March 2022

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 15, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0046 A.C. No. 36-07416-527800
v.	
CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	Mine: Enlow Fork Mine

DECISION

Appearances: Ryan Kooi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

James McHugh, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Bulluck

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 Consol Pennsylvania Coal Company, LLC ("Consol"), 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 a civil penalty in the amount of $905.00 for two alleged violations of his mandatory safety standards.

A remote hearing was conducted over Zoom. The following issues are before me: (1) whether Consol's violation of 30 C.F.R. § 75.1725(a) was attributable to the level of gravity alleged; (2) whether Consol violated 30 C.F.R. § 75.1200-1(d); and (3) the appropriate penalties for the violations. The parties' Post-hearing Briefs and Consol's Reply Brief are of record.

For the reasons set forth below, I **AFFIRM** Citation No. 9204073, as modified, and Citation No. 9204074, as modified, and assess penalties against Respondent.

I. Joint Stipulations

The parties have stipulated as follows:

1. Respondent is an operator, as defined in section 3(d) of the Mine Act, at the mine where the citations were issued.

2. Enlow Fork Mine is a mine, as defined in section 3(h) of the Mine Act.

3. The operations of Respondent at Enlow Fork are subject to the jurisdiction of the Mine Act.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to sections 105 and 113 of the Mine Act.

5. Enlow Fork Mine is owned by Respondent.

6. Payment of the total proposed penalty will not affect Respondent's ability to continue in business.

7. The individual whose name appears in Block 22 of each citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

8. True copies of each of the citations at issue in this proceeding were served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated in each citation, as required by the Act.

9. Exhibit A, attached to the Secretary's Petition in this docket, contains authentic copies of the citations at issue in this matter.

10. With regard to Citation No. 9204073, the parties agree to the fact of violation of 30 C.F.R. § 75.1725(a), when the horizontal keeper pins in shields 2, 269, 270, and 271 were not in place.

Tr. I 11-12, 126-27.

II. Factual Background

Consol owns and operates the Enlow Fork Mine ("Enlow Fork"), an underground coal mine in Washington County, Pennsylvania. Jt. Stips. 1, 5. As part of its efforts to comply with the Secretary's mine mapping requirements, Consol contracts with 18 Karat, Incorporated ("18 Karat"), to conduct surface searches for abandoned underground wells that are within 500 feet of active mining. Tr. I 173; Tr. II 53-54, 58-59. 18 Karat utilizes largely inaccurate, hand-drawn oil and gas producer maps and farm-line maps, pre-dating permit requirements and modern GPS technology, depicting wells drilled over 80 to 100 years ago in relation to landmarks that may no longer exist. Tr. I 182; Tr. II 54-57; Ex. R–7. Guided by the old maps, 18 Karat uses metal detectors to search for casings and pieces of exposed pipe above ground. Tr. I 173, 286; Tr. II 53-57. Once a well is found, it is surveyed and added to the mine map by a draftsman and, before Consol is permitted to mine through the well, it must plug it according to MSHA-approved specifications. Tr. I 165, 176, 182; Tr. II 53-54, 109, 131. Oftentimes, because landmarks and

surface features have disappeared or been altered, abandoned mines can be difficult, if not impossible, to find; when an alleged "search well" cannot be located, it is designated on the old maps and Consol's mine map by "DNF" ("Did Not Find") and a number placed over a square symbol. Tr. I 32; Tr. II 56-57, 63, 84; Exs. R–8, R–9.

On November 18, 2020, at 3:30 a.m., Consol cut through an alleged uncharted gas well, causing the operator to shut down longwall operations and call in a report to MSHA. Tr. I 26-27, 74. MSHA inspector and ventilation specialist Walter Young traveled to Enlow Fork in response to the report, and examined the record books and a mine map showing gas wells in the vicinity of Consol's active mining on the E-32 longwall section. Tr. I 19, 27, 30; Ex. P–3 at 18. The surface area above the intersected drill hole had been converted into a golf course, which accounts for 18 Karat's failure to locate it despite due diligence, and Consol's best estimate placement of it on its official mine map. Tr. II 84; Exs. R–7 at 11-12, R–10.

Young proceeded underground with Consol's safety supervisor Frank O'Brien. Tr. I 33; Ex. P–3 at 2. At 8:12 a.m., while walking the face with O'Brien and longwall coordinator Justin Higman, Young noticed that a small horizontal keeper pin ("keeper pin") was missing from the clevis of the number 2 headgate shield. Tr. I 59-60, 75. The inspection team continued down the face, Higman went ahead of Young and O'Brien to the tailgate and, when the pair caught up with Higman, Young observed a rock strategically placed on each otherwise "spotless" toe of tailgate shields 269, 270, and 271, where keeper pins should have been located. Tr. I 60-61, 75, 123. Using the toe of his boot, Young kicked the rocks away and, finding keeper pins missing in these clevises also, he issued a citation to Consol for failing to keep mobile and stationary machinery in safe operating condition. Tr. I 60-61, 75; Exs. P–3 at 1, R–1.

Thereafter, Young inspected the intersected alleged gas well, and observed that the 10-inch drill hole was full of water, contained no casing, had no sign of clay, oil, or gas smell, and was located too far away from any gas wells on Consol's mine map to be identifiable as one of them. Tr. I 77-79, 171-72, 217; Ex. P–4 at 8. These factors caused Young some skepticism as to whether the drill hole was actually a gas well. Tr. I 76, 171-72. Believing, with absolute certainty, that Consol had mined through a drill or bore hole that penetrated the coal seam, Young cited Consol for its failure to accurately plot on its official mine map all drill holes that penetrate the coalbed being mined. Tr. I 75-79; Ex. P–4 at 1.

III. Findings of Fact and Conclusions of Law

A. Citation No. 9204073

1. Fact of Violation

Inspector Young issued 104(a) Citation No. 9204073 on November 18, 2020, alleging a "significant and substantial" violation of section 75.1725(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and

was caused by Consol's "moderate" negligence.[1] Ex. P–3 at 1. The "Condition or Practice" is described as follows:

> The Company Number 2, 269, 270, and 271 gate shields located inby the number 26 crosscut on the E32 Longwall Working Section were not being maintained in safe operating condition. The horizontal keeper pins which secure the vertical breakaway pins from becoming airborne when they fail under stress were not in place. The LW face was idled due to intersecting an uncharted borehole which penetrated the coal seam at the time of issuance. The horizontal pins were installed into the shield clevises prior to the face resuming.
>
> Standard 75.1725(a) was cited 20 times in two years at mine 3607416 (20 to the operator; 0 to a contractor).

Ex. P–3 at 1. The citation was terminated later that day, when the cited horizontal keeper pins were properly installed. Ex. P–3 at 1.

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). Consol has conceded the fact of violation and the degree of negligence charged, but contests the significant and substantial ("S&S") gravity designation of the violation. Jt. Stip. 10; Resp't Br. at 2, n.5. The Mine Act identifies a significant and substantial violation as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

2. Gravity

The Secretary maintains that the violation was S&S because, absent keeper pins, vertical breakaway pins ("breakaway pins") can work themselves out of position due to the pushing and pulling of the shields, break, become airborne, and injure nearby miners. Sec'y Br. at 11. Respondent counters that breakaway pins only dislodge at the headgate and tailgate in unusual circumstances, such as an uneven mine floor, which were not present at the time of inspection. Resp't Br. at 6-7; Resp't Reply Br. at 4. Further, Respondent contends that pins do not become airborne when they fail and, even if that were to happen, they would not be reasonably likely to strike a nearby miner. Resp't Br. at 9; Resp't Reply Br. at 4.

The Commission has recently restated the four *Mathies* criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause

[1] 30 C.F.R. § 75.1725(a) provides: "[m]obile 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."

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); *see ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-37 (Aug. 2016); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The fact of violation has been conceded, satisfying the first *Mathies* criterion. The second *Mathies* criterion, under the Commission's *Newtown* refinement language, requires the Secretary to prove the reasonable likelihood of the violation causing the occurrence of the hazard that the standard targets. *Peabody*, 42 FMSHRC at 383. The Commission explained in *Peabody* that the judge must determine "whether [the] hazard was reasonably likely to occur given the particular facts surrounding this violation." *Id.* at 382 (quoting *Newtown*, 38 FMSHRC at 2041); *see Consol Pennsylvania Coal Co.*, *LLC*, 43 FMSHRC 145, 147 (Apr. 2021). "Reasonable likelihood" is not an exact standard, but rather an evaluation of risk with "a particular focus on the facts and circumstances presented." *ICG Illinois*, 38 FMSHRC at 2476; *see Newtown*, 38 FMSHRC at 2039. When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Newtown*, 38 FMSHRC at 2045 (citing *Knox Creek Coal Corp*., 811 F.3d 148, 161-62 (4th Cir. 2016)); *Peabody Midwest Mining*, *LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek*, 52 F.3d at 135; *U.S. Steel Mining Co*., 6 FMSHRC 1573, 1574 (July 1984). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). At step four, the judge determines whether any resultant injury would be "reasonably likely to be reasonably serious." *Newtown*, 38 FMSHRC at 2038.

a. Testimony

Inspector Walter Young testified that as he was walking down the face of the longwall, he observed that the number 2 headgate shield and the number 269, 270, and 271 tailgate shields were missing keeper pins in the clevises. Tr. I 59-61, 75, 122-23. He stated that mining operations had ceased at 3:30 a.m., and when he issued the citation later that morning at 8:12 a.m., because he could not find the missing keeper pins anywhere along the longwall, he estimated that they had been missing for at least a couple of passes. Tr. I 74-75, 137. He stated that he did not inspect the wear and tear on the exposed breakaway pins, and that he required Consol to replace the keeper pins in order to abate the condition. Tr. I 59, 75, 137. Young explained that breakaway pins are two inches in diameter, four or five inches long, have round tops, and are placed in the clevises to attach the shields to the relay bar. Tr. I 62-63, 122, 139; see Exs. R–2A-2D, 2G. He noted that these pins are under the pressure of line and gate shields weighing anywhere between 27 and 35 tons. Tr. I 59, 63, 133-34, 140. He further explained that when the shields are left back or fail to advance, the breakaway pins shear to relieve stress on the heavy equipment. Tr. I 63, 67-69, 117, 131, 133-140; Ex. P–3 at 6. Additionally, Young testified that keeper pins are designed to hold breakaway pins in place and that, although they may

become dislodged also and fly out of place under certain circumstances, unlike breakaway pins, they only project a foot or two in a very limited area up or down the pan line. Tr. I 66, 113-14. Without keeper pins, he asserted, pieces of breakaway pins can fly at least 15 feet, putting miners at risk even when they are standing two shields away from the shields being operated. Tr. I 70-72, 140, 146, 195. Young asserted that he has seen "thousands" of breakaway pins fail, and explained that broken pieces rarely fly vertically, but rather ricochet off of the shields which, in his opinion, accounts for why some miners are struck without sustaining injury. Tr. I 67, 131, 197-98, 214. He identified possible injuries from direct contact to include lacerations of the wrist and face, loss of eyes or teeth, and bruising. Tr. I 69-70, 73. Young also testified that, as a former miner, himself, he had personally observed a coworker get hit at the headgate by a breakaway pin, resulting in a deep laceration to his face requiring cosmetic stitches. Tr. I 69-70, 118-21. Finally, Young acknowledged that, as an inspector, he had never seen an accident resulting from projectile breakaway pin fragments, nor did he know of any MSHA or Consol accident reports pertaining to injuries caused by airborne pins. Tr. I 127, 128.

Enlow Fork safety supervisor Frank O'Brien testified that the first and last few shields on the longwall at the head and tailgate are moved by procedures different from shield movement in the middle mining zone, rendering the risk of breakaway pin failure much less likely at the gates. Tr. I 259, 272-75, 278. He explained that in the middle mining zone, the shearer is operating at speeds of 45 to 55 feet per minute and, using the SRB automated mode, once the shearer passes, the shields automatically pull in. Tr. I 253, 259, 272, 278-79. He noted that the middle mining zone is where he has seen breakaway pins break when faulty sensors occasionally fail to advance the shields. Tr. I 272-73, 278-79. He also explained that at the gates, the shearer operates at a speed of five to ten feet per minute, and the shields are moved manually at a considerably slower pace. Tr. I 259, 274-75, 278-79. Further, O'Brien testified that when shields are moved at the gates, the computer program prevents miners from operating them any closer than a distance of two shields, about 12 feet, away from an advancing shield. Tr. I 236, 259, 275-76, 280, 298-99. He stated that if a breakaway pin on a gate shield were to work its way out of place in the clevis, it would simply fall to the ground and that, throughout his mining career, he had never heard of or seen a breakaway pin become airborne or hurt a miner. Tr. I 229, 269, 272.

Jeremy Fabery, Enlow Fork's longwall maintenance coordinator, testified that there is a readily available supply of keeper and breakaway replacement pins down the longwall face on the toes of the shields, themselves, on rings welded to the shearer, and on the parts car outby the section. Tr. II 16-17, 39-40, 45-46. He also stated that, without keeper pins in place, when the shields pull and push, the breakaway pins work themselves out of place and eventually fall out. Tr. II 16, 25-26. Fabery explained that breakaway pins typically fail in the main mining zone, where the automated SRB system is operating, rather than at the gate ends; he asserted that this happens when shields are left back due to faulty sensors and the pins, designed to bear the stress instead of the heavy equipment, snap in two rather than shatter. Tr. II 20-23, 28, 43-44, 45-47. He also acknowledged that breakaway pins can fail at the head and tailgates, but only under adverse conditions, such as a roof fall. Tr. II 27-28. He testified that PMC-R computers on the head and tailgate shields allow the shieldmen to pull in the shields at a distance no closer than two shields away from the shields being operated, and that this manual process is much more controlled than automated SRB shield advancement in the main mining zone. Tr. II 23-25, 34. Finally, Fabery averred that he had never seen nor heard of pins becoming projectile and injuring anyone. Tr. II 29-32, 42.

b. Analysis

Focusing on the second *Mathies* criterion, the discrete safety hazard to which the violation contributed is breakaway pin fragments dislodging and forcibly projecting. Resolution of the reasonable likelihood of a hazard occurring must be analyzed through the particular facts surrounding the violation and the evidence established by the record. It is undisputed that breakaway pins fail under extreme stress when shields are left back. The record establishes that the cited shields, without keeper pins, were located at the head and tailgate of the longwall. Gate shields are manually moved using PMC-R computers, a much more controlled process than in the main mining zone, where the automated SRB mode moves the shields at a far faster pace. In the main mining zone, pins fail when faulty sensors cause line shields to be left back while the pan line is pushed. However, for a pin to fail on a gate shield, the shieldman would have to manually leave the shield back. While the parties agree that breakaway pins fail, they disagree about whether they become projectile. The only evidence of a failed breakaway pin forcibly projecting at the headgate was provided by Young; however, the balance of his testimony, respecting projectile pins being commonplace on the longwall, was non-specific as to whether this occurs in the main mining zone or at the gates.[2] Additionally, by his concession that pins are less likely to fail on the gate shields, it is reasonable to infer that pin failure more likely occurs in the faster moving main mining zone.

Despite Consol's contentions, the evidence of a breakaway pin injuring a miner, combined with the fact that breakaway pins are under the extreme pressure of moving shields weighing up to 35 tons, establishes that pin fragments *can* become airborne, even at the gates. However, the Secretary has failed to put forth sufficient evidence to establish the reasonable likelihood of this occurring. Conversely, credible evidence demonstrates that breakaway pins are far less likely to fail at the gates because, except for adverse mine conditions on the longwall, the slower, more controlled mining process minimizes the likelihood of shields being left back. Even if pins were to fail at the gates, the evidence establishes that the slower shield movement considerably decreases the likelihood of them becoming projectile. The Secretary does not reckon with this evidence whatsoever. Therefore, under the circumstances surrounding this violation, the Secretary has failed to prove, by a preponderance of the evidence, the reasonable likelihood of the breakaway pins on the cited gate shields becoming projectiles without the keeper pins in place. Consequently, I find that the Secretary has failed to satisfy the second *Mathies* criterion and, therefore, this violation was not S&S.

3. Negligence

Consol does not contest the degree of negligence ascribed to the violation. Resp't Br. at 2, n.5. The evidence establishes that the missing keeper pins were plainly visible, and that replacements were readily available. Tr. I 75; Tr. II 40. Indeed, the only noted obstructions on the otherwise clean tailgate shields were a rock over each missing keeper pin, apparently strategically placed to evade Young's detection. Tr. I 60-61, 75. Moreover, Consol had almost five hours between idling the longwall and Young's inspection to replace the missing keeper

[2] Young's conflicting testimony about his actual observance of this incident does not undermine his overall credibility as to its occurrence, and is viewed as an overstatement corrected on cross-examination. See Tr. I 70, 118, 120-21.

pins. Tr. I 74-75. Accordingly, I find that Consol was appropriately charged with moderate negligence in violating the standard.

B. Citation No. 9204074

1. Fact of Violation

Inspector Young issued 104(a) Citation No. 9024074 on November 18, 2020, alleging a violation of section 75.1200-1(d) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "low" negligence.[3] Ex. P–4 at 1. The "Condition or Practice" is described as follows:

> The Operator failed to accurately plot all drill holes which penetrate the coalbed being mined on the E32 Longwall Working Section (035-0 MMU). An uncharted borehole was inadvertently mined through at the number 39 shield at plus number 87+28. The Operator believes that the uncharted borehole could be Company Well Number 2057, but this borehole is approximately 125 feet closer to the Headgate and approximately 122 feet inby where the Company Number 2057 Well was plotted on the official mine map.
>
> Standard 75.1200-1(d) was cited 1 time in two years at mine 3607416 (1 to the operator; 0 to a contractor).

Ex. P–4 at 1. The citation was terminated later that day, after the intersected borehole was accurately plotted on the official mine map. Ex. P–4 at 2.

The Secretary maintains that a gas well is a drill hole and, therefore, irrespective of whether the mined-through drill hole was gas well DNF 2057, a violation of section 75.1200-1(d) occurred because it was not accurately plotted on the official mine map. Sec'y Br. at 14-16. Consol makes counter arguments that the wrong standard was cited because a gas well is not a drill hole and, even if it were, it did not have fair notice of such classification. Resp't Br. at 14-18, 24-25. Consol also contends that in order to prove a violation of the standard, the Secretary must produce a copy of the official mine map, and failed to do so. Resp't Br. at 23-24. Further, Consol asserts that by plotting gas well DNF 2057 in accordance with its Plan for Mining Operations Near a Well Believed Not to Exist, it satisfied the mapping requirements of section 75.1200-1(d). Resp't Br. at 20-21. Finally, Consol asserts that the mined-through hole was gas

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[3] 30 C.F.R. § 75.1200 provides: "[t]he operator of a coal mine shall have in a fireproof repository location in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale."

30 C.F.R §75.1200-1 provides: "[a]dditional information required to be shown on mine maps under § 75.1200 shall include the following:
(d) All drill holes that penetrate the coalbed being mined."

well DNF 2057 and, since it was plotted at the "best estimated" location, the official mine map was accurate. Resp't Br. at 21-23.

a. Testimony

Inspector Walter Young was dispatched to Enlow Fork on November 18 after the mine had reported to MSHA earlier that morning that it had cut through a suspected gas well. Tr. I 26-27. Young testified that when he arrived at the mine, he looked at the pre-shift and on shift record books, and a map that Consol provided to him showing gas wells in the active mining area. Tr. I 30-32; Ex. P–3 at 23. Young, Frank O'Brien, and Justin Higman proceeded underground to the E-32 longwall section where, at the number 39 shield, Young observed the 10-inch diameter drill hole. Tr. I 33, 77, 79. No methane was detected at the top of the drill hole and more than five percent methane was detected at the bottom, it was full of water, contained no casing, and there was no sign of clay, oil, or a gas smell. Tr. I 77-79; Ex. P–4 at 8. Young testified that he elected to cite a section 75.1200-1(d) violation because he could not be 100 percent certain that the uncharted drill hole was a gas well, but that it was certainly a drill hole that penetrated the coal seam. Tr. I 76, 163, 171. He explained that gas or oil wells often have gray clay around them and a musty smell but, in this case, nothing other than the size of the drill hole and the presence of methane at the bottom suggested that it was a gas well. Tr. I 82-84, 171. Young further testified that later in his inspection, he examined the official mine map, as well as the copy hanging on the wall across from the foreman's office, and he confirmed that the drill hole was not accurately plotted on the official map. Tr. I 44, 105, 111-12, 160.

Safety supervisor Frank O'Brien testified that he believed the mined-through hole to be a gas well due to its diameter, and he agreed that it could be classified as a drill hole. Tr. I 283, 299. He opined that the drill hole was DNF 2057, a gas well existing on old producer maps that 18 Karat had not been able to find on the surface, and based his belief on the fact that the drill hole was in the approximate area where the search for DNF 2057 had been conducted. Tr. I 286-91.

Consol project engineer and former 18 Karat project manager Matthew Ruckle also testified that he believed the intersected drill hole to be gas well DNF 2057. Tr. II 85. Ruckle stated that he coordinates contractor 18 Karat's surface searches for old gas wells, and ensures that they are plugged underground for safe mining once they are located. Tr. II 54, 58-59, 115. He explained that old producer and farm-line maps are studied to identify wells within 500 feet of planned mining and, because the maps were hand-drawn and created prior to promulgation of regulations requiring drilling permits, they are not very accurate and make locating the wells particularly difficult. Tr. II 53-56. Ruckle further explained that alleged wells, i.e., those not found by 18 Karat, are marked DNF ("Did Not Find") on the old maps and in their estimated location on Consol's official mine map. Tr. II 56, 64, 145. He testified that the surface search for DNF 2057 had included the area where Consol intersected the drill hole but, since the surface area is now a golf course, no evidence of the drill hole was ever found, even after it had been intersected underground. Tr. II 82, 84. While Ruckle opined that the intersected drill hole was DNF 2057 based on its location and diameter, he acknowledged that the location where Consol mined through it was 122 feet inby and at least 125.4 feet closer to the headgate than where DNF 2057 was plotted on the mine map. Tr. II 86, 88, 137-38, 147; Ex. P–4 at 10, see Ex. R–6.

b. Analysis

The standard at issue is clear on its face, unambiguously imposing a duty to accurately depict on mine maps drill holes penetrating the coalbed being mined. Indeed, in finding a violation of section 75.1200(h), requiring adjacent mine workings within 1000 feet of active mining to be accurately shown on mine maps, the Commission determined that "the plain meaning of section 75.1200 is that a mine map's depiction . . . must be accurate." *Musser,* 32 FMSHRC at 1273-74. This plain reading of the standard is consistent with the legislative history of section 215 of the Coal Act, the predecessor provision to section 312 of the Mine Act, which states that "[r]ecent inundation accidents . . . point up the need for accurate mapping of mines. Active mines often cut through into adjacent mines, or worked out and abandoned areas of the same mine, because of the lack of maps or because of inaccurate maps." S. Rep. 91-411, at 83 (1969).

Consol asserts that "the hole which was intersected underground was unquestionably a gas well," and that section 75.1200(k), requiring producing or abandoned oil and gas wells to be accurately shown on mine maps, was the appropriate standard to have cited; therefore, it contends, the citation should be vacated. Resp't Br. at 14-18. Further, Consol argues that it did not have fair notice that a gas well is a drill hole. Resp't Br. at 24-25. Conversely, the Secretary established that certain characteristics of the drill hole cast some measure of doubt as to whether it was a gas well. It is well settled that more than one standard can be applicable to a violation, and the instant citation should stand as long as the cited standard is broad enough to encompass the violation. *See, e.g.*, *Jim Walter Res., Inc*., 7 FMSHRC 493, 495-98 (Apr. 1985) (finding a regulation governing the transport of "materials" to include the transport of coal, despite the judge's finding that a more appropriate standard existed); *see also Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3077 (Dec. 2014) (noting the ambiguity in the scope of the regulation's application, but finding the dictionary meaning of the term "materials" "sufficiently broad" to encompass a suspended boom). The term "drill hole" is defined broadly as "a hole in rock or coal made with an auger or drill," and is synonymous with the term "borehole." *Drillhole*, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (2d ed. 1996). The term "well" is defined as "a borehole or shaft sunk into the ground" for numerous purposes, including "obtaining water, oil, . . . [or] gas," and is "commonly used as a synonym for borehole or drill hole." *Well*, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (2d ed. 1996). The term "drill hole" is "sufficiently broad" to encompass gas wells and, like the Commission in *Dawes*, I "decline to read a limitation into the standard where none exists." 36 FMSHRC at 3077. Further, not only do Consol's own witnesses interchangeably use "gas well," "drill hole," and "bore hole," but the broad definition of "drill hole" should have put Consol on notice that a gas well is one of many types of drill holes. Accordingly, I find that Consol had fair notice of section 75.1200-1(d)'s requirements, and that the standard is applicable to this violation.

Consol also contends that the Secretary could only prove a violation of section 75.1200-1(d) by introducing a copy of its official mine map into the record and, because of its failure to do so, the citation should be vacated. Resp't Br. at 23-24. The record establishes that the official mine map is very large, measuring 12 by 12 feet, and that Young did, in fact, inspect it on-site, as well as the copy hanging outside of the foreman's office, in addition to the smaller map provided to him of the active longwall section where the drill hole was intersected. Further, the smaller maps in evidence are accurate copies, depicting information included on the official mine map

by Consol. Moreover, Consol acknowledges that the drill hole was not depicted on any of the maps, official or otherwise, corresponding to the location where it was intersected. See Tr. I 300, 301-03; Tr. II 137-38, 147. Therefore, Consol's argument is unavailing.

Consol further argues that an MSHA-approved modification for section 75.1700 extends to its Plan for Mining Operations Near a Well Believed Not to Exist ("DNF Well Plan"), a part of its MSHA-approved Cut Through Plan and, in essence, transforms the DNF Well Plan, itself, into a "reasonable precautions plan" under the *Musser* "alternative precautions" exception.[4] Resp't Br. at 19-21 (citing In re Petition for Modification, Docket M-2014-011-C (Jun. 16, 2017)); Resp't Reply Br. at 9-10; Ex. P–4 at 25-35. Therefore, according to Consol, by plotting gas well DNF 2057 in accordance with its DNF Well Plan, it met the requirements of section 75.1200-1(d). Rep't Br. at 21; Resp't Reply Br. at 9-10. The Commission noted in *Musser* that an operator may petition the Secretary, under section 101(c) of the Mine Act, to "modify the strict application of section 75.1200" if adequate "alternative precautions" are implemented. 32 FMSHRC at 1275. Beyond Consol's bare assertions in its Briefs, its blanket expansion theory as to how the MSHA-approved modification for section 75.1700 permits modified compliance of section 75.1200 through its DNF Well Plan, is difficult, at best, to discern. Section 101(c) contains specific petition, investigation, and notice requirements which the approved Cut Through Plan, in and of itself, does not satisfy. 30 U.S.C. § 811(c); see Ex. P–4 at 20-24. The record is simply bereft of any indication that Consol petitioned MSHA for a modification of section 75.1200, and Consol advances no authority in support of its position that mere adherence to its DNF Well Plan satisfies the standard's mapping requirements. Consequently, Consol is held to the strict application of section 75.1200-1(d) unless or until, at some later date, it obtains an approved modification from MSHA.

Finally, Consol asserts that the intersected drill hole was alleged gas well DNF 2057 and, since it was plotted at the "best estimated" location, it was mapped accurately. Resp't Br. at 21-23. The foundation of this argument rests on Consol's misplaced interpretation of the term "accurate." In discussing the mapping violation of section 75.1200(h) in *Musser*, the Commission emphasized that "because the standard requires that the operator maintain an 'accurate and up-to-date map,' it follows that if the mine map fails to meet these requirements, the operator has violated the standard, regardless of whether it did everything possible to locate an accurate historical map of adjacent mine workings." 32 FMSHRC at 1272; *see also Dominion Coal Corp*., 35 FMSHRC 3557, 3594 (Dec. 2013) (ALJ) (noting that section 75.1200 does not require operators to make reasonable efforts to plot gas wells on mine maps, but rather imposes an absolute duty to be accurate). The strict liability nature of the Mine Act attaches liability, irrespective of operators' best efforts at compliance and, consequently, Consol's argument, i.e., that its best estimate is tantamount to accurate plotting, runs afoul of the clear mandate of the standard. Furthermore, resolution of whether the intersected drill hole was, as Consol contends, gas well DNF 2057, has no bearing on Consol's duty to plot the drill hole accurately. Put another way, assuming, *arguendo*, that the drill hole intersected by Consol on November 18 was gas well DNF 2057, it was not accurately plotted on the official mine map. End of story. It follows that Consol violated section 75-1200-1(d).

[4] Consol's usage of "reasonable precautions" terminology refers to the Commission's "alternative precautions" exception in *Musser*.

2. Gravity and Negligence

The record establishes that low levels of methane in the drill hole made it unlikely for there to be an ignition and injury. Tr. I 103-104. Further, Young's testimony was credible, that if there were an ignition, two miners operating the shearer would reasonably be expected to incur lost workdays or restricted duty as a result of burns, smoke inhalation, concussions, or broken bones. Tr. I 105. Accordingly, I find the Secretary's gravity designations for this violation to be appropriate.

The Secretary asserts that Consol's negligence was low in violating the standard due to its extensive efforts to locate old, abandoned gas wells. Sec'y Br. at 19-20. Credible evidence, as Young acknowledged multiple times, demonstrates Consol's diligence in searching for DNF 2057 and, even after the drill hole was mined through, there were no surface indicia of its existence on the golf course. See Tr. I 104-105, 182-84, 200, 286-89; Tr. II 53-56, 83-84; Ex. R–7. Considering the antiquated, inaccurate producer maps and drastically altered surface conditions, no prudent operator, conducting the most exhaustive search, could have likely located the drill hole prior to its intersection, and I find no fault in Consol's fruitless efforts. Therefore, I find that Consol was not negligent in committing the violation.

IV. Penalty

While the Secretary has proposed a total civil penalty of $905.00 for the violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act:

> (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (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) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation.

30 U.S.C. § 820(i); *see Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based on a review of MSHA's online records, I find that Consol is a large operator. The record also establishes that Consol demonstrated good faith in achieving rapid compliance after notice of the violations, and the parties stipulated that imposition of the proposed penalty will not adversely affect Consol's ability to remain in business. Jt. Stip. 6. Consideration of Consol's history of violations, gravity, and negligence factors for each violation follows below.

A. Citation No. 9204073

It has been established that this non-S&S violation was unlikely to cause an injury that was reasonably likely to result in lost workdays or restricted duty, and was caused by Consol's moderate negligence. In the fifteen-month period preceding issuance of this citation for missing horizontal keeper pins, nine violations of section 75.1725(a) became final Orders of the

Commission. Ex. P–5 at 15. Given that section 75.1725(a) is a general equipment maintenance standard, and that the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing an appropriate penalty. The Secretary has proposed a penalty of $782.00 by application of his Part 100 penalty table to an S&S violation. Applying the civil penalty criteria, I find that a penalty of $275.00 is appropriate.

B. Citation No. 9204074

It has been established that this non-S&S violation was unlikely to cause an injury that was reasonably likely to result in lost workdays or restricted duty, and that Consol was not negligent in its commission. In the fifteen-month period preceding issuance of this citation for a mapping violation, one violation of section 75.1200-1(d) became a final Order of the Commission, a mitigating factor in assessing an appropriate penalty. Ex. P–5 at 13. The Secretary has proposed a penalty of $123.00 by application of his Part 100 penalty table. Applying the civil penalty criteria, I find that a penalty of $100.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 9204073 is **AFFIRMED**, **as modified**, to delete the "significant & substantial" designation, and that Citation No. 9204074 is **AFFIRMED**, **as modified**, to reduce the degree of negligence to "none," and that Consol Pennsylvania Coal Company, LLC, **PAY** a civil penalty of $375.00 within 30 days of the date of this decision.[5] **ACCORDINGLY**, this case is **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

[5] Payment should be made 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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March 16, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2021-0153 A.C. No. 21-00831-535125 Mine: Northshore Mining Company

DECISION AND ORDER

Appearances: Emelda Medrano, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner

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

Before: Judge Young

SUMMARY

Citation No. 6166190, 30 C.F.R. § 56.12028: Failure to conduct grounding and continuity tests. Required annual continuity and resistance testing of grounding systems was not conducted on six conveyors, two surface water pumps, and two counter hoist weights.

Facts		p. 2 (Slip Op.)
Fact of violation	Affirmed	p. 2–3
Gravity	Affirmed	p. 3–5
Negligence	Affirmed	p. 5–6
Penalty	$530	p. 6

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 is one citation under section 104(a), issued to Respondent, Northshore Mining Company ("Northshore" or "Respondent"). The parties presented testimony and documentary evidence at a video conference hearing on November 18, 2021, and subsequently filed post-hearing briefs.

Northshore owns and operates the Northshore Mining Company mine site located in Silver Bay, Minnesota. Jt. Stip. 3; S. Post-Hearing Br. at 2 (Jan. 28, 2022) ("S. Br."). On the mine site, taconite is processed to make iron pellets. S. Br. At 1, 3. The mine site is subject to the

jurisdiction of the Mine Act and the Commission. Jt. Stips. 1, 2; S. Br. at 2. Citation No. 6166190 alleged that Respondent failed to conduct grounding and continuity tests as required under 30 C.F.R. § 56.12028. For reasons set forth below, I **AFFIRM** this citation and assess the penalty as proposed.

II. FACTUAL FINDINGS

This citation was issued by Inspector Mindy Meierbachtol on April 7, 2021. Ex. P–3, 002. She assessed the gravity as "unlikely," "fatal," non-S&S, and one person affected. *Id.* She assessed negligence as "moderate." *Id.* The inspector stated:

> The continuity and resistance testing of grounding systems was not conducted on the 162 conveyor, 62 conveyor, 163 conveyor, 63 conveyor, 64 conveyor, 67 conveyor, North & South surface water pump, and 63/163 counter hoist weight. This condition exposed miners to electrical shocks and burns resulting in injury. The last recorded continuity and resistance test was 12/1/2018. Continuity and resistance tests are necessary to discover electrical problems and to correct them before an electrical shock can occur.

Id.

The inspector reviewed the electronic records for the continuity and resistance tests of six conveyors, two water pumps, and the two counter hoist weights. Tr. 41–42, 62–63, 77–78, 149; P–5. Respondent's records revealed that the annual tests for the cited equipment had not been completed, and Respondent was unable to provide documentation of any recorded tests after 2018 for the conveyors and water pumps, and after 2019 for the counter hoist weights. *See* Tr. 42, 65, 84, 120–121, 125; Ex. P–4.

The violation was abated two days later, on April 9, 2021, when an electrician conducted and recorded the required tests. Tr. 74, 81–82; Ex. P–4, 010. The tests showed that the systems were properly grounded and would have tripped if necessary. Tr. 63–64, 78–79; Ex. P–4, 010.

At hearing, the Secretary testified that the counterweight hoists and water pumps had a voltage of 480 volts, while the conveyors had a voltage of 2,400 volts. Tr. 68–70, 137. Previous tests showed that the systems were functioning properly. *Id.* at 78–79. However, Respondent conceded that it could not have known if the grounding systems were working properly at the time the citation was issued. *Id.* at 125–26.

Respondent also testified that this citation was likely a "paperwork violation," meaning that someone could have performed the tests without recording them. *Id.* at 138, 139. Respondent also contended that multiple redundant systems, including grounding through the system's feeder cable and an external ground for motors, would lessen the Secretary's gravity assessment. *Id.* at 143, 146–47.

A. Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res.*, 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).

The cited standard states, "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." 30 C.F.R. § 56.12028 (2022). The inspector issued this citation based on Respondent's failure to perform annual continuity and resistance testing on six conveyors, two water pumps and two counterweight hoists. Tr. 65.

The Secretary provided credible testimony that Northshore violated the standard by failing to conduct annual continuity and resistance testing on grounding systems on the North and South surface water pumps, the No. 63 and 163 counter hoist weights, and the Nos. 62, 162, 63, 163, 64, and 67 conveyors. Tr. 65, 125, 137. There is sufficient evidence to find a violation because Respondent did not provide, and did not claim to have, records of the required tests. Tr. 123. Respondent's records revealed that annual tests had not been completed since 2018 for the conveyors and the water pumps and 2019 for the counter hoist weights. Tr. 65.

Respondent argued that it was possible a test was conducted and went unrecorded. However, no evidence was provided in support of this argument. On the contrary, Keith Klemner testified that if a test had been performed, it should have been recorded. Tr. 139. The fact that post-citation testing revealed proper grounding does not itself support the argument that this violation was merely a "paperwork violation."

This regulation is intended to protect miners—in this case, from the danger of electrocution or serious injury—by alerting mine operators to defects so that they can correct them to prevent serious injuries or fatalities from electrocution. Without performing these tests, Respondent had no way of knowing if there was a grounding failure that endangered miners.

Given these facts, I find that the Secretary has proven the violation by a preponderance of the evidence.

B. Gravity

The "likelihood" contemplated within the assessment of gravity is that of the injury that may result from the violation and the hazard to which it contributes. "Severity" is an assessment of the seriousness of a potential injury if it were to occur.

1. Likelihood

The Secretary concedes that injury is unlikely. I find that the violation was unlikely to cause injury, primarily because the inspector testified that during inspection, the cited equipment was stationary and no repairs were being performed. I credit that the inspector considered that there was no damage to the equipment, and that it was unlikely that a miner would be exposed to an improperly grounded circuit. Tr. 84–85. I therefore affirm the assessed likelihood.

2. Severity

In evaluating the severity of a potential injury, the Secretary defines "fatal" as "any work-related injury or illness resulting in death, or which has a reasonable potential to cause death." 30 C.F.R. § 100.3(e) (2022). Importantly, a severity evaluation at this stage 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).

There is sufficient evidence to find that the severity of this violation is potentially fatal. Annual resistance and continuity testing is statutorily mandated to discover and correct hazardous conditions before miners are injured. Examiners bear the responsibility of protecting miners from identifiable hazards, and it is imperative that mine management ensure all required exams are conducted and reported so that the potential for accidents is minimized. *See Recon Refractory & Constr.*, 36 FMSHRC 2265, 2272 (Aug. 2014) (ALJ Paez) (citing IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 21, at 44 (2003)); *Yaple Creek Sand & Gravel*, 11 FMSHRC 1471, 1481 (Aug. 1989) (ALJ Morris).

In this case, the tests ensure that the ground will carry a fault back to the breaker causing it to trip rather than shock or electrocute[1] a miner. Tr. 63–64. Without the results of the tests, Respondent had no way of knowing whether the grounding systems were working properly for the cited equipment. Tr. 63–64, 73, 125–126.

The Inspector testified that she considered the high voltage of the water pumps, hoists, and conveyors in determining that the occurrence of the hazard had a reasonable potential to result in death. Tr. 70. She also testified that several other factors contributed to her gravity assessment, including Respondent's failure to ensure the annual continuity and resistance tests, the high voltage in the cited equipment, the moist conditions at the conveyors, and the metal grating in the walkway between conveyors. Tr. 66–69. The violative systems were high voltage—either 480 or 2400

[1] "Electrocute" traditionally meant "to execute or put to death by electricity." *See Electrocute*, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE BEING THE AUTHENTIC EDITION OF WEBSTER'S UNABRIDGED DICTIONARY: COMPRISING THE ISSUES OF 1864, 1879, AND 1884 (Noah Porter ed., 1898). However, common usage has broadened to embrace "kill[ing] or severely injur[ing] by electric shock." *Electrocute*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/electrocute (last visited Mar. 15, 2022). Because the hazard here includes both the potential for serious injury and death, I have noted each specifically.

volts. Contact with improperly grounded systems with this high voltage could result in severe burns, shock, or electrocution.

Respondent argued that its redundant safety measures—grounding through the system's feeder cable and external grounding for the motors—support a reduction in gravity. I find that these systems are insufficient justification for a severity reduction. The redundant safety measures mentioned are aimed at ensuring the systems are grounded. While these systems may reduce the likelihood of an electrocution, it does nothing to reduce the severity of the injury—electrocution—if the grounding failed.[2]

Additionally, potential hazards are not eliminated if post-citation testing finds that no hazardous condition exists. Respondent's evidence that the systems were operating as intended is irrelevant to the severity determination in this case. The fact that the annual continuity and resistance testing was not completed constitutes a violation regardless of these later findings.

I find that Respondent's failure to conduct annual continuity and resistance testing of grounding systems for the violative equipment exposed miners to a potentially fatal injury. I find that a fatality, while unlikely, could occur due to electric shock or burns resulting from contact with this high voltage. Therefore, I affirm the assessed severity.

3. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. Tr. 70–71. I agree that, logically, one miner would be performing the workplace exam or conducting maintenance along the conveyors. Further, I find it reasonable that another miner would not contact the equipment after finding that the other miner was injured during that activity. I affirm the assessed number of persons affected.

C. 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." *Id.* At 1702.

I find that negligence was properly assessed as "moderate." Respondent is familiar with the mining industry and had knowledge that annual continuity and resistance tests were required.

[2] Although Respondent's redundant safety measures may reduce the likelihood of electrocution, the Secretary has already conceded that injury was unlikely in this case. Because that is true, the respondent must effectively show that the potential for injury is not merely remote, but practically impossible.

This knowledge was evidenced by the fact that Respondent had performed continuity and resistance tests prior to the issuance of this citation and on other equipment. Tr. 71. The operator should have been familiar with the protective purpose of running the annual tests, and a reasonably prudent person should have known about the violation and acted to remedy it. Nonetheless, Respondent failed to do so.

Respondent's suggestion at hearing that this citation was likely a "paperwork violation" is not supported by any evidence. A paperwork violation exists if a test has been performed, but not documented. Here, Respondent's employees did not provide any evidence of annual testing and admitted that if there had been testing, it would have been recorded. Tr. 138, 149–150.

Under continued normal mining operations, miners would have continued to be exposed to the hazard of electrocution with a reasonable potential to cause death. Respondent had not implemented any system to ensure that annual testing was completed, allowing prior work orders to close with no plan in place for them to regenerate. Tr. 72.

Respondent did not offer any evidence of mitigating circumstances to justify its failure to conduct annual testing. Tr. 127. However, in establishing negligence, the inspector considered that tests had been performed on other equipment and that the work orders for the cited equipment had been closed before the tests were conducted. Tr. 71–73; P–4, 003. Because closed work orders do not regenerate every year, Respondent did not receive any reminders to conduct the annual tests. Tr. 72.

For these reasons, I affirm the assessed negligence.

D. 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).

The Secretary has entered Respondent's violation history [MSHA Directorate of Assessments, Assessed Violation History Report] into evidence. *See* Ex. P–2. I have reviewed Respondent's general and repeat violations, and I find that the Secretary has properly considered Respondent's minimal violation history in his calculation. I agree that the Secretary has properly evaluated the size of the mine in his calculation. The parties have stipulated that payment of the penalty will not affect Respondent's ability to continue in business. Jt. Stip. 8.

I affirm the negligence and gravity as assessed. I find that the violation was the result of "moderate" negligence, and that the likelihood of injury was "unlikely," the severity was "fatal,"

and one person would be affected. I found that Respondent's redundant safety measures did not alter the gravity assessment in this case.

Following the citation, Respondent abated the citation by completing and recording the continuity and resistance test. Ex. P–3, 003. Considering this fact, I find that the operator demonstrated good faith in achieving rapid compliance after notification.

For the above reasons, I affirm the citation as written and assess a penalty of $530.00.

III. CONCLUSION

It is **ORDERED** that Citation No. 6166190 be **AFFIRMED** as issued.

It is **ORDERED** that the Respondent pay the Secretary of Labor the assessed penalty of **$530.00** within 30 days of the date of this decision.[3]

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

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[3] 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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March 30, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2020-0080 A.C. No. 36-07416-511932 Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Ryan M. Kooi, Esq., & Kenneth J. Polka, CLR, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

Patrick Dennison, Esq., Fisher and Phillips, LLP, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The "Act" or "Mine Act"). A hearing was held via Zoom Government on Thursday, August 19, 2021.[1] The parties subsequently submitted briefs. The within Decision has been reached after careful consideration of the evidence presented at hearing and arguments advanced by the parties.

[1] This docket originally included six citations. Prior to hearing, the parties settled Citation Nos. 9200923, 9200927, 9203371, 9078965, and 7033984. A Decision Approving Partial Settlement was issued.

LAW AND REGULATIONS

30 C.F.R. § 75.517 provides, in pertinent part:

Power wires and cables [. . .] shall be insulated adequately and fully protected.

CREDIBILITY ASSESSMENT

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part 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) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

JOINT STIPULATIONS[2]

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. §802(d), at the mine at which the citation at issue in this proceeding was issued.
2. At all times relevant to these proceedings, Enlow Fork Mine (ID 36-07416) was a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Operations of the Respondent at the mine at which the citation was issued are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Enlow Fork Mine is owned by the Respondent.
6. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.
7. The individual whose name appears in Block 22 of the citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
8. A true copy of the citation at issue in this proceeding was served by a duly authorized representative of the Secretary of Labor upon an agent of

[2] At hearing, it was agreed that the parties would submit joint stipulations in their post-hearing briefs. Tr. 7-8. Specifically, the joint stipulations were submitted as part of the Secretary's post-hearing brief.

Respondent at the date, time, and place stated in the citations, as required by the Act.

9. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2021-0080 contains an authentic copy of the citation at issue in this matter with all modifications or abatements, if any.

S. Br. at 1-2 (Nov. 8, 2021).[3]

SUMMARY OF TESTIMONY

WITNESSES

Robert Revi

At hearing, Robert Revi testified on behalf of the Secretary. In addition to the certifications Revi held during his employment in the coal industry and with MSHA, Revi earned a Bachelor of Science degree from California University of Pennsylvania. Tr. 15-17. At the time of hearing, Revi had worked 9 and 1/2 years as an inspector for MSHA.[4] Tr. 15.

On February 4, 2020, Revi, accompanied by his field office supervisor, Tom Bochna, went to Enlow Fork Mine to conduct a 103(i) spot inspection. Tr. 18. During the inspection, Revi was also accompanied by the operator's safety escort, Matthew Roebuck. Tr. 19.

Revi issued Citation No. 9079562 to Consol on the day of inspection. Tr. 19; Ex. S-1. The citation was served to Roebuck. Tr. 19. In his citation, Revi noted that the power cable to the Fletcher rib bolter was not being adequately protected from damage. Tr. 22; Ex. S-1. The damaged cable was laying on the mine floor between the 25-25.5 wall with damage to both the outer jacket and inner insulation of the red and white leads. Tr. 22. The operator had violated mandatory safety standard 75.517 45 times in two years at the subject mine. Tr. 22. After seeing the rib bolter and the cable coming off the cable roll of the bolter, Revi noticed damage to the cable. Tr. 22. After finding damage to the outer jacket and inner insulation, Revi informed Roebuck that he would be issuing an S&S citation. Tr. 23. Revi recalled that Roebuck had, in fact, gone over to trip the power; however, he did not record such in his notes. Tr. 23. The damaged portion of the cable was approximately 50 feet from the bolter. Tr. 24.

It appeared that a piece of equipment had been running over the cable. Tr. 24. Revi noted damage to the outer jacket and, upon further inspection, damage to the red and white insulation, exposing bare energized copper conductors. Tr. 24-25. This damage could be observed without touching or moving the cable. Tr. 25.

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[3] Hereafter, the joint stipulations, transcript, the Secretary's exhibits, Respondent's exhibits, the Secretary's post-hearing brief, and Respondent's post-hearing brief are abbreviated as "Jt. Stip.," "Tr.," "Ex. S-#," "Ex. R-#," "S. Br.," and "R. Br.," respectively.

[4] See Tr. 15-17 for a detailed description of Revi's mining experience and specialized certifications.

The damaged cable was located along a travel way. Tr. 25. The area at issue was a haul road that was still used as a primary entrance to get to the end of the track. Tr. 25. The loading crew unloaded supplies to store in the cross cuts and along the rib in the section. Tr. 25. Miners could walk right over the cable. Tr. 26. A miner, in attempting to move the cable out of the way, might grab the energized cable unaware of the "bad spot" in it. Tr. 26. The cable was a 4-gauge cable that handled 480 volts. Tr. 26. The breakers were set to trip at 500 amps. Tr. 27.

Revi determined that there was a reasonable likelihood of injury because of the location of the cable in a high travel area and the number of people who might encounter it. Tr. 27-28. He determined that the number of people affected would be one. Tr. 28. Revi testified that any miner using the rib bolter or handling the cable could be injured. Tr. 28-29. Given the potential 480-volt shock, he had originally determined that any injury would be permanently disabling in nature. Tr. 27-28; Ex. S-2. After further reflection, Revi decided that it was more reasonable to expect that any injury sustained would be fatal in nature. Tr. 32; Ex. S-1. Revi noted that 110 volts can kill most people and that the damaged cable carried 480 volts. Tr. 32. Revi concluded that this was an S&S violation. Tr. 33. Exposure to bare copper conductor leads could result in death by electrocution. Tr. 34.

The inspector referenced Respondent's assessed violation history that was considered in determining the penalty imposed. Tr. 36, Ex. S-4. Revi designated the level of negligence as "Moderate" because the area in question was located in the track entry, an area which was examined three times per shift by an agent of the operator. Tr. 39. In making his determination, he considered circumstances that may have contributed to the Respondent's failure to have found the unsafe condition. Tr. 39.

Revi did not interact with any crew members the day he issued the citation. Nor did he observe any equipment, including the Fletcher roof bolter, being operated in the area. Tr. 41.

Revi found no other violations, excluding the roof bolter cable. Tr. 42. He agreed that the red leads – and not the white leads – were the only actual leads exposed. Tr. 50. He had concluded that the cable's energy was on because there were lights illuminated on the bolter which was parked in a crosscut. Tr. 52.

Revi conceded that he did not have an electrical background and had not used an electrical meter to test the cable. Tr. 54-55. He agreed that the rib bolter and cable were powered with an electrical system that contained ground fault protection. Tr. 55. He had not gone to the power center to check whether the breaker was kicked. Tr. 57-58. Revi agreed that the Respondent also had a ground monitoring system in place. Tr. 59. He observed, however, that the tripping mechanisms used by the operator did not always trip whenever damage was done to the cable. Tr. 59.

Revi did not know when the cable was damaged nor whether any employee of the operator had been aware of damage to the cable. Tr. 66. He conceded that he had not recorded in his notes that the bolter lights were on. Tr. 77. He further agreed that the purpose of the ground wire in the cable was to trip and de-energize the cable if there was damage to the cable. Tr. 80.

Matthew Roebuck

On February 4, 2020, Roebuck accompanied Revi and Bochna during their safety inspection. Tr. 88-89. Roebuck kept a digital copy of his notes taken during the inspection. Tr. 90; Ex. R-1.

At the time of hearing, Roebuck had worked for Consol for a little over 10 years. Tr. 86. He started as an industrial engineer and had become a safety inspector shortly thereafter.[5] Tr. 87.

Revi called Roebuck's attention to the damaged cable. Tr. 97. Roebuck observed "a little bit" of red and white in the cable. Tr. 97. He informed Revi that he was going to the load center to knock the power off. Tr. 97. As he approached the power center, he noticed that one bolter had power on and one did not. Tr. 99. Because of some question as to what cable connected to what bolter, a mechanic, called to the scene, elected to knock power on both bolters. Tr. 99-100. Roebuck did not recall seeing any lights on either of the bolting machines near the 25 wall. Tr. 101.

Roebuck disagreed with Revi's "Reasonably Likely" and "S&S" designations. Tr. 102. Roebuck testified that an investigation revealed that power to the damaged cable's bolter had been knocked at the load center. Tr. 102. To return power to the damaged cable, the breaker at the load center would need to be reset. Tr. 102. Roebuck observed that abatement involved a mechanic splicing the damaged cable. Tr. 106.

Travis Stout

Travis Stout had worked for Consol for 27 years. Tr. 113. His jobs included: chief electrical foreman, system master mechanic, long haul mechanic, general maintenance foreman, and shift maintenance foreman.[6] Tr. 114. As general maintenance foreman, Stout maintained rib bolters, including bolter cables, on a day-to-day basis. Tr. 116. Stout reviewed the reports of electrical examinations conducted at Enlow Fork. Tr. 119; Ex. R-2.

There were various ground fault protections associated with the power center and the rib bolter. Tr. 122-23. These were: a sensitive ground fault on the individual circuit; a ground fault on the main circuit; and a backup ground fault on the main circuit. Tr. 123. A Bender ground fault relay was used at Enlow Fork in February of 2020. Tr. 126; Ex. R-3.

If both the red and white leads were damaged, the cable would not be expected to be energized. Tr. 133-34.

[5] See Tr. 86-87 for a detailed description of Roebuck's mining experience and specialized certifications.

[6] See Tr. 114-16 for a detailed description of Stout's mining experience and specialized certifications.

The type of machinery in question had a "tone monitor," which monitored all three phases. Tr. 134. If two phases had damage, it would cause the ground wire to trip the breaker, not permitting reset. Tr. 134.

Stout agreed that anybody at any time could take the bolter and energize it.[7] Tr. 136.

The trip rating on the sensitive ground fault was set at 300 milliamps. Tr. 137. The setting was adjustable and could be changed. Tr. 137. The breaker ground fault was probably closer to 7.5 amps and was also adjustable. Tr. 137.

Stout expressed surprise that a shock between 50-150 milliamps could cause fatal results. Tr. 138. He agreed that it was possible to have an exposed lead and still have power on the cable if it was not faulted out. Tr. 140.

CONTENTIONS OF THE PARTIES

The Secretary contends that the Respondent was moderately negligent in failing to adequately insulate and maintain a power cable in direct violation of 30 C.F.R. § 75.517. The Secretary contends that—assuming continued normal mining operation—there was a reasonable likelihood that the hazard contributed to by the violation would result in fatal injury to one person and would constitute an S&S violation. Finally, the Secretary argues that consideration of Respondent's sensitive ground fault system is irrelevant to an S&S inquiry.

The Respondent contends that the Secretary failed to prove any negligence on behalf of the operator, and that the cable in question was not in fact energized at either the time it was damaged or the time it was inspected. Respondent argues that exposure to the damaged cable would be unlikely. Further, if contact occurred, Respondent contends that it would result in no lost workdays, in part because the operator's grounding systems protected miners from potential electrical injury. Accordingly, Respondent contends that no S&S designation is warranted.

BURDEN OF PROOF AND STANDARD OF PROOF

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by the preponderance of the evidence. *Jim Walter Res. Inc.,* 28 FMSHRC 983, 992 (Dec. 2006). *RAG Cumberland Res. Corp.,* 22 FMSHRC 1066, 1070 (Sept. 2000). *Jim Walter Res., Inc.,* 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.,* 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'" *RAG*

[7] On redirect, Stout testified that if the ground fault was reset without correcting the condition that caused the fault in the first place, the breaker would trip out and the cables would be de-energized. Tr. 142.

Cumberland Res. Corp., 22 FMSHRC 1070 (Sept. 2000), (quoting *Concrete Pipe & Prods of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 8 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California.* 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States,* 97 U.S. 237, 266 (1877).[8]

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.[9]

As to this and other controverted matters discussed *intra*, this Court has credited the opinions of Revi, an experienced MSHA inspector. (*see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) and *Buck Creek Coal, Inc. v. MSHA*, 52 F. 3d 133, 135-136 (7th Cir.) re crediting opinions of experienced MSHA inspectors).

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[8] "What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly, the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case." 2 McCormick on Evid. § 339 (7th Ed.). Indeed, the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad*'s Book XXII: "Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor." Homer, The Iliad, Book XXII (Samuel Butler trans., [Publisher] [ed.]) (1898).

[9] When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if it is supported by substantial evidence. *Wolf Run Mining Co.,* 32 FMSHRC 1669, 1687 (Dec. 2010); *U.S. Steel Mining Co.,* 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(s)(A)(ii)(I). Substantial evidence has been described by the Commission as "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

ANALYSIS

Issue I: Did the Secretary carry his burden of proving a violation of 30 C.F.R. § 75.517?

Issue II: Given that the Respondent had in place a sensitive ground fault system when Citation No. 9079562 was issued, would this preclude a finding of S&S?

Issue III: Was the violation of 30 C.F.R. § 75.517 significant and substantial in nature?

Issue IV: Assuming the violation constitutes an S&S violation, is the moderate level of negligence designated by the inspector supported by a totality of the circumstances?

Issue V: Assuming the citation constitutes an S&S violation, is the originally assessed penalty of $3,046.00 appropriate?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Secretary carried his burden of proving a violation of 30 C.F.R. § 75.517.

Section 75.517 provides, in pertinent part, that power cables shall be insulated adequately and fully protected. 30 C.F.R. § 75.517. I find that Respondent did not adequately insulate or fully protect the cable supplying power to the rib bolter, and therefore, violated 30 C.F.R. § 75.517.

At hearing, the Secretary presented testimony from Inspector Robert Revi that he had observed a cable lying on the floor of Enlow Fork Mine. Tr. 21-22. The cable, which supplied power to a rib bolter, had damage to both the outer jacket and inner insulation, exposing bare conductor wires. The damaged cable was approximately 50 feet away from the bolter, across from the refuge alternative, inby the corner of the rib, in the No. 4 Entry. Tr. 22, 24, 94.

This Court found Revi to be credible in his testimony, establishing that the power cable was noticeably damaged, not adequately insulated, and not fully protected.[10]

Respondent at hearing and in its brief questioned whether the cable was energized at the time it was damaged or at the time the citation was issued. *See inter alia* Tr. 54-57 and R. Br. 3-

[10] In assessing the credibility of witnesses, this Court, as trier of fact, found Revi to be a forthright and honest individual. This Court specifically rejects Respondent's contention that Revi's testimony was unreliable and inconsistent; *see also* R. Br. 12. Indeed, the testimony of Travis Stout, Respondent's witness, that he was shocked to hear that a current of 50-150 milliamps might cause fatal results, raised much more doubt in this Court's mind as to veracity. Tr. 138.

6. The Respondent, however, has presented no Commission case law indicating that the underlying violation of this mandatory safety standard requires proof of cable energization.[11]

This Court finds that the Secretary carried his burden of proving a violation of 30 C.F.R. § 75.517 based, *inter alia*, upon the credible testimony of Inspector Revi. *See also* S. Br. 5.

II. Respondent's ground fault system in place when Citation No. 9079562 was issued would not, as a matter of fact or of law, preclude a finding of S&S.

At hearing and in its post-hearing brief, Respondent advanced various arguments as to why its sensitive ground fault system would have precluded the reasonable likelihood of serious injury or death and, accordingly, would have warranted against a finding of S&S. *See, inter alia,* R. Br. 13-14, 17-19.

As both a matter of fact and law, this Court rejects Respondent's arguments.

At hearing, Inspector Revi gave undisputed testimony that the 480-volt power cable at issue carried a current of 500 amps. Tr. 26-28. Based upon his training and experience, Revi opined that electrocution could occur with a current as low as 15 milliamps. Tr. 32. Respondent's witness, Travis Scott, testified that the three different fault systems were normally set at 300-500 milliamps, but with an adjustable setting. Tr. 123, 137-38. On cross-examination, Stout expressed surprise that a current between 50-150 milliamps could cause fatal results. Tr. 138. He further conceded that the sensitive ground fault system might not trip even if damage were done to the cable. Tr. 139-40.

At hearing, this Court did not allow admission of an OSHA document (Secretary's Ex. S-3), outlining the effects of electric currents on the human body. Tr. 30-32. [12] This Court did permit Inspector Revi, based upon his own experience, to testify as to the milliamps necessary to cause possible fatal injury. Tr. 30-32. In his hearing brief, the Secretary requested that this Court take judicial notice of the exhibit as it was a public record. *See* S. Br. 10.

Rule 201 of the Federal Rules of Evidence provides, in pertinent part, that the Court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and

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[11] While this Court does not find that the energization or de-energization of the cable is relevant to the existence of a violation, I am aware that the status of its energization—along with other factors—may affect the likelihood of exposure to a shock hazard, as stated in a recent Commission decision. *Consol PA Coal Co.*, 44 FMSHRC ___, slip op. at 8, No. PENN 2019-0008 (Feb. 10, 2022).

[12] This exhibit is attached hereto and has its original marking of petitioner's "Ex. P-3." As discussed within, Revi opined that 15 milliamps could be a killing current. According to this OSHA document, a current of 6-30 milliamps can cause painful shock, loss of muscular control, and a freezing current in which an individual cannot let go. This document further indicates that a current of 50-150 milliamps can cause extreme pain, respiratory distress, severe muscular contractions, and possible death. One amp equals 1000 milliamps, or milliamperes. Ex. S-3.

reasonably determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. The Court may take judicial notice at any stage of the proceeding on its own or if a party requests it. *Union Oil Co. of CA*, 11 FMSHRC 289, 300 n.8 (Mar. 1989) (stating that official notice may be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true).

After careful consideration, this Court takes judicial notice of the fact that a current carrying 50-150 milliamps can cause—as described in Ex. S-3/P-3—"extreme pain, respiratory distress, severe muscular contraction, and possible death." To the extent that Respondent has challenged Revi's opinions on the basis of his lack of advanced electrical knowledge (*see, e.g.*, R. Br. 3), this Court finds that the foregoing judicially noticed fact essentially corroborates Revi's testimony regarding the potentially fatal nature of the power cable's current, successfully rebuts respondent's arguments otherwise, and supports the Secretary's S&S determination.

Given that the Respondent's own witness testified that the sensitive ground fault system was set to trip at 300-500 milliamps—at least double the amount that could cause serious injury or death—such sensitive ground fault system measures, as a matter of fact, would not have protected miners from a potentially fatal electrical shock. Tr. 137; *see also* S. Br. 11.

As trier-of-law, this Court further agrees with the Secretary's argument that Respondent's sensitive ground fault system should be treated as a redundant safety measure and should not be taken into account in reaching an S&S determination. *See* S. Br. 11-12.

There is a long line of Commission and Circuit Court cases holding that redundant safety measures are not relevant to the S&S inquiry. The Commission has recently stated that, "'[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry.'" *Consol PA Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (noting that consideration of redundant safety measures is inconsistent with the language of § 104(d)(1) of the Mine Act)); *see also Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018); *ICG Illinois, LLC*, 38 FMSHRC 2473, 2481 (Oct. 2016); *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1312-13 (June 2016); *Knox Creek Coal Co. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016), *aff'g* 36 FMSHRC 1128 (May 2014); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015)*; Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013); *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995); S. Br. 11.

In determining whether the subject violation was S&S in nature, this Court refuses to set aside this corpus of Commission jurisprudence so as to make an exception to such when it comes to evaluating Respondent's backup protections for damaged power cables in the context of an S&S determination.

If there is one lesson that the history of American mining has taught, it is that operators' fail-safe systems often fail. Whether because of degradation due to normal continuing operations, "Acts of God," human error, mechanical defects, or, in the most bitter of cases, intentional

disablement, secondary safety measures may not protect miners from harm. It must be assumed that under continuing operations, the hazard arising out of the unsafe condition will occur. To presume otherwise can only result in real danger to miners.

If Respondent's argument is taken to its logical conclusion, the existence of alleged foolproof backup safety systems would always preclude a finding of likelihood at *Newtown*'s second step, necessarily vitiating the protective intent of the mandatory safeguard at issue. If operators begin to assume that backup ground fault safety measures will preclude S&S findings and their inspectors begin assuming such measures will always protect miners from electrical hazards associated with damaged wiring and cables, there is a real peril that operators and their agents might become less vigilant or, in the worst scenario, lackadaisical in ensuring 30 C.F.R § 75.517 safeguards are adhered to.

This Court also takes note of Respondent's argument that its sensitive ground fault protection settings are the lowest in the country and that it should be credited for reducing the likelihood of electrical hazards and encouraged to enhance miners' safety.[13] R. Br. 17-18. Respondent's safety initiatives are commendable. However, protection of miners' lives should be sufficient motivation for the installation of additional electrical hazard protections. There is something jarring about Respondent's request for praise for doing the right thing.[14] This Court specifically holds that such efforts do not warrant a finding of non-S&S.

III. The violation of 30 C.F.R. § 75.517 was significant and substantial in nature.

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth a four-step analysis for determining whether a violation was S&S in nature.

Under the *Mathies* test, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard; (3) a reasonable likelihood that the hazard contributed to will result in injury; (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3–4 (Jan. 1984).

In *MSHA v. Newtown Energy, Inc.,* 38 FMSHRC 2033, 2036-2040 (Aug. 2016), the Commission modified *Mathies* by adding a "reasonable likelihood" inquiry to the second step. Under *Newtown*, the S&S analysis inquires whether:

[13] As discussed *intra*, Consol's settings still are not set low enough to protect against serious injury or death.

[14] "[T]he first priority and concern of all in the coal [. . .] industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801 (2)(a).

(1) there has been a violation of a mandatory safety standard;
(2) based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed;
(3) based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
(4) any resultant injury would be reasonably likely to be reasonably serious.

MSHA v. ICG Illinois, LLC, 38 FMSHRC 2473, 2483 (Oct. 2016) (Althen Dissenting).

The Commission, in *Newtown*, held that the proper focus of the second step in *Mathies* was the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown*, 39 FMSHRC at 2037 n.8. The majority further emphasized that it was essential for the judge to adequately define the particular hazard to which the violation allegedly contributed. *Id.* at 2038. The starting point for determining the hazard should be the actual cited section. *Id.*

For the following reasons, this Court finds that the Secretary has established that all four prongs of *Mathies/Newtown* have been met, and therefore Citation No. 9079562 was properly designated as S&S.

A. A violation of a mandatory safety standard occurred.

The facts and discussion *supra* establish a violation of 30 C.F.R. § 75.517, which is a mandatory safety standard.

B. There was a reasonable likelihood of the occurrence of the hazard.

The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, but rather whether there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc.* 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

In the case *sub judice*, the discrete safety hazard created is electrocution due to intentional or non-intentional contact with the cited cable. The particular facts surrounding the violation created a reasonable likelihood of the occurrence of the hazard against which 30 C.F.R. § 75.517 was directed. These particular facts include the cable's damaged condition, its location in a main travel way, and the frequent usage of the rib bolter and power cable.

As argued by the Secretary in his brief, even assuming damage only to the outer jacket of a cable, a violation of this standard may warrant an S&S designation. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1287 (Dec. 1998) (affirming an ALJ's finding that "[w]hen the jacket is ruptured, the cable is not insulated as designed."); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (recognizing that a gash in the outer jacket of a trailing cable significantly weakens the protection afforded by inner insulation); *Spartan Mining Co*., 30 FMSHRC 699, 707–08 (Aug. 2008) (finding that an S&S designation was appropriate where a trailing cable was damaged, but the outer jacket did not appear to be broken).

Additionally, cables will likely sustain further wear and deterioration during continued normal mining operations.[15] *Webster Cty. Coal, LLC*, 31 FMSHRC 219, 235 (Feb. 2009) (ALJ); *see also* S. Br. 7-8; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (recognizing that a cut in the outer jacket of a cable constituted an S&S violation in part because of the "harsh environment of a coal mine."). Here, there was evidence of exposed bare copper, further supporting the Secretary's S&S finding.

The damaged cable was located near the No. 4 Entry, the main travel way used to access the section and the mining face. Tr. 25-26. Individuals walking down the No. 4 Entry might pick up the cable or step on it, sustaining electrical shock. Tr. 26.

The Fletcher rib bolter was readily available for use and its supporting power cable was also readily available. At hearing, Stout noted that, given the great number of cables laying about, it was difficult to determine which cable connected to a particular machine, further increasing the chances that the damaged cable might be picked up in error. Tr. 29, 99.

In view of the foregoing, this Court finds that the Secretary presented sufficient evidence to meet the second step of *Mathies* and *Newtown*.

C. Based upon the particular facts surrounding the violation, the occurrence of the hazard—electrocution due to intentional or non-intentional contact with the damaged cable—would be reasonably likely to result in an injury that would be reasonably likely to be serious, and indeed, fatal.

Considering the facts and discussion *supra*, intentional or non-intentional contact with a damaged 480-volt cable, carrying a 300-milliamp current, would be reasonably likely to cause electrocution and injuries such as electrical shock, burns, or death. Accordingly, the third and fourth steps of *Mathies* and *Newtown* are also met.

Given the evidence presented and the reasonable inferences flowing from such, the inspector reasonably concluded that it was reasonably likely that an individual in the entry area would, intentionally or unintentionally, suffer electrocution due to contact with the damaged cable. The inspector also reasonably concluded that the expected injury would affect one person and that, as discussed *supra*, the resulting injury would be fatal.

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[15] Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). When evaluating that contribution, it is assumed that normal mining operations will continue. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984); *see also U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). An S&S designation 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. *U.S. Steel Mining*, 6 FMSHRC at 1574; *Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (Dec. 1992).

IV. The moderate level of negligence designated by the inspector is supported by a totality of the circumstances.

According to 29 C.F.R. § 103.3(d), negligence is considered moderate when "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3, Table X. In *Sec'y of Labor v. Brody Mining, LLC.,* 37 FMSHRC 1687, at 1701 (Aug. 2015), the Commission affirmed that, in making a negligence determination, Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, are not limited to an evaluation of allegedly mitigating circumstances, and can consider "the totality of the circumstances holistically."

Considering that the area where the cable was located was highly traveled and subject to examination by an agent of the operator three times per shift, that the damage was readily observable by Revi, and that the damage was probably caused by machinery running over the cable, it is reasonable to conclude that the operator or his agents should have known of the violative condition.

Revi found a mitigating circumstance in that he could not place an agent of the operator at the cable at the time it was damaged. Tr. 27. Considering the totality of the circumstances holistically, including Respondent's contention that it had no knowledge of the damaged cable, this Court finds moderate negligence to be an appropriate designation of Respondent's failure to adhere to § 75.517 requirements.

V. The originally assessed penalty of $3,046.00 for the violation is appropriate.

When undersigned first joined the Commission and reviewed the pertinent statutory and case law regarding penalty assessments, I concluded that the pathway to determining a proper penalty amount was short, simple, and straightforward: conduct a de novo review; consider 110(i) criteria; explain any substantial deviation from the Secretary's proposed amount; reach an independent assessment. In the fullness of time, I learned that the path could often be much more lengthy, arduous, and convoluted.[16]

[16] My appellate odyssey following a proposed American Coal Company penalty was an object lesson on point. See *Sec'y of Labor v. Am. Coal Co.*, 35 FMSHRC 3077 (Sept. 2013) (ALJ); *Commission Remand*, 28 FMSHRC 1987 (Aug. 2016); *Decision on Remand*, 38 FMSHRC 2612 (Oct. 2016); *Commission Split Decision Affirming ALJ*, 40 FMSHRC 1011; *see also American Coal Co. v. FMSHRC*, 933 F.3d 723, 728 (D.C. Cir. 2019), affirming ALJ decisions.

Despite the foregoing, this Court perceives the pathway to an appropriate penalty assessment in this matter to be clear and unobstructed.[17]

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

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

30 U.S.C. 820(i).

In *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997), the Commission held that all of the statutory criteria in § 110(i) should be considered in the court's *de novo* penalty assessment, but not necessarily assigned equal weight. In *Musser Engineering, Inc.,* 32 FMSHRC at 1289, the Commission held that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. Here, the gravity of the violation as to injury was designated as fatal.

The Secretary has proposed a penalty of $3,046.00 for the violation cited in Citation No. 9079562. I have considered and applied the six penalty criteria found in § 110(i) of the Act. Considering all the circumstances, the Secretary's original proposed penalty assessment appears appropriate.

The mine and its controlling entity are considered large in size under 30 C.F.R. § 100.3. The parties stipulated that payment of the proposed total penalty would not affect Respondent's ability to continue in business. Jt. Stip. 6. The history of assessed violations, admitted into evidence at Ex. S-4, showed 26 violations of this standard by this operator in the 15-month period prior to issuance of this citation. *See also* Tr. 36; Ex. S-1.

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[17] *But, see* Stephen Crane's "The Wayfarer":

> The Wayfarer,
> Perceiving the pathway to truth,
> Was struck with astonishment.
> It was thickly grown with weeds.
> "Ha," he said,
> "I see that none has passed here
> In a long time."
> Later he saw that each weed
> Was a singular knife.
> "Well," he mumbled at last,
> "Doubtless there are other roads."

I have addressed negligence and gravity in the discussion above. This Court notes that much of Respondent's argument for a reduced penalty rested upon a modification of the gravity finding from "reasonably likely" to "unlikely," and a change of negligence from "Moderate" to "None." For reasons already discussed *supra*, this Court rejects such suggested modifications. Finally, while accepting that Respondent acted in good faith in abating the dangerous condition, this Court accords more weight to the gravity of the violation and the reasonable likelihood of fatal injury posed by the electrical hazard in determining an appropriate penalty.

Based on the foregoing, this Court finds that a penalty of $3,046.00 is appropriate.

ORDER

The Respondent, Consol Pennsylvania Coal Company, is **ORDERED** to pay the Secretary of Labor the sum of $3,046.00 within 30 days of this order. [18]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

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Attachment: Secretary's Exhibit P-3

[18] 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N
WASHINGTON, D.C. 20004

March 30, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0047 A.C. No. 36-10045-527805 Mine: Harvey Mine

DECISION

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

Before: Judge Paez

This docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. In dispute is a single section 104(a) citation issued to CONSOL Pennsylvania Coal Company, LLC (hereinafter, "CONSOL" or "Respondent").[1]

To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

In separate orders, Chief Administrative Law Judge Glynn F. Voisin assigned me both Docket No. PENN 2021-0047 on April 14, 2021, and Docket No. PENN 2021-0058 on May 12,

[1] In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. GX–#," and "Ex. R–#," respectively.

2021. On August 16, 2021, I consolidated these dockets and set them for hearing. The parties settled five of these six violations prior to the hearing, and only Citation No. 9203483 in PENN 2021-0047 remains.[2]

MSHA Inspector Jason Detrick issued Citation No. 9203483 at CONSOL's Harvey Mine on November 17, 2020. The citation alleges CONSOL violated 30 C.F.R. § 75.1722(a) by failing to guard the area in front of the 5B tailgate belt drive roller. The Secretary designated the citation as significant and substantial ("S&S"),[3] characterized CONSOL's degree of negligence as low, and determined the likelihood of injury to be reasonably likely to result in lost workdays or restricted duty. The Secretary proposed a penalty of $298.00 which CONSOL timely contested. The parties filed prehearing reports.

I held a remote hearing on November 17, 2021, via Zoom for Government. At the hearing, the Secretary presented testimony from MSHA Inspector Jason G. Detrick. CONSOL presented testimony from its Lead Safety Inspector Chase Shaffer and Safety Inspector William Hockenberry. I requested post-hearing briefs and permitted CONSOL to raise any objections to the Mine Violation History exhibit (Ex. GX–9) by the briefing deadline. Both parties submitted post-hearing briefs on January 18, 2022, and CONSOL raised no objection to the exhibit. I left the record open until February 2, 2022, for the parties to file reply briefs but received none.

II. ISSUES

In Citation No. 9203483, the Secretary asserts that CONSOL violated section 75.1722(a) by failing to guard the area directly in front of the 5B tailgate belt drive roller of the 5B tailgate belt line at crosscut zero. (Tr. 17:15–21, 27:8–10; Ex. GX–1-1.) The Secretary believes the violation should be upheld as S&S, reasonably likely to result in lost workdays or restricted duty, and the result of a low degree of negligence. (Tr. 17:21–24, 18:4–8; Ex. GX–1-1; Sec'y Post-hr'g Br. at 5–11.) CONSOL contests the fact of the violation, the gravity and negligence determinations, the S&S designation, and penalty. (Resp't Post-hr'g Br. at 5–14; Tr. 18:12–15.)

Accordingly, the following issues are before me: (1) whether CONSOL violated the guarding provisions of 30 C.F.R. § 75.1722(a) as alleged in Citation No. 9203483; (2) whether the gravity of such a violation would result in "lost workdays or restricted duty"; (3) whether the

[2] Upon receiving the Secretary's motion for a partial settlement, I issued a Decision Approving Partial Settlement on September 16, 2021, resolving three of the six citations contained in consolidated Docket Nos. PENN 2021-0047 and PENN 2021-0058. Thereafter, at the hearing the parties entered a settlement on the record for two section 104(a) citations, one of which disposed of the sole remaining citation in Docket No. PENN 2021-0058. I issued my Decision Approving Second Partial Settlement for the two citations on November 24, 2021, resulting in the full disposition of Docket No. PENN 2021-0058.

[3] The S&S terminology comes from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ." 30 U.S.C. § 814(d)(1).

citation was properly designated as S&S; (4) whether CONSOL's negligence in committing the violation is "low"; and (5) the appropriate penalty for the violation, if any.

For the reasons set forth below, Citation No. 9203483 is **AFFIRMED**.

III. FINDINGS OF FACT

At the hearing, the parties stipulated to the following items verbatim in a joint exhibit (Jt. Ex. 1; Tr. 83:3–10):

1. CONSOL Pennsylvania Coal Company, LLC ("CONSOL") is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
2. At all times relevant to these proceedings, Harvey Mine, Mine ID 36-10045, was and is a mine, as defined in section 3(h) of the Mine Act.
3. CONSOL's operations at the Harvey Mine are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to section 105 and 113 of the Mine Act.
5. True copies of each of the citations that are at issue in this proceeding were served on the Respondent or its agent as required by the Mine Act.
6. Exhibit A, attached to the Secretary's petition in the above-referenced dockets, contains authentic copies of the citations that are at issue in this proceeding with all appropriate modifications or abatements, if any.

A. Operations at the Harvey Mine

CONSOL operates the Harvey Mine, an underground coal mine in Greene County, Pennsylvania that utilizes both continuous mining and longwall mining. (Ex. GX–9; Tr. 93:20–23, 106:24–107:9.) Continuous miner machines drive into the coal seam and advance to create entryways used for travel into and out of the mine and to set up longwall operations. (Tr. 106:24–107:9.) The continuous miners also create passageways perpendicular to the entryways, called crosscuts, which connect the entryways, and when viewed from above these entryways and crosscuts resemble a grid. (Ex. R–5.) In one of these entryways, CONSOL constructed the 5B tailgate belt line. (Tr. 23:18–24:3, 93:14–23.) The 5B tailgate belt line dumps coal onto the "mother" belt that brings mined coal up to the surface for processing. (Tr. 23:25–24:7.) The 5B tailgate belt line utilizes a conveyor belt made of many splices, or pieces of belt, patched together that circulates around the length of the belt line. (Tr. 38:1–2, 108:2–8; Ex. GX–2-1.) The belt line must be lengthened by adding new splices every few days as the continuous miner machine cuts deeper into the coal seam. (Tr. 37:22–38:5, 106:25–107:23.)

The 5B tailgate belt line is constructed to sit closer to one side of the entryway to provide miners a passageway, and CONSOL built wooden walkways along the wide side of the belt line for miners to traverse the 5B tailgate belt entryway. (Tr. 30:8–17, 31:5–32:4.) In addition, CONSOL built a wooden walkway in front of the 5B tailgate belt drive roller—perpendicular to the wide side walkway—which goes underneath the bottom of the conveyor belt that revolves around the belt line. (Tr. 24:19–25:4, 57:10–24.) This wooden walkway provides access to the

opposite or "tight" side of the belt line. (*Id.*; 58:20–25, 59:18–21; Exs. GX–3-1-2.) The tight side is the narrow side closest to the rib (or mine wall) where miners cannot traverse the walkways without turning sideways due to the narrow clearance. (Tr. 36:2–9.) The record indicates a wooden walkway was also built on the tight side. (Tr. 58:18–59:8; Ex. GX–3-1.)

The perpendicular wooden walkway in front of the 5B tailgate belt drive roller is constructed of wooden planks and rests about six inches off the ground with a width of two-and-a-half to three feet. (Tr. 30:6–7, 16–17, 31:9–10, 21–25, 32:1–4.) The vertical distance from this walkway to the bottom of the conveyor belt running overhead is approximately five and a half feet. (Exs. GX–1-4, GX–3-2; Tr. 33:7–9, 67:22–25, 76:13–77:9, 105:12–18, 119:22–120:1.) A miner would need to bend down to get under the belt line here. (Tr. 68:3–4, 76:25–77:9.) The bottom conveyor belt travels towards the 5B tailgate belt drive roller. (Tr. 33:11–16, 35:3–6; Ex. GX–2-1.) The 5B tailgate belt drive roller is part of the machinery that powers the conveyer belt and is located approximately at crosscut one on the 5B tailgate belt line. (Tr. 25:22–26:3, 26:12–27:2.) The drive roller is some four feet in diameter and spans the width of the belt, which is some 52 inches. (Tr. 81:9–13, 100:10–15; Ex. GX–1-3.) The perpendicular wooden walkway sits no more than three and a half feet from the 5B tailgate belt drive roller. (Tr. 33:17–20, 67:8–17, 103:8–10; Exs. GX–1-4, R–1 at 002, R–4 at 015.)

B. Preshift Examinations and Repair of Ripped Belt

As required by law, CONSOL's preshift examiners survey the conditions at the Harvey Mine three times a day prior to the start of the day, afternoon, and midnight shifts. (Tr. 38:9–17, 44:3–6, 51:16–52:14.) During the day shift on November 16, 2020, around 1:00 p.m., workers shut down the 5B tailgate belt line to repair the conveyer belt, which was ripped in two. (Tr. 50:18–21, 51:3–18, 97:2–15; Exs. GX–1-3, R–1 at 002.)

To repair the ripped belt, miners made two complete splices of belt fragments to create one long conveyer belt. (Ex. R–1 at 002; Tr. 38:1–2.) After splicing the torn belt, miners on the midnight shift began training the belt. (Ex. R–3 at 013; Tr. 73:4–9, 108:5–8.) "Training the belt" means adjusting the rollers under the conveyor belt so it runs in the middle of the belt structure, thus preventing damage to the conveyer belt from rubbing against the stands. (Tr. 36:21–25, 72:24.) Training the belt occurs at the tailpiece area of the 5B tailgate belt line closest to the working face, which lies at the opposite end of the drive roller's location where Inspector Detrick issued the citation. (Tr. 111:15–112:18, 113:1–7.) Soon after miners on the midnight shift trained the 5B tailgate conveyer belt (Ex. R–3 at 013), CONSOL's preshift examiner traveled the area to examine the belt line in preparation for the day shift that began at 8:00 a.m., yet had staggered miner arrival times of 7:15 a.m., 7:30 a.m., and 7:45 a.m. due to COVID-19 restrictions. (Tr. 51:19–52:7, 73:21–24; Ex. R–2 at 003.) The 5B belt line was idle during the preshift examination that took place on November 17 from 5:00 a.m. to 6:53 a.m. (Tr. 50:12–14; Exs. GX–1-6, R–2 at 003.) At some point prior to the preshift examination the guarding around the 5B tailgate drive roller was removed. (Tr. 43:6–17, 53:6–14; Ex. GX–1-3.) The 5B tailgate belt line was turned back on around 7:30 a.m. on November 17, 2020, just prior to Inspector Detrick's inspection at 8:15 a.m. (Tr. 43:8–13, 97:19–21.)

C. Detrick's Inspection of the Harvey Mine

MSHA Inspector Jason Detrick inspected the Harvey Mine for a routine quarterly inspection. (Tr. 17:13–14, 23:10–12, 43:12–13, 47:10–12.) Detrick has served as an MSHA Inspector for the last eight years. (Tr. 22:15–16.) Prior to his work as an MSHA Inspector, Detrick worked approximately fifteen years in underground mines with experience in a myriad of positions, including equipment operator, shuttle car operator, and beltman, for a combined total of 23 years in mining. (Tr. 22:22–25.) Harvey Mine's Lead Safety Inspector Chase Shaffer and Safety Inspector William Hockenberry accompanied Detrick during his inspection. (Tr. 85:22–23, 117:16–20.) Shaffer has worked at Harvey Mine for six years and in the mining industry for over ten years with all his roles focused on mine safety. (Tr. 84:16–21, 85:24–86:2.) Hockenberry has worked in the mining industry for eight years. (Tr. 115:9–15, 24–25, 116:1–5.)

Inspector Detrick arrived at the Harvey Mine at 7:30 a.m. on November 17, 2020. (Tr. 17:13–14, 23:10–12, 43:12–13, 47:10–12.) He first checked the mine map and preshift examination records. (Tr. 48:2–5; Ex. GX–1-6.) The preshift records listed no upcoming maintenance tasks. (Tr. 71:9–12, 72:6–7; Ex. GX–1-6.) Detrick started the inspection of the 5B tailgate belt at 8:15 a.m. (Tr. 43:12–13.) Inspector Detrick and Shaffer began at the zero crosscut of the 5B tailgate section. (Tr. 24:2–7, 16–20.) They proceeded along the side of the belt line facing the exit. (*Id.*) Both Inspector Detrick and Shaffer took notes as they walked. (Tr. 29:10–14, 92:6–18; Exs. GX–1-2–4, GX–1-5, R–1.) They walked to the 5B tailgate drive motor area, which was wet, muddy, and "sloppy," as indicated by the sight of dark ground instead of white rock dust. (Tr. 29:24–30:5, 41:21–24; Ex. GX–3-2.) Inspector Detrick observed that the bottom of the 5B tailgate conveyer belt was in operation and running in the direction of the drive roller. (Tr. 24:11–13, 33:13–16.) Inspector Detrick noted the belt contained no coal since the belt line had just recently started running. (Tr. 43:8–13, 94:3–4; Ex. GX–1-6.) No guarding stood in front of the 5B belt drive roller adjacent to the walkway leading to the tight side, nor was there any guarding above that walkway to protect miners from the bottom of the conveyer belt overhead. (Tr. 33:21–34:2; Ex. GX–1-1.) Inspector Detrick issued Citation No. 9203483 which only addressed the guarding missing in front of the 5B belt drive roller. (Ex. GX–1-1; Tr. 25:2–6.)

D. Issuance of Citation No. 9203483 and its Abatement

In Citation No. 9203483 (Ex. GX–1-1), Inspector Detrick wrote:

> The 5B Tail Gate Belt Drive roller located at 0xc of the 5B Belt Conveyor is not guarded to prevent miners from coming into contact with moving belt components. If this condition continues to exist, it will increase the likelihood of injuries to those miners of a serious nature. All machine parts which may be contacted by persons and which may cause injury shall be guarded.

Inspector Detrick issued Citation No. 9203483 at 8:30 a.m. for missing guarding in front of the 5B belt drive roller per section 75.1722(a). (Tr. 27:8–10, 73:4–5; Ex. GX–1.) He designated the citation as S&S, as reasonably likely to lead to an injury resulting in lost workdays or restricted duty, and as low negligence. (Tr. 17:21–24; Ex. GX–1-1.) Inspector

Detrick determined the hazard in question could affect one person, likely either a mine examiner or a belt person. (Tr. 38:20–22; Ex. GX–1-1–3.)

Shaffer and Hockenberry found guarding panels nearby leaning up against the mine rib. (Tr. 96:14–18, 123:22.) To abate the citation, they turned off the 5B belt line and installed the six-foot guarding panel in front of the 5B belt roller. (Tr. 75:16–22, 108:19–21, 123:13–18; Exs. GX–1-1, GX–1-4.) Although the citation only addressed the missing guarding in front of the belt drive roller, Shaffer and Hockenberry also installed overhead guarding above the walkway in front of the 5B drive roller (*id.*), creating a cross-under so miners could safely go under the belt to the tight side while the belt line ran. (Tr. 99:7–11.)

IV. PRINCIPLES OF LAW

A. Elements for an S&S Violation

A violation is S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably 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, 42 FMSHRC 379, 383 (June 2020) (citing *Newtown Energy*, 38 FMSHRC 2033, 2037–38 (Aug. 2016)); *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming the application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria); *CONSOL Pa. Coal Co.*, __ FMSHRC __, 2022 WL 489572 (Feb. 10, 2022) (holding substantial evidence must support the theory of hazard under the second *Mathies* element). The Commission has specified that evaluation of the likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence Determinations

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically," including factors such as the protective purpose of the regulation,

and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Mach Mining*, 809 F.3d at 1264 (quoting *Brody Mining, LLC*, 37 FMSHRC at 1703).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Violation of 30 C.F.R. § 75.1722(a) – Failure to Guard Belt Drive Roller

The Secretary alleges that CONSOL violated section 75.1722(a) which requires that "exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." (Tr. 27:8–10); 30 C.F.R. § 75.1722(a).[4] CONSOL appears to contend no violation occurred but offered no supporting arguments at the hearing other than the missing guarding posed no hazard. (Resp't Post-hr'g Br. at 4; Tr. 19:1–2.)

Both MSHA Inspector Detrick and CONSOL's Shaffer agree the 5B tailgate belt line was actively running. (Tr. 24:11–13, 94:1–4.) They, as well as CONSOL's Hockenberry, also agree that at the time of the citation, the 6-foot guarding was missing from the area directly in front of the moving, exposed 5B belt drive roller. (Tr. 33:21–24, 119:13–20, 123:13–16; Ex. R–1.) The drive roller spans some four feet in diameter and is the width of the belt, which is 52 inches or over four feet wide. (Tr. 81:9–13, 100:10–15.) The walkway in front of the drive roller, used to access the tight side, sits no more than three to three-and-a-half feet from the 5B belt drive roller. (Tr. 33:17–20, 67:8–17, 103:8–10; Exs. R–1 at 002, R–4 at 015.) Given this exposure, miners may come in contact with the drive roller and suffer injury. (Tr. 42:7–16.) Based on the record, I determine that CONSOL failed to guard the 5B belt drive roller while the belt line was operating, and the sizeable gap from the missing guarding exposed moving machine parts that, due to their proximity to the walkway, may be contacted by persons. Therefore, I conclude that the Secretary has met his burden of proving CONSOL violated section 75.1722(a).

B. Significant and Substantial Determination

1. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. I have determined that CONSOL violated section 75.1722(a), because it failed to guard the 5B tailgate belt drive roller. *See* discussion *supra* Part V.A. Thus, the Secretary has satisfied the first element of the *Mathies* test.

2. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard Is Directed

[4] Section 75.1722(a) provides: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 75.1722(a).

For the second *Mathies* element, the Secretary must establish that "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown*, 38 FMSHRC at 2038. Here, the hazard is the possibility of miners contacting the moving 5B tailgate belt drive roller, the issue against which the standard is directed. (Tr. 42:17–43:5); *see* Electric Equipment and Safeguards for Mechanical Equipment, 37 Fed. Reg. 11,777, 11,779 (June 14, 1972) (proposing section 75.1722 "in order to prevent to the greatest extent possible, accidents in the use of mechanical equipment") (implemented Feb. 23, 1973, at 38 Fed. Reg. 4,976, codified at 30 C.F.R. § 75.1722).

CONSOL argues no miner would be near the exposed moving parts because no grease fittings nor maintenance were in this area and the 5B tailgate belt line had no dedicated belt attendant. (Tr. 75:13–15, 102:4–9, 22–25, 103:5–6, 104:18–105:5; Resp't Post-hr'g Br. at 8–9.) While Inspector Detrick observed no miners in the immediate vicinity at the time of his inspection, S&S determinations are made in the context of normal, continuous mining operations. *See, e.g.*, *Knox Creek Coal Corp*., 36 FMSHRC 1128, 1132 (May 2014) (indicating that the Judge erred when he took a "'snapshot' approach" to the S&S analysis). Contrary to CONSOL's assertion, miners would be in the area throughout the workday as examiners inspect the area before the day, afternoon, and midnight shifts. (Tr. 38:16–17.) While CONSOL argues a mine examiner normally stays on the walkway side to do a preshift examination, I credit as reasonable Detrick's testimony that a "mine examiner might have to go over [to the tight side] in order to do his exam if he suspects there's something wrong on th[e] tight side of the belt." (Tr. 36:12–17, 55:19–22, 62:15–16, 64:18–20, 103:5–6.) I also find Detrick's statement credible that "miners may shovel spillage from the belt," as this area is near the transfer point to the "mother" belt. (Tr. 24:1–7; Ex. R–5.) Detrick also stated that miners may be assigned to rock dust or perform other work in the area. (Tr. 36:12–17, 55:15–19, 101:19–102:9, 22–25.) Although CONSOL's Shaffer noted that the 5B tailgate belt did not have a dedicated belt attendant like two other belts had, Shaffer acknowledged that CONSOL had other beltmen called "rovers" who would go to wherever they were assigned work for the day. (Tr. 104:18–105:5.) Looking at CONSOL's own work log shows miners were assigned work along the 5B belt line during the afternoon shift of November 16, 2020. (Ex. R–3 at 009, 010.) Indeed, the very existence of the walkway to the tight side in front of the 5B belt roller shows miners would need to access this area (Tr. 57:6–20, 101:19–102:9), and one can also reasonably infer that removal of the guarding in front of the belt drive roller indicates some work had already been performed here. Thus, I find under normal mining operations that miners would have assigned work in this area.

With regard to the occurrence of the hazard, miners traversing this area in front of the 5B belt roller would be on a walkway that spans only two and a half to three feet in width. (Tr. 30:6–7.) Miners going into this area would also encounter the exposed bottom of the conveyor belt, which is only some five and a half feet above the wooden walkway. (Tr. 33:7–9.) Thus, a miner of average height wearing boots and a hardhat—not to mention a six-foot-tall miner like Inspector Detrick—must bend down to go under the belt. (Tr. 68:3–4, 76:25–77:1.) Not only does the route require a miner to bend down, but Detrick observed this area around the wooden walkway to be wet, muddy, and could "get slippery" as was apparent from CONSOL's photographs of the dark mine bottom instead of the usual white rock dusk. (Tr. 41:22–24, 64:23–25, 65:4–5; Exs. GX–1-3, GX–3-2.)

To get to the tight side, a miner would traverse under a moving belt in this bent over or stooped position. The missing guarding in front of the 5B belt drive roller created an unguarded space measuring approximately six feet high by four and a half feet wide. (Tr. 95:19–96:10, 100:13–14, 119:7–14, 123:10–19; *see* Exs. GX–3, R–4.) As Inspector Detrick determined, a miner could fall through the unguarded space next to the wooden walkway and come in contact with the drive roller, which could occur in two ways: Either the miner could slip and fall directly from the walkway into the moving and exposed drive roller, or the miner's hardhat could come in contact with the bottom of the unguarded conveyer belt[5] overhead and be thrust toward the 5B tailgate drive roller. (Tr. 41:13–42:3.)

In the first instance, a miner could slip on the wooden walkway in front of the belt drive roller, given that the area around this wooden walkway was wet and muddy and thus slippery. (Tr. 41:22–24, 64:23–65:5, 69:16–70:6; Exs. GX–1-3, GX–3-2.) In the second instance, a miner attempting to traverse under the conveyer belt would not be aware how close he was to contacting the bottom of the belt, especially when walking in a stooped position. CONSOL argues this is all speculative as a miner would not necessarily fall in the direction of the belt drive roller, nor would a miner fall upwards. Yet, if a miner slips in a bent over position, the miner is reasonably likely to jerk upwards or straighten up to try to regain his balance. In such an instance, he would be unable to see how close he is to the bottom of the conveyer belt and could reasonably contact the unguarded moving belt[6] and be thrust in the direction of the drive roller. The "miner's hardhat would be knocked off his head or he would be pulled into the belt." (Tr. 33:6–10, 19–20, 41:18–25; Exs. GX–1-4, GX–2-1.) Moreover, a miner would be exposed to the hazardous condition first when traversing towards the tight side and again when inevitably the miner must retrace his steps to return to the walkway side. Indeed, doing so in a bent down position over a wet, muddy, and narrow wooden walkway increases the likelihood of the miner slipping and falling towards the exposed drive roller. Either slipping and falling into the opening,

[5] The citation only considers the violation of the missing guarding around the 5B belt drive roller. (Ex. GX–1-1.) Therefore, I do not consider the possibility of direct injury from contact with the overhead belt in my S&S analysis. Nevertheless, *Mathies* requires an analysis of the circumstances as the inspector found them at the time of the violation. *Peabody*, 42 FMSHRC at 382.

[6] CONSOL wisely requires its miners to lock-out and tag-out the belt, or turn off the machine and render it inoperable, before proceeding under the belt. (Tr. 99:22–25.) While a prudent miner should lock-out and tag-out the belt line before walking under the belt, "[t]he Court cannot assume that miners would exercise caution." *CONSOL Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021). Inspector Detrick notes "there [are] accidents that happen every day because people weren't prudent in their personal safety," as well as "numerous fatalities" in the mining industry, that lead him to believe that miners would traverse under a belt without turning off, locking out, and tagging out the belt. (Tr. 62:21–23, 63:4–10); *see Sec'y of Labor v. Ohio Valley Coal Co.*, 359 F.3d 531 (D.C. Cir. 2004) (noting miner's failure to turn off machine when assessing for maintenance led to severing of his arm and subsequent fatality). Here, however, CONSOL's lock-out and tag-out policy is a redundant safety measure and is therefore irrelevant to the S&S analysis. *Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 116, 118 (D.C. Cir. 2018) (holding safety measures, including company policy not to access area of unsupported roof, are irrelevant to S&S analysis).

or having the miner's hardhat come in contact with the bottom conveyer belt overhead thereby knocking the miner towards the exposed drive roller, could catch the limbs or clothing of a miner and pull the miner into the moving machinery. (Tr. 42:20–25.)

Given the testimony, the photographic evidence of the cited area, and the record as a whole, I determine it is reasonably likely that a miner could slip and/or come in contact with the unguarded conveyer belt, thereby falling towards and contacting the exposed 5B belt drive roller. *Mathies*, 6 FMSHRC at 5 (noting "an inspector's judgment is an important element" in an S&S determination) (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that Judge did not abuse discretion in crediting opinion of experienced inspector).

I determine the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed, and, therefore, the Secretary has satisfied the second element of *Mathies*.

3. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. As discussed in the section above, if a miner slipped and fell because of the wet wooden walkway or tripped on the walkway, then the miner could reasonably fall into this six- by four-and-a-half-foot unguarded area and contact the moving machine parts. The miner's entire body would not need to contact the drive roller to cause injury. The approximately four-foot-diameter drive roller that spans the 52-inch width of the 5B belt spins swiftly, so contact with it is reasonably likely to cause injury to limbs. (Tr. 42:20–43:5, 41:19–42:3, 20–25, 81:11–13); *see* discussion *supra* Part V.B.2.

Consequently, I determine that the hazard of contacting the unguarded belt roller was reasonably likely to cause injury, thus satisfying the third element of the *Mathies* test.

4. Likelihood Resulting Injury Would Be of Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood the resulting injury would be of a reasonably serious nature. An injury of a "reasonably serious nature" does not require a specific type of injury, and a mere sprain or similar injury may be "reasonably serious." *S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the Judge erred in requiring the Secretary to demonstrate an injury would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element). Yet the drive roller is large enough, at around three and a half to four feet in diameter, and fast enough to crush limbs and otherwise cause a serious injury according to Inspector Detrick, who previously worked as a Beltman. (Tr. 42:7–16, 81:11–12.) CONSOL's witnesses did not dispute Inspector Detrick's testimony that such injuries could include damage to limbs. (Tr. 42:1–4, 20–25.) I determine that the injuries expected to result from contacting the drive roller are reasonably likely to be of a reasonably serious nature, thus satisfying the fourth *Mathies* element. For the same reasons, I affirm the Inspector's gravity determination as reasonably likely to result in lost workdays or restricted duty.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9203483 was appropriately designated as S&S.

C. Negligence

Inspector Detrick assigned low negligence to Citation No. 9203483. (Ex. GX–1.) In support, the Secretary asserts that the preshift examiner should have anticipated the 5B tailgate belt would resume operation and thus needed to have the guarding reinstalled. (Tr. 79:9–17.) CONSOL argues for no negligence because the 5B tailgate belt line lay idle when the preshift examiner on the midnight shift examined the area. (Resp't Post-hr'g Br. at 13–14; Tr. 120:15–16.)

The record indicates that CONSOL trained the 5B tailgate conveyer belt during the midnight shift, whereby the belt would be allowed to run. (Tr. 97:18–21; Exs. GX–1-3, R–3 at 013.) The parties agree that adding new splices and training the 5B belt would occur in the tailpiece area near the face where active mining takes place—this is the opposite end of the belt line from the 5B head roller where the guarding was missing. (Tr. 107:17–108:8, 111:13–112:3, 112:24–113:7.) Though CONSOL could remove guarding in the tailpiece area to train the 5B belt under the maintenance exception, 30 C.F.R. § 75.1725(c), the guarding in front of the 5B belt drive roller on the opposite end of the belt line would not be removed to train the belt. (Tr. 74:18–25.) Thus, while miners may need to remove a different piece of guarding in a different area of the mine to train the 5B belt, miners would not do this in the area around the 5B drive roller. Therefore, I am unpersuaded that this evidence lowers the negligence.

No evidence suggests that CONSOL was aware of the missing guarding while the belt operated and willfully ignored the violation. Still, CONSOL should have known of the violative condition since one of its employees or contractors removed the guarding. (Tr. 53:6–54:25; Ex. GX–1-3.) Moreover, Inspector Detrick observed that a reasonable preshift examiner on the midnight shift would expect the belt line to run again soon after the completion of repairs to the torn conveyer belt, and therefore should have noticed and reinstalled the missing guarding. (Ex. GX–1-3; Tr. 79:9–17.); *see* 30 C.F.R. § 75.360(b)(11)(v) (guarding moving machine parts).

I determine that CONSOL should have known of the violative condition, but there were mitigating circumstances. Therefore, I conclude low negligence is appropriate.

D. Penalty

The Secretary has proposed a penalty of $298.00. The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

CONSOL is a large operator with a low to moderate violation history. In the fifteen months preceding the issuance of this citation, MSHA issued to CONSOL's Harvey Mine three violations of section 75.1722(a) that became final orders of the Commission. (Exs. GX–1-1, GX–9-1, GX–9-6.) I determined CONSOL's negligence to be low. *See* discussion *supra* Part V.C. CONSOL has not alleged that the proposed penalties would adversely affect its ability to continue in business. I also determined the gravity of the violation to be S&S, the number of persons affected to be one, the likelihood of injury as reasonably likely, and the expected severity as lost workdays or restricted duty. *See* discussion *supra* Part V.B. Finally, CONSOL demonstrated good faith by quickly installing the missing guard to comply with the cited standard. (Tr. 75:16–22.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $298.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9203483 is **AFFIRMED**.

Respondent CONSOL Pennsylvania Coal Company, LLC is hereby **ORDERED** to **PAY** a penalty of $298.00 within 40 days of this decision.[7]

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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[7] 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.