FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-0062 A.C. No. 11-03058-335119
v.	
WHITE COUNTY COAL, LLC, Respondent	Mine: Pattiki Mine

DECISION AND ORDER
DECISION APPROVING SETTLEMENT

Appearances: Daniel R. McIntyre, Esq., Office of the Solicitor, Department of Labor, Denver, Colorado for Petitioner

Tyler H. Fields, Esq., Alliance Coal, LLC, Lexington, Kentucky for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), against White County Coal, LLC (Respondent) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(d).[1] The Secretary has proposed a total civil penalty of $13,587 for the six alleged violations of mandatory safety standards still at issue. P. Ex. 18 (Exhibit A, Docket No. LAKE 2014-0062).

The primary issues before me are: (1) whether the Secretary's gravity and negligence determinations in Citation Nos. 8451616, 8449462, 8449464, and 8451627 are appropriate; (2) whether the Secretary's negligence determinations in Citation Nos. 8451620 and 8451626 are

[1] Prior to hearing, the parties agreed to settle 31 of the 37 citations at issue in Docket No. LAKE 2014-0062. ALJ Ex. 1. My Decision Approving Settlement is set forth in Section V. Citation Nos. 8451616, 8451620, 8451626, 8451627, 8449462, and 8449464 were left for hearing.

appropriate; and (3) whether the Secretary's proposed civil penalties are appropriate for all six citations at issue.

An evidentiary hearing was held March 11-12, 2015, in Henderson, Kentucky. Witnesses were sequestered. The parties presented testimony and documentary evidence, and filed post-hearing briefs.[2] For the reasons set forth herein, I affirm the six citations, as written, and assess the proposed penalties after independent assessment of section 110(i) criteria. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the post-hearing briefs, I find and order the following:

II. Stipulations

At hearing, the parties agreed to the following stipulations:

1. White County was at all times relevant to these proceedings engaged in mining activities at the Pattiki Mine in White County, Illinois.

2. White County's mining operations affect interstate commerce.

3. White County is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the "Mine Act").

4. White County is an "operator" as that word is defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the mine where the contested citations in these proceedings were issued.

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

6. On the dates the citations in these dockets were issued, the issuing MSHA coal mine inspectors were acting as a duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and were acting in their official capacities when conducting the inspection and issuing the MSHA citations.

[2] Petitioner Exhibits (P. Exs.) 1-22 were received into evidence. P. Ex. 5A was subject to in-camera review, found to be protected by the deliberative privilege process, sealed, and placed in the rejected exhibit file for Commission review on appeal, if necessary. Tr. 496-97, 615. Respondent's Exhibits (R. Exs.) 1-15 were 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.

7. The citations at issue in these proceedings were properly served upon White County as required by the Act.

8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.

9. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the Pattiki Mine for 15 months prior to the date of the first citations in these proceedings and may be admitted into evidence without objection by White County.

10. White County demonstrated good faith in abating the violations.

11. During 2012, the Pattiki Mine produced 2,380,484 tons of coal.

12. The penalties proposed by the Secretary in this case will not affect the ability of the Respondent to continue in business.

P. Ex. 16; P. Br. 2-3.

III. Principles of Law

A. 30 C.F.R. § 75.202(a) – Protection from falls of roof, face and ribs

Section 75.202(a) requires operators to support or otherwise control the roof, face, and ribs of areas where persons work or travel to protect those persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. 30 C.F.R. § 75.202(a). In order to prove a violation of 30 C.F.R. §75.202(a), well-settled Commission case law holds that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). *See also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Helen Mining Company*, 10 FMSHRC 1672, 1674 (Dec. 1988).

B. 30 C.F.R. § 75.370(a)(1) – Mine ventilation plans; submission and approval

Section 75.370(a)(1) requires operators to develop and follow an approved ventilation plan that is designed to control methane and respirable dust, and that is suitable to the mine's conditions and the mining system used. 30 C.F.R. § 75.370(a)(1). The terms of an approved ventilation plan are enforceable as mandatory standards under the Act. *Zeigler Coal Co., Kleppe*, 536 F.2d 398 (D.C. Cir. 1976); *see also Peabody Coal Co.*, 16 FMSHRC 2199, 2203

(Nov. 1994) (affirming ALJ's conclusion that a ventilation plan is violated when an operator does not follow its specific terms).

C. 30 C.F.R. § 75.604(b) – Permanent splicing of trailing cables

Section 75.604(b) requires that when permanent splices in trailing cables are made, they shall be effectively insulated and sealed so as to exclude moisture. 30 C.F.R. § 75.604(b); *see e.g.*, *Black Beauty Coal Co.*, 36 FMSHRC 1821, 1858 (Mar. 2014) (ALJ) ("Assuming the continuation of normal mining operations, it was reasonably likely that the splice would be further degraded, moisture would get into the splice, and an injury of a reasonably serious nature or a fatality would result."); *see U.S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984) (recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function); *see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1286 (Dec. 1998) (holding there is a danger of electrocution even if no copper wires are exposed).

D. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See* e.g., *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

E. Significant and Substantial (S&S)

A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test often presents difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The S&S evaluation also considers 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. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

F. Negligence

Negligence is not defined in the Mine Act. The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

> Each 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. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

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 JWR Res.* 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

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")); s*ee 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 MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co.*, ____ FMSHRC ___, slip op. at 4 (Sept. 16, 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care, When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. . . .

30 C.F.R. § 100.3(d). Thus, mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). The level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. 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." *Id*. The level of negligence is

properly designated as low when there are *considerable* mitigating circumstances surrounding the violation. *Id*. (emphasis added).

Recently, the Commission held that Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *See Brody Mining, LLC*, ___ FMSHRC ___, slip op. at 13 (Aug. 25, 2015). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Id.* In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Id*., *citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly "mitigating" circumstances, and instead may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

G. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (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. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, *supra*, slip op. at 7, n. 1 (Chairman Jordan and Commissioner Nakamura concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to each of the six citations at issue.

IV. Findings of Fact and Legal Analysis

A. General Background

The Pattiki Mine, I.D. No. 11-03058, is operated by White County Coal, LLC and is located in White County near Carmi, Illinois. Tr. 226-27. The Pattiki Mine liberates enough methane to be considered a "gassy" mine, and therefore undergoes five-day spot inspections by MSHA. Tr. 226-27. White County mines coal from the Springfield and Herrin seams that are prevalent throughout Southern Illinois and Indiana. *Id*. Coal is mined on two shifts daily, five days a week, with an annual production of more than 2,000,000 tons. P. Ex. 1. The first and second shifts operate from 7:00 a.m. to 3:00 p.m. and from 3:00 p.m. to 11:00 p.m., respectively. Tr. 58, 110, 167. The third shift conducts maintenance from 11:00 p.m. until 7:00 a.m. Major repairs are conducted during third shift. Tr. 132.

The six citations litigated at hearing were issued by two inspectors on four different calendar days. P. Exs. 2, 4, 6, 8, 10-11. Five of the citations were issued during EO1 regular health and safety inspections, and one citation was issued during an EO8 non-injury accident investigation for a reported roof fall. *Id*., P. Ex. 4. Respondent concedes that it violated the mandatory safety standards set forth in each citation, but takes issue with the gravity and negligence determinations in Citation Nos. 8451616, 8449462, 8449464, and 8451627. R. Br. 26, 38, 46. Respondent disputes only the negligence determinations in Citation Nos. 8451620 and 8451626. R. Br. 37, 46.

B. Findings of Fact for Ventilation Citation No. 8451616

On August 21, 2013, at 10:00 a.m., MSHA inspector Chad Lampley issued Citation No. 8451616 alleging a violation of 30 C.F.R § 75.370(a)(1) because Respondent failed to maintain airflow in the proper direction along the unit No. 3 1st belt line in violation of the approved ventilation plan.[4] The cited regulation provides: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370.

The Citation states:

[4] Lampley has inspected coal mines with MSHA for approximately eight years. Tr. 221. Lampley earned a Bachelor's degree in Applied Sciences from Southern Illinois University, worked briefly at Galatia Mine, and subsequently attended and completed all required Mine Academy training for MSHA in Beckley, WV. Tr. 223-24. Lampley routinely undergoes refresher training to maintain competency on all standards of enforcement, electrical systems, and journeyman training requirements. Tr. 224. I find him to be an exceptionally knowledgeable and credible inspector.

> The operator did not comply with [the] approved ventilation plan on Unit #3. When checked with chemical smoke, air along the Unit #3 and Unit #3 1st belt conveyor was not moving in the proper direction. Directional movement was tested at multiple locations along both conveyor belts, resulting in outby movement. The operators [sic] approved ventilation plan depicts air travel in the inby direction when using a return stopping line belt vent. A return line vent is present at crosscut #6.

P. Ex. 2.

Lampley determined that an injury or illness was reasonably likely to occur, that the injury could reasonably result in lost workdays or restricted duty, that two people were affected, and that the Respondent's negligence was moderate. *Id*. The Secretary proposed a civil penalty in the amount of $1,657. P. Ex. 18.

Lampley designated Citation No. 8451616 as significant and substantial ("S&S") primarily because he had written Citation No. 8451615 as an S&S violation involving multiple accumulations in contact with the moving Unit #3 1st belt conveyor that were reasonably likely to result in a lost workdays or restricted duty injury to two persons as a result of moderate negligence. Tr. 258-60; *see* P. Ex. 22. In settlement, Respondent accepted Citation No. 8451615, as written, thereby admitting the violation. ALJ Ex. 1.

Respondent contends that the S&S designation for Citation No. 8451616 was improper because Petitioner has not proven the third *Mathies* element as redundant safety measures were in place. Respondent characterizes the hazard contributed to by the violation as "delayed notification of a fire on the belt line." R. Br. 26. Petitioner counters that exposure to smoke from a fire is the hazard contributed to by the violation, which will result in an injury. Tr. 299, 483; P. Br. 26. Respondent argues none-the-less, that carbon monoxide ("CO") sensors in place at the time of the citation would detect a fire, regardless of placement and airflow. R. Br. 27. Furthermore, Respondent asserts that the moderate negligence determination should be reduced to low negligence because considerable mitigating circumstances were present at the time the citation was issued. R. Br. 33.

The record established that White County changed mining direction, and conducted a belt move "a couple days before" Citation Nos. 8451615 and 8451616 were issued. Tr. 209. The change in location and direction of mining did not allow enough room for White County to emplace the return belt vent regulator as approved in the ventilation plan and map. Tr. 277, 282; P. Exs. 3, 15.[5] The return belt vent regulator was positioned to move air inby, but was actually

[5] P. Ex. 3 at 10 is a generalized view of the approved ventilation plan. P. Ex. 3 at 11 represents the actual equipment locations the day Citation No. 8451616 was issued. Both exhibits were utilized at hearing to highlight and compare the approved ventilation plan with the actual emplacement of equipment.

moving air outby. Tr. 267-68; P. Ex. 3 at 11. An intake air belt vent would have been appropriate for the direction that the air was moving, and would have complied with the ventilation plan. *Id*. Alternatively, White County could have moved the location of the regulator to the intake side of the belt. P. Ex. 14 at 41-43.

After conducting the belt move, White County installed additional check curtains between entries 5 and 6, and between cross-cuts 6, 7, and 8. Tr. 277. These curtains were not permitted by the ventilation plan. *Id*. The unauthorized check curtains combined with the improper location of the return belt vent regulator caused the airflow to course in the wrong direction. Tr. 277-79. Lampley credited White County for not deliberately causing the reverse airflow because the conditions resulted from the change in mining direction. Tr. 279, 282.

Less than two hours before issuing Citation No. 8451616, Lampley observed three distinct areas of accumulations along the same belt line. P. Ex. 22. Citation No. 8451615 states:

> Accumulations of loose coal and coal fines are present along the Unit #3 1st belt conveyor off the 9th 48. Accumulations are present in multiple areas along the belt, and in contact with the moving belt at crosscut #9 and crosscut #4. Accumulations of loose coal measuring 9 feet in length, 4 feet in width and 2 feet in height, are present at the crosscut #9 transfer point. Accumulations of dry black coal fines are in contact with a turning roller at crosscut #4. Piles of fines under bottom rollers are present between crosscuts #2 and #3. A pile of coal fines are [sic] present under the head pulley.

Id.

1. S&S Analysis

Since White County concedes the first, second, and fourth *Mathies* elements for Citation No. 8451616, my analysis focuses on the third *Mathies* element. R. Br. 26.

As noted, Citation No. 8451615 was settled as an S&S prior to hearing. ALJ Ex. 1; Tr. 534, 615. Respondent admitted this violation per paragraph 11 of the Motion to Approve Partial Settlement and Order Payment. Lampley determined that the observed accumulations that had been cited in Citation No. 8451615 were in contact with the belt line and therefore constituted "a friction ignition source." Tr. 409; P. Ex. 22. Thus, Citation No. 8451615 is a crucial link for Petitioner's S&S determination with respect to Citation No. 8451616.

The accumulations cited in Citation No. 8451615 are significant because the observed accumulations were upwind of the emplaced carbon monoxide ("CO") sensors required by the

ventilation plan. Tr. 211. The Matrix S1000 CO sensors that White County utilizes are required to be placed downwind of likely ignition sources. Tr. 603; 30 C.F.R. § 75.1103-4. Placing CO sensors downwind ensures that products of combustion are transported to the sensor. Tr. 290. Fifty feet per minute of air movement sufficiently allows the air to transmit particles of combustion or CO to the sensors along the beltline. Tr. 280. Belt drives, tail pulleys, take-ups, section loading points and transfer points are likely ignition areas that require CO sensor placement to be less than 100 feet downwind. Tr. 292; 30 C.F.R. § 75.1103-4(a)(1). Misplaced sensors can cause a delay in activation, which results in miners being exposed to smoke for longer than necessary in the event of a fire. Tr. 291-92. Exposure to smoke, exacerbated by a delay in notification, is reasonably likely to cause serious injury. *American Coal Co.*, 35 FMSHRC 2208, 2265 (July 2013) (ALJ). Thus, I find the Secretary has established that the violation in Citation No. 8451616 contributed to a smoke hazard in the event of a fire that was reasonably likely to result in a serious lost-time injury as a result of the accumulations found to be S&S in Citation No. 8451615. Accordingly, all four elements of the *Mathies* test have been satisfied and the violation cited in Citation No. 8451616 was properly designated S&S.

2. Negligence Analysis

White County miner, Patrick Yates, was working on the ventilation system prior to Lampley's arrival on the belt line. Tr. 425; R. Ex. 11.[6] Yates took measurements and determined that he had more intake than return air. *Id*. This signaled that something was wrong. *Id*. Yates told Lampley that he made the ventilation changes "last night," on the second shift. Tr. 426. When questioning unidentified miners at the cited location, Lampley was told that the curtains, which contributed to the outby airflow, were hung "the night before." Tr. 304. Lampley further observed the dates, times, and initials ("DTIs") of the previous on-shift examiner, who examined the belt line prior to Lampley's issuance of Citation No. 8451616. Tr. 303.

I find that the curtains were improperly placed on August 20, 2013, sometime between 3:00 p.m. and 11:00 p.m., towards the end of the second production shift. On-shift examinations were required prior to the end of the second shift at 11:00 p.m., and a pre-shift examination was required prior to the beginning of the first production shift at 7:00 a.m. Respondent adduced no evidence that the violation was recorded and rectified. Under the best case scenario for Respondent, the cited condition existed for at least three hours during the first production shift before the citation was issued at 10 a.m. *See* P. Ex. 2.

Additionally, Respondent was aware that this particular area of the mine required more attention than other areas. Tr. 280; R. Ex. 11. Jim Connors, a White County safety representative, recorded Lampley's comments on an internal company document that states:

[6] Yates' position at White County was not adduced at the hearing.

"You guys no [sic] you are struggling for air up here on this end of the mine. You need to do something different. Pat they need to give you some help. Talking to Pat Yates." R. Ex. 11. Thus, Respondent's own exhibit establishes that Respondent's safety department was or should have been on greater alert for ventilation conditions that would adversely affect the health or safety of miners in the cited are of the mine. R. Ex. 11; *see also* 30 C.F.R. § 100.3(d) stating that "an operator is held to a high standard of care" that requires it to be on "alert for conditions or practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices."

I conclude that White County knew or should have known of the violation, and acted with moderate negligence in failing to execute its ventilation plan. I credit Lampley's finding that the change in mining direction the previous day created sufficient mitigating circumstances to support a moderate negligence determination. Tr. 303. I affirm the moderate negligence determination. *See Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135-36 (7th Cir. 1995) (ALJ did not abuse discretion in crediting opinion of experienced inspector).

3. Penalty Assessment

The parties stipulated that Respondent is a large operator and that the originally proposed penalty of $1,657 would not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I affirm the Secretary's negligence and S&S determinations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,657 civil penalty against the Respondent for Citation No. 8451616.

C. Findings of Fact for Roof Control Citation No. 8451620

On August 25, 2013, Lampley conducted an EO8 roof fall investigation, and observed the conditions that led to the alleged violation in Citation No. 8451620. P. Ex. 13 at 11; P. Br. 31. The next day, August 26, 2013, at 7:04 p.m., Lampley reduced Citation No. 8451620 to writing and alleged a violation of 30 C.F.R. § 75.202(a) because there were multiple areas of inadequately supported roof in the Nos. 8 and 9 entries in front of the No. 1 seal route. Tr. 237-38.[7] Citation No. 8451620 states:

> The mine roof is not adequately supported along the Route #1 seals. The following conditions were observed in the return parallel off the 6th 48. When measured bolt spacing between the

[7] 30 C.F.R. § 75.202(a) provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect the person from hazards related to falls of the roof, face or ribs and coal or coal bursts." 30 C.F.R. § 75.202(a).

> coal rib and permanent support roof bolts are in excess of [sic] 5 foot in locations along both sides of entry #8 between crosscuts #27 and #26. Supplemental support is needed in entry #9 from crosscut 28 to crosscut 23. An above anchorage fall is present in entry #9 crosscut #27 blocking access to the Route 1 seal #1. Multiple limestone thickness transitions are present through this area, rib/pillar stresses, heaving of the floor/convergence observed on 6 x 6 posts in the area of seal #3.

P. Ex. 4.

Lampley determined that an injury or illness was unlikely to occur, and that if an injury did occur, it would reasonably result in fatality, with one person affected, as a result of Respondent's moderate negligence. *Id*. The Secretary proposed a civil penalty in the amount of $1,304. P. Ex. 18.

Respondent only disputes the moderate negligence determination. Respondent asserts that low negligence is more appropriate because considerable mitigating circumstances were present at the time the citation was issued. R. Br. 33.

The record establishes that on August 25, 2013, at 2:00 a.m., White County mine examiner, Cliff Goff, discovered a four-way intersection roof fall directly in front of route No. 1, seal No. 1, entry No. 9. Tr. 310, 502, 506. White County mine examiners travel entry No. 9 three times per day, once each shift. Tr. 322, 432.

Goff recorded the roof-fall discovery in the pre-shift examination book during his 3:00 a.m. to 7:00 a.m. pre-shift examination on August 25, 2013. R. Ex. 7. Goff reported the roof fall to Greg Thompson, White County's certified "fill-in" mine manager, who then reported the fall to White County safety director, Josh Bell. Tr. 608-09. Thompson reported to Bell that he "had airflow on both sides [of the seal], wasn't picking up excessive amount of methane or harmful gas" from the seal. *Id*. Bell then notified MSHA field office supervisor, Steve Miller, who issued a section 103(j) Order over the phone. *Id.*; Tr. 213, 236-37; P. Ex. 13 at 1. After reporting the fall, Goff continued his pre-shift inspection and utilized the weekly inspected return route to travel to the back side of the fall. Tr. 513.

Miller verbally issued section 103(j) Order No. 8451619 on August 25, 2013 at 5:15 a.m. P. Ex. 13 at 11. Miller issued the Order because he was unsure whether the No. 1 seal was damaged or remained fully intact. Tr. 310-11. The Order was modified at 5:16 a.m. to allow White County to install additional roof support in the three, unobstructed passageways in front of the No. 1 seal. Three additional crib supports were installed. Tr. 322-25, 431, 547; P. Ex. 13 at 2, 12. Installing the additional supports required miners to travel through entry No. 8. Tr. 323, 548.

Entry No. 8 was not on the examiner's normal route. The operator is not required to monitor that entry. Tr. 433, 517. Entry No. 8 is an active working, but was not required to be examined prior to issuance of the 103(j) Order. Tr. 476-77, 479.

At 5:17 a.m., the 103(j) Order was further modified to allow White County to examine and pump water near the seal. This modification required Respondent to monitor air quality to ensure that the area was safe for miners to work. P. Ex. 13 at 13.

The No. 1 seal was one of five seals in an area that contains approximately 140 to 150 acres of sealed-off, irrespirable air, with 45% methane gas present in the atmosphere. Tr. 312; P. Ex. 13 at 5-7. Air flowing through the area nearest to the first supplemental support contained traces of methane gas. Tr. 330. Thus, MSHA's number one priority was to determine whether the No. 1 seal had been breached. Tr. 331.

Lampley arrived at the mine on August 25, 2013 at approximately 9:20 a.m. He notified White County of his arrival, and modified the section 103(j) Order to a section 103(k) Order. Tr. 307; P. Ex. 13 at 14. Lampley then inspected the roof fall. Tr. 236. He observed eight to 10 feet of rock covering the entire intersection. Tr. 371. Lampley then traveled through the No. 8 entry to observe all sides of the roof fall. P. Ex. 13 at 3.

With regard to the conditions cited in Citation No. 8451620, Lampley first observed "some roof bolts" exceeding the allowed distances from the pillar in the No. 8 entry at cross cuts 26 and 27. Tr. 336, 338; P. Ex. 13 at 5. Roof pressure on the pillars, as a result of the roof fall, caused rib sloughage in the No. 8 entry, which subsequently resulted in roof-bolt spacing outside of allowable tolerances. Tr. 335-36. Lampley determined it could take "a couple of years" for the roof bolts in entry No. 8 to deteriorate to their cited condition. Tr. 336. Lampley denied White County assistant safety director Jay Kittinger's immediate offer to install extra supports and abate the roof-bolt spacing issue. Tr. 435, 484, 542.[8] Kittinger noted that "[o]ur examiners have been allowed to travel through this area over 24 hours before the citation was written." R. Ex. 10 at 2.

Lampley testified that he had authority to allow White County to install additional supports, but he did not want to further modify the 103(k) Order without "plans in place" because he was unsure whether the roof fall had breached the No. 1 seal. Tr. 436. Lampley requested Respondent's air sample readings, but was given inaccurate data. Tr. 315, P. Ex. 13 at 8. Lampley then asked for the air sample data that Respondent had recorded in the bound record book, which was more accurate. Tr. 316, P. Ex. 13 at 9.

[8] Kittinger currently serves as White County's safety director at the Pattiki Mine. R. Br. 10. Kittinger is a 31-year veteran of the mining industry. Tr. 536. Kittinger began his career at White County as a general laborer, moved up to operate face equipment, and then worked as section foreman, third-shift foreman, and day foreman, before transferring to White County's safety department. R. Br. 10.

Lampley balanced the pros and cons of miners installing supplemental support against the risk of contact with noxious air from a possible seal breach. Tr. 437. All personnel underground carry handheld detectors designed to monitor and alert the user to dangerous conditions in the atmosphere. Tr. 332. As noted, however, air readings had already been taken, and Respondent determined that there was not an air-quality hazard in the area around the roof fall, albeit after providing incorrect data to Lampley. Tr. 438-39. Additionally, a seal-monitoring station was set up in the No. 8 entry, to monitor air quality from around the fall. Tr. 438-39, 544.

Lampley next observed abnormal sloughage from a pillar corner near the seal No. 3 entry in cross cut 25. Tr. 339. Lampley noted that cap blanks installed on the tops of rib props were compressed and broken, which indicated that they were taking weight from the roof. Tr. 362.[9] Other six-by-six rib props were bowed and showed signs of taking weight. *Id*. Also, the floor heaved in this location. Tr. 339.[10] Lampley observed several pre-existing props in front of the entry to seal No. 5, which showed signs of breakage and that "the area was converging some." Tr. 346-47. Lampley further observed several additional props taking weight throughout the entire length of the No. 9 entry. Tr. 362.

Lampley determined that additional support should have been emplaced in the intersections based upon his observations made during the roof-fall investigation. Tr. 344. Lampley considered the close proximity of a prior intersection failure along the same parallel, and the fact that the route down entry No. 9 was traveled three times a day. Tr. 344, 366; P. Ex. 13 at 6. Lampley also determined that "[o]ther things was [sic] going on, that roof conditions were deteriorating, so at that point, additional support was needed." Tr. 370. For example, quick transitions of limestone were evident from visual inspection, along with differences in the length of previously installed roof bolts. Tr. 365; P. Ex. 4.[11] Lampley credibly testified that the roof bolt operator would have had to "detect that transition quickly enough and make adjustments accordingly to the permanent support that he's putting in place." Tr. 369. Notably, however, the permanent supports down entry No. 9 were properly installed, and still in place. Tr. 370.

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[9] "Cap blanks" are also referred to as "cat planks" in the transcript. Tr. 340, 362. They are large, wooden shims placed between the mine roof and the top of the wooden rib prop to close the gap between the mine roof and the top of the prop. *Id*.

[10] A floor heave occurs when the floor pushes up towards the mine roof. Tr. 339. The clay floor had been pushed up due to overburden pressure from the roof. Tr. 362. *See* Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 258 (2d ed. 1997). The floor heave that Lampley observed was approximately 150 to160 lateral feet from the roof fall. Tr. 340.

[11] The limestone roof transitioned from 48 inches to 18 inches in thickness across the entry covered by the fall. Tr. 367-69. Lampley observed the "relatively quick transition" because the roof fall exposed that portion of the limestone roof. *Id*.

Lampley's analysis of the conditions near the seal No. 3 floor heave is also persuasive. Lampley testified that the signs of stress that he had observed had likely existed for 5 days to a week, that floor heaving takes several days to several weeks to occur, and that the heave would continually get worse over time depending on roof stride above and the soft clay below. Tr. 366.

Lampley determined that the heaving and smashed props occurred over a period of time, "at least several weeks," but could change over merely "a couple of days." Tr. 341. Additionally, the presence of dust from the mine atmosphere that had accumulated on the broken props led Lampley to conclude that this condition existed for a period of time prior to the roof fall. Tr. 450-51, 475. Lampley, however, failed to record the presence of dust in his notes. Tr. 450-51. Lampley conceded the possibility that the dust from the roof fall likely accumulated on the props, and gave the appearance that the props had been broken for longer than they actually had been. Tr. 453.

Lampley recorded "considerable mitigating circumstances, not usual travel" in his notes, and confirmed this notation in testimony at trial. Tr. 444, 486; P. Ex. 5 at 4. However, Lampley testified that the cited area could have been written as high negligence or low negligence, so moderate negligence was a good balance. Tr. 487.

1. Negligence Analysis

I affirm inspector Lampley's moderate negligence determination. Respondent should have known of the size, location, and conditions observed by Lampley at the floor heave area alone. This entryway is inspected three times daily. Additionally, the presence of highly-deteriorated roof bolts and smashed cribs and props reinforce my finding. Although the roof fall constitutes a mitigating circumstance, I find that Respondent knew or should have known of the adjacent violation, and acted with moderate negligence by not adequately supporting the roof, face and ribs of areas where persons work or travel. 30 C.F.R. § 75.202(a). Accordingly, a moderate negligence determination is appropriate here.

2. Penalty Assessment

As noted previously, Respondent is a large operator, and the originally proposed penalty of $1,304 would not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have found that Respondent acted with moderate negligence. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,304 civil penalty against the Respondent.

D. Findings of Fact for Roof Control Citation No. 8451626

On September 10, 2013 at 11:20 a.m., Lampley issued Citation No. 8451626 alleging a violation of 30 C.F.R. § 75.202(a) because he observed an area of inadequately supported roof in entry No. 1 of unit No. 2's right side return. Tr. 372-373, P. Ex. 6. The Citation states:

> The mine roof is not adequately supported at crosscut 48, entry #1 of unit Unit #2's right side return. Adverse conditions are present in the form of slips/crack and considerable amounts of water coming from the roof in the affected intersection. Visual signs of inadequate support are present in the form of curling roof bolt bearing plates, corner pillar stresses, bagging of the mine roof, and compression of the single 30 inch four point crib built in the center of the intersection. This area is traveled weekly by the examiner.

P. Ex. 6.

Lampley determined that an injury or illness was unlikely to occur, that if an injury did occur it would be fatal, that one person was affected, and that the Respondent's negligence was moderate. *Id*. Lampley expected a roof fall to occur if the conditions persisted, but determined that an injury was unlikely because the cited area was only traveled once per week. Tr. 375-76. Lampley determined that only the examiner would be affected by the violation. Tr. 378. The Secretary proposed a civil penalty of $1,304. P. Ex. 18.

Respondent only disputes the moderate negligence determination. Respondent contends that a low negligence determination is more appropriate because it had no way of knowing that the cited condition existed. R. Br. 46.

Respondent's examination book indicated that the required weekly inspection was conducted on September 4, 2013. Tr. 455-56, R. Ex. 13. The next required examination was due the day after Lampley cited the Respondent. Tr. 456. Lampley testified that the cited conditions would continue to deteriorate, and lead to a "massive intersection failure." Tr. 215. Respondent's mine foreman, however, testified that an intersection failure was not likely. Tr. 578; R. Ex. 13.

Lampley observed 84-inch roof bolts, the primary roof support, properly installed. Tr. 215, 460. He also observed a single crib in the middle of the intersection that had taken "considerable" weight. Tr. 373-74. Lampley noted that the crib was located in a recently mined area, and that the environmental conditions "were changing quickly." *Id*. Lampley also observed water as it streamed from a large crack in the roof. *Id*. Finally, Lampley observed the roof "bagging down," and "curled" roof bolt plates, which he concluded were the result of roof pressure on the 84-inch bolts. *Id*.

Examiners travel the cited area weekly to conduct inspections. Tr. 216, 481, 579. Respondent contends that it had no way of knowing about the cited conditions since the last examination. Tr. 218-19, R. Br. 43. Lampley observed no dust on top of "some rib sloughage," which leads Respondent to posit that the cited conditions occurred after the last inspection. Tr. 457-58. Lampley conceded at hearing that if the cited conditions developed after the last examination, then Respondent would have had no way of knowing, nor should it have known, of the cited conditions. Tr. 458.

Lampley credited Respondent for its attempt to mitigate the deteriorating conditions by installing the supplemental crib. *Id*. He testified, however, that Respondent did not do enough to mitigate "bad roof conditions." *Id*. Lampley also testified that Respondent knew of the adverse conditions for three days or more because it stopped mining the cited area several cross-cuts out. Tr. 377.

Respondent addressed the conditions that Lampley observed and immediately "took care of [them]." Tr. 581, R. Ex. 13. Respondent added seven cribs to abate and terminate the violation. Tr. 398, P. Ex. 15 at 6.

1. Negligence Analysis

The existence of the supplemental roof support and still functioning primary roof support, combined with the rapid nature with which these conditions could develop, and the mine's evidence that no hazardous conditions were present in the last examination, support the Respondent's position regarding low negligence. Respondent, however, stopped mining the area three days earlier. Also, the presence of the supplemental supports leads to the conclusion that Respondent knew or should have known of the rapidly deteriorating roof conditions, but did not make sufficient efforts to mitigate the problem, particularly since seven additional cribs were necessary to abate and terminate the violation only three days after mining ceased. Accordingly, I affirm inspector Lampley's determination that Respondent was moderately negligent by not adequately supporting the roof, face and ribs of areas where persons work or travel. 30 C.F.R. § 75.202(a).

2. Penalty Assessment

The parties stipulated that the originally proposed penalty of $1,304 would not affect the Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have found that Respondent's negligence was moderate. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,304 civil penalty against the Respondent.

E. Findings of Fact for Roof Control Citation No. 8451627

With regard to roof control Citation No. 8451627, the record establishes that on September 7, 2013, four days before the citation was written, Respondent conducted an examination of the cited parallel air course and did not record any hazards. Tr. 588, R. Ex. 14. The parallel air course is traveled weekly by examiners. Tr. 216, 395, 481, 582. Lampley could not recall whether Respondent recorded any hazards in the weekly examination record book. Tr. 396. Respondent, however, had previously flagged the area to prevent travel. Tr. 391, 473; P. Ex. 9 at 1, 3.[12]

On September 11, 2013, inspector Lampley issued Citation No. 8451627 alleging a violation of 30 C.F.R. § 75.202(a) because he observed an area of inadequately supported roof in entry No. 7 on the 6th 48 parallel intake. The Citation states:

> The mine roof is not adequately supported at crosscut 35, entry #7 of the 6th 48A parallel intake (left side intake). Three loose permanent support roof bolts are present leaving an unsupported area that measured 12 feet by 7 feet. Loose rock and unconsolidated material are present at the affected area. After this citation was issued the area was flagged off to prevent travel.

P. Ex. 8.

Lampley designated the citation S&S because he determined that the primary roof support was failing and loose rock and unconsolidated material were hanging from broken wire mesh immediately above the examiner's route. Tr. 379-380; P. Ex. 9. Lampley determined that an injury or illness was reasonably likely to occur, that if an injury did occur it would result in lost workdays or restricted duty, that one person was affected, and that the Respondent's negligence was moderate. *Id*. The Secretary proposed a civil penalty in the amount of $1,944. P. Ex. 18.

Respondent argues that the Secretary has not proven the third *Mathies* element, and therefore the S&S designation should be removed. R. Br. 47. Specifically, Respondent argues that the gravity of the injury or illness in Citation No. 8451627 should be modified from reasonably likely to unlikely based on alleged similarities to Citation Nos. 8451626, which was so designated. Respondent also contends that the moderate negligence determination is inappropriate because the operator had no way of knowing about the cited conditions prior to the next required examination. R. Br. 45.

[12] The operator "flags" an area by installing a readily visible warning to alert miners of unsafe roof conditions. Tr. 474; *see* 30 C.F.R. § 75.208.

The primary roof support no longer functioned as approved, unlike the conditions cited in in Citation No. 8451626. Tr. 215. Accordingly, Lampley believed that it was more likely for loose rock or unconsolidated material to fall on a miner because of the unconsolidated nature of the roof. Tr. 215-16. Lampley also observed rusted, screen-wire mesh,[13] a rusted primary-support roof bolt protruding from the ceiling by 16 to 18 inches, and multiple layers of rock that had fallen onto the ground. Tr. 380-82, P. Ex. 9.

Respondent's mine foreman, Roger Adams, admitted the damaged wire mesh was obvious. Tr. 582. Lampley photographed the fallen rock "bagging and hanging" from the rusted and partially broken skin control. Tr. 383, P. Ex. 9. A person of average height would have to duck to avoid the damaged wire mesh. Tr. 490. The supplemental wire mesh no longer controlled the roof, as designed. Tr. 381, 582. Lampley credibly testified that he should not have been able to observe the three roof bolts if they had been properly positioned. Tr. 379, 381, 385.

Wooden props were spaced along the walkway approximately seven feet apart. Tr. 382. Marks on the props indicated that Respondent had installed supplemental support, but that additional rock had fallen afterwards. Tr. 389. The unsupported area of roof is directly over the examiner's walkway. Tr. 385, 394; P. Ex. 15 at 40. Fallen and unconsolidated rock already covered the walkway. P. Ex. 9 at 3.

Lampley testified that rock in the walkway fell in multiple stages. Tr. 383-84. Rock sloughed off the roof, and fell onto the mine floor. *Id*. Lampley deduced that the rusty and muddy colored rock appeared "to have been there for a longer period of time." *Id*. Oxidation was present on rock that had fallen previously. Tr. 388-90, 470-72. Lampley opined that the initial pile of rock fell more than six days before his inspection. Tr. 488.

The unsupported area of roof should have been reported as a hazard because the conditions were obvious and the roof was no longer supported by the permanent-support roof bolts. This was evident because the roof bolt bearing plates were no longer in contact with the mine roof. Tr. 392. The area should have been reported as a section 75.202(a) hazard in the examiners book, but Respondent failed to do so. Tr. 394.

1. The Reasonable Likelihood of Injury and S&S Designations Were Appropriate

Lampley properly designated Citation No. 8451627 as S&S because the roof bolts performing primary support no longer performed their approved function and Lampley observed fallen rock substantial enough to injure a miner. Tr. 393. The primary roof support no longer functioned, as approved. Tr. 393. Fallen rock was large enough to seriously injure a person such as the examiner walking directly beneath the inadequately supported roof. P. Ex. 9. Further,

[13] Tensar wire mesh is used as "skin control" to support the immediate area of rock around each roof bolt. Tr. 381.

unconsolidated rock would continue to fall, unless the cited conditions were abated. Additionally, the route had been flagged off by the Respondent prior to Lampely's inspection. Tr. 391, 473; P. Ex. 9 at 1, 3. Based on the preponderance of the evidence, I find it reasonably likely that unconsolidated rock would continue to fall and result in a lost-work-days or restricted-duty injury to an examiner as roof conditions deteriorated during normal mining operations. *Big Ridge, Inc.*, 36 FMSHRC 1677, 1689 (June 2014) (ALJ). Accordingly, I affirm the citation, as written. Citation No. 8451627 was correctly designated S&S.

2. Negligence Analysis

Lampley reasoned that a moderate negligence designation was appropriate because he observed sloughage throughout the entry. Tr. 387-88. Lampley testified that it is the operator's responsibility to be proactive and provide additional support where necessary, especially in an area that is deteriorating and traveled only once a week. *Id*. I find Lampley's reasoning convincing and consonant with the spirit and intent of the Mine Act. Further, I credit Lampley's testimony that based on oxidation, the initial pile of rock had fallen prior to the last examination. Thus, Respondent knew of the deteriorating conditions because it previously flagged-off the area for travel, and had installed supplemental support. Although Respondent's installation of supplement support provides some mitigation, Respondent knew or should have known that additional support was necessary based on previously fallen rock. Accordingly, I affirm the Secretary's moderate negligence determination.

3. Penalty Assessment

As noted previously, Respondent is a large operator, and the originally proposed penalty of $1,944 would not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed the S&S and moderate negligence designations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $1,944 civil penalty against the Respondent.

F. General Background Concerning Inspector Hudson's Issuance of Citations Nos. 8449462 and 8449464

On September 5, 2013, MSHA inspector Terry Hudson issued Citation Nos. 8449462 and 8449464 alleging violations of 30 C.F.R. § 75.604(b) because he observed damaged splices on two trailing cables, one on a shuttle car, and one on a roof bolter.[14] The regulation provides:

[14] Retired MSHA coal mine inspector, Terry Hudson, worked in the coal mining industry for 32 years. Tr. 24. Hudson issued Citation Nos. 8449462 and 8449464 during the same EO1 inspection. P. Exs. 10-11. Hudson was an MSHA coal mine inspector for six years, and was an electrical specialist for MSHA for four years prior to issuing the two citations at issue. Tr. 25, 28, 81. Hudson now works for Sunrise Coal as an assistant maintenance manager. Tr. 25.

"[w]hen permanent splices in trailing cables are made, they shall be: . . . (b) [e]ffectively insulated and sealed so as to exclude moisture." 30 C.F.R. § 75.604(b).

Respondent concedes the S&S violation for both citations at issue, but disputes that the injury or illness designation for each citation could reasonably be expected to be fatal. R. Br. 38. Respondent further disputes Hudson's designation that it acted with moderate negligence regarding both citations. *Id.* The Secretary proposed a civil penalty of $3,689 for each S&S violation. P. Ex. 18.

The Secretary argues for application of the missing witness rule with respect to both Citation Nos. 8449462 and 8449464. *See Eagle Energy, Inc.*, 23 FMSHRC 1107, 1120 (Oct. 2001). I decline to invoke such a presumption. The Secretary could have requested subpoenas for the "compulsory attendance of witnesses" at hearing, but did not do so. 29 C.F.R. § 2700.60(a).

G. Findings of Fact for Shuttle Car Trailing Cable Citation No. 8449462

At 11:30 a.m., on September 5, 2013, Hudson issued Citation No. 8449462 pursuant to section 104(a) of the Act for an alleged violation of mandatory safety standard 30 C.F.R. § 75.604(b), cited above.[15] The Citation states:

> The company #4067 Auxier Welding Shuttle Car, in use on the coal producing section Unit #3 MMU-013, had two splices in the trailing cable supplying 600 VDC to the machine that were not effectively insulated and sealed so as to exclude moisture. The outer wrap on the splices was open exposing the inner leads of the cable. One of the openings measured approximately ¼ inch by 1 ½ inches and the other measured approximately ¼ inch by ¼ inch.

P. Ex. 10.

Hudson testified that the blacked taped splices on the black cable were open, damaged and readily apparent due to wear and tear during normal mining operations. Tr. 32-33, 94. Further, the area where the shuttle car was operating was damp and wet. Tr. 38-39.

Hudson determined that the violation was S&S because it was reasonably likely to lead to a fatal injury, as a result of Respondent's moderate negligence, with one miner affected. *Id.* Specifically, Hudson testified that "I felt that it was reasonably likely that if you come in contact with this 600-volt voltage that's on this cable, that it could cause a fatal shock, yes." Tr. 42.

[15] The Citation indicates that it was issued at 10:40 a.m., but it was amended to 11:30 a.m. consistent with Hudson's testimony that he had initially recorded the incorrect time. Tr. 83-85; P. Ex. 10.

With regard to likelihood of injury, Hudson's notes state:

> Likelyhood [sic] – reasonably likely- The splices were not sealed to exclude moisture & the mine floor is damp wet where this machines [sic] cable lays on the mine floor during operation. History of electrical shocks & fatalities due to elec. shocks are from cable hazards similar to this hazard.

P. Ex. 12, p. 18.

With regard to negligence, Hudson's notes state:

> Neg - Mod- The heat from the cable has caused this hazard & not noticed.
>
> How long – A shift or longer – based on mining exp.
>
> Who knew – The car oper. and/or the person making the weekly check.

P. Ex. 12, p. 18-19.

Respondent contests Hudson's determination that a fatal injury could reasonably be expected to occur, and that Respondent's negligence was moderate. R. Br. 38.

As noted, the day shift at Pattiki Mine begins at 7:00 a.m. Tr. 85. The shuttle car takes approximately 40 minutes to arrive at its designated workstation. *Id*. Hudson issued the citation at 11:30 a.m., which means that shuttle car #4067 was in use for less than four hours. P. Ex. 10. The shuttle car traveled "probably a few hundred feet" between loads. Tr. 37. The record establishes that the shuttle car trailing cable incurs normal "wear and tear" from frictional contact with the ribs, as well as repeated winding on and off the cable reel. Tr. 32, 101.

Respondent called assistant general manager, Joshua Bell, to testify generally about Respondent's standards book regarding personal protective equipment policies, shuttle car per-operational and operational checks, and roof bolter pre-operational and operational checks, although Bell did not know who the # 4067 shuttle car operator or his supervisor was on September 5, 2013. Tr. 158-160; R. Exs. 1-3. Bell also testified about Respondent's permissibility examination on the 4067 shuttle car on September 5, 2013 (R. Ex. 4) and on the 6096 roof bolter on August 30, 2013 (R. Ex. 5). Tr. 167-171. On cross examination, however, it was established that Bell did not supervise the permissibility checks and had no personal knowledge of the circumstances surrounding them. Tr. 173-74.

Based on R. Ex. 4, Bell testified that on the morning of September 5, 2013, during the maintenance shift prior to issuance of Citation No. 8449462, respondent's mechanic, Terry Adams, conducted a weekly permissibility examination on the #4067 shuttle car and found and replaced a broken lens cover. Tr. 168; R. Ex. 4. Adams did not testify.

Bell testified that permissibility examinations are usually conducted on the maintenance shift. Tr. 167. They require the entire trailing cable to be pulled off the reel and inspected. Tr. 164. Such examinations are conducted by a mechanic and countersigned by the maintenance chief. Tr. 141-42. They are then reviewed by the individual miner's supervisor, the maintenance foreman, and the maintenance chief. *Id*. Bell testified that Hudson did not cite Respondent for failure to conduct a proper permissibility exam. Tr. 176. Hudson, however, candidly testified that he was not aware whether Adams had performed a permissibility examination on the #4067 shuttle car on the prior shift, or whether a pre-operational check had been done by the operator. Tr. 87-88.

Hudson testified that pre-operational examinations are required on shuttle cars. Tr. 56-57; R. Ex. 2. Operators inspect for damage to the trailing cable during these examinations. *Id*. Hudson testified that the shuttle car operator should notice excessive fraying, but may not notice small openings unless he conducts a proper pre-operational examination. Tr. 88.

Spliced areas of the cable, however, are weak spots and require extra vigilance to maintain in good condition. Tr. 31, 98. Shuttle car operators must notify a foreman or repairman to repair any damaged cable. Tr. 102. A qualified person must then certify that a splice has been repaired correctly. *Id*.

As noted, Hudson observed open splices that were not being properly maintained. Tr. 29; P. Ex. 10. The openings in the splice's outer insulation were obvious to him, although he testified on questioning from the undersigned that they might not be obvious during operation of the machine. Tr. 32-33, 45, 96. No damage to the inner insulated leads was observed. Tr. 80.

The #4067 shuttle car operates via variable frequency drive, which means it rectifies 600 volts direct current ("VDC") to alternating current on the car. Tr. 52. Heat from the reel causes damage to tape splice kits. Tr. 51, 53-54. Heat causes tape splice kit adhesive to lose adhesive properties and "roll back" on the trailing cable. Tr. 129. Based on his mining experience, Hudson credibly testified that heat alone, from less than four hours of mining operations, would not cause the conditions that he observed. Tr. 86-87.

> I think that the – had it been properly insulated and sealed at the start of that shift, then I would think that it would take longer. It takes more wear and tear to – for this slice to be – receive the damage.

> As far as being open, it's hard for me to determine how long it was open, you know, it's – as we've talked, it's an abrasive environment and it could – it could have been pulled open on that night – and but I – as far as what caused it, I think that the – it was the heat and abrasion over a longer period of time.

Tr. 87. In short, Hudson testified that the damage was from wear and tear during normal mining operations and existed for a shift or longer. Tr. 32, 57, P. Ex. 12. P. 19.

Respondent's maintenance foreman, David Baker, testified that the Respondent "doesn't have any trouble with heat," because of the shuttle car model and set-up utilized. Tr. 129. Baker's testimony supports my finding that the cited damage to the shuttle car trailing cable existed for longer than the heat generated during one shift.

Baker abated the violation. Tr. 117-18.[16] Baker cut out the old, damaged splices and created new splices in the trailing cable. Tr. 132-33, 135.

1. A Fatal Injury Was Reasonably Likely to Occur

Higher voltage generally equates to a greater likelihood of fatal shock. Tr. 43. Hudson testified that contact with 600 volts of direct current was reasonably likely to cause death. Tr. 42; P. Ex. 10. Based on his electrical training, Hudson credibly testified that contact with amperage as low as 100 milliamps can cause death due to heart fibrillation. Tr. 43.[17] The ground fault protection on the shuttle car is set at 800 amps. Tr. 43-44, 64. Therefore, a miner could be exposed to nearly 8,000 times the amperage that could cause death due to heart fibrillation. Tr. 44

Hudson credibly testified that a fully insulated cable would effectively contain the electrical current, but the copper leads could be damaged at any point along the cable regardless of whether the outer jacket of the trailing cable was damaged. Tr. 78, 120. Thus, visible bare copper leads are not required for exposure to an electrical current. Tr. 66-67. Commission precedent directly supports this determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC

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[16] David Baker is a 17-year veteran of White County, and has been employed in the mining industry performing maintenance work since 1990. Tr. 110-115. Baker has served as Respondent's maintenance foreman for the past seven years. Tr. 115. As maintenance foreman, he is responsible for supervising the maintenance personnel on production shifts. Tr. 110. Baker is a certified mine manager, and has his electrical card and hoisting papers in Kentucky and Illinois. Tr. 115-16.

[17] Amperage is the measurement of electron current flowing in an electrical conductor. Tr. 43-44. Voltage is the pressure applied to the electrical conductor that causes electrons to flow in a specified direction. *Id.*

1275, 1286 (Dec. 1998). In *Harlan,* the Commission held that damage to only the outer jacket is sufficient to support a finding of S&S. This is so because "there's no way of knowing [whether there are holes in the insulation surrounding the wire within the cable]." *Harlan Cumberland Coal* at 1286; *cf. U.S. Steel,* 6 FMSHRC 1573, 1574-75 (July 1984)(recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function). Based on these facts, I conclude that under continued normal mining operations, the violation contributed to a hazard that was reasonably likely to result in a fatal injury. Accordingly, I affirm Hudson's gravity determination, as written. P. Ex. 10.

2. Negligence Analysis

I find that Respondent was moderately negligent in failing to maintain the spliced areas of the shuttle car trailing cable. In the absence of testimony from Respondent's # 4067 shuttle car operator on September 5, 2013 or any other witness with first-hand knowledge, I credit Hudson's testimony based on his extensive experience, that the damaged splices were obvious, caused by heat and abrasion, and existed for more than one shift. Accordingly, Respondent's permissibility examiner, Terry Adams, should have repaired the damaged splices in addition to fixing the broken light lens. Further, based on Respondent's own pre-operational procedures, it should have known of the damaged splices and fixed them. In addition, given the roof bolter trailing cable violation discussed below, there was more than one violation of 30 C.F.R. § 75.604(b) on the same day, and Respondent violated § 75.604(b) seven times in the 15 months preceding the instant citation. P. Ex. 1, p. 7-9. Accordingly, I affirm Citation No. 8449462, as written.

3. Penalty Assessment

Respondent is a large operator. The parties stipulated that the originally proposed penalty of $3,689 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity and negligence determinations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $3,689 civil penalty against the Respondent.

H. Findings of Fact for Roof Bolter Trailing Cable Citation No. 8449464

Assistant mine manager Bell testified that that on August 30, 2013, a permissibility examination was conducted on roof bolter #6096, and the examination record indicates that examiner Terry Adams (TA) detected and remade a bad splice on the roof bolter trailing cable. Tr. 170-71, R. Ex. 5. Bell further testified that this was the last permissibility examination required prior to inspector Hudson's issuance of Citation No. 8449464 , and that another permissibility examination was not required until after Hudson's September 5, 2010 inspection. Tr. 171.

Permissibility examination for roof bolters require that the entire cable to be pulled off the reel and inspected. Tr. 164. Roof bolter operators are also required to conduct pre-operational examinations, just like shuttle car operators. Tr. 57, 161-62, R. Ex. 3.

On September 5, 2013, Hudson issued Citation No. 8449464 pursuant to section 104(a) of the Act for an alleged violation of mandatory safety standard 30 C.F.R. § 75.604(b). The Citation states:

> The company #6096 Fletcher Roof Bolter, in use on the coal producing section Unit #3 MMU-003, that had two splices in the trailing cable supplying 480 VAC to the machine that were not effectively insulated and sealed so as to exclude moisture. The outer wrap on the splices was open exposing the inner leads of the cable. One of the openings measured approximately ½ inch by 1 ½ inches and the other measured approximately ¼ inch by 2 inches.

P. Ex. 11.

Hudson determined that the violation was S&S because it was reasonably likely to lead to a fatal injury, as a result of Respondent's moderate negligence, with one miner affected. *Id*. Respondent concedes the S&S designation and only contests Hudson's determinations that a fatal injury could reasonably be expected to occur and that Respondent's negligence was moderate. R. Br. 38.

Hudson discovered the opened splices on the roof bolter trailing cable shortly after his inspection of the shuttle car trailing cable, which was at 11:30 a.m. Tr. 83-84. The roof bolter cable extends from a reel just like the shuttle car cable. Tr. 47. The roof bolter trailing cable is slightly smaller in diameter than the shuttle car trailing cable, but the openings that Hudson observed were larger than the openings observed on the damaged shuttle car trailing cable. Tr. 47, 90. Hudson did not observe any damage to the inner insulated leads. Tr. 68, 80. Respondent removed and replaced the outer wrap of the tape splice to abate the cited condition. Tr. 68.

Unlike the shuttle car trailing cable, the roof bolter trailing cable is handled frequently throughout the shift. Tr. 48. Hudson testified that during operation, damage is more likely to be observed on the roof bolter trailing cable than on the shuttle car trailing cable. Tr. 96. The roof bolter trailing cable is repetitively moved from the ground, and hung on the ribs during operation. Tr. 71. Also, unlike the shuttle car trailing cable, the roof bolter trailing cable does not travel as extensively throughout the mine, but instead remains closer to the coal cutting machine at the face. Tr. 50. Water is constantly being applied by the coal cutting machine. *Id*. Thus, the roof bolter trailing cable is constantly exposed to wet conditions. *Id*. Moisture between the inner and outer layers of cable insulation allows the electrical current to track. Tr. 39, 78. The #6096 roof bolter was operating in a "damp, to wet" area of the mine. Tr. 50.

Hudson admitted that the openings in the damaged splices that allowed the opportunity for moisture to penetrate the damaged outer jacket and reach the leads could have occurred during the shift. Tr. 97, 100, 205-06. However, based on the extent of heat deterioration and abrasive wear on the taped splices, his thirty-two years of mining experience lead him to conclude that the condition had deteriorated over a longer period of time. Tr. 97, 99. Hudson's notes regarding negligence state:

> Neg – Mod – Heat, abrasion & wear have caused the splice outer wrap to be in this cond. & not noticed.
>
> How long – A shift or longer – hard to determine
>
> Who Knew – The operators and/or the person making the wkly chc.

P. Ex. 12, p. 27; Tr. 70. Further, Bell opined that the roof bolter trailing cable violation would have existed for a longer period of time than the shuttle car trailing cable violation. Tr. 193.

1. A Fatal Injury was Reasonably Likely to Occur

Hudson credibly testified it is reasonably likely that contact with 480 volts alternating current ("VAC") will cause death. Tr. 47. I take judicial notice that contact with 480 VAC has caused death.[18] I apply the same analysis for the roof bolter trailing cable as I applied to the shuttle car trailing cable in which I found that the violation contributed to an electrocution hazard that was reasonably likely to result in a fatal injury. I emphasize that the roof bolter trailing cable had larger damaged areas, was handled more frequently, and was operated in wet conditions that were more extensive than the shuttle car trailing cable.

Based on these facts, I conclude that under continued normal mining operations, the violation contributed to an electrocution hazard that was reasonably likely to result in a fatality. Therefore, I affirm Hudson's gravity designation, as written. P. Ex. 11.

2. Negligence Analysis

I find that Respondent was moderately negligent in failing to maintain the spliced areas of the roof bolter trailing cable. I have credited Hudson's testimony that during operation of the roof bolter, damage is more likely to be observed on the roof bolter trailing cable than on the

[18] MSHA, *2003 Fatalgrams and Fatal Investigation Reports Coal Mines*, http://www.msha.gov/FATALS/2003/FAB03c21.htm (last visited July 29, 2015) (attributing death of a miner to electrocution from damaged trailing cable energized with 480 VAC).

shuttle car trailing cable. Further, the openings in the roof bolter trailing cable were larger than the shuttle car trailing cable openings. In the absence of testimony from Respondent's # 6096 roof bolter operator on September 5, 2013 or any other witness with first-hand knowledge, I credit Hudson's judgment based on his extensive experience that the damaged splices were caused by heat and abrasion that likely exceeded one shift. Based on Respondent's own pre-operational procedures, it should have known of the damaged splices on the roof bolter trailing cable and fixed them before Hudson cited them. In addition, given the shuttle car trailing cable violation discussed above, there was more than one violation of 30 C.F.R. § 75.604(b) on the same day, and Respondent violated § 75.604(b) seven times in the 15 months preceding the instant citation. P. Ex. 1, p. 7-9. Accordingly, I affirm the moderate negligence determination.

3. Penalty Assessment

Respondent is a large operator. The parties stipulated that the originally proposed penalty of $3,689 will not affect Respondent's ability to remain in business. MSHA recognized Respondent's good-faith compliance in abating the citation. I have affirmed MSHA's gravity and negligence determinations. After consideration of the penalty assessment criteria discussed earlier and set forth in section 110(i) of the Act, I assess a $3,689 civil penalty against the Respondent.

V. Decision Approving Settlement

As noted at footnote 1, the parties filed a joint motion to approve settlement of 31 of the 37 citations at issue. ALJ Ex. 1. A total reduction in penalties from $50,130 to $35,091 is proposed for those 31 citations, as set forth below. The parties request that Citation Nos. 8451609, 8451610, 8451611, 8451630, 8451631, 8451633, 8451634, 8451635, and 8451642 be modified to reduce the level of negligence from "high" to "moderate." The parties request that Citation No. 8451605 be modified to reduce the level of negligence from "moderate" to "low." The parties also request that Citation No. 8451614 be modified to reduce likelihood of injury or illness from "reasonably likely" to "unlikely," and to remove the "S&S" designation. Finally, the parties request that Citation No. 8445198 be modified from "fatal" to "lost workdays or restricted duty." I have considered the representations and documentation submitted in this case, and I conclude that the proffered partial settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts and citation modifications are as follows:[19]

Citation No.	Assessment	Settlement	Modification To Citation
8445186	$1,944	$1,944	None
8451605	$308	$100	Reduce to low negligence
8445189	$1,944	$1,944	None
8451609	$1026	$200	Reduce to moderate negligence
8451610	$1,111	$200	Reduce to moderate negligence
8451611	$1,111	$200	Reduce to moderate negligence
8445194	$334	$334	None
8451612	$5,080	$2,745	None
8431977	$5,080	$5,080	None
8431978	$3,405	$3,405	None
8451613	$1,657	$1,657	None
8451614	$1412	$200	Reduce to unlikely & non-S&S
8451615	$2,901	$2,901	None
8445196	$392	$392	None
8445198	$5,080	$1,000	Reduce to LWD or RD
8445199	$1,795	$1,795	None
8445200	$224	$224	None
8451623	$1,795	$1,795	None
8449465	$946	$946	None
8451628	$285	$285	None
8451629	$285	$285	None
8451630	$946	$200	Reduce to moderate negligence
8451631	$946	$200	Reduce to moderate negligence
8451632	$285	$285	None
8451633	$946	$200	Reduce to moderate negligence
8451634	$946	$200	Reduce to moderate negligence
8451635	$1026	$200	Reduce to moderate negligence
8451638	$207	$207	None
8449477	$5,080	$5,080	None
8451642	$946	$200	Reduce to moderate negligence
8451644	$687	$687	None
	$50,130	$35,091	

[19] Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

VI. Order

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation Nos. 8451609, 8451610, 8451611, 8451630, 8451631, 8451633, 8451634, 8451635, and 8451642 be **MODIFIED** to reduce the level of negligence from "high" to "moderate."

It is **ORDERED** that Citation No. 8451605 be **MODIFIED** to reduce the level of negligence from "moderate" to "low."

It is **ORDERED** that Citation No. 8451614 be **MODIFIED** to reduce likelihood of injury or illness from "reasonably likely" to "unlikely," and to remove the "S&S" designation.

It is **ORDERED** that Citation No. 8445198 be **MODIFIED** from "fatal" to "lost workdays or restricted duty."

For the reasons set forth above, Citation Nos. 8451616, 8451620, 8451626, 8449462, 8449464, and 8451627 are **AFFIRMED,** as written.

It is further **ORDERED** that the operator pay a total civil penalty of $48,678, i.e., $35,091 for the settled violations and $13,587 for the violations litigated at hearing, within thirty days of this Order.[20]

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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