

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 9, 2022

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 2021-0084
A.C. No. 36-07230-534033

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

Mine: Bailey Mine

AMENDED DECISION AND ORDER

Appearances: Matthew R. Epstein, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner
Kenneth Polka, CLR, U.S. Department of Labor, MSHA, Mt. Pleasant, Pennsylvania, for the Petitioner
Patrick W. Dennison, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Young

SUMMARY

Citation No. 9204245, 30 C.F.R. § 75.1725(a): Failure to maintain machinery in safe operating condition. A horizontal keeper pin, used to retain a vertical breakaway ("shear") pin, was missing from an operational headgate shield.

Table with 3 columns: Issue, Finding, Page. Rows include Facts, Fact of violation, S&S, Negligence, and Penalty.

Citation No. 9204250, 30 C.F.R. § 75.503: Failure to maintain electrical face equipment in permissible condition. 120-volt area light globes were cracked on an operational continuous miner located in a crosscut.

Table with 3 columns: Issue, Finding, Page. Rows include Facts, Fact of violation, and S&S.

1 This Decision and Order has been amended to correct page numbers in the Summary section found to be inaccurate due to clerical error.

Negligence	Low	p. 18
Penalty	\$355.00	p. 19

**Citation No. 9204257, 30 C.F.R. § 75.1200-1(d): Failure to plot a drill hole that penetrated the coalbed being mined.** Operator had not accurately marked an alleged gas well through which it inadvertently cut.

Facts		p. 19
Fact of violation	Affirmed	p. 20
Negligence	None	p. 21
Penalty	\$100	p. 21

## I. INTRODUCTION

This case is before me upon petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act” or “Act”), 30 U.S.C. § 815(d). At issue are three citations under section 104(a), issued to Respondent, Consol Pennsylvania Coal Company, LLC (“Consol” or “Respondent”).<sup>2</sup> The parties presented testimony and documentary evidence at a video conference hearing on February 1, 2022, and filed post-hearing briefs.

Consol owns and operates the Bailey Mine, located in Greene and Washington counties, Pennsylvania. Jt. Stips. 1, 2; S. Post-Hr’g Br. at 1, 2 (Apr. 13, 2022) (“S. Br.”). The mine is an underground coal mine and is subject to the jurisdiction of the Mine Act and the Commission. Jt. Stips. 3, 4; S. Br. at 1–2. Citation No. 9204245 alleged that Respondent failed to ensure the presence of a keeper pin, risking a gate shield pin becoming a projectile. Citation No. 9204250 alleged that Respondent failed to maintain 120-volt area light globes in permissible condition, risking methane ignition. Citation No. 9204257 alleged that Respondent failed to accurately plot a drill hole on its mine map. For reasons set forth below, I **AFFIRM** all three citations. I **MODIFY** the degree of negligence for Citation No. 9204257 from “low” to “none.”

## II. STANDARDS

### A. Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res., Inc.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). Mine operators are generally strictly liable for mandatory safety standard violations. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011).

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<sup>2</sup> This docket included seven section 104(a) citations. One was bifurcated and consolidated with Docket No. PENN 2021-0117. *See* Order Granting Mot. to Bifurcate and Consolidate at 1 (Jan. 19, 2022). Three were settled by the parties and approved prior to hearing. *See* Decision Approving Partial Settlement at 1–2 (Feb. 4, 2022).

## **B. Gravity**

The likelihood contemplated is that of the expected resulting injury. The severity evaluation assumes the occurrence of the hazard. See *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) (comparing S&S inquiry, which focuses on “the reasonable likelihood of serious injury,” with gravity inquiry, which focuses on “the effect of the hazard *if it occurs*”) (emphasis added).

The Secretary defines a severity assessment of “lost workdays or restricted duty” as “[a]ny injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.” 30 C.F.R. § 100.3(e) (2022).<sup>3</sup>

## **C. Significant and Substantial (“S&S”)**

A violation is properly designated as S&S if, “based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). The four elements required for an S&S finding are expressed as follows:

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

*Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. See *Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) (“A determination of ‘significant and substantial’ must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.”).

## **D. Negligence**

Judges may use a traditional negligence analysis, rather than relying upon Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–02 (Aug. 2015) (citing *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736

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<sup>3</sup> The inspector’s characterization of the gravity of the violation, in conformance with Part 100 for purposes of penalty assessment, is not binding on the Commission, but I recite it here because it may be useful in evaluating the enforcement decisions made by the agency.

F.2d 1147, 1151–52 (7th Cir. 1984)) (“Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way on Commission proceedings.”). The reasonably prudent person standard should be that of one “familiar with the mining industry, the relevant facts, and the protective purposes of the regulation.” *Brody Mining, LLC*, 37 FMSHRC at 1702.

#### **E. Penalty**

The Commission considers the following factors, from Section 110(i) of the Act, in assessing penalties under the Act:

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

30 U.S.C. § 820(i) (2006).

### **III. CITATION NO. 9204245**

#### **A. Factual Findings**

This citation was issued by Inspector Walter Young on March 1, 2021. Ex. GX-1, DOL 001. He assessed the gravity as “reasonably likely,” “lost workdays or restricted duty,” “S&S,” and one person affected. *Id.* He assessed negligence as “low.” *Id.* The description read:

The Operator failed to maintain the company number 3 gate shield located on the 8L Longwall Working Section (006-0 MMU), inby the number 27 crosscut in safe operating condition. The Horizontal Keeper Pin to retain the vertical (breakaway) pin in place was missing. This condition will permit the vertical breakaway pin or pieces of the vertical breakaway pin to become airborne and injury [sic] person when its fails. Multiple persons are in the area when the shearer cuts out at the headgate and during times when the headgate pan line is pushed. The Operator immediately removed the shield from service until the condition could be corrected.

*Id.* While taking a methane reading during a spot inspection, Inspector Young noticed that a horizontal keeper pin was missing from the clevis<sup>4</sup> on a headgate shield. Tr. 31, 32. Gate shields have more tonnage capacity than line shields and exert more than 30 tons of pressure. *Id.*

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<sup>4</sup>The clevis is a housing connected to the pan line of the shield and contains the shear pin where it connects to the relay bar, which moves the pan line. The clevis has two “ears,” or tabs, on the top and the bottom, and there are holes in those tabs, through which the horizontal retaining pins are inserted and then secured with an “r-clip” locked through a hole near the end of the pin, though a bolt may sometimes be used. Tr. 31–33.

at 38, 41. He described the purpose of the pin as keeping the vertical shear pin in place if it breaks as

designed, enabling it to safely fall out the bottom of the clevis. *Id.* at 33, 36; *see* Ex. GX-3, DOL 021. Shear pins break and need to be replaced frequently. Tr. 47.<sup>5</sup>

Inspector Young; Justin Jones, Consol’s former safety inspector; and James Denham, its maintenance supervisor, all acknowledged that the vertical shear pin is intended to break at designated points to protect the whole shield system. *See id.* at 44, 52, 107–08, 142; Ex. GX-2, DOL 020. Inspector Young concluded that a shear pin can work its way up out of the clevis under pressure from shield operation, and without the keeper pin, it can become a projectile. Tr. 33–34, 42. He testified that he personally observed a miner injured—he suffered a face laceration—by such occurrence at a headgate, and that others have been hit without injury. *Id.* at 42.

Messrs. Jones and Denham contend that the shear pins only break under adverse conditions—shield twisted or hung up on a rock, uneven bottoms, or muddy conditions. *Id.* at 109, 144. Neither has seen or heard of a broken shear pin becoming a projectile. *Id.* at 109, 110, 111, 146–47. Neither are aware of any injury reports describing such an occurrence, and Mr. Jones testified that he searched and found none since 2007. *Id.* at 111, 113, 147.

Messrs. Jones and Denham testified, and Inspector Young acknowledged, that miners typically operate these shields manually from two shields away—seven-to-eleven feet from the possible pin hazard. *Id.* at 68, 116, 149. Inspector Young contended that a miner could be struck within eight feet, enabling injuries such as lacerations or eye injuries. *Id.* at 66. He also described the area surrounding gate shields as a transition area—a walkway where many people stand while operating the shields. *Id.* at 42, 45.

## **B. Disposition**

### **1. Violation**

The cited standard states, “Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” 30 C.F.R. § 75.1725(a) (2022). The Secretary argues the machinery was not maintained in safe operating condition because Respondent failed to safely secure the shear pin. S. Br. at 7. Respondent, however, argues the missing keeper pin does not itself make the machinery unsafe. Resp’t’s Post-Hr’g Br. at 5 (Apr. 13, 2022) (“Resp’t Br.”). It refers to several other standards, argued as comparable to the cited standard, to support its assertion. The cited cases, however, are either inapposite or unnecessary to the decision here.

First, Respondent asserts that “more than mere presence of a condition [is required] to constitute a violation despite strict liability.” *Id.* The compared provisions are significantly

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<sup>5</sup> Shear pins are hollow and have indentations, or grooves, near each end to enable them to break as intended. Tr. 31–32, 50–52.

different. Section 75.323 requires ventilation system adjustments or work stoppages when a stated level of methane is present. *See* 30 C.F.R. § 75.323(b)(1)(ii)–(iii) (2022); Resp’t Br. at 5 n.3. The standard here does have a similar mitigating action requirement, but it *also* requires that machinery be maintained in safe operating condition—it does not only require action when an unsafe operating condition exists.<sup>6</sup> The provision and cited cases are, therefore, inapposite to my decision here.

Next, Respondent compares the cited standard with Section 56.11001 to argue that a violation does not occur simply because an unsafe condition exists. *See* Resp’t Br. at 6. First, a Section 56.11001 violation does in fact occur where an unsafe condition exists, and the cited cases do not support contention to the contrary.<sup>7</sup> The authority, if applied to a Section 75.1725 violation, would actually support a violation finding where the Secretary demonstrates an improper method of maintaining machinery—e.g., not having all the components present and serviceable. This authority is, therefore, inapposite to my decision here.

Finally, Respondent cites multiple ALJ decisions on Section 75.202(a) [roof fall protection] to argue that the provision here should be analyzed as a performance-based standard—requiring evaluation of the reasonableness of the operator’s efforts. *See id.* These decisions do not control my decision here. More importantly, they are unnecessary because there is Commission precedent that directly supports the evaluation of “unsafe operating condition” based on a reasonably prudent person standard.

The Commission has established that the standard for a Section 75.1725(a) violation is whether a reasonably prudent person would recognize the hazard, stating:

[I]n deciding whether machinery or equipment is in an unsafe operating condition, the alleged violative condition is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

*Spartan Mining Co.*, 30 FMSHRC at 711 (citing *Ala. By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

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<sup>6</sup> Compare *Spartan Mining Co.*, 30 FMSHRC 699, 711 (Aug. 2008) (“The standard imposes two duties upon an operator: (1) to *maintain machinery and equipment in safe operating condition*, and (2) to remove unsafe equipment from service.”) (emphasis added), with *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1767 (Nov. 1997), and *Amax Coal Co.*, 17 FMSHRC 48, 51 (Jan. 1995) (ALJ) (requiring action upon a finding of excessive methane, not methane prevention itself).

<sup>7</sup> The Commission in *Lopke Quarries, Inc.* required evidence that the asserted safe means of access actually was utilized, not only that it existed in addition to an allegedly unsafe access. 23 FMSHRC 705, 707 (July 2001). The Commission in *Henna Mining Co.* held that an operator “could show that a cited area is not a ‘means of access,’” demonstrating that existence of unsafe access would be adequate to prove a violation. 3 FMSHRC 2045, 2046 (Aug. 2006).

The Commission has affirmed a violation of this standard for missing components. *See Martinka Coal Co.*, 15 FMSHRC 2452, 2456 (Dec. 1993) (affirming a Section 75.1725(a) violation for missing belt rollers where substantial evidence from two witnesses showed the components were missing). The Commission has also found a violation of another unsafe condition standard by comparing it to the identical language in Section 75.1725(a). *See So. Ohio Coal Co.*, 13 FMSHRC 912, 915–16, 916 n.2 (June 1991) (quoting *Ala. By-Prods. Corp.*, 4 FMSHRC at 2129) (“Substantial evidence supports the judge’s finding that the two broken track pads presented an unsafe condition.”).

In *Martinka Coal Co.*, a belt structure was missing rollers, causing the belt to rub against the structure. 15 FMSHRC at 2456. The Commission affirmed the violation because of the presence of combustible accumulations and an ignition source. *Id.* In *So. Ohio Coal Co.*, the Commission found it sufficient that the inspector and operators testified that the condition—broken track pads—was unsafe. 13 FMSHRC at 916. It concluded that “safe operating condition” means that a machine can be used safely by miners. *Id.* at 915.

Therefore, whether missing or broken components are involved, there still must be a danger posed to miners by use of the cited machinery. The Commission recently affirmed two Section 75.1725(a) violations as S&S against this operator where cables were found to be in bad condition and posed a risk of snapping or dropping loads. *Consol Pa. Coal Co.*, 43 FMSHRC at 150–51, 153–54. There, a cable was found to not be connected as designed—merely wrapped around the reel. *Id.* at 150.

Here, the circumstances are sufficiently similar. The headgate shield clevis was missing a component—the horizontal keeper pin. The Secretary has presented credible evidence that the shear pins, which are designed to break, have been projected from the clevis upon breaking. The inspector noted one known injury where he was present and multiple reports from other miners of the hazard occurring without causing injury.

Respondent challenges an unsafe finding by arguing that it is unlikely that the pin would be projected. *See Resp’t Br.* at 6–7. Respondent borrows from its S&S argument a further assertion that an injury is unlikely because of likely miner distance from the hazard and lack of reports about injuries from projectile shear pins. *Id.* at 7–8.

I find that Inspector Young’s testimony is credible and reject the operator’s contentions. Respondent attempted to rebut the noted occurrence with testimony from Mr. Jones that he could not find any such reports going back to 2007. Tr. 111. Inspector Young, however, has been a MSHA inspector since 2006. *Id.* at 24. Thus, the event, which occurred while he was a foreman, *id.* at 61, would have occurred prior to the earliest year checked by Respondent.

In summary, the machinery was missing a component. That component is intended to prevent the shear pin from moving upward out of the clevis. There is credible testimony that shear pins can move upward and can be projected when broken under heavy pressure. I need not address here whether there is a confluence of factors making an injury reasonably likely. It is sufficient for purposes of the violation finding that a dangerous condition could be created by use of the cited machinery with a missing component. I therefore affirm the violation.

## 2. Gravity

### a. Likelihood

The Secretary asserts that the hazard is reasonably likely. I have found that credible evidence exists to support that the hazard—a projectile shear pin—could occur. *See supra* Section III.B.1. I therefore affirm the determination of likelihood in my penalty assessment.

### b. Severity

The Secretary asserts that the severity of the contemplated injury is lost workdays or restricted duty. If an injury-causing hazard—a projectile shear pin contacting a miner—occurred, it could reasonably result in an injury that would cause a miner to miss at least a full day of work. Inspector Young testified to an event that caused a face laceration. Further, I find credible that an object projected with such force could cause a laceration or damage to an eye. I therefore affirm the severity as characterized by the inspector.

### c. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. I agree that only one miner is likely to be contacted by a piece of a shear pin projected from the clevis. I thus affirm the inspector's enumeration of persons who could be affected.

## 3. S&S

I affirm the S&S designation for the following reasons.

### a. Step 1: The violation has been established.

A missing component from machinery, and the attested possibility that the component intended to be controlled by the missing component could cause an injury, is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section III.B.1.

### b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—a shear pin breaking under headgate pressure and becoming a projectile.

*Mathies* Step 2 is a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on “the particular facts surrounding the violation.” *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016).

Here, the standard requires that machinery be maintained in a condition that enables its safe use by miners. *See So. Ohio Coal Co.*, 13 FMSHRC at 915. The hazard the standard aims to prevent is one resulting from the dangerous operation of the cited machinery. The Secretary



provided a plausible specific hazard posed by the missing component. Therefore, the specific hazard here is the shear pin becoming a projectile.

The remaining issue is whether a reasonable likelihood exists that the shear pin will become a projectile under pressure from the headgate. Respondent is correct that the likelihood of hazard should be based upon the “particular facts surrounding the violation.” Resp’t Br. at 9 (citing *Newtown Energy, Inc.*, 38 FMSHRC at 2038). I find that the hazard is reasonably likely to occur.

The Secretary provided credible testimony that shear pins have broken and become projectiles. Regarding particular facts, the standard here was cited on a headgate shield. Inspector Young testified that the observed injury-causing hazard occurred while the miner was pushing out the headgate. Tr. 42.

I acknowledge that multiple Respondent witnesses testified that they have not seen this happen, and more importantly, that if it were to occur, it would require adverse conditions. The Commission recently vacated an S&S finding at Step 2 because exposure to a hazard was not likely. *See Consol Pa. Coal Co.*, Docket No. PENN 2019-0008, 2022 WL 489572, at \*6–7, \*9 (Feb. 10, 2022) (reasoning that contact with a damaged cable would require it to be knocked down from its hanging hooks, but there was no evidence that it could be easily knocked to the floor). This supports a failure at Step 2 if nothing in the record establishes the likelihood that the conditions enabling a projectile pin will occur. That is not the case here, however.

I find that an event that has occurred in the past is reasonably likely to occur, as a matter of logic and common sense. *See United Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (accepting testimony that the mine had experienced methane ignitions in the past to conclude that “evidence supports a finding that there was a reasonable likelihood that the hazard . . . could result in the occurrence of an ignition”); *Consolidation Coal Co.*, 6 FMSHRC 34, 38 (Jan. 1984) (affirming an S&S finding because evidence of bad roof *and testimony of past roof falls* made the occurrence of the hazard reasonably likely) (emphasis added). The inspector has not relied upon conjecture or speculation but on a previous event with which he was personally familiar.

I credit Inspector Young’s testimony that he has witnessed such an occurrence *at a headgate shield*, and that there have been other reports of projectile pins.<sup>8</sup> Also, assuming continued mining operations, it is possible that adverse conditions could present with a keeper pin still absent. Crediting testimony about the occurrence of the hazard in the past gives rise to

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<sup>8</sup> Inspector Young testified about another miner being injured at the Bailey Mine by a piece of shear pin, but he could not remember the miner’s name. Tr. 60–61. He acknowledged that he is only aware of one reportable accident, involving the miner he did name. *Id.* at 63. I find Inspector Young to be a credible witness and credit his account of one other known minor injury caused by the hazard at issue.

the potential that those conditions will converge again in the future. I therefore find that the hazard was reasonably likely at Step 2.<sup>9</sup>

**c. Step 3: It is reasonably likely that projectile shear pin contact with a miner would cause an injury—laceration or eye damage.**

*Mathies* Step 3 asks whether the hazard, not the violation itself, is reasonably likely to cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010). In evaluating the likelihood of injury, judges must assume the occurrence of the hazard. *See Newtown Energy, Inc.*, 38 FMSHRC at 2037.

One only reaches Step 3 of the *Mathies* analysis after determining that the hazard is reasonably likely to occur. I thus assume the occurrence of the hazard—a shear pin breaking under the pressure of the headgate and becoming a projectile. The Secretary provided testimony that such a pin could contact a miner and cause a laceration. This alone is insufficient for a finding that an injury is reasonably likely to occur. Respondent correctly asserts that Commission precedent requires more than a finding that there is a “potential” that an injury “could” occur. Resp’t Br. at 8 (citing *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1677 (Dec. 2010); *Texasgulf Inc.*, 10 FMSHRC 498, 500–01 (Apr. 1988)). As with Step 2, I must evaluate whether an injury is *reasonably* likely to occur based on the surrounding circumstances.

The Secretary is correct that Respondent cannot rely on safety measures or miner precaution—e.g., helmets and protective clothing—to defend at Step 3. *See* S. Br. at 9 (citing *Sec’y of Lab. v. Consolidation Coal Co.*, 895 F.3d 113, 116, 118 (D.C. Cir. 2018)). There must, however, be evidence on the record that miners would be in the area during operations to be injured by the hazard. *See Consol Pa. Coal Co.*, 43 FMSHRC at 152, 153 (demonstrating that miners worked at the site of the cited equipment, and that others worked nearby). The record must also demonstrate that one or more miners would have been at risk of injury from the discrete hazard. *See Peabody Midwest Mining, LLC*, 42 FMSHRC at 387–88 (acknowledging that evidence established that more miners than could be accommodated by refuge chambers would be present on section at shift change, but finding that the absence of evidence of any mining activities or other possible ignition source during shift change negated potential for injury).

The Secretary’s brief did not focus on the possibility that other miners beyond the miner moving the shields could have been exposed to the hazard. *See* S. Br. at 11 (relying mostly on the average distance between the miner using the remote and the shield being moved). However,

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<sup>9</sup> I stress that my decision is narrow and is based on the record facts presented to me at hearing in this case. Those facts, involving the same mine and general circumstances as a prior incident testified to by the inspector, suggest a greater likelihood that shear pins will fail and be ejected at the headgate than in the main mining line. Curiously, this seems to be at variance with a case involving the issue tried shortly before the case at bar. *See Consol Pa. Coal Co., LLC*, 44 FMSHRC 161, 167 (March 2022) (ALJ) (focusing on *reduced* likelihood that pins will be ejected at headgate shields). I have issued my decision based on the record facts as presented to me.

Inspector Young testified in two places about the presence of miners. First, he testified that gate shields are in transition areas that are in a walkway, but he specified in the same sentence that it is “where people stand whenever they push and pull these shields.” Tr. 42. This testimony does not explicitly provide that there are miners other than the shield operator exposed to the hazard.

Inspector Young later explained:

[T]here’s [sic] a whole lot of people exposed, especially at the head gate [sic] when they cut out. People just don’t run off the base and cut out and come back on to the face. The shields are pulled, the guys are standing up in the transition area and underneath the gate shields, and these shields – and then the pan line is pushed, and these guys come in and cut out.

*Id.* at 45. This testimony identifies other miners present during shield operation. Therefore, I assume the presence of both the shield operator and other miners while the shield is operated during continued normal mining operations.

I accept Mr. Denham’s testimony that miners are usually further away—possibly ten meters—while operating gate shields because they are usually moving multiple shields. *Id.* at 149. All witnesses nevertheless testified that miners at this mine generally operate shields manually from two shields away at a distance of seven-to-eleven feet.

Combining the likelihood that a miner would be within the shorter testified distance, the testimony that a projected pin has flown eight feet to injure a miner, and the lack of contrary testimony to the inspector’s claim that other miners are in the area during shield operation, I find that an injury is reasonably likely to occur.

**d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature.**

An inspector’s conclusion that a possible injury is of a reasonably serious nature has been held sufficient for *Mathies* Step 4. *See Consol Pa. Coal Co.*, 43 FMSHRC at 149 (finding it sufficient that the inspector characterized the potential injury as “serious” and noted potential injuries). The Commission also does not require a specific type of injury for it to be considered serious. *See S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013).

Here, the Secretary provided credible, undisputed testimony that the hazard could result in lacerations or eye damage. Respondent focused on the likelihood of the hazard and injury occurring, *see* Resp’t Br. at 11–14, only making conclusory statements that any resulting injury would not be of a serious nature, *see id.* at 13, 14. I find it is reasonably likely that an injury that could include lacerations or eye damage would be reasonably serious.<sup>10</sup>

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<sup>10</sup> Regarding the likelihood that a miner would be wearing a protective “Airstream™” helmet, which includes a face shield, I note that the miner injured in the incident described by Inspector Young had an Airstream™ helmet but had his face shield lifted when he was struck by a piece of a shear pin. Tr. 69.

#### **4. Negligence**

I find that the negligence was properly characterized by the inspector as “low.” Those charged with inspecting the shields are familiar with the mining industry and relevant facts. They should have been familiar with the protective purpose of ensuring the keeper pins were present. I therefore find that a reasonably prudent person in their position should have known about the violative condition and acted to remedy it.

The Secretary argues that this is a result of moderate negligence because the operator knew that these pins commonly break and failed to remedy a violation that it should have assumed. *See* S. Br. at 11–12. Respondent argues that no negligence was demonstrated because no one knew about a broken pin. *See* Resp’t Br. at 14. I disagree with both.

The inspector appropriately noted that these pins consistently break, and that the condition could have occurred between the last inspection and the violation. I credit the inspector’s explanation, and I agree to a limited degree with the Secretary—this is a condition Respondent must work to continually remedy to maintain the machinery in a safe operating condition. I therefore affirm the negligence finding.

#### **5. Penalty**

The Secretary has entered Respondent’s violation history [MSHA Directorate of Assessments, Assessed Violation History Report] into evidence. *See* Ex. GX-12. Its history consists of twenty-nine repeat violations during the inspection period. I have reviewed Respondent’s general and repeat violations, and I find that the Secretary has properly considered Respondent’s violation history in his calculation. I agree that the Secretary has properly evaluated the size of the mine in his calculation. Neither party has stated that payment of this penalty will affect Respondent’s ability to continue in business, and the minimal penalty amounts do not support such a conclusion.

The proposed penalty of \$383.00 was based, in part on the negligence [low] and gravity [reasonably likely] assessed in the citation. I have affirmed the reasoning underlying the Secretary’s assessments. The citation was terminated immediately by installation of a keeper pin. Thus, Respondent demonstrated good faith in achieving rapid compliance following citation. Having affirmed the citation as issued, in consideration of the six factors in Section 110(i) of the Act, I assess a penalty of \$383.00, as proposed by the Secretary.

#### IV. CITATION NO. 9204250

##### A. Factual Findings

This citation was issued by Inspector Young on March 3, 2021. Ex. GX-4, DOL 022. He assessed gravity as “reasonably likely,” “lost workdays or restricted duty,” “S&S,” and one person affected. *Id.* He assessed negligence as “low.” *Id.* The description read:

The Company Number 33, Continuous Miner (s/n- 033K, 2G-4022A) located approximately 130 feet inby the number 39 crosscut, in the number 3 entry on the 9L Working Section (007-0 MMU) was not maintained in permissible condition. Four 120 A.C. volt area light globes were cracked. The 2 area lights inby the side bolters contained one or more cracks which ranged from 1.5 to 3 inches in length, but the body of the globes could not be distorted by hand pressure. The double ended area light (2 globes) directly below the rib bolter on the operators [sic] side were badly damaged by being covered with cardboard and had overheated. These light globes contained numerous, large spider web like [sic] cracks going in multiple directions, one contained a hole measuring 0.25 inches wide by 0.375 inches long. Both of these lights could easily be distorted by hand pressure from the heat damage done to them from them being unnecessarily be [sic] covered with the cardboard. This condition permits the ambient mine atmosphere to freely enter the explosion proof electrical lighting fixtures. Additional confluence of factors are included in citation number 9204251 for the methane monitor not being maintained in proper operating condition and methane being liberated in this working section were used in determining this condition to be Significant and Substantial. The Operator immediately removed the machine from service until the conditions could be corrected. this [sic] mine liberates 10,835,416 cubic feet of methane every 24 hours.

*Id.*, DOL 022–23. He visited the mine for an E02 spot inspection because Bailey Mine liberates more than ten million cubic feet of methane every twenty-four hours, and it was on a five-day Section 103(i) inspection regimen. Tr. 28, 71, 76. Ventilation was working properly that day. *Id.* at 93.

Inspector Young found 120-volt light globes with cracks and holes. *Id.* at 73. He noted that the damage could have occurred since the last required exam several days prior. *Id.* at 82. He simultaneously noted that the section was liberating methane, obtaining a reading of 0.25 percent in the Number 3 Entry. *Id.* at 77. Methane typically increases when the continuous miner begins cutting coal, and the miner was inby a crosscut for operation. *See id.* at 94–95; Ex. GX-4, DOL 022.

He also issued a citation for an improperly calibrated methane monitor on the continuous miner with the violative globes. *See* Tr. 78; Ex. GX-5. The miner was deenergized in a test when the monitor read 1.5 percent. Tr. 88–89, 122–23. Inspector Young testified, and Mr. Jones acknowledged, that the monitor should have read 2.5, but only read 1.7, when the miner shut down. *Id.* at 89, 123.

No witnesses were aware of any electrical faults within the enclosure at the time of inspection. *Id.* at 133, 176. Respondent provided photographic evidence—taken of the continuous miner outside the mine, several months after the citation—that the lights in the cited globes were likely LED rather than fluorescent or incandescent. *Id.* at 164, 166, 174; Ex. R-7, CONSOL 0038, 0041. Inspector Young acknowledged that he did not know what type of lights were in the globes, only that they were 120-volt. Tr. 87.

John Baker, Consol’s electrical engineer, testified that LED lights are more efficient but still radiate heat. *Id.* at 160, 163. He recognized that, while close, the circuit in question is not intrinsically safe per the graph provided by Respondent. *Id.* at 170–72; Ex. R-8, CONSOL 0042. On cross-examination, he admitted that the dot on the graph is on the “explosive side” of the curve, that one cannot predict when an electrical circuit will fail, and that the cited globe was “not mechanically intact”—i.e., not explosion proof. Tr. 174, 176–77.

## **B. Disposition**

### **1. Violation**

The cited standard states, “The operator . . . shall maintain in permissible condition all electric face equipment required by . . . [§] 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.” 30 C.F.R. § 75.503 (2022). Permissibility requirements “ensure that ignitions occurring within enclosures on mining equipment which contain electrical circuits will not escape into the mine atmosphere.” *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1131 (May 2014).

Respondent made only a cursory challenge to the violation finding. *See* Resp’t Br. at 16 (“If a Violation Existed, the Citation was Improperly Designated as S&S . . .”). The Secretary, nevertheless, still has the burden of proving the violation. The Secretary provided credible testimony that cracks and holes existed in the cited globes. Respondent’s electrical engineer acknowledged that such conditions make the globes “not mechanically intact.” He further testified that an enclosure must be mechanically intact in order to be explosion proof.

I credit the testimony of both witnesses and find that the cited enclosures were not mechanically intact. Therefore, they were not explosion proof. Because permissibility is meant to prevent ignitions within enclosures from escaping, these enclosures were not permissible. Finally, the offending continuous miner was taken and used 130 feet inby the described crosscut. I therefore affirm the violation.

### **2. Gravity**

#### **a. Likelihood**

The Secretary asserts that the hazard is reasonably likely. I have found that credible evidence exists to support the potential ignition in a light fixture penetrating a compromised globe. *See supra* Section IV.B.1. I therefore agree with the determination of likelihood.

**b. Severity**

The Secretary characterized the severity of the contemplated injury as lost workdays or restricted duty. The Secretary provided credible testimony that such a hazard could cause external and internal burns, broken bones, or concussions. Tr. 81. I find that such injuries would reasonably result in an injury that would cause a miner to miss at least a full day of work. I therefore affirm the inspector's characterization of severity.

**c. Number of Persons Affected**

The inspector assessed that only one miner would be affected by the hazard. While I think it likely that more than one miner would be working in the vicinity of the offending machine when the hazard was possible, *see id.* (“Usually it’s the *bolters* closest to the facing that take the brunt . . . .”) (emphasis added), I defer to the inspector’s judgment as to the number of persons affected.

**3. S&S**

I affirm the S&S designation for the following reasons.

**a. Step 1: The violation has been established.**

The failure to maintain the mechanical integrity of light fixtures on equipment used in by the cited crosscut is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section IV.B.1.

**b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—ignition of the mine atmosphere.**

A methane ignition outside of the enclosure is the discrete safety hazard against which the standard intended to protect. The reasonable likelihood of this hazard occurring requires two things: the reasonable likelihood that an explosion will occur in the violative enclosure, and the reasonable likelihood that the escape of that explosion will ignite the mine atmosphere. *See Knox Creek Coal Corp. v. Sec’y of Lab.*, 811 F.3d 148, 164 (4th Cir. 2016) (quoting *Texasgulf, Inc.*, 10 FMSHRC at 501) (“When the Commission in *Texasgulf* required the consideration of a “confluence of factors” in making an S & S determination, it was specifically concerned with whether there was ‘a sufficient amount of methane in the atmosphere surrounding the impermissible gaps and ignition sources.’”).

**i. There is sufficient evidence in the record to find that an explosion within the enclosure was reasonably likely.**

The violative light fixture is a 120-volt system. Tr. 75, 87, 174. Even if an LED bulb was present, the circuit would not have been intrinsically safe. *Id.* at 172; Ex. R-8, CONSOL 0042. Electrical circuits do fail without warning, and one cannot predict when that will occur.

Tr. 176, 177. In addition to the poor condition of the globes, there was credible testimony by the inspector that moisture, erosion, vibration, or just age can contribute to a failed circuit that can contribute to an ignition. *Id.* at 75; *see also Knox Creek Coal Corp.*, 36 FMSHRC at 1134 (noting similar conditions and causes for failure that were sufficient for affirming an S&S designation).

The Secretary relied on the fact of violation and that even LED bulbs, if present, were acknowledged to not be intrinsically safe. *See* S. Br. at 12–13. Respondent correctly notes that the reasonable likelihood of an ignition within the light fixture is required, *see* Resp’t Br. at 17, but it fails to provide adequate evidence negating this likelihood. Respondent makes three assertions regarding the light fixture that I reject.

First, that there would have to be a failure in the light fixture on the nonprotected side of the light’s ballast. *Id.* There is sufficient evidence in the record to conclude that the circuit could fail in the normal course of operations. Further, such an argument would essentially negate the danger in any permissibility violation. The purpose of the standard is to prevent the effects of an ignition within an enclosure from reaching the outside atmosphere. A light fixture failure must be assumed to be able to ignite methane that naturally enters the enclosure.

Second, that there was no evidence of electrical issues with the lights. *Id.* at 18. This is similarly refuted by the requirement to assume continued normal mining operations. There is credible testimony from both parties that such circuits can and do fail.

Finally, that the LED lights allegedly present are nearly intrinsically safe—designed to be “near the energy level that could not ignite a methane concentration.” *Id.* Respondent’s own electrical engineer admitted, and the provided graph demonstrated, that even LED lights would not move the circuit to the intrinsically safe side of the line. Though “nearly” intrinsically safe, the evidence supports a conclusion that the lights in question, including LED lights, would provide a potential source for an ignition.

Even if the use of LED bulbs was sufficient to make an ignition unlikely, there is nothing in the record proving that LED bulbs were in fact present at the time of the citation. The picture evidence shows what does appear to be an LED fixture through the globes. Tr. 166; Ex. R-7, CONSOL 0041. That provided picture, however, was taken outside the mine, months after the citation was issued, and after the globes had been replaced. Tr. 174; Ex. R-7, CONSOL 0038, 0041. No witness testified that LED bulbs were present at the time of the citation.

**ii. A preponderance of the evidence establishes that an atmospheric ignition was reasonably likely.**

I have concluded that an ignition within the light fixture is reasonably likely, and the fact of impermissibility would allow such an explosion to escape the enclosure. Bailey Mine is a “gassy” mine that liberates more than ten million cubic feet of methane every twenty-four hours, and the mine and cited section were liberating methane at the time. Tr. 76–77; Ex. GX- 4, DOL 023; *see also Knox Creek Coal Corp.*, 811 F.3d at 164 (recognizing that a mine liberating more



than 500,000 cubic feet of methane or other explosive gases during a twenty-four-hour period was considered “gassy”).

In *Knox Creek Coal Corp.*, the affirmed Commission decision did not disturb the judge’s finding that the designation of a mine as “gassy” was sufficient to find that an ignition was reasonably likely. See 811 F.3d at 154 (recognizing the judge’s finding that “an explosion could escape the enclosures and trigger a larger explosion in the ‘gassy’ mine atmosphere”); 36 FMSHRC at 1131 (“[G]iven the gassy nature of the mine, sudden methane buildups in the explosive range could reasonably be expected to occur.”).

In addition to accepting the possibility of sudden methane buildups as sufficient for S&S, the ALJ’s decision in *Knox Creek* noted that methane accumulations above five percent had previously been detected. Docket No. VA 2010-89-R, 2010 WL 5619977, at \*43 (Dec. 27, 2010) (ALJ). He further accepted testimony that “although methane could accumulate to an excessive range from places such as the floor or the rib[s], usually it came from the face [as] coal was cut.” *Id.* at \*41.

Respondent asserts that the necessary confluence of events was not present. First, it provided testimony that there would have to be sufficient methane accumulation for a sufficiently long time, that it would have to occur quickly enough for the monitor to trip the miner, and that a simultaneous light fixture failure would have to occur. See Tr. 169–70; Resp’t Br. at 17.

I have already addressed the reasonable likelihood of circuit failure, and thus do not accept this contention here. Next, it is true that nothing in the record provides that the explosive level was reached in the cited entry or other entries. See Tr. 76–77, 84–85, 93, 121–22, 124–28; Ex. GX-4, DOL 038–39; Resp’t Br. at 17. However, such accumulation does not need to be shown at or near the time of the violation. Per *Knox Creek*, it is sufficient that the mine is “gassy,” and that buildups within explosive range are reasonably likely to occur.

As the Commission has consistently held, the S&S analysis must assume the continuation of normal mining operations. See *Knox Creek Coal Corp.*, 811 F.3d at 156 (affirming that the judge failed to consider methane accumulation “as [it] would have existed had normal mining operations continued”); see also 36 FMSHRC at 1132 (citing *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 677–78 (Apr. 1987)). In this context, we must assume a constant threat of explosive methane in a gassy mine. I therefore find a reasonable likelihood that methane levels will rise when the miner cuts coal during continued mining operations.

Finally, I also consider that the methane monitor was shown to not be calibrated properly, and that more methane than detected would likely be present before it cut the miner’s power. See Tr. 78, 123; Ex. GX-5. Taken together, there is sufficient evidence on the record to find that an ignition is reasonably likely to occur.

**c. Step 3: It is reasonably likely that ignition of the mine atmosphere would result in injury such as burns, broken bones, or concussions.**

The reasonable likelihood of occurrence of the hazard has been established. Assuming an ignition occurs, I find that it is reasonably likely to result in an injury. An explosion is generally reasonably likely to cause injury—burn or concussive—to nearby miners. The issue, therefore, is whether the record demonstrates that miners will be in vicinity of the hazard.

Respondent makes no specific assertions contesting Step 3; it only states broadly that “the Citation is not reasonably likely to result in a hazard that was reasonably likely to result in injuries of a reasonably serious nature.” Resp’t Br. at 18. The Secretary similarly provides little in support. *See* S. Br. at 13 (arguing that the failure of Respondent to dispute that “an LED bulb runs on 120 volts and is not intrinsically safe” satisfies Step 3). I find this assertion lacking in a Step 3 analysis because it is only relevant to the likelihood of the hazard occurring in Step 2. This nonetheless does not prohibit a finding that the violation meets the requirements for Step 3.

The Secretary provided credible testimony that miners would be working near the violative continuous miner during operation. I already credited his assessment that at least one miner—“bolter[] closest to the facing”—would be injured by an ignition. *See supra* Section IV.B.2.C. With no contrary testimony provided, this is sufficient to find that a miner would be injured if the hazard occurred.

**d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature.**

An inspector’s assessment of an injury as reasonably serious has generally been accepted. *See supra* Section III.B.3.d. Here, the Secretary has provided credible testimony that an ignition of the mine atmosphere could cause burns, broken bones, or concussions to miners, particularly the bolters working near the continuous miner. I find that such injuries are correctly characterized as of a reasonably serious nature.

**4. Negligence**

I find that the negligence was properly assessed as “low.” Those charged with inspecting for permissibility are familiar with the mining industry and relevant facts. They should have been familiar with the protective purpose of ensuring that light fixture housings (globes) are in permissible condition. I therefore find that a reasonably prudent person in their position should have known about the violative condition and acted to remedy it.

The Secretary maintains that this violation was a result of low negligence because the damage could have occurred in the days since the last required electrical exam. S. Br. at 13. Respondent provided no argument against the negligence finding, though it did elicit testimony from Inspector Young that the next required exam could have been completed by the day following the citation. Tr. 90–91; Ex. GX-4, DOL 040.

The inspector appropriately noted that, while a foreman should have seen the lights' condition, the damage could have occurred since the last exam. Tr. 82. I credit the inspector's explanation. I therefore affirm his negligence finding.

## **5. Penalty**

I have previously recognized the Secretary's proper consideration of the operator's business size and ability to continue in business. *See supra* Section III.B.5. These Section 110(i) considerations remain the same here.

Respondent's history of violations is reflected in Exhibit GX-12. Its history consists of twenty-four repeat violations during the inspection period. Accordingly, this factor has already been properly considered and is of no consequence in my assessment.

I affirm that the violation's gravity was properly characterized by the inspector, so I find no reason to impose a higher penalty assessment based on that factor. *See supra* Section IV.B.2–3. Respondent immediately abated the violation by replacing the light fixtures. *See* GX-4, DOL 022. I therefore find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification.

The proposed penalty of \$383.00 was based, in part on the negligence [low] and gravity [reasonably likely] assessed in the citation. I have affirmed the reasoning supporting both determinations. Having affirmed the citation as issued, and considering all of the criteria relevant to this violation, I assess a penalty of \$383.00.

## **V. CITATION NO. 9204257**

### **A. Factual Findings**

This citation was issued by Inspector Young on March 22, 2021. Ex. GX-6, DOL 046. He assessed gravity as “unlikely,” “lost workdays or restricted duty,” non-S&S, and two persons affected. *Id.* He assessed negligence as “low.” *Id.* The description read:

The Operator failed to plot all drill holes which penetrate the coalbed being mined on the 75.1200 map at the Bailey Mine. A [sic] alleged gas well was inadvertently cut through on the 10J Longwall Working Section (039-0 MMU) at the number 118 shield at plus number 25+53 and was not shown to exist on the 75.1200 map.

*Id.* Inspector Young visited the mine upon Respondent's call that it cut through an uncharted gas well. Tr. 179. He issued the citation because the unplotted, intersected well was “a bore hole that penetrated the coal seam.” *Id.* at 184.

The location was not accurately marked on Respondent's mine map. *Id.* at 187. Matthew Ruckle, Consol's project engineer, explained, and Inspector Young acknowledged, that Respondent conducted a diligent search, using available maps and outside contractors to search the surface. *See id.* at 190, 193, 217, 226–27, 229; Ex. R-13, CONSOL 0070–74. The nearest

plotted “did not find” (“DNF”) drill hole, nonetheless, was marked 273 feet away from the actual intersected hole. Tr. 185.

## **B. Disposition**

### **1. Violation**

The cited standard states, “Additional information required to be shown on mine maps under § 75.1200 shall include the following: . . . all drill holes that penetrate the coalbed being mined . . .” 30 C.F.R. § 75.1200-1(d) (2022). Respondent did not contest the fact of violation in its post-hearing brief. *See* Resp’t Br. at 20 n.5 (contesting only the negligence designation because of the recent decision in *Consol Pennsylvania Coal Co.*, 44 FMSHRC at 168, 173, which affirmed a citation for drill hole plotted 125 feet from its actual location).

The Secretary, nevertheless, still has the burden of proving the violation. An operator is liable for a violation of this standard if a drill hole is inaccurately plotted, regardless of the level of fault. *See Musser Eng’g, Inc.*, 32 FMSHRC at 1272 (citing *Spartan Mining Co.*, 30 FMSHRC at 706; *Asarco, Inc.*, 8 FMSHRC 1632, 1634–36 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989)). The Commission in *Musser* affirmed the judge’s finding of violation, reiterating the level of inaccuracy found:

To say that the operator’s map was inaccurate would be an understatement. If the operator’s map were accurate, the [mine] workings would not have been intersected because the [mine] really would have been approximately 450 feet away, as indicated on the operator’s map.

*Id.* at 1270 (citing 28 FMSHRC 699, 706 (July 2006) (ALJ)).

First, I agree with the assessment that this was a drill hole that penetrated the coalbed being mined. Respondent intersected the hole during mining operations; the inspector testified that Respondent “mined past it, and the face opened up,” and that “[t]hey might as well have mined through it.” Tr. 209.

Finally, the Secretary provided credible testimony that the closest plotted suspected gas well was 273 feet from where the operator intersected the hole in question. This is sufficient inaccuracy to sustain a violation. I therefore affirm the citation.

### **2. Gravity**

#### **a. Likelihood**

The Secretary asserts that an injury is unlikely. The inspector assessed ignition as unlikely because legal gas check results were within safe limits. Tr. 186. With no contrary evidence provided, I affirm the inspector’s likelihood finding.

## **b. Severity**

The Secretary provided credible testimony that the ignition or fire hazard, though unlikely, would result in burns, concussions, or broken bones. *Id.* at 190. I find that such injuries would reasonably result in a miner missing at least one full day of work. I therefore affirm the severity found in the citation.

## **c. Number of Persons Affected**

The citation found two miners would be affected by the hazard, noting that two people usually run the shear. *Id.* Respondent provided no contrary testimony. I therefore affirm the number of persons affected.

## **3. Negligence**

I find that negligence was improperly assessed as “low.” Respondent is familiar with the mining industry and relevant facts, and it has explicit familiarity with the protective purpose of the regulation. *See supra* Section V.B.1. Therefore, I find that a reasonably prudent person in Respondent’s position should have known about the violative condition.

Respondent here did not rest its efforts on reviewing old maps that it could not reasonably conclude were accurate indicators of boundaries of previous mine workings. *Contra Musser Eng’g, Inc.*, 32 FMSHRC at 1286 (affirming gross negligence where it was unreasonable for operator to rely on the maps used). Respondent used two third-party contractors—18 Karat, Inc. and Blue Mountain, Inc.—to search for the suspected gas wells. Tr. 226–29. Neither contractor found the holes in question, and they were marked as DNF. *See id.*; Ex. R-14, 15. Inspector Young even acknowledged that Respondent did the best it could to find the suspected wells. Tr. 193.

The Secretary relies on MSHA negligence definitions to argue for low negligence instead of no negligence. He acknowledges that there were “considerable mitigating circumstances,” but that the operator could have known of the violative condition. S. Br. at 14–15; *see also* 30 C.F.R. § 100.3(d) (2022).

An assessment of no negligence is supported, however, under a reasonably prudent person standard specific to miners. The Secretary did not provide testimony regarding further actions Respondent could have taken. I find that Respondent conducted its search using all available means. I therefore reduce the negligence finding from “low” to “none.”

## **4. Penalty**

I have previously recognized the Secretary’s proper consideration of the operator’s business size and ability to continue in business. *See supra* Section III.B.5. These Section 110(i) considerations remain the same here.

Respondent's history of violations is reflected in Exhibit GX-12. Its history consists of only two repeat violations during the inspection period. Accordingly, this factor has already been properly considered and does not significantly affect my assessment.

I affirm the violation's gravity as assessed, so that factor also does not carry additional weight in my penalty assessment. *See supra* Section V.B.2. Respondent immediately abated the violation by updating its mine map. *See* GX-6, DOL 046-47. I therefore find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification.

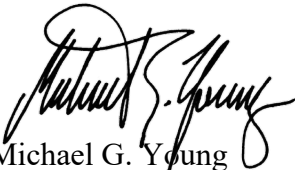
The proposed penalty was based, in part, on the negligence assessed. Because I find that a reduction in negligence is warranted, *see supra* Section V.B.3, I also find that a penalty reduction is appropriate. The proposed penalty was \$125.00, based in part on the Secretary's finding of moderate negligence. Because I find that the operator was not negligent, I assess a penalty of \$100.00.

## VI. CONCLUSION

It is **ORDERED** that Citation Nos. 9204245 and 9204250 be **AFFIRMED** as issued.

It is also **ORDERED** that Citation No. 9204257 be **AFFIRMED** with the assessed gravity, and that the level of negligence be **MODIFIED** from "low" to "none."

Finally, it is **ORDERED** that the Respondent pay the Secretary of Labor the assessed penalty of **\$838.00** within 30 days of the date of this decision.<sup>11</sup>



Michael G. Young  
Administrative Law Judge

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<sup>11</sup> Please pay penalties electronically at [Pay.Gov](https://www.pay.gov/public/form/start/67564508), a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.