

June 2022

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Review Was Granted In The Following Case During The Month of June 2022

Secretary of Labor obo Juan Smitherman v. Warrior Met Coal, LLC, Docket No. SE 2021-0153-D (Judge Moran, February 14, 2022)

Review Was Denied In The Following Cases During The Month of June 2022

Secretary of Labor v. Consol Pennsylvania Coal Company, LLC, Docket No. PENN 2021-0019 (Judge Moran, April 29, 2022)

Secretary of Labor v. GMS Mine Repair, Docket No. WEVA 2021-0431 (Judge Lewis, May 13, 2022)

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 3, 2022

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

v.

IMI AGGREGATES, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2021-0122
A.C. No. 12-02430-533325

Mine: Fall Creek Sand & Gravel

DECISION AND ORDER

Appearances: Lydia J. Faklis, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner,

Brad Wales, Safety Manager, IMI Aggregates, LLC, Greenfield, Indiana, for the Respondent,

Donna V. Pryor, Esq., Husch Blackwell LLP, Denver, Colorado, for the Respondent.¹

Before: Judge Sullivan

I. INTRODUCTION

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), on behalf of the Mine Safety and Health Administration (“MSHA”), against IMI Aggregates, LLC (“IMI” or “Respondent”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary seeks civil penalties totaling \$298.00 for two alleged violations of mandatory safety standards.

The parties presented testimony and documentary evidence during a virtual hearing via Zoom for Government on February 23, 2022. MSHA Inspector Jeffrey Cook testified on behalf

¹ Mr. Wales conducted direct and cross-examination of witnesses on the Respondent’s behalf during the hearing in this case, while Ms. Pryor submitted Respondent’s post-hearing brief.

of the Secretary and IMI maintenance employee Evan Young testified on behalf of the Respondent. Both parties subsequently filed post-hearing briefs on April 6, 2022.²

II. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

IMI owns and operates crushed stone, sand, and gravel mines throughout Indiana, including the Fall Creek Sand & Gravel Mine (“Fall Creek”) in Fortville. On March 3, 2021, MSHA Inspector Jeffrey Cook conducted an EO-1 regular inspection of Fall Creek. He had previously inspected Fall Creek, though it had been several years since it was part of his assigned rotation of mines. Tr. 20, 60-61.

Inspector Cook began his inspection at Fall Creek’s meeting shop area and continued to the haul roads, conveyors, plant, mobile equipment, and review of the mine’s paperwork. During his inspection, Inspector Cook issued two citations. Tr. 20-22. The first, Citation No. 9443972, was issued because a stretch of roadway lacked a berm of at least mid-axle height of the largest vehicle that traveled on it. This alleged violation of 30 C.F.R. § 56.9300(b) was designated as significant and substantial (S&S). To abate the citation, IMI built a berm approximately 125 feet long on the edge of the relevant roadway before the end of the day. Tr. 33-34; Sec’y Ex. 3, 5.

The other issued citation, No. 9443973, was for inadequate guarding of a tail pulley and feed drive chain, in violation of 30 C.F.R. § 56.14107(a). Tr. 21-22, Sec’y Ex. 11, at 1. During his follow-up inspection on March 15, 2021, Inspector Cook issued Order No. 9443990 for IMI’s failure to abate the original citation, in violation of section 104(b) of the Mine Act, 30 U.S.C. § 814(b). On March 29, MSHA Inspector Barry Hayes terminated both the citation and order after concluding that IMI had abated the violation by placing appropriate guards on the tail pulley and feed drive chain. Tr. 59.

IMI contested the two penalties that MSHA assessed in connection with the violations, \$159.00 and \$139.00 respectively, and this case was docketed before the Commission. At issue are the two alleged violations and the associated findings, including whether the first violation was S&S, and if one or more of the violations is upheld, the penalty or penalties to be assessed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 9443972 for Alleged Violation of Section 56.9300

1. Fact of Violation

At Fall Creek, mobile equipment travels between the mine shop and either the plant or hopper on a particular roadway. At hearing, Inspector Cook testified that on the day of inspection, he saw pickup trucks, service trucks, and a Caterpillar 980G wheel loader travel on the roadway. The Caterpillar 980G wheel loader, the largest vehicle to utilize the roadway, was described as a “rubber-tired piece of equipment . . . used to move sand and dirt and rock . . . to

² In this decision, the joint stipulations, transcript, Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Sec’y Ex. #,” and “Resp’t Ex. #” respectively.

load into the hopper to process.” Tr. 22, 24-25. Inspector Cook also noted that the Caterpillar 980G was not carrying a load and was, in his estimation, moving five to ten miles per hour. Tr. 61-62.

While on the roadway, Inspector Cook noticed a section that he suspected should have a berm at its edge, given his view of the drop-off from the edge. Tr. 22; Sec’y Ex. 1 (providing a photo of section’s edge taken by inspector). At hearing, Inspector Cook defined a “berm” as “an earthen structure that helps redirect equipment away from an overturn hazard.” Tr. 23. He subsequently issued Citation No. 9443972, alleging that IMI violated section 56.9300(b), in that:

The Main Shop elevated roadway was not bermed to mid-axle height of the mobile equipment (Caterpillar 980G) that travels the roadway. The area not adequately bermed was approximately 125 feet long with a drop[-]off of approximately 32 inches. This condition exposes miners to lost workday type injuries. There were several tire tracks along the edge of the unbermed roadway at the time of the inspection. Mine and [m]ine management have continuous access to this condition daily under continued mining operations.

Sec’y Ex. 5.

In designating the citation as S&S, Inspector Cook indicated that the Caterpillar 980G’s travel along the edge of the unbermed roadway was reasonably likely to cause an injury that could be reasonably expected to result in lost workdays or restricted duty of one miner, the equipment’s operator. Sec’y Ex. 11, at 1. Moreover, Inspector Cook categorized the violation as resulting from IMI’s moderate negligence. *Id.*

2. Analysis

Section 56.9300 provides in relevant part:

(a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

30 C.F.R. § 56.9300. “Berm” is defined to “mean[] a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle’s passage over the bank of the roadway.” 30 C.F.R. § 56.2.

It is undisputed that the cited section of roadway did not have a berm, and, therefore, it logically follows that a berm greater than or equal to the 34-inch mid-axle height of the Caterpillar 980G was not present either.³ Tr. 82; Sec’y Ex. 1.

The Secretary contends that the drop-off from the roadway was of a sufficient depth or grade under section 56.9300(a) for the requirements of section 56.9300(b) to apply. Sec’y Br. 14-15. In contrast, IMI maintains that a berm was *not* required along the section of roadway in question because, from its edge, there was not “a drop-off of sufficient grade or depth to cause” any vehicle that traveled over it, including the Caterpillar 980G, “to overturn or endanger persons in equipment.” In its post-hearing brief, IMI further argued that the Secretary’s evidence submitted at hearing supporting the citation was insufficient to establish that a berm was required under section 56.9300(a). Resp’t Br. 5.

In *Lakeview Rock Prod., Inc.*, 33 FMSHRC 2885, 2989 (Dec. 2011), the Commission held that an evidentiary hearing should decide any unresolved dispute over whether “a drop-off exist[ed] of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” *Id.* Further, the Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has defined the Secretary’s burden as a preponderance of the evidence, “which simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The evidence presented on the cited section of roadway’s depth and grade of the drop-off, and the danger it posed to vehicles operating on the roadway, is as follows. At hearing, Inspector Cook described the slope away from the edge as being “steep,” and the drop-off to be “fairly abrupt” before it “smooth[ed] out into a ditch” three to four feet away. Tr. 30-31, 68-69; Sec’y Ex. 1 (providing a picture of the edge, including the ditch). Inspector Cook explained that he positioned himself over the edge of the road and, holding a tape measure vertically, “eyeballed” the depth of the ditch to be 32 inches at that point along the road. He attributed his reluctance to go farther down the side due to the brush, muddy conditions, and his consequential inability to know what was in the ditch. Tr. 30-32, 62; Sec’y Ex. 1.1 & Resp’t Ex. 3.1 (including annotations to show where the inspector stood along the edge). To measure the length of the roadway, that he believed was subject to the drop-off, he “stepped off” 125 feet. Tr. 29-32, 62.

Inspector Cook also testified to evidence of tire tracks in the mud along the edge (clearly shown in Sec’y Ex. 1), and how driving close to the edge of an inadequately bermed road could cause a vehicle to fall off the road either in whole or in part. He explained that, once one or more of its wheels goes over the edge of the cited road and onto a muddy slope of the observed depth and grade, a truck the size and design of the Caterpillar 980G may overturn. Tr. 36-39, 62-63.

³ It is also undisputed that the largest vehicle that utilizes the cited section of roadway is the Caterpillar 980G, and that it has a mid-axle height of 34 inches. *Jt. Stip.* 16; Tr. 28; Sec’y Ex. 2.1. This measurement provided the basis under section 56.9300(b) for the height of the berm that IMI built to abate the citation. Tr. 90; Sec’y Ex. 3.

Evan Young, a maintenance mechanic who has worked at Fall Creek for four years, accompanied Inspector Cook during the inspection. Tr. 81, 86. In his testimony, Young estimated that only 40 to 50 feet of the roadway at issue had a drop-off from its edge. Tr. 88-89. While Young confirmed that the inspector had attempted to measure the drop-off, he did not agree that it was 32 inches in depth. Tr. 82. Not having measured the drop-off himself, Young stated “if I had to guess, it was roughly two feet.” He also described the area beyond the roadway’s edge as “not straight up and down,” but rather “a slope.” Tr. 82-83. Additionally, Young testified that while it was possible for a Caterpillar 980G to overtravel the edge of the roadway, in his opinion, the vehicle would not “roll” over once on the slope. Tr. 79, 87.

I credit Inspector Cook over Young on the question of whether a Caterpillar 980G would overturn in this instance if it overtraveled the bermless side of IMI’s roadway, for a few reasons. First, the inspector is significantly more experienced in these matters than Young. At the time of hearing, Inspector Cook had approximately seven years of experience as a MSHA metal and nonmetal mine inspector in addition to having worked 11 years for a coal mine operator earlier in his career. Along with initial MSHA authorized representative training, Inspector Cook has partaken in annual trainings as well. He testified to conducting approximately 80 mine inspections per year, including regular inspections, spot inspections, health inspections, hazard inspections, among others. Tr. 18-20, 60. With his background, Inspector Cook made at least some effort to measure the drop-off alongside the cited section of IMI’s roadway. In contrast, Young disputed the measurement based strictly on his forced “guess” regarding the depth of the drop-off. Tr. 30-32, 62, 82-83.

As far as the grade and slope of the drop-off, the two witnesses’ accounts did not appreciably differ. While Young described the drop-off as not “straight up and down by any means,” there is no record evidence that only such drop-offs could result in a vehicle overturning off a roadway’s edge. MSHA updated its safety standards pertaining to loading, hauling, dumping, machinery, and equipment in 1988, after an increase in machinery and equipment-related injuries. *See* Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496, 32500 (Aug. 25, 1988). Included in the revised standards was an update to then-section 56/57.9022, now section 56/57.9300, titled “Berms or guardrails.” By MSHA’s calculation, 90 fatalities had occurred across a 15-year period in instances in which a berm could have minimized the seriousness of mine roadway accidents. The rule adopted imposed berm or guardrail requirements when the drop-off is “of a *sufficient* grade *or* depth” to result in a vehicle overturning or otherwise endangering persons in the vehicle. 30 C.F.R. § 56.9300(a) (emphases added).

Young’s opinion that no vehicle, including the Caterpillar 980G, would roll over after overtraveling the cited roadway section was based on his experience as both a mechanic and a miner. Tr. 83. However, he did not reference any specific experience of a vehicle remaining upright in such an overtraveling scenario. In contrast, Inspector Cook testified to witnessing the aftermath of a vehicle overtraveling a road’s edge that lacked a berm. In that instance, he recounted that a truck with an estimated 16-inch mid-axle height had overturned when it went off a roadway with a nine-inch drop-off. Tr. 37-38.

In arguing that the citation should be vacated, IMI cites *Knife River Corp., N.W.*, 32 FMSHRC 912, 915-16 (July 2010) (ALJ), where a Commission Judge found that the Secretary did not prove that the drop-off at issue was of sufficient depth or grade to lead to a vehicle overturning. Resp't Br. at 6. Significantly, that case did not involve a standard mine roadway missing an adequate berm or guardrail, but rather an elevated scale on which vehicles would stop to be weighed. The question was whether, on the far side of the 9-inch high "rubrail" built into the scale at its edge, there was a drop-off of sufficient depth or grade to result in a vehicle overturning in the event of overtravel.

In *Knife River*, the Judge vacated the citation because the Secretary failed to provide a sufficient explanation of what would occur in such an event—finding the Secretary's testifying authority in the case to be "silent on information regarding how the height or grade of the scales considering all relevant factors such as their width, size of the trucks and the like would trigger" section 56.9300(a). *Id.* at 915. Given the lack of evidence of what would occur to a truck had the rubrail not prevented it from going over the edge of the scale, the Judge refused to draw inferences on her own from the photographs of the scales that the Secretary introduced. *Id.* at 915-16.

Here, I have reviewed the photograph Inspector Cook took of the roadway section at issue. Sec'y Ex. 1. As the inspector admitted, the photograph is not nearly as clear and accurate as one would wish. Tr. 66. Shadows and brush somewhat obscure the details of the depth and grade of the drop-off. However, under the circumstances, the photograph provides sufficient additional support for Inspector Cook's conclusion that there was a distinct risk that once a Caterpillar 980G's wheel or wheels overtraveled the muddy edge of the roadway, the vehicle would overturn. The grade and depth of the roadside drop-off shown in the photograph is generally consistent with the inspector's testimony on the subject. Tr. 38-39.

Accordingly, I do not find that *Knife River*, a case involving an elevated scale, rubrail, and drop-off, anywhere near analogous to the muddy roadway and drop-off presented in this case. The Secretary has carried his burden of proof with respect to the violation of section 56.9300 and the citation is affirmed.⁴

3. S&S and Gravity of the Violation

A violation is 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

⁴ Throughout the proceeding, IMI mentioned the undisputed fact that the section of relevant roadway did not have a berm during previous MSHA inspections, including prior ones conducted by Inspector Cook, and yet no citation had ever been issued. Jt. Stip. 15; Tr. 82; Resp't Br. at 3. However, by this point it is axiomatic that the Secretary cannot be estopped from enforcing a regulation against an operator simply because the operator had not been cited for violating the regulation in the past. *See, e.g., Cactus Canyon Quarries, Inc. v. Sec'y of Labor*, 953 F.3d 790, 793 (D.C. Cir. 2020). This of course includes the authority to enforce section 56.9300. *See Palmer Coking Coal Co.*, 22 FMSHRC 887, 890 (July 2000) (ALJ) ("[o]perator is in no worse position than if MSHA had cited the condition five years ago. It simply would have had to correct the condition and pay the civil penalty at that time.").

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)). In *Mathies*, the four elements or steps required for an S&S finding were expressed as follows:

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

Id. at 3-4 (footnote omitted).

More recently, the Commission restated *Mathies* Step 2 in terms of finding that “the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).⁵ Notably, an S&S determination is based on the facts existing at the time of citation issuance and assumes normal mining operations will continue. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012) (“[t]he [S&S] evaluation is made in consideration of the length of time that the violative [berm] condition existed prior to the citation and the time it would have existed if normal mining operations had continued.”).

In its post-hearing brief, IMI did not take separate issue with the S&S designation. However, because IMI’s evidence was relevant to some of the *Mathies* elements, I will analyze whether the Secretary met his burden of proving that the section 56.9300 violation is S&S.

a. *Mathies* Step 1 & Step 2

Step 1 of the Commission’s S&S analysis is satisfied above, as noted in my conclusion that the bermless section of IMI roadway constituted a violation. As for Step 2, the hazard posed by IMI’s failure to provide the berm—as required by the standard—is that a vehicle will overtravel the edge of the road, and become, in whole or part, subject to the 32-inch drop-off and slope down into the immediately adjacent ditch. *See Black Beauty*, 34 FMSHRC at 1741 (noting that MSHA berm standards anticipate danger of “loss of vehicle control near the edge of” an elevated roadway). As Inspector Cook explained, a berm maintains safety by redirecting equipment back into the roadway in the event of the equipment operator “hav[ing] a health issue, [being] distracted, lots of things can happen.” Tr. 38.⁶

⁵ As shown herein it makes no difference which version of Step 2 is applied in this case. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148-49 & n.6 (Apr. 2021).

⁶ In its Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, MSHA explains that, when a roadway berm is required, it must be of at least the greatest mid-axle height of the equipment using the road to “(1) ensure under-carriage contact with the restraint, (2) alert the equipment operator of the hazardous situation, (3) moderate the force of the equipment, (4) provide corrective action, and (5) assist the operator in regaining control of the equipment.” 53 Fed. Reg. at 32501.

At hearing, IMI hardly disputed that, absent an adequate berm on the pertinent roadway section, a vehicle, including the Caterpillar 980G, could go off the road. For example, Young admitted that any vehicle using that section of roadway “can drive off there, they could have drove off it” Furthermore, he specifically agreed with the “possibility” that a Caterpillar 980G could overtravel. Tr. 87.

In fact, the Secretary’s evidence raised the likelihood of vehicular overtravel beyond a “possibility” to a “reasonable likelihood.” Here, IMI’s operations included numerous vehicles using the road in question for two-way traffic each day, including the Caterpillar 980G, which Young estimated travels on the roadway four times a day. Tr. 24, 87-88. Significantly, this two-way traffic pattern apparently necessitated vehicular travel up to the very edge of the unbermed section of roadway, as evidenced by Inspector Cook’s photograph of tire tracks. Tr. 36; Sec’y Ex. 1. Given this evidence, I conclude that over time, without a berm to prevent vehicular overtravel, such was bound to occur. *See LRock Indus.*, 39 FMSHRC 1429, 1434 (July 2017) (ALJ) (finding that absent a berm, “overtravelling . . . was reasonably likely to occur, given that there was frequent traffic in the area and tire tracks relatively close to the dropoff.”).

As for the consequences of a Caterpillar 980G falling off the roadway in such a fashion, the berm standard, by its terms, goes much of the way towards establishing Step 2 of the *Mathies* analysis. A berm is only required under section 56.9300(a) when overtravel could take a vehicle into a “drop-off . . . of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” I have already credited Inspector Cook over maintenance mechanic Young on the question of whether an IMI vehicle overtraveling the edge of the pertinent roadway would result in a rollover, given the established slope and drop-off. Thus, Step 2 is satisfied as well.

b. *Mathies* Step 3 & Step 4

At hearing, there was a dispute over what injuries would likely occur in the event of a rollover as well as the nature of the injuries. I thus examine whether Steps 3 and 4 of the S&S test have been established.

Inspector Cook testified that if a Caterpillar 980G were to overturn off a roadway, the miner-operator could expect to suffer cuts, contusions, sprains, and strains which may result in lost workdays. Moreover, Inspector Cook categorized those injuries as serious in nature. Tr. 39. In contrast, Young disputed that overtravel would result in a rollover and further contested that a rollover of “[Caterpillar 980G] loader or haul truck or that sort of stuff” would result in any injury to the equipment operator. He based his opinion on the “safety belts and all the rollover protection” in the vehicle, as well as the roadway’s height. Tr. 89.

Inspector Cook was not as expansive in his explanation as he could have been regarding the consequences of a vehicular rollover in this instance. *Cf. Acha Const., LLC*, 38 FMSHRC 3025, 3032-33 (Dec. 2016) (ALJ) (detailing testimony on injuries reasonably likely to result from lack of required berm). However, based on his much greater experience in these matters, including his familiarity with the consequences of vehicular rollover, I credit him over Young

and find that there was both a reasonable likelihood that equipment rollover would result in an injury and that there was a reasonable likelihood that an injury suffered would be of a reasonably serious nature. *See Wolf Run Mining Co.*, 36 FMSHRC 1951, 1958-59 (Aug. 2014) (“not[ing] that an inspector’s judgment is an important element in an S&S determination” as part of *Mathies* Step 3 and under Step 4 crediting inspector’s testimony regarding the severity of injuries that had resulted to miner in a similar situation); *see also Consol Pa. Coal Co.*, 43 FMSHRC at 149.

Moreover, even though a Caterpillar 980G may be equipped with rollover protection and seatbelts, redundant safety measures are not to be considered in determining whether a violation is S&S. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *see, e.g., Acha*, 38 FMSHRC at 3032 (determining berm standard violation to be S&S after refusing to consider equipment’s rollover protection and seatbelts because they were redundant safety measures).

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. Therefore, I conclude that Citation No. 9443972 was appropriately designated as S&S. For the same reasons, I affirm Inspector Cook’s gravity designation as reasonably likely to result in lost workdays/restricted duty for the equipment operator.

4. Negligence

The Commission “may evaluate negligence from the starting point of a traditional negligence analysis.” *Brody Mining*, 37 FMSHRC at 1702. This analysis asks whether an operator has met “the requisite standard of care—a standard of care that is high under the Mine Act.” *Id.* Considerations include “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulations.” *Id.*; *see also A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). The Commission has explained that an ALJ “is not limited to an evaluation of allegedly ‘mitigating’ circumstances” and should consider the “totality of the circumstances holistically.” *Id.*; *see also* 30 C.F.R. § 100.3(d) (stating that operators must be “on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.”).

As previously mentioned, various types of equipment traveled the roadway multiple times a day, every day at Fall Creek. Tr. 40, 88. The Caterpillar 980G, specifically, traveled the roadway at least four times a day. Tr. 88. Moreover, the lack of a berm was obvious, as seen in Inspector Cook’s photographs of the roadway. *See* Sec’y Ex. 1, 1.1. Inspector Cook also documented in his notes that Brad Wales, IMI’s safety manager, stated that Young oversaw the area and should have recognized the hazard associated with not having a berm. Sec’y Ex. 6 (“Safety mgr. stated Evan was in charge of the area and should have recognized the hazard.”); *see also* Tr. 40 (“[Wales] said that [foreman] should have recognized the hazard.”). Given that the roadway lacked a berm for at least 45 feet and IMI’s own acknowledgement that it should have recognized the hazard, I affirm the level of negligence as moderate.

B. Citation No. 9443973 for Alleged Violation of Section 56.14107(a)

1. Fact of Violation

Continuing his inspection, Cook observed a hopper discharge conveyor (*hereinafter* “conveyor”), which he described is used to take “material from the hopper . . . to another part of the mine, to the plant.” Tr. 42. Inspector Cook noted that the conveyor beneath the hopper was surrounded by cattle gates, one on the left-hand side, one on the right-hand side, and one on the front side. On one of the gates was a sign that said, “Danger Falling Material” and a padlock. Tr. 41, 52-53; Sec’y Ex. 7, 7.1; Jt. Stip. 18.

Below the conveyor was a feed drive chain and tail pulley. It is undisputed that neither was individually guarded. Tr. 44, 91; Sec’y Ex. 7.1, 9.1, 10.1. At hearing, Young testified that there are 20 to 30 other tail pulleys and like machinery components at Fall Creek, all of which were individually guarded, and had been since he started working there. Tr. 92-94.

Due to the lack of individual guarding, Inspector Cook issued another 104(a) Citation, No. 9443973, which alleged:

The tail pulley on the Hopper Discharge conveyor under the feed hopper was not guarded to prevent contact. The drive chain for the feed conveyor under the hopper was not guarded to prevent contact. There were cattle gates placed around the base of the hopper structure indicating area guarding but did not prevent access to the rotating machine parts. This condition exposes miners to permanently disabling injury hazards.

Sec’y Ex. 11.

Inspector Cook designated the citation as a non-S&S violation of 30 C.F.R. § 56.14107(a) that was unlikely to cause an injury but could be reasonably expected to result in a permanently disabling injury had one occurred, which would affect one miner, and was a result of IMI’s moderate negligence. Sec’y Ex. 11.

2. Analysis

Section 56.14017(a) provides that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.” 30 C.F.R. § 56.14017(a). It is undisputed that both the feed drive chain and tail pulley constitute “moving machine parts” under section 56.14107(a). *See Moline Consumers Co.*, 15 FMSHRC 1954, 1959-60 (Sept. 1993) (ALJ) (“standard is obviously intended to protect individuals from moving component parts rather than the machine itself.”).

In adopting section 56.14107(a), MSHA explained that it revised existing standards to “clarif[y] that the objective is to prevent contact with [hazardous moving] machine parts[,]” and that “[t]he guard must enclose the moving parts to the extent necessary to achieve this objective.”

Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 Fed. Reg. 32496, 32509 (Aug. 25, 1988). Consequently, a Court interpreting the standard has held that “[b]oth the regulation and [this] explanation clearly require guards around moving parts,” and “[w]hen the meaning of a regulatory provision is clear on its face, the regulation must be enforced in accordance with its plain meaning.” *Mainline Rock & Ballast, Inc., v. Sec’y of Labor*, 693 F.3d 1181, 1185 (10th Cir. 2012) (quoting *Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1080 (10th Cir. 1998)).

To prove a violation of section 56.14107(a), the Secretary must show that an unguarded moving machine part “can cause injury.” The Commission has interpreted a similar guarding standard to require proof of “a reasonable possibility of contact and injury.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2096 (Sept. 1984); *see also Nelson Quarries, Inc.*, 36 FMSRHC 3143, 3146 (Dec. 2014) (ALJ) (interpreting section 56.14107(a) to require proof of reasonable possibility of injury). Here, there is no dispute that contact with either the tail pulley or the drive chain while in motion can cause injury.⁷

At issue is whether the feed drive chain and tail pulley were properly guarded to prevent injury as required by section 56.14107(a). The Secretary contends that both the feed drive chain and tail pulley were not properly guarded because, even with the cattle gates and padlock, the moving machine parts were still accessible to miners who may need to enter the hazardous area near the exposed moving machine parts. Sec’y Prehrg. Rep. 5; Sec’y Br. 24-27. IMI, on the other hand, argues that it did not violate section 56.14107(a) because the tail pulley was sufficiently guarded by location, miners were unable to access the area without permission, and would not do so when the machinery was operating. Resp’t Prehrg. Rep. 4; Resp’t Br. 7-9.

⁷ After observing the unguarded components, Inspector Cook concluded that a permanently disabling injury could have occurred if a miner encountered the machine parts while in motion. The inspector specified that permanently disabling entanglements, which cause amputations, cuts, and contusions, could occur because of the unguarded moving machine parts. He reiterated how dangerous such hazards can be and referenced a fatality that occurred two months prior because of an unguarded tail pulley. Tr. 44, 54-55; Sec’y Ex. 11. Young agreed with this assessment of the type of injuries that may result if a miner were to contact the unguarded moving machinery. Tr. 91.

Moreover, the application of safety standards does not require proof that the equipment at issue was operating at the time of the inspection. Here, both witnesses testified as to whether, in their opinion, the conveyor had been in use recently. Inspector Cook determined that the conveyor was recently used when he inspected the machinery based on the condition of the conveyor belt, describing it as clean and without rust on the rollers. Conversely, Young did not say that the conveyor ran recently, but rather that IMI was not running the machine at the time of inspection. Tr. 54, 94. I need not decide between these partially conflicting accounts. *See Mid-Continent Coal & Coke Co.*, 3 FMSHRC 2502, 2504 (1981) (holding that a temporary interruption in mining activities in preparation for further mining and production did not suspend regulatory requirements); *Crimson Stone v. FMSHRC*, 198 F. Appx. 846, 850 (11th Cir. 2006) (finding that the inspector did not have to catch the dry plant conveyor operating with its guard torn off to justify a citation for the violation).

In deciding whether to affirm or vacate the citation, I must first address whether IMI miners could complete their duties while remaining outside the cattle gates, thus establishing the cattle gates as adequate guarding, or whether there was any need for miners to get inside the gates and closer to the conveyor and its otherwise unguarded feed drive chain and tail pulley. Regarding a miner's need to enter the enclosure to conduct maintenance, neither Inspector Cook nor Young were clear in their testimony. In response to my question on how often a miner would go inside the cattle gates, Young stated flatly "[n]ever." However, he then qualified that answer with his explanation that "[a]ll of our grease lines and everything . . . they're routed and attached to the cattle panel on the left-hand side. . . . [T]hat you can access by the cattle gate." Tr. 94.

Inspector Cook initially testified that a miner would need to enter the cattle gates to be close to the tail pulley and feed drive chain to grease and otherwise maintain them. Tr. 46-49; Sec'y Ex. 8.1, 9.1. He later stated, however, that contact with the moving machine parts was unlikely, "[b]ecause of the extended grease lines and the cattle gates being there," and that he had seen no footprint evidence of miners having been there. Tr. 55. He nevertheless continued to maintain that a miner could enter the enclosure to conduct maintenance on the moving machine parts. Tr. 56.

However, I need not resolve the issue of whether maintaining the machinery would ever necessitate entry into the enclosure, because Young conceded that miners would at a minimum need to enter it for another maintenance responsibility—to clean up falling debris from the conveyor. Tr. 95; Sec'y Ex. 7.1 (providing photo of cattle gates that includes "Danger Falling Material" signage). Contact with unguarded moving machine parts while cleaning around the machinery has been recognized as a danger that guarding standards are designed to protect against. *See, e.g., Dix River Stone Inc.*, 29 FMSHRC 186, 202 (Sept. 2016) (ALJ). Significantly, Inspector Cook explicitly testified to his familiarity with a fatality that resulted from a miner shoveling around an unguarded tail pulley as part of his maintenance duties. Tr. 65.

IMI maintains that, under applicable MSHA guidance, the cattle gates nevertheless provided sufficient "area" guarding of conveyor components when miners were cleaning up debris. Resp't Br. at 7-8; Resp't Ex. 5, at 28 (U.S. Dep't of Labor, MSHA, MSHA's Guide to Equipment Guarding (Rev. 2004)). IMI relies on the gates, padlock, and testimony that miners were trained to follow IMI's policy of not entering the gates without (1) prior permission; and (2) before doing so, locking and tagging out the power supply to the conveyor, located nearby, so that the conveyor and its components could not run. Resp't Br. at 8-9; Tr. 64, 85, 90, 95.

The Secretary contends that such facts and operator policies are insufficient to establish compliance with section 56.14107(a). Drawing on his experience, Inspector Cook explained how a miner might not take the time to shut down the plant, but rather could run into the area without doing so to quickly perform an assigned task. Tr. 55-56. The inspector opined that, as of the date of his inspection, a miner could have easily climbed over the cattle gates and been in position to contact the unguarded tail pulley and drive chain. Specifically, Inspector Cook stated that a miner could climb over the cattle gates on the left side and front side of the conveyor and could also crawl under the cattle gate on the right side. Tr. 52-53; Sec'y Ex. 7, 7.1. While Young disagreed that a miner would be able to fit under the right-side cattle gate, he agreed that a miner

could climb over one of the gates, albeit in violation of IMI rules and the training it provides its miners. Tr. 90-91.

I find the foregoing evidence sufficient to establish a violation of section 56.14107(a) under reviewing court and Commission precedent. When analyzing the reasonable possibility of injury from unguarded moving parts, the Commission has long considered “*all relevant* exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct.” *Thompson Bros.*, 6 FMSHRC at 2096-97 (emphasis added). While the scenario outlined by the inspector here may be one that would be out of the ordinary, it is by no means so inconceivable as to take it out of the purview of the standard. *See id.* at 2096 (holding the guarding standard to protect against “contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.”); *see also Mainline*, 693 F.3d at 1186 (ratifying Commission’s approach in *Thompson* and using it to interpret section 56.14107(a)).

Acknowledging the Commission’s stated concern regarding all possible “vagaries of human conduct” and that “momentary inattention or ordinary human carelessness” must be protected against, Commission Judges, in deciding whether a guarding standard has been violated, have refused to presume that miners will always follow operator rules and protocols, including lock and tag out policies. *See, e.g., Climax Molybdenum Co.*, 38 FMSHRC 2453, 2460 (Sept. 2016) (ALJ) (rejecting lock and tag out policy as relevant consideration because “[e]ven a skilled employee may suffer a lapse of inattentiveness, either from fatigue or environmental distractions, and enter the area without first shutting down” equipment) (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)); *Dix River Stone Inc.*, 29 FMSHRC at 203 (rejecting evidence on miners always following lock and tag out policy because “the history of mining is replete with injuries and fatalities which occurred when previous practices that ‘always’ were implemented, were not.”); *Teichert Aggregates*, 39 FMSHRC 1098, 1101 (May 2017) (ALJ) (“pulley guarding needed to account for the unlikely event of a miner entering the area without following [lock and tag] out policy.”).⁸

While not binding Commission precedent, I find the reasoning in these cases persuasive and apply it to this case and its similar facts. Consequently, despite the evidence on miner adherence to IMI’s policies, such as on locking and tagging out power supplies and keeping the cattle gates locked, I conclude that there is a possibility that those policies would not prevent a miner from entering the enclosure and contacting moving machine parts.

Similarly, the cattle gates were not a sufficient physical deterrent under the standard. *See Yapple Creek Sand & Gravel*, 11 FMSHRC 1471 (Aug. 1989) (ALJ) (holding that a gate four to five feet from an unguarded drive chain assembly on a hopper feeder conveyor belt did not satisfy section 56.14107). Young conceded that, even when the gates were padlocked, a miner could enter the enclosure by climbing over one of them, given its height. Tr. 90-91. Thus, his

⁸ *See also Calco Inc.*, 15 FMSHRC 480, 484 (Mar. 1993) (ALJ) (refusing to consider lock and tag out policy, even though it was “uncontrovert[ibly] . . . always follow[ed]” because guarding standard does not recognize any such policy as an exception); *Nelson Quarries*, 36 FMSRHC at 3146 (taking lock and tag out policy into account only in finding section 56.14107(a) violation not to be S&S).

testimony contradicts Respondent's post-hearing brief that characterizes the area in question as "inaccessible." See Resp't Br. at 9 (citing *Melgaard Constr. Co.*, 26 FMSHRC 720, 726 (Aug. 2004) (ALJ)).

Commission Judges have held that applicable standards require moving machine parts to be guarded in locations that are climbing-accessible. See, e.g., *Brown Bros. Sand Co.*, 17 FMSHRC 578, 581 (Apr. 1985) (ALJ). Consequently, a barrier that can be easily defeated by climbing over it is not recognized as sufficient guarding under MSHA standards. See *Teichert*, 39 FMSHRC at 1101 (finding a guarding violation where climbing over or through handrail would expose miner to moving machine parts). According to the MSHA guidance document IMI submitted at hearing and relied heavily upon in its brief, barriers must be "difficult to defeat" and "prevent entry of a miner into an area containing moving machine parts" to be considered adequate "area guarding." Resp't Ex. 5, at 28. I find that was not the case with the cattle gates around the conveyor at the time IMI was cited for violating section 56.14107(a) and affirm the citation.⁹

3. Gravity

Inspector Cook designated the citation as "unlikely" to cause an injury, given the extended grease lines, positioning of cattle gates, and lack of footprints near the conveyor. Tr. 55. If an injury did occur, Inspector Cook found that it could result in "one" miner suffering a "permanently disabling" injury. Sec'y Ex. 11; Tr. 54-55. Because the citation is marked as "unlikely," it is not considered an S&S violation.

Inspector Cook, given his experience, provided credible testimony that contact with an unguarded feed drive chain and tail pulley could result in entanglement hazards and result in amputations, cuts, and appendages. Tr. 18, 44. Inspector Cook specifically recalled a fatality two months prior during another inspection of an unguarded tail pulley. Tr. 18, 44. He noted that if an injury were to occur, it would likely impact one miner who would be performing maintenance. Tr. 65. Moreover, Young testified that there was no guard directly over the tail pulley or feed drive and admitted that if a miner were to get caught in either of the moving machine parts while conducting maintenance, he or she could experience a permanently disabling injury including amputated fingers, serious lacerations, and broken bones. Tr. 92.

Given the facts above, I affirm the assessed likelihood, severity, and number of persons affected.

4. Negligence

⁹ As with the berm violation, IMI argues that the citation should be vacated because previous MSHA inspections had not resulted in a citation for a guarding violation with respect to the conveyor. Tr. 86; Resp't Br. at 8. The court in *Mainline* disposed of this contention, stating "MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. . . . 'Those who deal with the [g]overnment are expected to know the law and may not rely on the conduct of government agents contrary to the law.'" 693 F.3d at 1187 (quoting *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984)).

In his determination, Inspector Cook found that IMI was moderately negligent because other tail pulleys around the mine were adequately guarded and that this particular tail pulley could have been readily guarded as well. Tr. 56. He also explained that while IMI took efforts to put up cattle gates, a padlock, and a sign, such efforts were insufficient. Tr. 56. During the testimony of IMI's only witness, Young stated that, aside from the tail pulley and drive chain at issue, a lot of other pulleys at the mine *were* properly guarded, estimating the number to be about 20 to 30. Tr. 93.

It is plausible that a reasonably prudent person familiar with the mining industry under the same circumstances, would have placed individual guards on the tail pulley and drive chain to protect miners from the moving machine parts, just as IMI did on approximately 20-30 other tail pulleys and drive chains elsewhere at the plant. Moreover, because the tail pulley and drive chain at issue were visibly unguarded, as noted by both Inspector Cook and Young, it is evident that IMI was aware that the components at issue were not guarded separately.

Considering the totality of the circumstances, I find that the inspector was correct in finding that IMI was moderately negligent.

IV. PENALTY

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

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

30 U.S.C. § 820(i).

In the fifteen months preceding the issuance of Citation Nos. 9443972 and 9443973, MSHA issued seven violations to Fall Creek. *See* MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (last visited June 1, 2022). IMI, a relatively small operator, agreed in conjunction with the Secretary that the proposed penalty would not affect its ability to continue in business. Jt. Stip. 8.

A. Citation No. 9443972

For Citation No. 9443972, the Secretary proposed a penalty of \$159.00. I determined IMI's negligence to be moderate. *See* discussion *supra* Part III.A.4. I also determined the gravity of the violation to be S&S, to affect one person, and to be reasonably likely to cause a lost workdays/restricted duty-type injury. *See* discussion *supra* Part III.A.3. Moreover, IMI demonstrated good faith by building a berm that was higher than 34 inches on the same day that

it was cited. *See* Sec’y Ex. 3; Tr. 33, 90. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$159.00 for Citation No. 9443972.

B. Citation No. 9443973

For Citation No. 9443973, the Secretary proposed a penalty of \$139.00. I determined IMI’s negligence was moderate. *See* discussion *supra* Part III.B.4. I also determined the gravity of the violation to be non-S&S, to affect one person, to have an unlikely likelihood of injury, and if occurred, to result in a permanently disabling injury. *See* discussion *supra* Part III.B.3. After receiving the citation, IMI maintained that the cattle gates constituted sufficient guarding and did *not* remedy the issue, neither on the day as the initial inspection nor by the time of the subsequent inspection on March 15, 2021. This prompted MSHA to issue a 104(b) order for IMI’s failure to timely abate the alleged violation. Consequently, credit is not due to the Respondent for its abatement efforts with respect to the guarding violation. Tr. 56-57. Considering the six criteria set forth under section 110(i) of the Mine Act in conjunction with the relevant facts, I hereby assess a penalty of \$139.00 for Citation No. 9443973.

V. CONCLUSION AND ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 9443972 and 9443973 are **AFFIRMED**. Respondent IMI Aggregates, LLC, is hereby **ORDERED** to pay a penalty of **\$298.00** within 30 days of the date of this decision.¹⁰ Accordingly, this case is **DISMISSED**.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

¹⁰ Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 8, 2022

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

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

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

Mine: Bailey Mine

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.

Facts		p. 4 (Slip Op.)
Fact of violation	Affirmed	p. 5
S&S	Affirmed	p. 8
Negligence	Low	p. 11
Penalty	\$383.00	p. 12

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.

Facts		p. 12
Fact of violation	Affirmed	p. 13
S&S	Affirmed	p. 14

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

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. 19
Negligence	None	p. 20
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”).¹ 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).

¹ 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).²

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

² 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 clevis³ on a headgate shield. Tr. 31, 32. Gate shields

³ 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.

have more tonnage capacity than line shields and exert more than 30 tons of pressure. *Id.* 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. 47.⁴

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

⁴ 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.⁵ 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.⁶ 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.

⁵ 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).

⁶ 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).

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

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 of 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.⁷ 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

⁷ 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 2.⁸

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

⁸ 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.

the average distance between the miner using the remote and the shield being moved). However, 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.⁹

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.

⁹ 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.

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.¹⁰

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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¹⁰ Please pay penalties electronically at [Pay.Gov](https://www.pay.gov), a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2022

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

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

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

Mine: Bailey Mine

AMENDED DECISION AND ORDER¹

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.

Facts		p. 4 (Slip Op.)
Fact of violation	Affirmed	p. 5
S&S	Affirmed	p. 8
Negligence	Low	p. 12
Penalty	\$383.00	p. 12

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.

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

Facts		p. 13
Fact of violation	Affirmed	p. 14
S&S	Affirmed	p. 15
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”).² 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

² 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)*.

F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011).

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).³

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.”).

³ 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.

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 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 clevis⁴ 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.* 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. 47.⁵

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

⁴ 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.

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

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 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.⁶ 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.⁷ 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:

⁶ 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).

⁷ 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).

[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)).

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.⁸ 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 the potential that those conditions will converge again in the future. I therefore find that the hazard was reasonably likely at Step 2.⁹

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

⁸ 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.

⁹ 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.

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, 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.¹⁰

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.

¹⁰ 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.

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); *Youghiogeny & 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.¹¹

/s/ Michael G. Young
Michael G. Young
Administrative Law Judge

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of ALVARO SALDIVAR,
Complainant,

DISCRIMINATION PROCEEDING

Docket No. WEST 2021-0265-DM
MSHA Case No. WE MD 21-06

v.

GRIMES ROCK INC,
Respondent.

Mine: Grimes Rock Inc
Mine ID: 04-05432

DECISION AND ORDER

Appearances: Karla Malagon and Jessica Flores, Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California, for the Complainant

Mark Pachowicz, Pachowicz & Goldenring PLC, Ventura, California,
for the Respondent

Before: Judge Miller

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”) on behalf of Alvaro Saldivar against Grimes Rock Inc. (“Respondent”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act” or “Act”). Mr. Saldivar alleges that he was terminated for making safety complaints that are protected under the Mine Act. Both parties presented witnesses and evidence at the hearing that took place from January 25-27, 2022 and subsequently briefed the Court on issues of fact and law. For the reasons outlined below, I find that the Secretary has failed to prove a violation of section 105(c) of the Mine Act.

I. FINDINGS OF FACT

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses’ demeanors and vocal intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness’s testimony should not be deemed a failure to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

Grimes Rock operates a small sand and gravel mine located in Fillmore, California. This surface mine falls under the jurisdiction of the Mine Act, and its miners are covered by the Act's protections. *See* Jt. Stip. ¶ 1; 30 U.S.C. § 803. Alvaro Saldivar worked at Grimes Rock during two separate periods of employment. Grimes Rock first employed Saldivar as a welder in 2019. Jt. Stip. ¶ 7. Then, Grimes Rock re-hired Saldivar on October 5, 2020, and he continued working at the mine until he was terminated on January 15, 2021. Jt. Stip. ¶ 6. Saldivar's second stint of employment at Grimes Rock is the focus of the present discrimination proceeding.

Grimes Rock is owned by Russell Cochran and is managed by Ernesto Melendez, who oversees all operations at the mine. Melendez made the decision to rehire Saldivar in October 2020, motivated in part by Saldivar's high quality of work during his first term of employment. Tr. 389. Melendez testified that while there was no welder position available, he recognized the need for consistent servicing of the mine's mobile equipment, and he hired Saldivar to fill the role of "lube guy." Tr. 387.

The parties dispute certain details about Saldivar's precise title and role at Grimes Rock during the second period of his employment—Saldivar claims he was rehired as a "lube service technician and as an equipment operator" rather than a "lube guy"—but both sides largely agree as to what his duties were. Tr. 34. Grimes Rock rehired Saldivar to operate a lube truck that would carry oil and other automotive fluids around the mine and service its mobile equipment. However, at the time of Saldivar's rehiring, the lube truck had not yet been acquired, and so Saldivar was asked to help with other jobs around the mine. Tr. 36, 388. He was tasked with operating a water truck to assist with dust control, as well as operating a motor grader to help flatten and grade the roads at the mine. Tr. 36, 388. Management also asked Saldivar to service mobile equipment in the absence of the lube truck. Both sides agree that plant manager Rene Garcia and plant supervisor Aureliano Ruiz oversaw Saldivar's work, in addition to Melendez. Jt. Stip. ¶¶ 15,16.

A. Saldivar's training at Grimes Rock

Saldivar's training upon returning to Grimes Rock began with a text message. On October 5, 2020, Ernesto Melendez texted Saldivar a link to an MSHA training video. *See* Sec'y Ex. 19. Melendez testified that he sent a link to the virtual training instead of conducting an in-person training because Grimes Rock offices were closed due to the COVID-19 pandemic. Tr. 391. On October 6, Saldivar signed and dated a certificate of training indicating that he completed the video training. Resp. Ex. E. Saldivar signed a similar form confirming additional training the next day. Both forms indicate that the type of training received was "New Miner" training. Resp. Ex. E.

Saldivar began operating the Peterbilt water truck and motor grader within the first few weeks of returning to Grimes Rock. He testified that he was asked to operate these pieces of equipment before he was trained on them. Tr. 36-38. Saldivar said at hearing that he operated the equipment for one month without training, and that he requested training for this equipment in his preoperational inspection forms. Tr. 96, 100. Eventually, Grimes Rock enlisted electrician Vic Lester to train Saldivar on the water truck and motor grader. Saldivar characterized the training on the water truck as a "360 walk around" and described the training on the motor grader as "improper." Tr. 98, 100. Vic Lester testified that water truck training involved the two men

entering the cab, reviewing the controls, and then allowing Saldivar to operate the truck while Lester sat in the passenger seat. Tr. 610. Saldivar disputed this. Tr. 168. Lester also testified that he trained Saldivar on the motor grader by showing him the equipment, getting in the cab together, instructing him on how to operate the handles and levers to control the blade, and reviewing what to watch for while operating the grader. Tr. 613. Lester's testimony was corroborated by Melendez and Garcia, who testified that they witnessed Lester and Saldivar operating the equipment together. Tr. 396, 401, 465. Ruiz testified that Saldivar told him that he had been trained by Lester. Tr. 511. No information regarding the timing of the training is contained in the record.

Within the first few weeks of returning to Grimes Rock, Saldivar was also asked to begin servicing mobile equipment at the mine. This task included replenishing the fuel, checking the fluids, greasing the pinpoints, and performing other routine service on equipment such as the excavators, bulldozers, front loaders, and a backhoe at the mine. Tr. 38-39. Saldivar claimed that Grimes Rock only provided instruction on servicing the mobile equipment *after* he complained about the lack of training on his preoperational inspection forms. Tr. 96. Jordan Van Wie from Quinn Company led a training session that Saldivar described as a "360 walk around" of the equipment and a basic demonstration on how to "check fluids." Tr. 96, 101. Van Wie, a certified instructor of equipment maintenance, testified that he spent two or three hours showing miners the basic service techniques on four different pieces of equipment. Van Wie did not say if the training was before or after Saldivar made a complaint. Tr. 676, 679-80.

On occasion, Saldivar would have to move mobile equipment to the location where the grease and fluids were kept in order to service the equipment. According to Saldivar, he was directly ordered to move the equipment in this manner. Tr. 40. Saldivar testified that he was not trained on how to operate the heavy equipment, such as the backhoe. Tr. 40. He claimed that he directly requested training on the backhoe from Melendez and Garcia, but that the only training he received was a "360 walk around" of the equipment. Tr. 95-96. Melendez testified that neither he nor anyone else at the mine trained Saldivar regarding operation of the backhoe because Saldivar "was not an operator, there was no need for him to be on a backhoe." Tr. 405. According to Melendez, Grimes Rock equipment operators parked the mobile equipment on flat surfaces and "[t]here is no need to move any of the equipment" to service it, beyond maybe moving it "four feet." Tr. 434-35.

B. Saldivar's first disciplinary action

Three weeks after resuming work at Grimes Rock, Saldivar received his first disciplinary writeup. On October 27, Rene Garcia issued Saldivar a disciplinary form because the "water truck again for the third time was found with no coolant and very low on engine oil." Sec'y Ex. 2. Saldivar testified that, on that date, he had likely not yet received the Quinn Company training on equipment maintenance, and that the training he did receive lacked adequate instruction on how to service the water truck. Tr. 106.

C. The water truck tires, incident, and disciplinary action

Saldivar noticed issues with the tires of the Peterbilt water truck early in his second stretch of employment at Grimes Rock. He testified that some tires were “bald,” “cracked,” and had “wires exposed.” Tr. 43. Saldivar claimed that he verbally reported these issues to Melendez and Garcia and that he also informed management of the issues on his preoperational inspection sheets. Tr. 43-45. Melendez denied being told about balding tires. Tr. 412. Melendez testified that when a miner reports worn tires on a preoperational inspection form, Melendez will inspect the tires and make a “business decision” about whether they need to be replaced. Tr. 429.

On the evening of December 10, 2020, Saldivar was involved in an incident while driving the Peterbilt water truck. Saldivar operated the water truck that evening for dust-control purposes. He sprayed the roadside as he traveled downhill on the main mine road connecting the plant on top of the hill and the scales below. Saldivar turned the truck around at the bottom of the hill and returned uphill toward the plant. Saldivar testified that, as he drove up the steep grade, the truck’s tires lost traction and the truck started sliding back downhill. Tr. 49. Saldivar sensed that he had lost control of the vehicle, and he tried to steer the truck into a nearby row of cinderblocks to stop the truck’s slide. He succeeded, and the truck collided with the cinderblocks. The collision caused damage to a tire and a rim on the water truck. *See* Sec’y Ex. 6. Saldivar immediately radioed the night manager of the plant, Aureliano Ruiz, and informed him of the incident. Tr. 54-55. Ruiz told Saldivar to try to drive the truck up the hill in first gear and park it at the plant so that Ruiz could inspect the damage. Tr. 54-55, 247. Saldivar was able to get the truck to the plant safely in first gear. Tr. 247.

The next morning, Saldivar informed Melendez about the incident via text message. *See* Sec’y Ex. 5. He detailed how he lost control of the truck and damaged a rim and a tire. Melendez responded by saying, “You need to be careful we will write you up on it.” Sec’y Ex. 5. When Saldivar arrived at work the next morning, Rene Garcia issued him a discipline form for damaging company property. *See* Sec’y Ex. 3. Melendez testified that he “investigated” the water truck incident before authorizing the discipline form, but he and Saldivar agreed in their testimony that Melendez did not contact or interview Saldivar before the discipline was issued, apart from the single text message. Tr. 71, 358-59. Later that day, Melendez hired Pinky’s Tire Service to replace the tire and rim on the water truck. Both Melendez and the tire technician testified that no tires had been replaced between October and December 10, that only a single tire was replaced on December 11, and that the remaining tires were in passable condition. Tr. 425-26, 597.

D. Subsequent disciplinary actions

After receiving the writeup about the water truck incident on December 11, Saldivar received his third disciplinary action the very next day. On December 12, Aureliano Ruiz issued Saldivar a writeup for arriving to work four hours late. *See* Sec’y Ex. 7. Ruiz issued this form on Rene Garcia’s behalf, after Garcia told Ruiz that Saldivar failed to show up on time. Tr. 502. Ruiz testified that Saldivar gave no excuse for his tardiness except that “he ran late, that’s it.” Tr. 505. To Saldivar, the timing of this discipline form was suspicious because he had been tardy in the past without receiving any admonishment. Tr. 79. Saldivar admitted that he was late to work about once a week but claimed that he had obtained permission for these instances. Tr. 176-77.

He also testified that he was late without permission “[m]aybe a couple of times.” Tr. 178. Melendez testified that Saldivar’s attendance record “wasn’t good.” Tr. 429. Oscar Nava, a former coworker of Saldivar at Grimes Rock, said that “everybody is late to work” at the mine. Tr. 316.

On January 13, 2021, Saldivar noticed that the transmission fill tube on a dozer was missing its cap, and he reported the missing cap to Garcia and Melendez. Tr. 83; Sec’y Ex. 8. Saldivar was ultimately written up for the missing cap. Sec’y Ex. 8. According to Saldivar, he received the writeup in retaliation for reporting the unsafe condition. Tr. 84-85. Yet Rene Garcia, who issued the writeup, said both at hearing and on the disciplinary form that Saldivar admitted to having left the fill tube uncapped after being confronted by the dozer operator. Tr. 472; Sec’y Ex. 8. The dozer operator confirmed this at hearing. Tr. 659. Saldivar denied having made any such admission. Tr. 84.

Saldivar’s fifth and final writeup came the next day. Saldivar testified that he was assigned to grade the roads on January 14, and he was using the backhoe to collect the material needed as “base” in order to perform the grading. Tr. 86. When he was operating the backhoe, one of the tires was flat and appeared to separate from the rim. Tr. 85; Sec’y Ex. 10. Garcia issued Saldivar a writeup for the damage incurred to company property when Saldivar was “not paying attention” and “drove the tire off the wheel” of the backhoe. Sec’y Ex. 9. Garcia testified that he issued the disciplinary form because Saldivar was not supposed to be operating the backhoe and could not account for the damage to the tire. Tr. 469.

E. Saldivar’s termination

On January 15, 2021, Melendez radioed Saldivar to meet him at the scale house, where he informed Saldivar that he was fired. Tr. 173. Melendez gave Saldivar his final check and had him sign a termination letter. The letter indicated that Saldivar’s employment was terminated due to “damaged company property and performance issues.” Sec’y Ex. 15. Melendez testified at hearing that the factors he considered in terminating Saldivar included “his attitude, attendance, damaging the company property, not [being] willing to listen to anybody, [and] thinking he can do what he pleases at the mine.” Tr. 432-33. Several employees of Grimes Rock testified that Saldivar’s attitude was an issue at the mine. Tr. 407-19, 660-61, 669.

II. ANALYSIS

Section 105(c)(1) of the Mine Act prohibits a mine operator from discharging a miner, discriminating against him, or interfering with the exercise of his statutory rights “because . . . he has filed or made a complaint under or related to this chapter, including a complaint notifying the operator . . . of an alleged danger or safety or health violation” or “because of the exercise of such miner . . . of any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1). Congress intended for the protections of section 105(c) “to be construed expansively to ensure that miners will not be inhibited in any way in exercising any rights afforded” by the Mine Act. S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Legis. History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

A. The standard for discrimination

For decades, the Commission and its courts adjudicated claims of discrimination brought under section 105(c) of the Mine Act using the *Pasula-Robinette* framework. *Sec’y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec’y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). This framework was recently abrogated by the United States Court of Appeals for the Ninth Circuit. Specifically, the Ninth Circuit found flaw in the causation aspect of the *Pasula-Robinette* standard. Now, discrimination claimants within the Ninth Circuit must prove that unlawful discrimination was a “but-for” cause of the alleged adverse action. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1210 (9th Cir. 2021). The Ninth Circuit did not announce how this new standard would interact with the rest of the Commission’s precedent regarding discrimination claims, and the Commission itself has not yet had the opportunity to opine on this matter. This Court must apply a test of discrimination that embeds a but-for causation standard and that also hews to the Commission’s robust body of discrimination case law. Accordingly, this Court will adopt the test for discrimination as applied in the matter of first impression that appeared before the courts of the Commission. *See Thomas v. CalPortland Co.*, 43 FMSHRC 531, 538-40 (Dec. 2021) (ALJ).¹

The test for discrimination under section 105(c) of the Mine Act is therefore whether the complainant has proven, by a preponderance of the evidence, an adverse action that would not have been taken but for his engagement in protected activity.

In the absence of direct evidence of discrimination, a complainant may assert a prima facie case of discrimination under the Mine Act by showing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. This lower standard is not the ultimate standard of discrimination, but rather an evidentiary device that allows a miner to state a claim of discrimination using indirect evidence of discrimination, such as the operator’s knowledge of the protected activity, its hostility towards the protected activity, the coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Sec’y of Labor on behalf of Johnny Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). If the miner successfully states his prima facie case, he has established a rebuttable presumption of discrimination under the Mine Act.

The mine operator then has an opportunity to rebut the miner’s prima facie case by producing evidence showing that no protected activity occurred or that the adverse action was not motivated by the protected activity. This is merely a burden of production, not of persuasion. An operator’s failure to produce any legitimate evidence in rebuttal to the prima facie case would result in a judgment in favor of the complainant. However, when an operator produces such

¹ At the time of publication, only one court has had the opportunity to apply the new Ninth Circuit “but-for” standard after a hearing in a discrimination case. *See Thomas*, 43 FMSHRC at 538-40. That decision engaged in a detailed discussion of how to apply the Ninth Circuit’s standard while preserving Commission precedent and honoring the intent of the legislators who drafted the Mine Act, who sought to encourage miners’ free engagement in protected activity. Furthermore, the decision clarified how burden-shifting and the prima facie case are consistent with the Ninth Circuit’s holding in *Thomas*. The test and the accompanying discussion are adopted here.

evidence, the presumption of discrimination is nullified, and the judge must weigh the conflicting evidence according to the substantive “but-for” standard. During this final phase, the complainant must have an opportunity to show that the operator’s explanation in rebuttal is pretextual. Throughout this entire process, the burden of persuasion never shifts to the mine operator.

B. Saldivar’s claim of discrimination

Under this newly articulated test, Alvaro Saldivar must prove that he suffered an adverse action and that the adverse action would not have been taken but for his protected activity. As an initial offering, Saldivar must first establish a prima facie case of discrimination.

1. Saldivar’s prima facie case

A prima facie case of discrimination requires a showing (i) that the complainant engaged in protected activity, (ii) that he suffered an adverse action, and (iii) that there is a motivational nexus between the protected activity and the adverse action. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799. The burden on the complainant is not onerous. He must only produce “evidence sufficient to support a conclusion” that he was discriminated against. *Driessen*, 20 FMSHRC at 328. A miner has proven his prima facie case when he has “present[ed] evidence from which the trier of fact could infer retaliation.” *Turner v. National Cement Company of California*, 33 FMSHRC 1059, 1065 (May 2011).

i. Protected activity

Alvaro Saldivar engaged in at least two instances of protected activity. First, Saldivar engaged in protected activity when he lodged safety complaints about the condition of the tires on the water truck. Saldivar testified that he had issues with the water truck’s tires from the moment he was rehired. In his opinion, the tires were “bald” and “cracked” with “wires exposed.” Tr. 41-45. He testified that he alerted management of the poor tire condition both verbally and on his preoperational inspection sheets. I find Saldivar’s testimony on this issue to be credible. Melendez denied that Saldivar made such complaints, but he did acknowledge his policy of allowing some wear and tear on the tires as part of his “business decision” regarding whether they need to be replaced. Tr. 429. Also, I find it suspicious that the mine failed to produce the preoperational inspection sheets when asked by the Secretary. Since they were not produced as requested, I credit the testimony of Saldivar that he did list his complaints on those sheets. Safety complaints like the ones made by Saldivar are quintessential protected activities under section 105(c)(1) of the Mine Act, which expressly protects a miner who makes a “complaint notifying the operator . . . of an alleged danger or safety or health violation.” 30 U.S.C. § 815(c)(1).

Second, Saldivar’s complaints to management about inadequate task training also constitute protected activity under the Mine Act. Saldivar believed that he needed additional training on several pieces of equipment, and he testified that he made both verbal and written reports of poor training to Grimes Rock management. Again, I find Saldivar’s testimony on this point to be credible. While mine management generally denied that Saldivar made such reports, Melendez did admit at hearing that Saldivar had told him that he “need[ed] more practice” on the motor grader. Tr. 400. Proper task training is paramount under the Mine Act, *see* 30 U.S.C. §

825(a)(4), and inadequate training constitutes a major health and safety risk. *Id.* at § 814 (declaring that an untrained miner is a “hazard to himself and others.”). Making a report of inadequate training is therefore equivalent to making a report about unsafe working conditions, and it is protected activity under section 105(c) of the Act. *Cf. Thomas*, 43 FMSHRC at 542. Accordingly, Saldivar has established his engagement in at least two protected activities.

ii. Adverse action

The Commission has defined “adverse action” to mean “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” *Sec’y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). Here, the parties agree that Saldivar was terminated by Grimes Rock on January 15, 2021. *Jt. Stip.* ¶ 11. There is therefore no dispute that Saldivar suffered an adverse action as defined by the Commission.

iii. Motivational nexus

The next relevant inquiry is whether a motivational nexus exists between Saldivar’s complaints and his firing. Because “[d]irect evidence of motivation is rarely encountered,” the Complainant may initially show this motivational nexus with the four circumstantial indicia of discrimination described by the Commission in its case law: the operator’s knowledge of the protected activity, the operator’s hostility, timing, and disparate treatment. *Chacon*, 3 FMSHRC at 2510. The complainant need not establish all four indicators of discrimination, but rather each factor proven by the miner contributes cumulatively to his case of discriminatory motive.

In this case, two factors are most persuasive: knowledge and timing. An operator’s knowledge of protected activity “is probably the single most important aspect of a circumstantial case.” *Chacon*, 3 FMSHRC at 2510. Management at Grimes Rock knew about Saldivar’s safety complaints. Saldivar testified that he repeatedly made complaints about the water truck tires and about his inadequate training to Melendez and Garcia, both verbally and in writing. Additionally, Melendez acknowledged at hearing that Saldivar had asked for additional practice on the motor grader before he would feel comfortable operating it. *Tr.* 400.

Timing is another factor that weighs in favor of Saldivar. Coincidence in timing between the protected activity and the alleged adverse action can point toward discriminatory motive. The Commission has noted that it “applies no hard and fast criteria in determining coincidence in time” and that “[s]urrounding factors and circumstances may influence the effect to be given.” *Hicks v. Cobra Mining Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Saldivar testified that he began making safety complaints within the first few weeks of returning to work at Grimes Rock on October 5, 2020. *Tr.* 96. By October 21, Saldivar had received the first in a series of disciplinary actions. *Sec’y Ex.* 2. These actions escalated until Saldivar was terminated on January 15, 2021. Therefore, at most three months elapsed between the first instances of protected activity and the adverse action, and disciplinary actions were progressively being issued during those three months. Under Commission case law, this temporal proximity can be an indication of discriminatory motive. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec.

2000) (finding that timing weighed in favor of complainant when four months elapsed between protected activity and adverse action).

Knowledge and timing are the two strongest factors supporting Saldivar's claim of discriminatory motive, and these two factors alone can support a prima facie case. *See Pero*, 22 FMSHRC at 1365. But the Secretary has also offered some evidence regarding the final two factors, hostility and disparate treatment. Saldivar testified at hearing that Melendez and Garcia acted "malicious" toward him "every time [he] would complain about something." Tr. 211. He viewed the progressive disciplinary actions as evidence of management's mounting hostility for him in response to his complaints. Tr. 211. Furthermore, the Secretary argues that mine owner Russell Cochran displayed animus toward Saldivar when he called Saldivar's subsequent employer, Brett Jones. According to MSHA Special Investigator Troy VanWey, Jones told VanWey about how Cochran warned him to "be cautious" because "if [Saldivar] was willing to file [a discrimination] complaint against [Cochran], he could also file it against Mr. Jones as well." Tr. 543. Cochran denied ever having such a conversation. Tr. 587. Finally, the Secretary also alleges that Saldivar was treated differently than other miners once he lodged his complaints. A fellow miner, Oscar Nava, recounted times when he was late or when he damaged company property, but he told the Court that he was never fired for this conduct. Tr. 319-21. According to the Secretary, no other Grimes Rock employee had been terminated for performance issues in the two years prior to Saldivar's firing, except for an accountant. *See Sec'y Br.* at 16 (citing tr. 379).

The Secretary has introduced enough circumstantial evidence to support a conclusion or inference of retaliation. *See Turner*, 33 FMSHRC at 1065; *Driessen*, 20 FMSHRC at 328. Accordingly, a successful prima facie case of discrimination has been shown.

2. *Grimes Rock's rebuttal*

Grimes Rock now has an opportunity to rebut Saldivar's prima facie case by producing evidence indicating either (i) that no protected activity occurred or (ii) that the adverse action was not motivated by the protected activity. The company has offered arguments and evidence addressing both issues.

i. Grimes Rock's argument that no protected activity occurred

The first argument advanced as part of the operator's rebuttal is that Saldivar never engaged in protected activity. Grimes Rock contends that Saldivar did not complain about the water truck tires, nor about his inadequate training at the mine.

First, Grimes Rock denies that Saldivar reported the poor condition of the tires on the Peterbilt water truck. In its brief, Grimes Rock first points out the absence of documentary evidence (notes, text message, preoperational inspection forms) showing that Saldivar ever made such a report. While Saldivar testified that he had reported the unsafe tires, mine management directly denied this claim at hearing. Tr. 411. Grimes Rock failed to point out at hearing that the Secretary repeatedly asked for such documentation, including preoperational reports, and the mine failed to provide it. Grimes Rock has also introduced pictures and testimony indicating that at least some of the tires that Saldivar complained about were in relatively good condition. *See*

Resp. Ex. J; tr. 425-26, 597. This evidence does not nullify Saldivar's prima facie case, because a miner only needs a reasonable, good-faith belief about the existence a safety issue to support his protected activity. *See Kelly Diede v. Summit Inc.*, 13 FMSHRC 1155, 1162 (July 1991) (ALJ) ("The fact that there may have been no objective underlying safety problem would not invalidate a miner's good faith reasonable safety complaint.").

Second, Grimes Rock denies that Saldivar ever complained about inadequate training. Again, it argues that the Secretary has failed to introduce any evidence of the complaints beyond Saldivar's own testimony. But once again, Grimes Rock failed to produce the documents when asked by the Secretary. Furthermore, Grimes Rock argues that inconsistencies in Saldivar's testimony about his level of training diminishes his credibility on this point. Resp. Br. at 3. Finally, the company questions whether the underlying safety issue (the lack of training) was legitimate, detailing the variety of training that Saldivar went through while employed at Grimes Rock. The evidence points to the fact that, while Saldivar received new miner training and perhaps other training, he did not receive adequate task training. Grimes Rock produced no evidence of task training records for Saldivar.

ii. Grimes Rock's argument that the adverse action was not motivated by the protected activity

Grimes Rock also argues that its termination of Saldivar was unrelated to his safety complaints. Instead, the operator asserts that it fired Saldivar due to his poor work performance, poor attendance, poor attitude, and the damage he caused to company property.

First, Grimes Rock claims that Saldivar's poor work performance was one reason for his termination. The company points to Saldivar's disciplinary actions as evidence of his unacceptable performance. Management issued the first writeup after Saldivar drove the water truck with low coolant and engine oil, risking damage to company equipment. The second writeup was issued in the wake of the water truck incident. Grimes Rock argues that Saldivar caused the incident by overwatering the road and driving up the slick road in second gear. *See* Resp. Br. at 15-16. Rene Garcia issued two additional writeups: one for leaving the transmission fill tube of the dozer uncapped, and one for not paying attention while using the backhoe and causing damage to the tire. To Grimes Rock, these disciplinary forms stand as documentation of Saldivar's careless performance on the job.

The alleged performance issues extend beyond those documented on discipline forms. Rene Garcia testified that, on several other occasions, Saldivar failed to properly service the mine's mobile equipment. Tr. 475. These instances included failures to replenish hydraulic fluids and to clean the air filters. Tr. 475. This testimony was supported by equipment operator Mauricio Garcia, who testified that the fluid levels on his dozer were "either way too low or they were way over the [proper] amount" after Saldivar had performed the lube service. Tr. 669.

Second, Grimes Rock points to Saldivar's poor attendance as a factor in the decision to terminate him. Saldivar admitted at hearing that he had been tardy on multiple occasions, and he was written up for being four hours late to work on December 12, 2020. Tr. 175; Sec'y Ex. 7. When asked about Saldivar's overall attendance, Melendez said that "[i]t wasn't good." Tr. 429.

Saldivar missed days at work due to meetings with his probation officer, often with Melendez's permission. Tr. 176-77. According to mine management, these frequent meetings had become quite disruptive to Saldivar's work schedule. Melendez recounted telling Saldivar to have his probation officer contact Melendez so that he could relay that Saldivar would "end up losing his job due to attendance" if the meetings continued with the same frequency. Tr. 430. Melendez also said at hearing that Saldivar's timecard revealed further attendance issues that went beyond the excused absences with his probation officer. Tr. 430.

Third, the operator cites Saldivar's poor attitude as a reason for his firing. Melendez testified that Saldivar butted heads with other employees. Tr. 409-14. According to Melendez, Saldivar did not take criticism well and would act more knowledgeable than his coworkers. Tr. 409-14. Rene Garcia testified that other employees began to ask him whether anyone else could service their equipment because "they did not want to deal with Mr. Saldivar." Tr. 474. Mauricio Garcia told the Court that he stopped asking Saldivar to correct his mistakes because Saldivar got so "bothered" if confronted about his errors. Tr. 669. When counseled by management, Saldivar "would get upset" and ignore the directives given to him. Tr. 410, 474. While the write-ups and the tardiness alone do not support a basis for terminating Saldivar, the testimony of a number of witnesses regarding Saldivar's attitude and inability to get along with other miners is persuasive.

Finally, Grimes Rock claims that it terminated Saldivar in part due to the damage he caused to company property. The company asserts that Saldivar's carelessness resulted in tire and rim damage on the water truck and the backhoe. Other documented performance issues, like leaving the transmission fluid uncapped and failing to replenish fluids on mobile equipment, could have caused further damage, according to Grimes Rock. Melendez testified that he "hired [Saldivar] to make sure that we kept our equipment safe and good, and he was actually costing me more money [with] every [piece of] equipment he would touch." Tr. 432.

In sum, Grimes Rock has presented evidence rebutting the existence of the discriminatory motive behind the adverse action. The Respondent's burden in making its rebuttal is merely one of production. Grimes Rock has introduced legitimate evidence that, if taken as true, would permit a factfinder to conclude that it did not discriminate against Saldivar. Accordingly, Grimes Rock has satisfied its burden of production and successfully rebutted the presumption of discrimination.

3. Disposition

Saldivar established a prima facie case, and Grimes Rock offered evidence in rebuttal. The rebuttable presumption of discrimination has dissipated. Now, the only inquiry remaining in this case is whether the Secretary has shown by a preponderance of the evidence that Saldivar's engagement in protected activity was a but-for cause of his termination.

In his brief, the Secretary argues that certain aspects of Grimes Rock's asserted rationales for terminating Saldivar are illegitimate and pretextual. The opportunity to prove pretext is an important part of the complainant's final burden in employment-discrimination cases. The complainant "must . . . have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (under Title VII

of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”).² Indeed, “a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000) (under Title VII).

The Commission has explained that “pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Sec’y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (internal citations omitted). In previous cases, the Commission has outlined the types of evidence that may show pretext: a complainant may demonstrate “either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge.” *Turner*, 33 FMSHRC at 1073 (emphasis omitted).

Here, the Secretary offers three showings of pretext. First, he points to inconsistencies among Melendez’s statements about his reasons for terminating Saldivar. In the termination letter, Melendez told Saldivar that he was being fired for “damage [to] company property and performance issues,” but he did not mention attendance or attitude issues as a motivating factor. Sec’y Ex. 15. Then, in a later letter to MSHA, Melendez said “[t]he reason I terminated Alvaro was for damaging company property.” Sec’y Ex. 14. These inconsistencies allegedly shed doubt upon at least two of the operator’s stated rationales for firing Saldivar. Second, the Secretary argues that Melendez’s readiness to hire Saldivar after his first period of employment and, subsequently, to provide a positive reference for Saldivar shows management’s satisfaction with Saldivar’s work performance. Third, the Secretary asserts that the evidence of disparate treatment, discussed *supra*, demonstrates that two nondiscriminatory rationales are pretextual.

None of the proffered theories of pretext are compelling. The inconsistencies in Melendez’s statements are minor, and they do not necessarily show that Melendez was dishonest. Perhaps Melendez should have been more thorough in his statements but failing to do so does not stand as evidence of discrimination. Similarly, pretext is not found in Melendez rehiring Saldivar. Melendez testified that Saldivar is a skilled welder. Rehiring him based on that performance, or even offering a positive reference based on his welding³, is not inconsistent with firing him for poor performance in a different role. Finally, the alleged disparate treatment does not prove pretext. The Secretary notes that another Grimes Rock employee, Oscar Nava, also had attendance issues.

Grimes Rock did not fire Nava for those attendance issues—but Melendez did demote him. Further, Nava was not a “similarly situated” employee when compared to Saldivar. Nava worked at Grimes Rock for five years and had been promoted multiple times during that tenure. Saldivar,

² The Commission often looks to other federal anti-retaliation legislation like Title VII when addressing questions involving the anti-retaliation provision of the Mine Act. *See, e.g., William Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1830 (Aug. 2012); *Turner* 33 FMSHRC at 1065-66.

³ The evidence supporting the notion that Melendez gave Saldivar a positive reference is weak.

in contrast, worked for Grimes Rock for just three months and remained at an entry-level position. Both parties failed to provide evidence in the record to demonstrate how Grimes Rock routinely hires or fires employees, and on what basis. Without such evidence it is difficult to conclude that Saldivar was treated differently than others. All of the Secretary's evidence regarding disparate treatment is unpersuasive because it fails to identify, with any specificity, true comparators that were treated differently than Saldivar.⁴

The Secretary's limited showing of pretext, particularly evidence regarding disparate treatment, cannot support a finding of discrimination on behalf of Saldivar. The Secretary's case rests almost exclusively upon Saldivar's testimony. While I find Saldivar to be a credible witness, the record is simply devoid of other testimonial or physical evidence substantiating Saldivar's claims. I also find Melendez's testimony to be credible. The two men rarely deviated in their recitation of the facts, but instead disagree on how to interpret those facts. The weight of the evidence in this case tilts in favor of the interpretation advanced by Melendez and Grimes Rock.

The mine operator has established a reasonable nondiscriminatory rationale for firing Saldivar. His performance issues are well documented in the discipline forms, as well as in testimony from his coworkers and supervisors. Grimes Rock has introduced photographs and other documentation showing the property damage incurred by Saldivar, and the company has also elicited testimony from several mine employees attesting to Saldivar's bad attitude at work. As for attendance, Saldivar admitted to a certain amount of tardiness, and his supervisors all testified to additional attendance issues. Given the testimony in the record, I find the attendance issue to be pretextual, thrown into the mix to support the allegation that Saldivar was terminated due to his performance. However, the other bases raised by Grimes Rock may have played a part in the firing. The record supports a conclusion that Saldivar was fired for legitimate reasons.

By comparison, the Secretary's case is limited. In many instances, the Secretary's claim of discrimination relies upon uncorroborated witness testimony instead of tangible documentary evidence.⁵ For example, there is little, if any, evidence beyond Saldivar's own testimony that demonstrates Grimes Rock's hostility toward his protected activity.

⁴ This includes the Secretary's argument regarding the paucity of other miners who were terminated for performance issues. *See* Sec'y Br. at 16. Melendez testified that he did fire an accountant for poor work performance, *see* tr. 379, and the Secretary—who bears the burden of proof in this case—failed to identify any similarly situated employees whose performance issues did not lead to discipline.

⁵ The Secretary argues that it lacks documentary evidence in part because Grimes Rock withheld preoperational inspection sheets documenting Saldivar's complaints. In his brief, the Secretary asserts that "[a]s a sanction for [Grimes Rock's] spoliation of highly relevant evidence, the Court should infer that the missing reports reflected Mr. Saldivar's protected activity of complaining about safety issues." Sec'y Br. at 21. However, I credited Saldivar's testimony in that regard, so there is no need to grant that inference. I accepted it in part due to the operator's continued resistance to cooperate in the case and to provide relevant documents to the Secretary as requested. The mine operator's behavior throughout the case, toward the Court and toward the Secretary's counsel is clearly animus, but not necessarily against Saldivar.

I accept the Secretary's view that Grimes Rock, through its owner, tried to influence Saldivar's subsequent employer by relating that Saldivar had filed a discrimination complaint against Grimes Rock and by warning that he may do the same thing to the new employer. However, that is not enough to establish animus. The Secretary also characterizes as hostile the issuance of the five disciplinary writeups, but those disciplinary actions are more likely attributable to Saldivar's poor performance at work. The Respondent has offered documentation and testimony supporting the allegations put forth in those discipline forms. In contrast, the Secretary offers very little evidence demonstrating that those writeups are marked by hostility or pretext.

Finally, the Secretary argues that "Grimes [Rock] should not be able to violate the Mine Act by failing to provide the required training and then blame Mr. Saldivar" when his inadequate training led to accidents or property damage. Sec'y Br. at 16. The Secretary's point is well taken. The fault for equipment damage should not be laid upon an untrained miner, and the Secretary alleges that Grimes Rock consistently neglected to provide its miners with the task training mandated by law. Based on my review of the record, the Secretary is likely correct. Unfortunately for the Secretary, that is not enough to negate the evidence supporting the operator's reasons for termination. Ultimately, the Secretary has failed to adequately refute the mine's legitimate nondiscriminatory rationale for firing Saldivar.

This case is a close call. I recognize that the Complainant is at a disadvantage because "it is the employer who is in the best position to prove what [it] would have done," *Pasula*, 2 FMSHRC at 2800, but the Secretary must still satisfy his burden to show by a preponderance of the evidence that discrimination was a but-for cause of Saldivar's termination. The evidence offered by the Secretary in this case does not satisfy that burden. I find that Saldivar was terminated for both protected activity and poor performance; however, the protected activity was not a but-for cause of his firing.

In conclusion, I find that the Secretary has demonstrated a prima facie case of discrimination but has failed to adequately establish that the proffered reasons for terminating Saldivar were pretext. The Secretary did not show by a preponderance of the evidence that Saldivar's protected activity was a but-for cause of his termination. Instead, the weight of the evidence suggests that Grimes Rock would have terminated Saldivar for legitimate reasons even in the absence of his complaints. Therefore, I find that the Secretary has not met the required burden of proof pursuant to section 105(c) of the Mine Act. Because the Secretary has not met his burden in this case, I need not reach the question of remedy.

III. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by the Secretary of Labor on behalf of Alvaro Saldivar is hereby **DISMISSED**. The outstanding motions

filed by the Respondent in this case are summarily **DENIED**. The Order of Temporary Economic Reinstatement in the related case is terminated.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 16, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of MOSES ORTIZ,
Applicant

v.

MARIO SINACOLA & SONS
EXCAVATING, INC. AND ITS
SUCCESSORS,
Respondent

APPLICATION FOR TEMPORARY
REINSTATEMENT

Docket No. CENT 2021-0184-DM
MSHA Case No. SC-MD-2021-06

DISCRIMINATION PROCEEDING

Docket No. CENT 2022-0028-DM
MSHA Case No. SC-MD-2021-06

Midlothian Quarry and Plant
Mine ID: 41-00071

**ORDER GRANTING THE SECRETARY’S MOTION TO ENFORCE ORDER
DIRECTING TEMPORARY REINSTATEMENT OF MOSES ORTIZ &
ORDER DENYING RESPONDENT’S MOTION FOR DISMISSAL AND SANCTIONS
FOR PERJURY**

Before: Judge Manning

These matters are before me on an application for temporary reinstatement¹ and a complaint of discrimination filed by the Secretary of Labor (“Secretary”) on behalf of Moses Ortiz pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2), against Mario Sinacola & Sons Excavating, Inc. and its successors (“Sinacola”).

¹ On August 24, 2021, this court issued a Decision Approving Settlement Agreement and Order of Temporary Economic Reinstatement (“TR Order”). In lieu of physically reinstating Ortiz to his former position at Sinacola, the TR Order made clear the parties jointly agreed Ortiz would be temporarily economically reinstated. Under the terms of the Settlement Agreement submitted by the parties and approved by the court, Respondent agreed to pay the difference between Ortiz’s previous rate of pay at Sinacola and the lesser amount he was earning in a new job held at the time the parties filed the settlement agreement. The TR Order incorporated other terms of the economic reinstatement, as well as rights and responsibilities of the parties, and ordered the parties to comply with such. Notably, the Settlement Agreement explicitly stated it was to “remain in effect until a ‘final order’ of the Commission is entered regarding Ortiz’s underlying discrimination complaint.” Because the TR Order was not a final disposition of the application for temporary reinstatement, I retained jurisdiction over the case. 29 C.F.R. § 2700.45(e)(4).

On May 5, 2022, the Secretary filed a Motion to Enforce Order Directing Temporary Reinstatement of Moses Ortiz (“Sec’y Mot.”) in which he argued that Sinacola had failed to comply with the TR Order. On May 12, Respondent filed a response to the Secretary’s motion and its own Requests for Dismissal and Sanctions for Perjury (“Resp. Mot.”). Subsequently, on May 24, the Secretary filed a reply to Respondents Request for Dismissal and Sanctions for Perjury. (“Sec’y Reply”).²

SUMMARY OF THE PARTIES’ ARGUMENTS

The Secretary, in his motion, asserts that Respondent “failed to comply with the [TR Order] . . . to temporarily economically reinstate Moses Ortiz by failing to make payments for three (3) pay periods to date.” Sec’y Mot. 1. Accordingly, the Secretary moves the court to enforce its own order and require Sinacola to “pay the amount owed for any missed payments and continue to make the agreed payments to Mr. Ortiz until a final order is issued in the merits case.” *Id.* at 2.

Respondent, in its response and request, moves the court to dismiss the underlying discrimination case and sanction Ortiz for material perjury and fraud on the Commission. Resp. Mot. 1. According to Respondent, Ortiz confessed during a deposition that his case is based on retaliation for prior criminal convictions and not on retaliation for safety complaints. Further, Ortiz made his only safety complaint to MSHA after he was terminated³ and he cannot name anyone at Sinacola who has been fired for reporting safety concerns. Finally, Respondent argues that Ortiz failed to disclose three serious felony convictions on his 2010 job application and that Respondent would not have hired Ortiz had it known the truth. Consequently, Respondent, citing the “after-acquired evidence” doctrine and the Supreme Court’s decision in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995), argues that Sinacola “cannot be forced to pay wages to an ex-employee who would never have been hired in the first place had he told the truth, nor can Ortiz be economically reinstated as the Motion to Enforce asks.”⁴ Resp. Mot. 3-4.

The Secretary, in his reply, argues that the “after-acquired evidence” doctrine is not applicable to the temporary reinstatement case. While the doctrine “can limit damages awarded and will generally render reinstatement and front pay inappropriate[,]” the Court in *McKennon*

² The Secretary’s motion was filed in the temporary reinstatement docket, i.e., CENT 2021-0184-DM. Respondent filed its response to the Secretary’s motion in the underlying discrimination docket, i.e., CENT 2022-0028-DM. Because Respondent also requests that the discrimination case be dismissed and sanctions be imposed, I accepted the filing in both the temporary reinstatement docket and the discrimination docket. Accordingly, both the temporary reinstatement case and discrimination case are captioned on this order.

³ Respondent’s response focuses on two alleged safety complaints. First, a safety complaint made to MSHA regarding a supervisor allegedly not wearing a seatbelt. Second, a safety complaint made to someone not with MSHA regarding a hernia.

⁴ Respondent also argues Ortiz perjured himself during his deposition when he mischaracterized his felony convictions as minor misunderstandings.

was addressing permanent reinstatement as a remedy after a determination on the merits was made, not temporary reinstatement, as is at issue here.⁵ Moreover, the Secretary, citing *McKennon*, asserts that even if after-acquired evidence can be considered, Respondent has failed to put forth sufficient evidence of wrongdoing of such severity that Ortiz in fact would have been terminated on those grounds alone. Sec’y Reply 3. The Fifth Circuit Court of Appeals has held that the pertinent inquiry is whether the employee would have been fired upon discovery of the wrongdoing, not whether the individual would have been hired in the first instance. Here, the only evidence Respondent submitted is an affidavit from its Vice President of Human Resources that Sinacola would not have hired Ortiz.⁶

The Secretary further asserts that Ortiz’s discrimination complaint was not frivolously brought and that Ortiz’s protected activity need not have occurred in the form of a complaint to MSHA. According to the Secretary, Ortiz made numerous safety complaints to Respondent and, immediately before being terminated, told a member of mine management that “he could have contacted MSHA regarding his concerns ‘a long time ago.’” Sec’y Reply. 5. The Commission has long recognized that making a complaint to management and asserting that one may exercise their right to contact MSHA are both protected activities under the Mine Act.⁷ Based on the MSHA investigator’s findings regarding protected activity, the fact that termination was an adverse action under the Act and, given that some of these events occurred within a single conversation, there clearly was a nexus. When the Secretary finds that a miner’s discrimination complaint is not frivolously brought, the Mine Act requires the Commission to order the immediate reinstatement of the miner pending final order on the complaint.

Additionally, the Secretary argues Respondent continues to harass and retaliate against Ortiz. The after-acquired evidence doctrine is well established. Respondent failed to meet its burden under the doctrine but nevertheless attempted to bring the convictions before the court to prejudice Ortiz. Sec’y Reply. 7. Further, Respondent “habitually refused to comply with the . . . [TR Order], having missed payments on at least 10 occasions since the Order was entered.” Sec’y Reply 7. Furthermore, despite alleging that Ortiz perpetrated a fraud on the court and perjured himself, Respondent presented no evidence of the type of egregious conduct necessary to establish fraud and failed to present evidence of any testimony under oath that Ortiz contradicted during his deposition. Sec’y Reply 8.

⁵ The Secretary cites the decision of my colleague, Judge Simonton, for the proposition that after-acquired evidence is irrelevant and inadmissible in a temporary reinstatement proceeding. *Sec’y v. Small Mine Dev.*, 2020 WL 8180380, at *2 (December 18, 2020).

⁶ The Secretary asserts it is clear Respondent would not have terminated Ortiz based on the convictions or any information omitted from Ortiz’s employment application because Respondent had prior knowledge of that information but did not terminate Ortiz until after he lodged a safety complaint and stated he could contact MSHA.

⁷ The Secretary acknowledges that the friction between Ortiz and his supervisor likely began when the supervisor became aware of Ortiz’s criminal record in 2014 or 2015. However, the Secretary asserts that this history does not form the basis of the suit.

Given the above arguments, the Secretary avers there is no evidence the temporary reinstatement claim was frivolously brought. Accordingly, the Secretary asks the court to enforce the temporary economic reinstatement order of August 24, 2021, and require Respondent, in an expedited manner, to pay the amount owed for any missed payments and continue making those payments until a final order is issued in the merits case. Finally, the Secretary asks that Respondent's response and request be stricken from the record given that it fails to come close to meeting the burden of proving perjury or fraud on the court, and only serves to further harass and retaliate against Ortiz.

DISCUSSION AND ANALYSIS

Both the temporary reinstatement proceeding, and the discrimination proceeding are captioned in this order. It is critical that the parties recognize the difference between these two proceedings. While the scope of the discrimination proceeding is broad and addresses the merits of the complaint of discrimination, the scope of the temporary reinstatement proceeding was, and is, narrow and limited to a determination whether the discrimination complaint was frivolously brought. *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990) (“*JWR*”). Moreover, unlike in a discrimination proceeding on the merits, in a temporary reinstatement proceeding a judge “may not resolve credibility disputes or make rulings on credibility.” *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 301 (June 2021) (“*Saldivar*”).

Although a hearing was not held on the application for temporary reinstatement,⁸ the record supports that Ortiz's complaint was not frivolously brought. The application for

⁸ Rather than go to hearing on the application for temporary reinstatement, the parties jointly entered into a settlement agreement in which Ortiz, in lieu of actual reinstatement, was “economically reinstated.” The Commission addressed economic reinstatement agreements in *Sec'y of Labor on behalf of Gray v. North Fork Coal Corp.* 33 FMSHRC 589 (Mar. 2011) (“*Gray*”), and stated as follows:

[The operator] confuses the legal principles that apply to back pay awards if and when the miner succeeds in his discrimination complaint on the merits, with the legal principles governing the wholly separate temporary reinstatement proceeding.

. . .

[T]he purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard. . . . The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits. The issue of back pay usually does not arise since the miner is not compensated for the earlier period of time between termination and the judge's order temporarily reinstating him or her. . . . Conversely, if the operator chooses to pay the miner while foregoing the miner's

(continued...)

temporary reinstatement, the special investigator's sworn declaration, and the Secretary's discrimination complaint allege that in February and April of 2021 Ortiz made safety complaints and asserted to mine management his right to contact MSHA with safety concerns.⁹ Notably, each of those filings allege Ortiz was terminated immediately after asserting his right to contact MSHA to mine management.¹⁰ The Commission has held that termination eight days after an operator gains knowledge of a protected activity can establish a motivational nexus for purposes of determining whether a complaint of discrimination is frivolously brought. *A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325-326 (Mar. 2000). Here, there is evidence that possibly only seconds or minutes elapsed between the time Ortiz asserted his right to contact MSHA and his

⁸ (...continued)

labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim.

Consequently, we reject the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before us. Unlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements. The agreement which formed the basis of the judge's order was arrived at after negotiations between the parties. Moreover, we are cognizant of the fact that it was North Fork's decision to offer economic reinstatement in lieu of actual reinstatement that gave rise to the retroactive pay relief that North Fork now seeks to challenge.

Gray at 592-593. (Internal citations omitted).

⁹ While Respondent does not explicitly argue that only complaints to MSHA can serve as protected activity, the Secretary's reply directly addresses that argument and correctly states that protected activity can include, among other things, complaints to mine management and assertions by a miner that they may exercise their right to contact MSHA. *See e.g., Saldivar* 43 FMSHRC 299, 307 (Safety complaints made to the operator are protected activity), *Sec'y of Labor on behalf of Coffee v. Txoma Mining, LLC*, 40 FMSHRC 615, 625 (Mar. 2018) (ALJ).

¹⁰ The Secretary correctly points out that Ortiz, as a lay person, need only have a "mere belief" that he has been discriminated against, and need not know what specifically constitutes protected activity in order to trigger the Secretary's investigation into the complaint in order to fully develop the possible claim of discrimination. *Sec'y Reply 6 (quoting Hopkins County Coal, LLC*, 38 FMSHRC 1317 (June 2016). Here, the Secretary's investigation revealed at least two instances of potential protected activity by Ortiz, i.e., reporting the seatbelt issue to mine management and informing management that he could contact MSHA with his concerns.

termination. Given the temporal proximity of the alleged protected activity and adverse action, a nexus appears to exist that supports a determination that the complaint was not frivolous.¹¹

I find Respondent's argument regarding after-acquired evidence unavailing and inapplicable in the context of temporary reinstatement proceedings. Both parties cite the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995). In *McKennon*, unlike here, the Court was addressing the impact of the after-acquired evidence doctrine on remedies available after a determination on the merits of a discrimination complaint. There the Court found that although certain remedies, such as full reinstatement and front pay, may not be available to a discriminatee based on after-acquired evidence of wrongdoing by the individual, such evidence is not a complete bar to recovery. Here, there has been no hearing on the merits of the discrimination complaint and this court has issued only an order of *temporary* economic reinstatement based upon the parties' jointly submitted Settlement Agreement. Given the unique, limited nature of temporary reinstatement proceedings, the Mine Act's direction that miners be immediately reinstated pending final order on the complaint, 30 U.S.C. § 815(c)(2), and the parties' joint agreement to economically reinstate Ortiz pending final order on the complaint, I agree that any after-acquired evidence of wrongdoing "is irrelevant and inadmissible at this temporary reinstatement stage." *Sec'y of Labor v. Small Mine Dev.*, 2020 WL 8180380, at *2.¹² Sinacola has presented insufficient evidence or legal argument to merit overturning the August 24, 2021, Decision Approving Settlement Agreement and Order of Temporary Economic Reinstatement.

With regard to Respondent's motion to dismiss the discrimination proceeding, I find its arguments unavailing. Respondent's motion would require the court to prematurely weigh evidence and make credibility findings. The parties are currently engaged in discovery and preparing for hearing. This order is not the appropriate time or place for the court to weigh evidence on whether Sinacola discriminated against Ortiz. Rather, during and after the August 2 hearing, the court will weigh the evidence, make findings of fact and determine whether Ortiz was discriminated against and, if so, what the appropriate remedy may be.

As stated above, Respondent maintains that Ortiz was discharged when it learned that he had previously been convicted of serious felonies and that Ortiz agreed with this conclusion during his April 8, 2022, deposition. I note that there appears to be a serious dispute of material fact between the parties regarding when Respondent became aware of Ortiz's criminal record.

¹¹ The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *JWR*, 920 F.2d at 748, n.11.

¹² Although Respondent's argument involving the after-acquired evidence doctrine fails in the context of the temporary reinstatement proceeding, Respondent is free to reassert that argument and present evidence at the hearing on the merits after the Secretary has been given an opportunity to establish a prima facie case. I note that the Fifth Circuit has held that "the pertinent inquiry . . . is whether the employee would have been fired upon discovery of the wrongdoing, not whether he would have been hired in the first instance." *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108 (5th Cir. 1995).

Although Respondent asserts it would not have hired Ortiz had it known of his criminal record, it is unclear when Respondent became aware of that record. The Secretary asserts Respondent had prior knowledge of the criminal record, yet Ortiz was not terminated when management first became aware of the convictions. This dispute of material fact is an issue that must be addressed at the hearing on the merits. If Respondent had prior knowledge of the criminal record but failed to act on that knowledge, one could argue that a later termination allegedly based on that knowledge is pretextual. *See JWR*, 12 FMSHRC 1521, 1534 (Aug. 1990) (“pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.”); *see also Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000) (“a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.”)

Finally, I find that Respondent's arguments regarding perjury and fraud on the court lack merit. I agree with the Secretary's analysis and find that Respondent has failed to point to anything which could meet the high burden of proving a fraud on the court, i.e., an “unconscionable plan or scheme which is designed to improperly influence the court in its decision.” *First Nat'l Bank of Louisville*, 96 F.3d 1554, 1573 (5th Cir. 1996). Further, although Respondent may take issue with Ortiz's failure to disclose these convictions on his application for employment, Ortiz appears to have been candid about the existence of his criminal record when asked about it, under oath, at his deposition. In addition, Ortiz claims that Respondent knew of at least one of his convictions for about six years prior to his termination. Based on the record developed in these cases to date, I find that it has not been established that Ortiz perpetrated fraud on the court.

ORDER

The Secretary's Motion to Enforce Order Directing Temporary Reinstatement of Moses Ortiz is **GRANTED**. Respondent is **ORDERED** comply with all terms of parties' settlement agreement in the temporary reinstatement case that was approved by this court by order dated August 24, 2021. Specifically, Respondent is **ORDERED** to pay Ortiz the money owed for payments under the agreement that were missed as set forth by the Secretary. Such payment shall be made as quickly as possible, but by no later than June 24, 2022. Further, Respondent is **ORDERED** to continue making payments under the terms of the settlement agreement as

ordered by this court until such time that a final order is issued in the discrimination case on the merits. Respondent's Requests for Dismissal and Sanctions for Perjury is **DENIED**.¹³

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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¹³ The Secretary, in his reply, requested that Respondent's response be stricken from the record. The Secretary, in making this request, appears concerned that Ortiz will be prejudiced if the convictions are before the court. Given that I sit as the finder of fact in this matter, the risk of prejudice due to the existence of the convictions in the record is minimal at most. Accordingly, I decline to strike the Respondent's response from the record.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2022

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of ALVARO SALDIVAR,
Complainant,

v.

GRIMES ROCK, INC.,
Respondent.

APPLICATION FOR
TEMPORARY REINSTATEMENT

Docket No. WEST 2021-0178

Mine: Grimes Rock, Inc.
Mine ID: 04-05432

ORDER GRANTING SECRETARY’S MOTION TO ENFORCE

This case is before me upon an application for temporary reinstatement filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”), and 29 C.F.R. § 2700.45 et seq. The Secretary of Labor filed the application on behalf of Alvaro Saldivar seeking his reinstatement as a lube and water truck/equipment operator at the Grimes Rock mine pending the final disposition of Saldivar’s discrimination complaint.

A hearing was held on May 11, 2021, and one week later this Court issued a Decision and Order of Reinstatement (“Reinstatement Order”) wherein Grimes Rock was ordered to reinstate Saldivar. Grimes Rock appealed under Procedural Rule 45(f), and the Commission affirmed the Reinstatement Order on June 11, 2021. While the appeal was pending, the parties independently agreed for Saldivar to be economically reinstated in lieu of actual reinstatement. The Court approved the agreement in its Decision Approving Settlement and Order of Temporary Economic Reinstatement (“Economic Reinstatement Order”) issued on May 28, 2021.

Since the issuance of those orders, the Respondent has filed numerous motions in an effort to terminate or pause its payment obligations. Most recently, the Respondent has filed a Renewed Motion to Toll and Terminate Economic Temporary Reinstatement Order in which it argues that its obligation should be suspended altogether due to Saldivar’s changed circumstances following the hearing in this case. As explained in the Court’s January 7, 2022 Order Denying Respondent’s Motion to Toll Economic Reinstatement, the pertinent case law does not support the Respondent’s contention. Therefore, its payment obligations will not be suspended on the bases set forth in the motion.

Meanwhile, the Secretary has submitted a related filing, a Motion to Enforce Court Ordered Settlement Agreement. The Secretary alleges that Grimes Rock is skirting its obligation to make Saldivar whole pending disposition of his discrimination case. The settlement agreement reached by the parties provided that Saldivar would receive the amount of his wages at Grimes Rock minus the amount he was making at his then-employer Wayne J. Sand & Gravel Inc. The agreement was silent as to what would happen if he moved on from that position, and the

Respondent continued paying the diminished amount even after Saldivar left Wayne J. Sand & Gravel Inc. and was unemployed.

The purpose of temporary reinstatement, as codified in the Mine Act, is “to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard.” *North Fork Coal Corp.*, 33 FMSHRC 589, 592 (Mar. 2011). The Reinstatement Order in this case was issued to accomplish this goal for Saldivar. The later Economic Reinstatement Order simply “described how the parties proposed to implement relief ordered by the judge pursuant to the Mine Act.” *Id.* Accordingly, I cannot “ignore that statute in determining the construction, application, and effect” of the Economic Reinstatement Order and the agreement between the parties incorporated within it. *Id.*

The Economic Reinstatement Order was issued in the shadow of the initial Reinstatement Order, which mandated full and total reinstatement for Saldivar at his previous rate of pay. I approved the parties’ settlement agreement insofar as it adequately made Saldivar whole while his discrimination case was pending. Ambiguity in the agreement must be interpreted to further the goal of the Mine Act and of the original Reinstatement Order. Obligations under the Economic Reinstatement Order can change when circumstances change, as evidenced by the tolling of the operator’s obligation upon Saldivar’s unavailability. *See* Order Granting Motion to Toll Temporary Reinstatement (April 19, 2022).

Accordingly, I find that the Respondent is obligated to pay Saldivar the full amount ordered in the original Reinstatement Order offset by his pay from other employers for the period elapsed between May 18, 2021 and June 17, 2022, minus any periods of unavailability. The Secretary has agreed in his motion that those periods of unavailability include August 6 through November 14, 2021 and March 30 through May 17, 2022. Grimes Rock is not responsible for compensating Saldivar while he was unavailable during those periods of time. The company has argued in many repetitious filings that it is not responsible to pay Saldivar during his times of unavailability, and the Secretary has agreed to that assertion. In his motion seeking pay for Saldivar, the Secretary lists, in detail, the times Saldivar was available or unavailable for work, as well as the times that Saldivar mitigated the amount owed with alternative employment. Grimes Rock responded to the Secretary’s motion with some information about payments made to Saldivar, but did not supply any facts to dispute the times and amounts set forth by the Secretary. Hence, there are no facts in the record that contradict Saldivar’s availability to work for all times outside of the two above-listed periods of unavailability. If the Respondent had any **factual** information refuting the Secretary’s calculations of economic reinstatement, it has had ample time to supply those facts. Grimes Rock files incessant motions, often duplicative and irrelevant, but nonetheless has had every opportunity to supply facts instead of conjecture in its constant filings.

Grimes Rock claims that it should be entitled to a hearing on the issue of missed pay, asserting that it has the right to question whether Saldivar has been looking for work. Here again, Grimes Rock misunderstands the nature of temporary reinstatement. Instead of barraging the Court with countless “renewed” motions, the Respondent should take the time to understand the law, and to allow the Court time to address the important and underlying issue of discrimination. Every minute spent reading and digesting these tedious motions only sets back the time the Court

has to issue a final decision in this case. Accordingly, the Respondent’s motions to terminate the temporary reinstatement and its motion for a hearing are hereby denied.

WHEREFORE, the Secretary’s Motion to Enforce Court Ordered Settlement Agreement is **GRANTED**. The Respondent is **ORDERED** to pay Saldivar the full wages as ordered in the Reinstatement Order during the periods of his availability to work between May 18, 2021 and June 17, 2022, offset by his wages earned from alternative employment during that period. The Respondent shall pay \$9,723.08¹ that is past due for the period before May 17, 2022, and is further obligated to pay a gross total of \$2,810.86² for the period between May 17 and June 17, 2022. Future payment obligations under the Economic Reinstatement Order are hereby **TERMINATED** as of this date. The Respondent’s renewed motion is **DENIED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

¹ The Secretary does not allege nonpayment before November 8, 2021. Calculations are based on the table below. Information in the table comes from both parties’ submissions in this case. The difference between the final amounts owed here and in the Secretary’s motion is accounted for by the April 1 check, as included in the Respondent’s response.

Pay Period Begins With	Amount Due	Amount Paid	Amount Owed
11/8/2021	\$ 1,583.26	\$ 1,068.39	\$ 514.87
11/22/2021	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
12/6/2021	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
12/20/2021	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
1/3/2022	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
1/17/2022	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
1/31/2022	\$ 1,250.66*	\$ 1,250.66	\$ 0.00
2/14/2022	\$ 3,166.53	\$ 1,250.66	\$ 1,915.87
2/28/2022	\$ 2,616.53*	\$ 2,136.78	\$ 479.75
3/14/2022	\$ 3,166.53	\$ 2,136.00	\$ 1,030.53
3/28/2022	\$ 633.31	\$ 0.00	\$ 633.31
TOTAL	\$ 28,249.47	\$ 18,526.39	\$ 9,723.08

* Periods of mitigation.

² This figure was calculated by subtracting the wages from Saldivar’s new employment (prorated for 22 workdays) from his previous wages from Grimes Rock (prorated for 23 days of availability).

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June 22, 2022

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

v.

PERRY COUNTY RESOURCES,
 Respondent

CIVIL PENALTY PROCEEDING(S)

Docket No. KENT 2022-0024
 A.C. No. 15-19015-546383

Mine: E4-2

ORDER

Before the Court is the Secretary’s Motion to Approve Settlement of the citations and order involved in this matter. The parties move to modify one of the citations, as stated below. The penalty would be reduced accordingly, from the original assessed amount of **\$1,470.00** to **\$1,204.00**.

Citation/Order No.	Originally Proposed Assessment	Settlement Amount	Modification
KENT 2022-0024			
9282163	\$302.00	\$302.00	Admitted violation of 30 C.F.R.§75.380(d)(1) involving primary escapeway on 1 West Mains No modification, paid as assessed
9282162	\$336.00	\$336.00	Admitted violation of 30 C.F.R.§75.202(a), also involving primary escapeway on 1 West Mains No modification, paid as assessed but 104(b) order issued and not in the record
9282123	\$530.00	\$264.00	Modified to “Low” negligence, 50% penalty reduction Yet another escapeway related violation, this time involving the secondary escapeway – directional lifeline not maintained

9282125	\$302.00	\$302.00	Admitted violation of 30 C.F.R. §75.1722 moving machine part tailpiece guard not maintained No modification, paid as assessed
Total	\$1,470.00	\$1,204.00	18% Total Penalty Reduction

The Court reviewed the Motion and the draft Order submitted by the Secretary. Upon doing so, a problem was revealed. The record for this docket is not complete because the official record for Citation No. 9282162 is missing the documents regarding a section 104(b) order issued in connection with that citation. The Secretary may not elect to hide official documents in connection with Mine Act enforcement actions from public view.

Before addressing the missing section 104(b) order, it is necessary to step back and examine the underlying section 104(a) citation. Citing a violation of 30 C.F.R. §75.202(a), that standard, titled “Protection from falls of roof, face and ribs,” requires that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. §75.202(a).

The MSHA inspector issued the Citation, No. 9282162, on October 25, 2021, and informed under the condition or practice section that “[t]he roof bolt plates are missing, due to rusting, on several roof bolts along the primary escapeway entry on the 1 West Mains. The missing plates extend from crosscut #5 to crosscut #22 in various locations. This condition exposes miners to hazards of roof fall dangers. **Draw rock has fallen into the roadway in these locations. The weekly examiner travels this area one time a week.**” (emphasis added).

In his evaluation, the Inspector marked the injury as reasonably likely to occur, resulting in lost workdays or restricted duty. Accordingly, he listed the violation as “significant and substantial.” The negligence was marked as “moderate.” Though originally the inspector marked the termination of the violation to be due the next day, October 26th, thereafter the operator requested additional time to abate the violation for “spot bolt[ing] the roof in the cited location,” with the delay needed to “get[] the bolt machine to the area.” The inspector granted the additional time, with the new termination date of October 29, 2021 by 3 p.m.

The record does not reveal whether the extended termination date was met, though one may presume it was not, because Exhibit A for this docket reveals that a section 104(b) order was issued. It is that information which is missing from the record and about which the Secretary has refused to supply it. The Court requested that the Secretary supply the missing documents related to the section 104(b) order. The Secretary’s non-attorney representative, a conference and litigation representative, (“CLR”), Gary W. Oliver, refused to supply the missing documentation. In an email, Mr. Oliver stated “[t]he (b) order requested is not related to the single violation modified in this settlement, Citation No. 9282123. The underlying violation to the (b) order, Citation No. 9282162 has been affirmed and as reflected to the Exhibit A, the good faith abatement discount was not given. Therefore there is no compromise of penalty for Citation No. 9282162 requiring the court’s approval pursuant to Section 110(k). The Secretary requests an

order approving or denying the motion to approve settlement as filed.” E-mail from Gary W. Oliver, CLR, MSHA (May 31, 2022).

The Court responded that it did not see the matter as the CLR did, informing that “each citation/order, being part of the docket, is within [the Court’s] authority to conduct an informed review. [The Court added] that it doesn’t speak well of MSHA to hide information under cover of a settlement. As [the Court] told [the CLR] in an earlier email today, the order is part of the public record. It should have been in the official record, yet it is not there. If [the CLR] do[es] not want the order to see the light of day, [the Court] think[s] that is an unwise course of action as the representative charged with protecting the safety and health of miners. As former Supreme Court Justice Louis Brandeis stated: ‘sunlight is said to be the best of disinfectants.’ If you refuse to comply, [the Court] will have no choice but to file a FOIA request and in [the Court’s] ruling on the motion to approve settlement [it would have] to take note of the agency’s unwillingness to provide public record information for this admitted violation.” June 14, 2022 email from the Court to the parties.

Thereafter, on June 13, Emily Toler Scott, an attorney for the Secretary, entered her appearance.¹

DISCUSSION

The Court does not believe that the fact a violation is paid in full, with no modifications made to the issuing inspector’s evaluation, is the end of the matter. The principle behind this view is very basic, in carrying out its review responsibilities under 30 U.S.C. §820(k), the Court is obligated to be fully informed about the circumstances surrounding the issuance of a citation or an order. Citation No. 9282162 is part of this docket, but the documentary record concerning this admitted violation is incomplete. This is because a section 104(b) order was issued by the inspector in connection with that Citation, No. 9282162. The Secretary may not decide to selectively secrete such information from the Court, the public and especially from the miners it is charged to protect. From this Court’s perspective, such a stance is inimical to the spirit of the Mine Act.

A Section 104(b) order is an important feature of the Mine Act. Section 104(b) of the Mine Act states:

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) has not been totally abated within the period of time as originally fixed therein ... and (2) that the period of time for 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), to be withdrawn from, and to be prohibited from entering, such area

¹ On behalf of the Secretary, on June 13, 2022, Attorney Toler Scott filed a Supplemental Motion to Approve Settlement or Motion to Certify for Interlocutory Review. That motion will be addressed in a separate order.

until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

As the Commission has noted, such orders have significance in their own right. It has observed that:

First of all, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase “order under section 104” in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary’s notification of the proposed assessment of penalty.... 30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA’s regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) (“Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than \$6,500 for each day during which such failure or violation continues.”).

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and miners’ representatives when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)].* The notice of proposed **penalty** to operators in such cases shall state that a **[104(b)] order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.* S. Rep. No. 95-181, at 34-35 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests,

if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As Judge Zielinski recognized in his first decision, ‘the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.’ 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) (‘Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.’).

UMWA v. Maple Creek Mining, 29 FMSHRC 583, 592-594 (July 2007) (emphases added).

Per the above decision, the Commission recognized the independent importance of 104(b) orders may be the subject of a penalty in their own right, citing section 104(b)(1)(A).² The legislative history, as also cited by the Commission, makes this plain: “[t]he notice of proposed **penalty** to operators in such cases shall state that a [104(b)] **order** has been issued and the **penalty** provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.*” *Id.* at 593. (emphases added).

Though no additional reasons are needed to require disclosure of the (b) order in this matter, the record does not reveal if the Secretary met his obligation to notify the miners’ representatives when, as here, he believed that an operator has failed to abate a violation within the specified abatement period.

This Court is well aware that its review of settlements is presently cabined within the terms of the Commission’s decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) (“*AmCoal*”) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) and that under those decisions the Court’s review role has become statistically perfunctory.³ However, there is still an obligation and duty to examine *each* citation *and order* within a submitted docket, even if the citation is not contested and paid as originally assessed. The responsibility to ensure that there is

² In that connection, as noted above, the Commission observed that in circumstances of such failures, the Secretary is to notify the operator of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure. Under such circumstances the Secretary may assess steep, daily, penalties. Those penalties may now be up to \$8,101.00 per day. 30 C.F.R. Part 100.5(c) (2021).

³ As Commission Chairman Arthur Traynor and Commissioner Mary Lu Jordan have noted, judges applying this precedent are able to approve 99.96% of settlement motions submitted for their review. *See AmCoal I*, 38 FMSHRC at 1977 n.7 (noting that in a five-year period from approximately 2011 to 2016, Commission Judges approved 38,501 settlements and denied only 17); *Hopedale Mining*, 42 FMSHRC 589, 604, n.2 (Aug. 2020) (Commissioners Jordan and Traynor, dissenting).

a complete record is separate and apart from, and not mutually exclusive to, the review of violations that have settled, whether such settlements are for the full amount proposed or some lesser amount.⁴

Frankly, the Court is at a loss to understand why the Secretary of Labor is not in full support of providing the *full record* of the enforcement actions taken in connection with an admitted 104(a) citation. In this matter that involves hiding the inspector's issuance of a 104(b) order in connection with that citation. The apparent decision to secrete such information from the Court, the public and especially from the miners it is charged to protect is perplexing and at odds with the admonition from several federal courts invoking Justice Louis D. Brandeis' remark that "Sunlight is said to be the best of disinfectants." *See, for example, Argus v. U.S. Dept Agriculture*, 740 F.3d 1172 (8th Cir. 2014), wherein Argus invoked the federal law meant to bring disclosure sunlight to the government bureaucracy, in its request to see spending information from the U.S. Department of Agriculture under the Freedom of Information Act, 5 U.S.C. § 552. To the same effect as the Secretary has done here, the Department of Agriculture, with little explanation, refused disclosure. Reversing the lower court's determination that the information sought was exempt from disclosure, the Eighth Circuit took note of Justice Louis D. Brandeis' remark about the disinfecting benefit of sunlight. *Id.* at 1173, citing *Other People's Money* 92 (1914).

For these reasons, the Court **ORDERS** the Secretary to disclose all documents pertaining to the issuance of the section 104(b) order associated with Citation No. 9282162.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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⁴ The 104(b) Order, presently hidden from the record, is of additional concern because five minutes after issuing Citation 9282162, the inspector issued another Citation, No. 9282163, citing a separate safety hazard in the same escapeway.