FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

December 20, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0094-M A.C. No. 31-00212-570484 (G556)
v.	:	
W.G. YATES & SON'S CONSTRUCTION COMPANY, Respondent.	:	Mine: Lee Creek Mine

DECISION

Appearances: John O. Gainey, Esq. & Melanie A. Stratton, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner;
McCord Wilson, Esq., Rader and Campell, P.C., Dallas, Texas, for Respondent.

Before: Judge Paez

This docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 815. In dispute is a single section 104(a) citation[1] issued to W.G. Yates & Son's Construction Company ("W.G. Yates" or "Respondent"), Contractor, for a fire that occurred during repairs to steel support beams on the third floor of the Washer Building at PCS Phosphate & Nutrien's ("Nutrien") Lee Creek Mine.[2]

To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d

[1] This docket originally contained two section 104(a) citations. On September 19, 2023, I issued my Decision Approving Partial Settlement resolving one of the two citations prior to the hearing, so only Citation No. 9633680 remains.

[2] In this decision, the hearing transcript and the Secretary's, Respondent's, and Joint exhibits are abbreviated as "Tr.," "Ex. P–#," "Ex. R–#," and "Joint Ex. #," respectively. The parties' post-hearing briefs and reply briefs are abbreviated as "Br." and "Reply," respectively.

1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Citation No. 9633680 alleges W.G. Yates violated 30 C.F.R. § 56.4500[3] on December 6, 2022, when a fire occurred as a result of hot welding slag landing in a drainage pipe and igniting the pipe's rubber lining. The Secretary proposed a penalty of $1,246.00, which W.G. Yates timely contested. I held an in-person hearing in New Bern, North Carolina.

At the hearing, the Secretary presented testimony from Inspector Bryan Lee Deaton and Johnnie O'Neal, Safety Specialist for Nutrien and Owner of Lee Creek Mine. W.G. Yates presented testimony from two witnesses: Ronnie White, Respondent's Site Manager, and Matthew Roush, Respondent's Mechanical Superintendent. In addition to the parties' submissions of documentary and photographic evidence, I requested that the parties submit post-hearing briefs and reply briefs.

II. ISSUES

Based on Citation No. 9633680, the Secretary asserts that W.G. Yates violated section 56.4500 by failing to separate heat sources from combustible material. (Exs. P–1-1, P–5-1; Tr. 26:18–19, 99:4–9, 130:5–11.) The citation characterizes the likelihood of injury to be reasonably likely to result in the fatality of one miner, designates the violation as significant and substantial ("S&S"),[4] and marks W.G. Yates' degree of negligence as moderate. (Ex. P–1-1.) The Secretary argues the citation should be upheld and the proposed penalty affirmed. (Sec'y Br. at 14.) W.G. Yates contests the fact of the violation and the S&S designation. (Resp't Br. at 2.)

Accordingly, I determine the following issues are before me: (1) whether W.G. Yates violated 30 C.F.R. § 56.4500 as alleged in Citation No. 9633680; (2) whether the citation was properly designated as S&S; (3) whether the citation was properly designated as the result of moderate negligence on the part of W.G. Yates; and (4) whether the proposed penalty is appropriate for any such violation.

---

[3] Section 56.4500 provides: "[h]eat sources capable of producing combustion shall be separated from combustible materials if a fire hazard could be created." 30 C.F.R. § 56.4500. Additionally, section 56.2 of that subpart states: *"*[c]ombustible material means a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion, or release flammable vapors when subjected to fire or heat. Wood, paper, rubber, and plastics are examples of combustible materials." 30 C.F.R. § 56.2.

[4] The S&S terminology comes from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ." 30 U.S.C. § 814(d)(1).

For the reasons set forth below, Citation No. 9633680 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Parties' Stipulations

At the hearing the parties stipulated in a joint exhibit to the following items, verbatim:

1. W.G. Yates & Son's Construction Company ("W.G. Yates" or "Respondent") is an "operator" as defined in Section 3(d) of the Mine Act.
2. Respondent's operations affect interstate commerce.
3. Respondent is the operator of the Lee Creek Mine (Mine ID No. 31-00212), which is subject to the Federal Mine Safety and Health Act of 1977 (the "Mine Act") as amended.
4. Jurisdiction exists because 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.
5. The citation at issue in these proceedings was properly served by certified mine inspectors acting in their official capacity as authorized representatives of the Acting Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevance of any statements asserted therein.
6. The citation and notification at issue were timely and properly contested by Respondent.
7. Administrative Law Judge Paez has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act.

(Tr. 6:14–7:3; Jt. Ex. 1.)

B. Operations at Lee Creek Mine

Nutrien owns Lee Creek Mine which supplies phosphate ore that "goes into everyday products from toothpaste to soda pop." (Tr. 15:21–16:8.) To mine the phosphate ore, Nutrien employs a contractor who uses excavators and haul trucks to remove the soil above the ore. (Tr. 15:23–24.) The ground is then leveled and drag lines are used to excavate the ore. (Tr. 15:24–16:1.) Next, the ore is pumped from the mine to the mill system, starting at the Washer Building.[5] (Tr. 16:1–3; 105:10–17.) At the Washer Building the raw phosphate ore is washed with water and passed through shaker screens, where unwanted debris is drained away and the cleaned phosphate exits on conveyor belts for further processing. (Tr. 105:4–17.) Nutrien owns

[5] The building is also referred to as the "Shaker Mill" and "Mill Building" in the transcript.

all the equipment in the Washer Building. (Tr. 147:17–148:6.) W.G. Yates is a maintenance contractor for Nutrient. (Tr. 142:23–143:4.)

C. Facilities at Lee Creek Mine

The third floor of the Washer Building is where the phosphate ore is rinsed with water, creating a slurry that flows through an eighteen-foot-long shaker screen and then down into a square belly pan that spans five feet long and eight feet wide. (Tr. 24:18–20, 27:25–28:7, 30:2–10, 105:4–17, 150:17–19.) The belly pan sits three inches below the shaker screen. (Tr. 27:18–20, 150:17–19, 151:6–14.) In the center of the belly pan is a ten-to-twelve-inch circular drainage hole (Tr. 29:21–30:1) with a discharge pipe beneath it. (Tr. 28:2–23.)

The water and debris from rinsing the phosphate first enter the drainage hole in the base of the belly pan and then pass through the ten-foot-long vertical section of the discharge pipe down to the second floor of the Washer Building (Tr. 28:2–29:20; Ex. P–3). The water and debris then encounter a 90-degree "elbow" section of the discharge pipe. (Tr. 28:21–29; Ex. P–3.) The inside of the elbow section of the discharge pipe is lined with rubber (Tr. 24:4–6, 29:9–20, 35:6–14, 186:1–6), though neither Nutrien nor W.G. Yates knew that the elbow pipe was lined with rubber at the time of the incident. (Tr. 59:2–18, 126:9–14.) A horizontal pipe connected to the elbow pipe then carries the water and debris out of the Washer Building to a waste area. (Tr. 28:5–29:8; Ex. P–3.)

The purpose of the discharge pipe is to carry the water (Tr. 101:3–5) used to screen the phosphate ore and any debris that is not caught by the shaker screen. (Tr. 28:2–4; 38:2–11.) The pipe is not designed to carry hot materials during normal use. (Tr. 38:2–11.) The pipe is a permanent fixture and would be difficult to move (Tr. 76:8–20) or open to see inside. (Tr. 97:10–21.)

The Washer Building's flooring consists of metal grating, which allows air to circulate freely. (Tr. 146:2–11; 89:25–90:6, 150:5–7.) At the time of the fire, some of the grating was being replaced or otherwise removed to create openings to allow work to be done. (Tr. 45:25–46:2, 55:1–3.) There were three openings in the third floor at the time of the fire. (Tr. 177:4–6.) Barricades blocked off the openings, with most of the openings doubly barricaded. (Tr. 177:7–179:2; Ex. P–8.) As a safety precaution, the miners working on the third floor by these openings wore fall protection. (Tr. 54:20–55:18, 91:3–20.) The miners unhooked themselves from this protection when they evacuated the Washer Building due to the fire. (Tr. 185:9–17.)

D. Events on December 6, 2022

1. MSHA Inspection of Lee Creek Mine

On the morning of December 6, 2022, Inspector Deaton and Inspector in Training, Scott Rogers, arrived at the Lee Creek Mine to investigate an unrelated accident. (Tr. 16:17 – 17:14.) When they arrived, approximately four hundred contractors and employees were working at the mine. (Tr. 17:15–18.) Inspector Deaton and Rogers met with a representative for another

contractor, Bruce Pollock, to address the separate accident. (Tr. 17:22–24.) After addressing the accident, the group traveled in Pollock's truck to return to the Mill Office. (Tr. 18:2–3.)

On their way back to the Mill Office along the backside of the mine road, Inspector Deaton noticed smoke coming from the Washer Building approximately three miles away. (Tr. 17:22–19:7, 44:6–9, 68:14–69:2.) Given the emergency, Inspector Deaton and the others headed immediately to the Washer Building to investigate the smoke, where they met Johnnie O'Neal, the Acting Safety Director for Nutrien. (Tr. 16:18–18:7.) O'Neal reported that a fire occurred in the building but was unsure if anyone had been hurt. (Tr. 19:23–20:11.) Inspector Deaton then issued a section 103(k) order[6] to preserve the area and to investigate the fire. (Tr. 20:12–22:6.)

2. Fire at the Washer Building

The Washer Building was not processing phosphate ore on December 6, 2022 due to building maintenance. (Tr. 46:1–2, 82:20–83:17, 115:10–13, 130:16–24, 143:1–23, 181:19–24.) Specifically, W.G. Yates contractors were performing structural steel replacement work. (Tr. 46:1–2, 79:2–17, 115:10–117:13, 143:1–23, 181:19–24.) Approximately fourteen miners (Tr. 45:17–18) were working in the Washer Building on the day of the incident. (Tr. 43:11–13.) The fourteen miners included two "fire watches," who are miners charged with looking out for smoke or fire. (Tr. 77:17–23.) There was a fire watch on the bottom floor of the Washer Building and the mine foreman served as a roving fire watch. (Tr. 77:13–16.)

As part of the maintenance work, W.G. Yates had to level a shaker screen on the third floor of the Washer Building. (Tr. 23:6–10.) To level the shaker screen, the W.G. Yates contractors used an oxygen acetylene torch to cut one of the shaker screen's steel support beams[7] that was welded to the floor. (Tr. 24–28, 105:4–17, 115:10–13, 143:21–144:2; Exs. P–2, P–7, P–8.) Before cutting the steel support beam, W.G. Yates conducted an inspection of the work area, as required by the hot work permit,[8] but did not observe any combustible materials in the area.

[6] MSHA inspectors issue section 103(k) orders when they do not know all the circumstances but want to take control of an area. A section 103(k) order still allows the operator to conduct rescue and recovery, including extinguishing the flames in the current case. Such an order preserves the accident scene for MSHA to conduct an investigation and determine the cause of the accident. (Tr. 21:22–22:6); 30 U.S.C. 813(k).

[7] The steel support beams are also referred to as "support legs" and "legs" in the transcript.

[8] Nutrien issued W.G. Yates a hot work permit for the steel cutting project on December 6, 2022. (Tr. 81:4–7.) The hot work permit stated that there were no "combustible hazards within 35-foot radius [in] all directions around the hot work." (Tr. 80:8–81:7, 147:2–4; Ex. R–4.) The hot work permit requires that all combustible hazards within thirty-five feet of the hot work area are either "wet down" or covered with a fire blanket prior to commencing the hot work. (Tr. 119:9–20.) The boxes next to "fire extinguisher" and "water hose" were checked on the hot work permit, indicating that one of these must be available nearby during the cutting process. (Tr. 94:8–96:4, 168:15–170:2; Ex. R–4.) The hot work permit did not require both a nearby water source and fire extinguishers when engaging in steel cutting. (Tr. 94:8–95:3,

(Tr. 147:9–16, 168:6–20, Ex. R–4.) Before performing the cutting, W.G. Yates contractors also covered the rubber conveyor belts on the second floor with "fire blankets" to prevent the conveyor belts from catching on fire. (Tr. 39:7–13, 41:25–42:13, 63: 3–5, 98:7–8, 145:5–24, 166:10–12, 185:18–20.) Site Superintendent Matthew Roush also testified that a fire blanket was used in the cutting area on the third floor. (Tr. 145:5–146:1.)

When the W.G. Yates contractors were cutting the steel support beam with the oxygen acetylene torch, hot metal slag fell into the belly pan and down the discharge pipe, burning[9] the rubber lining of the elbow section of the pipe and causing thick, black smoke.[10] (Tr. 24:8–12, 27:21–24.) The smoke rose upward (Tr. 151:17–24) from the discharge pipe through the belly pan, through the shaker screen on the third floor, through the grating on the fourth floor (Tr. 149:14–150:7), and then straight up out of the grated ceiling of the building towards the sky where it could be seen from three miles away. (Tr. 18:25–19:4, 151:17–24, 58:4–9.) The W.G. Yates contractors performing the cutting were standing approximately fifteen feet away from the discharge pipe when the elbow section of the discharge pipe caught fire. (Tr. 150:8–25, 153:4–154:23.)

After noticing the smoke, a miner yelled "fire" to alert the other miners. (Tr. 75:1–5, 122:1–4, 149:7–18, 151:1–5, 152:16 – 20). In response, about four or five of the miners grabbed nearby fire extinguishers.[11] (Tr. 43:16-44:5, 151:1–5.) The miners directed the fire extinguishers into the three-inch gap between the belly pan and the shaker screen. (Tr. 43:16–44:5, 109:23–110:3.) They deployed all six fire extinguishers that were on the third floor. (Tr. 43:16–44:5; Ex. P–2.) However, in part because the discharge pipe was inaccessible (Tr. 43:16–44:5, 109:23–110:3), the miners failed to extinguish the fire. (Tr. 75:1–5.) As the W.G. Yates contractors tried to extinguish the fire, Nutrien Safety Specialist Travis Hubers called the Emergency Rescue Team.[12] (Tr. 43:22–24; Ex. P–10.)

The Emergency Response Team arrived soon after the call, wearing self-contained breathing apparatuses with oxygen tanks. (Tr. 87:6–9, 98:23–99:14, 129:16–25.) The miners previously working in the Washer Building ran out to the fire truck to help hoist the fire hose

---

168:15–170:2.) Rather, the permit allowed for one or the other, and the record indicates W.G. Yates had six fire extinguishers available. (Tr. 94:8–96:4, 168:15–170:2, 43:18–19.)

[9] The W.G. Yates contractors had been performing the cutting for about 30 minutes before the hot slag ignited the elbow section of the discharge pipe. (Tr. 76:21–77:2.)

[10] W.G. Yates previously replaced or leveled several shaker screens in the Washer Building without any resulting fire. (Tr. 77:3–9; 144:8–22.)

[11] The extinguishers were not intended to extinguish fires but merely to assist the miners in escaping in case of a fire. (Tr. 109:11–110:2.) The miners did not have access to any water nearby. (Tr. 60:10–17, 82:13–19, 84:19–86:12, 94:8–96:4, 168:15–20; Ex. R–4.)

[12] The Emergency Response Team works onsite with its own fire trucks and medical personnel and are trained "extensively" (Tr. 44:16–24, 105:24–111:11, 133:16–134:5) in rescue and recovery. (Tr. 44:16–24.)

towards the fire. (Tr. 152:11–152.) After helping the Emergency Response Team hoist the hose, the miners stayed outside because they were not trained to fight fires. (Tr. 110:6–111:19.) The Rescue Team discharged water into the belly pan which extinguished the fire. (Tr. 43:1–44:24.)

The fire persisted for approximately seventeen minutes (Tr. 43:14–24) and did not spread beyond the discharge pipe. (Tr. 87:19–22.) The fire did not cause illness or injury to any of the miners or rescuers. (Tr. 86:13–87:11, 93:19–94:1, 130:7–15, 115:19–9, 155:19–156:17.)

3. The Washer Building Fire Investigation

After the Emergency Response Team extinguished the fire, Inspector Deaton went to the third level of the Washer Building. (Tr. 22:20.) Inspector Deaton directed the fourteen miners at the scene to write statements of what they had observed. (Tr. 22:20–23:19, 45:17–18.) Inspector Deaton recorded his observations and took photos of the scene. (Tr. 23:22–23.)

In reviewing the miners' statements from his investigation, Inspector Deaton learned that one miner, Donovan Welch, left the building due to the heavy smoke. (Tr. 48:3–50:19, 69:4–15, Tr. 88:20–25, Ex. P–5.) Witness Johnnie Linwood O'Neal, Safety Specialist for Nutrien and acting Safety Manager on December 6, 2022 (Tr. 102, 105:24–108:22), also observed "a good amount of smoke, black smoke" coming from the Washer Building from about a quarter mile away. (Tr. 106:17–111:21.) O'Neal provided undisputed testimony at the hearing that "the blacker the smoke, the hotter the fire." (Tr. 110:6–112:23.)

Matt Roush, the Mechanical Superintendent for W.G. Yates, observed oxygen acetylene tanks sitting on the third floor right up against a hard barricade, about thirty-five feet from the discharge pipe, before they were moved when the fire occurred. (Tr. 162:10–163:16; Ex. R–5.) Inspector Deaton stated that a miner, Brad Lynd, deemed the tanks an explosion hazard and moved them approximately ten feet further away from the discharge pipe when the fire began. (Tr. 48:6–15, 51:23–54:2, 92:13–93:2, 121:20–122:9, 162:10–163:16; Exs. P–6, P–7, P–8.)

E. Issuance of Citation No. 9633680 and its Abatement

Based on his investigation, Inspector Bryan Deaton issued Citation No. 9633680 on December 7, 2023, in which he wrote the following:

> On December 6, 2022, at approximately 1122 hours an unplanned fire occurred on the third level of the washer building and no water source was available to fight the fire in its early stages or to cool the hot metal. A miner was using an oxygen acetylene cutting torch to cut a weld on the front right support leg of the #3 blue 14 mesh screen. During this work hot metal fell into the belly pan of the screen then entered a 90 degree elbow in the discharge pipe located below the screen. The 90 degree elbow was rubber lined and the hot metal ignited the rubber causing the unplanned fire. The fire produced heavy smoke and burned for approximately 17 minutes before it as extinguished by the onsite

> fire fighting team. Approximately 14 miners were working in the area at the time the fire occurred. This exposes a miner to a serious injury due to a heat source not being separated from combustible materials.

(Ex. P–1:1.)

To abate the citation, Respondent replaced the fire extinguishers and assisted in installing a water source that reaches all areas of the third floor of the Washer Building. (Tr. 60:10–17, 84:19–86:12, Ex. Inc. Rep. at 2.) Additionally, the burned elbow section of the discharge pipe was replaced. (Tr. 131:13–132:12, 159:1–12, 185:23–186:6.)

IV. ADDITIONAL FINDINGS OF FACT, PRINCIPLES OF LAW, ANALYSIS, AND CONCLUSIONS OF LAW

A. Violation of 30 C.F.R. § 56.4500 – Failure to Separate Heat Sources from Combustible Materials

The Secretary alleges that W.G. Yates violated section 56.4500, a mandatory safety standard requiring "[h]eat sources capable of producing combustion [to] be separated from combustible materials if a fire hazard could be created" when it failed to separate hot metal slag from the discharge pipe containing a rubber lining. (Sec'y Br. at 5–7 (quoting 30 C.F.R. § 56.4500).) Specifically, the Secretary alleges a team of W.G. Yates contractors cut a shaker screen's steel support beam with an oxygen acetylene torch about fifteen feet away from the discharge pipe. (Sec'y Br. at 6; Tr. 24:8–12, 27:21–24.) During this cutting process, hot metal slag fell into the belly pan of the shaker screen and then down into the discharge pipe below. (Tr. 25:2–9, 112:10–18.) The slag came into contact with the rubber lining of the elbow section of the discharge pipe, resulting in a black, smoky fire witnessed approximately three miles away from the Washer Building. (Tr. 17:22–19:7, 24:8–12, 27:21–24, 44:6–9, 68:14–69:2, 110:10–111:21, 120:1–14.)

The hot slag produced by the oxygen acetylene torch clearly qualifies as a heat source capable of combustion because the torch heated the solid steel support beam until the steel liquified and, according to site superintendent Roush, "[s]teel's got to get so hot to melt." (Tr. 24:11–25:9, 52:10–24, 162:10–14, 166:13–16.) Inspector Deaton testified that it is common knowledge that rubber is combustible, and it is also listed under MSHA's definition of combustible materials. (Tr. 31:11–20.) Inspector Deaton also testified that there was no screen or barrier between the belly pan and discharge pipe that would have prevented the hot slag from making contact with the rubber lining of the elbow section of the discharge pipe. (Tr. 30:24–31:10.)

W.G. Yates argues that the heat source and discharge pipe were separated and therefore section 56.4500 was not violated. (Resp't Br. at 14–15.) Specifically, W.G. Yates contends that the approximately fifteen feet between the W.G. Yates contractors cutting the steel support beam and the discharge pipe was a sufficient distance to constitute "separation" under section 56.4500. (Resp't Br. At 15.) W.G. Yates also asserts that a fire blanket was used in the cutting area to

contain any sparks or slag. (Resp't Br. at 15.) In the preamble to section 56.4500 MSHA clarified that it intended "'separated' to mean a heat source is either insulated or removed a sufficient distance from combustible material in the area so that it no longer constitutes an ignition source." Safety Standards for Fire Prevention and Control at Metal and Nonmetal Mines, 50 Fed. Reg. 4,022, 4,030 (Jan. 29, 1985.) Here, the heat source was clearly not insulated or removed a sufficient distance from the combustible material, as the hot slag made contact with the rubber lining of the elbow section of the discharge pipe, igniting the fire. (Tr. 29:16–20, 38:15–39:13, 62:13–63:22, 70:2–10, 98:12–22, 120:1–6.)

W.G. Yates claims that the rubber in the elbow section of the discharge pipe does not qualify as a "combustible material" under MSHA's definition. (Resp't Br. at 15-17.) MSHA defines combustible material as a "material that, in the form in which it is used and *under the conditions anticipated*, will ignite, burn, support combustion, or release flammable vapors when subjected to fire or heat." 30 C.F.R. § 56.2 (emphasis added). Thus, W.G. Yates argues that, because Nutrien did not know about the discharge pipe's rubber lining and did not notify W.G. Yates about it, the rubber lining of the discharge pipe was not reasonably likely to ignite "under the conditions anticipated." (Resp't Br. at 15–17.) W.G. Yates emphasizes that "[n]o one would anticipate that rubber lining in process piping would catch fire from nearby welding." (Resp't Br. at 17.)

However, as Inspector Deaton pointed out, the term "rubber" is specifically mentioned in MSHA's definition of "combustible materials" as an example of a combustible material. *See* 30 C.F.R. § 56.2 (emphasis added) ("[c]ombustible material means a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion, or release flammable vapors when subjected to fire or heat. Wood, paper, *rubber*, and plastics are examples of combustible materials"). Therefore, the rubber in the discharge pipe clearly qualifies as a combustible material under MSHA's definition because it released flammable vapors when subjected to the hot slag. (Tr. 29:16–20.) Here, there is no question of whether the rubber could create a fire hazard because a fire has already occurred. (Tr. 29:16–20.)

W.G. Yates also argues that compliance with section 56.4500 requires the combustible material to be locatable. (Resp't Br. at 17.) Specifically, W.G. Yates asserts that, since Nutrien did not inform them of the rubber lining and it "would have been almost impossible for it to be located without taking apart the piping system itself," compliance with the standard as interpreted by the Secretary would lead to absurd results. (Resp't Br. at 17.) However, "[u]nder section 110(a) of the Mine Act . . . the operator of a coal mine faces strict liability for any violation of a mandatory safety standard." *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 360 (D.C. Cir. 1997); *see, e.g.*, *Nally & Hamilton Enter.*, 38 FMSHRC 1644, 1650 (July 2016) (holding that "[b]ecause the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault"); *Asarco, Inc.–Nw. Mining Dep't v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989) (noting that "when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty"); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982) (noting that "[t]he legislative history of the predecessors to [section 820(a)] in the 1969 Act discloses that it was intended to provide for 'liability for violation of the standards against the operator without regard to fault' and concluding that "an operator may be liable without fault"); *Allied Products*

Co. v. FMSHRC, 666 F.2d 890, 893 (5th Cir. 1982) (noting that "the language of the [Mine] [A]ct . . . provides that any failure to comply with the regulations shall result in issuance of a citation to the operator [and t]here are no exceptions for fault, only harsher penalties for willful violations"). Thus, regardless of W.G. Yate's lack of knowledge of the rubber lining it can still be held liable under the Mine Act.

Based on the record, I determine W.G. Yates failed to separate a heat source capable of combustion, i.e., the hot slag produced from cutting the steel support beam with the oxygen acetylene torch, from a combustible material, i.e., the rubber lining inside the elbow section of the discharge pipe. Therefore, I conclude that the Secretary has met her burden of proving W.G. Yates violated section 56.4500.

B. Significant and Substantial Determination

Section 104(d)(1) of the Mine Act describes a S&S violation as a violation "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 USC § 814(d)(1). A violation is 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). To establish an S&S violation, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, 42 FMSHRC 379, 383 (June 2020) (citing *Newtown Energy*, 38 FMSHRC 2033, 2037–38 (Aug. 2016); *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted)); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming the application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* test).

I now analyze these elements of the *Mathies* test to determine if the violation is S&S.

1. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984). I determined W.G. Yates violated section 56.4500 because it failed to separate a heat source in the form of the hot slag created by the oxygen acetylene torch from a combustible material in the form of the rubber lining inside the elbow section of the discharge pipe. *See* discussion *supra* Part IV.A. As Inspector Deaton testified, if "hot sparks [go] down the belly pan, yes, it's reasonably likely to consider that they would contact it if you're putting hot material down

there." (Tr. 100:15–21.) Thus, I determine that the Secretary satisfied the first element of the *Mathies* test.

2. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard Is Directed

For the second *Mathies* element, the Secretary must establish that "based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016).[13] In assessing this element, "[t]he Commission defines the 'hazard' in terms of the prospective danger the cited safety standard is intended to prevent." *Id.* Section 56.4500 seeks to prevent fires. *See* 50 Fed. Reg. 4,022 (Jan. 29, 1985) ("adequate precautions to prevent fires from starting, and advance preparation for fire control should one start, are essential components of a mine's safety program"). Thus, I must determine whether under these particular circumstances, the violation (the failure to separate the hot slag from the discharge pipe's rubber lining) was reasonably likely to result to result in a fire.

W.G. Yates argues that the occurrence of the fire was not reasonably likely because (1) W.G. Yates preformed this identical task in identical circumstances in the same building five times before without any fires (Resp't Br. at 19; Tr. 144:8–22); (2) it was not reasonably likely for the hot slag to escape the fire blanket (Resp't Br. at 20; Tr. 70:6–10; 72:11–73:12, 145:5–146:1); (3) it was unlikely the hot slag would travel fifteen feet from the steel support beam to the discharge pipe (Resp't Br. at 20, Tr. 150:8–25, 153:4–154:23); (4) it was not reasonably likely the discharge pipe contained a rubber lining (Resp't Br. at 20; Tr. 147:2–148:3; and (5) it was not reasonably likely that the slag would ignite the rubber lining. (Resp't Br. at 19–21; Tr. 76:21–77:5).

W.G. Yates misconstrues the second *Mathies* element. The second *Mathies* element does not ask whether the violation itself was reasonably likely to occur. Rather, the "second step addresses the extent to which the violation contributes to a particular hazard." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Thus, the Secretary only needs to establish that there was a reasonable likelihood that when the slag made contact with the discharge pipe's rubber lining it would ignite the rubber lining and cause a fire, the hazard against which section 56.4500 is directed. Given the fact that the oxygen acetylene torch heated the metal to such a high temperature that "it becomes a liquid form," the slag it produced was likely extremely hot. (Tr. 52: 10–15.) Therefore, it was reasonably likely that the extremely hot slag's contact with the discharge pipe's rubber lining, which as previously established is combustible (*see* discussion *supra* Part IV.A), would ignite a fire. Moreover, the Commission has held that "the Secretary need not demonstrate that the mine's redundant—and required—safety measures are in a state of disrepair, or prove violations of other standards, in order to show that a violation involves a high degree of danger." *Am. Coal Co.*, 39 FMSHRC 8, 18 (Jan. 2017).

[13] I reject the Secretary's argument that the Commission's analysis of step two of the *Mathies* test in *Newton Energy* is inconsistent with the Mine Act's definition of S&S. (Sec'y Br. at 8.)

Based on Inspector Deaton's and Safety Specialist O'Neal's unrefuted testimony regarding the cause of the fire (Tr. 23:25–10, 29:13–20, 112:7–18, 120:1–6), I determine that the failure to separate the hot slag from the rubber lining of the discharge pipe created a reasonable likelihood of the occurrence of a fire, which section 56.4500 is designed to prevent. Thus, I determine the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed, and, therefore, the Secretary has satisfied the second element of the *Mathies* test.

3. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984). Thus, the Secretary must establish that based upon the particular facts surrounding this violation, the occurrence of a fire would be reasonably likely to result in an injury. Inspector Deaton testified that it was reasonably likely that smoke and toxic fume inhalation, burns, or injuries from falling could have occurred as a result of the fire in the discharge pipe. (Tr. 45:14–46:2, 60:3–23.)

In disputing this element of the *Mathies* test, W.G. Yates relies on the fact that no miners were injured as a result of the fire. (Resp't Br. at 22; Tr. 155:19–9). However, if Nutrien's Rescue Team had not arrived so expeditiously with proper training and equipment, W.G. Yates miners would have been reasonably likely to sustain injury. The Commission has noted that "[d]espite the existence of a fire brigade, a mine fire is still very dangerous, and the miners on the fire brigade themselves would be exposed to its dangers." *Am. Coal Co.*, 39 FMSHRC 8, 18 (Jan. 2017). Indeed, a lack of injuries during this fire does not preclude a finding of a reasonable likelihood of injury, as the Commission has found S&S violations when no injury occurred. *See Elk Run Coal Co*, 27 FMSHRC 899, 906 (Dec. 2005) (citation omitted) (concluding that "the absence of an injury-producing event when a cited practice has occurred does not preclude an S&S determination.); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987) (holding that "in order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event").

W.G Yates argues that smoke and toxic fume[14] inhalation from the fire was unlikely because the smoke rose directly upward (Tr. 151:17–24) from the discharge pipe and through the

[14] W.G. Yates argues that, because the Secretary did not include the potential injuries of toxicity from smoke and injuries from falling through open holes in her prehearing statement and Inspector Deaton did not include these potential injuries in his citation or field notes, I should not consider any testimony about these potential injuries or not give the testimony any weight. (Resp't Br. at 25.) However, W.G. Yates could have deposed Inspector Deaton ahead of the hearing and asked him about his rationale for determining the violation was S&S, but it chose not to do so. *See* 29 C.F.R. § 2700.56(b) ("[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence"). Therefore, I determine that the testimony regarding the potential injuries of toxicity from smoke and injuries from falling through open holes is admissible.

shaker screen on the third floor (Tr. 149:14–150:7) and then straight up out of the building towards the sky. (Tr. 58:4–9; Resp't Br. at 22–23.) Thus, W.G. Yates asserts that there was nothing that would cause the smoke to accumulate in the Washer Building. (Resp't Resp. at 5.) However, I must consider the likelihood of injury during normal, continuous mining conditions which could include different ventilation patterns, causing the smoke to drift. *See, e.g.*, *Knox Creek Coal Corp*., 36 FMSHRC 1128, 1132 (May 2014), *aff'd*, 811 F.3d 148 (4th Cir. 2016) (indicating that the ALJ erred when he took a "'snapshot' approach" to the S&S analysis). Additionally, Inspector Deaton testified that "the smoke produced from the rubber burning is a toxic fume. It can result in lung injuries." (Tr. 61:18 – 23.) Moreover, the Commission has previously determined "it is a 'common sense conclusion' that a fire would present a serious risk of smoke and gas inhalation to any miners who are present." *Am. Coal Co.*, 39 FMSHRC 8, 18 (Jan. 2017) (quoting *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995).

W.G. Yates also argues that there was no danger of burns, as the elbow section of the discharge pipe was not accessible to any employees. (Resp't Br. at 23–24.) Specifically, W.G. Yates notes the elbow section of the discharge pipe was barricaded off and even if a miner climbed over the barricade, they would have had to climb on top of a conveyor belt to reach the discharge pipe. (Resp't Br. at 23–24.) However, as W.G. Yates points out, "[i]t is common knowledge that smoke rises." (Resp't Br. at 9.) Thus, the heat from the fire in the elbow section of the discharge pipe likely rose to the top of the vertical section of the discharge pipe and belly pan on the third floor. Miners in the area immediately around the top of the drainage pipe, such as those attempting to put out the fire with the fire extinguishers, could have been burned if they inadvertently got too close to the area over the pipe.

Lastly, W.G. Yates disputes that the fire could cause the miners to fall through the openings in the third floor. (Resp't Br. at 25–26.) Specifically, W.G. Yates argues that the open holes in the third floor were barricaded to prevent anyone from falling into them. (Resp't Br. at 26.) W.G. Yates adds that if a miner somehow got around the barricades and stepped in them then their retractable yo-yo lanyards would stop their fall almost immediately. (Resp't Br. at 26.) Additionally, W.G. Yates disputes that the smoke caused limited visibility. (Resp't Resp. at 5.)

However, Inspector Deaton explained in his testimony that the fire produced a "thick, heavy, black smoke," and thus it could impair the miners' visibility and cause them to become disoriented and fall into the openings on the third floor or get a foot or leg stuck in these holes and be unable to expeditiously escape the smoky conditions. (Tr. 44:6–15, 45:18, 62:2–9.) Safety Specialist Johnnie O'Neal also testified to the "good amount of smoke, black smoke [that he saw] coming" from the Washer Building. (Tr. 111:16–21.) Even with the miners' fall protection, stumbling into the open grates could result in muscle strains, twisted ankles, or broken bones. A fallen miner could also reasonably present an obstacle to an escaping miner.

I determine it is reasonably likely that the fire could have resulted in a miner inhaling smoke and, or toxic fumes, enduring burns from the fire's heat, or falling into the openings in the third floor due to obscured vision from the thick, black smoke, thus satisfying the third element of the *Mathies* test.

4. Likelihood Resulting Injury Would Be of a Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury would be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 4 (Jan. 1984). An injury of a "reasonably serious nature" does not require a specific type of injury, and a mere muscle strain, sprained ligament, or fractured bone may be "reasonably serious." *S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element); *see also Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (reversing the ALJ's finding of non-S&S and concluding that a finger or a wrist fracture are "reasonably serious injuries").

Inspector Deaton determined that in the event of smoke inhalation, the resulting injury or illness would be of a reasonably serious nature due to the "thick, heavy, black smoke." (Tr. 45:11–18.) Additionally, O'Neal, who has worked as a safety specialist and a firefighter (Tr. 108:15–22, 112:19–22) testified that burning rubber can "really do a lot of damage." (Tr. 112:22–25.) W.G. Yates did not dispute Inspector Deaton's testimony that a miner continually exposed to this kind of smoke, "probably would have died up there. He would not have made it out." (Tr. 50:10–19.) Inspector Deaton explained that "[t]he smoke produced from the rubber burning is a toxic fume . . . it can be fatal if enough of it is taken into the human body." (Tr. 61:18–23.) O'Neal testified to the possible risks if the smoke were inhaled: "carcinogens, the studies that have been done on just anything that could be breathed in if you don't have the proper respirator or anything, so just [] smoke alone, it could be very toxic, not knowing what you're breathing." (Tr. 110:23–111:5.) Moreover, the Commission has previously upheld a Judge's finding that "the hazard of smoke and fire would reasonably result in an injury that could reasonably be expected to be severe or even fatal from smoke inhalation." *Big Ridge, Inc.*, 35 FMSHRC 1525, 1528 (June 2014); *see also Buck Creek*, 52 F.3d at 135 (finding "that in the event of a fire, smoke and gas inhalation by miners in the area would cause a reasonably serious injury requiring medical attention").

In addition to hazardous smoke inhalation, Inspector Deaton testified that the fire could have caused first, second, or third degree burns that could result in infection and fatality. (Tr. 61:3–12.) Inspector Deaton's statement is supported by O'Neal's testimony that he observed a significant amount of black smoke coming out of the Washer building and "the blacker the smoke, the hotter the fire." (Tr. 110:6–112:23.) As previously discussed, heat rises, so a miner hovering over the top of the discharge pipe could reasonably have suffered serious burns.

Inspector Deaton also testified to the likelihood of the thick smoke impairing the miners' vision such that the miners could have become disoriented and fallen through the openings in the floor "or their foot could have become lost in some of the other openings if they had retractable lanyards and they would not have been able to escape and they would have been overcome by the smoke in the fumes." (Tr. 62:2–9.) The Commission has previously affirmed a Judge's conclusion that a trip and fall can result in reasonably serious injuries. *See S. Ohio Coal Co.*, 13 FMSHRC 912, 918 (Jun. 1991) (affirming a Judge's conclusion that a trip and fall accident would result in injuries such as "sprains, strains, or fractures"). I conclude that a miner falling into the openings in the third floor could result in muscle strains, twisted ankles, or broken

bones, which are considered reasonably serious injuries. *See Original Sixteen to One Mine, Inc.*, 36 FMSHRC 2224, 2250 (ALJ) (2014) (upholding the Secretary's S&S determination that a miner was reasonably likely to suffer serious musculoskeletal injuries such as muscle strains, twisted ankles, or broken bones from falling into hole).

I determine that the inhalation of smoke and toxins, burns, and injuries from falls as a result of the fire are reasonably likely to result in a reasonably serious injury or fatality. For the same reasons, I affirm the Inspector's gravity determination as reasonably likely to result in fatal injury.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that the violation in Citation No. 9075606 is appropriately designated as S&S.

C. Negligence

The Commission evaluates the degree of negligence using "a traditional negligence analysis." *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Am. Coal Co.*, 39 FMSHRC at 14 (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers what actions a reasonably prudent person familiar with the mining industry would have taken under the same circumstances, the relevant facts, and the protective purpose of the regulation. *Id.* at 1702 (citation omitted). 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. *Brody Mining, LLC*, 37 FMSHRC at 1702.

Here, Inspector Deaton determined that W.G. Yates exhibited a "moderate" degree of negligence, meaning that "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances" that reduce the negligence level from high to moderate. (Ex. P–1; Tr. 59:2–12; Sec'y Resp. at 6.) Inspector Deaton based his negligence evaluation, in part, on his determination that more fire blankets should have been used in the cutting area on the third floor. (Tr. 59:19–25.) When asked on direct examination if there were any fire blankets in use when the cutting of the steel support beam occurred, Inspector Deaton stated that "[o]n the second level they had covered the conveyor belts with fire blankets." (Tr. 39: 7–11.)

During cross-examination, W.G. Yates pointed to Inspector Deaton's field notes stating that Josh Eastman told him a fire blanket was used around the cutting area. (Ex. R –2; Tr. 71:15–19, 72:6–73:12.) Site Superintendent Matthew Roush also testified that a fire blanket was used in the cutting area of the third floor. (Tr. 145:5–146:1.) Additionally, Damien Liles, a miner on the third floor, reported in a written statement that after he saw smoke, he "removed the

fire blanket and yelled fire." (Tr. 74:25–76:6.) Liles's statement was written immediately after the fire was extinguished as part of Inspector Deaton's investigation. (Tr. 22:17–23:19.)

Although Inspector Deaton testified he did not observe any fire blankets around the cutting area on the third floor during his investigation (Tr. 69:21–70:5), he later admitted on cross-examination that a fire blanket could have been removed from the cutting area during the firefighting. (Tr. 73:7–76:5.) Given the evidence before me, I credit the written statement of Liles—the miner on the third floor when the fire started—which is supported by Eastman's statement to Inspector Deaton as well as Roush's testimony at the hearing. (Ex. R –2; Tr. 72:6–73:12, 74:25–76:6, 145:5–146:1.) I credit this evidence of a fire blanket in use in the cutting area over the testimony of Inspector Deaton, who arrived on the third floor after the fire was extinguished, by which time items were likely moved. Thus, I determine that W.G. Yates placed a fire blanket in the cutting area.

However, I do not discredit Inspector Deaton's testimony and the Secretary's argument that, if the fire blankets were used properly, they would have covered the drainage hole in the belly pan and prevented the fire. (Tr. 38:15 –39:13, 69:21–70:1, 98:12–22; Sec'y Resp. at 3.) Although I find that a fire blanket was used in the cutting area, I agree with Inspector Deaton that the fact a fire occurred demonstrates the fire blanket(s) could have been used more effectively to prevent the hot slag from entering the belly pan's drainage pipe.

Inspector Deaton also stated that he assigned a moderate degree of negligence because W.G. Yates "should have done a little bit more due diligence" prior to cutting the steel support beam. (Tr. 59:19–25, 65:5–12.) Yet besides arguing a fire blanket should have been used, the Secretary did not introduce specific evidence to demonstrate that W.G. Yates acted in an unreasonable manner given what it knew at the time. Inspector Deaton admitted that pulling the elbow pipe apart to examine its interior would be extremely difficult, and only after the fire did someone come up with the idea to drop a Go Pro camera down the pipe to examine the interior of the elbow pipe to determine how the fire began. (Tr. 81:16–82:12, 97:10–21.)

W.G. Yates argues that it performed due diligence by retaining a hot work permit from Nutrien. (Resp't Br. at 6–7.) Nutrien owned all the equipment and structures in the Washer Building and was therefore in the best position to know if combustible material lined any of the pipes. (Tr. 147:17–148:6.) But Nutrien did not know the elbow pipe had a rubber lining (Tr. 59:2–12, 120:4–14, 126:9–14), so it indicated on the hot work permit that no combustible material existed within a thirty-five-foot radius of the cutting. (Tr. 80:8–81:7, 147:2–4; Ex. R–4.) Nothing in the record indicates Nutrien or W.G. Yates had reason to suspect that the elbow pipe contained combustible material. *Cf. DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3097 (Dec. 2014) (considering operator's objectively reasonable belief that it was not violating the standard in affirming the ALJ's negligence finding).

Inspector Deaton testified that in his experience it is not safe to send heat sources into an area "where you're not sure what's in the area." (Tr. 60:1–4.) (Sec'y Resp. at 7.) I agree with Inspector Deaton's cautionary statement. Yet the evidence educed at the hearing indicates that W.G. Yates performed due diligence by conducting its own inspection (Tr. 147:9–16) after obtaining the required hot work permit, which indicated there was not any combustible material

within thirty-five feet of the cutting area (Ex. R–4; Tr. 146:16–147:4), and placed a fire blanket on the third floor in the cutting area as well as fire blankets on the rubber conveyor belts on the second floor.[15] (Tr. 72:6–73:12, 74:25–76:6, 145:5–146:1.) Superintendent Roush also stated that W.G. Yates had done this cutting work several times before with no issues. (Tr. 144:1–145:4.) Although the Secretary acknowledges that W.G. Yates "conducted a pre-shift examination but did not discover the rubber lining or have knowledge of the contents of what was inside the pipes," I conclude that Inspector Deaton did not give enough weight to these mitigating factors when determining the level of W.G. Yates' negligence. (Sec'y Br. at 11.)

The Secretary argues that W.G. Yates "*deliberate* action of sending a heat source through pipes without knowing the combustibility of the pipes and the materials insides supports the [moderate] classification level." (Sec'y Resp. at 7 (emphasis added).) Similarly, the Secretary asserts that "the workers treated the belly pan and discharge pipe as a drain system to dispose of the hot metal and sparks from their oxygen acetylene torches." (Sec'y Resp. at 5.) However, the Secretary has not produced any evidence demonstrating that W.G. Yates was deliberately "shooting" or sending hot slag into the belly pan. (Sec'y Br. at 6; Sec'y Resp. at 4, 5.) Rather, the record indicates that the hot slag landed in the discharge pipe as an unintended consequence of cutting the steel support beam with the oxygen acetylene torch.

Upon considering the record as a whole, I determine W.G. Yates' use of a fire blanket in the cutting area to be a mitigating factor that Inspector Deaton did not properly consider in his determination of Respondent's level of negligence. I also determine that the Secretary did not give enough weight to the fact that W.G. Yates did not know about the rubber lining, even after conducting its own inspection, and the fact that W.G. Yates had no previous problems performing the same work on other parts of the same mine site. (Tr. 59:2–18, 77:3–9, 126:9–14, 144:8–22, 147:9–16, 168:6–20.) I also determine that there is no basis for the Secretary's conclusion that W.G. Yates deliberately shot hot slag into the belly pan. I therefore conclude that W.G. Yates' negligence is lower than initially determined by Inspector Deaton. On a continuum, I determine that W.G. Yates' negligence is somewhere less than moderate and closer to low. Therefore, I conclude that W.G. Yates' negligence is on the low end of moderate.

D. Penalty

The Secretary has proposed a penalty of $1,246.00. (Sec'y Br. at 11.) The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the

[15] On the day of the fire the building's water supply had been turned off. (Tr. 168:15–20.) Additionally, there was not a water source available on the third floor that could reach all parts of the floor. (Tr. 60:10–17, 82:13–19, 84:19–86:12.) However, the hot work permit did not require both a nearby water source and fire extinguishers when engaging in steel cutting. (Tr. 94:8–95:3, 168:15–170:2.) Rather, the permit allowed for one or the other, and the record indicates W.G. Yates had six fire extinguishers available. (Tr. 94:8–96:4, 168:15–170:2, 43:18–19.)

operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary argues that W.G. Yates is a large operator. (Sec'y. Br. at 12.) However, upon examining Exhibit A of the Penalty Petition and the criteria of Table V – Size of Independent Contractor in 30 C.F.R. § 100.3(b), I determine that W.G. Yates is well below the one million annual hours of a large operator, but rather falls somewhere in the middle. Thus, I conclude that W.G. Yates is a medium–sized operator. Regarding W.G. Yates's history of previous violations, in the fifteen months preceding the issuance of this citation, MSHA issued five non-S&S violations of safety and health standards that became final orders of the Commission to W.G. Yates. (Ex. P–9.)

The Secretary argues that W.G. Yates's negligence was moderate since W.G. Yates conducted a pre-shift examination but did not discover the rubber lining or have knowledge of what was inside the discharge pipe. (Sec'y Br. 13.) The Secretary argues that W.G. Yates' negligence was moderate and not low, because it did not use a fire blanket appropriately in the cutting area and it deliberately discharged the metal slag from cutting the steel support beam into the belly pan. (Sec'y Resp. at 3–5.) However, as described above (*see* discussion *supra* Part IV.C), testimony at the hearing, a miner's statement written immediately after the incident, and Inspector Deaton's own field notes, establish that a fire blanket was used in the cutting area. (Ex. R–2; Tr. 71:15–19, 72:6–19, 75:1–25, 141:19–22, 145:5–146:1.) Moreover, as I concluded above (*see* discussion *supra* Part IV.C), the Secretary has not produced any evidence demonstrating W.G. Yates intentionally sent hot metal slag into the belly pan. Considering these mitigating circumstances, I determine W.G. Yates exhibited a lower level of moderate negligence.

"In the absence of proof that the payment of civil penalties would adversely affect a company's ability to stay in business, it is presumed that there would be no such effect." *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 n.14 (7th Cir. 1984). As W.G. Yates has not alleged that the proposed penalty would adversely affect its ability to continue in business, I presume that it will not. I determined the gravity of the violation to be S&S with the number of persons affected to be one,[16] the likelihood of injury as reasonably likely, and the expected severity as fatal. Finally, W.G. Yates demonstrated good faith in attempting to achieve rapid compliance when it assisted in installing a water source for the third floor of the Washer Building as well as replenishing the fire extinguishers. (Ex. Inc. Rep. at 2; Tr. 60:10–18, 84:19–85:23.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $800.00.

[16] Inspector Deaton explained that he designated one person at risk of injury because "I felt it was a fair assessment . . . I could have put 14 there but I chose to be fair and only use one." (Tr. 58:15–59:1.)

V. ORDER

In light of the foregoing, I hereby **ORDERED** that Citation No. 9633680 is **AFFIRMED** as written.

Respondent W.G. Yates & Son's Construction Company is hereby **ORDERED** to **PAY** a penalty of $800.00 within 40 days of this decision.[17]

Alan G. Paez
Administrative Law Judge

Distribution: (Via U.S. Mail and Electronic Mail)

John O. Gainey, Esq., & Melanie A. Stratton, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, S.W.,
Room 7T10, Atlanta, GA 30303-8816
(gainey.john.o@dol.gov)
(melanie.stratton.a@dol.gov)
(atl.fedcourt@dol.gov)

McCord Wilson, Esq., Rader and Campbell, P.C., 2777 N. Stemmons Freeway, Suite 1125, Dallas, TX 75207-2505
(mwilson@radercampbell.com)
(abeeler@radercampbell.com)

/MEK

[17] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.