FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 30, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-263 A.C. No. 11-013141-173084-01
v.	Docket No. LAKE 2009-338 A.C. No. 11-013141-175621
MACH MINING, LLC, Respondent.	Mine: Mach Mine No. 1

DECISION

Appearances: Sarah T. Weimer, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Christopher D. Pence, Esq., Allen Guthrie & Thomas, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon a Petition for 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 are two section 104(a) citations issued to Mach Mining, LLC ("Mach" or "Respondent"), alleging violations at Mach's Mach No. 1 mine. To prevail, the Secretary must prove his charges "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

The Secretary filed his petitions for the assessment of penalty against Mach, and Mach timely filed its answers. Chief Judge Lesnick assigned consolidated Docket Nos. LAKE 2009-263 and LAKE 2009-338 to me along with Docket No. LAKE 2009-264. The parties subsequently settled Docket No. LAKE 2009-264, and I disposed of the case in a separate Decision Approving Settlement.

The Secretary has proposed a total civil penalty of $4,800.00 for the two remaining citations, and I held a hearing on the record in Evansville, Indiana to determine the merits of the Secretary's case.[1] Citation No. 6683204 charges Mach with violating 30 C.F.R. § 75.380(f)(3)(iii) for obstructing a primary escapeway with a battery charging station, and alleges that Respondent's conduct constituted high negligence.[2] The Secretary presented the testimony of Mine Safety and Health Administration ("MSHA") Inspector and Electrical Engineer Dean Cripps, while Respondent presented testimony from Mach General Manager Anthony Webb and Fire Safety Incorporated Sales Representative Lowell Holler.

In addition, Citation No. 6679603 charges Mach with violating 30 C.F.R. § 75.400 for failing to clean up and prevent the accumulation of coal dust, loose coal, and other combustible material.[3] The Secretary also alleges that the condition was significant and substantial[4] ("S&S") and the result of Mach's high negligence. The Secretary presented testimony from two

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[1] In this decision, the following abbreviations are used: "Resp't Prehr'g Rprt" refers to the Respondent's Prehearing Report; "Br." refers to a brief by either party; "Tr." refers to the hearing transcript; "Sec'y Ex. #" refers to the Secretary's exhibits; "Resp't Ex. (Letter)" refers to Respondent's exhibits.

[2] Section 75.380(f)(3) provides:

> The following equipment is not permitted in the primary escapeway
> . . . .
> (iii) Underground transformer stations, battery charging stations, sub-stations, and rectifiers except–
> (A) Where necessary to maintain the escapeway in safe, travelable condition; and
> (B) Battery charging stations and rectifiers and power centers with transformers that are either dry-type or contain nonflammable liquid, provided they are located on or near a working section and are moved as the section advances or retreats.

30 C.F.R. § 75.380(f)(3).

[3] Section 75.400 provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400.

[4] 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."

inspectors, Inspector Edward Law and Inspector Bobby Jones, while Mach presented evidence from Webb, Mach Examiner Dave Adams, and Mach Mine Foreman Chris England.

Respondent has stipulated to my jurisdiction over this matter under the Mine Act, Mach's status as an operator subject to the Mine Act, and the effect Mach's coal has on interstate commerce. (Resp't Prehr'g Rprt. at 1.) The Secretary and Respondent each submitted posthearing briefs and reply briefs.

II. ISSUES

The Secretary asserts that the conditions were properly cited as violations and the allegations underlying the citations were valid. (Sec'y Br. at 1.) Mach admits a violation of both cited safety standards but contends that Citation No. 6679603 should be modified to a non-S&S citation. (Resp't Br. at 1.) Moreover, Mach asserts that both citations were improperly designated as resulting from Mach's high negligence. (*Id.*)

Accordingly, the issues before me are as follows: (1) whether the record supports the Secretary's assertions regarding the gravity of Citation No. 6679603; (2) whether the record supports the Secretary's assertions in Citation Nos. 6683204 and 6679603 regarding Mach's level of negligence; and (3) whether the civil penalties proposed by the Secretary are appropriate.

For the reasons set forth below, Citation Nos. 6683204 and 6679603 are **AFFIRMED** as written.

III. BACKGROUND AND FINDINGS OF FACT

The Mach No. 1 mine is a longwall coal mine in Johnston City, Illinois. (Sec'y Ex. 1; Tr. 18:8–9, 220:20–21, 263:8–11.) Mach Mine No. 1 is a "gassy" mine that liberates more than 1 million cubic feet of methane per 24 hours. (Tr. 143:20–144:3.) Each panel of the Mach No. 1 mine has a similar configuration and is generally about 18,000 feet in length. (Tr. 27:20–22, 30:13, 84:16–19.) A system of conveyor belts carries the coal to the main belt. (Tr. 13:7–8, 118:11–14.) The main belt—also known to as the "second east belt"—runs the entire 18,000-foot length of the longwall and carries the coal out of the mine. (Tr. 13:7–8, 118:11–14.) Mach Mine No. 1 also maintains sprinkler systems and carbon monoxide ("CO") monitors as fire suppression and detection equipment in the Second East Headgate area of the mine. (Tr. 157:4–161:5, 255:4–11.)

In the fall of 2008, a temporary belt—known as a pony belt—extended into a setup room area to facilitate transfer of coal to the second east belt. (Sec'y Ex. 1; Tr. 114:5–23, 118:2–4.) The pony belt transferred the coal from the setup room onto the second east belt. (Sec'y Ex. 1; Tr. 115:12–117:23.) The pony belt and second east belt were the same width, making spillage common at the transfer point. (Tr. 13:9–13, 119:11–18, 231:12–23, 253:12–24.)

The mine also maintains primary and secondary escapeways for each section, which provide miners in the working area a safe pathway to exit the mine in the event of an emergency. (Tr. 24:15–25:10, 32:7–9.) Primary escapeways are designed to be ventilated with intake air fresh from the surface to prevent smoke contamination of the main escape route in the event of a mine fire. (Tr. 24:24–25:3.) Alternate escapeways are separated from the primary escapeway in their entirety, but they need not be ventilated with intake air. (Tr. 25:4–10.)

IV. PRINCIPLES OF LAW

A. General Principles Governing Significant and Substantial ("S&S") Designations

A violation is S&S "if, based on 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) 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." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc.*, 52 F.3d at 135–36 (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The third *Mathies* element is often heavily contested. In the accumulations context, the third element is met where a "confluence of factors," such as the extent of the accumulation and presence of possible ignition sources, make the hazard reasonably likely to result in injury. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). This evaluation should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). Materials need not be hot when inspected to prove friction as an ignition source, if heat will eventually result during continued normal mining operations. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (finding the lack of a hot spot immaterial where friction was present between belt rollers and accumulations).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission has indicated that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (finding no abuse of discretion where ALJ credited opinion of experienced inspector).

B. General Principles Governing Determinations of Negligence

Negligence is conduct, either by commission or omission, which falls below a standard of

care established under the Mine Act to protect miners against the risk of harm. 30 C.F.R. § 100.3(d). Mine operators are held to a high standard of care, and failure to exercise such care constitutes negligence. *Id.* An operator is required to be alert for conditions affecting the health and safety of miners, while taking preventive and/or corrective action to address hazardous conditions or practices. *Id.* MSHA may consider mitigating circumstances which can include the operator's actions to prevent or correct hazardous conditions or practices. *Id.*

Estoppel defenses are not generally available against the federal government. *See, e.g., Knob Creek Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Inspectors' previous representations about compliance with a regulation do not estop MSHA from issuing future citations, *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063–64 (Sept. 2000), but detrimental reliance on an inconsistent interpretation is properly considered in mitigating the penalty. *U.S. Steel Mining, Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984) (indicating that a local MSHA office's past approval of operator's transportation methods does not negate an S&S finding and noting that detrimental reliance may be considered in mitigation of penalty).

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

A. Citation No. 6679603 — The Accumulations Violation

1. Additional Findings of Fact

a. Roof Fall, Inspection, and Accumulations — October 30

The early hours of October 30, 2008, were a busy time at Mach Mine No. 1. At approximately 2:00 a.m., Mach began to move the temporary pony belt connecting the mine's setup room to the second east belt, which would be a four or five hour process.[5] (Tr. 240:17–241:7.) Meanwhile, at approximately 2:30 a.m., Adams identified coal accumulations in the second east belt tail area, deenergized the belt, and notified Mach's foreman that the belt tail needed to be cleaned. (Tr. 228:15–21, 229:1–12.) However, a roof fall occurred in the Second East Headgate area between 3:00 a.m. and 3:30 a.m. (Tr. 239:2–3.) Finally, at some point overnight prior to 7:00 a.m., a miner injured himself while installing supplemental support in another area of the mine. (Tr. 204:20–22, 205:8–11, 246:21–23.)

Two MSHA inspectors, Inspector Jones and Inspector Law, independently responded to the report of the roof fall. (Tr. 110:8–12, 113:4–5, 204:8–14, 205:4–5.) Inspector Jones arrived at Mach Mine No. 1 at approximately 6:30 a.m. (Tr. 204:8–14, 205:4–5, 122:18–22, 136:9–13, 137:13–15, 205:17–18.) He verbally issued a section 103(k) order at approximately 7:15 a.m., which required Mach to evacuate the area near the roof fall—including the area of the accumulations, which was approximately 400 feet away. (Tr. 123:6–11, 148:3–6, 208:4–10, 210:6–10, 14–17.) After Jones issued the section 103(k) order, Mach was prohibited from

[5] However, the stopped pony belt did not require the main belt to stop. (Tr. 190:10–15.)

accessing the Second East Headgate area, including the junction point between the pony belt and main belt. (Tr. 185:2–5.) Jones testified that he saw the accumulations at the tail piece of the second east belt on his way to the roof fall area. (Tr. 206:4–8.) According to Jones, he did not immediately cite the accumulations because he was "more concerned with getting the roof control—the roof fall investigation so I could go and investigate the accident to the miner." (Tr. 206:11–14.)

Later that morning, Law received a call regarding the roof fall at Mach No. 1 Mine. (Tr. 110:8–11.) While traveling to the roof fall area, Law also observed the accumulations at the head of the pony belt and the tail of the second east belt. (Tr. 113:12–24.) At 10:40 a.m., Law issued a section 104(a) citation to Mach for violating 30 C.F.R. § 75.400. Law's citation states:

> The [Second] East Headgate belt tail has been running in accumulations of combustible materials in the form of coal fines, loose coal and coal. The accumulations are in front of, along the sides of and under the belt tail area. They range from 5 to 10 feet in length, 3 to 4 feet wide and from 6 to 24 inches in depth. The bottom belt has been running in coal and is in contact with the belt, under the tail pulley and in contact on both sides of the tail pulley. The accumulations of combustible materials are also built up under the pony belt scrapers in contact with the belt 10 to 18 inches in depth and the width of the belt. There has been a roof fall on the pony belt and the belts are currently not operating.

(Sec'y Ex. 7.) The accumulations were dark in color[6] and were not rock dusted.[7] (Sec'y Ex. 7; Tr. 120:2–7,0 121:9–10.) Although the second east belt was not running at the time, it appeared the accumulations were extensive and had been in contact with both sides of the belt. (Sec'y Ex. 7; Tr. 113:24, 114:1, 119:1–3.) According to Law, belt friction provided an ignition source.

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[6] Although General Manager Webb testified that the accumulations were mostly rock (Tr. 251:12–19), I note that Law credibly testified that the material was coal. (Tr. 126:21–24.) Moreover, Respondent's own witness, Foreman England, testified that the accumulations had "*a little bit of rock* and coal." (Tr. 270:15–17 (emphasis added).) Thus I credit Law's description regarding the composition of the accumulations.

[7] Law did note that the surrounding area was rock dusted "fairly well" but indicated the accumulations, which were "pretty distinct in color," were not. (Tr. 121:8–14.)

(Tr. 145:8–10.) He also indicated the accumulations appeared to have been there "for a while."[8] (Tr. 156:3–4.)

As to the extent of the accumulations, Law observed loose coal spilled along both sides of the belt, behind it, and underneath the head area. (Sec'y Ex. 7; Tr. 118:23–119:1.) Law measured the accumulations with a tape measure and described them as being five to 10 feet out along the sides of the belt tail and pony belt head area, three to four feet wide, and six to 24 inches deep. (Sec'y Ex. 7; Tr. 126:18–19, 113:19–20.) Underneath the pony head area, there were 10 to 18 inches of coal accumulations, such that the belt was "actually sitting on top of the coal." (Sec'y Ex. 7; Sec'y Ex. 8; Tr. 113:21–24.)

Based on his observations, Law also determined that the violation was S&S and the result of Mach's high negligence. (Sec'y Ex. 7; Tr. 111:7–13, 152:15–154:16, 164:1–165:17.)

b. Additional Findings of Fact — Mach's Corrective Measures

Although Respondent admits that the cited accumulations were present in the belt tail area, Mach disputes Inspector Law's determination regarding the duration of the violative condition. (Resp't Br. at 2–3, 12–13.) Instead, Mach claims that the accumulations were a recent spill. Specifically, Respondent points to Examiner Adams' testimony to suggest that accumulations listed in the exam book for the afternoon shift on October 29 had been cleaned. Adams worked a 9:00 p.m. to 7:00 a.m. shift at Mach Mine No. 1 on October 29 and October 30. (Tr. 224:22–23, 238:1–3.) Between 9:30 p.m. and 10:00 p.m. on October 29, Adams passed by the second east belt tail area. (Sec'y Ex. 7; Tr. 227:2–9, 228:10–11.) Adams testified that the accumulations described in Citation No. 6679603 were not consistent with his observations at 9:30 p.m. (Tr. 228:1–3.) According to Adams, at 9:30 p.m. the main belt and pony belt were running, and the tail rotor was clear. (Tr. 228:4–14.) Mach thus claims that the accumulations from the October 29 afternoon shift must have been cleaned before Adams' 9:30 p.m. observations. (Resp't Br. at 14.)

Despite Adams' testimony, the evidence in this case convinces me that Respondent made no attempt to clean or address the accumulations at issue until Adams shut down the second east belt at 2:30 a.m. First, Inspector Law credibly testified that he believed no corrective action had been taken based on the amount of coal accumulations he found during his examination. As Law explained: "If it had been cleaned up twice prior to that, then they had an awful spill occurring . .

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[8] At the hearing, Inspector Law admitted he did not specifically know whether Mach had performed any work during the October 29 afternoon shift to address the accumulations noted in its afternoon examination books. (Tr. 156:24–157:2, 188:16–20.) However, Law noted that Mach's exam records from both the October 29 afternoon and October 30 midnight shifts identified accumulations at the belt tail area but listed no corrective action had been taken. (Tr. 155:2–14; *see also* Resp't Ex. B.) Inspector Law therefore inferred that the accumulations had been there for a "fairly long length of time." (Tr. 155:9–11.)

. when whatever took the belt down, whoever took the belt down . . . it was running in coal and it had built up to the point that it was a pretty good size accumulation. . . . [I]f it was [cleaned up], then the spill they had ongoing was creating a very big hazard." (Tr. 156:15–157:3.) In Law's opinion, therefore, no corrective action had been taken between the October 29 afternoon shift and his inspection on October 30. (Tr. 156:15–17.) Law has more than 27 years experience as a miner and inspector. (Tr. 108:9–109:24.) His opinion is therefore entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported the ALJ's S&S determination).

Second, Adams admitted he was not making a belt examination when he made his 9:30 p.m. observation; instead, he was in the area to examine a belt transformer. (Tr. 228:4–10.) Though Adams may have observed the area, his observation was not focused on the accumulations. In fact, during the hearing Adams gave no basis to believe his 9:30 p.m. observation of the belt tail area was at all rigorous. I therefore give no weight to Adams' testimony on this point.

Finally, Mach produced neither testimony from General Manager Webb, Mine Foreman England, or Adams nor other evidence identifying any actual corrective action taken to clean up the accumulations.[9] Based on the above, I therefore find Mach made no corrective actions to clean up the accumulations between the time the afternoon examiner observed them and the roof fall occurred at approximately 3:30 a.m.

2. Legal Analysis

a. Conclusion of Law — S&S Determination

Mach stipulated to a violation of 30 C.F.R. § 75.400, fulfilling the first *Mathies* factor. As I noted, Law credibly testified that the belt was in contact with the coal and an ignition was possible. Moreover, a belt running in coal may lead to a belt fire, creating smoke affecting anyone in the belt entry and increasing the chance of an explosion. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (August 1985) (recognizing that coal can dry out and

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[9] Mach's posthearing briefs note that operators are allowed 24 hours to mark corrective actions in their examination books and that those 24 hours had not passed when Law inspected Mach's examinations books. However, Respondent's own brief highlights its lack of evidence: "*Presumably*, the accumulations noted during the afternoon shift (before 11:00 p.m. on October 29) *could have* been cleared prior to Mr. Adams' examination at approximately 9:30 p.m. that evening." (Resp't Br. at 14 (emphasis added).) Undeterred, Mach apparently hopes I will hypothesize about the corrective actions it might have taken and infer that those actions occurred. Yet, such conjecture provides no actual evidence from which I might infer that Mach actually cleaned the accumulations noted on its afternoon exam books.

ignite). Thus, the accumulation contributed to a discrete safety belt fire safety hazard, and I determine that the Secretary has satisfied the second element of the *Mathies* test.

Mach also claims that injuries were not reasonably likely to occur, which is the third *Mathies* element.[10] (Resp't Br. at 10–12.) First, Respondent contends that if an ignition did occur, the direction of air flow in the entry meant that "smoke would travel outby away from miners in the working section." (*Id.* at 11.) Second, Respondent claims that the belt did not provide a possible ignition source because it had been deenergized. (*Id.* at 10–11.) Finally, Mach claims that it would have cleaned the violative accumulations in the course of normal mining operations before the second east belt was reenergized. (*Id.* at 14–15.)

Nevertheless, the evidence before me demonstrates that the Secretary has satisfied his burden of proof on *Mathies*' third element. Here, Law credibly testified that the second east belt had been running in coal. According to Law, one miner would be exposed to the hazard of a belt fire because the belt examiner that regularly checked the belt system would encounter smoke. (Tr. 154:8–9.) Regardless of the air flowing away from the miners on working section, a belt fire

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[10] Mach also included several other arguments that bear brief discussion, but which are ultimately inapposite. First, Mach suggests an ignition was unlikely because the material under the belt tail was wet and mostly rock. (Resp't Br. at 10; Resp't Reply Br. at 5.) However, I have credited Inspector Law's description of the accumulations. *See* discussion *supra* note 6. Here, Inspector Law indicated that the friction created from the belt contacting the coal would dry out the coal and provide an ignition source. (Sec'y Ex. 8; Tr. 135:14–19.) In addition, the Commission has consistently found that wet or damp coal will dry out and fuel or propagate a fire or explosion. *See, e.g.*, *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329–30 (Aug. 2013) (citing *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120–21 (Aug. 1985), and *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1230, 1232 (June 1994)).

Mach also claims that its CO detection and fire suppression systems would alert affected miners to evacuate. (Tr. 15:12–21; Resp't Br. at 11–12.) Likewise, Mach suggests that personnel doors on the belt entry would allow a belt examiner to escape in the event of a fire. (Resp't Br. at 11–12). However, the presence of other fire safety equipment like CO monitors and personnel doors does not decrease the likelihood of injury. *Buck Creek Coal*, 52 F.3d at 136 (stating that the presence of fire safety measures does not mean that fires do not pose a serious safety risk to miners).

Finally, Mach claims that methane was not present at the time of the violation. (Resp't Br. at 12.) I note that Mach Mine No. 1 is a gassy mine and methane may develop quickly. Nevertheless, it is unclear why Respondent believes methane is a necessary prerequisite for an ignition. As Inspector Law credibly testified, a fire may occur when a "fire triangle" is present. (Tr. 144:23–145:3.) A "fire triangle" has three components: an ignition source, fuel, and oxygen. (Tr. 145:1–3.) Law identified all three fire triangle components—an ignition source (the belt friction), fuel (the accumulations of coal), and oxygen (in the air). (Tr. 145:8–10.)

would therefore reduce visibility and make it difficult for the examiner to breathe or find his or her way out of the mine.

Respondent's claim that the deenergized belt did not provide an ignition source is similarly inapposite. Although the second east belt had been deenergized at the time Law issued Citation No. 6679603, the belt was running in accumulations when Adams observed the accumulations at 2:30 a.m. *Cf. Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989) (noting that "[t]he operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed *prior to the citation* and the time that it would have existed if normal mining operation had continued.") (emphasis added). Thus, the second east belt provided a source of ignition for several hours before Adams took any steps to shut down the belt.

In addition, the evidence suggests the belt was reasonably likely to be reenergized in the course of normal mining operations. Notwithstanding the belt shut down and Inspector Jones' section 103(k) order, Respondent failed to clean the accumulations for several hours *prior* to the 3:30 a.m. roof fall. Thus, it appears that cleaning the accumulations was not a priority for Respondent. Indeed, England admitted that he prioritized conditions listed in Mach's exam books. (Tr. 265:14–9.) In this context, the belt could be purposefully or inadvertently reenergized after Mach addressed the roof fall and completed its pony belt move. *Cf. Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1141 (May 2014) (concluding that an accumulation was S&S where the operator had already dispatched a clean-up crew to an accumulation running in coal because the Commission could not assume the clean up would be completed before production resumed.) Given the presence of an ignition source, the size of the coal accumulation, the amount of time that the accumulations existed and ran in coal, Mach's previous inaction, and the possibility that the belt would be reenergized in continued mining operations, the confluence of factors in this case convinces me that the hazardous condition was reasonably likely to result in injury. I therefore determine that the third *Mathies* element has been satisfied.

Finally, Law also credibly testified to the seriousness of the injuries a belt fire would cause. Specifically, Law testified that a belt fire is reasonably likely to result in smoke inhalation and carbon monoxide poisoning injuries. (Tr. 154:8–16.) As the Commission has observed, smoke inhalation and carbon monoxide poisoning are serious injuries. *Cf. Big Ridge, Inc.*, 35 FMSHRC 1525, 1533 (June 2013) (affirming judge's S&S determination where the hazard was reasonably likely to result in smoke inhalation, carbon monoxide poisoning, and burns); *see also Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (indicating that "ignitions and explosions are major causes of death and injury to miners."). Accordingly, I determine that the Secretary has also satisfied the fourth element of *Mathies*.

Based on the foregoing, I determine that the Secretary has established all four elements under *Mathies* and conclude that this violation was properly designated as S&S.

b. Conclusions of Law — Negligence Determination

The Secretary contends that Respondent's knowledge of the violative condition, notice that greater efforts were necessary for compliance, history of previous violations, the extent and obviousness of the accumulations, and the danger the accumulations presented each demonstrate Mach's high negligence. (Sec'y Br. at 21–22.) In contrast, Mach argues that the high negligence designation is improper because: (1) Examiner Adams shut off the belt upon discovery of the accumulations and instructed the foreman to clean up the accumulations; and (2) the roof fall and the resulting section 103(k) order prevented Mach from cleaning up the accumulations for a lengthy period before Inspector Law issued the citation.[11] (Resp't Br. at 16–17.)

Here, Mach knew that coal commonly accumulated at the transfer point where coal from the pony belt was dumped onto the main belt. (Tr. 13:5–11.) As Adams observed, accumulations and spillage occurred in that area "pretty often." (Tr. 231:23.) Likewise, General Manager Webb noted that coal accumulated at this transfer point because the two belts were the same width, causing significant build-up on the sides of the main belt. (Tr. 253:12–15.) Despite this knowledge, Mach allowed significant amounts of coal to accumulate under the belt. Indeed, Inspector Law's testimony and description in Citation No. 6679603 detail the extent of the violation. (Sec'y Ex. 7; Tr. 125:20–126:2.) Mach was also on notice of the specific accumulations at issue beginning on the afternoon of October 29. (Tr. 13:14–19.) Thus, Respondent was on notice that accumulations were likely to arise at this transfer point *and* knew about the actual violative conditions in question.

Moreover, Law stated that Mach could have promptly cleaned up the accumulations with a shovel. (Tr. 150:3–7.) In fact, Mach quickly corrected the condition after Law issued Citation No. 6689603. (Tr. 237:14–16.) Compared with the danger the accumulations presented, it appears that cleaning the accumulation would have been relatively simple. Yet, Mach took no steps to clean the condition prior to the roof fall at 3:30 a.m.

Further, the evidence before me does not demonstrate any mitigating factors. Although Adams instructed the foreman to shut off the main belt because it was "gobbed out" (Tr. 228:24, 258:11–14), Adams' efforts neither *prevented* nor *corrected* the hazardous condition: the coal accumulation remained under the belt line. Rather than mitigate its negligence, Mach's willingness to shut down the belt and halt the transportation of coal out of the mine highlights just how negligent Mach had been in allowing the situation to progress over several hours. At that point, the accumulations must have been so serious that Mach was willing to stop the

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[11] Mach also suggests the accumulations listed in the exam book from the afternoon shift on October 29 had been cleaned and that the accumulations at issue in Citation No. 6679603 resulted from spillage. (Resp't Br. at 16–17.) However, I have found that Respondent took no steps to clean the accumulation in the belt tail area prior to the roof fall. *See* discussion *supra* Part V.A.1.b.

transport of coal despite the slowdown to its operations. Moreover, neither Adams' action nor the roof fall precluded the main belt's purposeful or inadvertent reengagement in the hours prior to the section 103(k) order at 7:15 a.m. or after the roof fall had been addressed. If the belt were reenergized, the belt remained an ignition source for a dangerous belt fire.

Mach's claim that it would have cleaned the violative accumulations if the roof fall had not occurred is likewise unavailing. (Tr. 233:17–23.) It is true that the early morning hours of October 30 were busy ones at Mach Mine No. 1. A miner had been injured. A roof had fallen. Focusing on the roof fall and injured miner is a seemingly rational decision; indeed, Inspector Jones himself testified that he bypassed issuing the accumulation citation to attend to the roof fall and injured miner.[12] Superficially, Mach's reasons for not cleaning the accumulations in those hectic early morning hours might seem to mitigate Respondent's negligence. Yet when examined more closely, Mach's argument ignores *hours* of inactivity *preceding* the roof fall. Despite the ease with which Mach could have cleaned the accumulation, Respondent took no steps to address the violative condition between the afternoon shift on October 29 and the roof fall at 3:30 a.m. on October 30.

For the foregoing reasons, I find the Secretary met his burden to prove Mach's high negligence concerning Citation No. 6679603. In light of my conclusion that this violation was also S&S, Citation No. 6683204 is hereby **AFFIRMED** as written.

B. Citation No. 6683204 — The Charging Station Violation

1. Additional Findings of Fact

a. Additional Findings of Fact — Prior Citation

A battery charger is a large piece of electrical equipment, measuring approximately six feet long, three feet wide and two to three feet high. (Tr. 41:22–24.) Battery chargers connect, or plug in, to belt power centers through a cable attached to the charger. (Tr. 26:11–27:4.) The end of the battery charger cable, called a cathead, plugs into the belt power station. (Tr. 34:10–12.) When a lock is placed on the cathead, the battery charger's cable cannot be plugged into the belt power center and thus the battery charger cannot be energized unless the lock is removed. (Tr. 38:8–11, 93:7–12.)

On October 28th, 2008, Inspector Cripps cited Mach for a violation of 30 C.F.R. § 75.380(f)(3)(iii) because he had found two charging stations in same primary escapeway. (Sec'y Ex. 5; Tr. 35:11–19.) After the October 28th citation, Mach moved the charger to the

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[12] Jones explained: "If it had been an normal day, I would have cited it, or if it—even if it had just been the roof fall, I probably would have cited it. My number one intention when I went below was to get where the miner was injured where I could look it over." (Tr. 212:10–15.)

surface so to allow Fire Safety, Incorporated ("Fire Safety") to update its fire suppression system. (Tr. 11:13–15, 104:18–23.) According to Sales Representative Holler, Fire Safety completed the update on October 29, tagged the charger, completed an inspection report, and left it on the surface of the mine because it was not Fire Safety's responsibility to return the charger underground. (Tr. 104:14–16. 105:3–8; Resp't Ex. C.)

On November 7, another inspector terminated the October 28 citation when the charger cable was locked out.[13] (Sec'y Ex. 5; Tr. 36:19–37:1, 46:22–47:7, 68:21–22, 75:11–12, 100:5–16.) At some point, someone returned the charger to the primary escapeway, but the means by which it returned and the actual date of return is unknown. (Tr. 98:3–7.) General Manager Webb testified that he did not order any Mach employees to return the charger to the primary escapeway, does not have a way of knowing who returned the charger underground, and did not know the charger was returned to the primary escapeway until November 15 or 16. (Tr. 88:14–23.) When Webb found the charger in the escapeway, he saw its power cable rolled out towards the power center, with the cathead laying on the ground unlocked. (Tr. 93:12–19, 98:17–21, 99:19–22.) Webb then directed his longwall maintenance chief, Dallas Travelstead, to put a lock on the cathead. (Tr. 89:15–18, 93:5–10, 99:16–18.)

b. Cripps' November 17, 2008 Inspection

On November 17th, 2008, Inspector Cripps conducted an inspection of Mach No. 1 mine. (Sec'y Ex. 6; Tr. 19:10–15.) During his inspection, Cripps noticed a battery charging station parked in the primary escapeway at Headgate Number 2, about one and a half miles away from the working section. (Tr. 24:8–10.) The charging station was not being used to maintain the escapeway. (Sec'y Ex. 5; Tr. 23:21–24:6.) The charger cable was locked out, but it was extended to the belt power center one crosscut inby. (Sec'y Ex. 5–6; Tr. 34:7–12, 43:5–14, 38:8–11.) Cripps also noticed a battery-operated scoop located in the charging station in a position to be charged, although it was not charging at the time. (Tr. 23:8–9, 26:2–3, 31:5–6.) As Cripps observed the condition, Greg Patton, a foreman, approached the area and told Cripps he had come to see if his scoop was charged up. (Sec'y Ex. 6; Tr. 44:19–45:5.) Patton told Cripps he normally charged his scoop in this location, and he did not know whose lock was on the charging station. (Tr. 45:17–20.)

Based on his inspection and observations, Cripps issued Citation No. 6683204, indicating:

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[13] Cripps, however, would not have terminated the October 28 citation simply for locking out the charger's cathead; instead, he would have required removal from the primary escapeway. (Tr. 37:10–14.) As Cripps noted, merely locking the cathead would allows "anybody [with] . . . a key . . . [to] go up and simply take the lock off and plug it in and begin charging with it at any time." (Tr. 38:4–11.)

> A scoop charging station, No. 4 charger, was located at No. 78 crosscut of the HG #2 primary escapeway and was not being used to maintained [sic] the escapeway. The cable that supplies 480 volts to the charger extended to the belt power center at No. 79 crosscut and was locked out. This charging station was cited on 10/28 for being in the primary escapeway. The citation was terminated when the charger was locked out. Evidence indicates that this charger has been being used since the previous citation was issued and terminated.

(Sec'y Ex. 5; Tr. 21:20–24, 49:6–51:1.) In addition, Cripps determined the violation was the result of Mach's high negligence. (*Id.*; Sec'y Ex. 6; Tr. 50:8–52:1, 57:24–58:10.)

2. Conclusion of Law — Negligence Determination

Mach argues that it did not receive notice that MSHA would no longer accept a locked-out cathead as abating the 30 C.F.R. § 75.380(f)(3)(iii) violation. (Resp't Br. at 20–22.) Mach notes that the charger's cathead was locked out—purportedly in conformance with the abatement procedures approved in abating its October 28 citation—when Cripps found it in the primary escapeway. (Resp't Br. at 20–22.) Mach argues, therefore, that conformance with prior abatement should mitigate its negligence. The Secretary argues the battery charger's return to the escapeway after its October 28 citation makes Mach negligent and contends the lock on the cathead does not mitigate Respondent's negligence.[14] (Sec'y Br. at 10–12.)

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[14] At the hearing and in their briefs, the parties disagreed whether Foreman Patton used the battery charger in the interim between the October 28 citation and November 17 citation. (*See, e.g.*, Resp't Br. at 7–8.) Yet, it is unclear why the chargers' actual use would measurably affect Mach's negligence in this case. As General Manager Webb admitted, the cathead had been unlocked and extended toward the power center when he found the charger in the primary escapeway just one or two days before Inspector Cripps issued Citation No. 6683204. (Tr. 93:7–8, 99:19–22.) It is also appears that Mach's management did not closely monitor the use of the charger. Indeed, Webb admitted he did not know how or when the charger returned to the escapeway. (Tr. 88:14–23.) Thus, Mach allowed the cathead to be unlocked and available for use for an indeterminate length of time. If the charger was not actually used during that period, that inactivity appears to have been fortuitous or accidental.

Although good fortune and happy accidents are always welcome outcomes, the Mine Act holds operators to a high standard of miner safety. Regardless of the charger's actual use, and 30 C.F.R. § 75.380(f)(3) prohibits Mach from placing battery chargers in the escapeway absent certain conditions. The actual use of the battery charger in this case is irrelevant to that duty. Thus, I need not determine whether Patton actually used the battery charger after its return to the escapeway.

Although I recognize that prior forms of abatement *might* be the basis for mitigating negligence in *some* scenarios, *see* discussion *supra* Part IV.B, in this case Mach made no showing of detrimental reliance. Standing alone, General Manager Webb's order to lock the cathead once he found the charger in the escapeway *might* have been a basis to infer a late-in-the-game attempt to rely on the abatement required for the October 28 citation.[15] However, the text of the regulation itself suggests Mach knew or should have known the charger could could not be in the escapeway regardless of whether it was locked. In fact, the regulation itself specifically states that battery charging stations are not permitted in primary escapeways. *See* 30 C.F.R. § 75.380(f)(3)(iii). Thus, it is unclear why Respondent believes that the locking the cathead on the battery charger would allow the charger to be placed in the escapeway.

Moreover, the evidence before me also suggests that Mach *knew* a battery charger could not be located in the primary escapeway. Webb admitted that when he noticed the charger in the escapeway and had it locked, he was trying to do "the next best thing . . . to prevent it from being energized until we could . . . get it either, one, moved out of there or two, get it air locked."[16] (Tr. 93:2–11.) Further, Mach brought forth no other evidence demonstrating that Respondent *relied* on MSHA's allegedly inconsistent guidance when it stationed the battery charger in the escapeway. On the contrary, Webb indicated he did not know how or when the charger returned to the escapeway, nor did he order anyone to do so. Thus, no matter how many back of the envelope calculations it might make, Mach's math does not add up: unplanned activity and after-the-fact efforts to do "the next best thing" do not equal reliance.

Although the cathead was locked out when Mach moved the charger back to the escapeway, the cathead was *unlocked* in the escapeway a few days before Citation No. 6683204. Webb's steps to relock the cathead notwithstanding, such actions do not preclude its future use. Allowing the charger to return to a place where it could be used does not meet the Mine Act's high standard of care. Though Mach's policy may not have been to use the charger in the escapeway, charger's location, convenience, and utility provide both an opportunity and incentive for miners to use the misplaced charger. I conclude, therefore, that Mach's level of negligence was high. Citation No. 6683204 is hereby **AFFIRMED** as written.

C. Penalty Assessment

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an

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[15] Although Respondent argues it conformed with the procedures approved in abating its October 28 citation, Mach curiously did not introduce a copy of the October 28 citation into the record. Cripps and Webb both testified regarding those abatement steps, but the record is unclear precisely when and how Mach abated the October 28 citation.

[16] Air locking is a means by which a battery charger could be separated from the escapeway using a set of doors between entries. (Tr. 86:19–87:8.)

appropriate civil penalty. The Secretary seeks a penalty of at least $4,800 for these violations. I have reviewed the History of Violations and Assessments Reports, which are not disputed (Sec'y Ex. 2; Sec'y Ex. 3; Sec'y Ex. 4.) This report included nine previous section 75.400 violations, of which one was S&S. In considering this history along with the other statutory factors, I also take special note that the section 75.380(f)(3)(iii) violation occurred just three weeks after an identical violation. Respondent stipulated to the gravity of Citation No. 6683204, and I have found Mach's negligence to be high. I have also found Citation No. 6679603 to be properly designated S&S and the result of Mach's high negligence. Additionally, nothing in the record suggests that the Secretary's proposed penalty of $4,800 is inappropriate for the size of Mach's business, that it would infringe on Mach's ability to remain in business, or that Mach did not abate the violation in good faith. The violations were abated in good faith. (Sec'y Ex. 5; Sec'y Ex. 7.)

Considering the evidence before me, I conclude a total civil penalty of $4,800.00 is appropriate, given the violation history, size of the mine and Mach's ability to remain in business, Mach's high negligence, the gravity of both violations, and Mach's good faith abatement of the violations. Accordingly, I hereby assess a civil penalty of $4,800.00.

VI. ORDER

WHEREFORE, it is **ORDERED** that Citation No. 6683204 and 6679603 are **AFFIRMED**. Within 40 days of this decision, Mach is **ORDERED** to pay a civil penalty of $4,800.00.

Alan G. Paez
Administrative Law Judge

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