr. 87. This reasoning is a bit confusing, especially since the fire extinguisher was in good working condition. Confusion aside, it was usable, operative, and in good working condition. I therefore lower the likelihood of injury from “unlikely” to “no likelihood.”

4. Negligence

Inspector Cook designated this violation as resulting from moderate negligence. Respondent does not contest this negligence finding. Cook credibly testified that he characterized the level of negligence as moderate because Floyd knew that the tag with the last examination date needed to be there, but it was not present at the time of the inspection. As a potential mitigating circumstance, Cook accepted Floyd’s claim that the tag had been present earlier in the shift, so Floyd had no reason to know a violation existed. Tr. 85-86. Floyd also had no knowledge of how or why the tag had been ripped. Tr. 86, 167. He testified that since the tag was present that morning, he observed the date, but that he could not remember it. Tr. 86. A second mitigating circumstance is that Floyd checked and saw that the gauge showed the extinguisher was in “good” working order. Tr. 86. Cook concluded that Floyd did his “due diligence” to verify the gauge and dial, which revealed the fire extinguisher was in working order, but Cook also recognized that Floyd had not known how to conduct a full inspection. Tr.

87, 165-66. Given Cook’s testimony and no contradictory evidence or testimony presented by Respondent, I affirm the assessed level of moderate negligence.

In sum, for Citation No. 9656125, I find a violation of section 77.1110, and affirm the severity of any potential injury, the number of people affected, and moderate negligence designations. However, I modify the likelihood of occurrence from “unlikely” to “no likelihood,” and assess a penalty of \$133.00, as further explained below.

VII. PENALTY

Commission administrative law judges have the authority to assess civil penalties *de novo* for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that the ALJ consider six statutory penalty criteria in assessing civil monetary penalties:

(1) the operator’s history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator’s ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For Citation No. 9656124, the Secretary proposed a regular assessed penalty of \$133.00. In the fifteen months preceding issuance of the citation, MSHA issued two violations of section 77.1102 to the Kemmerer Mine, but none specifically to Rain-for-Rent. *See MSHA, Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). Neither party addresses whether there would be a negative effect on the operator’s ability to continue in business. Without any evidence, I presume that no such adverse effect would occur. *See John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (confirming that “[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator’s] ability to continue in business, it is presumed that no such adverse [e]ffect would occur.”) (citations omitted). I also find that the small penalty proposed is appropriate to the small size of the business of Rain-for-Rent. As discussed above, I determined Respondent’s negligence to be moderate. Regarding the gravity of the violation, I found that it would affect one person and was unlikely to result in a fatal injury. Moreover, Respondent demonstrated good faith by immediately taking the truck off the mine property to correct the citation. Ex. A, at 2. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$133.00.

For Citation No. 9656125, the Secretary proposed a regular assessed penalty of \$133.00. In the fifteen months preceding issuance of the citation, MSHA issued one violation of section 77.1110 to the Kemmerer Mine, but none specifically to Rain-for-Rent. *See MSHA, Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). Like the first citation, there is a presumption that no adverse effect on the operator’s ability to

continue in business would occur. *See e.g., John Richards Const.*, 39 FMSHRC at 965. Also, the \$133.00 penalty is appropriate for the small size of the business. As discussed above, I determined Respondent's negligence to be moderate. Regarding the gravity of the violation, I found that it would affect one person and that there was no likelihood of a resulting permanently disabling injury. Moreover, Respondent demonstrated good faith by immediately taking the truck off the mine property to correct the citation. Ex. A, at 4. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$133.00.

VIII. CONCLUSION AND ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9656124 be **AFFIRMED** as modified by MSHA,¹⁶ Citation No. 9656125 be **MODIFIED** to reduce the likelihood of occurrence from "unlikely" to "no likelihood," and that Respondent pay a total civil penalty of \$266.00 within 30 days of this Decision.¹⁷ Accordingly, this case is **DISMISSED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

¹⁶ The citation is affirmed with the modification that the parties reached with MSHA reducing the likelihood of occurrence from "reasonably likely" to "unlikely." Ex. A, at 51; Tr. 72.

¹⁷ Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508> or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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