

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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July 8, 2025

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

v.

PEABODY SOUTHEAST MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2023-0174
A.C. No. 01-02901-569908

Mine: Shoal Creek Mine

DECISION AND ORDER

Appearances:

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Arthur M. Wolfson, Esq., Fisher & Phillips LLP, 6 PPG Place, Suite 830, Pittsburgh, Pennsylvania 15222

Before: Judge John Kent Lewis

INTRODUCTION

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Peabody Southeast Mining, LLC (“Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 801, *et seq.* This docket originally contained 18 citations, 17 of which were settled prior to hearing.¹ The single citation at issue, **Citation No. 9705670**, was issued to Respondent on December 14, 2022, for the Shoal Creek Mine (“Mine”), for violation of 30 C.F.R. § 75.202(a).

I held a virtual Hearing on Zoom for Government for the remaining citation on February 25, 2025, during which the parties presented testimony and documentary evidence. Witnesses were sequestered during the hearing. MSHA Inspector John Yarko (“Inspector Yarko”) testified for the Secretary; Longwall Face Boss Daniel Piper (“Piper”) and Safety Supervisor Paul Moore (“Moore”), both of Respondent’s Shoal Creek Mine, testified for Respondent.

¹ See Amended Decision Approving Partial Settlement (Oct. 18, 2024).

After carefully considering the testimony and evidence presented, as well as the parties' post-hearing briefs and arguments, I **AFFIRM Citation No. 9705670** as issued and order Respondent to pay the assessed penalty of \$2,561.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact are based on the record as a whole and my careful observation of the witnesses as they testified. In resolving any conflicts in testimony, I have considered the interests of the witnesses or lack thereof, as well as the consistencies and inconsistencies in each witness' testimony and between the testimony of the witnesses. In evaluating the testimony of each witness, I have also relied on the witness' demeanor. Any failure to provide detail in this Decision and Order as to any witness' testimony does not mean I did not fully consider that testimony; similarly, any failure to discuss certain evidence does not indicate that such evidence was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

A. Joint Stipulations

At the Hearing, the parties agreed to the following stipulations as contained in the Secretary's Prehearing Statement dated Feb. 18, 2025:

1. At all relevant times, Respondent was the operator of the Shoal Creek Mine, Mine Identification No. 01-[02901], within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act"), specifically § 802(d).²
2. At all relevant times, Shoal Creek Mine was a "coal or other mine" within the meaning of the Mine Act, specifically § 802(h).
3. At all relevant times, the products of the Shoal Creek Mine entered commerce, or the operations or products of the Shoal Creek Mine affected commerce, within the meaning of the Mine Act, specifically §§ 802(b) and 803.
4. Respondent is subject to the jurisdiction of the Mine Act, 30 U.S.C. § 801 *et seq.*
5. **Citation 9705670**, identified in the Petition for Assessment of Civil Penalty, as well as any modifications thereto, were properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of the Respondent on the date and place stated therein.
6. The proposed penalty of \$2,561.00 for **Citation No. 9705670**, if paid as prayed for in the Petition for Assessment of Civil Penalty, will not affect Respondent's ability to remain in business.

² The Secretary's original Prehearing Statement contained an incorrect Mine Identification No. for Shoal Creek Mine in ¶1, and a correct Mine Identification No. in ¶8. Both are now correct.

7. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

8. Respondent operates Shoal Creek Mine, Mine ID 01-02901.

9. Employees at Respondent's Shoal Creek Mine worked more than 1.1 million hours in 2022.

Jt. Ex. 1 (bolding, and select capitalization, italics, and section symbols added).

B. Summary of Hearing Testimony³

1. Inspector Yarko

a. Direct Examination of Inspector Yarko: Background

Inspector Yarko, employed by MSHA since October of 2015, Tr. 13:19 – 14:1, is an MSHA “roof control/ground control specialist.” Tr. 14:3-4.⁴ In that role, his duties include reviewing and analyzing roof control plans for underground coal mines and ground control plans

³ References to the Hearing Transcript are designated as “Tr.” followed by page number: line number. References to Joint Exhibits are designated by “Jt. Ex.” followed by a number. References to the Secretary's Exhibits are designated as “Sec. Ex.” followed by a number. References to Respondent's Exhibits are designated as “R” followed by a letter and sometimes a numbered subdivision. References to the post-hearing briefs are designated “Sec. Br.” and “Resp. Br.” as appropriate.

The following Exhibits were admitted at the Hearing: J Ex.-1 (Stipulations); Sec. Ex. 1 (**Citation No. 9705670**); Sec. Ex. 2 (two sets of inspection notes from Inspector Yarko dated Dec. 14, 2022); Sec. Ex. 3 (103(k) Order ((Order No. 9705667 and -01)); Sec. Ex. 4 (inspection notes from Inspector Yarko dated Dec. 13, 2022); Sec. Ex. 7 (Cover Letter and Action Plan J1 E1 XC 41-42.5, dated Dec. 13, 2022); Sec. Ex. 8 (MSHA Approval Letter for Action Plan Update, dated Feb. 3, 2023); Sec. Ex. 9 (Action Plan Update, dated Feb. 3, 2022); Sec. Ex. 10 (Shoal Creek Mine – Roof Control Plan); Sec. Ex. 11 (On-Shift Examiner's Reports, dated Dec. 7-14, 2022); Sec. Ex. 12 (four photos of pumpable cans); Sec. Ex. 14 (diagram, bearing handwritten dates Jan. 6, 2023 and Jan. 30, 2023); Sec. Ex. 15 (Assessed Violations History Report); R-A(1) (Preshift Examiner's Reports, dated Oct. 25, 2022); R-E(1) (longwall diagram); R-E(2) (XC 42 -42 ½ diagram); R-F (notes from Safety Supervisor Moore, dated Dec. 11, 2022); R-G (production reports, dated Dec. 12-14, 2022); R-I (inspection notes initialed “RT,” dated Dec. 11, 2022); R-J(3) (inspection notes from Inspector Yarko dated Dec. 14, 2022). *See also infra* n. 7 (explaining the two sets of inspection notes contained in Sec. Ex. 2).

⁴ Inspector Yarko joined MSHA in October 2015 as a trainee, attended the MSHA Academy, was subsequently transferred to Litchfield, Illinois as a mine inspector and in 2022, moved to Birmingham, Alabama, after which he assumed his current role as a roof control/ground control specialist in August of 2022. Tr. 14:5-6, 14:18 – 15:9.

for surface mines, conducting 6-month roof evaluation reviews, and conducting E01, E02, spot and methane inspections, and accident inspections. Tr. 14:7-17. Before becoming an MSHA inspector, he worked in the mining industry, Tr. 15:10-12, 18:2-7, serving on a “belt crew, instructing, advancing, and maintaining” underground conveyor belts, performing various roof bolting tasks, and eventually becoming a full-time continuous miner operator. Tr. 15:13 – 16:8.⁵

Inspector Yarko described the Shoal Creek Mine (“Mine”), which he had inspected numerous times, as a room & pillar longwall mine. Tr. 18:10 – 19:3. The Mine operated a longwall identified as “the J-2,”⁶ which had a headgate serving as the main entrance through which the crew entered, and a tailgate serving as an airflow return and as an additional escape route from the longwall face. Tr. 19:16-21, 20:17-18. The height of the Mine roof varied but was on average 8 to 9 feet high. Tr. 20:8-11.

Inspector Yarko conducted an E08 noninjury accident inspection at the Mine on Dec. 13, 2022, under Event No. 6920805 for the “possibility of a roof fall on the J-2 longwall,” Tr. 20:15-18, and he identified Sec. Ex. 4 as his inspection notes from that day. Tr. 20:19 – 21:12; 23:11-15; Sec. Ex. 4. He returned the next day, Dec. 14, 2022, and upon arrival, issued two citations (Citation No. 9705669 and the contested citation, **Citation No. 9705670**) under Event No. 9620805. Tr. 21:17-21; 34:11-19; Sec. Ex. 2. He then conducted an E01 inspection under a new event number (Event No. 6916737). Tr. 22:3-22; Sec. Ex. 2. Inspector Yarko identified Sec. Ex. 2 as his inspection notes from Dec. 14, 2022, Tr. 23:11-15,⁷ and explained the difference in coding contained thereon: “the E08 [on Dec. 13, 2022] was due to issuance of the roof fall on the tailgate [of the J-2 longwall], and then I switched over to an E01 [on Dec. 14, 2022] to conduct normal inspections for the E01 event . . . open at the mine for that quarter.” Tr. 22:18-22. Thus, he issued **Citation No. 9705670** on the morning of Dec. 14, 2022, under the Event Number associated with the E08 inspection conducted on Dec. 13, 2022, before switching to an E01 inspection under a new event number.

b. Direct Examination of Inspector Yarko: E08 Inspection

On Dec. 13, 2022, Inspector Yarko arrived at the Mine at 7:45 AM and informed Moore he would conduct an E08 inspection. Tr. 24:1-4, 33:5-7. Inspector Yarko travelled with Moore

⁵ Inspector Yarko had worked for Freeman United, MaRyan Shay, and Prairie State Generating Company. Tr. 18:2-7.

⁶ As explained *infra*, the Mine had also operated a longwall known as the “J-1.” *See e.g.*, Tr. 73:21 – 75:5.

⁷ Sec. Ex. 2 contains two separately numbered sets of inspection notes dated Dec. 14, 2022. The first set (MSHA-016 to MSHA-020) contains 14 numbered pages, bears Event No. 6920805, documents the *issuance* of Citation No. 9705669 and **Citation No. 9705670**, and notes on page 14, “Changed from the E08 Event to E01 Event, hand delivered these citations to the mine operator today when I arrived at the mine for E01 inspection.” Sec. Ex. 2, first set, page 14. The second set (MSHA-022 to MSHA-027) contains 16 numbered pages, bears Event No. 6916737, documents the *termination* of **Citation No. 9705670** and Citation No. 9705669, the extension of Citation No. 9632675, and the issuance of Citation No. 9705671. Sec. Ex. 2, second set.

and a miners' representative on the J-1 gate road, which was also tailgate Entry No.1 for the J-2 longwall. Tr. 24:5-12. Inspector Yarko issued Order No. 9705667 under Section 103(k) of the Mine Act for the roof fall he observed on the J-1 gate road/J-2 tailgate at Entry No. 1, Crosscut 41 to 42 ½. Tr. at 25:2-14, 17-18; Sec. Ex. 4, at 14; Sec. Ex. 3.⁸ That order provided:

An unplanned roof fall has occurred at this mine in the J-1 gate road Entry #1, Crosscut #41-42.5 and the J-2 Longwall Section MMU 017. This area is at the active J-2 longwall tailgate and face where coal is being extracted. This order is being issued, under Section 103(k) [of the Mine Act], to assure the safety of all persons at this operation. This order is also being issued to prevent the destruction of evidence which would assist in investigating the cause or causes of the accident. It prohibits all activity in the affected area, until MSHA has determined that it is safe to resume normal operations. The order applies to all persons engaged in the recovery operation. The operator is required to submit and receive approval for an action plan to restore the area.

Sec. Ex. 3 (hereinafter the "103(k) Order").

After issuing the 103(k) Order, Inspector Yarko travelled to the headgate of the J-2 and walked the estimated 1000-foot length of the J-2 longwall face from the headgate to the tailgate, taking air readings along the way. Tr. 26:9-17. He also examined the roof fall he had just observed on the J-1 gate road/J-2 tailgate from the perspective of the J-2 longwall face, noting fall that extended along the face. Tr. 27:1-10; Sec. Ex. 4, at 21. He testified that, looking toward the tailgate from the J-2 longwall face, he could "see material that ha[d] fallen towards the face area of the shields." Tr. 28:14-20. In his inspection notes, he drew a diagram depicting the fall he observed extending from Shield 176 (i.e., the shield immediately adjacent to the tailgate) to Shield 166 along the face and made a handwritten note indicating "[f]all of face from T.G. [tailgate] to Sheild 145." Tr. 27:4-6, 29:5-10, Sec. Ex. 4, at 21.

Inspector Yarko returned to the surface and inspected the J-2 On-Shift Examination record book. Tr. 29:13 – 30:8; Sec. Ex. 11 (On-Shift Examiner's Reports, dated Dec. 7, 2022 –

⁸ Section 103(k) of the Mine Act, 30 U.S.C. § 813(k) provides:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

While Order No. 9705667 is not at issue, it provides important context for the contested citation. I note also that Inspector Yarko's inspection notes from Dec. 13, 2022, document the issuance and termination of Citation No. 9705666 (involving a loose rib), also written during the E08 inspection at the Mine. Sec. Ex. 4, at pages 5-10.

Dec. 14, 2022). He issued Citation No. 9705668 because those records did “not show a hazardous condition record for the section tailgate egress plan.” Tr. 30:16 – 31:2 (further explaining “the record book showed that the [tailgate] section is [on] egress, but there is no hazardous condition in the records [identifying] the reason . . . why” the tailgate section was on egress); *see also* Sec. Ex. 4, at 23-28(1).⁹

Inspector Yarko then reviewed the Action Plan which the Mine had submitted to correct the hazard identified by the 103(k) Order and modified the 103(k) Order to allow implementation of the Action Plan which aimed to provide “[a]dditional support of the roof.” Tr. 31:18 – 32:15, Sec. Ex. 4, at 28(2); Sec. Ex. 7 (Cover Letter and Action Plan J1 E1 XC 41-42.5, dated Dec. 13, 2022).¹⁰ The Action Plan, which contained a 1-page textual description and a 1-page map of the pertinent area, had two phases:

Phase 1

1. Props and/or timbers (8” x 8” or 6” by 6”) will be installed as shown on the attached map working from outby and supporting the way inby.
2. Pre-shift examinations of the J-1 #1 Entry, approximately two (2) crosscuts outby the longwall face, will be required until a t-split examination can be made from the J-2 Longwall face.
3. Once the twelve (12) – 8” x 8” or twenty-four (24) – 6” x 6” props and/or timbers have been installed, checked by MSHA, and a pre-shift examination performed in the J-1 #1 Entry, production may resume on the J-2 Longwall.

Phase 2

1. Pumpable cribs will be installed as shown on the attached map to a minimum of XC 41.
2. Additional supports will be installed in the intersection of XC 41 as shown on the attached map.
3. Once the t-split examinations can be made from the J-2 Longwall face normal operations will resume.

Sec. Ex. 7, at 2.¹¹ The Action Plan’s 1-page map depicted both existing and proposed additional pumpable cribs (with already compromised pumpable cribs marked by an X), as well as existing and proposed props or timbers (with already compromised props marked by an X). Sec. Ex. 7, at 3. All of the supports (existing, compromised, and proposed) were clustered in the area of Entry

⁹ Respondent did not contest Citation No. 9705668. Egress is discussed in detail *infra*, Section B.1.e. I also note that Inspector Yarko’s inspection notes from Dec. 13, 2022, contained two pages identified as page 28. I use 28(1) and 28(2) to distinguish between them.

¹⁰ “Crosscut” and “XC” for Crosscut are used interchangeably by Inspector Yarko and the Mine in pertinent exhibits.

¹¹ A copy of Sec. Ex. 7 is attached to this Decision and Order as Attachment A.

No. 1, Crosscut 42 to 42½ with existing and proposed pumpable cribs also shown extending outby to Crosscut 41 and beyond. *Id.*

After concluding the E08 inspection, Inspector Yarko held a post-inspection conference with Moore and the miner's representative, informing them of the 103(k) Order and the two citations he had issued that day. Tr. 32:18 – 33:1; Sec. Ex. 4, at 29. He also gathered comments, including Moore's comment that Moore did "not agree with this 103(k) Order referring to the roof fall" and "didn't agree that it [i.e., the condition prompting the order] was a roof fall." Tr. 33:14-20, Sec. Ex. 4, at 29.

c. Direct Examination of Inspector Yarko: Two Additional Citations Issued, Plus the Switch to E01

Inspector Yarko returned to the Mine the next day (i.e., Dec. 14, 2022), and upon arrival, issued two citations under the Event Number associated with the prior day's E08 inspection: **Citation No. 9705670** under 30 C.F.R. § 75.202(a) and Citation No. 9705669 under 30 C.F.R. § 50.10(d) for the Mine's failure to contact MSHA within 15 minutes of the unplanned roof fall.¹² Tr. 34:1-19; Sec. Ex. 2, first set, 2-13. **Citation No. 9705670** provided:

The roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face, or ribs and coal or rock bursts. A roof fall is present at the J-2 Longwall Section MMU 017 and J-1 gate road Entry #1, Crosscut # 42½. The section has the[ir] egress plan active and an action plan is in place.

Standard 75.202(a) was cited 79 times in two years at mine 0102901 (79 to the operator, 0 to a contractor).

Sec. Ex. 1; Tr. 40:8-14.¹³ In his inspection notes for Dec. 14, 2022, first set, documenting the issuance of **Citation No. 9705670**, Inspector Yarko made a drawing (hereinafter "Page 9 drawing") depicting the roof fall he had observed the day before. Tr. 35:1-8; Sec. Ex. 2, first set, at 9. *See also* Sec. Ex. 4, at 14 (inspection notes from Dec. 13, 2022, containing a similar drawing). As he explained: "the Page 9 drawing shows the J-1 gate road Entry 1 from Crosscut 41 going up to 42, then to 42 and a half where the longwall face tailgate and the roof fall occurred." Tr. 35:14-17.

Inspector Yarko's Page 9 drawing contained circles representing "pumpable cans or cribs" (also known as "J-cans") which he explained provided "additional roof supports for the

¹² Citation No. 9705669, which was settled as part of this docket, *see* Amended Decision Approving Partial Settlement (Oct. 18, 2024), provided in pertinent part: "The operator has neglected to inform MSHA of notification for an unplanned roof fall at the J-2 Longwall Section MMU 017 Tailgate/Face and the J-1 gate road Entry # 1, Crosscut #42½." Petition for Assessment of Civil Penalty, at 86.

¹³ Section 15 (Area or Equipment) was left blank on **Citation No. 9705670**.

tailgate.” Tr. 36:5-10; 36:13-18 (further describing a pumpable can as “like a nylon film bag” extended “from the floor to the roof” and filled “with a pumpable material . . . to make it solid for the roof support.”), Sec. Ex. 12 (four photos of pumpable cans); Tr. 36:19 – 37:6 (identifying the photos).¹⁴ Referring to his Page 9 drawing, Inspector Yarko testified:

four [pumpable] cans *near the [roof] fall* were crushed out or beginning to fail. They were starting to fail and being crushed by the weight of the fall, along with it appears to be one crushed and split eight-by-eight prop or wooden timber [depicted on the drawing by “the box with an X in it.”]

Tr. 37:20 – 38:4 (emphasis added), 38:5-8. While he agreed it would be typical to use pumpable cans in the tailgate, Tr. 38:9-12, Inspector Yarko explained that the crushing of a pumpable can indicated “failure of the roof[.]” Tr. 39:11-14. *See also* Tr. 39:15-21 (“the cans are showing failure due to the stress of the roof falling . . . they’re not holding up the roof as intended.”) Inby the crushed cans, Inspector Yarko observed “a failure of the roof and [a] blocking [of] the tailgate.” Tr. 42:20-21. *See also* Tr. 43:2-5 (testifying he observed “[f]ractures in lamination in the roof allowing separation. And the roof support not holding and maintaining the roof. There’s failures in the roof.”)

d. Direct Examination of Inspector Yarko: **Citation No. 9705670**

Inspector Yarko issued **Citation No. 9705670** under Section 75.202(a) “[d]ue to the cans that are set in place to protect the roof from falling, the failure of those *and* blocking the tailgate from egress.” Tr. 41:4-16 (emphasis added). He designated the gravity as “reasonably likely” because he deemed it “reasonably likely that the roof failure[,] . . . if persons were back there conducting normal work such as air readings or examinations, that an accident were to occur . . . of falling material from the roof.” Tr. 41:17 – 42:14; Sec. Ex. 1. He designated the injury as “lost workdays or restricted duty” because he anticipated injuries from a roof fall to be “[a]t the minimum, lost workday, restricted duty due to falling material” and “bumps, bruises, scrapes, broken bones, if not . . . permanent or fatal injuries.” Tr. 42:9-14. He designated the violation as “significant and substantial” based on:

the reasonable likelihood of the injury – persons are back there working and conducting examinations, air readings, proper installing of additional supports, whatever normal mining conditions or what operator tasks would have been – that it was reasonably likely that lost workdays, at a minimum, were to occur from the failure of the roof and falling material.

Tr. 43:6-18; Sec. Ex. 1. He designated the negligence as “moderate” because “the operator did at the time comply with the roof control plan by setting and installing cans along with the original roof support[,] a primary support for roof bolts. . . . It was supported before the failure happened per plan.” Tr. 43:19 – 44:9, Sec. Ex. 1 (**Citation No. 9705670** providing “The section has th[eir] egress plan active and an action plan is in place.”)

¹⁴ *See also* Tr. 83:18 – 84:2 (Inspector Yarko explaining on cross-examination that he considers pumpable cans and pumpable cribs to be the same thing).

Inspector Yarko designated the number of persons affected as 07 and testified the number would include “persons on the longwall . . . the shearer operators, shield pullers, additional labor, cleaning, maintenance, foreman, and also . . . whoever the operator designates to conduct the air reading on the tailgate side and examine.” Tr. 44:10-20; Sec. Ex. 1. He explained a miner could be in that area of tailgate Entry No. 1 to conduct a weekly examination “due to it being a return air course” and because “you would have to conduct a T-split air reading off of the longwall as part of an air reading for pre-shift/on shift.” Tr. 45:1-7. He described a T-split reading as an “air reading in the tailgate to ensure that the air coming from the longwall goes back into the bleeder and also goes back into Entry [No.] 2 to provide air sweeping into the bleeder,” Tr. 45:16-19, and said such an air reading would need to be taken “[t]ypically once or twice a shift, depending on how pre-shifts are set up, or as needed, due to ventilation changes or just to double-check” for “low air anywhere else along the longwall.” Tr. 45:20 – 46:4, 4-6 (“Minimum two . . . It just varies per situation.”). *See also* Sec. Ex. 7, at 2 (Phase 1, No. 2, referring to “Pre-shift examinations of the J-1 #1 Entry”).

The termination date for **Citation No. 9705670** was identified as Dec.14, 2022, 0900, i.e., the same day as issuance. Sec. Ex. 1.

e. Direct Examination of Inspector Yarko: Egress

Tailgate Entry No. 1 of the J-2 longwall was on egress on Dec. 13 and Dec. 14, 2022, when Inspector Yarko conducted his inspections. He described “egress” as a term used in roof control plans which “typically means that the passage of escape is blocked and unsafe through the tailgate” such that miners can “only leave the longwall area face through the headgate.” Tr. 47:1-5. He identified Sec. Ex. 10 as the Mine’s approved Roof Control Plan, and Section 9.7 therein as related to “egress.” Tr. 48:5-15. That section provided:

9.7 Longwall Egress Procedures

1. When a ground failure prevents travel out of the tailgate side of the section, miners will be:
 - a) Notified that the tailgate is blocked and the egress plan will remain in effect until the tailgate is cleared.
 - b) Re-instructed in escapeway and escape procedures.
 - c) Re-instructed in the use and availability of self-contained self-rescuer devices (SCSR), located along the face, at the tailgate and headgate areas.
 - d) Re-instructed in the use of the two-way communication systems located along the panline from the headgate to the tailgate drive and from the headgate to the communication office on the surface.
 - e) Nobody will be down wind of the shearer while it is cutting.
 - f) A mantrip or other means of mechanical transportation will be provided at the long wall section.
 - g) Additionally, the air entering the longwall section will be monitored and evaluated. A supervisor or a qualified person designated by the supervisor

will monitor the air entering the longwall section with a hand held CO detector or monitored with low level CO sensors spaced every 1,000 feet.

Sec. Ex. 10, at 15. Inspector Yarko testified that when the tailgate was on egress, air readings of the T-split would still need to be taken to ensure “proper air flow and directional air flow.” Tr. 49:12-17. He did not know how long the tailgate had been on egress but recalled issuing a citation in October 2022 “due to loose roof bolts not secured to the roof on the tailgate.” Tr. 50:7-12. *See also* Tr. 50:13-17 (“[T]hey did not have anything in their exam books about being on the egress, so I issued a citation on that, putting them on egress due to the loose roof bolts being over the tailgate, not supporting or controlling the roof in that aspect.”) Asked how a mine could exit egress, Inspector Yarko testified:

. . . typically, in longwall, you would advance forward and continue mining while monitoring that tailgate, or I suppose on a long term, you could rehabilitate the area and clean it up and rebolt it and go through that extensive process. But typically, you would just mine through that area to get the fall behind you and the gob behind the shield line.

Tr. 51:3-13.

f. Direct Examination of Inspector Yarko: Post-Citation Events

As documented in Inspector Yarko’s inspection notes, **Citation No. 9705670** was terminated on Dec. 14, 2022, at 9:20 a.m. because the Mine had “completed phase 1 of the action plan submitted on 12-13-2022 to support the roof fall at the J-2 Longwall Section MMU 017 and J-1 gateroad, Ent. 1 XC 42.” Sec. Ex. 2, second set, at 4.

Inspector Yarko returned to the area of Entry No. 1, Crosscuts 41-42 ½ numerous times after issuing **Citation No. 9705670**. Tr. 52:9-12.¹⁵ At the Hearing, he testified using a map of area upon which he had made additional handwritten notes during inspections conducted on Jan. 6 and Jan. 30, 2023. Sec. Ex. 14 (diagram bearing handwritten dates Jan. 6, 2023 & Jan. 30, 2023, labelled “J-1 E1 XC 41-42.5 Additional Floor to Roof Supports”). Using that map, he testified that the roof had subsequently fallen on tailgate Entry No. 2 as well as along the

¹⁵ Respondent’s counsel characterizes Inspector Yarko’s testimony related to inspections conducted *after* Dec. 14, 2022 (i.e., the day **Citation No. 9705670** was issued and terminated) as irrelevant. Resp. Br. at 13 n.12. I deem the following testimony relevant for the limited and specific purpose of providing context for my assessment of “work or travel” as required by Section 75.202(a) at the time **Citation No. 9705670** was issued. I also note that, in admitting Sec. Ex. 8 (MSHA Approval Letter for Action Plan Update, dated Feb. 3, 2023), Sec. Ex. 9 (Action Plan Update, dated Feb. 3, 2023) and Sec. Ex. 14 (diagram, bearing handwritten dates, Jan. 6, 2023 and Jan. 30, 2023 and containing Inspector Yarko’s handwritten callouts), I overruled the objection of Respondent’s counsel that these exhibits were irrelevant as involving events occurring after **Citation No. 9705670** was issued and terminated. I deem these exhibits relevant for the same limited and specific purpose of providing context for my assessment of “work or travel” at the time **Citation No. 9705670** was issued. *See infra*. Analysis, Section A.3.

Crosscuts between tailgate Entries Nos. 1 and 2.¹⁶ Tr. 53:6-9; Sec. Ex. 14. The roof had also fallen on Entry No. 1 inby the J-2 longwall face at the 42½ area, at the point where a cluster of props was depicted on the map. Sec. Ex. 14. Inspector Yarko explained that, in blue handwritten callouts added to the map, he marked the props he observed on Jan. 6, 2023, to be “damaged, busted, split, and failed.” Tr. 53:12-18, Sec. Ex. 14. In red handwritten callouts added to the map, he marked the props he observed on Jan. 30, 2023, to be “mushroomed out, bowed, split” or “busted.”¹⁷ Tr. 53:19 – 54:2, Sec. Ex. 14. The blue circles on the map depicted existing cans and the reddish/pink circles depicted additional proposed cans. Tr. 54:9-13. Based on observations he made on Jan. 6, 2023, and Jan. 30, 2023, Inspector Yarko: “didn’t feel safe back there, so [he] didn’t think that a miner should have to go back there, whether it be a laborer, management, state and federal [inspectors], anybody. It would be too unsafe.” Tr. 61:8-16. He “proposed to the district” that the operator “should come up with . . . a barrier, barricade” to create “an evaluation point . . . that would be the last point that the examiner can go under the safe and stable roof.” Tr. 59:5-11.

Inspector Yarko testified that Sec. Ex. 9 (Action Plan Update, dated Feb. 3, 2023), consisting of a transmittal letter from Respondent to MSHA, a 1-page “Action Plan Update” and a 1-page map labelled “J-1 E1 XC 41-42.5 Additional Floor to Roof Supports,” contained an Update to the original Action Plan that had been submitted on Dec. 13, 2022, in response to the 103(k) Order. Tr. 59:20 – 60:1. He read from the “Action Plan Update” proposed by the Mine:

1. A Physical Barrier will be installed in the J-1 #1 Entry as close as practicable to the outby corner of the Crosscut 42 intersection.
2. Pre-shift and on-shift examinations of the J-1 #1 Entry, with records of these examinations recorded in a book on the surface, will be made to the Physical Barrier outby the Crosscut 42 intersection and approximately two (2) crosscuts outby the longwall face, until a t-split examination can be made from the J-2 Longwall face.

¹⁶ The map contained in Sec. Ex. 14 depicted only Crosscuts 41 and 42 in full between Entry No. 1 and Entry No. 2, with yellow highlighting (depicting fallen roof) extending beyond Crosscuts 41 and 42 both inby and outby along Entry No. 2.

¹⁷ As Inspector Yarko explained, he took the same map “back to check after [the Mine] had put additional supports in,” Tr. 53:19-22, differentiating between his observations on Jan. 6, 2023, and Jan. 30, 2023, by using two different colors, blue and red. *See* Tr. 53:10 – 54:2

Sec. Ex. 9, at 2; Tr. 60:9-20.¹⁸ Inspector Yarko explained that the proposed physical barrier would be the “evaluation point,” Tr. 60:21, and confirmed the Action Plan Update dated Feb. 3, 2023, related to conditions he had observed during his inspections on Jan. 6 and Jan. 30, 2023, when he added the callouts to the map contained in Sec. Ex. 14. Tr. 60:22 – 61:7. Prior to the issuance of that Action Plan Update, miners were able to, and would have had to, travel in the area to conduct air readings, perform examinations, and to “apply additional floor to roof support or just roof support.” Tr. 66:3-8; 58:22 – 59:4 (“the weekly examiner, for instance, he has to conduct an examination in its entirety, which means he would have to go through all the way up [the tailgate, i.e., Entry No. 1] until he could . . . [g]o no more”). After the Action Plan Update, dated Feb. 3, 2023, miners performing such tasks would need to travel only to the evaluation point provided by the physical barrier placed “as close as practicable to the outby corner of the Crosscut 42 intersection.” Tr. 66:9-12.

g. Cross-Examination of Inspector Yarko

On cross-examination, Inspector Yarko confirmed he had never worked at a longwall mine prior to becoming an MSHA inspector. Tr. 67:17-19. He also confirmed that an out-of-district inspector with the initials “RT” inspected the Mine on Dec. 11, 2022 (i.e., two days before Inspector Yarko’s E08 inspection) and had produced typewritten inspection notes. Tr. 69:1 – 70:12, R-I.¹⁹ Inspector Yarko acknowledged that these inspection notes stated “Reviewed pre shift J2 longwall NVO,” and defined “NVO” as “No violations observed.” Tr. 71:14-22. He also agreed these notes stated: “Traveled the face of the longwall to the tailgate. The tail gate has been under egress since October 25th [, 2022]. The top around the tailgate is down which does not allow entry into the tailgate entry. The operator is following the roof control plan when it comes to Egress. NVO.” Tr. 72:1-10, R-I. Inspector Yarko believed these inspection notes referred to the same area he inspected two days later. Tr. 72:11-13.

¹⁸ The Action Plan Update also provided:

3. A breaker row of a minimum of three (3) cribs and/or pumpable cribs and two (2) rows of three (3) timbers or props will be installed in the J-1 #1 Entry as close as practicable to the Crosscut 42 intersection. After these are installed, a new Physical Barrier will be made at the outby edge of the breaker row.

Sec. Ex. 9, at 2. On the map attached to Sec. Ex. 9, I understand the callout for “existing Physical Barrier” to refer to the barrier referenced in No. 2 of the Action Plan Update and in Inspector Yarko’s testimony; I understand the callout for “proposed Physical Barrier” to refer to the “New Physical Barrier” to be placed at the “outby edge of the breaker row” referenced in No. 3 of the Action Plan Update. In other words, the plan was to move the evaluation point further outby the continuing deteriorating roof in tailgate Entry No. 1.

¹⁹ Inspector Yarko also acknowledged these inspection notes bore Supervisor Initials (“TC”) and date “12-20-22.” Tr. 70:13-15. He identified Thomas Chatham as the then-field office supervisor and agreed it would be common for a field office supervisor to review inspection notes. Tr. at 70:18 – 71:10. *See also infra* n. 25.

The Mine had previously operated a longwall known as “the J-1,” but Inspector Yarko had never seen it operate. Tr. 73:9 –74:1. He acknowledged the Mine’s two longwalls must have operated simultaneously at some point because he knew the Mine’s Roof Control Plan dictated “a distance they had to stay apart;” he also knew the J-1 had “finished up.” Tr. 74:2 – 75:5.

Inspector Yarko agreed the tailgate is not part of the longwall face, at least “not until the longwall shearer cuts through the block of coal into the tailgate,” and that the T-split is not on the longwall face. Tr. 75:6-19. He also confirmed that upon reviewing the Pre-Shift Examinations from the J-2 longwall on Dec. 13, 2022, he issued a citation because those exams “didn’t list a hazardous condition in the record book for the egress.” Tr. 75:20 – 77:11.

Vis-à-vis the drawing Inspector Yarko had made in his inspection notes from Dec. 13, 2022, depicting fall on the shields, Sec. Ex. 4 at 21, he testified shields do provide “roof support for the longwall due to the longwall doesn’t put up roof bolts or primary supports like a continuous miner section.” Tr. 78:3-21. He also agreed that shields provide roof support for miners “from the shield to the pan line or to the shearer” as they work and walk along the face provided there are no gaps and the shields are not off-angle. Tr. 79:1-10. He agreed there are no roof bolts in the roof of a longwall face and that the expectation in longwall mining is that the roof will fall “behind the shields.” Tr. 79:11-21 (twice stressing that the expectation is for roof to fall “behind the shields.”)

Inspector Yarko confirmed he had performed other accident investigations in his career and agreed 30 C.F.R. § 50.2 defines “accident” and includes a provision pertinent to roof falls. Tr. 80:4-11.²⁰ He acknowledged “anchorage zone” refers to roof bolts (“that’s a part of this, yes”), but also refers to other criteria for a roof fall including “impairs ventilation” or “impedes travel [passage].” Tr. at 80:15 – 81:3. Inspector Yarko also agreed that egress made it so that miners could not get off the face of the J-2 longwall into the tailgate and that MSHA had approved a Roof Control Plan for the Mine containing an egress provision to account for times when the tailgate was impassable. Tr. 81:4-21; Sec. Ex. 10 (containing § 9.7 (Longwall Egress Procedures)).

Inspector Yarko acknowledged he had written by the drawing contained on page 21 of his inspection notes from Dec. 13, 2022: “Fall of face from T.G. [tailgate] to Shield #145. Roof/face [is] glued from approximately Sheild 120 to T.G. (#176)” and explained that “glued” meant the Mine had “put an adhesive compound into the roof . . . to bond the roof together; to glue it, essentially.” Tr. 82:11-19; Sec Ex. 4, at 21. He agreed gluing would be a relatively common occurrence in longwall mining “if you have failures of the roof” or “for preventative measures,”

²⁰ The specific provision implicated by this line of questioning provides:

An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage[.]

30 C.F.R. § 50.2(h)(8).

Tr. 82:20 – 83:6, and testified the time required to glue “[d]epends on the surface area of the roof you’re trying to glue and how big the voids are and how wide it is.” Tr. 83:11-15.

Inspector Yarko agreed pumpable cans may be placed in an area adjacent to where longwall mining is occurring because such cans are “designed to help hold the roof up,” including when it is giving way. Tr. 84:6-20 (clarifying “I suppose you could say that, yes” vis-à-vis Respondent counsel’s use of the phrase “giving way”).

Inspector Yarko reiterated that he did not know what the conditions were to activate egress because such was not identified in the Mine’s examination book. Tr. 85:11-13. He also acknowledged designating negligence on **Citation No. 9705670** as moderate because he considered egress to be a mitigating circumstance and identified it as such in his inspection notes. Tr. 85:1 – 86:5; Sec. Ex. 4, first set, at 13; *see also* Sec. Ex. 1.

Inspector Yarko terminated **Citation No. 9705670** soon after issuing it on Dec. 14, 2022, at 9:20 AM, acknowledging the termination in his inspection notes. Tr. 87:1-11; R-J(3), at 4; *see also* Sec. Ex. 2, first set, at 1, 4 (“Action taken: The operator has completed phase 1 of the [A]ction [P]lan submitted on 12-13-2022 to support the roof fall at the J-2 Longwall Section MMU 017 and J-I gate road, Ent. 1, XC 42”).

Finally, Inspector Yarko confirmed that, during his inspection on Dec. 13, 2022, after inspecting tailgate Entry No. 1, he exited the tailgate, entered and went up the headgate, entered the J-2 longwall face from the headgate and walked the length of the face. Tr. at 87:20 – 88:5. He could not “get to the tailgate itself” from the face because “it was blocked.” Tr. 88:6-10.

h. Redirect, Recross, and Further Redirect of Inspector Yarko

Inspector Yarko confirmed on redirect examination that he returned to the area underlying **Citation No. 9705670** to conduct inspections on Jan. 6 and Jan. 30, 2023, and knew that, in the interim, the J-2 longwall face had advanced not at all or “very little.” Tr. 89:8-13; Sec. Ex. 14. He assumed the failure to advance was “due to the failure of the roof,” Tr. 89:14-21, and testified it was unusual for a longwall not to advance. Tr. 90:3-8. He explained a mine would want to keep a longwall moving “[s]o the failure of the roof remains behind the shields as it’s intended to in any longwall mine” and opined that leaving a longwall idle creates risk because “you’re allowing the roof to continue to be unstable and fall where the shields and the miners are working[.]” Tr. 90:10 – 91:2. Asked if a roof fall would impact surrounding roof, he testified that when roof falls are occurring in adjacent areas, the roof “typically deteriorates due to the pressures.” Tr. 91:5 – 92:11.²¹ Inspector Yarko also explained that had normal mining been occurring, the Mine could have lifted egress by “getting through the area that [triggered] egress . . . and having that [area] back behind the shields, by continuing to mine, [by] hopefully

²¹ As part of this testimony, Inspector Yarko explained the shaded areas on the diagram contained in Sec. Ex. 14 represented roof fall on Crosscuts 41 and 42 in Entry No. 2 heading toward Entry No. 1 and explained that the stopping between Entries Nos. 1 and 2 at Crosscut 41 was also crushing, indicating failure of the roof along Crosscut 41 as it headed toward Entry No. 1. Tr. 91:10 –92:6; Sec. Ex. 14.

getting away from that bad area[,] getting in front of it. Opening up that tailgate to support the roof, [and provide] safe access.” Tr. 92:20 – 91:3. Asked to examine Sec. Ex. 11 (On-Shift Examiner’s Reports from Dec. 7-14, 2022), Inspector Yarko testified he understood “TG under egress” and “mining through” to mean the Mine was “trying to mine through that fall area. . . . trying to advance the longwall.” Tr. 93:20 – 94:8. *See also* Tr. 94:9-13 (confirming his understanding of how the Mine could lift egress as consistent with his understanding of “mining through.”)

On recross examination, Inspector Yarko acknowledged **Citation No. 9705670** was terminated “[d]ue to Phase 1 [of the initial Action Plan] being implemented” weeks before he conducted subsequent inspections on Jan. 6, 2023, and Jan. 30, 2023, and added callouts and notes to the map contained in Sec. Ex. 14. Tr. 94:20 – 95:8, 96:2-5. He also acknowledged **Citation No. 9705670** referred to Entry No. 1, Crosscut 42½ (as opposed to Entry No. 2, Crosscut 41, *see supra* n. 21, about which he had testified on direct examination). Tr. 95:9 – 96:1.

On further redirect examination, Inspector Yarko testified that during inspections on Jan. 6, 2023, and Jan. 30, 2023, the Mine was still having an issue with control of the roof in the area underlying **Citation No. 9705670**. Tr. 100:12-16.

2. *Longwall Face Boss Piper*

a. Direct Examination of Piper

Piper, who holds Alabama Mine Foreman papers and has worked in the mining industry for 16 years, was responsible at the Mine for “mining operations on the longwall[,] taking ventilation readings and preshifting.” Tr. 107:17 – 108:2, 10-14. At the time of the hearing, he had held the Longwall Face Boss position for 3 years, including in December 2022. Tr. 108:3-9.²²

Piper described the Mine’s longwall as a “thousand-foot coal block” mined by working outby which he characterized as “modern-day retreat mining.” Tr. 108:20 – 109:1. He explained a longwall is developed by having “two miner sections” (i.e., a headgate and a tailgate) that “drive units” with “the thousand foot coal block between them.” Tr. 109:2-11. Using R-E(1), he identified the J-2 longwall as having three headgate entries (depicted at the top) and three tailgate entries (depicted at the bottom), with tailgate Entry No. 1 located closest to the J-2 longwall face. Tr. 109:12 – 110:11. Piper labelled the mined-out area as “gob . . . behind the shield line,” Tr. 110:15-22, and testified that as a longwall advances “the roof and the gob come[] down behind . . . to keep ventilation on the face.” Tr. 111:21 – 112:2. He also testified that headgate Entry No. 3 and tailgate Entry No. 1 “will come down[] as well, as you mine the coal block out.” Tr. 112:8-15.

²² Thus, the events pertinent to **Citation No. 9705670** would have occurred when Piper was newly in this position.

Asked if there are any particular measures for roof support taken in the entries that border a longwall, Piper testified “[t]he only time that you would have any extra measures is if your top comes past the shield line, and then you would go under what would be an egress plan.” Tr. 112:18 – 113:2. Asked if there are measures for roof support placed in the tailgate entry as a longwall is being developed, Piper identified the roof control plan, bolting pattern, and “added support which is pumpable cribs.” Tr. 113:3-9. He described a pumpable crib as “a round cylinder, concrete filled,” placed “on ten-foot centers, double rope,” Tr. 113:11-13, and testified they are made special for entries bordering a longwall and are designed to have a weight rating, meaning they are “supposed to help keep the weight distributed out from in front of you,” allowing “the area to support more loaded weight.” Tr. 113:14 – 114:3.

Piper testified the Mine was operating two longwalls (the J-1 and the J-2) in the fall of 2022, situated such that the J-1 headgate entries served as the J-2 tailgate entries. Tr. 114:4 – 116:2; R-E(1).²³ He testified an egress plan is activated if conditions stop travel out of the tailgate entry and characterized such conditions as common in longwall mining because “your weight can shift, and your geological top conditions can actually . . . outrun your shield line.” Tr. 116:5-17. He explained egress would be implemented by a pre-shift examiner or face boss making a report which identified the tailgate as on egress, thereby triggering added measures, including notification to the crew, provision of an emergency ride, and additional CO readings. Tr. 117:2-8; 118:4-12. *See also* Sec. Ex. 10 at 15. He further explained that when the tailgate is on egress, it cannot be accessed from the longwall face and therefore the additional CO readings would be taken at the last shield (i.e., Shield 176 for the J-2). Tr. 117:13-20. To lift egress, the Mine would need to “mine through the condition to outrun the bad area.” Tr. 117:21 – 118:3.

Piper testified that, during a pre-shift exam, air readings measuring the “velocity of air coming down the face” would be taken at the headgate, midface and tailgate, and the “work area from the headgate to the tailgate” would be examined. Tr. 118:15 – 119:9. He explained “[y]our normal area for an air reading at the tailgate is not more than a hundred foot from the last shield and not less than 50 foot from the last shield” as per the Mine’s ventilation plan. Tr. 119:10-22. Piper testified that because these air readings would be taken on the face, there is no reason to go into the tailgate for purposes of the pre-shift exam under normal conditions; thus, when the tailgate is on egress, the required pre-shift exam readings can still be taken. Tr. 120:9-19.

Piper testified tailgate Entry No. 1 was put on egress on Oct. 25, 2022, second shift, according to R-A(1), and was never taken off. Tr. 121:1 – 122:22. He identified R-E(2) (XC 42 – 42 ½ diagram) as depicting the “top [having] come down into the tailgate entry,” and identified such as the condition which triggered egress. Tr. 123:13 – 124:3. He further testified R-E(2) depicted the J-2 longwall face situated at “Crosscut 42 and a half, 42 and a quarter,” and explained the face never made it past Crosscut 42 on its way outby. Tr. 124:4 – 125:1.

Piper testified that once both longwalls were no longer mining, examinations of tailgate Entry No. 1 were performed weekly by an examiner travelling tailgate Entry No. 1 to Crosscut 42 where a date board sat in the intersection of Entry No. 1 and Crosscut 42. Tr. 125:2-18. The examiner, who recorded his presence on the date board, was not required to travel further inby.

²³ A copy of R-E(1) is attached to this Decision and Order, as Attachment B.

Tr. 125:19 – 126:3. Piper testified that when the J-2 longwall was on egress no one from the longwall crew would be in the tailgate Entry No. 1 because “[i]t’s under egress. You’re unable to make it there.” Tr. 126:4-10.

Piper, who worked on the J-2 longwall in the days before Inspector Yarko issued the 103(k) Order on Dec. 13, 2022, testified roof conditions had not changed in the time leading up to the order. Tr. 126:11-20. Examining production reports contained in R-G for Dec. 12, 2022, and Dec. 13, 2022 (owl and day shifts), Piper testified the tailgate end of the J-2 longwall face had not advanced. Tr. 127:12 – 130:8; R-G.²⁴

b. Cross-examination of Piper

On cross-examination, Piper testified the J-2 longwall did not stop producing coal, although it did encounter a “delay” or a “slow[] down” due to “geological conditions that hindered [the Mine] from producing.” Tr. 132:19 – 133:6, 134:2-6. He further testified such conditions were encountered in October 2022 and never resolved, although the Mine tried “to mine through” them. Tr. 133:7 – 134:1, 18-19; *see also* Tr. at 134:20 – 135:3 (Piper testifying the condition had not been mined through and normal production on the J-2 never resumed).

Asked to identify what initially placed tailgate Entry No. 1 on egress, Piper testified “[t]he top conditions at the tailgate,” which he described as “[t]he top came down past your shield line, making it where you’re unable to make it into the tailgate entry.” Tr. 135:7-14. Piper opined such an occurrence was not unusual in longwall mining and that it was not generally unusual for such conditions to prevent resumption of production. Tr. 135:15-21. He also testified that, in his 16-year career, what happened on the J-2 longwall was the only time he had ever witnessed such conditions causing production to cease and never resume. Tr. 135:22 – 136:19.

Piper identified pre-shift examiner Gary Miles as having placed tailgate Entry No.1 on egress in October 2022. Tr. 136:20 – 137:5. Asked to identify the longest time he had ever seen a longwall section on egress, Piper identified the Mine’s J-2 and testified that, typically, egress lasts “[a] couple shifts.” Tr. 137:13-21. Asked to examine Sec. Ex. 11 (On-Shift Examiner’s Reports from Dec. 7 – 14, 2022), which reports he had signed, Piper acknowledged “HS” (for Violation of Mandatory Health and Safety Standard) was checked next to “TG under Egress” and testified he should have checked “HC” (for Hazardous Condition) instead. Tr. 138:3 – 140:7.²⁵ Asked to identify what the hazardous condition would have been, Piper stated, “Your tailgate is under egress” and explained “[o]n a longwall . . . if your tailgate is blocked, there’s only one way in and one way out” (i.e., through the headgate). Tr. 140:8-22.

²⁴ Piper explained he knew this because the starting and finishing footage numbers for the J-2 longwall at tailgate Entry No. 1 were the same, i.e., 6325 for all four shifts. Tr. 128:2-14; R-G.

²⁵ Piper acknowledged most of the On-Shift Examiner’s Reports in Sec. Ex. 11, bearing dates from Dec. 7 –14, 2022, showed HS (and not HC) checked and testified there had been no discussion as to how to fill out these reports, “other than [the tailgate] needing to be on egress.” Tr. 141:1-12.

Presented with R-E(1), Piper agreed tailgate Entry No. 1 served as a return air course, Tr. 141:18 – 142:5, and testified a return air course must be examined weekly in its entirety. Tr. 142:6-11. He explained that, assuming no issue with roof control on the longwall face, a weekly examiner would travel up tailgate Entry No. 1 to Crosscut 42, stopping before the face line which was halted at approximately Crosscut 42½. Tr. 142:12 – 143:10 (“They would travel to 42 because your face line being at 42 and a half, you wouldn’t – you’re not going to continue on into the gob.”). He identified the distance between Crosscut 42 and 42½ as “less than a hundred foot.” Tr. 143:19-22.

Piper testified that when **Citation No. 9705670** was issued, the tailgate was inaccessible from the J-2 longwall face, and that methane readings of the tailgate were taken from the last shield (i.e., Sheild 176). Tr. 144:9 – 145:3. He testified that if miners were travelling to the area between Crosscuts 41 and 42 to install additional supports, that area would need to be pre-shifted or on-shifted, Tr. 145:4-16, and said he knew of the Action Plan developed in response to the 103(k) Order, but not what it required. Tr. 145:17 – 146:3. Piper had been involved in implementing the Action Plan, explaining at Crosscut “41, travelling outby [to Crosscuts 40, 39, 38], we set two timbers against every stopping.” Tr. 146:6-17.

Asked to identify conditions in tailgate Entry No. 2, Piper testified: “You had your T-split at [Crosscut] 42, and Entry [No.] 2 is the area not traveled from that point on[,]” meaning from “42 inby.” Tr. 149:10-16. Piper did not recall roof conditions in Entry No. 2, Crosscut 42 outby. Tr. 149:17-19.²⁶ He agreed it would be important to keep the roof stable in tailgate Entry No. 1 so it could function as a return air course. Tr. 149:21 – 150:2.

c. Redirect and Recross of Piper

On redirect examination, Piper testified he did not believe placing the tailgate on egress constituted a violation of any kind, egress had been implemented consistent with the approved Roof Control Plan, and he had helped set timbers in tailgate Entry No. 1 in response to the 103(k) Order. Tr. 150:12 – 151:1. He identified the T-split as located at Entry No. 1, Crosscut 42, and described the T-split as “a point that your air leaves the face,” explaining “in this situation, your return air split [with] [s]ome of it [going to Entry No.] 2 and the rest of it travel[ling] outby.” Tr. 151:2-10. According to Piper, a person taking a weekly air course reading would not need to go inby the T-split, and that was why a date board had been placed at the intersection of Entry No. 1 and Crosscut 42. Tr. 151:11-16.

On recross examination, and referring to R-E(1), Piper confirmed the T-split was located at the intersection of Entry No. 1 and Crosscut 42, explaining the “T-split would be an open crosscut where . . . [t]he stopping was knocked out.” Tr. 152:10 – 153:8; 153:11-17 (confirming that, as shown on R-E(1), Crosscuts 41, 40, 39 and 38 had stoppings depicted by a dark bar parallel to Entry No. 1). Piper testified the T-split, under the Mine’s ventilation plan, was examined weekly and that such was the same as the weekly air course reading. Tr. 154:11-21.

²⁶ Due to placement of the J-1 and the J-2 longwalls, the J-2 tailgate Entry No. 3 was gob from the J-1. *See* R-E(1), Tr. 148:8-14.

3. Safety Supervisor Moore

a. Direct Examination of Moore

Moore, with 18½ years of experience in the mining industry, serves as the Mine’s Safety Supervisor and, in that role, he escorts MSHA inspectors on Mine property, and assists with training, the work force, “tasks” and “whatever comes up.” Tr. 156:15 – 157:7. Moore accompanied MSHA Inspector Tom Tulinowski at the Mine on an inspection conducted on Sunday, Dec. 11, 2022.²⁷ Tr. 157:8-20; 163:7-9. Specifically, he accompanied Inspector Tulinowski to investigate a complaint on the J-2 longwall face, and they were able to reach the tail drive on the face,²⁸ but not the tailgate “[b]ecause of the – the roof shift where your mining process happens. The longwall had come to a halt, and the weight transfer transferred into the entry behind us and caught up and caused us to go under egress making the tailgate unpassable.” Tr. 157:21 – 158:22. Moore explained tailgate Entry No. 1 was impassable due to material, including “rash gob,” that had fallen, agreeing that such could be characterized as “material that falls in longwall mining.” Tr. 159:5-12.

Moore took his own notes during Inspector Tulinowski’s inspection, identified as R-F,²⁹ and explained that “Phone In: Bad top at L/W T/G” in his notes meant there had been a “phone in complaint on the E04, bad top on the longwall and the tailgate, and bad top at the tailgate.” Tr. 160:11-22; R-F. Moore confirmed Inspector Tulinowski had found that complaint to be negative, Tr. 161:1-4, and further identified R-I as describing inspection activity consistent with what Moore also recalled and recorded. Tr. 162:2 – 163:1; *see also* n. 27.

²⁷ During cross-examination, Respondent’s counsel had Inspector Yarko read from the inspection notes of “R.T.” dated Dec. 11, 2022, and offered as R-I. Tr. 69:14 – 72:13, *see also supra* Section B.1.g. Counsel for the Secretary objected to the admission of R-I at that point, noting the lack of testimony offered as to who had created the notes. Tr. 96:22-16. Respondent’s counsel, after identifying R-I as a document produced by the Secretary in discovery, promised to have the company escort from Dec. 11, 2022, offer testimony placing the notes in context. Tr. 97:19 – 98:21 (“I don’t have the inspector testifying, but I do have the company escort testifying.”) As Moore escorted Inspector Tulinowski, the implication is that R-I contains Inspector Tulinowski’s notes. After Moore’s testimony, I admitted Exhibit R-I over the Secretary’s continued objection, Tr. 168:10 – 169:4, subject to my assessment of its probative weight. Tr. 170:2-4. *See also infra* Analysis Section A.2.

²⁸ Moore identified the tail drive as located “one or two shields in from the gob plate.” Tr. 158:11-14.

²⁹ Moore took his own notes to identify the date, inspection type, inspector, escort, inspection progression, whether citations were issued, and “any compliance issues that needed to be addressed.” Tr. 160:4-10. His notes identify another complaint investigated by Inspector Tulinowski on Dec. 11, 2022—described as shields “[n]ot having markings on them to prevent people from venturing underneath them”—which complaint was determined to be positive, but did not implicate the tailgate. Tr. 161:5-22.

Two days later, on Dec. 13, 2022, Moore accompanied Inspector Yarko on his E08 inspection, during which they travelled down tailgate Entry No. 1, investigated “that area,” exited the tailgate, and then travelled to and down the J-2 longwall face. Tr. 163:10-22. Moore testified he and Inspector Yarko travelled tailgate Entry No. 1 to “[r]ight in about 42 crosscut,” and observed the pumpable cribs placed in that area. Tr. 164:1-10. Asked to identify the condition of those pumpable cribs, Moore testified: “Some cribs were taking weight, as they’re designed to do. Some of the ones back towards the tailgate where the weight had shifted were starting to yield . . . They’ll mushroom out and let you know they are taking weight.” Tr. 164:11-20. Asked if the pumpable cribs were still providing support, Moore testified: “Somewhat, yes.” Tr. 164:21-22. He identified the pumpable cribs that had mushroomed as located “right inby [the] 42 area . . . [r]ight at the 42 crosscut area,” Tr. 165:1-8, identified a distance of about 15 feet between Crosscut 42 and the halted J-2 longwall face, and said the “gob pile” was located another 5 feet beyond that. Tr. 165:9-16. Moore testified no one would ever go to where the gob pile was because “[t]hat’s where we were mining through.” Tr. 165:17-20.

After leaving tailgate Entry No. 1 and entering the J-2 longwall face from the headgate, Moore and Inspector Yarko walked the length of the face, stopping at the “tail drive area” because they could not access the tailgate. Tr. 165:21 – 166:8. Moore testified conditions had not changed as between his journey to that same area on the face on Dec. 11, 2022, with Inspector Tulinowski, and with Inspector Yarko two days later. Tr. 166:12-16. Moore testified he had expressed his disagreement with the 103(k) Order issued on Dec. 13, 2022, telling Inspector Yarko:

we were following our [roof control] plan that was approved. Under our egress, whenever our tailgate gets a disturbance blocked, we mine through it. And we were following our plan. And I did not agree that a fall had occurred at all . . . [b]ecause it’s normal mining practice. It falls in the sequence of mining. Whenever the weight transfer stops, it all catches with you. You have to continuously mine.

Tr. 167:3-14; 15-17 (Q: “An[d] is *that* what you were observing in the . . . Entry No. 1 tailgate entry? A: Yes, sir.”) (emphasis added).

b. Cross-examination of Moore

On cross-examination, Moore agreed the area between the J-2 longwall face and tailgate Entry No. 1 was impassable and explained such was because material “[f]rom a normal mining condition” had fallen into tailgate Entry No. 1 from the roof. Tr. 170:16 – 171:2. He agreed the roof in Entry No. 1 is normally supported and that material from the roof is not supposed to fall on and block the tailgate. Tr. 171:5-11. He testified the material which had fallen had come from tailgate Entry No. 1, more specifically “from the shield line. It could have come from the shield line back,” and that it had come from the roof. Tr. 171:20 – 172:8. Asked how high the material was when viewed from the face, Moore testified “[n]ine feet,” extending from the floor to the roof. Tr. 172:12-19.

Moore confirmed he and Inspector Tulinowski did not travel in tailgate Entry No. 1 on Dec. 11, 2022; rather, they only went down the J-2 longwall face to view the tailgate from that

vantage point. Tr. 173:21 – 174:9. Moore did, however, travel in tailgate Entry No. 1 with Inspector Yarko on Dec. 13, 2022, to “in and around Crosscut 42,” until they could go no farther due to the “same material” Moore identified as having made the tailgate impassable. Tr. 174:10-21. He testified this area (i.e., “in and around Crosscut 42”) should be examined weekly, by an exam which included rip pins, gas, and ventilation hazards. Tr. 174:22 – 175:6. He also agreed Entry No. 1 was a return air course and that, while an examiner would never travel beyond the face, an inspector would be expected to weekly travel the entirety of Entry No. 1 to the face. Tr. 175:7 – 176:8.

Asked to examine Sec. Ex. 2, set 1, page 9 (i.e., Inspector Yarko’s Page 9 drawing), Moore agreed the four cans located just inby Crosscut 42 (depicted in the Page 9 drawing as “crushed out” by an X) were “starting to mushroom.” Tr. 177:10 – 178:12.³⁰ He also agreed there would have been cans inby those four cans and that it would be fair to say those cans had “either crushed off completely, or material had fallen all around them such that [Moore] could not view them.” Tr. 178:17 – 179:4. Moore testified that, under normal mining conditions, one *should* be able to pass through tailgate Entry No. 1. Tr. 179:10-17. Asked more specifically about the two cans located closer to the area Inspector Yarko depicted in his Page 9 drawing as the “Fall,” Moore testified he could not recall if those cans were in any worse condition than his earlier description, i.e., “starting to mushroom.” Tr. 179:18 – 180:10.

After describing a timber as a “six-by-six wood” put in place “to hold up a slab of rock that’s . . . leaking down or in place of a rib pan that’s missing” or doubled up “for a . . . roof pin that is out,” Moore acknowledged one of the props in the area off to the side of Crosscut 42 was “taking a little weight,” and showing splinters. Tr. 180:18 – 181:11. He further described the roof in that area: “It actually looked like just a chunk of the ribs. It was the corner brow was what that was supporting, and it looked like that’s what was leaning on it.” Tr. 181:16-19. Moore recalled observing “just sloughage” on the rib in terms of taking weight. Tr. 181:20-22.

c. Redirect of Moore

On redirect examination, Moore testified he was a certified examiner but had never performed a weekly examination in tailgate Entry No. 1. Tr. 182:8-12. He testified there are “date boards in multiple locations” in tailgate Entry No. 1, and believed the furthest one inby was “right around [Crosscut] 42[.]” Tr. 182:13-21. He identified a T-split as where the brattice is knocked out between Entries Nos. 1 and 2, confirmed he did not know where the T-split was in the tailgate at the time **Citation No. 9705670** was issued, and testified an examiner performing the weekly air course reading would not need to go beyond the T-split to the face. Tr. 183:3-21. On Dec. 13, 2022, when he accompanied Inspector Yarko, Moore recalled walking inby from Crosscut 42 “probably five, seven feet.” Tr. 183:22 – 184:3.

³⁰ Secretary’s counsel referred to Sec’s Ex. 2, page number 18; that page, hand-marked as Page No. 9 in Inspector Yarko’s inspection notes, is also labelled MSHA-018. *See* Tr. 177:12-13; 186:15-17; Sec. Ex. 2, set 1, page 9. The referenced drawing is contained on page 9.

4. *Rebuttal Witness - Inspector Yarko Recalled*

Recalled on rebuttal and asked how far inby he travelled with Moore on tailgate Entry No. 1 on Dec. 13, 2022, Inspector Yarko testified: “I think we stopped right after [the] first set of damaged cans. I wouldn’t have gone past that. It’s no different than any loose or damaged roof fall or hanging rock or anything. You don’t put yourself in a position and expose yourself to hazards. Therefore, we stop before that.” Tr. 186:18 – 187:4.³¹

BASIC CONTENTIONS OF THE PARTIES

The Secretary requests **Citation No. 9705670** be affirmed, contending the Secretary has proven (1) a violation of Section 75.202(a), (2) that violation was “significant and substantial” and (3) that Respondent exhibited “moderate” negligence. The Secretary, contending the assessed penalty of **\$2,561.00** is appropriate, seeks a penalty of at least that amount.

Respondent argues no violation of Section 75.202(a) occurred because (1) the Mine was complying with the egress plan contained in its MSHA-approved Roof Control Plan with respect to the cited area when **Citation No. 9705670** was issued, (2) the Mine’s compliance with 30 C.F.R. § 75.215(b) (a specific standard) demonstrates compliance with Section 75.202(a) (a general standard), and (3) no work or travel occurred in the cited area (which Respondent characterizes as including *only* tailgate Entry No. 1, Crosscut 42½). Alternatively, if a violation is found, Respondent contends the “significant and substantial” designation, the “reasonably likely” designation, and the “moderate” negligence designation are each inappropriate, and thus, the assessed penalty should be reduced.

ANALYSIS

To prevail, the Secretary must prove the violation by a preponderance of credible, relevant evidence. *In re Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). 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) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

³¹ Due to audio interference experienced by the court reporter, the question was re-asked (and slightly re-posed as “how far down Entry No. 1” did Inspector Yarko recall travelling with Moore. Tr. 187:5-22. Inspector Yarko testified:

I would have stopped short of the first set of damaged cans that we came upon or that prop. . . . And those cans being mushroomed or crushed, hindered in any way, what I would consider damage or faulty roof support, supplemental or primary. And so you would not go past that. I would stay in a good supported area.

Tr. 187:5 – 188:14.

A. The Secretary Has Proven a Violation of Section 75.202(a)

Citation No. 9705670 was written as a violation of Section 75.202(a), which provides: “The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face, or ribs and coal or rock bursts.”

Mine roofs, including those in entries which border a longwall face, are inherently dangerous, and roof falls have been the leading cause of death in underground mines for years. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *Big Laurel Mining Corp.*, 37 FMSHRC 2001, 2014 n.13 (Sept. 2015) (ALJ) (“MSHA and the Commission have repeatedly recognized that roof falls rank among the most serious dangers in the mining industry”). *See also Elk Run Coal Co., Inc.*, 27 FMSHRC 899, 904 (Dec. 2005) (“The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor . . . The intent of [30 U.S.C. § 862(a)] was to afford comprehensive protection against roof collapse[,] the leading cause of injuries and death in underground coal mines.”) (internal quotation omitted).

1. *The Applicable Analysis*

In *Jim Walter Res., Inc.*, 37 FMSHRC 493, 495 (March 2015), the Commission held that, where a roof fall has occurred, the Secretary, in order to establish a violation of Section 75.202(a), must prove: (1) the roof or ribs were not supported to protect persons from hazards related to roof falls, and (2) the insufficiently supported roof or ribs were located in an area where persons work or travel. Where a roof fall has not yet occurred, the Commission uses the following test to assess an alleged Section 75.202(a) violation:

the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987) (as cited in *Helen Mining Co.*, 10 FMSHRC 1672, 1675 (Dec. 1988)).³²

Here, the Secretary contends two sets of conditions existed on Dec. 13, 2022, which support the issuance of **Citation No. 9705670** under Section 75.202(a): (1) “the roof fall itself” as observed by Inspector Yarko at tailgate Entry No. 1, Crosscut 42½ for which he issued both the 103(k) Order on Dec. 13, 2022, and **Citation No. 9705670** on Dec. 14, 2022, and (2) “the continuing deteriorating conditions” on tailgate Entry No. 1. Sec. Br. at 8. For this second condition, I understand the Secretary to be referring to Inspector Yarko’s concern when issuing **Citation No. 9705670** that the roof in and around the specific area of the roof fall was deteriorating, i.e., tailgate Entry No. 1, Crosscut 42 to 42½ near where the roof fall had already blocked Entry No. 1 from the J-2 longwall face as well as fall along the face extending from Sheild 145 to Sheild 176 at the tailgate. *See* Sec. Ex. 2, first set, at 9 (Inspector Yarko’s Page 9 drawing); Sec. Ex. 4, at 14 (similar drawing to Inspector Yarko’s Page 9 drawing), 21 (drawing depicting fall along the J-2 longwall face).

On this record, I agree with the Secretary that these two conditions converged to prompt the issuance of **Citation No. 9705670** under Section 75.202(a). *See* Tr. 41:12-16 (Inspector Yarko identifying both conditions when explaining why he issued a citation under Section 75.202(a): “Due to the cans that are set in place to protect the roof from falling, the failure of those *and* blocking the tailgate from egress.”) (emphasis added). The roof fall already present at Entry No 1, Crosscut 42 ½ (which was also the condition prompting egress), coupled with Inspector Yarko’s observation of comprised pumpable cans and a compromised prop located in the area of Entry No. 1, Crosscut 42 to 42½, suggested to him—as an MSHA roof control/ground

³² In *Jim Walter*, the Commission rejected that the occurrence of a roof fall establishes a *per se* violation of Section 75.202(a) and instead used the two-part test set forth therein to assess the alleged Section 75.202(a) violation in a situation where the roof fall had fatally injured a miner. 37 FMSHRC at 494, 495. *See also* *Peabody Gateway North Mining, LLC*, 46 FMSHRC 1076, 1095 (Dec. 30, 2024) (ALJ) (applying the *Jim Walter* two-part test where an occurred roof fall injured a miner); *Canyon Fuel Company, LLC*, 45 FMSHRC 328, 341 (May 23, 2023) (ALJ) (applying the *Jim Walter* two-part test where an occurred rib burst injured a miner), DFR (granted June 30, 2023). Commissioner Cohen, concurring separately in *Jim Walter*, observed that the Commission’s disposition effectively overruled *Canon Coal, Co.*, 9 FMSHRC 667 (April 1987), a case in which the Commission had used a reasonably prudent person standard to assess an alleged violation of Section 75.200, the predecessor to Section 75.202(a). 37 FMSHRC 498 (Commissioner Cohen, concurring). Commissioner Cohen also observed that the Commission had relied on *Canon Coal* in *Harlan Cumberland*, wherein the Commission used a reasonably prudent person standard to assess an alleged Section 75.202(a) violation where a roof fall had not yet occurred. *Id.* He then opined that use of the two-part test in *Jim Walter*—wherein a miner had been fatally injured by an occurred roof fall—did “not disturb *Harlan Cumberland*” in a situation where a roof fall had not yet occurred. The continued validity of using a reasonable person standard after *Jim Walter* has been briefed in the *Canyon Fuel* case (WEST 2021-0188, *et. al*), presently before the Commission. No one was injured by the occurred roof fall implicated in the case now before me.

control specialist—that the roof had already failed in one area and was exhibiting signs portending future failure in the surrounding area. Tr. at 37:21 – 38:4-8 (Inspector Yarko referring to his Page 9 drawing and testifying “four [pumpable] cans near the fall were crushed out or beginning to fail. They were starting to fail and being crushed by the weight of the fall, along with it appears to be one crushed and split eight-by-eight prop or wooden timber [depicted on Inspector Yarko’s Page 9 drawing by “the box with an X in it”] near Crosscut 42); 28:17-20, 29:5-10 (Inspector Yarko testifying to fall along the longwall face); Sec. Ex. 4, at 21 (identifying material falling towards the face area of the shields from Sheild 166 to Sheild 176 (i.e., the shield closest to tailgate Entry No.1) along the longwall face); 91:5 – 92:11 (Inspector Yarko explaining that roof falls have an effect on surrounding roof which “typically deteriorates due to the pressures”).

Despite the effort of Respondent’s witnesses to avoid characterizing the material that had already fallen from the roof and blocked the tailgate at Entry No. 1, Crosscut 42½ as a “roof fall,” I find that what Inspector Yarko observed at that location is appropriately characterized as a roof fall based on his credible testimony, *see e.g.*, Tr. at 25:6-18; 32:9-12; 41:14-16, Sec. Ex. 4, at 14, 21; Sec. Ex. 2, first set, at 8-9, Section 103(k) of the Mine Act, and 30 C.F.R. § 50.2(h)(8) (defining “accident” as an “unplanned roof . . . fall in active workings that impairs ventilation or impedes passage”).³³ I also find, based on Inspector Yarko’s credible testimony and documented observation of compromised pumpable cribs, a compromised prop, and material that had fallen onto Shields 145-176 along the face, that the roof in the surrounding area was exhibiting signs of continuing deteriorating conditions.

To the extent Respondent seeks to characterize the material which had fallen from the roof and blocked Entry No. 1, Crosscut 42 ½ as material expected to fall due to “weight transfer” in the normal course of longwall mining, I reject that characterization here as the record belies any effort to portray the roof fall observed by Inspector Yarko as planned or expected. Respondent’s own witnesses testified: (1) the roof in tailgate Entry No. 1 is normally supported and is not supposed to fall and block the tailgate creating the “hazardous condition” of preventing miners from being able to exit the longwall face into tailgate Entry No. 1, Tr. 171:5-11, 172:12-19 (Moore, cross-examination); Tr. 139:20 – 140:22 (Piper, cross-examination); and (2) failure of the J-2 longwall to advance after the roof fall triggered egress, despite persistent efforts to “mine through,” was, at the very least, out-of-the ordinary. Tr. 133:7-12, 18-21, 134:18-19; 134:20 – 135:3; 135:7 – 137:21; 135:22 – 136:19 (Piper, cross-examination).³⁴ *See also* Tr. 89:14-21, 90:3-6-8, 90:12 – 91:2 (Inspector Yarko explaining it was unusual for a longwall not to advance, and leaving a longwall idle creates risk because “you’re allowing the

³³ Section 103(k) of the Mine Act also refers to “accident” and the Commission has held that “accident” for purposes of Section 103(k) is not limited to the definitions set forth in 30 C.F.R. § 50.2(h). *Revelation Energy, LLC*, 35 FMSHRC 3333, 3338 (Nov. 2013).

³⁴ I recognize Piper testified that headgate Entry No. 3 and tailgate Entry No. 1 are expected to “come down” as the coal block is mined out. *See* Tr. 112:3-15. I credit that testimony but note other portions of his testimony, especially when coupled with Inspector Yarko’s testimony, suggest that the normal expectations in longwall mining were not necessarily in play here due to the roof fall that had already occurred and the Mine’s inability to “mine through” the condition that had prompted egress and failure to resume normal production on the J-2 longwall.

roof to continue to be unstable and fall where . . . miners are working.”). A roof control plan, by providing for egress, does not thereby prevent material which has *fallen from the roof* of a tailgate entry from being characterized as a “roof fall” and cited as, or in conjunction with other conditions indicating continuing deterioration of the roof, a violation of Section 75.202(a).

Here, where the occurred roof fall did not injure anyone and where the inspector observed other conditions in the surrounding area that suggested continuing deterioration of the roof, in order to continue my assessment of the alleged Section 75.202(a) violation, I next address whether the roof was “supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs,” under *Jim Walter* and *Harlan Cumberland*, respectively.

2. *Roof Not Supported or Otherwise Controlled under Section 75.202(a)*

Tailgate Entry No. 1 was indisputably on egress when **Citation No. 9705670** was issued. *See e.g.*, Sec. Ex. 1; Sec. Ex. 2, first set, at 8, 13; Tr. 30:16 – 31:2. As such, I will address Respondent’s two arguments related to the impact of egress on the Section 75.202(a) analysis before assessing whether the roof was “supported or otherwise controlled” under that section.

Respondent contends no violation of Section 75.202(a) occurred here for two interrelated reasons: (1) because at the time **Citation No. 9705670** was issued, the Mine was complying with the egress plan contained in its MSHA-approved Roof Control Plan for the discrete location identified on the citation (i.e., tailgate Entry No. 1, Crosscut 42½); and (2) because the Mine was complying with 30 C.F.R. § 75.215(b) (pertinent to “[t]he procedures that will be followed” when the tailgate is on egress), it was perforce complying with Section 75.202(a). Resp’s Br. at 10-12. I reject both arguments and begin with the second one first.

Section 75.215(b), entitled “Longwall mining systems,” provides:

For each longwall mining section, the roof control plan shall specify—

(a) The methods that will be used to maintain a safe travelway out of the section through the tailgate side of the longwall; and

(b) *The procedures that will be followed* if a ground failure prevents travel out of the section through the tailgate side of the longwall.

(emphasis added). *See also* 30 C.F.R. § 75.222(g)(2) (identifying what a roof control plan must address when “a ground failure prevents travel out of the section through the tailgate side of the longwall section”). Here, the Mine’s Roof Control Plan does contain procedures consistent with Section 75.215(b). Such is the egress plan which was active when Inspector Yarko inspected the Mine on Dec. 13, 2022, and Dec. 14, 2022; he acknowledged the egress on **Citation No. 9705670** as well as in his related inspection notes. Sec. Ex. 1 (“The section has the[ir] egress plan active and an action plan is in place”); Sec. Ex. 2, first set, at 8, 13; *see also* Sec. Ex. 10, at 15, § 9.7 (“Longwall Egress Procedures”).

The inclusion of such procedures in a roof control plan (which is what Section 75.215(b) requires) does not mean, however, that an operator is performe “support[ing] or otherwise control[ing]” the roof within the meaning of Section 75.202(a). Part 75, Subpart C (Roof Support) of Title 30, C.F.R., “sets forth requirements for controlling the roof, face, and ribs . . . in underground coal mines,” § 75.200 (“Scope”), and critically, Section 75.202(a) contains the overarching mandate: “The roof, face and ribs of areas where persons work or travel *shall be* supported or otherwise controlled to protect persons” from related hazards.” (emphasis added). Every subsequent section contained in Subpart C aims to achieve that overarching mandate, and roof control plans, under Sections 75.220-223, partake of the same aim. But compliance with the sections in Subpart C or with a roof control plan approved thereunder does not necessarily mean that what Section 75.202(a) requires is being achieved in every instance wherein those sections are, or that plan is, being followed. Other sections contained in Subpart C make that clear. *See* § 75.220(a) (“Additional measures shall be taken to protect persons if unusual hazards are encountered”), § 75.223(a)(1) (“Revisions of the roof control plan shall be proposed by the operator [w]hen conditions indicate that the plan is not suitable for controlling the roof . . .”), § 75.223(a)(2) (“Revisions of the roof control plan shall be proposed by the operator [w]hen accident and injury experience at the mine indicates the plan is inadequate”). *See also So. Ohio Coal Co.*, 10 FMSHRC 138, 140-41 (Feb. 1988) (compliance with an approved roof control plan does not preclude liability for failure to comply with a generally applicable regulation requiring adequate roof support). Thus, what Section 75.202(a) requires is related to, but also necessarily separate from, what Section 75.215(b) requires.

Respondent cites *Twentymile Coal Co.*, 32 FMSHRC 628 (June 17, 2010) (ALJ), in support of its Section 75.215(b) argument, Resp. Br. at 12-13, but that case cannot be read to embrace the generic proposition that “the specific governs the general” such that compliance with Section 75.215(b) necessarily demonstrates compliance with Section 75.202(a). Rather, *Twentymile* reinforces the need to understand what each standard requires in context when

assessing whether satisfaction of one can be used to demonstrate satisfaction of the other.³⁵ Moreover, the roof fall which triggered egress—and served as one of the two converged conditions prompting issuance of **Citation No. 9705670**—occurred *before* tailgate Entry No. 1 was placed on egress. Thus, it would be illogical to accept that compliance with Section 75.215(b) demonstrates compliance with Section 75.202(a).

Respondent’s other contention—that Section 75.202(a) was not violated because, at the time **Citation No. 9705670** was issued, the Mine was complying with its egress plan for the discrete location identified on the citation (i.e., Entry No. 1, Crosscut 42 ½)—contains several moving parts. First, to the extent Respondent contends that following its egress plan necessarily demonstrates compliance with Section 75.202(a), I reject that argument. Even assuming an egress plan, as well as Section 75.215(b) and 75.222(g)(2) upon which it would be based, are all premised on a recognition that the process of longwall mining may cause material to fall and prevent travel at the tailgate, such does not mean that Section 75.202(a) has no role to play where a roof fall and/or continuing deteriorating conditions in the area of a roof fall suggest the roof is not being “supported or otherwise controlled” to protect persons who work and travel in the area from hazards related to roof falls.³⁶ Again, other sections contained in Subpart C, including §§ 75.220(a), 75.223(a)(1), and 75.223(a)(2), make that clear. And again, because the roof fall that triggered egress obviously occurred *before* tailgate Entry No. 1 was placed on egress, it would be illogical to accept that honoring egress demonstrates compliance with Section 75.202(a).

³⁵ In *Twentymile*, the ALJ determined “*the particular lifeline present in the alternate escapeway*” at the mine, which served to satisfy Section 75.380(d)(7) (requiring an escapeway to be provided with “a continuous, durable directional lifeline or equivalent device”), simultaneously served to ensure the escapeway was “[c]learly marked to show the route and direction of travel to the surface” as required by Section 75.380(d)(2). 32 FMSHRC at 638 (emphasis added). The ALJ vacated a citation issued under Section 75.380(d)(2) for red reflectors in the alternative escapeway which were “completely covered with dust and could not be seen,” *id.* at 636, where the operator argued that the escapeway was *still* “clearly marked to show the route and direction of travel to the surface” via the lifeline. The ALJ reasoned: “I see no reason why a lifeline should *per se* be incapable of satisfying [Section 75.380(d)(2)]. To say that something is incapable of satisfying one standard because it satisfies another standard defies logic and finds no support within Commission case law.” *Id.* at 640. He then identified three reasons why “a lifeline, in many situations, may provide an even better means of ‘clearly marking’ the escapeway than reflectors hung from the roof,” and concluded “[a]ll of these factors, combined with [the issuing inspector’s] testimony that the miners at this mine are well trained and that the operator had effective escapeway policies, lead me to believe that the lifeline clearly marked the route and direction of travel to the surface, thereby satisfying [Section 75.380(d)(2)] in spite of the fact that the roof reflectors may not have done so.” *Id.* at 641.

³⁶ I recognize egress is relevant also to Section 75.202(a)’s requirement that persons “work or travel” in the area of unsupported roof and address that issue *infra* in Analysis Section A.3.

Second, Respondent argues that when a mine is following egress because the process of longwall mining has created conditions requiring the imposition of egress,³⁷ a reasonably prudent person familiar with the mining industry and the protective purpose of Section 75.202(a) would conclude that the mine *is* complying with Section 75.202(a). Respondent further contends that, here, a representative reasonably prudent person familiar with the mining industry, i.e., Inspector Tulinowski, reached that very conclusion when he inspected the Mine on Dec. 11, 2022, observed “[t]he top around the tailgate is down which does not allow entry into the tailgate entry,” observed that “[t]he operator is following the roof control plan when it comes to Egress” and concluded “NVO” (no violation observed). Resp. Br. at 11; Tr. 71:21 – 72:13; R-I. Respondent, referencing testimony that roof conditions were the same two days later when Inspector Yarko conducted his E08 inspection, and that the J-2 longwall had not moved in the interim, *see* Tr. at 127:17 – 130:8 (Piper), 166:12-16 (Moore), argues: “[i]f no violation existed on [Dec.] 11, no violation existed on [Dec.] 13 for the same condition.” Resp.’s Br. at 11. I reject this argument as well.

“An individual inspector’s decision not to issue a citation (or failure to notice a violation) does not create a binding interpretation on behalf of the Secretary.” *Canyon Fuel Company, LLC*, 39 FMSHRC 1578, 1585 n. 9 (Aug. 2017) (opinion of Commissioners Jordan & Cohen in 2:2 decision) (further noting “District Manager Riley should be commended for recognizing the potential danger to miners” which MSHA inspectors had overlooked for years). Inspector Tulinowski did not testify at the hearing. While his inspection notes were produced by the Secretary and admitted into evidence, Tr. 169:14-15; 170:2-7; R-I, and while Moore’s recollection of Inspector Tulinowski’s activity during the Dec. 11, 2022, inspection corroborated the activity recorded therein, *see* Tr. at 157:10 – 163:9; R-I; R-F, the record contains no testimony about the reasoning behind Inspector Tulinowski’s “NVO” conclusion or what he thought about what he observed on Dec. 11, 2022, but for the 4 terse lines contained in his inspection notes (which Counsel for the Secretary obviously could not cross-examine). It is hard to give these unamplified inspection notes, much, if any, probative weight.

More critically, however, Inspector Tulinowski did not travel *in* tailgate Entry No. 1 beneath the roof at Crosscut 42-42 ½ on Dec. 11, 2022; he only travelled down the J-2 longwall face, observing the fallen material at the tailgate from *that* vantage point. Tr. 173:21 – 174:9 (Moore, cross-examination); R-I; R-E(2). Inspector Yarko, on the other hand, travelled up tailgate Entry No. 1 to approximately Crosscut 42 ½, observing “an unplanned roof fall” which prompted him to issue a 103(k) Order. Sec. Ex. 3. In his notes from Dec. 13, 2022, documenting issuance of that order, he drew a diagram of the fall observed from *his* vantage point beneath the roof in Entry No. 1, which drawing also depicted four crushed pumpable cribs and a “prop split” indicating to Inspector Yarko that the roof in Entry No. 1 was compromised in the area near the roof fall; he then reproduced that diagram with slight variation in his notes from Dec. 14, 2022, documenting issuance of **Citation No. 9705670**. *See* Sec. Ex. 4, at 14 (diagram); Sec. Ex. 2, first set, at 9 (Inspector Yarko’s Page 9 drawing); Tr. at 35:1-5, 36:5-10; 37:16 – 39:21 (Inspector

³⁷ In this situation, while the process of longwall mining did create the condition which triggered egress, acknowledging that does not necessarily mean that the roof fall which occurred and blocked the tailgate at Crosscut 42½ where the J-2 had come to rest, was a normal or expected condition in longwall mining. Again, I note the record before me belies that characterization.

Yarko testifying, *inter alia*, vis-à-vis his diagram in Sec. Ex. 2, first set, at 9, that “the cans are showing failure due to the stress of the roof falling . . . they’re not holding up the roof as intended”); 41:12-16, 42:15-21 (explaining the conditions he observed in tailgate Entry No. 1 on Dec. 13, 2022, violated Section 75.202(a) due to the roof fall combined with the failed and failing pumpable cans).³⁸ See also Tr. 135:7-14 (Piper, on cross-examination, describing the conditions that put the tailgate on egress as “top conditions at the tailgate”); *id.* at 170:20 – 172:18 (Moore, on cross-examination, testifying the tailgate was impassable because material from the roof had fallen into Entry No. 1, the roof of the tailgate is normally supported, and he had no way of knowing, when he accompanied Inspector Tulinowski down the face of the J-2 longwall, whether the roof in the tailgate was compromised because he “couldn’t go under there to see it” due to the material which had fallen from the roof and completely blocked his view); 178:11 – 179:4 (Moore, on cross-examination, testifying the four pumpable cans (shown as closest to the roof fall on Inspector Yarko’s Page 9 drawing) were “starting to mushroom” and that it was fair to say cans inby had already been crushed).

Inspector Tulinowski did not observe the roof fall from inside tailgate Entry No. 1, nor did he observe the compromised pumpable cans and prop beneath the roof in Entry No. 1, at Crosscut 42-42½. Thus, even if the conditions existing on Dec. 11, 2022, and Dec. 13, 2022, were the same in that the tailgate was on egress and the J-2 longwall had not advanced, Inspector Tulinowski’s notes do not undermine Inspector Yarko’s conclusion that what *he* observed from his vantage point *inside* Entry No. 1 (and later from the face of the J-2 longwall) was a roof fall coupled with signs of continuing deteriorating conditions in the surrounding roof. Thus, I have considered Inspector Tulinowski’s inspection notes from Dec. 11, 2022, as contained in R-I, and have given them little probative weight in my assessment of Section 75.202(a).

I turn now to whether the roof was “supported or otherwise controlled to protect persons” from hazards related to falls of the roof under *Jim Walter* and *Harlan Cumberland*, respectively.

As to the roof fall which had already occurred at Entry No 1, Crosscut 42½, which did not injure anyone, I find the Secretary has proven that the roof was unsupported or otherwise uncontrolled. Here, as all three witnesses testified, material had fallen from the roof, blocking tailgate Entry No. 1. Tr. 25:6-9, 17-18, 41:14-16 (Inspector Yarko); 123:17-19 (Piper identifying R-E(1)), 135:7-14 (Piper, cross-examination); Tr. 171:5 – 172:8 (Moore, cross-examination). The fallen material extended from the floor to the roof, approximately 9 ft. in height. Tr. 172:9-19 (Moore, cross-examination). While the fall of material from the mine roof was not of the same magnitude as that which had occurred in *Jim Walter*, 37 FMSHRC at 494, or in *Big Laurel*

³⁸ Respondent suggests Inspector Yarko “concluded that a violation existed before inspecting the area.” Resp’s Br. at 11, n. 10. While the record does not identify exactly what brought Inspector Yarko to the Mine on Dec. 13, 2022, to conduct the E08 inspection, he testified: “I do believe it was a possibility of a roof fall on the J-2 longwall tailgate.” Tr. 20:15-18. See also *id.* at 22:18-19; R-F (documenting Inspector Tulinowski’s inspection on Dec. 11, 2022, had been in response to a phoned in report of bad top at the J-2 longwall tailgate). I reject Respondent’s suggestion of pre-judgement as unsupported and note that, whatever prompted the E08 inspection, the record fully supports Inspector Yarko’s discovery of an unplanned roof fall blocking access to tailgate Entry No. 1 from the J-2 longwall face.

Mining, 37 FMSHRC at 2003 (involving citations for multiple failures), it was not insignificant; it blocked the tailgate (thereby creating a hazardous condition) and the Mine was apparently unable to “mine through” it. Thus, I find that the roof at tailgate Entry No. 1, Crosscut 42½ was not supported or otherwise controlled under the second prong of the *Jim Walter* test for a roof fall that has already occurred.

As to the continuing deteriorating conditions observed by Inspector Yarko in the surrounding area, i.e., Entry No. 1, Crosscut 42-42½ and from Shields 145 to 176 along the face, I find the Secretary has proven that the roof was unsupported or otherwise uncontrolled. When Inspector Yarko travelled tailgate Entry No.1 to approximately Crosscut 42, he observed the roof fall, plus “four [pumpable] cans near the [roof] fall” that were “crushed out or beginning to fail” as well as “one crushed and split eight-by-eight prop or wooden timber” near the top corner of Crosscut 42. Tr. 37:20 – 38:4, 5-8; *see also* Sec. Ex. 2, first set at 9 (Inspector Yarko’s Page 9 drawing). Additionally, when Inspector Yarko travelled down the longwall face, he observed fall extending from Shield 145 to Shield 176, the shield immediately adjacent to the tailgate. Tr. 28:17-20, 29:5-10; Sec. Ex. 4, at 21 (Inspector Yarko’s drawing of fall on the shields). *See also* Tr. 82:11 – 83:15 (Inspector Yarko, on cross-examination, acknowledging his drawing of fall on the shields also noted “Roof/face glued from approximately Shield 120 to T.G. (#176)” and testifying that gluing would be a relatively common occurrence in longwall mining “if you have failures of the roof” or “for preventative measures”). Notably, Respondent’s witness Moore did not deny the existence of concerning signs of deteriorating roof in the area; rather, he sought to give those signs a more benign characterization. *See* Tr. 164:11-22 (Moore testifying “Some cribs were taking weight, as they’re designed to do. Some of the ones back towards the tailgate where the weight had shifted were starting to yield . . . They’ll mushroom out and let you know they are taking weight.”); 165:1-8 (Moore identifying the pumpable cribs that had mushroomed as “right inby [the] 42 area . . . [r]ight at the 42 crosscut area”). When asked if the pumpable can were still providing roof support, Moore testified “Somewhat, yes,” Tr. 164:21-22 —a rather lukewarm response. On this record, I credit the characterization embraced by Inspector Yarko: that the crushing of the pumpable cans indicates “”failure of the roof . . . [t]hat the cans are showing failure due to the stress of the roof falling . . . they’re not holding up the roof as intended.” Tr. 39:11-21.

I further find that a reasonably prudent person familiar with the mining industry (including the use of pumpable cans in the tailgate entries of a longwall) and the protective purposes of Section 75.202(a) would have: (1) upon observing a roof fall extending 9 ft. from the floor to the roof and blocking the tailgate at Entry No. 1, Crosscut 42½, sought to observe and assess roof conditions on both sides of that fall from the vantage points achieved by Inspector Yarko, i.e., from *in* the tailgate Entry No. 1, Crosscut 42-42½, and from the tailgate end of the longwall, and (2) from these two vantage points, (a) recognized the objective signs of continuing deteriorating conditions as documented in the diagrams produced by Inspector Yarko in his inspection notes, and (b) sought to provide additional support for the roof. *See* Sec. Ex. 4, at 14, 21; Sec. Ex. 2, first set, at 9 (Inspector Yarko’s Page 9 drawing). Also relevant is the fact that the tailgate had been placed on egress weeks beforehand and that efforts to “mine through” were not meeting with success. While Respondent appears to have glued portions of the roof/face along the longwall, Sec. Ex. 4, at 21, I find that, on this record, a reasonably prudent person would

have taken further steps to support or control the roof so as to meet the standard of protection intended by Section 75.202(a).

Thus, I find the Secretary has proven, under both *Jim Walter* and *Harlan Cumberland*, that the roof was not “supported or otherwise controlled” within the meaning of Section 75.202(a).

3. *Areas Where Persons Work or Travel under Section 75.202(a)*

Next, I address whether “persons work[ed] or travel[ed]” in the area of unsupported and/or uncontrolled roof as required by Section 75.202(a). The Secretary contends this requirement is “easily met” in this case, Sec. Br. at 9, whereas Respondent contends “no work or travel occurred” in the area and thus the Secretary cannot prove a Section 75.202(a) violation. Resp. Br. at 13.³⁹

The text of Section 75.202(a) plainly requires that persons must “work or travel” in the area where the roof, face, or ribs are unsupported or otherwise uncontrolled for the standard to be violated. The Commission has interpreted “work or travel” in Section 75.202(a) “to be circumstance specific[.]” *Jim Walter*, 37 FMSHRC at 495, and in *Cyprus Empire Corp.*, 12 FMSHRC 911, 917-918 (May 1990), the Commission reversed a violation of Section 75.202(a) where the record contained “no evidence that at any time during the existence of the dangerous roof conditions, other than during the attempt to install additional roof support, any miner worked or traveled in the cited area.” The Commission has also deemed it sufficient for one person to “work or travel” only once in the area of unsupported roof for the “work or travel” requirement to be met. *Faith Coal Co.*, 19 FMSHRC 1357, 1359 (Aug. 1997) (affirming Section 75.202(a) violation where mine operator admitted he crawled through the relevant area one time).

As explained above, **Citation No. 9705670** is premised on two conditions which converged: (1) “the roof fall itself” at Entry No. 1, Crosscut 42½, and (2) “the continuing deteriorating conditions” in and around the area of the roof fall (i.e., tailgate Entry No. 1, Crosscut 42 to 42 ½ as well as fall on the face from Sheild 145-176). Thus, it is necessary to assess “work or travel” in the specific area of the roof fall as well as in the area of continued deteriorating conditions.

At the Hearing, Inspector Yarko identified “persons on the longwall,” including “shearer operators, shield pullers, cleaning, maintenance, foreman” as persons who may be in the affected area. Tr. 44:15-18. While Inspector Yarko was uncertain exactly when the roof fall had occurred

³⁹ Respondent offers a particularly crabbed interpretation of “area” for purposes of “work or travel” under Section 75.202(a), arguing it encompasses only Entry No. 1, Crosscut 42½. Resp’ s Br. at 13. I reject that interpretation. That area was already physically blocked by the roof fall at Entry No. 1, Crosscut 42½ and here, as explained above, **Citation No. 9705670** was premised on *two* conditions, only one of which was the roof fall itself. That said, I do recognize that egress necessarily impacted “work or travel” in the area of “continued deteriorating conditions” and address that impact below.

and when tailgate Entry No. 1 was placed on egress, Respondent’s witnesses testified the fallen material at Entry No. 1, Crosscut 42½—now characterized as the roof fall—was the condition that triggered egress in October 2022. Tr. 133:1– 134:8 (Piper, cross-examination); 174:10-21 (Moore, cross-examination). At that time, the J-2 longwall was operating, so tailgate Entry No. 1 *would* have been accessible and serving as an escapeway, Tr. 19:18-21 (Inspector Yarko); Tr. 140:15-20 (Piper, cross-examination), and as a return air course requiring (at a minimum) a weekly exam under 30 C.F.R. § 75.364(b)(2).⁴⁰ See Tr. 45:3-4 (Inspector Yarko); 142:3-8 (Piper, cross-examination); 175:2, 7-9 (Moore, cross-examination). This exam requires that the return air course be travelled “in its entirety.” § 75.364(b)(2); Tr. 142:9-11 (Piper, cross-examination, acknowledging such); 175:10 – 176:8 (Moore, cross-examination, acknowledging such and testifying an examiner would be expected to go “up to the face in the No. 1 [E]ntry” but never past the face into the gob, and agreeing such was his understanding of “entirety”); see also Tr. 149:21 – 150:2 (Piper, cross-examination, acknowledging it would be important to keep the roof in Entry No. 1 stable so it could serve as a return air course); Tr. 179:16-17 (Moore, cross-examination, acknowledging “[u]nder normal mining circumstances, yes, you should be able to pass through the tailgate”). Thus, I find that miners, including, at a minimum, members of the longwall crew and the weekly air course examiner, would be working or traveling in, and/or required by their job duties to work or travel in, the area of the occurred roof fall at tailgate No. 1, Crosscut 42 ½ when the roof fall occurred (which, again, was *before* the tailgate was placed on egress).⁴¹

At the Hearing, the parties offered a good deal of testimony aimed at identifying who might be working or travelling in the cited area *after* the tailgate was placed on egress due to the roof fall and more specifically, where exactly those persons would be travelling to in relation to Crosscut 42- 42½. Inspector Yarko testified that “whoever the operator designates to conduct the air reading on the tailgate side and [to conduct] examin[at]ions,” Tr. 44:18-20, could be in Entry No. 1 near the area of the roof fall and he identified the pertinent examinations as including:

- “a weekly examination due to [tailgate Entry No. 1 serving as] a return air course” Tr. at 45:3-4, and

⁴⁰ Section 75.364(b)(2) provides:

At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations . . . (2) In at least one entry of *each return air course, in its entirety, so that the entire air course is travelled.*

(emphasis added).

⁴¹ I acknowledge Piper’s testimony that when the tailgate was on egress, no one from the longwall crew would be in the tailgate because they could not get there physically from the longwall face, Tr. 126:4-10, and note Inspector Yarko’s understanding that, at the time he inspected the Mine on Dec. 13 and Dec. 14, 2022, members of the longwall crew could not enter the tailgate from the longwall face due to egress. See *e.g.*, Tr. 46:11-14; 47:1-5.

- “a T-split air reading off of the longwall as part of an air reading for preshift/on shift” examinations. Tr. 45:5-7.⁴²

See also Tr. at 42:1-2 (Inspector Yarko testifying “if persons were back there conducting normal work such as air readings or examinations”); 43:12-16 (explaining he marked the citation as “significant and substantial” due to the reasonable likelihood of injury to “persons . . . back there working and conducting examinations, air readings, proper installing of additional supports,” and other operator-assigned tasks). Respondent argues that neither of these examinations would take an examiner to Crosscut 42 *and a ½*, because (1) for a preshift examination, while an examiner is required to take air readings along the face at the headgate, midface and tailgate, the examiner would not enter the tailgate to take the required reading at the tailgate because such readings are taken “not more than 100 feet nor less than 50 feet from the last shield per the [M]ine’s approved ventilation plan,” and (2) a weekly air course examiner would travel only to Crosscut 42—the location of the T-split and a date board—and not beyond. Resp. Br. at 14.

It is a nonstarter to argue that neither of the examinations identified by Inspector Yarko would take an examiner to Crosscut 42 *and a ½* when *that* area was already physically blocked by the roof fall. As explained above, I have rejected Respondent’s effort to limit the cited area to *only* tailgate Entry No. 1, Crosscut 42½ where the roof fall had already occurred to block access to the tailgate from the J-2 longwall face.

⁴² Inspector Yarko explained a T-split reading as an air reading taken in tailgate Entry No. 1 “to ensure that the air coming from the longwall goes back into the bleeder and also goes back into [tailgate] Entry [No.] 2 to provide air sweeping into the bleeder.” Tr. 45:15-19. *See also* 151:6-10 (Piper, explaining the T-split as “a point [at which] your air leaves the face” and splits, with “some of it” travelling into Entry No. 2, and “the rest of it travell[ing] outby”). The parties appear to agree the T-split was located at Crosscut 42. *See* Sec. Br. at 7 n.5; Resp. Br. at 14; *see also* Tr. 153:6-17 (Piper, explaining the T-split as “an open crosscut where [the stopping] was knocked out” and identifying Crosscuts 38, 39, 40 and 41 as depicted on R-E(1) as crosscuts parallel to tailgate Entry No. 1 where stoppings were still in place); 154:6-10 (Piper confirming the T-split is the crosscut that does not have stopping (i.e., Crosscut 42 as depicted on R-E(1)) because “that’s the point that your intake air would become mixed with the face air”); Tr. 183:3-4 (Moore, on redirect examination, identifying the T-split as where the brattice is knocked out between Entries Nos. 1 & 2).

As for the T-split examinations, including how often they would occur,⁴³ and where they would occur,⁴⁴ I acknowledge the existence of conflicting testimony as between Inspector Yarko on the one hand and Piper on the other. I see no need to resolve whether a T-split reading would occur more often than weekly, or whether a T-split reading can be taken from the face without entering tailgate Entry No. 1 because, even if I assume that neither a preshift or onshift examiner would be under the area of continued deteriorating conditions in Entry No. 1 to take air readings, the record fully supports that a weekly air course examiner—whether travelling to the T-split or simply to a date board at the intersection of Entry No. 1 and Crosscut 42—would be under that area.

Respondent's witnesses testified there was a date board located at Crosscut 42 beyond which the weekly air course examiner would not go. Tr. 125:9 – 126:3 (Piper); Tr. 142:12 – 143:20 (Piper testifying on cross-examination “42 and a half is your face line, so 42 is where you would stop”); 182:13-21 (Moore testifying on redirect examination, “I’m pretty sure there’s [a date board] right around 42 . . . but I can’t tell you that for absolute certain”). They also testified that the T-split was located at Crosscut 42, at which a T-split air reading would be taken at least once a week. Tr. 151:5 (Piper identifying on redirect examination the T-split at Crosscut 42); 154:11-21 (Piper testifying on re-cross examination that the T-split is to be examined weekly); Tr. 183:10-21 (Moore testifying on redirect examination that the weekly T-split examiner need not go beyond Crosscut 42).

As for the distance between Crosscut 42 and Crosscut 42½, Piper testified it was “less than a hundred foot,” Tr. 143:19-22, and Moore testified “between 42 crosscut where the edge of

⁴³ Inspector Yarko's testimony appears to conflict with Piper's testimony as to how often a T-split reading would be taken. Inspector Yarko testified a T-split reading would be taken as part of preshift and on-shift examinations, Tr. 45:5 – 46:4, and thus would be conducted at least once or twice per shift as well as on an as-needed basis “due to ventilation changes or just to double-check if [there is] low air anywhere else along the longwall.” Tr. 45:20 – 46:6. Piper testified that per the Mine's ventilation plan, the T-split would be examined weekly; he also testified that such would be the same as the “weekly air course” reading. Tr. 154:11-21. I note the Action Plan, Sec. Ex. 7, at 2, seems to assume preshift examinations include a T-split reading. *See also* Sec. Ex. 9, at 2 (Action Plan Update, from Feb. 3, 2023) (same).

⁴⁴ Inspector Yarko's testimony also appears to conflict with Piper's testimony as to where air readings for purposes of a preshift examination would occur. Inspector Yarko testified that T-split readings—which he testified were required for preshift and on-shift examinations—would still need to be taken while tailgate Entry No. 1 was on egress “to make sure there's proper air flow and directional air flow,” Tr. 49:12-17, and explained that, to take a T-split reading during egress, the examiner would have to travel up tailgate Entry No. 1 because the tailgate was inaccessible from the longwall face. Tr. 46:11-19. Piper testifying that for pre-shift examinations, air readings measuring the velocity of air coming down the face would be taken on the face at the headgate, mid-face and tailgate, and there was no reason to enter the tailgate to take any of those readings or, in normal operations, to conduct a preshift examination. Tr. 118:15 – 119:9, 119:10 – 120:19. *See also* Tr. 176:9-17 (Moore acknowledging on cross-examination that he did not know where methane readings for shift examinations are taken).

that crosscut is to where the tailgate was, you're probably talking 15 feet" with an additional 5 feet to what Moore referred to as "the gob pile" which the Mine was trying to "mine through." Tr. 165:12-20. In that space, Inspector Yarko had observed two sets of two pumpable cans and a prop which had already been compromised indicating failure of the roof. Sec. Ex. 4, at 14; Sec. Ex. 2, first set, at 9 (Inspector Yarko's Page 9 drawing), Tr. 39:11-14, 39:15-21 ("the cans are showing failure due to the stress of the roof falling . . . they're not holding up the roof as intended"). He also testified, and I specifically credit his testimony, that when roof falls are occurring in adjacent areas, the roof "typically deteriorates due to the pressures." Tr. 91:5 – 92:11. *See also* Tr. 66:3-7 (Inspector Yarko testifying that, prior to issuance of the Action Plan Update on Feb. 3, 2023, with its physical barrier set up just outby Crosscut 42, miners would have had to travel into the area of Crosscut 42 to conduct air readings and perform examinations).

Thus, I find that an air course examiner who stopped at the date board located at Crosscut 42 and/or stopped at Crosscut 42 as the location of the T-split, would be a person working or travelling in the cited area at the time **Citation No. 9705670** was issued for purposes of Section 75.202(a).⁴⁵ *Contra Cyprus Empire*, 12 FMSHRC at 912 (reversing a finding that Section 75.202(a) had been violated because the Secretary failed to prove that "while the area was dangered-off, the job duties of any miners required them to enter the affected area").

For all of the reasons explained above, I find the Secretary has proven a violation of Section 75.202(a) by a preponderance of the evidence.

B. "Significant and Substantial"

Section 104(d) of the Mine Act identifies a "significant and substantial" ("S & S") violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). Under Commission case law, a violation is properly designated S & S 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) (quoting *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). The four steps required to support an S & S designation are:

- (1) the 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 that hazard would be reasonably

⁴⁵ Explaining why he designated the violation as "significant and substantial," Inspector Yarko also identified "persons . . . back there . . . installing . . . additional support." Tr. 43:6-14. Miners installing additional support would also be working or travelling in the cited area, and Piper acknowledged that if miners were going into the area between Crosscut 41 and 42 to install additional supports, that area would need to be preshifted and/or onshifted, Tr. at 145:11-16, thereby placing at least one other person (if not more), in or very near the cited area to fulfill job duties.

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 set forth in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).⁴⁶

The Secretary bears the burden of proving a violation is S & S by a preponderance of credible evidence, *Consolidated Coal Co.*, 39 FMSHRC 1737, 1742 (Sep. 2017), and an S & S determination must be based on the assumed continuation of normal mining operations. *Consol Pennsylvania Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (“A determination of [S & S] 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.”) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). For the following reasons, I find the test for S & S as set forth in *Peabody Midwest* to be met, and thus conclude **Citation No. 9705670** was properly designated S & S.

1. Step 1: *Underlying violation of a mandatory safety standard*

As discussed above, the Secretary has proven a violation of Section 75.202(a), which is a mandatory safety standard. Thus, Step 1 of the test for S & S is met.

2. Step 2: *Reasonable likelihood of the occurrence of the discrete hazard*

Step 2 requires a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy*, 38 FMSHRC at 2037. A finding at Step 2 must be based on “the particular facts surrounding the violation.” *Northshore Mining Co.*, 38 FMSHRC 753, 757 (Apr. 2016). The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, but rather that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

The specific hazard which Section 75.202(a) aims to prevent is the hazard of a roof fall as well as the increased danger thereof. Here, where a roof fall has already occurred, that which has already occurred is necessarily also reasonably likely to occur. Additionally, I find that the continuing deteriorating conditions documented by Inspector Yarko in his inspections notes and testimony further support that a roof fall as well as the increased danger of a roof fall in tailgate Entry No. 1, Crosscut 42-41½ as well as along the tailgate side of the longwall face, was reasonably likely to occur. Thus, Step 2 of the test for S & S is met.

⁴⁶ The Secretary argues the *Newtown/Peabody* reformulation is inconsistent with the Mine Act’s definition of S & S, stressing that Section 104(d)(1) is satisfied if the violation *could* contribute to the hazard, not whether it is reasonably likely to contribute. Sec. Br. at 12. I need not reach this argument to conclude that the test for S & S is met here.

3. Step 3: Occurrence of the hazard reasonably likely to result in an injury

For Step 3, I assume the occurrence of the hazard (not the violation) and determine whether, based on the facts surrounding the violation, that hazard is reasonably likely to cause an injury. *Newtown Energy, Inc.*, 38 FMSHRC at 2037. The evaluation of reasonable likelihood at Step 3 is made on the further assumption of “continued normal mining operations,” *Texasgulf Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574), and an inspector’s judgment is an important factor in determining whether there is “a reasonable likelihood that the hazard contributed to will result in an injury.” *Harlan Cumberland*, 20 FMSHRC at 1278-79 (citing *Mathies*, 6 FMSHRC at 5).

As the Commission has repeatedly recognized, mine roofs are inherently dangerous and the Commission’s case law documents that roof falls have killed and seriously injured countless miners. *See e.g., The Doe Run Co.*, 42 FMSHRC 521, 521 (Aug. 2020) (involving fatality); *Jim Walter*, 37 FMSHRC at 493 (same). Inspector Yarko testified that the hazard contributed to here—i.e., failure of the roof and falling material—would be reasonably likely to cause injury, and I credit his judgment as an inspector and MSHA roof control/ground control specialist. Thus, the occurrence of the hazard is reasonably likely to result in an injury, and Step 3 of the test for S & S is met.

Respondent contends the S & S designation (as well as the “reasonably likely” designation, *see infra*) was based on a mistaken premise, i.e., that persons would be exposed to and potentially injured by the hazard at which Section 75.202(a) is aimed, i.e., a roof fall. In making this argument, Respondent is essentially re-offering its argument that no persons “work[ed] or travel[led]” under the area of unsupported roof as required by Section 75.202(a). More specifically, Respondent argues: (1) due to egress, no one from the longwall face could access tailgate Entry No. 1 at the time **Citation No. 9705670** was issued; (2) a preshift examiner need not enter the tailgate to take air readings because, under normal circumstances or due to egress, those readings would be taken from the longwall face per the Mine’s ventilation plan; and (3) an examiner examining the return air course need not travel tailgate Entry No. 1 beyond the T-split located at Crosscut 42. Resp. Br. at 18-19.⁴⁷ I reject Respondent’s argument that “there was no exposure” to the hazard such that the occurrence of the hazard would not be reasonably likely to result in an injury for purpose of Step 3 of the test for S & S, having already concluded in Section A.3, *supra*, that “work or travel” did occur in the cited area.

4. Step 4: Reasonable likelihood the injury would be reasonably serious

For Step 4, the Secretary must prove a reasonable likelihood that the potential injury would be of a “reasonably serious nature.” *Peabody Midwest*, 42 FMSHRC at 383. As previously noted, the Commission has repeatedly recognized that mine roofs are inherently dangerous and Commission case law readily documents that roof falls have killed and seriously

⁴⁷ Realistically Respondent’s argument is aimed at all four steps of the test for S & S. I have opted to address it in relation to Step 3 because only those persons exposed to the hazard because they “work or travel” in the area under the unsupported/uncontrolled roof are reasonably likely to be injured by it.

injured countless miners. *See e.g., Doe Run*, 42 FMSHRC at 521 (involving fatality); *Jim Walter*, 37 FMSHRC at 493 (same); *LJ's Coal Co.*, 14 FMSHRC 1225, 1229 (Aug. 1992) (reversing ALJ's determination that violation of Section 75.220 was not S & S where record supported that the injury resulting from a roof fall would be of a reasonably serious nature). Additionally, Inspector Yarko testified that injuries from a roof fall can include "[b]umps, bruises, scrapes, broken bones, if not . . . permanent or fatal injuries," Tr. 42:11-14, and this testimony was controverted by Respondent. Thus, the injury caused by a roof fall is very likely to be of a "reasonably serious nature," and Step 4 of the test for S & S is also met.

Thus, I affirm the S & S designation.

C. Injury "Reasonably Likely"

Inspector Yarko designated gravity on **Citation No. 9705670** as "reasonably likely" to cause lost workdays or restricted duty. Sec. Ex. 1. He testified "[i]t's reasonably likely" that, if the roof failed and persons were "back there conducting normal work such as air readings or examinations" there would be, at a minimum, the injury of lost workdays or restricted duty. Tr. 41:17 – 42:8. *See also* Tr. 42:9-14 (Inspector Yarko identifying the type of injuries from exposure to a roof fall); *id.* at 45:11-18. Inspector Yarko testified that the hazard contributed to here—i.e., failure of the roof and falling material—would be reasonably likely to cause injury, and I credited his judgment as an inspector and MSHA roof control/ground control specialist for purposes of Step 3 of the test for S & S, Analysis Section B.3 *supra*. I do here as well for the designation on **Citation No. 9705670** that injury was "reasonably likely" to occur.

Respondent contends the "reasonably likely" designation was based on the same mistaken premise identified above, i.e., that persons would be exposed to and potentially injured by the hazard at which Section 75.202(a) is aimed. In making this argument, Respondent is essentially re-offering its argument that no persons "work[ed] or travel[led]" under the area of unsupported roof as required by Section 75.202(a). Resp. Br. at 18-19; *see also* Analysis Section B.3, *supra* (identifying Respondent's more specific reasons in support of this argument). I reject Respondent's argument that "there was no exposure" to the hazard such that the occurrence of the hazard would not be reasonably likely to result in an injury, having already concluded in Section A.3, *supra*, that "work or travel" did occur in the cited area.

Thus, I affirm the "reasonably likely" designation.

D. Negligence

Respondent contends the designation of "moderate" negligence on **Citation No. 9705670** was inappropriate, and argues the appropriate designation was "none" because the Mine was complying "at all times" with its approved Roof Control Plan." Resp. Br. at 19-20. More specifically, Respondent argues (1) the Mine complied with its Roof Control Plan "in installing the original roof support as it developed the tailgate entries" and in implementing its egress plan, *id.* at 20, and (2) Inspector Yarko acknowledged both of these facts at the Hearing. *Id.* at 20

(citing Tr. 44, 85-86, Sec. Ex. 2, at 13).⁴⁸ Counsel for the Secretary presents no argument specific to the negligence designation in his post-hearing brief.

Negligence is “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. . . . A mine operator is required to 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.” 30 C.F.R. §100.3(d). According to the Secretary’s Part 100 Penalty Table, negligence is considered by MSHA to be moderate when the “operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d), Table X. Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, are not limited to an evaluation of allegedly mitigating circumstances, and may consider “the totality of the circumstances holistically.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-1702 (Aug. 2015).

Respondent correctly points out that Inspector Yarko testified the Mine had complied with its Roof Control Plan when it installed the original roof support in tailgate Entry No. 1; he also testified repeatedly that the tailgate was on egress when he inspected the Mine on Dec. 13 and 14, 2022. *E.g.*, Tr. at 30:21 – 31:2; 46:11-14. Inspector Yarko took these items into consideration as mitigating circumstances for the Section 75.202(a) violation. *See* Sec. Ex. 1; Sec. Ex. 2, first set, at 13; Tr. 44:2-6 (“I marked it moderate negligence due to the fact that the operator did at the time comply with the roof control plan by setting and installing cans along

⁴⁸ Specifically, Inspector Yarko testified, “I marked it as moderate negligence [because] the operator did at the time comply with the roof control plan by setting and installing cans along with the original . . . primary support [of] roof bolts.” Tr. 44:2-6. During cross-examination of Inspector Yarko, the following exchange occurred:

- Q: You mentioned on direct when talking about the negligence designation . . . [that] you considered it a mitigating circumstance that [the Mine] had been complying with the roof control plan when [it] developed this tailgate entry, correct?
- A: Correct. That’s why it’s moderate.
- Q: But [the Mine was] also complying with [its] roof control plan when [it] enacted the egress plan after the condition presented itself, right?
- A: I don’t know what the conditions were to activate egress. It was not in the examination book.
- Q: Well, I’m going to show you . . . [Sec. Ex. 2] which are your notes from [Dec. 14, 2022]. . . . you list it as ‘mitigating circumstances; section was put on egress,’ correct?
- A: Yes.
- Q: So [the Mine was] following [its] egress plan at the time?
- A: Correct. Yeah. The roof control plan. Yes.

Tr. 85:1 – 86:5, *See also* Sec. Ex. 2, first set, at 13 (identifying “Section was put on egress” as a mitigating circumstance).

with the original roof support”). See *Liggett Mining, LLC*, 36 FMSHRC 15, 20, 29-30 (Jan. 2014) (ALJ) (sustaining moderate negligence finding for Section 75.202(a) violation where inspector considered operator’s compliance with approved roof control plan as a mitigating circumstance).

But again, as explained above, neither compliance with a roof control plan nor egress (which again, was triggered by the roof fall that already occurred at Entry No. 1, Crosscut 42½ before **Citation No. 9705670** was written), precludes a Section 75.202(a) violation. And here, I have also found, under *Harlan Cumberland*, that a reasonably prudent person familiar with the mining industry (including the use of pumpable cans in the tailgate entries of a longwall mine) and the protective purposes of Section 75.202(a) would have: (1) upon observing a roof fall extending 9 ft. from the floor to the roof and blocking the tailgate at Entry No. 1, Crosscut 42½, sought to observe and assess roof conditions on both sides of that fall from the vantage points achieved by Inspector Yarko, i.e., from *in* the tailgate Entry No. 1, Crosscut 42-42½, and from the tailgate end of the longwall face, and (2) from these two vantage points (a) recognized the objective signs of continuing deteriorating conditions as documented in the diagrams produced by Inspector Yarko in his inspection notes, and (b) sought to provide additional support for the roof before being required to do so by the 103(k) Order. See Sec. Ex. 4, at 14, 21; Sec. Ex. 2, first set, at 9 (Inspector Yarko’s Page 9 drawing).

Thus, I affirm the moderate negligence designation as appropriate under the totality of the circumstances viewed holistically.

E. Penalty

The Secretary proposed a regular penalty of \$2,561.00 for **Citation No. 9705670** and now submits that this penalty is appropriate, asking me to assess a penalty of “at least” \$2,561.00.” Sec. Br. at 14-15. Assuming a violation of Section 75.202(a) is found, Respondent asks that the penalty be reduced in conjunction with the non-S & S and lower likelihood of injury and negligence designations Respondent advocates. As explained above, I have sustained the S & S, “reasonably likely,” and “moderate” negligence designations as appropriate on this record.

Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). In assessing civil monetary penalties, an ALJ shall consider the six statutory penalty criteria:

[T]he operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Id. See also *Sellersburg Stone, Co.*, 5 FMSHRC 287, 292-293 (Mar. 1983) (directing Commission judges to make findings of fact on the statutory penalty criteria), *aff’d*, 736 F.2d 1147 (7th Cir 1984). Once factual findings on the statutory criteria have been made, a judge’s

penalty assessment for a particular violation is an exercise of discretion, bounded by proper consideration of the statutory criteria and the Mine Act's deterrent purposes. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising discretion to determine the amount of a penalty, an ALJ is not bound by the penalty proposed by the Secretary. *See e.g., Hidden Splendor Res.*, 36 FMSHRC 3099, 3101 (Dec. 2014).


In *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held all six of the statutory criteria in Section 110(i) should be considered in a *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc.*, 32 FMSHRC at 1289, the Commission explained that, generally, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. A civil penalty must be "of an amount which is sufficient to make it more economical for an operator to comply with the [Mine] Act's requirements than it is to pay the penalties assessed and continue to operator while not in compliance." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 41 (1977).

According to the Assessed Violation History Report (date range Sept. 14, 2021 – Dec. 13, 2022), contained in Sec. Ex. 15, the Mine has been issued 808 citations, 260 of which were designated S & S. *Id.* at 19. The Report documents that 69 of those 808 citations alleged violation of Section 75.202(a). *Id.* at 2-3. *See also* Sec. Ex. 1 (**Citation No. 9705670**, noting Section 75.202(a) "cited 79 times in two years" to the operator). According to Exhibit A to the Secretary's Petition for Assessment of Civil Penalty, Respondent's "Controller Tonnage" was 134,149,006 tons for 2021, and the "Mine's Tonnage" was 117,126 tons for 2021. *See also* Sec. Br. at 14. Peabody is thus a large operator and the parties have stipulated the proposed penalty will not affect its ability to stay in business. Jt. Ex. 1, ¶ 6. I have determined that Respondent exhibited "moderate" negligence (as mitigating circumstances were present and accounted for) and that a serious injury was reasonably likely to occur. *See* Analysis Sections B, C & D, *supra*. I note also that **Citation No. 9705670** was terminated soon after it was issued on Dec. 14, 2022, after the Mine completed phase 1 of the Action Plan submitted in response to the 103(k) Order, *see* Sec. Ex., second set, at 4, and that the Mine received a 10% reduction for good faith abatement. *See* Exhibit A, S. Pet.

On this record, having considered the six statutory penalty criteria and the Mine Act's deterrent purposes, I see no reason to deviate from the Secretary's proposed penalty, and thus I find the proposed penalty of \$2,561.00 to be appropriate.

ORDER

In accordance with the foregoing, I **AFFIRM Citation No. 9705670** and **ORDER** Respondent to pay a penalty of \$2,561.00 within 30 days of this order.⁴⁹


John Kent Lewis
Administrative Law Judge

Distribution:

Thomas J. Motzny, Esq., United States Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219, motzny.thomas.j@dol.gov

Arthur Wolfson, Esq., Fisher & Phillips LLP, 6 PPG Place, Suite 830, Pittsburgh, Pennsylvania 15222, awolfson@fisherphillips.com

Attachments:

Attachment A: Sec. Ex. 7 (Cover Letter and Action Plan J1 E1 XC 41-42.5, dated Dec. 13, 2022)

Attachment B: R-E(1) (longwall diagram)

⁴⁹ Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.



Peabody Southeast Mining, LLC
Shoal Creek Mine
Camp Creek Portal
654 Camp Creek Portal Rd.
Oakman, Alabama 35579
205-497-8147

December 13, 2022

Ms. Mary Jo Bishop, District Manager
Mine Safety and Health Administration
1030 London Drive, Suite 400
Birmingham, Alabama 35211

RE: J-1 E1 XC 41-42.5 Action Plan
Peabody Southeast Mining LLC, Shoal Creek Mine
MSHA ID. 01-02901

Dear Ms. Bishop:

Peabody Southeast Mining, LLC respectfully submits the attached J-1 E1 XC 41-42.5 Action Plan for Shoal Creek Mine ID #01-02901 in response to K-Order #9705667.

It is requested that the proposed action plan be reviewed and approved in a timely manner to allow Shoal Creek Mine to return to operation.

If you should have any questions or need any additional information, please feel free to contact me at your convenience at (205) 497-8260 (office) or (205) 435-4074 (cell).

Sincerely,

Ed A. Davis

Austin Davis
Senior Engineer
Peabody Southeast Mining, LLC

Cc: Eric Martin
Curt Taylor
Nick Boeckmann
Billy Davis
Kyle Yeilding
Charlie Lilly
Austin Davis



Peabody Energy Southeast Mining, LLC
Shoal Creek Mine, MSHA I.D. No. 01-02901
J-1 E1 XC 41-42.5 Action Plan

Peabody Energy Southeast Mining, LLC respectfully submits the following J-1 E1 XC 41-42.5 Action Plan.

Phase 1

1. Props and/or timbers (8" x 8" or 6" x 6") will be installed as shown on the attached map working from outby and supporting the way inby.
2. Pre-shift examinations of the J-1 #1 Entry, approximately two (2) crosscuts outby the longwall face, will be required until a t-split examination can be made from the J-2 Longwall face.
3. Once the twelve (12) – 8" x 8" or twenty-four (24) – 6" x 6" props and/or timbers have been installed, checked by MSHA, and a pre-shift examination performed in the J-1 #1 Entry, production may resume on the J-2 Longwall.

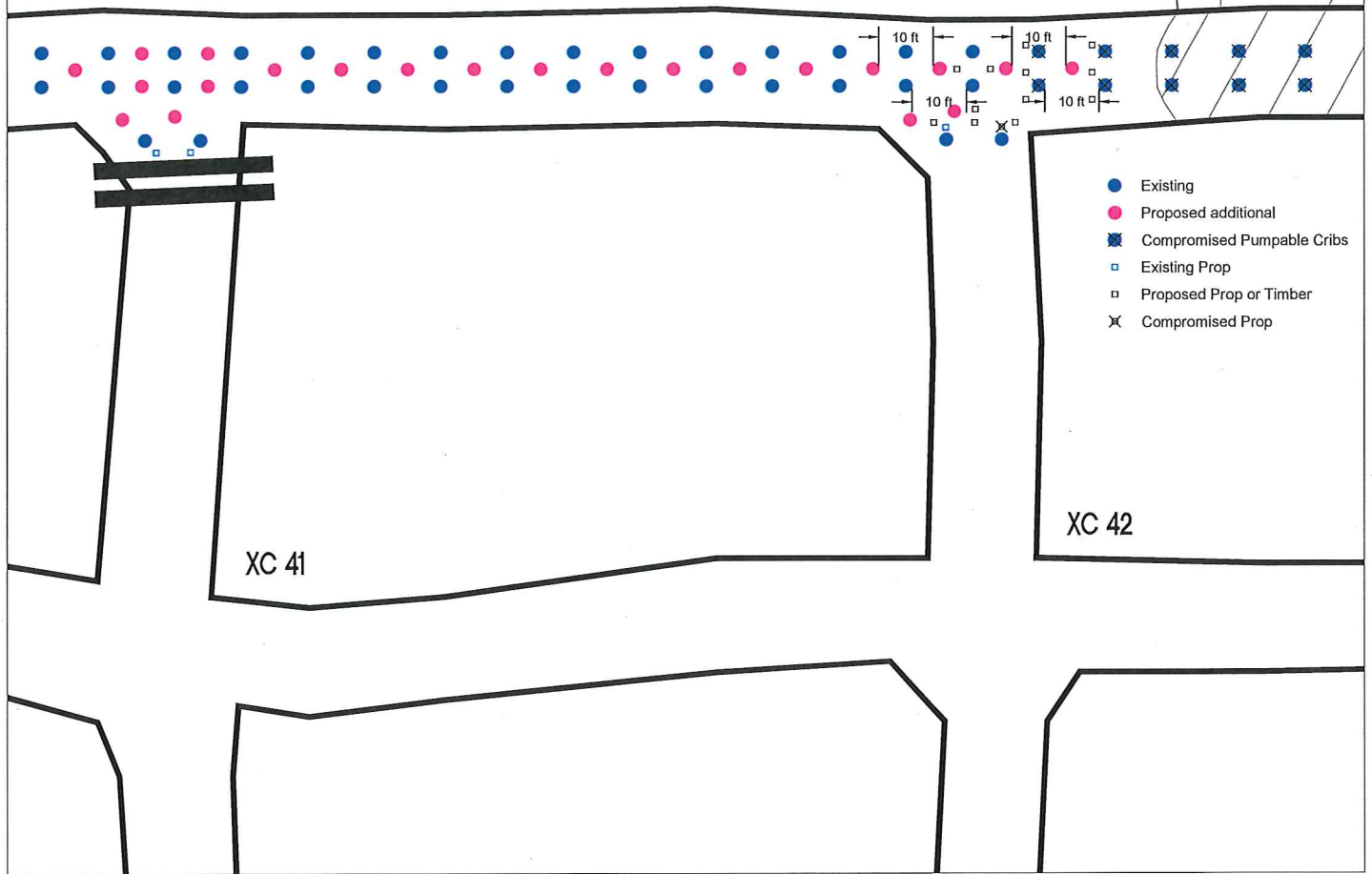
Phase 2

1. Pumpable cribs will be installed as shown on the attached map to a minimum of XC 41.
2. Additional supports will be installed in the intersection of XC 41 as shown on the attached map.
3. Once the t-split examinations can be made from the J-2 Longwall face normal operations will resume.

J-1 E1 XC 41-42.5

Additional Floor to Roof Supports

J-2 LW Face



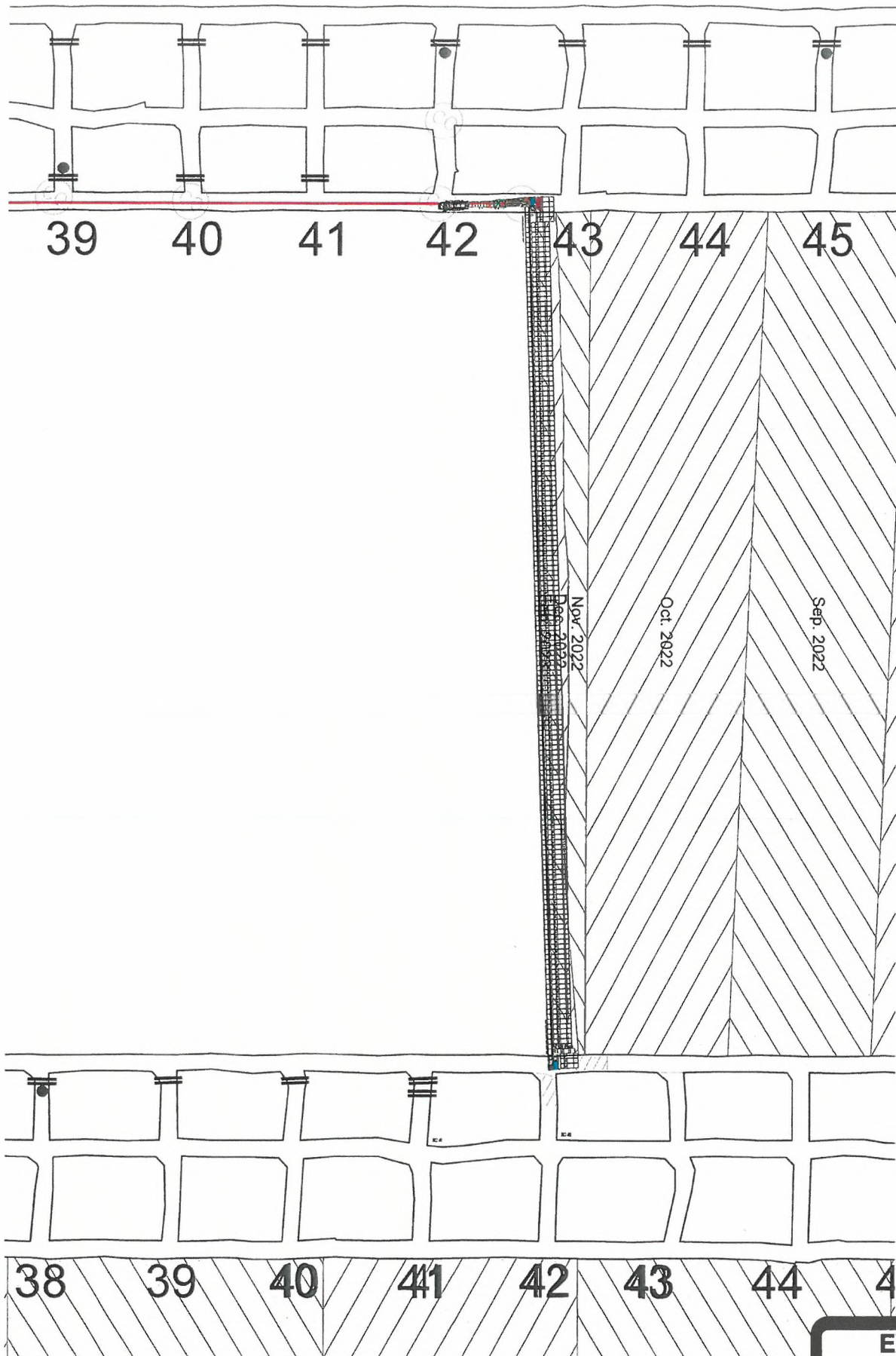


EXHIBIT
R-E (1)

tabbles