FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 6, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2016-0089 A.C. No. 01-03389-396647
v.	Docket No. SE 2016-0103 A.C. No. 01-03389-398986
PROSPECT MINING AND DEVELOPMENT COMPANY, INC., Respondent	Mine: Carbon Hill Mine

DECISION AND ORDER

Appearances: C. Renita Hollins, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

J.D. Terry, Prospect Mining & Development Company, Inc., Jasper, Alabama for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

These cases are before me upon Petitions 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. SE 2016-0089 involves one section 104(a) citation charging Respondent, Prospect Mining and Development Company, Inc. ("Respondent"), with an alleged violation of 30 C.F.R. § 75.208. Docket No. SE 2016-0103 involves one section 104(a) citation charging Respondent with an alleged violation of 30 C.F.R. § 75.512-2.

A hearing was held in Birmingham, Alabama on November 2, 2016. During the hearing, the parties offered testimony and documentary evidence.[1] Pursuant to the Commission's procedural rules governing simplified proceedings, the parties presented closing arguments in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e). The issues presented are whether Respondent violated the cited standards, and if so, whether the S&S, gravity, and negligence designations were appropriate, and what civil penalties should be assessed. For the reasons discussed below, I modify Citation No. 8530836 to reduce the level of negligence from

[1] In this decision, "Tr. #" refers to the hearing transcript, and "P. Ex. #" refers to the Petitioner's exhibits. P. Exs. 1-7 were received into evidence at the hearing.

"moderate" to "no" negligence. I assess a penalty of $362. I affirm Citation No. 8531669, as written, and assess a penalty of $807.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

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). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury... but rather on the effect of the hazard if it occurs"). Alternatively, 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).

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). [2] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued, without any assumptions regarding

[2] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 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).

abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[3]

Once the fact of the violation has been established, step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has recently clarified that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (*citing Knox Creek Coal Corp.*, 811 F.3d at 163). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy,* 38 FMSHRC at 2038.

The third step of the *Mathies* analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Id.* at 2037 (internal citations omitted). The third step's inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Knox Creek*, 811 F.3d at 161-65. The question in applying the third step of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014). The Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (*citing Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

For violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations.[4] *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993); *Texasgulf*, 10 FMSHRC 498,

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[3] *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

[4] I note that under the clarified *Mathies* test, the determination of whether a particular safety hazard is reasonably likely to occur has shifted from the third step to the second step. The third

501 (Apr. 1988); *see, e.g.*, *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). In particular, "the confluence of factors analysis requires consideration of the particular circumstances in the mine, including the possible ignition sources, the presence of methane, and the type of equipment in the area." *Excel Mining, LLC*, 37 FMSHRC 459, 465 (Mar. 2015).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies*' factors are often combined in a single showing. *Id.* Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.[5]

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008)(negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is

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Mathies step now assumes the existence of the hazard. *Newtown Energy*, 38 FMSHRC at 2037; *Knox Creek*, 811 F.3d at 161-65.

[5] Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Penalty Criteria

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider six statutory criteria set forth in section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g., Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criteria. *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are neither bound by the Secretary's proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (*citing Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) (MSHA Part 100 regulations are not in any way binding in Commission proceedings)). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citation omitted).

My independent penalty assessment for each citation at issue is set forth herein.

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Jurisdiction exists because the Respondent was an operator of a mine as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and the products of the subject mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803.

2. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to section 105 of the Mine Act.

3. Prospect Mining and Development Company, Inc., Mine ID 01-03389, is subject to the Federal Mine Safety and Health Act of 1977, as amended.

4. Prospect Mining and Development Company, Inc. is an "operator" as defined in section 3(d) of the Mine Act.

5. Prospect Mining and Development Company, Inc., [sic] operations affect interstate commerce.

6. Prospect Mining and Development Company, Inc., worked 89,576 hours in 2014 and produced 84,876 tons of coal in 2014.

7. Prospect Mining and Development Company, Inc., worked 106,644 hours in 2015 and produced 84,876 tons of coal in 2015.

8. Citations at issue in this proceeding were served by certified mine inspections acting in their official capacity as authorized representatives of the Secretary of Labor during the time of the inspection and when the citations was [sic] issued.

9. Prospect Mining and Development Company, Inc., demonstrated good faith in abating the cited conditions.

10. The assessed penalty for each docket will not affect the operator's ability to remain in business.

P. Ex. 1.

B. Docket No. SE 2016-0089 (Citation No. 8530836)

Citation No. 8530836 was issued on September 22, 2015 by MSHA inspector, Sheila Dawkins, who was conducting respirable dust surveys at Respondent's Carbon Hill Mine. Tr. 34. Dawkins arrived at the mine on September 22 at 6:30 a.m., and after inspecting the mine's record books, traveled underground to conduct an imminent danger run and take respirable dust samples. Tr. 51; P. Ex. 3, at 12-7. She did not issue any citations during her record book inspection, her imminent danger run, or her respirable dust surveys. P. Ex. 3, at 12-7.

Around 12:45 p.m., Dawkins and Bobby Meadows, the mine superintendent, were watching the continuous miner mine a 25-foot section of coal in the No. 6 entry. Tr. 35. They were standing "back a little distance" from the continuous miner, because the size of the continuous miner and the four foot height of the coal seam made standing close to the continuous miner hazardous.[6] Tr. 35-37. They were also unable to see past the continuous miner into the No. 6 entryway at that time. Tr. 38. As the continuous miner finished loading the shuttle car and moved out of the No. 6 entry, Dawkins saw that the final row of roof support bolts was not marked by a visible warning (usually a bright red or pink reflector), as required under 30 C.F.R. § 75.208. Tr. 35-36. Dawkins brought the alleged violation to Meadows' attention, and they both searched the area for a fallen reflector, but could not find anything in the vicinity of the entry. Tr. 36, 39, 58-59.

[6] Dawkins testified that the continuous miner is eighteen feet wide and thirty or forty feet long. Tr. 35.

Dawkins then issued Citation No. 8530368, alleging a violation of 30 C.F.R. § 75.208,[7] based on the following condition:

> A readily visible warning or physical barrier was not installed to impede travel beyond permanent support in the #6 entry on the 2-15 section. Twenty-five feet had been mined out of the entry.

P. Ex. 2. The Secretary alleges the violation is S&S, reasonably likely to cause fatal injuries to one person, and the result of Respondent's moderate negligence. The Secretary proposes a penalty of $807.

After failing to find the reflector in the vicinity of the No. 6 entry, Meadows had someone install a new reflector. Tr. 36. While waiting about ten minutes for the installation of the new reflector, Dawkins remained in the No. 6 entry to ensure that no miners traveled underneath the unmarked, unsupported roof. Tr. 64-65.

1. The Violation in Citation No. 8530836 was S&S.

The Secretary requests that I affirm Citation No. 8530836, as written, and assess the Secretary's proposed penalty of $807. Tr. 22-25. The Respondent challenges the Secretary's allegations regarding the fact of the violation, the S&S designation, the negligence designation, and the proposed penalty. Tr. 16.

In Commission proceedings, the Secretary must prove his allegations by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). The Commission has explained that "[t]he burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence."" *Id.* (citing *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998), *quoting Concrete Pipe & Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993)).

In applying the Commission's *Mathies* factors, I must first determine whether the conditions cited by Dawkins in Citation No. 8530836 constitute a violation of 30 C.F.R. § 75.208. Section 75.208 provides that, "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support." 30 C.F.R. § 75.208. Dawkins testified that prior to issuing Citation No. 8530836 at 12:45 p.m., she had inspected all the working faces of Carbon Hill Mine. Tr. 22, 25. On cross examination, Dawkins admitted that it was "more than likely" that the required reflector was in place at the

[7] 30 C.F.R. § 75.208 provides that, "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support."

No. 6 entry at the time of her initial inspection, and that it could have been knocked down by the continuous miner or by someone else coming into contact with it. Tr. 52, 61, 64.

Regardless of when the reflector was knocked down or otherwise removed from the last row of roof support bolts, Dawkins' unrebutted testimony indicates that the reflector was not in place when the continuous miner finished mining in the No. 6 entry. Tr. 35-36. While section 75.208 does permit the absence of a visible warning or physical barrier during the installation of roof support, Respondent has not argued (and the record does not reflect) that roof support was being installed when Dawkins issued Citation No. 8530836. I therefore find a violation under the strict liability principles contemplated by the Mine Act.

I next identify the hazard in the first part of step two of the clarified *Mathies* test. *Newtown Energy,* 38 FMSHRC at 2038. As the Commission explained, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id.* The clear purpose of section 75.208 is to prevent miners from traveling under unsupported roof. I therefore define the hazard contributed to by the violation as miners traveling under unsupported roof. Tr. 41-42.

Having determined that the lack of a visible warning reflector presents a hazard to miners, I now consider whether "there exists a reasonable likelihood of the occurrence of the hazard against which the [standard] is directed." *Newton Energy*, 38 FMSHRC at 2037. In the context of Citation No. 8530836, I must determine whether the lack of a visible reflector or physical barrier is reasonably likely to lead to miners traveling underneath the unsupported roof. I note that, under Commission precedent, "[t]he question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations." *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996) (Comm'rs Holden and Riley, plurality) (*citing Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991); *U.S. Steel Mining Co.*, 7 FMRHC 1125, 1130 (Aug. 1985). I also consider conditions on a mine-wide basis. *Id.* (*citing Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (Aug. 1994)).

I find that the Secretary has shown that miners were reasonably likely to travel underneath the unsupported roof in the No. 6 entry. Respondent argues that because Dawkins stood in the No. 6 entry for the ten minute duration between the issuance of Citation No. 8530836 and its abatement, there is no likelihood that miners would have traveled underneath the unsupported roof. Tr. 64-65. However, the S&S inquiry must consider "the violative conditions as they existed both prior to and at the time of the violation and *as they would have existed had normal mining operations continued.*" *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (emphasis added and internal citations omitted). While Dawkins' presence in the No. 6 entry undoubtedly prevented miners from exposure to any roof fall hazard in the particular facts of this case, "normal mining operations" do not include an inspector warning miners to stay away from potentially hazardous conditions. *See Jim Walter Resources,*

Inc., 28 FMSHRC 579, 604 (2006) ("The Commission, in determining whether a violation is S&S, considers circumstances assuming that normal mining operations continue without the intervention of an inspector.") (*citing U.S. Steel Mining Co.*, 7 FMSHRC at 1130). I therefore reject Respondent's argument that Dawkins' presence in the No. 6 entry reduced the likelihood that miners would travel underneath the unsupported roof during continuous normal mining operations.

Dawkins testified that under normal mining operations, the next stage in the mining process (after the continuous miner left the No. 6 entry) was the installation of permanent roof support in the mined-out area. After installing the permanent roof bolts, the roof bolter would normally have hung the required reflector on the last row of roof bolts, and the scoop operator would then enter the No. 6 entry to clean up loose coal, rock dust, and advance the ventilation curtain. Tr. 40, 56. Had Dawkins not remained in the No. 6 entry, the roof bolter might very well have traveled underneath the unsupported roof while installing the permanent roof support. Furthermore, Meadows or another supervisor may have done so when checking the cut. When the violative condition underlying Citation No. 8530836 is viewed under the circumstances as they would have existed under normal mining operations, I find that the Secretary has met his burden of proof to show that miners were reasonably likely to travel underneath the unsupported roof in the No. 6 entry.[8]

I now turn to the third and fourth *Mathies* steps, i.e., whether the hazard identified in step two (miners traveling underneath unsupported roof), would be reasonably likely to result in an injury of a reasonably serious nature. Dawkins' testimony at hearing indicated that she was concerned that miners traveling underneath the unsupported roof in the No. 6 entry could be injured or killed by a roof fall. Tr. 42. Despite Dawkins' testimony regarding the likelihood that a roof fall would fatally injure a miner, she gave no testimony regarding the likelihood of a roof fall *occurring* in the No. 6 entry. The Secretary offered no evidence or testimony regarding the roof conditions or history of roof falls at Respondent's Carbon Hill Mine. Nor did the inspector offer general testimony (based on her personal knowledge and experience in the mining industry) regarding the likelihood of roof falls. However, the Commission has recognized the serious safety concerns posed by roof falls, and "has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning." *Consolidation Coal Company*, 6 FMSHRC 34, 37 (Jan. 1984); *see also See Halfway, Inc.*, 8 FMSHRC 8, 13 (Jan. 1986) ("Our decisions have stressed the fact that roof falls remain the leading cause of death in underground coal mines."); *Black Beauty Coal Co.*, 33 FMSHRC 1482, 1496 (June 2011) (ALJ) (upholding the Secretary's S&S designation based in part on the fact that newly cut, unsupported roofs are likely to fall). As Dawkins testified:

> If you go inby [the last row of permanent roof support] and the roof falls, it's very clear that you're not going to make it with the extent that it was 25 feet of

[8]Section 75.208 states that "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support." While it might be argued that the regulation provides a blanket exception in the case of roof support installation, I decline to adopt an interpretation of the regulation that exposes miners to the significant hazard of traveling underneath unsupported roof.

> unsupported top . . . . And if that top falls, you're going to be crushed and [suffer] internal injuries, broken bones. There's a good possibility that you're not going to make it if the top falls on you and you go inby this area that's not supported.

Tr. 41-42. I therefore find that there exists a reasonable likelihood that miners traveling underneath the freshly-cut, unsupported roof would be seriously injured if not killed by a roof fall.

In conclusion, I have found that the violation of section 75.208 occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. I have found that the hazard created by the violation was reasonably likely to result in a reasonably serious injury. *Newtown Energy*, 38 FMSHRC at 2038. I therefore find that the violation of section 75.208 in Citation No. 8530836 was S&S, and reasonably likely to result in fatal injuries to one person.

2. The Violative Condition in Citation No. 8530836 was Not Caused by Respondent's Negligence.

In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. The Secretary alleges that the missing reflector was the result of Respondent's moderate negligence, and Dawkins testified that "management should have known that this condition existed. . . .[I]t's important that management informs their people as well as the supervisor that at all times a visible warning sign should be hung on the last row of permanent support." Tr. 44. Dawkins also testified that Meadows offered no mitigating circumstances regarding the violation. *Id.* However, under the Commission's traditional negligence standard as outlined above, I find that the violative condition did not result from Respondent's negligence. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) ("[Commission] judges may evaluate negligence from the starting point of a traditional negligence analysis.")

As noted above, Dawkins admitted on cross-examination that the required reflector was "more than likely" in place at the No. 6 entry at the time of her initial inspection, and that it could have been knocked down by the continuous miner or by someone else coming into contact with it. Tr. 52, 61, 64. Dawkins also admitted that it was "reasonably likely" that, after being knocked down, the reflector had been "sent down the conveyor chain and loaded onto a shuttle car." Tr. 60. Moreover, Dawkins testified that the continuous miner blocked her view of the No. 6 entry while she was observing the mining process, and it was only after the miner moved out of the No. 6 entry area that she was able to see into the entry itself and notice the missing reflector. Tr. 38.

Since Dawkins admitted that the reflector was likely in place before the continuous miner began cutting in the No 6 entry, and she was only able to view the entry and note that missing reflector after the continuous miner left the area, I cannot conclude that the operator knew or should have known that the reflector was missing prior to the time when the continuous miner left the area. In other words, the Secretary produced no evidence that an agent of management

knew or should have known of the violation prior to the time that the inspector first observed it after the continuous miner operator pulled out of the entry. The Secretary thus failed to show any breach of duty on the part of management. *See Leeco, Inc.*, 38 FMSHRC 1634, 1637-38 (July 2016) (finding no negligence where the Secretary failed to introduce evidence demonstrating what actions a reasonably prudent operator would have taken). I also find that Meadows' prompt action of calling someone to replace the missing reflector after Dawkins first drew his attention to the violation was consistent with the actions that a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken in similar circumstances. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. I therefore find that the Secretary failed to establish that the violative condition in Citation No. 8530836 was the result of Respondent's negligence.

3. Penalty Assessment

The Secretary proposed a penalty of $807 for Citation No. 8530836. The parties stipulated that Respondent's miners worked 89,576 hours and produced 84,876 tons of coal in 2014, and worked 106,644 hours and produced 84,876 tons of coal in 2015. P. Ex. 1, Stips. 6-7. Accordingly, I find that Respondent is a medium-sized mine. *See* 30 C.F.R. § 100.3, Table I. The parties have stipulated that "[t]he assessed penalty for each docket will not affect the operator's ability to remain in business." P. Ex. 1, Stip. 10. The parties stipulated that Respondent demonstrated good faith in abating the cited conditions. P. Ex. 1, Stip. 9. Section 75.208 was cited in one citation out of the 52 violations that Respondent received at Carbon Hill Mine in the 15 months preceding the issuance of Citation No. 8530836. I have affirmed the Secretary's S&S designation, and modified Citation No. 8530836 to reduce the level of negligence from "moderate" to "no negligence." Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $362.

C. Docket No SE 23016-0103, Citation No. 8531669

Citation No. 8531669 was issued on October 26, 2016 by MSHA inspector Darryl Allen as part of his regular E01 inspection of the Carbon Hill Mine. Tr. 73-74. Allen began his inspection by checking the pre-shift, on-shift, belt, and electrical record books. Tr. 75. During his subsequent underground inspection, Allen found what he thought was an alleged violation on the scoop charger. Tr. 75.[9] He returned above ground to review the electrical record books to determine whether the alleged violation had been recorded, and he discovered that the record books did not contain any record of the scoop charger. Tr. 79. Based on the lack of records related to the scoop charger, Allen concluded that the electrician conducting the required weekly electrical examinations had not included the scoop charger in his examinations. Tr. 79, 81-82.

[9] Although Allen issued a citation regarding the allegedly hazardous condition on the scoop charger, the citation was later vacated after Allen spoke with an MSHA electrical specialist and determined that the condition was not a violation. Tr. 83-84.

Allen issued Citation No. 8531669, alleging a violation of 30 C.F.R. § 75.512,[10] based on the following practice:

> Record of weekly electrical examinations can not [sic] be provided for the Co. No. 1 outby scoop charger located at the South Main track cross cut 16. (Exide brand, Serial No. CL110645) The scoop charger has been in service for an undetermined length of time of at least 2 months. The scoop charger is observed in unsafe operating condition at the time of inspection. If this condition is allowed to continue to exist under normal mining conditions, it is reasonably likely that miners will receive injuries of a serious nature as a result of undetected and uncorrected hazardous conditions of various types.

P. Ex. 5. The Secretary alleges that the violation is S&S, reasonably likely to cause injuries resulting in lost work days or restricted duty for one miner, and the result of Respondent's high negligence. *Id.* Allen terminated the citation on October 28, 2015, when he returned to the mine and was informed by a certified electrician that the scoop charger had been examined, and the examination had been recorded in the weekly electrical examination record book. Tr. 128.

1. The Violation in Citation No. 8531669 was S&S.

The Secretary requests that I affirm Citation No. 8531669, as written, and assess the proposed penalty of $807. Respondent argues that the pre-shift examinations done on the scoop charger indicate that it was in safe operating condition for the two-month duration of the violation, and that gravity and negligence should be modified accordingly. Tr. 173, 200.

I begin with the fact of the violation. Section 75.512-2 requires that electrical examinations be conducted at least weekly. 30 C.F.R. § 75.512-2. Allen's unrebutted testimony indicates that Respondent was unable to produce electrical examination records for the scoop charger. Tr. 79, 81-82. Although Meadows assisted Allen in searching through Carbon Hill Mine's examination record books, they could find no record indicating that an electrical examination had been conducted on the scoop charger. Tr. 80, 87. I therefore find the violation occurred as alleged by the Secretary.

I next identify the hazard in the first part of *Mathies*' second step. Section 75.512-2 specifies the frequency with which the electrical examinations required under section 75.512 must be performed. Regular examinations for the purpose of detecting and correcting hazards are "of fundamental importance in assuring a safe working environment underground." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997) (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). In the context of electrical equipment, inspector Allen testified that the failure to conduct regular inspections could result in the failure to correct hazardous conditions that could expose miners to fire hazards as a result of possible ignitions or

[10] 30 C.F.R. § 75.512-2 provides that "[t]he examinations and tests required by § 75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition."

electrocution (including electrical burns). Tr. 84-86. I find that Respondent's violation of section 75.512-2 contributed to the safety hazards of a mine fire or electrocution. *Id.*

I now consider whether, "based on the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard[s] against which [section 75.512-2] is directed." *Newtown Energy*, 38 FMSHRC at 2037. At hearing, the Secretary elicited testimony from Allen on two specific types of hazards, an electrocution and a mine fire. While Allen gave specific testimony on *how* any number of component failures on the scoop charger itself might cause ignitions or electrical fires, Allen gave no testimony regarding the *likelihood* of any such component failures. For example, Allen testified that

> it's reasonably likely that any type of failure, whether it be at the power center and, say, on the charger cable, on the charger itself, it would possibly produce a ground that would put power on the frame of the machine. There's just a multitude of things that can happen . . . .

Tr. 84-85. Allen also testified that if the scoop charger is not properly maintained,

> it has the capability of starting a fire. It's a 480-volt piece of equipment with a long cable that can be damaged at any time. That combined with a failure of the breaker or something else that is, you know, common mine history. A failure of electrical equipment has resulted in mine fire.

Tr. 85-86. The Secretary cannot merely allege that a violation *could* contribute to a hazard resulting in injury; the Secretary must present evidence that a violation is *reasonably likely* to contribute to a hazard resulting in an injury. *See Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010) ("We note that in past cases we have not agreed that it is sufficient that a violation "could" result in an injury.") (citing *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995) (affirming ALJ's decision that the Secretary failed to meet his burden of proof under the third prong of *Mathies* where the inspector testified that miners "could" be exposed to respirable dust, pneumoconiosis "could" result, and methane ignitions "can" result)).[11]

The Commission has held that when evaluating violations that may contribute to fire hazards, the adjudicator must evaluate the "confluence of factors" inside the mine that might trigger an ignition, fire, or explosion under normal mining conditions. *Ziegler Coal Co.*, 15 FMSHRC at 943. These factors include possible ignition sources, methane levels, and the type of equipment in the area. *Excel Mining, LLC*, 37 FMSHRC at 465 (Mar. 2015). The Commission has also recognized that fires and explosions are reasonably likely to occur when the "fire triangle" of oxygen, a fuel source, and an ignition source is present. *See U.S. Steel Mining Co.*, 27 FMSHRC 435, 449 (May 2005) ("The hazard in this case involves the danger posed when the three ingredients needed to sustain a fire or explosion—sufficient oxygen, fuel, and an ignition source—come into close proximity.") (*citing Alabama By-Products*,

[11] I note that under the clarified *Mathies* test, the determination of whether a particular safety hazard is reasonably likely to occur has shifted from the third step to the second step. The third *Mathies* step now assumes the existence of the hazard. *Newtown Energy*, 38 FMSHRC at 2037; *Knox Creek*, 811 F.3d at 161-65.

25 FMSHRC 227, 229-30 (Apr. 2003) (relying on inspector testimony that "a fire or explosion can occur when you have the right mixture of fuel, heat, and oxygen"). Beyond Allen's general statement that a component failure on the scoop charger could cause the charger itself to catch on fire, the Secretary did not introduce any specific evidence or testimony regarding the particular circumstances surrounding the equipment, or in the Carbon Hill Mine generally, that could contribute to a mine fire hazard. Allen gave no testimony regarding the possible causes of component failure or how likely a component failure might be to occur on the scoop charger. Nor did the Secretary present evidence regarding accumulations, float coal dust, or methane within the mine that might satisfy the oxygen and fuel components of the fire triangle. I therefore find that the Secretary has not shown, by a preponderance of the evidence, that Respondent's failure to conduct weekly examination of the scoop charger contributes to the reasonable likelihood of a mine fire or ignition. *Newtown Energy*, 38 FMSHRC at 2037.

Allen also testified that Respondent's violation could contribute to the hazard of electrocution. The roof at Carbon Hill Mine is composed of shale, and commonly falls in thin layers between the roof bolts. Tr. 86. Allen testified that the thin, sharp shale pieces can cause nicks in electrical cables. *Id.* If a piece of shale falls and nicks the scoop charger cable, any miner who touches the cable would be exposed to electrocution or an arc burn. Tr. 85, 87. Since Respondent was not conducting weekly examinations of the scoop charger and its electrical components, including the charger's cable, miners would have been unaware of any potentially hazardous condition resulting from cable damage caused by fallen shale. Tr. 84-87. Although Respondent argues that the required pre-shift examinations would have identified and immediately corrected any hazardous conditions associated with the scoop charger before miners were exposed to them, Respondent submitted no evidence at hearing (either as exhibits or in the form of witness testimony) from which I can conclude that the scoop charger was, in fact, included in routine pre-shift examinations. Given Allen's testimony that falling shale is "common" at the Carbon Hill Mine, I find that the Secretary has shown, by a preponderance of the evidence, that Respondent's failure to conduct weekly electrical examinations on the scoop charger contributed to the reasonable likelihood that miners would be exposed to the hazards of electrocution or an arc burn. Tr. 86.

I also find that the electrocution or arc burn hazards presented by the lack of scoop charger examinations are reasonably likely to result in an injury of a serious nature, thereby satisfying the third and fourth *Mathies* factors. Congress and the Commission have recognized that the shock hazards resulting from damaged cables pose a significant danger to miners. S. Rep. No. 91-411, at 71 (1969), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 197 (1975); *see also Spartan Mining*, 30 FMSHRC at 707-08 (finding that the failure to protect cables from damage contributed to an electrocution hazard that was reasonably likely to result in an injury of a reasonably serious nature).

In conclusion, I find the violation of section 75.512-2 occurred as alleged by the Secretary in Citation No. 8531669. I further find that such violation was S&S and reasonably likely to result in an injury of a reasonably serious nature to one miner.

2. The Violation in Citation No. 8531699 was the Result of Respondent's High Negligence.

Allen designated Citation No. 8531669 as resulting from Respondent's high negligence. Allen testified that "weekly examinations are as basic as it gets." Allen had "no doubt" that Respondent knew (and certainly should have known) that weekly examinations were required to be conducted on the scoop charger. Tr. 87. Although Meadows assisted Allen in searching through the record books to locate the weekly electrical examination records, Meadows never told Allen that the examinations had been conducted, but were just not recorded. Tr. 88. Respondent provided no evidence that Respondent had been conducting weekly electrical examinations on the scoop charger. The scoop charger was in service for at least eight weeks without being examined by a certified examiner. P. Ex. 5. Accordingly, I affirm the Secretary's high negligence designation. P. Ex. 5, Tr. 89.

3. Penalty Assessment

The Secretary proposed a penalty of $807 for Citation No. 8531669. The parties stipulated that Respondent's miners worked 89,576 hours and produced 84,876 tons of coal in 2014, and worked 106,644 hours and produced 84,876 tons of coal in 2015. P. Ex. 1, Stips. 6-7. Accordingly, I find that Respondent is a medium-sized mine. 30 C.F.R. § 100.3, Table I. The parties have stipulated that "[t]he assessed penalty for each docket will not affect the operator's ability to remain in business." P. Ex. 1, Stip. 10. The parties stipulated that Respondent demonstrated good faith in abating the cited conditions. P. Ex. 1, Stip. 9. Section 75.512-2 was not cited in any of the 52 citations issued at Respondent's Carbon Hill Mine in the 15 months preceding the issuance of Citation No. 8531669. I have affirmed the Secretary's gravity and negligence designations. Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $807.

IV. ORDER

For the reasons set forth above,

Citation No. 8530836 is **MODIFIED** to reduce the level of negligence from "moderate" to "no negligence," and

Citation No. 8531669 is **AFFIRMED**, as written.

Respondent, Prospect Mining and Development Company, Inc., is **ORDERED** to pay a total civil penalty of $1,169 within thirty days of the date of this Decision and Order.[12]

Thomas P. McCarthy
Administrative Law Judge

Distribution:

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J.D. Terry, Prospect Mining and Development Company, Inc., 218 Highway 195, Jasper, AL 35503

/ccc

[12] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.