FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 19, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. PENN 2018-0169
CONSOL PENNSYLVANIA COAL COMPANY, LLC	: :	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY THE COMMISSION:

This proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), involves three citations issued to Consol Pennsylvania Coal Company, LLC ("Consol") by the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). The first citation alleges that the operator committed a significant and substantial ("S&S")[1] violation of its MSHA-approved roof control plan under 30 C.F.R. § 75.220(a)(1) when it neglected to place reflectorized signs at a face entry warning of unsupported roof. The second and third citations allege that the operator committed S&S violations of 30 C.F.R. § 75.1725(a) for failing to maintain hoisting cables on two machines in safe operating conditions.

Consol did not contest the fact of violation for any of the citations, but instead challenged the S&S findings. After a hearing on the merits, a Commission Administrative Law Judge issued a decision affirming the S&S findings for each citation. 41 FMSHRC 626 (Oct. 2019) (ALJ).

Consol filed a petition for discretionary review of the decision challenging the Judge's S&S findings, which we granted. For the reasons discussed below, we affirm the Judge's decision regarding each of the citations.

[1] The S&S terminology is taken from section 104(d)(1) of the 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."

I.

Citation No. 9076610

A. Factual Summary

On January 4, 2018, MSHA Inspector James Baker arrived at the Harvey Mine to perform a spot inspection. As the inspector examined an entry, he observed that a pile of debris with rocks the "size of large garbage cans" had fallen inby the last roof support. The pile of debris measured about two to three feet in height.[2] Baker noticed that the unsupported roof was in "very poor shape," and that non-reflective, white, Tensar mesh was used to control loose debris as mining progressed. Sec'y Br. at 4; Tr. 19, 24. At the time, the mesh was rolled up to the last roof strap and was left hanging.[3] He did not see any reflectorized signs warning of unsupported roof in the entry, in violation of Consol's roof control plan ("RCP"),[4] which requires that the operator place reflectorized signs on each side of all entries to the face.[5] Sec'y Resp. Br. at 3-4; Tr. 18-19, 22, 24.

As a result, Baker issued Citation No. 9076610 for failure to utilize reflectorized warning signs immediately outby unsupported roof in the No. 2 entry, in violation of the mine's roof control plan under section 75.220(a)(1) of the Secretary's regulations. Section 75.220(a)(1) states that: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1).

B. The Judge's Findings

The Judge stated that "[t]he purpose of the reflectorized signs is [to] keep miners from going under the unsupported roof." 41 FMSHRC at 632. He also recognized the continued hazard posed by the roof fall that had already occurred. The Judge also identified the danger posed by additional material falling, rolling down the pile of debris, and striking a nearby miner. *Id.* at 636.

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[2] He did not measure the rock since that would entail going under unsupported roof. Tr. 20.

[3] While the inspector and the operator's witnesses varied slightly in their estimates of the roof height and length of hanging Tensar mesh, those differences are not material to this decision.

[4] The roof control plan was not submitted into the record by either party. As such, we must rely on the parties' consistent and undisputed testimony regarding the official requirements of the plan.

[5] The section foreman had conducted an onshift inspection of the area only 47 minutes prior to Baker's inspection and had not noted the lack of reflective signs. 41 FMSHRC at 632.

The Judge rejected the operator's contention that the hanging mesh was a suitable alternative to a reflectorized sign. He found it compelling that the RCP does not provide that the hanging mesh can serve as an alternative to reflective signs. Instead, the Judge noted that under the RCP, the purpose of the hanging mesh is to be rolled out on the roof as roof bolts and straps are being installed. The mesh is not meant to serve as a warning device. Additionally, he observed that there was no testimony that the mine had instructed its employees that mesh extending down from the roof was to alert them that unsupported roof was beyond that point. *Id.*

The Judge further rejected the idea that the pile of fallen rock and coal also served as a warning barrier. Instead, the Judge saw it as a graphic demonstration of the danger involved in the hazard, thus underscoring the importance of the reflective signs. He reasoned that the pile was proof that roof had in fact fallen, and because of this, the Judge took issue with Consol's assertion that this obviously hazardous condition somehow "diminish[ed] the S&S determination." *Id.*

The Judge ultimately found that the lack of reflectors presented a discrete safety hazard by the absence of a genuine warning that unsupported roof was ahead. He found that roof falls, across the board, are a continuing threat in underground mining, and that in the current case, the roof did in fact fall. The Judge concluded that a roof fall "without qualification, is reasonably likely to cause injury," and that it is a given that any roof fall presents a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Id*. at 637.

C. Analysis

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*., the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord 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 (5th Cir. 1988) (approving *Mathies* criteria).

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). In 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). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and

at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *quoting Knox Creek Coal Corp*., 36 FMSHRC 1128, 1132 (May 2014); *see also McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1991 (Aug. 2014). The second step of *Mathies* requires a determination of whether, 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. *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037-38 (Aug. 2016); *Mach Mining*, 40 FMSHRC at 3–4.[6]

A determination of "significant and substantial" must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease. *U.S. Steel Mining*, 6 FMSHRC at 1574; *Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (Dec. 1992). The Court cannot assume that miners would exercise caution. The hazard continues to exist regardless of whether caution is exercised, and the operator's responsibility is not lessened. *Eagle Nest, Inc*., 14 FMSRHC 1119, 1123 (July 1992). Additionally, "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry." *Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *see also Buck Creek*, 52 F.3d at 136.

The first element of *Mathies* has been satisfied here as Consol does not contest the fact of violation. However, Consol argues that the Judge failed to substantiate the second element of *Mathies* because he misidentified the potential hazard resulting from an absent reflector as material falling from the roof and rolling off the pile of coal and rock. It contends that the only hazard that the standard was designed to protect against is a miner walking under unsupported roof. Obviously, the fact that no one had been identified as going under unsupported roof on this specific day does not negate the danger of falling roof or that a miner on a break would not be reasonably likely to cross the threshold.

Consol also argues that in addition to the ventilation curtain and wedge cut, the physical barrier of the roof mesh and the large pile of rocks and coal across the entire entry, as depicted in the inspector's notes, clearly indicated the location of the last row of permanent roof support. It contends that the pile of coal and rocks and the roll of Tensar mesh hanging from the roof created a physical barrier to prevent a miner from going into the hazardous area.

The roof control plan expressly mandates that the operator place reflectorized signs in all entries to the face to alert miners of bad roof. As noted by the Judge, Consol's roof control plan, which is enforceable as a mandatory standard, does not allow for other mechanisms to substitute for the reflectorized signs. 41 FMSHRC at 636; *Martin Cty. Coal Corp.*, 28 FMSHRC 247, 254-255 (May 2006). The mesh and debris from an earlier roof fall are not acceptable substitutes for

[6] Chairman Traynor believes that *Newtown Energy, Incorporated* was wrongly decided. He signs this majority opinion because he believes that the elevated burden of proof required by the Commission in *Newtown Energy* and its progeny is of no consequence in this particular proceeding. All Commissioners agree that substantial evidence supports the Judge's conclusion that these specific violations are S&S.

the roof control plan's requirement for reflective warnings. Unlike the non-reflective Tensar mesh and other conditions highlighted by Consol, the reflectorized signs are particularly noticeable in dark, underground mines. Specifically, a miner's cap light would reflect brightly off of the signs, thereby enabling the miner to see them. 41 FMSHRC at 632. The signs are a designated visual signal to alert miners of dangerous unsupported roof and to prompt them to stay a safe distance from the hazard. The Judge reasonably found that the absence of reflective signs contributed to the reasonable likelihood of the hazard of miners being exposed to roof fall injuries, as they might not know to keep from the area.[7]

The Judge also reasonably found that none of the conditions created a barrier to entry. 41 FMSHRC at 636, 638 (determining that "rock had fallen, creating an impediment, but not a barrier"). The mine's safety inspector, Albert Stein, described the pile as "two to three feet" in height and "just like a little hump." Tr. 401. The height of the entry was about eight to eight and half feet high, which would leave five to six feet of clearance. Tr. 400, 402.

Additionally, the MSHA inspector expressed justifiable concern that the reflectors would not be there to warn a less experienced miner who might attempt to enter the area to get the curtain or extra tubes. *See* 41 FMSHRC at 633. This is compelling as there may be numerous miners in the area with varying levels of experience getting the face ready for the next cut. Element two of *Mathies* is thus satisfied.

With respect to Step 3, the inspector determined that in addition to miners, an examiner would be exposed to this hazard twice per shift—during the pre-shift and on-shift examinations. *Id.* at 632.

Inspector Baker testified that, based on the fallen rock he saw on the ground, an injury "could be real bad" if a miner were in the unsupported area and something were to fall. Tr. 26. Characterizing the potential injury as "serious," the inspector stated that it could result in a broken neck or a broken back. Tr. 28. As the circumstances present ample opportunity for a miner to find himself in close proximity to the unsupported roof and to suffer serious injury, the Judge reasonably concluded that it would be of a reasonably serious nature.

We affirm the finding that the violation was S&S.

II.

Citation No. 9077085

A. Factual Summary

On January 6, 2018, MSHA Mine Inspector Bryan Yates performed an inspection at the Harvey Mine. While inspecting the advancing section, he saw a Caterpillar duckbill battery scoop used to transport supplies parked on the Number 2 track entry. The scoop has a winch

[7] Because we affirm the Judge's finding that the Tensar mesh did not serve as a substitute safety warning, we need not consider the Judge's additional finding that the Tensar mesh was a redundant safety measure that could not be considered.

located just behind the scoop bucket used for loading and moving heavy longwall components, including longwall shields that weigh approximately 22 tons, onto the duckbill scoop. The winch uses a one-inch diameter steel cable that wraps around a spool approximately one foot in diameter sitting in a two-foot wide housing. The cable is extended towards equipment being loaded and secured with a large stabilizing hook, which anchors the cable to the reel.

Yates noticed that the winch cable was badly damaged. It had broken strands, several kinks, and multiple frays sticking out. Ex. P-3A; 41 FMSHRC at 639. The stabilizing hook connecting the cable to the reel was broken, resulting in the cable no longer being connected to the reel, but merely wrapped around the reel. 41 FMSHRC at 643. He also noticed scratches in the scoop bucket. *Id.* The scoop had not been removed from service. *Id.*at 645. Yates issued Citation No. 9077085 on the basis that the winch cable was not being maintained in safe operating condition and had not been removed from service in violation of section 75.1725(a).

Section 75.1725(a) states that: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. § 75.1725(a).

B. The Judge's Findings

The Judge affirmed the Secretary's S&S determination. Finding Consol's argument "unusual," he rejected the operator's position that the cable was in such poor condition that it was not useable. 41 FMSHRC at 645. Instead, relying on Yates' testimony, the Judge accepted that a miner attempting to use the damaged winch cable would be exposed to two discrete safety hazards: the cable snapping under the weight of a load, whiplashing, and striking a nearby miner due to the tension on the cable; and the load itself dropping and striking a miner. The Judge concluded that the obvious hazard is that a cable in this undisputedly poor condition can break and an injury could result in such an event.

The Judge found it compelling that the cable had not been removed and the equipment was not tagged out of service, thereby leaving it available for use. He also credited the inspector's testimony that the cable was the source of the scratches in the bucket, which established that it was being used in its damaged state. Based on the circumstances and credible evidence, the Judge determined that this situation was "an accident waiting to happen." *Id.*

C. Analysis

Consol concedes the fact of violation, but maintains that the violation was not S&S. It argues that the rope cannot break if it cannot be used, and if it cannot be used, it is not reasonably likely to contribute to a hazard. It is Consol's position that because the rope was no longer attached to the winch reel, any tension put on the rope would simply cause the winch reel to free spin. Pointing to the testimony of Harvey Mine Safety Inspector Chase Shaffer, it contends that the rope is not long enough to wrap on itself to create an anchor point, and that the inspector did not conduct any tests to demonstrate his unsupported theory, which Consol asserts is "mere speculation." PDR at 9-10; Consol Reply Br. at 13.

We disagree. Substantial evidence supports the Judge's finding of S&S. The Judge identified the obvious safety hazard as the damaged cable breaking and causing injury to nearby

miners. 41 FMSHRC at 645. In relying on the inspector's testimony, the Judge determined that this hazard could occur in one of two ways. If the severely damaged cable was used to pull heavy equipment, the tension could cause the equipment to drop and hit a nearby miner or cause the cable to snap, whiplash, and hit a miner. As support for the latter, Yates recounted a prior incident he witnessed where a miner had several bones in his face broken and was knocked unconscious after he was slapped in the face by a scoop cable that snapped and whipped back, hitting the miner who happened to be standing in the vicinity.

Additionally, the Judge did not accept Consol's argument that the reel would just free spin. Inspector Yates testified that if the cable is wrapped two to three times around the spool, with sufficient tension it would create a "binding" effect that would render the anchor point meaningless and it could sufficiently pull a load. Tr. 91-92. He stated that the anchor point on the reel is not made for tension and that the wrapped cable is part of the anchoring. Tr. 92-93. As for the length of the cable, according to Yates: "They use very long chains to hook onto stuff, so the rope don't have to go all the way to it. You meet the rope with the chain." Tr. 90. He further noted that you could simply take the hook and hook it to the chain. The Judge found the inspector's testimony credible. The Commission has long held that a Judge's credibility determination is entitled to great weight and may not be overturned lightly. *See Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2770 (Dec. 1981); *Bussen Quarries, Inc*., 39 FMSHRC 970, 974 (May 2017).

Moreover, Consol's contention that the cable was not suitable and therefore would not be used, erroneously presumes that any miner attempting to utilize the cable would see its condition, surmise it unsafe for use and not use it. The miner could see the damage, simply decide it is not that bad and use it anyway. This is particularly so if the miner approaches the machine with the assumption that equipment unsuitable for use would have already been removed from service. Thus, there is a significant chance that a miner would not discover the cable to be unusable until an attempt to use it. By that time, the damage would be done.

We conclude that the damaged cable presented a discrete safety hazard and that it was reasonable for the Judge to rely on the experienced inspector's testimony.[8] We have recognized that an inspector's judgement is an important element in an S&S determination, and a Judge is well within bounds to credit the opinion of an experienced MSHA inspector that a violation is S&S. *Buck Creek*, 52 F.3d at 135 ("the ALJ certainly did not abuse his discretion here in crediting the opinion of [the] Inspector."); *Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1277 (Dec. 1998) ("We see no basis for overturning the judge's crediting of the first-hand observations of [the inspector] over the testimony of Harlan's safety director.").

[8] Inspector Yates has approximately 20 years of mining experience. He has previously worked as a scoop operator and shuttle car operator and was formerly a cargo specialist in the army where he operated heavy equipment, including cranes and forklifts and had experience using and inspecting winch cables. Tr. 58-59.

We also find that there is ample evidence to support the finding that the hazard was reasonably likely to result in an injury.[9] Inspector Yates gave undisputed testimony that the scoop operator often works with another miner who directs travel in low visibility conditions, but who is situated outside of the scoop, in the entry or crosscut. Additionally, he noted that there were three other miners working nearby. Tr. 78-79; 41 FMSHRC at 644. We conclude that other miners in the entry would still be exposed to the hazard of a whiplashing or snapping cable. Although Consol argues that its miners are trained to stay out of red zones, we have found that an operator cannot attempt to claim mitigation regarding S&S when it rests upon the assumption that miners would stay out of red zones or otherwise exercise caution. *Eagle Nest*, 14 FMSHRC at 1123.

Consol further contends that the inspector never saw the cable used in the manner alleged or otherwise demonstrated by his theory. It points out that the scoop is constantly used and for a variety of tasks. Consol maintains the scratches in the bucket could have occurred in any number of ways, "including the use of an undamaged rope or the rope bouncing around in the spool as the scoop is used." PDR at 10; Consol Reply Br. at 13.

In light of the photographic evidence, however, the Judge found the inspector's inference reasonable that as the cable is extended and retracted, the frayed metal strands will rub on the inside of the winch housing causing scratches each time it comes on and off, establishing use. 41 FMSHRC at 645. Yates stated that these scratches do not occur when a cable in good condition is used. He also did not agree that the scratches could have developed simply in the normal rolling up of the cable, because there were too many of them and such marks do not occur in the normal process of rolling up the cable. *Id.* at 641. Yates testified that he believed friction from frayed strands was "absolutely" how the scratches occurred. Tr. 74-75. He also noted that Consol could not explain why the scoop was left in that condition and that he was aware that they were setting up a new longwall face in the 4A section. Tr. 80. The Judge reasonably found the inspector's testimony credible.

Accordingly, we affirm the finding of S&S.

III.

Citation No. 9077091

A. Factual Summary

On January 19, 2018, Inspector Yates found the Venturo lifting device on a Brooksville jeep badly damaged. The lifting device is essentially a small crane on the back of a mantrip with a lifting capacity of about 1,600 pounds. Tr. 150. Miners use the lifting device to vertically lift and lower longwall components, such as motors, pumps, and jacks. Tr. 154-55, 412. The device

[9] Although the Judge stated that the violations in Citation Nos. 9077085 and 9077091 were "at least somewhat likely to result in harm" (41 FMSHRC at 645, 664), he cited to and applied the correct Commission standard, which requires that the violation be "*reasonably* likely" to result in injury. *Id.* at 627, 645, 664; *see Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981) (emphasis added).

uses a small winch with a wrapped stainless-steel cable that spools out 10-15 feet when being used and is meant to be operated from a distance. Tr. 150-51, 187, 414. There is a metal hook at one end of the cable that hooks onto a load. When a load is hooked, the jeep then travels down the track and loads equipment in or out of a scoop. 41 FMSHRC at 658, 660.

As Yates approached the jeep, he saw tape wrapped around the cable, which he removed to see what was underneath. He saw two to three feet of the original cable broken off from the hook, but with the hook still attached to the other end of the cable. The cable was frayed with broken and loose strands. The non-hooked end of the cable was looped back through the hook and braided back into the cable and then wrapped with black tape. The damaged cable had not been removed and the jeep had not been locked and tagged out. 41 FMSHRC at 659. The jeep, which is pre-operationally inspected once a week, was located in the track shoot at the bottom of Patterson Creek portal, in the crosscut between entries, where miners park their rides.[10] It was not in use and the winch controller was disconnected from the power source. Yates issued Citation No. 9077091, asserting another violation of section 75.1725(a) because the lifting device on the jeep was not maintained in safe operating condition. 41 FMSHRC at 658.

B. The Judge's Findings

The Judge determined that this violation was S&S. Relying on the inspector's testimony, he identified two hazards presented by this condition, the cable snapping back and a load dropping. He concluded that the twin discrete safety hazards presented a clear measure of danger to safety. The Judge found that the jeep was not locked or tagged out and was available for use. 41 FMSHRC at 664. He accepted the inspector's testimony, as credible, that the cable had been used in its improper condition, since the defect was discovered at the end of a shift. Accordingly, the Judge rejected Consol's position that the cable was not functional, posing no hazard. He reasoned that it was insufficient for Consol to depend on miners adhering to their safety training, especially as in this case, with an inadequate attempt at repair for an insufficient cable. He also rejected Consol's reliance on its preoperational check policy, since the improper attempt to secure the cable was insufficient, intentional, and contrary to that policy. *Id.*

C. Analysis

Just like the previous citation, this violative condition exposes miners to the discrete safety hazard of the cable breaking and causing injury to nearby miners. Specifically, injury may occur if the cable snaps under the weight of a load, whiplashes, and strikes a nearby miner, or if the load itself drops and strikes a miner—both creating a clear measure of danger to safety. 41 FMSHRC at 664; Tr. 162, 184.

[10] Although Consol's safety inspector Albert Stein testified that the last pre-op examination of the jeep was the day before the citation was issued, Consol's counsel indicated at trial that Stein's testimony was inconsistent with the pre-operational inspection records and sought to admit the records. The Judge rejected admission of the records on the ground that Consol had failed to disclose them to opposing counsel prior to trial. Tr. 416 -19.

Consol maintains that this winch cable was unsuitable for use and that the two hazards cited by the Judge were unlikely occurrences. It maintains that the inspector's conclusion was wholly speculative. It asserts that "[c]ommon sense dictates" that if the lifting device was used in this condition, the taped area would come apart and the rope would retreat into the spool, and there would be no whiplash. PDR at 29. It also argues that it trains its miners to stay out of red zones and to use the controller when operating the lift.

We, again, are not persuaded by these arguments. First, Consol suggests that the cable retreating into the spool is the only possible outcome if it is used in the damaged condition. The inspector pointedly disagreed with Consol and maintained that the cable would not retreat into the spool but would, instead, whip around at random. Second, even if Consol were correct that the cable was not capable of lifting anything, it erroneously presumes that a miner will look at the inadequately repaired cable, reach that same conclusion, and then decide not to use it. It is insufficient to depend on its miners resting on their safety training "about risks for cable failure," to keep them safe. *See* 41 FMSHRC at 664. Our history, unfortunately, is replete with well-trained, but injured, miners.

Moreover, the damaged portion of the cable was covered with black tape, which as the Judge noted, served to hide the inadequate fix, thus preventing miners from seeing the full extent of the damage. 41 FMSHRC at 664; *see also* Sec'y Resp. Br. at 7 ("With the black tape over it, the repair attempt was less visible."). This is further compounded by the fact that the jeep was not locked or tagged out of service, so there was nothing warning miners against powering the jeep and using the winch cable in its damaged condition. A miner could see the patch job done to the cable and assume that because it is patched and not tagged out of service, the cable is suitable for a quick, occasional or light use until it gets replaced.

Consol counters that "most likely" the rope was or "appeared to be" tied and taped up simply to avoid losing the hook and to keep the rope from being pulled back into the boom. PDR at 10, 29. It argues that electrical tape and a modest tie job were not going to allow the rope to be used to lift a load. Consol also points out that the controller must be connected to a power source to operate the boom and lifting device, which it was not. 41 FMSHRC at 661. We find this theory unavailing.

Consol presented no evidence, particularly testimony from any miner having direct knowledge of the taped cable, in support of this assertion. Neither the winch apparatus nor the jeep was locked out or removed from service for the purpose of initiating repairs. We also find compelling Inspector Yates' opinion that the improper repair took time and the only reason to invest such time is if one intended to use it. He stated that "you wouldn't do that if you was going to take it out of service. You would have left it broke. You would have threw it inside of the mantrip and went on back." Tr. 159. Consol presented no rebuttal evidence.

We further conclude that the controller being disconnected from a power source does not constitute a deterrent or impediment. One would simply need to connect the jeep to a power source in order to use the damaged cable.

Just like the previous citation, the Judge found that either hazard could reasonably be expected to cause cuts, broken bones, contusions, and even amputations, in the event of a falling load or whiplashing cable, and the injuries would be of a reasonably serious nature. 41

FMSHRC at 659, 664. We conclude that the Judge's S&S finding here is reasonable and this citation is affirmed.

IV.

Conclusion

Based on the record evidence and the Judge's credibility determinations, we conclude that substantial evidence supports the Judge's S&S findings regarding each of the above citations. *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) (noting that the "sensibly deferential" substantial evidence standard of review does not allow the court to reverse reasonable findings and conclusions, even if it would have weighed the evidence differently); *Donovan on Behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (finding that it was error for the Commission to "substitute a competing view of the facts for the view the ALJ reasonably reached").

Accordingly, we affirm the Judge's decision in all respects.

Arthur R. Traynor, III, Chair

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

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