

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 12-1223

OAK GROVE RESOURCES, LLC,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

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

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASE

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Federal Mine Safety and Health Review Commission and its administrative law judge and in this Court are listed in the brief for Oak Grove.

(B) Rulings Under Review. References to the rulings at issue appear in the brief for Oak Grove.

(C) Related Cases. This case has not previously been before this Court or any other Court. On June 15, 2010, United Mine Workers of America Local Union 2133 filed a claim with the Federal Mine Safety and Health Review Commission under Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821, to recover compensation miners lost as a result of their withdrawal under the order at issue in this case. That case was assigned Docket No. SE 2010-851-C and is currently pending before an administrative law judge of the Commission.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Br.	Brief for Oak Grove
Commission	Federal Mine Safety and Health Review Commission
J.A.	Joint Appendix
Judge	Administrative Law Judge
Mine Act Or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Oak Grove	Oak Grove Resources, LLC
Secretary	Secretary of Labor
S&S	Significant and Substantial

STATEMENT OF JURISDICTION

The Secretary of Labor ("Secretary") is satisfied with the jurisdictional statement set forth in Oak Grove's brief relating to (1) the jurisdiction of the Federal Mine Safety and Health Review Commission ("Commission") and its administrative law judge below, and (2) the jurisdiction of this Court on appeal. Br. 1-2.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the judge properly concluded that the order MSHA issued for Oak Grove's violation of 30 C.F.R. § 75.364(b)(2) was not duplicative of the previous citation MSHA issued for Oak Grove's violation of 30 C.F.R. § 75.364(f)(2).

2. Whether the judge properly concluded that Oak Grove's violation of 30 C.F.R. § 75.364(b)(2) was "significant and substantial" ("S&S").

3. Whether the judge properly concluded that Oak Grove's violation of 30 C.F.R. § 75.364(b)(2) was an "unwarrantable failure" to comply.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to this brief beginning at A-1.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act") was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's * * * mines * * * in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to assure compliance with the Act and with standards. 30 U.S.C. § 813(a). Section 104 of the Act provides for the issuance of citations and orders for violations of the Act or of standards. 30 U.S.C. § 814. Under Section 105(d) of the Act, a mine operator may contest a citation, order, or proposed civil penalty before the

Commission, an independent adjudicatory agency established under the Act to provide trial-type administrative hearings and appellate review in cases arising under the Act. 30 U.S.C. § 815(d). See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor v. National Cement Co. of California, Inc., 573 F.3d 788, 789 (D.C. Cir. 2009).

Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), states that a violation of "any mandatory health or safety standard" shall be designated "significant and substantial" if it is "of such nature as could significantly and substantially contribute to the cause and effect of a * * * mine safety or health hazard." Under Commission case law, a violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Div., National Gypsum Co., 3 FMSHRC 822, 825 (1981). See Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1085 (D.C. Cir. 1987) (citing National Gypsum).

Designation of a violation as S&S subjects an operator to the possibility of certain enhanced enforcement actions under the Mine Act. For example, violations that are both S&S and

caused by an "unwarrantable failure"¹ to comply with a mandatory standard will result in issuance of a Section 104(d)(1) citation, and subsequent unwarrantable failure violations will result in issuance of a Section 104(d)(1) withdrawal order and, potentially, Section 104(d)(2) withdrawal orders. 30 U.S.C. § 814(d). See RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 592-93 (D.C. Cir. 2001) (explaining the "D-chain" sequence of actions commenced by the issuance of a Section 104(d)(1) citation). In addition, an operator's record of S&S violations may result in a determination that it has exhibited a "pattern" of S&S violations. 30 U.S.C. § 814(e). See 30 C.F.R. Part 104 ("Pattern of Violations"). Once a mine operator is identified as a pattern violator, it is subject to the added regulatory scrutiny and enhanced enforcement set forth in Section 104(e) of the Act, including mandatory issuance of withdrawal orders whenever new S&S violations are found. Ibid.

B. The Facts

Oak Grove operates the Oak Grove Mine, a large underground coal mine in Jefferson County, Alabama. The mine liberates over one million cubic feet of methane every 24 hours and is subject

¹ An operator's failure to comply with a standard is "unwarrantable" if it is caused by "'aggravated conduct constituting more than ordinary negligence.'" RAG Cumberland Resources v. FMSHRC, 272 F.3d 590, 592 n.1 (D.C. Cir. 2001) (quoting Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997, 2004 (1987)).

to spot inspections by MSHA under Section 103(i) of the Mine Act, 30 U.S.C. § 813(i). 34 FMSHRC 594, 613, J.A. 4, 23. See Tr. 11, J.A. 34. The mine utilizes both longwall and continuous mining production sections in the active workings. Tr. 86, J.A. 53. In March 2010, the mine had three active Sections -- 12 east, 13 east, and the longwall. Ibid. The mine utilized several fans to produce adequate ventilation of the active workings and of the worked-out areas. Tr. 87, 114, J.A. 53, 60.

An old worked-out area of the mine, known as the 10 South Old Works ("Old Works"), was unsealed at the time of the events in this case, and was therefore required to have its return air course examined in its entirety on a weekly basis to ensure that all hazardous conditions were reported and immediately corrected. Jt. Ex. 1, J.A. 153 (mine map); Tr. 28, 33, 36, J.A. 38, 39, 40. See 30 C.F.R. § 75.364(b)(2), (d). No one may enter any underground area of an inadequately examined mine, except the certified persons required to perform examinations. Tr. 68-69, J.A. 48. See 30 C.F.R. § 75.364(f)(2).

At the hearing, Inspector McDonald explained the importance of the weekly examinations to miners' safety and explained that, as part of the examination, the certified examiner must take oxygen and methane readings at certain designated locations in the returns. Ex. G-4, J.A. 133 (weekly examination records);

Tr. 26-30, J.A. 38-39. McDonald testified that the weekly examination is "crucial" because it helps ensure that the operator's ventilation plan is working properly. Specifically, the examination enables the operator to determine whether it is maintaining the proper air quantity and quality to keep potentially explosive methane swept out of the area and to prevent methane from displacing breathable oxygen for miners working in the vicinity, such as the pumper/examiners² at risk in the Old Works. Tr. 30-31, 158, 173-74, J.A. 39, 71, 74-75.³ In addition, the examination detects other developing hazards that may affect miners working in the area covered by the examination, such as slipping and tripping hazards that can injure examiners and pumpers entering the area after the examination. Tr. 49-50, 51, 55-56, 67, 82, 106-09, 155-57, J.A. 43-44, 48, 55-56, 52, 58, 70.

On March 23, 2010, MSHA received a complaint from a miner at the Oak Grove Mine pursuant to Section 103(g) of the Mine Act, 30 U.S.C. § 813(g). Tr. 24, J.A. 37. On March 9, 2010,

² These miners usually work alone and substantial distances from others and, if they become disabled, might not be missed until the end of their shift. Tr. 31, 68, J.A. 39, 48.

³ Although the greatest risk of methane accumulations is at freshly-mined coal, it is typical for methane to build up in areas that were mined in the past, including in old works and behind seals, especially in a gassy mine such as the Oak Grove Mine. Tr. 30-31, J.A. 39.

the mine had withdrawn its production miners upon detecting unlawful levels of methane gas behind the seals of a mined-out area. During this period, the mine was experiencing problems with water accumulations that had impeded the performance of mandatory weekly examinations. Tr. 91-92, J.A. 54. Oak Grove was using several pumps to dewater the mine. The miner's complaint alleged that the production miners had re-entered the mine on March 23 without an examination of the entire return of the Old Works having "been made." Tr. 24, J.A. 37.⁴

Upon arriving at the Oak Grove Mine on the morning of March 23, 2010, Inspector McDonald informed mine management that he was there to conduct an inspection pursuant to a Section 103(g) complaint and wanted to start by examining the mine's record books. Tr. 24-25, J.A. 37. During his inspection of the mine's weekly examination books, McDonald observed that the Thursday, March 18, 2010, weekly examination of the Old Works had been performed on the day shift by Nelson Workman, one of the mine's certified examiners, and that the books listed several locations (the first east south air courses, 8 south of the section 1 faces, the number 4 entry air station 1C, and the Number 4 fan, where four readings were to be taken) that Workman

⁴ Inspector McDonald explained that the terms "being made" and "make" refer to the weekly examination being conducted in its entirety. Tr. 47, 69, 78, J.A. 43, 48, 51.

could not make because of excessive water. Ex. G-4, J.A. 133 (weekly examination records: "Hazards, unable to make high water"); Tr. 25-30, 37-38, J.A. 37-39, 40-41.⁵

Inspector McDonald also observed that Day Shift Foreman Keith Miller and General Mine Foreman David Ingle had countersigned the March 18, 2010, Old Works weekly examination.⁶

McDonald explained that, after returning to the surface, the certified examiner records his findings in the weekly examination report. Tr. 33, J.A. 39. McDonald explained that mine management must review the findings of the weekly examination report, countersign the report, and immediately address and correct any hazards noted in the report. Ibid. See also Tr. 79, J.A. 51; 30 C.F.R. § 75.364(h).

After reviewing the report of the March 18th Old Works weekly examination, Inspector McDonald asked General Mine Foreman Ingle whether Oak Grove was actively engaged in coal

⁵ The Old Works fireboss book also noted that an incomplete examination of the evaluation points had been attempted on March 11, 2010. More importantly, after attempting to make the same areas on March 20, 2010, as he had attempted on March 18, Examiner Workman reported that he was able to make more of the evaluation points, but still was unable to make all of them, even though the pumps were running and some progress was being made in dewatering the mine. Ex. G-4, J.A. 133; Tr. 30, 37-38, 92, J.A. 39, 40-41, 54.

⁶ Foreman Miller, who stated that he was responsible for ensuring that weekly examinations were conducted in their entirety, ordered Examiner Workman to re-examine the Old Works on March 20, 2010, in an attempt to make the areas he was unable to make on March 18. Tr. 146-47, J.A. 68.

production at the time. Tr. 24, 31-32, J.A. 37, 39. Ingle told McDonald that the mine was actively producing coal. Tr. 31-32, J.A. 39. Day Shift Foreman Miller provided McDonald with a document listing the names and locations of all miners working underground in the mine. Ex. G-5, J.A. 134 (list of miners working in mine); Tr. at 32, 144, J.A. 39, 67. Ingle asked McDonald whether the mine should stop production; McDonald stated that it would probably be in the operator's best interest to do so. Tr. 34, J.A. 40. In that light, Mine Superintendent Gary Shortt told McDonald that he was withdrawing the miners from the mine. Ibid. McDonald stated that he wanted to inspect underground before ultimately deciding whether to issue a withdrawal order. Ibid.

Accompanied by Foreman Miller, Inspector McDonald then proceeded underground to determine for himself whether the conditions listed on the March 18 Old Works weekly examination report still existed. Tr. 34-35, 148 J.A. 40, 68.

See Jt. Ex. 1, J.A. 153. Much of the area travelled was approximately 42-to-48-inches high, requiring the six-foot tall inspector and the others in the inspection party to walk "bent over." Tr. 45-46, J.A. 42-43. McDonald testified that, while underground, he was unable to take air velocity and quality readings at the 1-B air station, which must be examined as part of the Old Works weekly examination, after encountering murky

water and "too many stumbling and tripping hazards." Tr. 49, 50-51, J.A. 43-44. The 1-B air station is located at an old track area and was slick. Tr. 49-50, J.A. 43-44. McDonald explained that, because of the stumbling and tripping hazards at that location -- consisting of "old blocks, straps and whatever" -- he lost his notepad and had to catch himself from falling into the 24-inch deep water while feeling his way through the water with his feet. Tr. 49-50, 103, 123, J.A. 43-44, 57, 62.⁷ McDonald testified that Miller indicated that the depth of water would only increase as he traveled further toward the 8 South faces ("South 1 face"). Tr. 90, 102, J.A. 54, 57.⁸ Miller agreed generally with McDonald's description of the conditions in the Old Works on March 23, 2010. Tr. 152, J.A. 69.

Proceeding in the direction of the South 1 face to the 1-C air station, which also must be examined as part of the Old Works weekly examination, Inspector McDonald was unable to examine that location because of the waist-deep water.

Tr. 51-52, J.A. 44.

⁷ Inspector McDonald testified that, normally, water should be no higher than 16 inches, the height of the top of an average miner's boot. Tr. 102, J.A. 57.

⁸ Mine Examiner Chris Kilgore, who had joined Inspector McDonald by the time he approached the 1-B air station, also informed the inspector that the 24-inch depth of murky water encountered at that point could be anticipated to become waist-deep as he traveled further toward the 8 South faces. Tr. 44, 50-51, 103-04, J.A. 42, 44, 57.

Similarly, Inspector McDonald was unable to take air readings at the South 1 face (the area of the No. 2 regulator), which must be examined as part of the Old Works weekly examination, because of the presence of excessive water. McDonald stated that water had accumulated to 32 inches deep, or approximately to his thighs. Tr. 55-56, 150, J.A. 45, 69. Foreman Miller told McDonald that he doubted whether they would be able to travel much further in that area of the mine because of the increasing depth of the water. Tr. 55, J.A. 45.

Inspector McDonald next traveled to the "fault pump." There was an approximately six-foot drop ("dip") in the mine floor at that location. Tr. 57, J.A. 45. At the fault pump, which must be examined as part of the Old Works weekly examination, McDonald observed that water had "roofed" (i.e., accumulated to the mine roof) on the left side and had accumulated to a height of 18 inches from the mine roof on the right side. Tr. 57-58, 150, J.A. 45-46, 69.⁹ McDonald explained that he was unable to examine any of the return entries past the fault line. Tr. 58, J.A. 46. McDonald believed that the amount

⁹ Foreman Miller testified that he had to hold on to the rib (i.e., wall) of the return entry to maintain his balance. Tr. 150, J.A. 69.

of water at the fault pump compromised the ventilation through that area. Tr. 89, J.A. 53. See Tr. 132, J.A. 64.¹⁰

Finally, Inspector McDonald travelled to the Number 4 fan,¹¹ which must be examined as part of the Old Works weekly examination, and attempted to take air velocity and quality readings. Tr. 59, 61, J.A. 46. McDonald explained that, in that area, the mine roof is approximately 48 inches or less from the mine floor. Tr. 60-61, J.A. 46. Under the best conditions, McDonald and the others would have had to walk bent over in order to travel through the area. Tr. 59, J.A. 46. McDonald testified, however, that there was 24 inches of water in the area. Tr. 59, J.A. 46. Moreover, beneath the accumulated water, McDonald encountered old materials and items that had been left behind. Ibid. It took McDonald approximately 20 minutes to walk only 300 feet through slipping and tripping hazards. Tr. 60, J.A. 46. In those conditions -- with low roof, high water, and slipping and tripping hazards -- McDonald was unable to take readings at any of the four approaches to the

¹⁰ A compromised ventilation system could create hazards to miners working in the area both by permitting methane to displace breathable oxygen and by permitting an explosive level of methane to accumulate. Tr. 83-84, J.A. 52.

¹¹ The Number 4 fan served the bottom half of the mine's bleeder system, including the areas of the Old Works at issue here. The mine's three active sections are located in a different part of the mine and are served by different fans. Tr. 87, 114, J.A. 53, 60.

Number 4 fan (from the north, south, east, and west) that were required to be examined. Tr. 38, 60-61, J.A. 41, 46.

After attempting unsuccessfully to examine the Number 4 fan, Inspector McDonald issued Foreman Miller a withdrawal order (Order No. 8518110) under Section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging an S&S and unwarrantable failure violation of 30 C.F.R. § 75.364(b)(2).¹² Ex. G-2, J.A. 117 (order); Tr. 21 61, J.A. 36, 46.¹³ McDonald returned to the surface after nearly seven hours underground. Tr. 35, J.A. 40.

Inspector McDonald issued the order after determining that, while miners were sent back to work on the production sections

¹² The mandatory standard states in relevant part:

(b) Hazardous conditions. At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:

(2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. § 75.364(b)(2).

¹³ No one accompanying Inspector McDonald voiced any disagreement with his issuance of the order. Tr. 63, J.A. 47. Foreman Miller, who accompanied Inspector McDonald on his March 23, 2010, inspection, could not remember whether or not he (Miller) attempted to take air quantity and quality readings in any of the areas the inspector stated he could not approach because of high water. Tr. 148-49, J.A. 68.

of the mine on March 23, 2010, the last complete examination of the return in the Old Works had been conducted more than seven days before. Tr. 65-67, 95-96, 141, J.A. 47-48, 55, 66. McDonald determined that the effectiveness of the Number 4 fan had been compromised to an unknown degree by extremely high water in its vicinity. Tr. 67, 80, J.A. 48, 51. McDonald testified: "This is a multi-fan mine, and each fan plays an integral part of that mine's ventilation system. And if you compromise one fan, you're taking away from the other mine fans." Tr. 67, J.A. 48. McDonald believed that the Number 4 fan "was compromised" by restriction in the ventilation system caused by the amount of water at the fan. Tr. 67, 80, J.A. 48, 51. Adequate ventilation was a primary concern of the inspector, as was the tripping hazard resulting from the slick and uneven terrain under high murky water. Tr. 67, J.A. 48.

Inspector McDonald believed that the two pumpers working in the Old Works were likely to be affected by the violative conditions,¹⁴ and that an injury or illness was highly likely to result from either (1) the displacement of breathable oxygen in the area by an accumulation of methane¹⁵ or (2) the tripping and

¹⁴ During the hearing, the Secretary modified the order from alleging that six persons were affected to alleging that two persons, those sent to the Old Works to examine the area and monitor and maintain the pumps, were affected. Tr. 77, J.A. 50.

¹⁵ Foreman Miller testified that it is important to examine

entangling hazards under the accumulated water. Tr. 77, 80, 81, 83-85, J.A. 50, 51, 52. See Tr. 158, 171-72, J.A. 71, 74. The inspector therefore designated the violation S&S.¹⁶

Furthermore, Inspector McDonald determined that the violation was a result of the operator's unwarrantable failure to comply with the mandatory safety standard. Tr. 65-68, J.A. 47-48. McDonald relied on the facts (1) that Oak Grove had been cited seven times in the previous two years for violations of the same mandatory standard, 30 C.F.R. § 75.364(b)(2), (2) that mine managers had countersigned weekly examination reports on March 18 and 20, 2010, and were therefore aware of the longstanding water accumulation impediment to Oak Grove's conducting a complete weekly examination in the Old Works, and (3) that another MSHA inspector, Stephen Freeman, had on March 9, 2010, issued Oak Grove a citation under Section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging that miners entered the mine without a weekly examination of the Old Works

the Old Works weekly in order to determine whether there is low oxygen or high methane in the area, and to prevent miners from getting hurt while walking in the area. Tr. 155-57, J.A. 70.

¹⁶ Senior Mining Engineer Shortt acknowledged that at least one pumper was assigned to work in the Old Works every eight hour shift, seven days a week. Tr. 191-92, J.A. 79.

in its entirety having been conducted, in violation of 30 C.F.R. § 75.364(f)(2).¹⁷ Ex. G-2, J.A. 117 (order); Tr. 69-70, J.A. 48-49.¹⁸ See Ex. G-6, J.A. 135 (citation).

Foreman Miller acknowledged that he had read the record of Examiner Workman's March 20, 2010, examination indicating that the examiner still could not get to certain prescribed evaluation points because of high water. Tr. 147, J.A. 68. Miller also acknowledged that he nonetheless sent miners to produce coal in the active sections of the mine later that same day. Tr. 147-48, J.A. 68.

¹⁷ The mandatory standard states in relevant part:

(f)(2) Except for certified persons required to make examinations, no one shall enter any underground area of the mine if a weekly examination has not been completed within the previous 7 days.

30 C.F.R. § 75.364(f)(2).

¹⁸ After abatement of a cited violation is achieved by the operator, the MSHA inspector terminates the violation, and the operator is no longer at risk of receiving a withdrawal order under Section 104(b) of the Mine Act, 30 U.S.C. § 814(b). At the time Inspector McDonald issued his order, the citation had not yet been terminated by MSHA. Tr. 100, J.A. 56. Both the citation and the order were terminated on April 1, 2010, when another MSHA inspector, Inspector Edward Boylan, determined that accumulated water had receded to the point that examination of the Old Works return in its entirety was then possible. Tr. 75, 100, 206, 210-11, J.A. 50, 56, 83, 84. Oak Grove paid the penalty associated with the citation prior to the July 28, 2011, hearing. Tr. 10, J.A. 34.

Senior Mining Engineer Gary Shortt¹⁹ testified that he read the weekly examination record for March 22, 2010, and understood that two places that were required to be examined in their entirety during the weekly examination of the Old Works return had not been examined. Tr. 184-85, J.A. 77. Shortt expected that the unexamined places would have been examined on March 22, even if the examiner had worn waders (knee-high mining boots). Tr. 185, 187, J.A. 77, 78. When Shortt became aware that the examination had not been completed on March 22 -- including at the Number 4 fan -- he directed that a certified person immediately be assigned to complete the job on March 23. Tr. 186, J.A. 78. That assignment went to Examiner Kilgore. Later, after production mining had resumed, Shortt learned that the examiner had had trouble securing a ride to the area. Tr. 187, J.A. 78.

Although Shortt knew the history of high water in the area, he had not been told, one way or the other, whether the weekly examination had in fact been completed before allowing the miners to re-enter the mine and resume production. Tr. 187-90, 196-98, J.A. 78-79, 80-81. In spite of the known recent conditions in the area, Shortt merely assumed that the area would have been examined in its entirety because he directed

¹⁹ Shortt testified that he supervised Foremen Ingle and Miller. Tr. 194-95, J.A. 80.

that it be examined in its entirety. Tr. 199, J.A. 81. Shortt ordered the miners back into the mine to engage in production work "without making sure that the Old Works area had been examined." Tr. 200, J.A. 81. Shortt "did not call to see if [the examination] had [been completed], no." Ibid.

C. The Decision of the Administrative Law Judge

In his March 7, 2012, decision, the judge rejected Oak Grove's argument that Inspector McDonald's March 23, 2010, order, alleging a violation of Section 75.364(b)(2) on that date, was duplicative of Inspector Freeman's March 9, 2010, Section 104(a) citation, alleging a violation of Section 75.364(f)(2) on or around that date. 34 FMSHRC 594, 606-08, J.A. 4, 16-18. The judge focused primarily on the fact that the citation had been issued on March 9, 2010, whereas the order was issued on March 23, 2010. The judge noted that Section 75.364 is entitled "Weekly examination" and requires that examinations be performed "at least every 7 days." 34 FMSHRC 607, J.A. 17 (emphasis by the judge). The judge reasoned that, because "the interval between the two enforcement actions exceeded the 7 day maximum interval between examinations, a new violation arose" when Oak Grove again introduced miners into its mine during a different weekly period for which no weekly examination of the area at issue had been completed. Ibid.

The judge concluded that, contrary to Oak Grove's argument, the Commission has never held that two violations are impermissibly duplicative merely because both violations could be abated by a single action. Rather, the Commission has focused on whether the two standards require different actions by the operator to achieve initial compliance. Here, the judge found that two different actions were required, i.e., that the order was issued because Oak Grove failed to examine "at least one air course, in its entirety" in the Old Works (Section 75.364(b)(2)), while the previous citation had been issued because Oak Grove permitted miners to enter an area of the mine for which the weekly examination "[was] not [] completed within the previous 7 days" (Section 75.364(f)(2)). 34 FMSHRC 607, J.A. 17 (emphasis by the judge).²⁰ The judge noted that, aside from the rejected duplication argument, Oak Grove "effectively

²⁰ The judge took note of the fact that, several months before the events at issue here, Oak Grove similarly was confronted with receiving a citation followed by an order for allowing production mining at its mine when the mine's bleeder system had not been examined in its entirety because of water accumulations. In that case, as in this case, Oak Grove argued that the order was duplicative of the citation. Although the Commission affirmed the order, it did not reach the issue of duplicativeness, holding that Oak Grove failed to preserve the issue at hearing before the judge. 34 FMSHRC 606, J.A. 16. See Oak Grove Resources, LLC, 33 FMSHRC 2657, 2363-65 (2011).

* * * conceded the violation." Ibid. Accordingly, the judge affirmed the violation alleged in the order.²¹

The judge also affirmed the inspector's designation of the violation as S&S. 34 FMSHRC 608-14, J.A. 18-24. The judge concluded that, "based upon the particular facts surrounding th[e] violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 34 FMSHRC 608, J.A. 18.

Initially, the judge determined that the inspector's testimony that the water accumulations in the return of the Old Work presented slipping and tripping hazards, although persuasive, was irrelevant to the judge's determination of whether the violation was S&S because Section 75.364(b)(2) was aimed exclusively at assuring adequate ventilation of the Old Works and is not concerned with slipping or tripping hazards. 34 FMSHRC 609-11, J.A. 19-21.

Nonetheless, the judge determined that, regardless of the inspector's legal conclusions regarding why the violation was S&S, the inspector's other testimony regarding the ventilation-related hazards arising from the violation was sufficient to support an S&S finding. 34 FMSHRC 611-14, J.A. 21-24. In

²¹ Aside from its duplicativeness argument, Oak Grove on appeal does not challenge the judge's affirmance of the violation.

particular, the judge credited Inspector McDonald's testimony that the restricted air flow in the vicinity of the Number 4 fan compromised the effectiveness of that fan -- a result that, in turn, could affect the other mine fans and the effectiveness of the ventilation in the Old Works. 34 FMSHRC 611-12, J.A. 21-22. The judge noted that Foreman Miller agreed that monitoring ventilation in the Old Works on a weekly basis was important. 34 FMSHRC 612, J.A. 22. In concluding that the testimony of McDonald and Miller supported an S&S finding, the judge stressed that the Oak Grove Mine is an "ultra-gassy mine," citing the Commission's decision in Oak Grove Resources, LLC, 33 FMSHRC 2657, 2658 (2011). 34 FMSHRC 613, J.A. 23.²²

Finally, the judge affirmed the inspector's designation of the violation as an unwarrantable failure. 34 FMSHRC 615-18, J.A. 25-28. The judge concluded that Oak Grove's conduct in sending miners to re-enter the mine and resume production on March 23, 2010, prior to the conducting of a weekly examination of the return in the Old Works in its entirety constituted aggravated conduct. In so finding, the judge stressed the facts

²² As an "additional observation," the judge noted that, in light of the importance Congress placed on operators performing mandated mine examinations -- preshift, onshift, and weekly examinations -- in enacting the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), the predecessor to the Mine Act, "it would not be unreasonable to view any violation of the [weekly examination] provision as presumptively significant and substantial." 34 FMSHRC 614, J.A. 24.

(1) that Inspector Freeman had on March 9, 2010, issued Oak Grove a citation under Section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging that miners entered the mine without a weekly examination of the Old Works in its entirety having been conducted, in violation of 30 C.F.R. § 75.364(f)(2) (34 FMSHRC 615-16, J.A. 25-26), (2) that mine managers had countersigned weekly examination reports on March 18 and 20, 2010, and were therefore aware of the longstanding water accumulation impediment to Oak Grove's conducting a full weekly examination in the Old Works (34 FMSHRC 615, 617, J.A. 25, 27), and (3) that Oak Grove had been cited seven times in the previous two years for violations of the same mandatory standard, 30 C.F.R. § 75.364(b)(2) (34 FMSHRC 618, J.A. 28).

On April 4, 2012, Oak Grove filed a petition for discretionary review of the judge's decision with the Commission. No two member of the five-member Commission finding that the judge's decision warranted review, the Commission on April 16, 2012, denied review, making the judge's decision the final decision of the Commission. Notice of April 16, 2012, J.A. 30. See 30 U.S.C. §§ 823(d)(1), 823(d)(2)(A)(iii), 823(d)(2)(B); 29 C.F.R. § 2700.70(b).

SUMMARY OF ARGUMENT

This case involves MSHA's issuance of a withdrawal order after Oak Grove re-introduced miners underground at its gassy mine to resume production before a mandatory weekly examination of the return air entry of a mined-out area had been completed. Two weeks earlier, MSHA had issued Oak Grove a citation for permitting miners to re-enter the mine before a mandatory weekly examination of the same area had been completed.

The withdrawal order, issued under 30 C.F.R. § 75.364(b)(2), was not duplicative of the citation, issued under 30 C.F.R. § 75.364(f)(2), because the two enforcement actions were for Oak Grove's failures to conduct mandatory weekly examinations during two separate and discrete weekly periods before allowing its miners to re-enter the mine. Oak Grove's argument that the order was duplicative of the violation because both violations were abated by the same action is without legal foundation and should be rejected.

The violation resulting in the issuance of the order was S&S because it exposed Oak Grove's miners both to slipping and tripping hazards and to the ventilation-related hazards of insufficient breathable oxygen and an explosion. Both kinds of hazards are major concerns of Section 75.364's weekly examination requirement, and the judge erred in finding that the MSHA inspector's testimony relating to the slipping and tripping

hazards was irrelevant to his S&S determination. To the contrary, the inspector's testimony regarding the slipping and tripping hazards and the ventilation hazards provide independent and cumulative bases for the judge's ultimate determination that the violation was S&S. The judge's finding that the violation was S&S based on the ventilation hazards is supported by substantial evidence and should be affirmed.

Finally, Oak Grove's action of sending miners to resume production mining before a weekly examination was performed in its entirety was an unwarrantable failure because three of its managers knew that the operator had been cited two weeks earlier for engaging in similar unlawful conduct, knew that the mine's examination records revealed that weekly examinations had not been completed for a period of several weeks, knew that the mine had been cited seven times for violating the weekly examination requirement in the preceding two years, and knew that no weekly examination had been performed in its entirety as of one day before the order was issued -- but took no steps to ensure that a complete weekly examination had been completed. Because substantial evidence supports the judge's unwarrantable determination, it should be affirmed.

ARGUMENT

I.

STANDARD OF REVIEW

This Court decides legal questions under a de novo standard of review. Secretary of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096, 1099 (D.C. Cir. 1998).

If the meaning of a statute is plain and unambiguous, the Court must "'give effect to the unambiguously expressed intent of Congress.'" Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003); Secretary of Labor on behalf of Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). If the statute is silent or ambiguous with respect to the question presented, the Secretary's interpretation of the provision is owed full deference and is entitled to affirmance as long as it is reasonable. Cannelton, 867 F.2d at 1435. Accord Excel Mining, 334 F.3d at 5. When the Commission agrees with the Secretary's interpretation of a statutory provision, that interpretation should be emphatically deferred to, and the Commission's interpretations of the Mine Act are generally upheld when they accord with the Secretary's interpretations. RAG Cumberland Resources v. FMSHRC, 272 F.3d 590, 596 (D.C. Cir. 2001). "In the statutory scheme of the Mine Act, the

Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a * * * health and safety standard, and is therefore deserving of deference." Excel Mining, 334 F.3d at 6 (internal quotation marks and citations omitted).

The Court reviews factual findings of the Commission and its judges under the substantial evidence standard. Keystone Coal, 151 F.3d at 1099. "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Spirit Airlines, Inc. v. DOT, 687 F.3d 403, 411 (D.C. Cir. 2012) (quoting Kornman v. SEC, 592 F.3d 173, 184 (D.C. Cir. 2010) (internal quotation marks omitted)).

II.

THE JUDGE PROPERLY CONCLUDED THAT THE ORDER
MSHA ISSUED FOR OAK GROVE'S VIOLATION OF
30 C.F.R. § 75.364(b)(2) WAS NOT
DUPLICATIVE OF THE PREVIOUS
CITATION MSHA ISSUED FOR OAK GROVE'S VIOLATION
OF 30 C.F.R. § 75.364(f)(2)

Oak Groves argues that the March 23, 2010, withdrawal order was duplicative of the March 9, 2010, citation, and was therefore invalid. Br. 15-23. Oak Grove's argument is legally incorrect and should be rejected.

A. Applicable Legal Principles

The Commission has considered the question of duplicative enforcement actions in a series of cases. It is settled Commission law that citations and orders are not duplicative if the legal standards cited impose separate and distinct duties on the operator. Cumberland Coal Resources, 28 FMSHRC 545, 553 (2006). The Commission has long recognized that the Mine Act imposes a duty on operators to comply with all mandatory safety and health standards, and does not permit an operator to shield itself from liability for a violation of a standard simply because the operator violated a different but related standard. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981). See also Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 378-79 (1993) (although multiple violations may have emanated from the same events, the citations were not duplicative because the standards cited impose distinct duties upon the operator); Southern Ohio Coal Co., 4 FMSHRC 1459, 1463 (1982) (although multiple violations arose out of a single series of events, the operator committed separate violations).

There has been disagreement over some aspects of the duplicativeness doctrine -- for example, over whether a finding of duplicativeness is supported by the fact that multiple violations can be abated by a single abatement method.

See Spartan Mining Co., 30 FMSHRC 699, 715-19, 728-30 (2008) (evenly divided Commission). There has been no disagreement, however, over the principle that duplicativeness depends on whether the Secretary cites multiple violations on the basis of "one specific act or omission," or on the basis of more than one. Ibid. at 716; Western Fuels-Utah, Inc., 19 FMSHRC 994, 1004 n.12 (1997). The Commission has never found that duplicativeness occurs when the the Secretary cites multiple violations on the basis of more than one specific act or omission.

B. The Order Was Not Duplicative of the Citation Because the Violations Cited Occurred During Two Discrete Periods When Separate Weekly Examinations Were Required

Oak Grove maintains that the sole and determinative issue is whether it was able to abate both the order and the earlier citation with the same action, i.e., dewatering the Old Works to the point where the examiner was finally able to perform an examination of the return air course in its entirety on April 1, 2010. In particular, Oak Grove asserts:

[T]he two enforcement actions were based upon Oak Grove's inability to travel the entries of the 10 South/Old Works in their entirety due to excess water in the area. There were not "different actions" required by Oak Grove as suggested by the ALJ (JA17); rather the action required by Oak Grove was to conduct an examination.

Br. 18-19 (emphasis supplied). Oak Grove conflates the actions necessary for abatement of the two violations with the distinct duties imposed upon the operator by the two standards. Br. 18-23. Because the two violations occurred during two discrete periods of time for which separate weekly examinations were required to be performed by Oak Grove, Oak Grove was not required to conduct "an examination"; Oak Grove was required to conduct two separate and complete weekly examinations if it intended to send miners into the mine during either period (in fact, it unlawfully sent miners into the mine during both periods). Accordingly, the judge's finding that the two violations involved two separate compliance duties (34 FMSHRC 607, J.A. 17) should be affirmed.

In analyzing whether the March 23, 2010, order duplicated the March 9, 2010, citation, the judge focused primarily on the fact that Section 75.364 is entitled "Weekly examination" and requires that examinations under any of its subsections be performed "at least every 7 days." 34 FMSHRC 607, J.A. 17 (emphasis by the judge). The judge reasoned that, because "the interval between the two enforcement actions [in this case] exceeded the 7 day maximum interval between examinations, a new violation arose" when Oak Grove again re-introduced miners into the mine during a different period for which no weekly examination had been completed. Ibid.

Unlike Oak Grove, the judge appreciated that whether two different standards dealing with weekly examinations had each been cited once, or a single standard dealing with weekly examinations had been cited twice, was irrelevant because "the two violations occurred at different points in time." 34 FMSHRC 607, J.A. 17 (quoting Spartan Mining, 30 FMSHRC at 717). Cf. United States v. De La Cruz Suarez, 601 F.3d 1202, 1220 (11th Cir.) (impermissible double-counting of Sentencing Guidelines factors does not occur when factors are applied to acts that are "temporally and spatially separated"), cert. denied, 130 S.Ct. 3532 (2010); United States v. Gibson, 808 F.2d 1011, 1012 (3d Cir. 1987) (applying similar reasoning in double jeopardy analysis). Each event constituted a separate and discrete violation of the standards dealing with weekly examinations, and each involved a separate and discrete compliance duty.

In essence, Oak Grove -- having recently been cited for improperly endangering its miners on March 9, 2010, by having them re-enter the mine before a weekly examination of the return in the Old Works was completed -- is arguing that it should escape sanction for again endangering its miners on March 23, 2010, by directing them to resume production mining before a

weekly examination was completed, and before the original citation was terminated.²³

Oak Grove's argument turns both logic and safety upside down. It is precisely because Oak Grove had recently been cited under Section 75.364(f)(2) for allowing miners to re-enter the mine before a weekly examination could be completed that the operator had a duty of heightened vigilance to ensure that no similar event occurred during future periods when weekly examinations were required -- and why, when it failed to fulfill that duty, it violated Section 75.364(b)(2). The duplicativeness doctrine is meant to protect operators from being cited twice for a single act or omission -- not to shield operators from being cited for an act or omission because they have already been cited for a similar but separate act or omission in the past.²⁴

²³ It is important to appreciate that the abatement time on the citation had been extended past March 23, 2010, because MSHA understood that the mine had been evacuated in response to unlawful gas levels behind the seals. MSHA did not envision that extending the abatement time of the citation could be understood by any responsible and safety-conscious operator under those circumstances to have authorized it to resume mining. The continued existence of high water precluding the completion of mandatory weekly examinations of the return in the Old Works is what had precipitated the operator being cited in the first place.

²⁴ Oak Grove's argument is equivalent to arguing that a haul truck operator cited for operating his vehicle on public roads without headlights during daylight hours, and given ten days to secure such headlights, could reasonably believe he was thereby

III.

THE JUDGE PROPERLY CONCLUDED THAT OAK GROVE'S VIOLATION OF 30 C.F.R. § 75.364(b)(2) WAS S&S

A. Applicable Legal Principles

A violation is S&S as described in Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), if it is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." As the Commission has interpreted the Act, 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." Cement Div., National Gypsum Co., 3 FMSHRC 822, 825 (1981). The test for determining whether a violation is S&S is set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). In Mathies, the Commission held that to establish that a violation is S&S, the Secretary must prove:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard - that is, a measure of danger to

authorized to endanger the public by driving at night without headlights for the next ten days. The officer citing the truck driver would reasonably anticipate that the truck driver would not drive his vehicle at night until after he installed headlights (the need for headlights at night being analogous to the need for a weekly examination before miners may re-enter the mine). If the truck driver chose instead to drive at night without headlights during the ten-day abatement period, he would be subject to a reckless driving charge and the ten-day abatement period would not suffice as a defense.

safety – contributed to by the violation;
(3) a reasonable likelihood that the hazard
contributed to will result in an injury; and
(4) a reasonable likelihood that the injury
in question will be of a reasonably serious
nature.

Mathies, 6 FMSHRC at 3-4 (citing National Gypsum Co., 3 FMSHRC at 825). In Musser Engineering, Inc. and PBS Coals, Inc., 32 FMSHRC 1257, 1280-81 (2010), the Commission made clear that to satisfy the third element of Mathies, the Secretary is not required to "prove a reasonable likelihood that the violation itself will cause injury". Id. Accord Black Beauty Coal Co., __ FMSHRC __, Docket No. LAKE 2008-477, (August 2, 2012) (Slip op. at 9); Cumberland Coal Resources, LP, 33 FMSHRC 2357, 2365-66 (2011), appeal docketed, No. 11-1464 (D.C. Cir. Nov. 29, 2011). Instead, to establish the third element of Mathies, the Secretary is required to prove a reasonable likelihood that the hazard contributed to by the violation will cause injury. Ibid.

As in most S&S disputes, it is the third Mathies element that is in dispute here.

B. Substantial Evidence Supports the Judge's S&S Finding

1. The judge erred in concluding that the slip and trip hazard described by the inspector cannot form the basis of an S&S designation violation under 30 C.F.R. § 364(b)(2), and the evidence supports the inspector's determination

In this case, the judge concluded that "despite the record evidence establishing a significant slipping and tripping

hazard, such conditions cannot form the basis for a 'S&S' finding where a section 75.364(b)(2) violation is alleged, because that is not the focus of that standard."²⁵ 34 FMSHRC 609, 610, J.A. 19, 20. See Br. 32-34, 35. The judge was incorrect.

Section 75.364(b) is titled "Hazardous conditions" and mandates in relevant part that a weekly 'examination for hazardous conditions' be made at certain designated locations, including "in at least one entry of each return air course * * *." 30 C.F.R. § 75.364(b)(2) (emphasis supplied). In that regard, Section 75.364(b)(2) is similar to other examination requirements in 30 C.F.R. Part 75, Subpart D.²⁶ See, e.g., 30 C.F.R. §§ 75.360(b) (during preshift examinations, "the person conducting the [] examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if air is moving in its proper direction"), 75.361 (during supplemental examinations, "a certified person shall

²⁵ On appeal, a party that prevailed below may raise any ground that was raised below. Warren v. District of Columbia, 353 F.3d 36, 38 (D.C. Cir. 2004) (citing cases).

²⁶ Although all of these provisions are set forth in 30 C.F.R. Part 75, Subpart D, which is titled "Ventilation," the examination requirements set forth therein, by their plain language, deal with examining for more than just ventilation hazards. Because ventilation hazards are a primary concern of each examination standard, however, the Secretary chose to set forth all the examination standards just once, and to do so under the umbrella of ventilation standards.

examine the area for hazardous conditions, determine whether the air is travelling in its proper direction and at its normal volume, and test for methane and oxygen deficiency"), 75.362 (during onshift examinations, "[t]he certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction"). Each of those examination requirements refers to hazardous conditions and, separately, also refers to ventilation issues.

None of those sister standards -- each one of which is a part of the overall scheme of mandatory examination requirements for underground coal mines set forth at 30 C.F.R. Part 75, Subpart D -- in any manner limits the "hazards" required to be reported and corrected to ventilation hazards. Although ventilation is a major concern of Section 75.364(b)(2), as it is of its sister examination requirements, miner safety depends on the recognition and correction of all hazards faced by miners who are working in -- or will be working in -- the areas to which the examination requirements apply. The Secretary's interpretation of Section 75.364(b)(2) should be accepted by the Court as consistent with the plain language of the standard or, in the alternative, as a reasonable and safety-promoting interpretation. See Excel Mining, 334 F.3d at 6; Cannelton, 867 F.2d at 1435.

The Commission has recognized that the "hazardous conditions" to be examined for and corrected in weekly examinations include more than ventilation hazards. See, e.g., Lodestar Energy, Inc., 24 FMSHRC 689, 690-91 (2002) (noting with approval credited testimony that hazards addressed by the weekly examination requirement included ventilation and roof fall hazards). Compare Quinland Coals, Inc., 9 FMSHRC 1614, 1619 (1987) (hazards addressed by preshift examination included roof fall hazards).²⁷

With the overall regulatory framework in mind, and with a full understanding that the production miners were working in a different area of the mine and at a significant distance from the Old Works, Inspector McDonald recognized that the slipping and tripping hazards presented by the debris underlying the high water in the Old Works posed a hazard to the two pumper/examiners who worked in the area examining the Old Works and maintaining the numerous pumps being used to dewater the mine. Tr. 82, 105, 106-09, J.A. 52, 57, 58.²⁸ Indeed, it was

²⁷ Oak Grove's own witness, Foreman Miller, testified that it was important to examine "roof conditions" during the weekly examination so that miners do not "get hurt on the way to walking there." Tr. 156-57, J.A. 70.

²⁸ Oak Grove's own witness, Foreman Miller, acknowledged that both pumpers/examiners ("firebosses") worked in the Old Works while production miners were withdrawn from the active workings of the mine. Tr. 158, 176, J.A. 71, 75. See Tr. 105, J.A. 57 (implicit acknowledgment by Oak Grove's counsel). Oak Grove

the slipping and tripping hazards to the pumpers that led the inspector to conclude that the gravity of the violation was high and that two persons would be affected by the violation.

Tr. 105, J.A. 57.²⁹

Accordingly, the judge erred in holding that the inspector's testimony regarding the slipping and tripping hazards -- testimony the judge credited as "anything but speculative on that question" (34 FMSHRC 610, J.A. 20) -- could not be the basis for a finding that the violation was S&S. Having credited that testimony as "persuasive on the issue" (ibid.), the judge should have concluded that the violation cited by Inspector McDonald on March 23, 2010, was S&S because of the slipping and tripping hazards the violation presented.

Oak Grove asserts that the pumper/examiners working in the Old Works were subject only to "speculative" slipping and tripping issues as described by the inspector. Br. 35. The slipping and tripping hazards were anything but "speculative." Not only did Inspector McDonald testify at length, and in detail, regarding the slipping and tripping hazards he

Mining Engineer Shortt testified that management "assigned a pumper fireboss each shift to the [Old Works] * * * every eight hour, seven days a week." Tr. 193, J.A. 79.

²⁹ The Commission has recognized that there is a close relationship between the penalty criterion of gravity and the S&S nature of the underlying violation, and that the same evidence and consideration are relevant to both. See, e.g., Quinland Coals, Inc., 9 FMSHRC 1614, 1622-23 and n.11 (1987).

encountered during his inspection (Tr. 49-50, J.A. 43-44 (tracks), 51, J.A. 44 ("too many stumbling and tripping hazards"), 55-56, J.A. 45 (same), 82, J.A. 52 (same), 106-09, J.A. 58 (same), but Oak Grove's own witness, Foreman Miller, who accompanied the inspector underground on March 23, 2010, also described the tripping hazards presented. Tr. 172, J.A. 74.

2. Substantial evidence also supports the judge's stated basis for finding the violation S&S

The judge noted that, although he considered the inspector's testimony that the primary reason the violation was S&S was the slipping and tripping hazards, he was not legally bound as the factfinder to base his S&S determination on the legal analysis of Inspector McDonald, a non-lawyer and non-jurist, and could instead look to the totality of McDonald's testimony relating to the S&S issue. 34 FMSHRC 611, J.A. 21.³⁰

³⁰ The Secretary submits that the judge's interpretation of Inspector McDonald's testimony relating to the S&S issue overstates the inspector's reliance on slipping and tripping hazards. Although McDonald stated that slipping and tripping hazards were a primary determinative of the S&S nature of the violation (Tr. 82, 106-09, J.A. 52, 58), he also stated that his concern was both with those hazards and with his inability to measure ventilation at the prescribed evaluation points. McDonald testified:

The purpose of conducting these weekly examinations would be that you examine these areas, examine the ventilation on it to make sure that you've still got the proper air in the area to keep the methane swept out of these areas.

The judge found "Inspector McDonald's other statements to be sufficient (i.e., those statements aside from his slipping and sliding concerns)[] regarding his determination that the violation was significant and substantial." 34 FMSHRC 613, J.A. 23. The judge concluded that the inspector's overall testimony established that the hazards created by ventilation restriction from water accumulated in the return of the Old Works, and the compromised function of Number 4 fan, which was necessary to adequately ventilate the return of the Old Works, rendered the violation of Section 75.364(b)(2) S&S. 34 FMSHRC 611-12, J.A. 21-22.

Oak Grove argues that "there was no evidence of ventilation issues to support an S&S finding * * *." Br. 34 (emphasis supplied). On the contrary, Inspector McDonald testified in detail:

Q: What are the dangers associated with not being able to complete the examination at the fans and at the other air measurement places?

A: The dangers of not being able to - because you don't know what your readings - you get these readings from the fan. And if you don't have the proper air reading there, when you know that something has happened to change that reading, that you'd be able to

Tr. 30, J.A. 39. See also Tr. 81, 83-85, J.A, 51, 52. The judge himself acknowledged that the inspector focused both on tripping hazards and on ventilation hazards in concluding that the violation of Section 75.364(b)(2) was S&S. 34 FMSHRC 615-16 n.32, J.A. 25 n.32.

go and look for, and if you aren't able to get to these fans and get these readings on a weekly basis - and, see, that way you make sure that nothing has changed. You could have suck[ed] the bratti[ce] out somewhere and altered the ventilation.

Q: And what are the hazards associated with the ventilation being altered in the Old Works? * * *?

A: Well, this is located right below the longwall gobs. And your long wall gobs, by altering that fan you could actually have low oxygen and high methane drifting from the gob into these areas.

Q. And you wouldn't know it?

A. And you wouldn't know it.

Q. And then if there is high methane and low oxygen drifting down to the Old Works, what's the danger of that? How is that dangerous?

A. You have an explos[ive] level of methane that could be coming out, low O2. I mean, one step in, it's fatal.

Q. How is it fatal?

A. By the oxygen level. It depends on what the oxygen level is. When you get down to 16 percent - and it depends on the person individually as to how they can survive on it. There have been weekly examiners in this state that have walked into low O2 making weekly examinations and died.

Tr. 83-84, J.A. 52. See also Tr. 30-31, J.A. 39 (it is "typical" for methane to build up in even mined-out areas of the mine and of "crucial" importance that that ventilation be

maintained in such areas), 31, J.A. 39 ("high methane levels depletes your oxygen, it gets in the flow, and if the oxygen level gets to a certain level it can cause death"), 67, J.A. 48 (describing the inspector's primary concern: how the effectiveness of the Number 4 fan was compromised by the amount of water in its vicinity, and how, "if you compromise one fan, you're taking away from the other mine fans"), 68, J.A. 48 (describing how the mine pumper/examiners typically work alone and how, if they became injured, others would not know until they were missed at the end of the shift), 77, J.A. 50 (same).

The judge stressed that the inspector's concerns "were not mere conjecture," and that they had to be viewed in light of the well-known fact that the Oak Grove Mine is "ultra-gassy" inasmuch as it liberates "more than a million cubic feet of methane every 24 hours." 34 FMSHRC 613, J.A. 23.

Oak Grove argues that the testimony of Inspector McDonald on which the judge relied in finding the violation S&S was "speculative" because the inspector admitted that he was unable to take air quality and quantity measurements at the Number 4 fan and the fault pump as a result of the water accumulated in the Old Works at the time of his March 23, 2010, inspection. Br. 34-36. In effect, Oak Grove argues that the fact that it permitted so much water to accumulate in the Old Works -- water that McDonald testified compromised the effectiveness of the

Number 4 fan and restricted ventilation through the area of the fault pump -- that the inspector could not take air readings should work to its favor by precluding an S&S determination based on the inspector's testimony. Again, Oak Grove turns both logic and safety upside down. Such an argument would lead to the absurd and safety-defeating result that the more serious the violation committed by the operator, the less possibility that the violation could be designated S&S, because of the increased likelihood that the very measurements required by the standard are rendered impossible by the violation.

In any event, the fact remains that, although accumulated high water prevented Inspector McDonald from reaching certain prescribed evaluation points in order to take air measurements (Tr. 80, J.A. 51), and thus prevented him from being able to state precisely how much the ventilation in the Old Works return entry had been compromised by that high water, the inspector was able to say that, at this gassy mine, any significant compromise of the ventilation system was a threat to miners. See Tr. 67, 80, 83-84, J.A. 48, 51, 52 ("compromised" Number 4 fan likely affected other fans in the mine), 89 (there was "minimal" airflow through the return entry at the fault pump).

Equally important, focusing on whether the inspector was able to specifically quantify the degree of hazard created by Oak Grove's violation at the time of his inspection improperly

ignores the fact that the mining atmosphere undergoes an ever-changing, dynamic process -- the very reason the weekly (and other) examination requirements exist in the first place. Man-made and natural factors (such as mining methods and locations, barometric pressure, and natural earth movements) relate to changes both in the amount of methane introduced into the mine atmosphere and to the ventilation system's ability to deal effectively with mine gases. The real issue is therefore not what the inspector measured at the time of his inspection; it is what could reasonably be anticipated to occur in the face of continued mining under the violative condition. See U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (1984) (in analyzing whether a violation is S&S, the violation must be evaluated in terms of "continued mining operations," not limited to the precise moment the violation was cited). The inspector's testimony was not only sufficient to establish that hazardous conditions existed at the time of his inspection; it also was sufficient to suggest that the violation would continue to present a hazard until it was abated.

Oak Grove attempts to minimize the foregoing concern by arguing that on March 23, 2010, its violation only endangered the two miners working in the Old Works, and did not endanger the majority of the miners who were unlawfully working in the active workings of the mine, a significant distance away.

Br. 35. While Oak Grove may be willing to write off the safety of two of its miners as long as the majority of miners are working in relative safety,³¹ neither the inspector (who was well aware where the active workings were located (Tr. 105, J.A. 57)) nor the judge was willing to do so.

Oak Grove also asserts that Inspector McDonald's order "makes no mention of ventilation." Br. 34. See Ex. G-2, J.A. 117. The inspector, however, not only cited in the order a mandatory standard dealing primarily (though not exclusively) with ventilation concerns, i.e., Section 75.364(b)(2), he also testified as follows:

THE COURT: And the focus of your order, when you cited 364(b)(2), that was focused on the ability to get to a location to make proper readings?

THE WITNESS: That's correct.

THE COURT: Not focused on tripping hazards? Is that fair?

THE WITNESS: That's fair.

³¹ Permeating Oak Grove's brief is the unacceptable assumption that, were the worst to occur in the unexamined Old Works area of the mine, i.e., a massive explosion from accumulated methane in an "ultra-gassy" mine, miners working in the active workings would be unaffected. Although that prediction might prove true, Congress, in enacting the Mine Act, and the Secretary, in promulgating standards under the Act, chose to err on the side of safety. Even a slight possibility that miners in the active workings could be affected by an explosion in the Old Works should have caused Oak Grove to be concerned about protecting all its miners and not just the two miners working in the Old Works.

Tr. 81, J.A. 51. See also Tr. 85, J.A. 52 (McDonald testified that his inability to take the readings formed part of his S&S determination).

Finally, Oak Grove asserts that the judge erred in effectively finding the violation "per se" S&S, rather than properly analyzing the question under the applicable case law. Br. 36-37. The judge did no such thing. Indeed, the judge used six pages of his seven-page S&S analysis to explain why he found Inspector McDonald's testimony sufficient to establish that Oak Grove's violation of Section 75.364(b)(2) was S&S. 34 FMSHRC 608-13, J.A. 18-23. Only on the last page, after setting forth the rationale for his decision, did the judge set forth "some additional observations." 34 FMSHRC 614, J.A. 24. In so doing, and in citing to relevant legislative history demonstrating the importance Congress placed on requiring operators to perform a weekly examination of return air courses "in their entirety" before miners are allowed to enter the mine, the judge opined that "it would not be unreasonable to view any violation of the provision as presumptively significant and substantial." 34 FMSHRC 614, J.A. 24 (emphasis supplied). Whether that opinion is appropriate or inappropriate, it is plainly not an indispensable part of the judge's basis for his S&S finding.

Because substantial evidence shows that the violation of Section 75.364(b)(2) exposed miners both to serious slipping and tripping hazards and to ventilation hazards relating to insufficient oxygen and possible explosion, the Court should affirm the judge's finding that the violation was S&S.

IV.

THE JUDGE PROPERLY CONCLUDED THAT OAK GROVE'S
VIOLATION OF 30 C.F.R. § 75.364(b)(2)
WAS AN UNWARRANTABLE FAILURE

A. Applicable Legal Principles

An "unwarrantable failure" within the meaning of Section 104(d) of the Mine Act, 30 U.S.C. § 814(d), consists of "aggravated conduct constituting more than ordinary negligence * * * [and] is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987). Accord Windsor Coal Co., 21 FMSHRC 997, 1000 (1999); LaFarge Construction Materials, 20 FMSHRC 1140, 1145 (1998). The Commission has held that a number of factors are relevant in determining whether a violation is unwarrantable, including the obviousness of the violation (Windsor Coal, 21 FMSHRC at 1006-07), the degree of danger posed by the violation (Quinland Coal, 10 FMSHRC 705, 709 (1988)), the operator's efforts to abate the violation (Eagle Energy, 23 FMSHRC 829, 836-37 (2001)), whether the operator knew

of the violation (Consolidation Coal Co., 22 FMSHRC 340, 352 (2000)), and whether a supervisor was involved in the violative conduct. Lopke Quarries, Inc., 23 FMSHRC 705, 711 (2001). See also San Juan Coal Co., 29 FMSHRC 125, 128-29 (2007).

B. Substantial Evidence Supports the Judge's Unwarrantable Failure Finding

In finding the violation in this case unwarrantable, the judge relied on evidence establishing that three things - (1) the earlier citation on March 9, 2010, (2) management's review of the Old Works' weekly examination book,³² and (3) the mine's history of being cited for a violation of Section 75.364(b)(2) seven times in the preceding two years -- had placed management on notice that there was a significant impediment preventing the assigned examiners from completing the weekly examination. 34 FMSHRC 615, 618 J.A. 25, 28. On the basis of those three things, the judge determined that Oak Grove engaged in aggravated conduct. Ibid.

Inspector McDonald predicated the unwarrantable designation in the order on the facts that (1) the high water had been entered in the Old Works examination book that had been countersigned by two managers, (2) the adverse conditions in the

³² The judge noted that Mine Foremen Miller and Ingle had countersigned the March 18, 2010, examination record describing the water accumulation in the Old Works. 34 FMSHRC 617, J.A. 27.

Old Works were "open and obvious," (3) Oak Grove had been cited for a violation of Section 75.364(b)(2) seven times in the prior two years, and (4) that mine management "knowingly allowed miners to enter the underground portion of the mine and began to produce coal" without the mandatory evaluation points being made. Ex. G-2, J.A. 117 (order). Regarding the last reason cited by the inspector, Oak Grove Senior Mining Engineer Shortt, to whom Foremen Miller and Ingle reported (Tr. 194-95, J.A. 80), testified that (1) he knew that the Old Works examination book indicated that the area had high water, which had been receding between March 20 and March 23 (Tr. 184-85, 190, 203, J.A. 77, 79, 82), (2) that, on the morning of March 23, 2010, he ordered that miners be sent into the mine to resume production mining even though he knew that the Number 4 fan had still not been examined (Tr. 196-98, J.A. 80-81), (3) that he merely assumed such examination would in fact be conducted before the miners were sent to resume production mining because he ordered the examination to be conducted, and that he ordered the miners back to work "without making sure that the Old Works area had been examined" (Tr. 199-200, J.A. 81), and (4) that neither Foreman Miller nor Foreman Ingle, both of whom were aware that Shortt had ordered that production mining be resumed on March 23 -- and both of whom "had the responsibility to make sure that before production began at the Old Works [the] area had been examined

in its entirety" -- knew whether an examination of the return in the Old Works had been made (Tr. 201, J.A. 81).

Oak Grove asserts that the violation was not an unwarrantable failure because (1) it was impermissible for the judge to consider the March 9, 2010, citation as placing Oak Grove on notice because that citation was "duplicative" of the March 23, 2010, order (Br. 26), (2) the judge erred by failing to consider that only a small part of the mine was affected by the violation (Br. 26), (3) Oak Grove had instituted measures to dewater the Old Works and its examiners had attempted to conduct a weekly examination of the area in its entirety, albeit unsuccessfully (Br. 27), and (4) Mining Engineer Shortt had attempted in "good faith" to get the weekly examination performed in its entirety before miners were sent to resume production mining (Br. 28). None of those rationalizations stand up to scrutiny.

First, for the reasons stated by the judge and discussed above, the March 9, 2010, citation was not duplicative of the March 23, 2010, order. The two enforcement actions do not satisfy the test for duplicativeness.

Second, the number of miners endangered by the hazard created by Oak Grove's failure to conduct the required weekly examination is more relevant to the S&S issue. In any event, as discussed above, the fact that Oak Grove knowingly endangered

"only" two miners, rather than 83 miners (see Ex. G-5, J.A. 134; Tr. 143, J.A. 67), cannot be interpreted as anything less than aggravated conduct. The fact that the operator knowingly endangered some miners cannot be mitigated by the fact it did not endanger more.

Third, as the judge recognized (34 FMSHRC 617-18, J.A. 27-28), in light of the actual knowledge that three mine managers (Shortt, Miller, and Ingle) had of the recent history of water accumulations preventing complete weekly examinations -- and especially in light of the managers' knowledge that such an examination had not been completed just before miners were directed to re-enter the mine -- it was simply irrelevant that Oak Grove had instituted measures (pumping) to address the water accumulation problem. Oak Grove needed to do more. It needed to assure that a weekly examination was conducted in its entirety before allowing miners to re-enter the mine.

Finally, it is insufficient that Senior Mining Engineer Shortt had issued instructions that a complete examination was to be conducted on March 23, 2010, after he was informed that no such examination had occurred on March 22. As a senior manager with knowledge of the recent history of water accumulations preventing such examinations, Shortt was especially duty-bound to assure that a complete examination was performed before miners re-entered the mine. Shortt failed in that duty.

Foremen Miller and Ingle, who were privy to the same information available to Shortt, were likewise under the same duty, and likewise failed in that duty.

Because substantial evidence supports the judge's finding that Oak Grove engaged in aggravated conduct when it sent miners to resume production mining on March 23, 2010, without a weekly examination having been conducted in its entirety, the Court should affirm the judge's finding that Oak Grove's violation of Section 75.364(b)(2) was an unwarrantable failure.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the judge in all respects.

Respectfully submitted,

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2. This Brief for the Secretary of Labor is submitted in searchable PDF digital format. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and has been prepared in a monospaced typeface, 12-point, Courier New Font. The brief has been scanned for viruses using the virus scanning program McAfee Virus Scan Enterprise - version 8.8.0, last updated on November 5, 2012, and according to the program is free of viruses.

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ADDENDUM

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* At the time of the violations cited by MSHA in this case, the attached standards applied. Sections 75.360, 75.361, 75.362 and 75.364 were amended April 6, 2012, and the amended standards became effective August 6, 2012.

30 U.S.C. § 814(a)

§ 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 814(b)

§ 814. Citations and orders

(b) Follow-up inspections; findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)

§ 814. Citations and orders

(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 C.F.R. § 75.360

Effective: Prior August 6, 2012

§ 75.360 Preshift examination at fixed intervals.

(a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

(2) Preshift examinations of areas where pumpers are scheduled to work or travel shall not be required prior to the pumper entering the areas if the pumper is a certified person and the pumper conducts an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, tests for methane and oxygen deficiency, and determines if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous conditions and violations of the mandatory health or safety standards found by the pumper shall be made and retained in accordance with § 75.363 of this part.

(b) The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:

(1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.

(2) Belt conveyors that will be used to transport persons during the oncoming shift and the entries in which these belt conveyors are located.

(3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

(4) Approaches to worked-out areas along intake air courses and at the entries used to carry air into worked-out areas if the intake air passing the approaches is used to ventilate working sections where anyone is scheduled to work during the oncoming shift. The examination of the approaches to the worked-out areas shall be made in the intake air course immediately inby and outby each entry used to carry air into the worked-out area. An examination of the entries used to carry air into the worked-out areas shall be conducted at a point immediately inby the intersection of each entry with the intake air course.

(5) Seals along intake air courses where intake air passes by a seal to ventilate working sections where anyone is scheduled to work during the oncoming shift.

(6)(i) Entries and rooms developed after November 15, 1992, and developed more than 2 crosscuts off an intake air course without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift; and,

(ii) Entries and rooms developed after November 15, 1992, and driven more than 20 feet off an intake air course without a crosscut and without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift.

(7) Areas where trolley wires or trolley feeder wires are to be or will remain energized during the oncoming shift.

(8) High spots along intake air courses where methane is likely to accumulate, if equipment will be operated in the area during the shift.

(9) Underground electrical installations referred to in § 75.340(a), except those pumps listed in § 75.340 (b)(2) through (b)(6), and areas where compressors subject to § 75.344 are installed if the electrical installation or compressor is or will be energized during the shift.

(10) Other areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination.

(11) Preshift examinations shall include examinations to identify violations of the standards listed below:

(i) §§ 75.202(a) and 75.220(a)(1)--roof control;

- (ii) §§ 75.333(h) and 75.370(a)(1)--ventilation, methane;
- (iii) §§ 75.400 and 75.403--accumulations of combustible materials and application of rock dust;
- (iv) § 75.1403--other safeguards, limited to maintenance of travelways along belt conveyors, off track haulage roadways, and track haulage, track switches, and other components for haulage;
- (v) § 75.1722(a)--guarding moving machine parts; and
- (vi) § 75.1731(a)--maintenance of belt conveyor components.

(c) The person conducting the preshift examination shall determine the volume of air entering each of the following areas if anyone is scheduled to work in the areas during the oncoming shift:

(1) In the last open crosscut of each set of entries or rooms on each working section and areas where mechanized mining equipment is being installed or removed. The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses.

(2) On each longwall or shortwall in the intake entry or entries at the intake end of the longwall or shortwall face immediately outby the face and the velocity of air at each end of the face at the locations specified in the approved ventilation plan.

(3) At the intake end of any pillar line--

(i) If a single split of air is used, in the intake entry furthest from the return air course, immediately outby the first open crosscut outby the line of pillars being mined; or

(ii) If a split system is used, in the intake entries of each split immediately inby the split point.

(d) The person conducting the preshift examination shall check the refuge alternative for damage, the integrity of the tamper-evident seal and the mechanisms required to deploy the refuge alternative, and the ready availability of compressed oxygen and air.

(e) The district manager may require the operator to examine other areas of the mine or examine for other hazards and violations of other mandatory health or safety standards found during the preshift examination.

(f) Certification. At each working place examined, the person doing the preshift examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

(g) Recordkeeping. A record of the results of each preshift examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards and their locations found by the examiner during each examination, and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the certified person who made the examination or by a person designated by the operator. If the record is made by someone other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. A record shall also be made by a certified person of the action taken to correct hazardous conditions and violations of mandatory health or safety standards found during the preshift examination. All preshift and corrective action records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

(h) Retention period. Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.

30 C.F.R. § 75.361

Effective: Prior to August 6, 2012

§ 75.361 Supplemental examination.

(a) Except for certified persons conducting examinations required by this subpart, within 3 hours before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine the area for hazardous conditions, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

(b) Certification. At each working place examined, the person making the supplemental examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

30 C.F.R. § 75.362

Effective: Prior to August 6, 2012

§ 75.362 On-shift examination.

(a)(1) At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

(2) A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour of the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan. Measurements of the air velocity and quantity, water pressure and flow rates are not required if continuous monitoring of these controls is used and indicates that the dust controls are functioning properly.

(b) During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

(c) Persons conducting the on-shift examination shall determine at the following locations:

(1) The volume of air in the last open crosscut of each set of entries or rooms on each section and areas where mechanized mining equipment is being installed or removed. The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses.

(2) The volume of air on a longwall or shortwall, including areas where longwall or shortwall equipment is being installed or removed, in the intake entry or entries at the intake end of the longwall or shortwall.

(3) The velocity of air at each end of the longwall or shortwall face at the locations specified in the approved ventilation plan.

(4) The volume of air at the intake end of any pillar line—

(i) Where a single split of air is used in the intake entry furthest from the return air course immediately outby the first open crosscut outby the line of pillars being mined; or

(ii) Where a split system is used in the intake entries of each split immediately inby the split point.

(d)(1) A qualified person shall make tests for methane—

(i) At the start of each shift at each working place before electrically operated equipment is energized; and

(ii) Immediately before equipment is energized, taken into, or operated in a working place; and

(iii) At 20-minute intervals, or more often if required in the approved ventilation plan at specific locations, during the operation of equipment in the working place.

(2) Except as provided for in paragraph (d)(3) of this section, these methane tests shall be made at the face from under permanent roof support, using extendable probes or other acceptable means. When longwall or shortwall mining systems are used, these methane tests shall be made at the shearer, the plow, or the cutting head. When mining has been stopped for more than 20 minutes, methane tests shall be conducted prior to the start up of equipment.

(3) As an alternative method of compliance with paragraph (d)(2) of this section during roof bolting, methane tests may be made by sweeping an area not less than 16 feet inby the last area of permanently supported roof, using a probe or other acceptable means. This method of testing is conditioned on meeting the following requirements:

(i) The roof bolting machine must be equipped with an integral automated temporary roof support (ATRS) system that meets the requirements of 30 CFR 75.209.

(ii) The roof bolting machine must have a permanently mounted, MSHA-approved methane monitor which meets the maintenance and calibration requirements of 30 CFR 75.342(a)(4), the warning signal requirements of 30 CFR 75.342(b), and the automatic de-energization requirements of 30 CFR 75.342(c).

(iii) The methane monitor sensor must be mounted near the inby end and within 18 inches of the longitudinal center of the ATRS support, and positioned at least 12 inches from the roof when the ATRS is fully deployed.

(iv) Manual methane tests must be made at intervals not exceeding 20 minutes. The test may be made either from under permanent roof support or from the roof bolter's work position protected by the deployed ATRS.

(v) Once a methane test is made at the face, all subsequent methane tests in the same area of unsupported roof must also be made at the face, from under permanent roof support, using extendable probes or other acceptable means at intervals not exceeding 20 minutes.

(vi) The district manager may require that the ventilation plan include the minimum air quantity and the position and placement of ventilation controls to be maintained during roof bolting.

(e) If auxiliary fans and tubing are used, they shall be inspected frequently.

(f) During each shift that coal is produced and at intervals not exceeding 4 hours, tests for methane shall be made by a certified person or by an atmospheric monitoring system (AMS) in each return split of air from each working section between the last working place, or longwall or shortwall face, ventilated by that split of air and the junction of the return air split with another air split, seal, or worked-out area. If auxiliary fans and tubing are used, the tests shall be made at a location outby the auxiliary fan discharge.

(g) Certification.

(1) The person conducting the on-shift examination in belt haulage entries shall certify by initials, date, and time that the examination was made. The certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

(2) The certified person directing the on-shift examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan shall certify by initials, date, and time that the examination was made.

30 C.F.R. § 75.364

Effective: Prior to August 6, 2012

§ 75.364 Weekly examination.

(a) *Worked-out areas.*

(1) At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the air is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and leaves the worked-out area. An alternative method of evaluating the ventilation of the area may be approved in the ventilation plan.

(2) At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by § 75.334 as follows:

(i) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in its proper direction shall be made where air enters the worked-out area.

(ii) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in the proper direction shall be made immediately before the air enters a return split of air.

(iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

(iv) In lieu of the requirements of paragraphs (a)(2)(i) and (iii) of this section, an alternative method of evaluation may be specified in the ventilation plan provided the alternative method results in proper evaluation of the effectiveness of the bleeder system.

(b) *Hazardous conditions.* At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:

(1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

(2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

(3) In each longwall or shortwall travelway in its entirety, so that the entire travelway is traveled.

(4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

(5) In each escapeway so that the entire escapeway is traveled.

(6) On each working section not examined under § 75.360(b)(3) during the previous 7 days.

(7) At each water pump not examined during a preshift examination conducted during the previous 7 days.

(c) *Measurements and tests.* At least every 7 days, a certified person shall—

(1) Determine the volume of air entering the main intakes and in each intake split;

(2) Determine the volume of air and test for methane in the last open crosscut in any pair or set of developing entries or rooms, in the return of each split of air immediately before it enters the main returns, and where the air leaves the main returns; and

(3) Test for methane in the return entry nearest each set of seals immediately after the air passes the seals.

(d) Hazardous conditions shall be corrected immediately. If the condition creates an imminent danger, everyone except those persons referred to in § 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.

(e) The weekly examination may be conducted at the same time as the preshift or on-shift examinations.

(f)(1) The weekly examination is not required during any 7 day period in which no one enters any underground area of the mine.

(2) Except for certified persons required to make examinations, no one shall enter any underground area of the mine if a weekly examination has not been completed within the previous 7 days.

(g) *Certification.* The person making the weekly examinations shall certify by initials, date, and the time that the examination was made. Certifications and times shall appear at enough locations to show that the entire area has been examined.

(h) *Recordkeeping.* At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the person making the examination or a person designated by the operator. If made by a person other than the examiner, the examiner shall verify the record by the initials and date by or at the end of the shift for which the examination was made. The record shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

(i) *Retention period.* Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.