

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 2025

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

v.

PEABODY SOUTHEAST MINING,
LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

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

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

Mine: Shoal Creek Mine

DECISION AND ORDER

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

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

Before: Judge McCarthy

I. STATEMENT OF THE CASE

These consolidated dockets are before me upon two Petitions for the Assessment of Civil Penalty filed by the Secretary through her Mine Safety and Health Administration (“MSHA”) against Respondent Peabody Southeast Mining, LLC (“Peabody” or “Respondent”), pursuant to section 105(d) of the Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary alleges Peabody violated 30 C.F.R. sections 75.400 and 75.363(a) when it allowed combustible material to accumulate along the slope belt and at the slope tail and failed to fully

correct that condition when notated in the relevant pre-shift examinations. The Secretary assessed a total penalty of \$126,227.00, \$46,799.00 for Order No. 9704796 and \$79,428.00 for Order No. 9704803.

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

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

II. STIPULATED FACTS

The parties submitted the following joint stipulations:

1. Peabody qualifies as an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
2. Shoal Creek Mine is a “mine” as defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. The products of the Shoal Creek Mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803.
4. This case is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (“Commission”) and its designated Administrative Law Judges (“ALJs”) pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. § 801 *et seq.*
5. The individual whose name appears in Block 22 of the Orders in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Orders were issued.

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

6. The Orders at issue, as well as any modifications, were properly served by a duly authorized representative of the Secretary of Labor, through MSHA, upon an agent of Respondent on the date and place stated therein.
7. The Orders contained in “Exhibit A” attached to the Secretary’s petitions in these consolidated cases are authentic copies of the Orders with all the appropriate modifications or abatements, if any.
8. Peabody Southeast Mining, LLC timely contested the Orders.
9. Payment of the total proposed penalties in these matters will not affect Peabody’s ability to continue in business.

Jt. Ex. 1.

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

III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

Order No. 9704796

1. Findings of Fact

On November 9, 2022, MSHA Inspector Craig arrived at the Shoal Creek Mine to

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

Before traveling up the slope's incline to inspect the rest of the belt, Craig conversed with Eugene Faught, the evening shift's radius and dewater supervisor. Tr. I, 126; Tr. II, 39. Faught informed Craig that three days earlier, several legs on the slope belt broke, causing coal spillage. Tr. II, 139. Craig then asked Faught about the wet material on the ground of the clean room and why Craig did not see anyone cleaning the accumulations near the tailpiece area. Tr. II, 139. Faught explained that a miner, Hunter Isaacs, was assigned to clean the area, but that Isaacs needed to retrieve a piece of machinery, a Bobcat, to facilitate the cleaning. Tr. II, 35, 38. Craig then ordered the shutdown of the belt while still in the tailpiece area. Tr. II, 41, 110-11. Faught assured Craig that he had more workers cleaning the slope belt. Tr. II, 41-42. But, once they arrived at the slope belt, Faught stated that the miners went to the tailpiece area. Tr. II, 41-42. Craig asked Faught again why no one was cleaning the accumulations. Tr. II, 42.

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

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

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

that were located directly under the belt or piled offside. Tr. I, 62, 63, 69, 70. At one point, he saw one of the offside rollers spinning in these coal accumulations. Tr. I, 70.

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

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

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

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

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

2. Finding of Violation

Order No. 9704796 states that:

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

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

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

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

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

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

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

Ex. P-1.

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

The Commission has found that this standard prohibits accumulations but not mere spillages. *See Old Ben Coal Co., (Old Ben Coal II)*, 2 FMSHRC 2806, 2808 (Oct. 1980) (recognizing that a non-violative spillage may result from normal mining operations). The Commission, however, has not set out a bright-line distinction between an accumulation and spillage. Instead, in *Old Ben I*, the Commission explained that “whether a spillage constitutes an accumulation...is a question, at least in part, of size and amount.” *Old Ben Coal Co., (Old Ben I)*, 1 FMSHRC 1954, 1958 (Dec. 1979). *Old Ben II* clarified that an accumulation is “[t]hose masses of combustible materials which could cause or propagate a fire or explosion...” 2 FMSHRC at 2808. Put together, a violation occurs, “where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present.” *Id.* (footnote omitted); *see also Black Beauty Coal Co.*, 703 F.3d 553, 558-59, 559 n.6 (D.C. Cir. 2012) (explaining that, although spills may occur quickly, accumulations of combustible materials substantial enough to cause or propagate a fire are prohibited even if recent).

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

The Commission has expressly rejected the argument that “accumulations of combustible materials may be tolerated for a ‘reasonable time’.” *Old Ben I*, 1 FMSHRC at 1957-58. After

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

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

Peabody challenges the inspector’s conclusion that it violated section 75.400 on three distinguishable grounds. First, it argues that the material amounted to a non-violative spillage rather than an accumulation. Second, Peabody suggests that the spillage was caused by a significant unpredictable condition, legs of the belt structure broke at frame nos. 751 to 802. Resp’t Br. at 23-24. The broken legs caused the belt to lean offside, which resulted in a “mass” or “bunch of spillage.” Tr. II, 104, 128. It further suggests that another incident occurred right before the subject inspection, i.e., the surge bin malfunctioning. Resp’t Br. at 25. As support, Respondent points to testimony that the slope tailpiece area had been cleaned on the day shift of November 9. Tr. I, 254-55; R-2 at 10. By the end of the day shift, the area was cleaned down to the concrete. Tr. I, 254-55. But when Faught observed the area early in the evening shift, he determined that there was more material present than the day before. Tr. I, 31. Third, Peabody asserts that it consistently cleaned the material that developed along the slope belt and tail area. Such cleaning occurred on all shifts beginning when the legs broke on November 7, up until Craig conducted his inspection on November 9. Resp’t Br. at 25.

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

Here, inspector Craig’s testimony establishes that a substantial amount of coal, coal fines, and coal dust accumulated and settled at multiple locations along the slope belt and tailpiece area, specifically from the slope tail to the 633-belt structure mark. Tr. I, 49-64, 83. For starters, when measuring the accumulations at the slope tail, inspector Craig found them to be approximately 300 feet long, 46 inches wide, and 32 inches deep, piled under the belt. Tr. I, 49-59; Ex. P-1. He testified that area consisted of fine coal material and at the bottom of the coal pile was eight to ten inches of wet material, while the top was twenty-four inches of drier material. Tr. I, 51. Craig theorized that the top material was dry due to the frictional heat and

contact with the running belt. Tr. I, 51. He further explained that the accumulations could not rise any higher because they were touching the valve of the belt and were completely worn flat. Tr. I, 51. Some of the accumulations then started to work out from under the belt structure and those were measured to extend approximately six inches from both sides of the slope belt. Tr. I, 45, 51. As Craig continued along the slope belt, he observed more accumulations, but these consisted of harder coal fines and larger chunks of dry coal. Tr. I, 60. The amount and extensiveness of the coal weighs in favor of finding an accumulation rather than a spillage.

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

The aftermath and subsequent cleaning efforts also suggest a violative accumulation. Barnett testified that fifty to sixty miners were cleaning the belt while he conducted his onshift examination. Tr. II, 198. Faught testified that there were about twenty miners assigned to clean during every shift up until the Order was terminated. Tr. II, 44. Craig explained that he spoke to Peabody's management and discovered that it took 1,250 manhours to fully clear out the accumulations. Tr. I, 30. The number of miners and hours it took to fully clean these accumulations reveal the extent of the accumulations in both size and amount, which the Commission has found relevant in determining whether the condition is spillage or accumulation. These facts weigh in favor of finding an accumulation, and I conclude that a non-violative spillage would likely not take that long to clean up nor would it require dozens of miners to do so.

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

In this case, the evidence clearly reveals the extensive amount and size of the coal accumulations, multiple damaged rollers, and bottom and top rollers rubbing against the slope belt causing friction, which could potentially spark. Tr. I, 45, 49-59, 60, 62-63, 68-71, 75, 77-79; Ex. P-1; Ex. P-3. This objectively qualifies as a violative condition under 30 C.F.R. § 75.400, because there were masses of combustible material, namely the float coal dust, and loose coal at

the tail belt, and the type of hazard posed by these conditions is precisely what the regulation aims to prevent. I therefore conclude that the RPP standard is met, and that Peabody violated 30 C.F.R. § 75.400.

3. Significant and Substantial

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

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

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

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

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

Peabody contests the S&S designation on two grounds. First, it argues that the testimonial evidence reveals an absence of a confluence of factors supporting a reasonable likelihood of a fire. Resp’t Br. at 29. Specifically, it points to the wet sloppy material, the constant cleaning and water source, and the absence of methane. Resp’t Br. at 29. Second,

Peabody argues that the remedial action in progress would have continued notwithstanding the subject inspection, which it deems important because the evaluation of a reasonable likelihood of injury should be made assuming continued normal mining operations. It ultimately suggests that the “normal mining conditions” were the remedial actions being done. Resp’t Br. at 29.

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

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

a. Mandatory Safety Hazard

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

b. Reasonably Likely to Cause the Defined Hazard

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

The remaining issue is whether there is a reasonable likelihood that these coal accumulations would ignite and start a fire or explosion. Under the facts, there is a real concern that the coal fines and coal accumulations in contact with the belt and damaged rollers would

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

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

c. Reasonably Likely to Cause Injury

Third, the Secretary must show that the occurrence of the hazard is reasonably likely to cause injury. *Mathies*, 6 FMSHRC at 3. This step involves assuming the occurrence of the hazard—not the violation—and determining whether, based on the facts surrounding the violation, the hazard is reasonably likely to cause injury. *Newtown*, 38 FMSHRC at 2037-40; *Texasgulf*, 10 FMSHRC at 501. For cases involving section 75.400, step three of *Mathies* is a bit more specific and is often lumped together with step two. The Commission has found that in cases that involve violations which may contribute to the hazard of an ignition or explosion, the likelihood of an injury resulting depends on the existence of a “confluence of factors” that could trigger the ignition or explosion. *Mach Mining, LLC*, 40 FMSHRC at 4; *Texasgulf*, 10 FMSHRC at 501.

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

factors” that could trigger an ignition or explosion, even considering the fact some of the coal was initially wet.

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

d. Reasonably Serious Injury

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

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

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

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

4. Unwarrantable Failure

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

The Commission has determined that an unwarrantable failure is "aggravated conduct constituting more than ordinary negligence for a mine operator in relation to a violation of the Act." *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007) (citation omitted). Like S&S, the Secretary bears the burden of establishing the validity of an unwarrantable failure finding. *See Keystone*, 17 FMSHRC at 1838. In other words, "while an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge." *Coal River Mining, LLC*, 32 FMSHRC 82, 88-89 (Feb. 2010) (*citing IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009)).

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

a. Duration of the Violative Condition

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *E. Assoc. Coal Corp.*, 32 FMSHRC 1189, 1198 (Oct. 2010). In deciding whether a violation should be attributed to an operator's unwarrantable failure, the Commission looks to the length of time or number of shifts that the violative condition existed. The Commission accepts direct and circumstantial evidence to

establish duration. *Windsor Coal Co.*, 21 FMSHRC 997, 1003 (Sept. 1999); *Coal River Mining, LLC*, 32 FMSHRC 82, 92-93 (Feb. 2010) (explaining that even imperfect evidence of duration should be considered by the judge); *see also Peabody Coal*, 14 FMSHRC 1258, 1261-63 (Aug. 1992) (affirming the judge’s duration finding based primarily on the inspector’s observation and testimony of the cited area).

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

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

As the Commission has done in the past, I credit the inspector’s testimony and find that at least three or more shifts passed. It is reasonable to conclude that the violation likely lasted for

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

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

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

b. Extensiveness and Obviousness of the Violative Condition

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

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

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

c. Knowledge of the Condition

Peabody admits that it had actual knowledge of the coal accumulations at the cited

locations, however, it argues that its corrective measures do not support an unwarrantable failure finding. Resp't Br. at 32. The Secretary asserts that Respondent's admitted knowledge of the accumulations around the slope tail and slope belt satisfy this factor. I agree with the Secretary primarily because I disagree with Peabody's suggestion that its corrective measures are relevant for this factor, since those are more applicable when weighing the abatement efforts as an unwarrantable failure factor.

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

d. Degree of Danger Posed by the Condition

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

Peabody argues that there is no high degree of danger because some of the material cited was wet, soupy, and had the consistency of muck. Resp't Br. at 34; Tr. II, 34, 109. Similarly, it contends that the presence of a constant water source from all the washing that had been done lowers the degree of danger. Resp't Br. at 34. The Secretary asserts that the violative condition posed a high degree of danger to miners since there were significant amounts of coal accumulations and several nearby ignition sources including damaged rollers in various areas around the slope belt and tailpiece area. Sec'y Br. at 17. I agree with the Secretary, and again, Peabody's position ignores the fact that wet, damp coal can eventually dry out due to friction,

caused by rollers running in accumulations or the accumulations rubbing against the belt. As confirmation, the Commission has consistently found that “wet coal accumulations pose a *significant danger* in underground coal mines,” because they can dry out through frictional contact with belts or rollers, which can cause a fire or explosion. *Mach Mining, LLC*, 40 FMSHRC at 3-6 (upholding the ALJ’s recognition that wet coal remains a danger because of frictional heat sources); *Mach Mining, LLC*, 38 FMSHRC 2229, 2242 (ALJ) (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-2330 (Aug. 2013)).

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

e. Abatement Efforts

The Commission has stated that:

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

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

I recognize that the record reveals several abatement efforts taken during several shifts before Craig's inspection that may weigh against finding an unwarrantable failure. However, I find those more relevant for Order No. 9704803, involving hazardous conditions listed in the pre-shift examination. The focus for this Order, in my view, is on the remedial efforts employed close in time before the inspection. At hearing, Faught testified that in preparation for the evening shift and before Craig's arrival, he assigned three miners to clean the slope belt and one miner, Isaacs, to clean the slope tail. Tr. II, 35, 38, 41-42. When Craig asked at the slope tail why no one was cleaning, Faught answered that Isaacs needed to retrieve a Bobcat to facilitate the cleaning. Tr. II, 38. When asked along the slope belt, why no one was cleaning, Faught suggested that the three miners had gone to the tailpiece area as instructed. Tr. II, 41-42. Because of this, inspector Craig testified that he observed no remedial work in progress at either the slope tail or belt when he conducted his inspection. Tr. I, 114. He also found that the photographs he took during the inspection support his position that the accumulations had not been recently touched or partially cleaned. Tr. I, 114; P-3; P-8. The fact Craig observed no one working on the accumulations that expanded several hundred feet, weighs in favor of an unwarrantable failure designation.

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

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

f. Notice of Need for Greater Compliance Efforts

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

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

I ultimately agree with the Secretary. As the Commission noted in *Consolidation Coal*, a high number of past violations of section 75.400 places an operator on notice. I find seventy-five citations within the past two years to be a significant number of past violations and sufficient to place Peabody on notice that greater efforts were necessary to comply with section 75.400. This factor thus weighs in favor of an unwarrantable failure designation.

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

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

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

⁵ It could be argued that if Peabody had the presence of a clean inspection, it would have brought it up as akin to an affirmative defense under Fed. R. Civ. P. 8. However, Commission precedent and the Mine Act make clear that it is the Secretary's burden to prove the presence of all three prerequisites. 30 U.S.C. § 814(d)(2); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1071-75 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Cyprus Cumberland Res. Corp.*, 21 FMSHRC 722, 728 (July 1999); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911-12 (Aug. 1984). If Peabody had

For starters, Commission precedent makes clear that it is the Secretary's burden to prove the third prerequisite by a preponderance of the evidence. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911-12 (Aug. 1984); *Kitt Energy Corp.*, 6 FMHSRC 1596, 1600 (July 1984), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985) (explaining that "[t]he burden of establishing the validity of such an order, necessarily including proof that an intervening clean inspection has not occurred, appropriately rests with the Secretary"). In *U.S. Steel Corp.*, the Commission confirms that an intervening clean inspection is not limited to completely regular scheduled inspections but may be composed of a combination of spot inspections, so long as, taken together, they constitute an inspection of the mine in its entirety. 6 FMSHRC at 1912. The Commission found fault in the insufficient, limited testimony on the issue of the clean inspection and concluded there was no substantial evidence. *Id.* at 1912-15. It additionally took issue with the inspector's belief that only a regular quarterly inspection without similar violations lifted the d-chain, and then highlighted the absence of any testimony on whether a combination of regular or other inspections covered the entirety of the mine. *Id.*

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

Kitt Energy provides additional guidance and confirms my position. In that case, the Commission suggested that the Secretary could prove that an area remains to be inspected during the relevant time period by presenting records of all inspections at the mine and the extent of those inspections. *Kitt*, 6 FMSHRC at 1600. Similarly, the Commission has specifically stated that the Secretary may rely upon a log depicting all inspection activity at the mine. *Cumberland*, 21 FMSHRC at 728 n.7. Here, the Secretary makes no reference to a log presenting records of the mine's entire inspection activity during the relevant time; she references the violation history, which is not synonymous. She seems to desire an inference that, because MSHA issued other 104(d)(2) orders, that must mean there had been no clean inspection. But such an inference,

been expected to raise the issue on its own, this would shift the burden in clear contradiction of Congressional intent. Peabody could have simply chosen not to expend resources bringing the issue forward when it knew the Secretary had to prove it.

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

without more, is unreasonable. MSHA can issue 104(d)(2) orders but that does not automatically mean there was no intervening clean inspection. Such a conclusion would defeat the purpose of any meaningful judicial review of the validity of these orders and would make any 104(d)(2) order, as long as it is issued by an MSHA inspector, valid. The Secretary also desires an inference that because the violation history reveals additional unwarrantable failures that must mean there was no clean inspection. This inference is equally as concerning and speculative without more direct testimony or evidence. I refuse the invitation by the Secretary to make these inferences and ultimately conclude that the Secretary failed to carry her burden to prove this third prerequisite.

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

5. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by considering the importance of the standard violated and the operator’s conduct with respect to that standard, in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. *See, e.g., Harland Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

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

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

and number of persons affected. Sec’y Br. at 12-13. I ultimately agree with the Secretary that the inspector’s testimony regarding gravity was credible and entitled to considerable weight.

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

Such a conclusion is supported by the evidence notwithstanding the source of water, wet material, and absence of methane. The Commission has recognized that wet material can contact a frictional or heat source and dry out, meaning that the conditions present here still pose a risk of combustibility. *Black Diamond*, 7 FMSHRC at 1121. The Commission has further found that the presence of low amounts of methane or the absence of methane, does not necessarily bar a finding of reasonable likelihood. *See e.g., Sec’y of Labor v. U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (Aug. 1985). As Craig testified “[m]ethane can accumulate at any point in time in different areas of the mine...you still wouldn’t want to compromise the [south main fields] with a flame because there is an unknown mixture of what could be behind the seals which would make a fire...” Tr. I, 122. A rapid buildup of methane thus could be reasonably expected. Tr. I, 122.

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

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

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

6. Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, “whether the operator was negligent.” 30 U.S.C. § 820(i). Negligence is not directly defined in the Mine Act, so the Commission has held that “judges may evaluate negligence from the starting point of a traditional negligence analysis” rather than based on the Secretary’s definition of negligence under 30 C.F.R. § 100.3(d). *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) (explaining that the MSHA regulations are not binding in Commission proceedings). The Commission has further recognized that “[e]ach mandatory standard... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation... occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

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

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

Peabody contests MSHA’s high negligence designation. However, it does not explain why it is challenging high negligence. It merely states, “[t]o the extent that any violation if found, the unwarrantable failure and *high negligence* designations for Order No[.] 9704796 [are] inappropriate.” Resp’t Br. at 30. However, in its unwarrantable failure analysis, Peabody makes clear that it took some remedial action during the time preceding the issuance of the Order. Resp’t Br. at 32-33. As I will discuss later, these remedial efforts are much more forceful for

Order No. 9704803. That is primarily because for the accumulations order, the focus is on what actions were being done around the time of the inspection and immediately before it. The preceding days are therefore somewhat less relevant here. The Secretary maintains that Peabody was highly negligent and that its corrective actions on the day of the inspection were inadequate. This is a close issue, but I ultimately agree with the Secretary and affirm the negligence designation.

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

I next consider potential mitigating circumstances. As mentioned, the focus here is on the remedial efforts made right before the shift or during it. Faught testified that he recruited four miners to clean the slope belt and tailpiece areas. Tr. II, 38-41-42. However, during the inspection, Craig observed no miners cleaning the area. Tr. I, 114. This weighs against a finding of a mitigating circumstance, because if no miners were cleaning during the evening shift, the coal accumulations that were growing would be left uncorrected. Inspector Craig testified that some of the accumulations were starting to work out from under the belt structure and were measured to extend approximately six inches from both sides of the slope belt. Tr. I, 45, 51. Craig further credibly testified that the accumulations could not rise anymore because they were in contact with the belt and were becoming worn flat. Tr. I, 49, 50-51. His testimony indicates that the accumulations were increasing in size and because they could not rise any, they were becoming wider and piling off to the side. So, if he noticed no one cleaning, even though men were “assigned,” its efforts during the shift do not serve as an effective mitigating circumstance.

On November 9, 2022, for the owl shift, a crew of two miners “cleaned and loaded at 4000” at the slope tail area. Tr. II, 77. And for the day shift, two miners were observed cleaning accumulations at the offside of the slope tail. Tr. II, 168-69. Rider Richardson, the dayshift dewater supervisor, testified that his crew washed down the top of the slope to 3000 feet, and from the clean room to the tail using shovels and a wheelbarrow to clean all the way down to the concrete. Tr. II, 255. At the end of that shift, Richardson said he saw no more coal material remaining in that area. Tr. II, 255. The record shows that cleaning had been done during the day shift and the owl shift of November 9, 2022, which weighs in favor of a mitigating circumstance. However, given the fact that it took 1,250 manhours and over a dozen miners for several shifts after the order was issued, assigning only two miners for each of those shifts was wholly inefficient and insufficient in correcting the violative condition. Tr. I, 30; Tr. II, 44. Though I find

these efforts to be a mitigating circumstance⁶ and commend Peabody's efforts in addressing the accumulations, this alone does not warrant lowering the degree of negligence.

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

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

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

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

Order No. 9704803

1. Findings of Facts

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

a. Pre-shift, On-shift Examinations

The slope belt and tailpiece area are subject to a pre-shift examination every shift. Each shift's fireboss or mine examiner conducts a pre-shift, on-shift examination during the last three hours of his shift. Tr. II, 102; *see generally* 30 C.F.R. § 75.360. The examination for this area of the mine begins at the top of the slope, then the examiner proceeds to walk inby along the

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

beltline. The purpose of the examination is to look for hazardous conditions or health and safety violations for the current and oncoming shift. The examiner either takes corrective action immediately upon identifying a hazardous condition, or he notates and describes the condition in the examination book. Tr. II, 102, 152, 184.

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

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

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

b. November 7, 2022

The record suggests that the operator knew of the developing accumulations even before November 7, 2022, two days before Craig’s inspection. Tr. II, at 127.⁷ Anthony Chamness, Peabody’s owl-shift fire boss, testified that on November 7, he discovered broken legs on the slope belt and the slope belt was leaning and causing accumulations to build up on the offside⁸ under the belt and on the walkway side. Tr. II, 127-28; S-7. The legs hold the slope belt’s rails in place, which helps hold the top and bottom rollers. Tr. I, 241. After observing the broken legs and

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

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

considerable spillage on the sides of the belt, Chamness ordered the shutdown of the belt and contacted that shift's dewater supervisor, Mark Elwood, to bring a crew to check on the issue. Tr. II, 128-29.

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

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

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

Rider Richardson, the day-shift radius or dewater supervisor, testified that as he arrived at the area, he was advised that seventeen offside legs were broken causing major spillage. Tr. I, 241. At the time, the slope belt was still shut down and there were at least ten miners who came to change the slope legs. Given the size of the accumulations, Richardson requested additional help. Tr. I, 242, 245. Richardson testified that, at the end of his shift, eleven legs were fixed, and that about 10% of the accumulations were cleaned after miners washed and shoveled them. Tr. I, 243-44.

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

c. November 8, 2022

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

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

For the evening shift, Barnett testified that he observed miners still working on the slope belt and that it was "still in bad shape." Tr. II, 197. The material had been washed further down and sprayed as compared to the previous day, which revealed to him that miners had been working on it. Tr. II, 199. He ultimately marked the condition as HS in his examination book because the belt rollers were not in contact with the accumulations and the accumulations were just lying on the bottom. Tr. II, 200. At the beginning of Faught's supervisory shift, the radius sump was out, and the crew could not set it up, so the dewater area flooded out. Tr. II, 27. This required a new cable for the radius pump, which slowed the cleaning process because the spraying of more water would exacerbate the situation. Tr. II, 28. At the end of the shift, Faught provided this information to Kevin Clore, the mine foreman, who wrote down in the examination book that each slope tail "needs more," indicating that the accumulations were still to be corrected. Tr. II, 29-30, 167.

d. November 9, 2022

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

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

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

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

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

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

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

Ultimately, based on his observations, review of the pre-shift examination books beginning November 5, and awareness that the mine knew of the accumulations, Craig concluded that "hazardous accumulations" were present along the slope belt and slope tail for multiple days without corrective action or posting. Tr. I, 114, 138-56; Ex. P-4. Craig, acknowledging that the records revealed men had been assigned or worked on the accumulations, testified that men working, men assigned is not corrective action. Tr. I, 212. He explained at hearing that "[y]ou've got to show that they did something." Tr. I, 156. One of Peabody's own supervisors, Richardson, similarly stated that flagging something, assigning men to shovel or

carry over the condition on examination records, does not constitute corrective action under the regulation. Tr. I, 226, 257. Because he found the accumulations to be hazardous without corrective action, Craig issued Order No. 9704803. Ex. P-4.

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

2. Finding of Violation

Order No. 9704803 states that:

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

Men assigned and carried over is not a corrective action.

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

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

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

Ex. P-4.

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

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

30 C.F.R. § 75.363(a).

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

Commission’s Approach

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

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

The Commission’s reasoning can be summarized into the following two-step inquiry: (1) determining whether a hazardous condition exists, as supported by testimony and other evidence;

and (2) assessing whether the operator either posted or dangered off the condition or immediately corrected it. *Id.* at 651-54. I find this analysis and derived inquiry instructive in determining whether a violation of section 75.363(a) has occurred. However, in the next section, to secure further guidance, I analyze how other ALJs have addressed this regulation.

Other ALJ Approaches

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

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

Parties’ Arguments

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

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

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

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

Analysis

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

Second, if the Secretary proves that a hazardous condition existed, she must next demonstrate that the condition had not been posted with a conspicuous danger sign, dangered off,

or immediately corrected. *Id*; see also *Black Beauty*, 33 FMSHRC at 1511; *RAG Cumberland Res.*, 23 FMSHRC at 1257. For this element, the decisionmaker should examine any actions the operator employed and whether those actions sufficiently and fully corrected the hazardous condition at issue. *Black Beauty*, 33 FMSHRC at 1511.

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

A. Accumulations Constitute a Hazardous Condition

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

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

Upon arriving at the inspection area, Craig observed accumulations of coal and coal fines ranging from the slope tail to the 633-belt structure mark and a running slope belt. Tr. I, 45, 49-64, 83; Ex. P-1, P-5. At the slope tail, the accumulations spanned 300 feet long by 32 inches high by 46 inches wide. Tr. I, 49-59. In that area, the coal accumulations were fine and the top three

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

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

quarters of the accumulation were dry, while the remaining quarter was wet. Tr. I, 51. Craig reasoned that the upper layer was dry because of the frictional heat that was occurring as the belt ran in contact with the coal accumulations. Tr. I, 51. That contact also caused the top of the accumulation to be worn flat. Tr. I, 50; Ex. P-1. He credibly testified that the accumulations were piled up under the belt and were in contact with the belt and therefore could not get any higher than 32 inches. Tr. I, 49; Ex. P-1. As he moved away from the slope tail area outby along the slope belt, he noticed more accumulations six to eight inches deep directly under the belt and piled on the offside, where he saw an offside roller spinning in coal accumulations. Tr. I, 63, 70; Ex. P-1.

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

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

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

The testimony, documentary evidence, and Congressional intent support a finding that these coal accumulations constituted a “hazardous condition” easily satisfying the Commission’s definition. The conditions cited by the inspector clearly “create or increase the possibility” of loss, danger, or peril. I therefore find that the Secretary has adequately proven its first step, that a hazardous condition existed.

B. Not Corrected Immediately

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

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

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

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

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

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

Under either avenue, *that is*, posting or immediately correcting the condition, there is a connotation in the plain language of section 75.363(a), that the condition must be *fully corrected* to satisfy the regulation. The facts show that the conditions were not fully corrected until Craig

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

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

terminated the order on November 11, 2022. Tr. II, 44. Such failure to fully and immediately correct the condition may be attributed to Peabody's failure to shut down the belt on November 8 or November 9 to prioritize the complete cleanup of the coal accumulations. Tr. I, 139. This approach was suggested by inspector Craig, who testified that the pre-shift examiner "should have shut off the belt and they should not have turned it on until the conditions were corrected because those are immediate hazardous conditions." Tr. I, 139. Regardless, assigning four men to clean ever-increasing accumulations, with Craig not observing any one of them cleaning the slope belt or tail area, is insufficient.

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

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

3. Significant and Substantial

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

The Secretary disagrees and maintains that all four of the *Mathies* elements are met and that there was a reasonable likelihood for a fire or explosion and resulting serious injury to occur.

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

Sec’y Br. at 10-13. For the reasons below, I ultimately agree with the Secretary and uphold the S&S designation.

a. Mandatory Safety Hazard

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

b. Reasonably Likely to Cause the Defined Hazard

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

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

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

Additionally, any “wet accumulations” could dry out and ignite. *Mid-Continent Res.*, 16 FMSHRC 1226, 1230 (June 1994). As the Commission explained in *Black Diamond Coal*, “in the case of a fire starting elsewhere in a mine, the heat may be so intense that wet coal can dry out, ignite and propagate the fire.” 7 FMSHRC at 1120. In this case, when describing the accumulations in the slope tail area, Craig testified that the top three quarters were dry while the bottom quarter was wet. Tr. I, 51. Applying the Commission’s reasoning in *Black Diamond*, a fire could occur on the top layers and then dry out the bottom layer where the coal was wet.

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

c. Reasonably Likely to Cause Injury

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

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

issue, the accumulations likely would not have been corrected for a few weeks. Tr. II, 198. Inspector Craig testified in agreement. He stated that the pre-shift examiner “should have shut off the belt and they should not have turned it on until the conditions were corrected because those are immediate hazardous conditions.”¹⁵ Tr. I, 139. So, continued normal mining operations would have led to continuous buildup of accumulations, raising the likelihood of a fire or explosion, which in turn, makes an injury much more likely.

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

d. Reasonably Serious Injury

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

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

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

condition, namely the coal accumulations, worn off belt rollers, and locked bottom rollers, poses the same degree of risk of injury as the underlying hazard itself.

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

4. Unwarrantable Failure

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

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

a. Duration of the Violative Condition

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

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

judge's duration finding primarily based on the inspector's observation and testimony of the cited area).

I find that this factor weighs in favor of finding an unwarrantable failure. The cited standard deals with the operator's failure to immediately correct, post, or danger off a "hazardous condition." Here, the Secretary provided sufficient evidence to show that coal accumulations had been an ongoing issue as noted in pre-shift examination books for at least three days. Ex. P-6, P-7. Regardless of the previous days, the duration of not immediately correcting the condition or posting it *at least* lasted the day of November 9.¹⁶ Neither the owl shift nor the day shift examiner immediately corrected the hazardous accumulations, nor did they danger off the area with the multiple ignition sources and the coal accumulations running into contact with the belt. Commission precedent makes clear that even a few shifts is sufficient to satisfy this factor. *Windsor*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (finding that a duration lasting more than one shift weighs in favor of finding unwarrantable failure); *CAM Mining*, 38 FMSHRC 1903, 1909 (Aug. 2016) (upholding an unwarrantable failure finding since the operator's failure to abate the hazard exposed at least two shifts of miners to highly dangerous conditions).

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

b. Extent and Obviousness of the Violative Condition

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

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

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

failing to immediately correct, post, or danger off the hazardous accumulations and ignition sources to be obvious and somewhat extensive. This weighs in favor of finding an unwarrantable failure.

c. Degree of Danger Posed by the Violative Condition

For this factor, Peabody once again stresses that the material was “wet” and “soupy” with the consistency of “muck.” Resp’t Br. at 34; Tr. II, 34, 109. Based on that characterization, along with the continuous washing and cleaning that occurred, it reasons the degree of danger is quite low. The Secretary, in opposition, asserts that the hazard cited posed a high degree of danger to miners given the significant accumulations and multiple ignition sources that were allowed to persist. Tr. I, 160. As support, the Secretary cites to Peabody’s description that any injury would be fatal or reasonably serious. Tr. 112, 157-58. The Secretary also maintains that even “wet” coal can dry out and ignite to create a dangerous fire or explosion just like dry coal material. Sec’y Br. at 17. I ultimately agree with the Secretary.

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

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

d. Abatement Efforts and Knowledge of the Violative Condition

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

The Secretary maintains that the record shows remedial work was not in progress on the slope belt or tail area when the inspection took place. As support, the Secretary cites Craig’s testimony that he did not observe any cleaning and submitted photographs that reveal no signs

that the accumulations had been touched or partially cleaned. Given this, the Secretary argues that there was no evidence that the mine was trying to address the condition immediately. Sec’y Br. at 18-19. The Secretary also asserts that because it took 1,250 manhours to fully correct the conditions, Peabody’s efforts to immediately correct the conditions were entirely inadequate.

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

Here, Peabody’s abatement efforts toward the section 75.363(a) violation include its considerable and consistent actions to address the coal material on the slope belt and tailpiece area on every shift beginning on November 7, 2022, which is when the legs broke leading to considerable spillage. In other words, Peabody acted in good faith to try and immediately correct the underlying hazardous condition. Though that does not prevent a finding that Peabody violated the regulation, such good-faith remedial efforts are relevant in the unwarrantable failure analysis and are a factor weighing against such a designation. *See e.g., Cannelton Indus., Inc.*, 20 FMSHRC 726, 734 (July 1998) (citation omitted); *Peabody Midwest Mining, LLC*, 40 FMSHRC 87, 141 (Jan. 2018) (ALJ).

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

For November 8, 2022, Chamness testified that miners were still working on cleaning the accumulations and marked it again as HS. Tr. II, 131, 134. Kennedy reviewed that HS designation and during his shift, ordered his crew to wash, load the slope, replace two bad bottom rollers, and spot other damaged rollers. Tr. II, 70. For the day shift, Yancey conducted the examination and testified that the accumulations were improving and that several more miners were working on cleaning. Tr. II, 165. Once that shift ended, Richardson summarized the accomplishments as washing the slope, mucking the material at 4000, improving the old structure, pumping down the coal material, and completely emptying the dewater sump. Tr. I,

251. For the evening shift, Barnett testified that miners were still working on the slope belt, but admitted it was still in “bad shape.” Tr. II, 197. Nonetheless, the crew continued to wash down the material. Tr. II, 199-200. At one point, Barnett marked the condition as HS and testified that the belt rollers were not in contact with the accumulations anymore. Tr. II, 200.

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

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

e. Notice of Need for Greater Compliance Efforts

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

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

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

Since I ultimately find an unwarrantable failure, the remaining inquiry is whether Order No. 9704803 is properly designated as a 104(d)(2) Order. Again, to properly issue a 104(d)(2) order, there must be: (1) a valid underlying 104(d)(1) order; (2) a violation of a mandatory safety or health standard caused by an unwarrantable failure; and (3) no intervening clean inspection. *U.S. Steel Corp.*, 6 FMSHRC at 1911. Here, the first two prerequisites are met since the parties stipulated that Order No. 9212662 serves as the predicate 104(d)(1) order, and the operator’s failure to comply with section 75.363(a) resulted from its unwarrantable failure. Similar to the first order, the third prerequisite is not met because the Secretary failed to carry her burden of proof. Because all three prerequisites are not met, this Order is modified from a 104(d)(2) order to a 104(d)(1) order.

5. Gravity

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

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

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

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

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

6. Negligence

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

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

Here, inspector Craig failed to explain why he designated the Order as "high" negligence. In passing, he mentioned the degree of negligence when discussing whether there was an unwarrantable failure on the part of the operator. Tr. I, 158. Craig specifically testified that he based his unwarrantable failure finding "on the negligence of just putting – of knowing the condition existed for an extended amount of time, but still allowing miners to work in and around the area that would be affected if there was a belt slide to occur on the slope plus that air comes as an intake air slope...[i]t's reasonably likely that anybody in that general vicinity would be affected by that belt fire." Tr. I, 158, 159.

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

failure analysis. To emphasize the importance of these remedial actions and to properly assess negligence, I quickly summarize a few pertinent facts again here.

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

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

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

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

7. Specially Assessed Penalty

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

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

Under 30 C.F.R. § 100.5(a), "MSHA may elect to waive the regular assessment under §100.3 if it determines that conditions warrant a special assessment." When MSHA determines that a special assessment is warranted, the proposed penalty simply must be based on the six criteria under section 100.3(a), but does not have to be calculated in accordance with the penalty conversion tables in section 100.3. 30 C.F.R. § 100.5(b). Rather the Secretary has discretion in proposing the penalty amount. 30 C.F.R. § 100.5(a). In *Solar Sources Mining, LLC*, the Commission clarified that Judges "must make an independent assessment based upon the facts and penalty criteria without using the special assessment as any sort of baseline or reference point." *Solar Sources Mining, LLC*, 42 FMSHRC 181, 197, 198 n. 25, 200. In other words, Judges are not required to "explain their divergence from a special assessment." *Id.* The Commission similarly has held that the procedures by which penalty assessments are proposed by the Secretary, including special assessments, are irrelevant and immaterial to a penalty assessment by the Commission or its trial judges. *Black Diamond Coal Co.*, 7 FMSHRC at 1121-1122. Given this Commission case law, I conclude that I need not defer to the specially assessed penalty, and so, I conduct a *de novo* analysis of the six penalty criteria in the succeeding section of this Decision.

IV. PENALTY

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

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

30 U.S.C. § 820(i).

Order No. 9704796

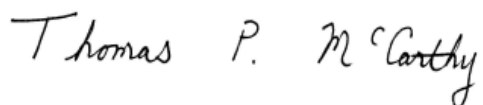
For this first Order, the Secretary proposed a regular assessed penalty of \$46,799.00. In the fifteen months preceding the issuance of Order No. 9704796, MSHA issued seventy-five violations of section 75.400 to Peabody Southeast Mining, LLC, at its Shoal Creek Mine. *See* MSHA, *Mine Data Retrieval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

Order No. 9704803

For the second Order, as mentioned above, the Secretary proposed a special assessment of \$79,428.00. In the fifteen months preceding the issuance of Order No. 9704803, MSHA issued five violations of section 75.363(a) to Peabody Southeast Mining, LLC, at its Shoal Creek Mine. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 26, 2025). Again, the parties stipulated that payment of the total proposed penalties will not affect Peabody's ability to continue in business. *Jt. Ex. 1, ¶ 9*. As outlined above, I determined Peabody's negligence to be moderate on the "high end," and resulting from an unwarrantable failure. Regarding the gravity, I found the violation as S&S, that it would affect eight miners, and was reasonably likely to result in a fatal injury. Peabody demonstrated good faith in attempting to clean the accumulations once notified of the violation. Considering the six criteria set forth under 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$35,000.00.

V. CONCLUSION AND ORDER

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



Thomas P. McCarthy
Administrative Law Judge

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