FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	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
v.	
PEABODY SOUTHEAST MINING, LLC, Respondent.	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.

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.

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[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.

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 dewaters 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. 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-

[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.

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 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

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[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.

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

[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.

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 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.

- 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.

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 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.

[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.

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]

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[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

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 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.

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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.

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)). 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); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007, 2011-12 (Dec. 1987); *see*

[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.

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 FSMRHC 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 FSMRHC 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); *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 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." *Whayne 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. *Whayne 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 mine[10], 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 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.

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

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. 1, 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**.

Thomas P. McCarthy
Administrative Law Judge

Distribution:

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