FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 22, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. VA 2014-0198 A.C. No. 44-04856-344491
v.	
CONSOL BUCHANAN MINING COMPANY, LLC, Respondent	Mine: Buchanan Mine #1

DECISION AND ORDER

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia and David A. Steffey, Conference and Litigation Representative, Mine Safety and Health Administration, District 5, Norton, Virginia for Petitioner

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton PLLC, Lexington, Kentucky for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Docket No. VA 2014-0198 involves five citations, Nos. 8208302, 8208448, 8208450, 8208451, and 8196366. At the outset of trial, the parties filed a Joint Motion to Approve Partial Settlement of Citation Nos. 8208302 and 8208448.[1] Tr. I, 20-23. Citation Nos. 8208450, 8208451, and 8196366 remain in dispute.

[1] I have reviewed the parties' Joint Motion for Partial Settlement as placed on the record at the hearing. The parties request that Citation No. 8208448 be modified to reduce the level of negligence from "moderate" to "low" and that the proposed penalty of $108 be found appropriate. The parties also request that Citation No. 8208302 be modified to delete the "significant and substantial" designation, reduce the level of negligence from "moderate" to "low," and reduce the civil penalty from $807 to $500. Tr. 20-22. I have considered the representations and documentation submitted. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The primary issues presented are whether MSHA had jurisdiction to inspect the guard house and bulldozer respectively cited in Citation Nos. 8208450 and 8208451, whether the auxiliary fan violation alleged in Citation No. 8196366, as amended at trial, significantly and substantially contributed to the cause and effect of a respirable-dust health hazard and/or methane-ignition safety hazard, and whether that alleged violation was reasonably likely to result in a fatal injury.

A hearing was held on January 26 and 27, 2015 in Abingdon, Virginia. The parties introduced testimony and documentary evidence.[2] Witnesses were sequestered.

For the reasons set forth below, I find that MSHA properly exercised jurisdiction when inspecting the guard house and bulldozer cited in Citation Nos. 8208450 and 8208451, respectively. I find that the penalties proposed by the Secretary of $108 for Citation No. 8208450 and $108 for Citation No. 8208451 are consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. 820(i).

I also find that the auxiliary fan violation alleged in Citation No. 8196366, as amended at trial to allege a fatal as opposed to permanently disabling injury, significantly and substantially contributed to the cause and effect of a methane ignition hazard, which was reasonably likely to result in a fatal injury in this gassy mine. Accordingly, I find it unnecessary to decide whether that same violation also significantly and substantially contributed to the cause and effect of a respirable-dust health hazard that was reasonably likely to result in a fatal injury. Based upon my independent assessment of the record evidence, I find that the penalty proposed by the Secretary of $1203 for Citation No. 8196366 should be increased to $2,678 consistent with the statutory criteria in section 110(i) of the Mine Act and my finding that the severity of gravity increased from permanently disabling to fatal. 30 U.S.C. 820(i). Accordingly, I assess a total civil penalty of $2,894 for the three remaining violations found herein.

Based on a careful review of the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,[3] I make the following:

II. Findings of Fact Concerning Citation Nos. 8208450 and 8208451

A. Stipulations

The parties stipulated to the following:

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[2] P. Exs. A-C and P. Exs. 1-30 were received into evidence. Tr. 15-18, 226, 431. R. Exs. 1-7 were also received into evidence.

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide these civil penalty proceedings pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977.

2. Consol Buchanan Mining Company, LLC [Consol Buchanan] is the owner and operator of the Buchanan Mine #1.

3. Operations of the Buchanan Mine #1 are subject to the jurisdiction of the Act.

4. The proposed penalty amounts that have been assessed for the violations at issue pursuant to 30 U.S.C. § 820(a) will not affect the ability of Consol Buchanan to remain in business.

5. Consol Buchanan does not dispute that the MSHA Inspectors listed in Item 22 of the citations at issue were acting in their official capacity and as authorized representatives of the Secretary of Labor when each of the citations involved in this proceeding were issued.

6. True copies of each of the citations that are at issue in this proceeding along with all continuation forms and modifications, were served on Consol or its agents as required by the Act.

7. Each of the violations involved in this matter were abated in good faith.

8. Government Exhibit 1 is an authentic copy of Citation No. 8208450, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

9. Government Exhibit 2 is an authentic copy of Citation No. 8208451, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

10. Government Exhibit 3 is an authentic copy of Citation No. 8196366, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

11. With respect to Citation No. 8196366, Consol Buchanan does not contest the fact of violation, but does contest the gravity determinations, whether the violation was significant and substantial, the level of negligence, and the appropriateness of the proposed penalty amount.

12. For purposes of Section 110(i) of the Act, the proposed penalty amounts are appropriate given the operator's history of violations and the size of the operator.

P. Ex. C. *See also* Tr. 9-10, 15.[4]

B. Background Facts Concerning Citation Nos. 8208450 and 8208451

Citation Nos. 8208450 and 8208451 are the first citations ever issued at Consol Buchanan's VP-8 stockpile site (VP-8). Tr. 201-02. VP-8 was an abandoned mine that originally consisted of two separate mines, VP-5 and VP-6. Tr. 453. These mines were owned and operated by Island Creek Coal Co., a subsidiary of Consol Energy, Inc., until Consol Buchanan, another subsidiary, purchased them sometime before 2006 and combined them under the Mine ID of VP-5. Tr. 204-05, 453-54. The combined property, renamed VP-8, was placed in abandoned status in 2006. Tr. 203-04, 453-55. The VP-8 site purportedly remained abandoned until the time of the citations at issue. Tr. 438-39, 455-57, R-5.

The record establishes that Consol Buchanan began using VP-8 to stockpile clean coal about a year or two after purchasing the site from Island Creek. Tr. 371, 401. When the Buchanan Mine #1 produced more coal than was needed to ship immediately, clean coal was taken from the Buchanan Prep Plant to the Permac facility, a site two miles down the road, which could hold about 120,000-130,000 tons of coal. Tr. 69, 399. Once the Permac facility was full, excess coal was taken to VP-8, which could hold up to 150,000 tons of coal. Tr. 50-51, 69.

VP-8 is situated on the other side of a hill from the Buchanan Prep plant, less than two miles away as the crow flies, and a four or five mile drive around the hill. Tr. 200, 240-41. The site has two access points. A lower gate is located closest to the coal stockpile and was most often used by coal trucks and other stockpile equipment. An upper gate primarily serviced vehicles traveling to gas and oil operations up the hill, although the coal stockpile was also accessible through this gate. Tr. 65-67, 95-96.

Consol Energy, Consol Buchanan's parent corporation, contracted with G4S Security to provide security for all equipment kept at the site. Tr. 322-23. G4S manned a guard house just inside the upper gate, about 500-600 feet from the coal stockpile. Tr. 214. The original guard house was replaced with a newer building sometime between October 2013 and January 2014. Tr. 260-61, 290-93. MSHA inspector Mark Tuggle was the first to inspect the new guard house in January 2014. Tr. 257.

Coal trucks from the preparation plant typically accessed VP-8 by the lower gate, but they would use the upper gate when the stockpile became too large. Tr. 133-34, 138. Although the G4S security guards stationed at the upper gate did not stop coal trucks, they stopped all other vehicles going to the coal stockpile, including equipment operators, mine foremen, contractors, and state and federal inspectors, who were required to sign in and out of the property. Tr. 100, 104, 108-09, 297-98, 340-41, R-3. Besides monitoring traffic at the upper

[4] It should be noted that the parties agreed to two additional stipulations in this matter. P. Ex. C. However, those stipulations deal with Citation No. 8208302, which was included in the Joint Motion for Partial Settlement. Therefore, it is not necessary to include them here. Further, Respondent's stipulations regarding the appropriateness of the civil penalty dealt with the proposed penalties as they were before subsequent modification of Citation No. 8196366 at hearing, as will be discussed *infra*.

gate, the guards occasionally made rounds at the stockpile area, and they were required to check the lower gate after hours to make sure it was locked. Tr. 100-01, 316-17. The guards were responsible for the security of the stockpile equipment. Tr. 218-19, 323. The guards also provided annual MSHA hazard training for workers at the site. Tr. 98-99, 103-04, 320-21, 405-06, 434-45. The guard house itself provided power to a nearby fuel tank used to fuel the stockpile equipment. Tr. 214, 262-64, 296, 431-32.

At least by 2012, MSHA began inspecting the VP-8 stockpile. MSHA inspector Wes Clevinger added the VP-8 stockpile site to MSHA's Information Tracking System (ITS) during an inspection in 2012, although it may have been in the system before that time. Tr. 129-33, 228, 257, 302-04. Clevinger inspected VP-8 several times beginning in 2006. Tr. 122-23. He and other MSHA inspectors inspected the site regularly between 2012 and 2014. Tr. 122-23, 176-77, 192-93, 239-40. Clevinger examined the old guard house in 2012. Inspector Robbie Bowers examined the old guard house on March 19 and September 5, 2013. Inspector Tuggle examined it on October 17, 2013. Tr. 134-37, 206-07, 244, 249, P. Ex. 18, 19. Clevinger and Tuggle also inspected the fuel tank, whenever it was present. Tr. 157-58, 243-44, 249-52, 262; P. Ex. 19.

Throughout all of these inspections, VP-8 was treated as an adjunct facility of the Buchanan Mine #1 ID, although it remained in "abandoned" status. Tr. 453; R. Ex. 5. No representative of Consol Buchanan ever raised any objection to the inspections, or suggested that action should be taken to officially attach VP-8 to the Buchanan Mine #1 ID. Tr. 127, 180-81, 358, 471-72. No evidence was presented at hearing to show that any loading or unloading took place at the VP-8 site between August 2, 2013 and September of 2014, but at the time Tuggle issued the instant citations in January 2014, coal was stockpiled at the site. Tr. 391-92, 435-36.

Tuggle wrote Citation Nos. 8208450 and 8208451 during his inspections on January 16 and 17, 2014, respectively. Tr. 261; P. Exs. 1 & 2. Citation No. 8208450 alleges a violation of 30 C.F.R. § 77.904, which states:

> Circuit breakers shall be labeled to show which circuits they control unless identification can be made readily by location.

The Citation narrative states:

> The circuit breakers installed in the breaker box of the new guard house at the VP#8 location [are] not labeled to show which circuits they control. The circuits [cannot] be readily identified without use of a meter or similar device.

P. Ex. 1.

Tuggle testified that all the wiring was in good shape and the breaker box was covered, but the electricians who wired the guard house should have known that the circuit breaker was not labeled. Tr. 267, 268-69. Since the power cords leading from the circuit breaker were in the guard house wall, there was no way to identify where they went. Tr. 265. This created the

possibility that someone performing electrical work would fail to de-energize the correct circuit and would receive an electrical shock. Tr. 267-68.

Tuggle designated Citation No. 8208450 as non-S&S because he determined that the violation was not reasonably likely to result in injury or illness. P. Ex. 1. Tuggle designated gravity as lost work days because most workers wear rubber boots or other insulation, and were likely to receive only a non-fatal shock. *Id.*; Tr. 268. Tuggle designated Respondent's negligence as moderate. P. Ex. 1. A Buchanan Prep Plant electrician abated the violation. Tr. 268-69. MSHA proposed a civil penalty of $108.

During the same inspection, Tuggle issued a separate citation, not at issue here, for an undated fire extinguisher in the guard house. Tr. 253. Respondent did not contest that citation, and paid the penalty proposed by the Secretary.[5] Tr. 252-53.

Also on January 16, 2014, Tuggle noticed a bulldozer before leaving the VP-8 site. Tr. 269. Although the bulldozer was not locked and tagged out, Tuggle was unable to fully inspect it because there was no operator available to operate it for him. Tr. 269-70.

The next day, January 17, 2014, Tuggle returned to the VP-8 site to inspect equipment remaining on the site, including the bulldozer. Tr. 269-70. Upon examination of the bulldozer, Tuggle wrote Citation No. 8208451 alleging a violation of 30 C.F.R. § 1110, which states:

> Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

The condition or practice section of Citation No. 8208451 states:

> The fire extinguisher provided on the Caterpillar D8N dozer (S/N 9TC1395) has not been examined since June 2013 or 7 months. Additionally, the on-board fire suppression system has not been examined since July 2012 or 18 months ago. Both tags were checked and have same dates of July 2012. Proper examination of fire fighting equipment is necessary to ensure fire fighting equipment is being maintained in a usable condition for use when necessary. The operators normal cycle for the contract fire suppression company is due in February 2014. This is a spare dozer and not regularly used. The fire extinguisher and fire fighting system is charged and could be used if necessary.

P. Ex. 2.

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[5] This fact is especially significant, as will be discussed *infra*, because of Respondent's adamant objection to jurisdiction in this case.

Tuggle designated the citation non-S&S because he determined that the violation was unlikely to result in injury or illness. P. Ex. 2. Tuggle designated the gravity as unlikely to result in a lost-work-days injury because the fire extinguisher was charged and could be used, despite the stale inspection date. Tr. 276. Tuggle designated Respondent's negligence as moderate. P. Ex. 2. MSHA proposed a civil penalty of $108. P. Ex. A.

Tuggle testified that normal use of a bulldozer causes it to heat up, and that substances such as antifreeze oil and hydraulic fluid may provide fuel for a fire. Tr. 276-77. He further testified that regular inspections of the fire extinguisher helped to ensure the safety of equipment operators in the event of a fire. Tr. 277.

The dozer had recently undergone repairs, and had been returned to the VP-8 site about a week before Tuggle inspected it. The dozer had not been locked and tagged out. Tr. 269, 271-73, 276, 278-79. After it was returned to the VP-8 site from the repair shop, the dozer's blade and hoses had been reattached, and superintendent Paul Danko instructed equipment operator Mike Bradshaw to run the dozer to try it out. Tr. 62-63, 275, 278-79, 380, 421-22 P. Exs. 21, 22; *but see* Tr. 433.[6] However, the Secretary failed to establish that the dozer had actually been operated after its repair and prior to issuance of the citation. Tr. 59, 349, 424.

On the day the citation was issued, the dozer was situated near the guard house, facing the stockpile. Tr. 274, 288, 418-19. At that time, there was no work being done on the stockpile, although there was coal stockpiled there. Tr. 288, 435-36.

III. Legal Analysis Concerning Citation Nos. 8208450 and 8208451

A. MSHA Jurisdiction Was Proper Over the VP-8 Site

Consol Buchanan does not dispute that the conditions alleged in Citation Nos. 8208450 and 8208451 constituted violations of the cited standards. Respondent put on no evidence to undermine the citations at trial, and made no arguments on the issue in its post-hearing brief. R. Br. 9. I credit inspector Tuggle's uncontested testimony regarding the fact and gravity of the violations, and I find that the Secretary has met its burden of proof on these issues. Specifically, I find that the breaker box in the guard house was unlabeled and that the fire extinguisher on the dozer had an expired inspection date. Tr. 267-69, 276. Further, I find that each citation was non-S&S, and unlikely to result in lost workday/restricted duty injuries. Tr. Tr. 268, 276, P. Ex. 1&2.

Despite conceding the facts of the violations, Consol Buchanan argues that MSHA lacked jurisdiction to inspect and issue citations for the guard house and the bulldozer. R. Br. 9. Specifically, Respondent argued that while the definition of a "mine" under the Mine Act should

[6] Danko denied that he gave this instruction. Tr. 433. However, Bradshaw's testimony to the contrary was corroborated by testimony from Tuggle, as well as by Tuggle's notes. Tr. 275; P. Ex. 21. I credit Bradshaw's clear recollection that Danko instructed him to run the dozer to try it out, as corroborated by Tuggle's notes. Moreover, irrespective of this credibility resolution, I find that the dozer was *capable* of being operated, which finding is bolstered by other evidence in the record. *See* 10-11, *infra*.

be "very broad," jurisdiction should not be asserted in a way that is "contrary to common sense." R. Br. 9-10 citing *Southern Nevada Paving*, 2008 WL 4287781, *8 (Aug. 2008). In short, it argues that assertion of jurisdiction over VP-8 is patently irrational.

MSHA derives its jurisdiction over the nation's mines and miners from the Mine Act, which states, in pertinent part:

> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

30 U.S.C. § 803. The Mine Act defines the reach of the term "mine" broadly to include:

> C) . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of preparing coal. . . .

30 U.S.C. § 802(h)(1). The Mine Act also defines what constitutes the "work of preparing coal":

> "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, *storing, and loading* of bituminous coal, lignite, or anthracite, *and such other work of preparing such coal as is usually done by the operator of the coal mine.*

30 U.S.C. § 802(i) (emphasis added).

The Secretary cites Commission and Circuit Court precedent for the proposition that MSHA's jurisdiction must be broadly interpreted. For instance, the Third Circuit has emphasized Congressional intent that "'what is considered to be a mine and to be regulated under this Act' was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 892 (3d Cir. 1979) (quoting S.Rep.No.181, 95th Cong., 1st Sess. 1, 14, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414). The D.C. Circuit echoed this observation in *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1553-54 (D.C. Cir. 1984) ("Because the Act was intended to establish a 'single mine safety and health law, applicable to all mining activity,' its jurisdictional bases were expanded accordingly to reach . . . 'structures . . . which are used or are to be used in the . . . preparation of the extracted minerals.'" S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977); S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), U.S. Code Cong. & Admin. News 1977, 3401, 3414.); *see also RNS Services Inc. v. Secretary of Labor*, 115 F.3d 182, 185 (3d Cir. 1997) ("The storage and loading of coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user, and the Mine Act was intended to reach all such activities."); *United Energy Servs., Inc. v. Fed. Mine Safety &*

Health Admin., 35 F.3d 971, 975 (4th Cir. 1994) ("[T]he proper focus of our analysis is on the safety of mining operations and . . . we should construe broadly the Act's coverage to achieve this goal.")(citing S.Rep. No. 181, 95th Cong., 1st Sess. 1, 14, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414.).

The Commission has also consistently given broad and inclusive interpretation to the jurisdictional limits of the Act. *See Secretary of Labor (MSHA) v. Pyramid Mining, Inc.*, 16 FMSHRC 2037, 39 (1994) ("The legislative history of the Mine Act and the Federal Coal Mine Health and Safety Act of 1969 recognize the hazards presented by abandoned mining areas and address the health and safety of non-miners as well as miners."); *Secretary of Labor (MSHA) v. Jim Walter Resources*, 22 FMSHRC 21, 22 (2000) (holding that a common supply shop, which was not located at any mine site and lacked a Mine ID, was subject to Mine Act jurisdiction).

The Secretary argues that the VP-8 coal stockpile fits within this broad interpretation of Mine Act jurisdiction. I agree. Even the most creative legal mind would be hard pressed to find that a coal stockpile does not fall within "lands, . . . structures, facilities, . . . or other property . . . used in" the "storing, and loading" of coal. 30 U.S.C. § 802(h)(1), (i). The site's abandoned status and the confusion over the Mine ID do not suffice to defeat jurisdiction. *Pyramid Mining,* 16 FMSHRC at 39; *Jim Walter Resources,* 22 FMSHRC at 22. Indeed, jurisdiction is even more soundly established here than in those cases because the VP-8 site has not been abandoned, and the stockpiling of clean coal plays a more direct, integral and essential part of the mining process than the role played by a supply shop.

Nevertheless, even assuming MSHA jurisdiction over the VP-8 site generally, Consol Buchanan argues that MSHA lacked jurisdiction over the guard house and the bulldozer cited in Citation Nos. 8208450 and 8208451, respectively. For the reasons set forth below, I find that MSHA properly exercised jurisdiction to inspect the guard house and the bulldozer, and that Citation Nos. 8208450 and 8208451 were properly issued, as written.

1. Jurisdiction Was Proper Over the Guard House

With regard to the guard house, Consol Buchanan argues that jurisdiction over the VP-8 site should be restricted to "areas where the coal was being stockpiled and the areas associated with the stockpiling of coal." R. Br. 9. But Consol Buchanan effectively admitted MSHA's jurisdiction over the guard house by paying the penalty on the fire extinguisher citation issued there by Inspector Tuggle during the same inspection.[7] Tr. 252-53. Even apart from this

[7] Furthermore, Consol Buchanan has been on notice of MSHA's claim of jurisdiction over the VP-8 site since at least 2011, when the first inspection occurred. Tr. 177-78; P. Ex. 14. As noted above, at no point since then did Respondent object to or question MSHA's jurisdiction to inspect VP-8. The testimony of Donald Sparkman, a previous MSHA field office supervisor and current Consol Buchanan safety manager, does not help Respondent's position. Tr. 449, 451-52. Sparkman testified that he thought that MSHA lacked jurisdiction over the VP-8 site, but suggested that jurisdiction might be appropriate if a Mine ID were properly and officially attached to the site. Tr. 463, 471-72. Despite testifying that he was aware that this process would need to be initiated by the operator, Sparkman failed to initiate this process when he left MSHA to go to work for Consol Buchanan. Tr. 470-71, 472; see also 30 C.F.R. §§ 41.10-41.13

settlement admission, I find that Citation No. 8208450 was properly issued, as written, since the guard house was used in, and its presence in part resulted from, the work of storing and loading coal at the VP-8 stockpile, and because the guards working in the guard house provided MSHA hazard training.

In its brief, Respondent argues that the guard house was located on a separate and distinct area of the VP-8 site, and that the guard house and the work of the guards who manned it, were not "integral" or "necessary" to the work of stockpiling coal. R. Br. 9-10. These arguments lack merit. The guard house itself and the guards who manned it were located on the VP-8 site and directly involved in the work done at the stockpile.

Specifically, the circuit breaker in the guard house cited by inspector Tuggle was used to provide power to the tank that fueled stockpile equipment. Tr. 263-64. Similarly, employees and equipment engaged in loading, unloading, and storing coal occasionally used the upper gate to access the stockpile, especially when it was full. Independent contractors, like Cleco, signed in at the guard house and assisted in coal operations. Tr. 394-95; R. Ex. 3 (1/7/14, 1/8/14, 1/10/14). Also, the G4S guards stationed at the upper gate had important roles in the stockpiling process. Specifically, these guards would patrol the stockpile and provided security for the equipment at the stockpile. Tr. 218-19, 323. They also provided annual MSHA-required, site-specific hazard training to workers at the site. Tr. 321. Accordingly, I find that these guards were agents of Respondent, lodged with apparent authority to hold themselves out to third parties as responsible for MSHA training and security at the site. Tr. 218-19, 321-23; Restatement (Second) of Agency §§ 8, 27 (1958); see also *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) (reading the statutory definition of "agent" under 30 U.S.C. § 802(e) "agent" to include someone with responsibilities normally delegated to management personnel, with responsibilities that are crucial to the mine's operations, and who exercises managerial responsibilities at the time of the negligent conduct). Therefore, I conclude that jurisdiction was proper over the guard house as an integral part of the VP-8 stockpile site.

Having determined that the guard house was an integral and necessary part of the mine stockpile, it is also evident that miners in the guard house, including electricians, could be exposed to safety hazards within the purview of the Mine Act. Those hazards would include electrocution or shock hazards posed by de-energizing an unlabeled circuit breaker in the guard house. Tr. 263-64, 267-68. *See W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (MSHA properly cited equipment (gas cylinders) in a storage garage shared by a sand and gravel operation and an asphalt plant because cited equipment was "used or [was] to be used in mining and ... could affect miners in the garage."); *Jim Walters Resources,* 22 FMSHRC 21 (Jan. 2000) (central supply shop located between one and six miles from closest coal extraction site is a mine under section 3(h)(1) because a mine includes "facilities and "equipment" used or to be used in mining operations or coal preparation facilities).

(regulations dealing with operators requirement to provide notifications regarding legal identity of a mine). If Sparkman thought that MSHA was improperly exercising jurisdiction *after* he began working for Consol Buchanan, the fact that he neither raised any objection nor tried to correct the situation by seeking a VP-8 Mine ID looks like an effort to preserve a technical jurisdictional argument in case of litigation. It was Sparkman, after all, who first raised the jurisdictional issue in this case. Tr. 464-65, 467-68.

Accordingly, I find that Citation No. 8208450 was properly issued, as written, and that the proposed penalty of $108 is appropriate under the criteria set forth in section 110(i) of the Act.

2. Jurisdiction Was Proper Over the Bulldozer

With regard to Citation No. 8208451, Consol Buchanan contends that the cited bulldozer was not in service at the time of the citation. I find that that the bulldozer was available for use and was not locked and tagged out.[8] Commission case law has consistently held that if equipment in violation of MSHA regulations "has not been rendered inoperable [and] is located in a normal work area, fully capable of being operated, that constitutes 'use.'" *Wake Stone Corp.* 36 FMSHRC 825, 828 (2014) (quoting *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 845 (1981)) (internal quotations omitted); *see also Alan Lee Good*, 23 FMSHRC 995, 997 (2001) (finding that even equipment not to be used on a particular shift must be maintained in functional condition if not tagged out of operation); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (1990) (finding that "use of the equipment" existed where truck was not tagged out and was in turn-key condition). The Commission has found that allowing equipment to stay "parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives." *Ideal Basic* 3 FMSHRC at 845.

In *Wake Stone*, the Commission held that vehicles "located in a normal work area, . . . capable of being used, and [not] locked and tagged out . . . were in 'use' at the time of inspection." *Id.* at 4. Here, the dozer was located on the VP-8 site, where it had previously been used to move coal on the stockpile.[9] Tr. 59. In fact, it had been sitting at VP-8 for about a week after its return from the repair shop. Tr. 271-73, 278-79. Superintendent Danko's testimony established that, like the equipment in *Mountain Parkway*, the dozer was fully capable of being used. It was "ready to go" after the blade and hoses had been reattached. Tr. 421-22. Further, inspector Tuggle testified that in order to use the dozer, someone would only have to "open the door and start it." Tr. 274. Finally, irrespective of whether the dozer was not 'logged back in,' as the operator sought to establish,[10] the dozer was not locked and tagged out of service, as Commission precedent in *Wake Stone* requires. Tr. 381-83, 274.

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[8] The dozer was available for operation. The blade and hoses had been reattached, it was on the lot where it had previously been operated, and it had not been locked and tagged out of service. Tr. 59, 269-70, 274. Operator Bradshaw, prep plant foreman Case, and superintendent Danko all considered the dozer to be available for use once the blade and hoses had been reattached. Tr. 62-63, 275, 421-22.

[9] The dozer was left near the upper gate, 50-60 feet from the fuel tank that was powered by the guard shack. Tr. 274.

[10] Foreman Case testified that he did not think the bulldozer had been put back on the active inventory log, or "back into service." Tr. 381. However, he admitted that he wasn't "100 percent sure" if this was true. Tr. 383.

The record establishes that no pre-operational inspection of the dozer was performed during the week that it sat at VP-8 without being locked and tagged out after it was returned from the repair shop.[11] Tr. 283-84. The fact that Respondent may have performed a pre-operational check before running the dozer, however, is no basis for vacating the violation. The Commission specifically rejected that argument in *Wake Stone Co.*, 36 FMSHRC at 828-29, and reinforced the rule that equipment that is not locked and tagged out of operation and parked for repairs must be maintained in functional condition. The Commission reasoned that "requiring that operators continuously keep machinery in operational condition encourages more vigilance with regard to instituting and enforcing effective maintenance procedures." *Wake Stone,* 36 FMSHRC at 829.

For all of the above reasons, I find that the bulldozer was "used in, or [was] to be used in" the work of "storing, and loading" coal under the Act. Therefore, I find that MSHA had jurisdiction over the bulldozer at the VP-8 site. I conclude that Citation No. 8208451 was properly issued, as written, and that the proposed penalty of $108 is appropriate under the criteria set forth in section 110(i) of the Act.

IV. Findings of Fact and Legal Conclusions Concerning Citation No. 8196366

A. Background Facts

Consol Buchanan Mine #1 is a large mine that employs about 600 miners, who work on three shifts. Tr. 481, 482-83. In 2013 and 2014, the mine had eleven mechanized mining units (MMUs) and used continuous miners and a longwall in super sections for production operations. Tr. 482. The mine is on a five-day spot inspection schedule under section 103(i) of the Mine Act because it emits high methane levels exceeding one million cubic feet of methane every 24 hours. Tr. 483; 30 U.S.C. § 103(i). The Consol Buchanan Mine #1 liberates between ten and eleven million cubic feet of methane every 24 hours. Tr. 483. The mine has had face ignitions while cutting sandstone on some of the older panels. Tr. 601.

On the morning of January 27, 2014, MSHA health inspector Mark Deel arrived at the Mine to conduct an E01 inspection for respirable dust at mechanized mining unit (MMU) 015. Tr. 481, 485-86. Deel and the 015 MMU crew entered the Mine about 7:30 a.m. Tr. 485-86. After attending a safety briefing with section foreman David Remines, Deel began an imminent danger run on 015 MMU at about 8:30 a.m. Tr. 486-88, 585-86. Deel measured between 0% to 0.4% methane throughout the section. Tr. 498-99, 509.

During his imminent danger run, Deel traveled down the #2 entry to inspect the #2 and #1 face, and to check the dust parameters on the continuous miner in the #2 entry. Tr. 508. The #2 entry is an intake air passage, used to ventilate the face with clean air. Tr. 494. Once air passes down the #2 entry to the face, it is routed back up the #1 entry, away from working

[11] Superintendent Danko did look over the dozer shortly after it was delivered, but only to make sure that it was delivered back on site and had the blade back on it. Tr. 446; *see also* Tr. 418-19.

miners. Tr. 494-95. At this point, it is designated as return air, since it carries coal dust and methane away from the face. Tr. 496, 563.[12]

At the time of Deel's inspection, there were two auxiliary fans in the #1 entry, just outby the last open cross cut. Tr. 508, 519-20; P. Ex. 26. The dog box, a curtain extending across the #1 entry to adjust return air pressure, was situated just inby between the auxiliary fans and the last open crosscut. Tr. 495, 526; P. Ex. 26. Ventilation tubing ran all the way from the #1 face, past the dog box, and up to the fans. Tr. 568-69; P. Ex. 26.

It took Deel approximately 45 minutes to inspect the #2 and #1 face, after which he traveled back up the #2 entry. Tr. 509, 539. While doing so, Deel observed a cloud of rock dust in the crosscut between the #1 and #2 entries. Tr. 489, 540, 546, 548. The Secretary stipulated that the dust observed was rock dust, not coal dust, but Deel testified and the Secretary alleges that coal dust would have been generated during continued normal mining operations and mixed with the rock dust creating a respirable dust hazard that would contribute to pneumoconiosis, a permanently disabling disease that eventually causes death. Tr. 541, 619. Upon inspection, Deel discovered that positive pressure in the #1 return air passage had allowed the check curtain in the crosscut to fall slack, opening a gap approximately one foot by five feet, through which return air was entering the #2 intake passage. Tr. 526.

At approximately 10 a.m., Deel wrote Citation No. 8196366 for a violation of 30 C.F.R. § 75.331(a)(4), which states:

> (a) When auxiliary fans and tubing are used for face ventilation, each auxiliary fan shall be— (4) Located and operated to avoid recirculation of air.

The Citation's condition or practice narrative states:

> The auxiliary fans being used to ventilate the faces of 015 MMU are not being located and operated to avoid recirculation of air. When examined return air was being allowed to recirculate into the intake air ventilating the 015 MMU through a check curtain located 1 crosscut outby the last open crosscut. This condition is allowing methane and rock dust to be emitted into the intake atmosphere. 0.3% ch4 was detected coming through the curtain from the return entry. Four miners are currently working inby this

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[12] Foreman James Belcher pithily summarized the critical distinction between intake air and return air:

> Q: Okay, so if I understand you correctly, you cannot use return air to ventilate a working face?
>
> A: No, that is bad air.

Tr. 563.

> condition on the 015 MMU. This condition creates the hazards of a methane ignition and exposure to respirable dust that would result in permanently disabling injures (sic) or disease. Upon continued normal mining coal dust would be ventilated from the working faces and allowed to recirculate into the intake air.

P. Ex. 3.

Deel designated the citation S&S because he determined that the violation contributed to a health hazard that was reasonably likely to result in a permanently disabling injury, and he determined that four workers were affected, as a result of Respondent's moderate negligence. Tr. 499, 515, 538, P. Ex. 3. At trial, the Secretary moved to amend the gravity designation to reasonably likely to result in a fatal injury and to allege both a health and safety violation. That motion was granted.[13] Tr. 25-29. MSHA initially proposed a civil penalty of $1203, prior to the amendment.

At the time of the citation, mining had not yet begun on the section. The four miners, whom Deel observed working inby the cited condition, were preparing for the shift and cleaning their equipment. Tr. 487, 496, 515. These miners included two roofbolt operators, a continuous miner operator, and a section foreman. Tr. 501.

Deel testified that under continued normal mining conditions, the recurrent recirculation of return air into the intake air passage would increase the level of methane and coal dust at the face over time. Tr. 494-96, 500, 524-25, 541-42. Therefore, without abatement of the cited condition, the hazards of exposure to respirable dust and methane ignition would worsen over time. Tr. 499-500, 503-04, 529-30, 538. High levels of respirable coal dust increase the likelihood that miners will develop pneumoconiosis or black lung disease. Tr. 503, 541, 565. Float coal dust also contributes to the likelihood that a methane ignition will result in fatal injury, since coal dust can propagate an explosion. Tr. 503-04, 567.

Inspector Deel determined that Respondent's negligence was moderate. He testified that "The Mine Act requires the mine operator to have a high standard of care. They've got to be on the lookout for hazards and to correct those hazards." Tr. 502. Deel determined that the level of dust that was "caked" near the back side of the check curtain indicated that the condition had existed for some time, and should have been noted during the pre-shift examination. Tr. 502-03. Deel's notes indicate that the condition existed for at least 4 hours and should have been noted on the previous shift. P. Ex. 25, p. 11.

On cross examination, Respondent established that 45 minutes earlier, Deel and the section foreman had walked by this area and did not see any problem with dust emanating

[13] Deel marked the citation as a health violation, but not a safety violation. Tr. 485, 541-42; P. Ex. 3. The Secretary moved to amend the citation to allege a safety violation as well. That motion was also granted. Tr. 28-30. Deel testified that he should have marked the citation as both a safety and health violation, but as a health specialist, he only marked the health violation box out of habit and oversight. Tr. 485, 541-42. I credit Deel's reasonable explanation as Respondent did not undermine this testimony on cross. Tr. 516.

around the curtain. Tr. 509. Further, Respondent established that any coal dust recirculating would have been "peppered with" and mixed with rock dust and fallen to the ground prior to exiting through the curtain. Tr. 520-21.

Remines testified that he met Deel at the crosscut when Deel was taking his methane reading. Tr. 588. Remines testified that he did not see any dust at the check curtain in the crosscut where Deel testified that he had observed a cloud of dust; however Remines did acknowledge the negative pressure situation and the gap in the check curtain.[14] Tr. 589, 608-09.

Remines further testified that after meeting back up with Deel, he immediately walked to the dog box in Entry #1, observed that it had been knocked out of place, and readjusted it. Tr. 589-91, 609. As soon as the dog box was adjusted by Remines, the pressure differential created by the auxiliary fans was rectified, and the hole in the check curtain closed. Tr. 526, 589-90.

Meanwhile, after taking the methane reading, Deel measured the gap in the curtain. Deel was unable to collect any other data before Remines adjusted the dog box, after which the curtain closed. Tr. 528.

Section foreman James Belcher worked the night-owl shift before Deel arrived on the 015 MMU. Tr. 555-56. Belcher testified that after the end of his shift, between 4:30 a.m. and 6:00 a.m., Belcher performed a pre-shift examination of the section.[15] Tr. 556, 560; R Ex. 6. Belcher testified that he inspected the check curtain and crosscut cited in Citation No. 8196366, as well as the dog box and the auxiliary fans, but he observed no recirculating dust or other hazards. Tr. 556, 557, 575.

Respondent presented evidence that the Buchanan Mine #1 engages in certain practices to mitigate the risks posed by respirable dust and methane ignition. While mining is ongoing, the #1 entry is constantly rock dusted by dusters attached to the auxiliary fans. Tr. 520, 521, 559-60, 573. Rock dust eliminates float coal dust by mixing with it and then dropping out of the air. Tr. 573-73, 593-94. Further, the air pressure in entry #2 is kept at a high volume to dilute methane. Tr. 518-19, 596-97.

In addition, each continuous miner is equipped with methane detectors located five feet outby the ripper head. Tr. 511-12, 529. When the methane monitors detect one percent

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[14] In resolving this conflict, I credit Deel's clear recollection of the rock dust, as corroborated by his notes, which state "dust was observed coming around check curtain between 1 and 2 entries ... a hole is present between the curtain and the outby rib measuring 1.5 feet x 5 feet with dust coming through the hole ... [d]ust is present on the back side of the stopping that is ½ built indicating the condition existed on the previous shift." See P. Ex. 25.

[15] While I acknowledge Belcher's testimony here, I credit Deel's testimony that the condition had existed for about four hours. Although Belcher testified that there were no hazards between 4:30 and 6:00 a.m, Deel did not issue the citation until four hours later at 10 a.m. Further, Deel pointed to specific and compelling evidence that rock dust had accumulated and caked near the back of the curtain. I find that the condition existed for about four hours after section foreman Belcher completed his pre-shift at 6 a.m.

methane, they give a visual warning. Tr. 511, 525. At one and a half percent, the continuous miner shuts down. Tr. 511-12. However, it is possible for methane monitors to become clogged or lose calibration. Tr. 530-31, 616. Furthermore, even when the methane monitors are functioning properly, ignition remains possible because methane at the face can rise to ignition levels before detection by the monitors. Tr. 534.

The Buchanan Mine also uses a technique known as "core holing" to map the type of rock present in the roof in front of the continuous miner. Tr. 605-07. Core holing indicates when the roof is sandstone, which tends to spark, as opposed to slate, which does not tend to spark. Tr. 513, 601-03. The roof was slate at the time of Deel's inspection. Tr. 602. Although Remines personally has never experienced any problems with the core holing technique, he acknowledged on cross examination that sandstone roof tends to come and go, that core holing is not always an accurate predictor of when sandstone is present, that float dust suspended in the air is explosive, and that trailing cables become damaged during continuous mining. Tr. 604-05, 607-08.

Deel observed potential ignition sources inby the cited condition, such as trailing cables and continuous miner bits, but he did not examine the cables for damaged jackets or exposed leads. Further, Deel conceded that cables that are properly maintained are not ignition sources and that the cited area had adequate air volume and was properly rock dusted. Tr. 501, 512, 535-36.

B. Citation No. 8196366 Was a Significant and Substantial Violation and Would Affect Four Miners

Consol Buchanan does not specifically dispute the existence of a violation or the designation of moderate negligence.[16] Rather, Respondent focuses its challenges on the S&S designation and the appropriateness of the proposed penalty. R. Br. 12.

The Mine Act describes an S&S violation as one "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). The Commission has held 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." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). Consistent with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575. "The fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative.'" *U.S. Steel IV*, *supra*, 18 FMSHRC at 867, *quoting Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986). *See also Elk Run Coal Co.*, 27

[16] Although Respondent initially contested the negligence determination and number of people affected in its answer and pre-hearing report, it did not mention these issues in its opening statement at trial, nor did it make argument on these issues in its post-hearing brief. Tr. 36-41; R. Br. 12. In any event, I affirm the moderate negligence determination and the fact that four miners were affected by violation, as set forth below.

FMSHRC 899, 906-07 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (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. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, supra,* 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An S&S determination must be based on the particular facts surrounding the violation and in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.,* 6 FMSHRC 1573, 1574 (July 1984)).

The first *Mathies* element is satisfied here. As noted, Consol Buchanan did not specifically contest the existence of the violation alleged in Citation No. 8196366 at trial or in its post-hearing brief. In any event, the record evidence establishes a violation of 30 C.F.R. § 75.331(a)(4) because auxiliary fans used for face ventilation were not operated to avoid recirculation of air. Rather, probative record evidence establishes that during continued normal mining operations, the auxiliary fans located outby the last open crosscut in the Number 1 return air entry would allow return air from the working faces to recirculate methane and respirable coal dust (mixing with rock dust) back through a "damaged" check curtain located one crosscut outby the last open crosscut into the Number 2 entry intake air course that ventilated 015 MMU. Tr. 494-96, 500, 503, 541-42; see also P. Ex. 3. As Deel credibly testified, "... the check curtain in the crosscut between Number 1 and Number 2 had an opening because the pressure from the auxiliary fans which were inby in the Number 1 Entry caused a positive pressure in the Number 1 Entry and just caused the curtain to fall slack and away from the rib." Tr. 526. This created an opening in the check curtain allowing methane and rock dust to be emitted back into the intake atmosphere. Tr. 525-26; P. Ex. 3. Accordingly, I find that the Secretary has established the fact of the violation by a preponderance of the evidence.

With regard to the second *Mathies* element, the Secretary need only identify a discrete safety or health hazard associated with the putative S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n. 5 (Dec. 2012). The instant increase in respirable coal dust or methane recirculating to the face contributed to both a health and a safety hazard. Based on the evidence presented at hearing, I find that under continued normal mining conditions and without any presumption of abatement, the violative condition contributed to the discrete safety hazard of a methane ignition and to the discrete health hazard of respirable dust exposure. Tr. 500. Continued normal mining operations would release coal dust and methane into return air at the face. Tr. 503-04, 530, 541. Without abatement of the positive pressure caused by the auxiliary fans at the "damaged" check curtain, respirable dust and methane would have continued to "circle the block" and been recirculated to the face, where miners worked. Tr. 500, 524-25, 526, 530, 541. I credit Deel's testimony that there was a cloud of rock dust near the crosscut between the Number 1 and Number 2 entries and that the dust was "caked" near the back side of the

check curtain.[17] Tr. 502-03, 539-40, 546. Further, float coal dust combined with increased methane levels and the presence of potential ignition sources creates the safety hazard of a methane ignition and propagation. Tr. 503-04.

Respondent contends that the violation did not contribute to any discrete safety or health hazard. R. Br. 13. Specifically, Respondent argues that its safety measures, including rock dusting, ventilation practices, methane monitors, and core holing, would have prevented the hazards from ever materializing. Respondent characterizes these safety measures as part of continued normal mining operations. R. Br. 13. For the following reasons, I reject Respondent's argument.[18]

The Commission has consistently held that the adoption of redundant safety measures to mitigate or extinguish a hazard does not change the fact that a hazard may pose a serious risk to miners. *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Cumberland Coal Resources, LP.*, 33 FMSHRC 2357, 2369 (Oct. 2011) (redundant, mandatory safety protections to not constitute a defense to an S&S determination). Respondent's redundant safety measures such as ventilation practices, methane monitors, rock dusting and core holing do not change the fact that methane ignition and overexposure to respirable coal dust pose serious risks to miners in this gassy mine. Respondent's redundant safety measures aim to mitigate or detect these hazards. They do not eliminate them. Accordingly, I find that the second *Mathies* element is satisfied.

With regard to the third *Mathies* element, the Secretary demonstrated that the cited condition or violation contributed to the hazard of methane ignition which was reasonably likely to result in an injury. The Commission has held that where the violation contributes to the hazard of methane explosion or ignition, "the likelihood of an injury resulting from the hazard depends on whether a 'confluence of factors' exists that could trigger an explosion or ignition." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014)(quoting *Texasgulf, Inc.*, 10

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[17] Whether coal dust was reasonably likely to have made it through the curtain and actually been recirculated given its likely mixture with rock dust before that point reaches the third *Mathies* factor and not the instant inquiry into whether a discrete health hazard was created by the violation.

[18] On March 23, 2015, after the close of the hearing, the Secretary filed a Notice of Supplemental Authority. In that notice, the Secretary provided a copy of Judge Paez's decision in *Mach Mining, LLC*, 37 FMSHRC 614 (Mar. 2015). According to the Secretary, that case was substantially similar to the instant matter. The Secretary noted that Judge Paez rejected the operator's argument in that case that it took additional remedial safety measures and found that an S&S designation was appropriate despite low measured levels of methane. Respondent filed a Response to the Secretary's Notice of Supplemental Authority. In it, Respondent argued that Judge Paez's decision was not binding, that other ALJ decision had made different findings, and that Judge Paez was dealing with a violation of a ventilation plan rather than an auxiliary fan violation. As will be discussed *infra*, in the instant matter Respondent's remedial efforts and the low level of methane were immaterial to the ultimate determination. While Judge Paez's decision was well-reasoned and persuasive, my findings here largely rest on the credible facts presented and the cases cited herein.

FMSHRC 498, 501 (Apr. 1988)). Such factors may include potential ignition sources, the presence of methane, the presence of float coal dust or loose coal, and the type of equipment operating in the area. *Paramont Coal Company Virginia LLC*, 2015 WL 3526151, at *3 (May 2015); *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

Here, the mine has had face ignitions while cutting sandstone on some of the older panels. Tr. 601. Although the roof was slate at the time of Deel's inspection (Tr. 602), foreman Remines acknowledged that sandstone roof tends to come and go and that core holing is not always an accurate predictor of when sandstone is present. Tr. 604-05, 607. A methane content of 0 to .4 percent was already present at the faces and .3 percent methane was present at the check curtain prior to the start of mining operations. Tr. 524. Deel credibly testified on cross examination that when the .4 methane at the face mixed with the .3 methane at the curtain to create .7 methane and then recirculated through intake air and around the block, the buildup of methane would increase. Tr. 500, 524-25. As noted, under normal continued mining operations, more methane would be released from the face, along with coal dust. Given the gassy nature of the mine, a sudden buildup of methane could reasonably be expected to occur. In fact, Congress has recognized that methane can accumulate rapidly. S. Rep. No. 91-411 at 59, reprinted in Legis. Hist. 1969 Act at 185. Deel credibly testified that "... inby the methane monitor, when you start cutting coal, emitting methane, and it gets above the end of the or into the explosive range before the methane monitor can pick it up." Tr. 534. If methane was continually recirculated during continuous normal mining operations from return air through the check curtain to intake air because of the auxiliary fan violation, a rapid methane buildup to a 5 percent explosive level was even more likely.

Furthermore, Deel observed several potential ignition sources inby the cited condition, specifically trailing cables and continuous miner bits. Tr. 501. Respondent argues that there was no evidence that *actual* ignition sources were present, such as exposed leads or pieces of sandstone roof that had fallen to the mine floor. Tr. 535-36, 600-01. However, the Commission has long held that the Secretary need not establish the presence of an imminent danger or actual ignition source in order to uphold an S&S designation. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). The presence of potential ignition sources is sufficient under the confluence of factors test. *Cf.*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 -136 (7th Cir. 1995)(affirming judge's S&S determination at 16 FMSHRC at 542, that a tail roller that was completely covered and turning in combustible coal fines could easily become an ignition source that could cause a fire if the roller became heated, despite the apparent absence of evidence that the tail roller was hot or that any defects in the roller were present); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1133-34 (May 2014)(permissibility violations led to deteriorating conditions that were reasonably likely to create an ignition hazard in a gassy mine). Accordingly, considering the specific facts and circumstances of this case, I conclude that there was a sufficient confluence of factors to establish that the auxiliary fan violation contributed to a hazard of a methane ignition that was reasonably likely to result in an injury. [19]

[19] I am persuaded by the testimony elicited by Respondent that coal dust particles in the air would mix with heavier rock dust and fall to the ground prior to recirculation of the air. (Tr. 520-21, 573). However, having determined that the violation was reasonably likely to contribute

Concerning the fourth *Mathies* factor, I find a reasonable likelihood that any injury resulting from the reasonable likelihood of a methane explosion would be of a reasonably serious nature and result in a fatality. As the 2010 Upper Big Branch tragedy reminds us, during continued normal mining operations, the ignition of methane and any subsequent propagation can lead to a fire or explosion, potentially crushing workers under heavy rocks, or burning them to death. *See Pinnacle Mining Co.*, 36 FMSHRC 1918, 1923 (July 2014); *Knox Creek Coal Corp.*, 36 FMSRHC 1128, 1134, 1137 (May 2014); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (recognizing that "ignitions and explosions are major causes of death and injury to miners"). Therefore, I find that the fourth *Mathies* element is satisfied.

For all of the above reasons, I find that the violation alleged in Citation No. 8196366 significantly and substantially contributed to the cause and effect of a discrete safety hazard of methane ignition that was reasonably likely to result in a fatality. Therefore, I affirm the S&S Citation, as amended at trial.

As noted, Deel observed four miners working inby the cited condition, preparing for the shift and cleaning their equipment. Tr. 487, 496, 515. They were the two roofbolt operators, a continuous miner operator, and a section foreman. Tr. 501. Accordingly, I conclude that Deel reasonably determined that four miners were affected by the violation.

C. The Violation was the Result of Respondent's Moderate Negligence

Further, I conclude that Deel reasonably determined that Respondent's negligence was moderate. As Deel testified, "The Mine Act requires the mine operator to have a high standard of care. They've got to be on the lookout for hazards and to correct those hazards." Tr. 502. Indeed, the Mine Act imposes a high standard of care on foremen and supervisors. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that "a foreman ... is held to a high standard of care")); *see also Capitol Cement Corp.*, 21 FMSHRC 883, 892-93 (Aug. 1999) ("Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction, " *quoting Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Although the Secretary's definitions of terms in Part 100 are not binding on the Commission, they nonetheless provide guidance. *See Wade Sand & Gravel Co.*, ____ FMSHRC ___, slip op. at 4 (Sept. 16, 2015). Relevant to the discussion here, MSHA defines negligence by regulation in the civil penalty context as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." Negligence is further defined as "the failure to exercise a high standard of care." 30 C.F.R. § 100.3. The level of negligence is properly designated as moderate when "[t]he 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. The level of negligence is properly

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to an injury as a result of a methane ignition, I find it unnecessary to decide whether the auxiliary fan violation also contributed to a health hazard of inhalation of respirable dust that was reasonably likely to result in an injury by contributing to the development of black lung disease.

designated as low when there are *considerable* mitigating circumstances surrounding the violation. 30 C.F.R. § 100.3, Table X (emphasis added).

For the reasons previously stated in my final *Big Ridge* decision, I find MSHA's penalty regulations and the manner in which the Secretary applies them in proposing a penalty to provide useful guidance. *See Big Ridge Inc.*, 36 FMSHRC ___, slip op. at 4-6 (July 19, 2014) (ALJ); *see also Wade Sand & Gravel, supra,* slip op. at 7, n. 1 (Chairman Jordan and Commissioner Nakamura concurring). Based on the testimony and briefs, I do not find considerable mitigating circumstances that would justify reducing the negligence designation from moderate to low. Respondent highlights none. In these circumstances, I find that the Secretary properly designated the level of negligence as moderate.

In this regard, I have credited Deel's testimony that the condition had existed for about four hours. Although section foreman Belcher testified that there were no hazards between 4:30 and 6:00 a.m. when he concluded his pre-shift examination, Deel did not issue the citation until four hours later at 10 a.m. Further, Deel pointed to specific and compelling evidence that rock dust had accumulated and caked near the back of the curtain. I find that the condition existed for about four hours after section foreman Belcher completed his pre-shift at 6 a.m. Accordingly, I conclude that Respondent should have known of the condition at least prior to Deel's discovery, particularly since a section foreman was working inby the cited condition. The moderate negligence designation was appropriate.

D. Civil Penalty

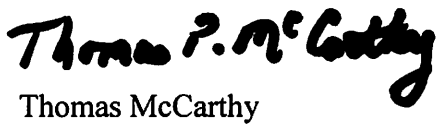
I independently assess the civil penalty pursuant to the criteria in section 110(i) of the Mine Act. The Buchanon Mine is a large underground coal mine that produces over 2,000,000 annual tons of coal. P. Ex. A. It has a low history of previous violations during the prior 15-month period. P. Ex. A and 28. The parties stipulated that the proposed penalty amounts that have been assessed for the violations at issue pursuant to 30 U.S.C. § 820(a) will not affect the ability of Consol Buchanan to remain in business. MSHA determined that Respondent demonstrated good-faith in attempting to achieve rapid compliance after notification of the violations. P. Ex. A. I have found that the operator was moderately negligent for each violation found. I have affirmed the gravity determinations for Citation Nos. 8208450 and 8208451, and increased the severity of gravity with respect to the severity of injury expected in Citation No. 8196366 from permanently disabling to fatal. Accordingly, I find that the penalties proposed by the Secretary of $108 for Citation No. 8208450 and $108 for Citation No. 8208451 are consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Based upon my independent assessment of the record evidence, I find that the penalty proposed by the Secretary of $1203 for Citation No. 8196366 should be increased to $2,678 consistent with the statutory criteria in section 110(i) of the Mine Act and my finding that the severity of gravity increased from permanently disabling to fatal. 30 U.S.C. 820(i). Accordingly, I assess a total civil penalty of $2,894 for the three violations found herein.

V. ORDER

WHEREFORE, the parties' Joint Motion for Approval of Partial Settlement made on the record is **GRANTED**.

For the reasons set forth above, I **AFFIRM** Citation Nos. 8208450 and 8208451, as written. I further **AFFIRM** Citation No. 8196366, as amended at trial to allege that the auxiliary fan safety violation under section 75.331(a)(4) was reasonably likely to result in a fatal injury to four miners working inby as a result of Respondent's moderate negligence.

It is **ORDERED** that the operator pay a total civil penalty of $3,502 for the violations found herein within 30 days of this decision.



Thomas McCarthy
Administrative Law Judge

Distribution:

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