

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

GMS MINE REPAIR,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2014-27  
A.C. No. 11-03193-333379 (MVK)

Docket No. LAKE 2014-178  
A.C. No. 11-03193-339876 (MVK)

Docket No. LAKE 2014-115  
A.C. No. 11-03193-337266 (MVK)

Mine: Lively Grove Mine

## DECISION AND ORDER

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

William C. Means, Esq., GMS Mine Repair, Bruceton Mills, West Virginia,  
for Respondent.

Before: Judge Paez

This case is before me upon the petitions for assessment of a civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, (“Mine Act”), 30 U.S.C. § 815(d). In dispute are four section 104(a) citations issued to GMS Mine Repair (“GMS” or “Respondent”) at the Lively Grove Mine. To prevail, the Secretary must prove his charges “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

### I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned to me Docket Nos. LAKE 2014-27, LAKE 2014-115, and LAKE 2014-178, and I consolidated them for hearing. The

Secretary initially charged GMS with a total of seven section 104(a) citations. The parties settled two of the seven citations, and I issued a Decision Approving Partial Settlement on January 20, 2015. Respondent subsequently requested to withdraw its contest of a third citation, and on January 30, 2015, I issued an Order Granting Motion to Withdraw Contest disposing of that citation. Thus, four section 104(a) citations remain at issue.

Docket No. LAKE 2014-27 involves two citations. First, Citation No. 8444102 alleges a violation of 30 C.F.R. § 72.630(b) for failing to maintain the dust collection system of a roof bolting machine. Second, Citation No. 8444104 alleges a violation of 30 C.F.R. § 75.362(a)(2) for failing to conduct a proper on-shift examination of the roof bolting machine. The Secretary designated each of the alleged violations as significant and substantial (“S&S”)<sup>1</sup> and as a result of GMS’s moderate negligence. The Secretary proposes a total penalty of \$5,802.00 for this docket.

Citation No. 8443658 in Docket No. LAKE 2014-178 alleges a violation of 30 C.F.R. § 75.606 for failing to protect a trailing electrical cable from damage. The Secretary designated the violation as S&S and as a result of GMS’s moderate negligence. The Secretary proposes a penalty of \$5,080.00 for this citation.

Lastly, Citation No. 8443659 in Docket No. LAKE 2014-115 alleges a violation of 30 C.F.R. § 75.202(a) for insufficiently supporting the mine roof by failing to secure sulfur balls, which are mine roof irregularities. The Secretary designated the violation as S&S and as a result of GMS’s moderate negligence. The Secretary proposes a penalty of \$1,412.00 for this citation.

After proper notice to the parties, I held a hearing in Evansville, Indiana. The Secretary presented testimony from Inspectors Randy G. Henry and Shane M. Gilpin. GMS presented testimony from GMS Mine Coordinator Phillip Kittinger. The parties each filed post-hearing briefs and the Secretary filed a reply brief on April 6, 2015.<sup>2</sup>

## II. ISSUES

The Secretary argues that the conditions noted in each of the four citations were properly cited as violations and that the allegations underlying the citations are valid. (Sec’y Br. at 25.) In response, GMS denies each violation, arguing that the Secretary has failed to meet his burden of proof for each citation.<sup>3</sup> (Resp’t Br. at 6.)

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<sup>1</sup> The S&S terminology is taken 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.”

<sup>2</sup> In this decision, the hearing transcript, the Secretary’s exhibits, and GMS’s exhibits are abbreviated as “Tr.,” “Ex. G-#,” and “Ex. R-#,” respectively. The parties also admitted a list of stipulations in a joint exhibit, which was admitted as “Ex. Jt.-#.”

<sup>3</sup> GMS argues that Citation No. 8444102 and Citation No. 8444104 are duplicative citations based on the same facts. GMS contends that it should have been cited only once, if at all, for either a violation of 30 C.F.R. § 72.630(b) or 30 C.F.R. § 75.362(a)(1). However, the two

Accordingly, the following issues are before me: (1) whether, for each citation, the Secretary proved that GMS violated a mandatory safety or health standard at Lively Grove Mine; (2) whether the Secretary proved that each alleged violation was S&S; (3) whether the Secretary proved that GMS acted with moderate negligence regarding each violation; and (4) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, I **AFFIRM** Citation Nos. 8444102, 8444104, 8443658, and 8443659, as written.

### **III. FINDINGS OF FACT**

Lively Grove Mine is an underground, room-and-pillar coal mine located in Washington County, Illinois. GMS is an independent contractor that provides underground maintenance and contracting services to coal mine operators, including Prairie State Generating Company ("Prairie State"), owner of Lively Grove Mine. (Tr. 55:5–56: 6.) Work at the Lively Grove Mine was divided into three shifts, a first shift during the day, a second shift in the evening, and a third shift also called the "midnight" shift. (Tr. 98:16–21, 107:24–108:7.) Miners from GMS staffed the day and evening production shifts. (Tr. 98:16–21.) Prairie State's own employees worked during the midnight shift, a maintenance shift where no coal is produced. (*Id.*)

Like in all underground coal mines, miners at the Lively Grove Mine may be exposed to a number of potential hazards from roof falls and rib bursts to mining-related respiratory illnesses and accidents involving power machinery.

The coal mining process extracts coal deposits that exist in layers between rock strata. Removing the coal seam may expose dangerous irregularities in the mine roof, such as sulfur balls. (Tr. 173:16–174:8.) Sulfur balls, which are also referred to as kettle bottoms and carbonate nodules, are dense, spherical irregularities in the rock layer. (Tr. 173:11–174:8.) When cut through, sulfur balls often appear different from the surrounding rock. (Tr. 173:21–174:14.) Because sulfur balls are irregularities in the rock strata, they may separate from the mine roof and fall suddenly, particularly when the roof is made of weaker material like shale. (Tr. 174:15–22, 175:9–21.) Due to the risk of sulfur balls falling on miners, MSHA requires operators to install additional support for these roof anomalies. (Tr. 176:9–25.) Prairie State's roof control plan specifies that exposed sulfur balls must be supported with wire mesh or a metal plate across the exposed anomaly. (Tr. 176:16–20, 203:14–19.)

At the Lively Grove Mine, the machinery used to install roof bolts produces dust that, if inhaled, can contribute to respiratory illnesses. (Tr. 38:22–25, 64:4–14.) Dust containing quartz can lead to the development of silicosis, a deadly lung disease. (Tr. 34:12–16.) Given this danger, MSHA requires the quartz content of respirable dust in a working area to be no greater than five percent. (Tr. 53:17–54:5.) MSHA further requires all roof bolting machines to be equipped with dust control mechanisms such as air vacuums and dust filters before the machines

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standards impose separate and distinct duties—in a nutshell, monitoring versus maintaining. Because these violations may have arisen due to the same event is not dispositive. *Cumberland Coal Res., LP*, 28 FMSHRC 545, 553 (Aug. 2006); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993).

are permitted into a mine. (Tr. 55:24–56:6); *see* 30 C.F.R. § 72.630(b). As part of this requirement, operators must regularly inspect the dust suppression systems on the mine’s machinery to ensure the devices are working properly. (Tr. 63:24–64:14.) At the Lively Grove Mine, GMS conducted on-shift examinations of Prairie State’s equipment during the first and second shifts. (Tr. 98:4–21, 55:22–56:6.) GMS also bore responsibility for maintaining and repairing the roof bolting machine during its shifts. (Tr. 55:22–56:6.)

Additionally, underground mining takes place with permissible machinery powered by electricity which presents a potential electrocution risk to miners, particularly those handling the wiring for energized machinery. (Tr. 163:17–164:8.) Examinations to detect cuts in power or trailing cables are thus important for safety. Most miners at the Lively Grove Mine do not wear the kind of work gloves that would protect them from potential electrocution. (Tr. 166:5–11.)

#### IV. PRINCIPLES OF LAW

##### A. Significant and Substantial

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) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

In providing guidance for the application of the *Mathies* test, the Commission has observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present a measure of danger.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (citing *Nat’l Gypsum*, 3 FMSHRC at 827). The Commission has further indicated that the correct inquiry under the third element of *Mathies* is not whether there must be a reasonable likelihood that the violation will cause injury, but “whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). Evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The Commission has noted that “an inspector’s judgment is an important element” in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). Finally, the Commission has adopted a presumption that the violation of a respirable dust standard is S&S. *See Consolidation Coal Co.*, 8 FMSHRC 890, 898–99 (June 1986), *aff’d*, 824 F.2d 1071 (D.C. Cir. 1987).

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

### **A. Citation No. 8444102 – Drill Dust Controls**

#### **1. Further Findings of Fact**

Inspector Henry visited Lively Grove Mine on August 26, 2013, to collect quarterly respirable dust samples. (Tr. 21:6–24.) Henry had more than 35 years of experience in the mining industry working as a miner and an MSHA inspector. (Tr. 20:14–19.) Henry’s training included MSHA certification as a respirable dust sampler and in respirable dust maintenance and calibration. (Tr. 20:3–13.)

After examining the mine’s pre-shift and on-shift examination books, Henry traveled into the mine with Prairie State’s safety technician, Kim Morgan. (Tr. 22:7–16, 24:8–14.) At the working section, Henry found two miners using a RRI double boom Fletcher roof bolter. (Tr. 27:9–14, 28:2–10.) The roof bolter, which had previously received certification from MSHA for use in the mine, contained a dust control system whereby vacuums sucked in and filtered out dust produced from drilling into the mine roof. (Tr. 41:3–10, 32:16–34:10, 39:1–2.) The roof bolter had two drilling mechanisms, one on the left side of the machine and a second on the right side. (Tr. 28:20–29:2.) Accordingly, the roof bolter also had a separate dust collection system for each side. (Tr. 38:8–11, 41:16–25.)

Inspector Henry began by examining the left-hand side of the machine. (Tr. 29:22–30:3.) First, he measured the suction strength of the left-hand vacuum and examined the exterior hoses and fittings. (Tr. 29:6–30:3.) There, Henry discovered a hole in a vacuum-hose fitting that emitted an audible suction sound. (Tr. 42:4–20.) Although the leak was audible, Henry did not see dust kicking out of the hole, and the vacuum’s suction strength was still above the regulatory minimum. (Tr. 39:7–40:23; Ex. G–3 at 26.) Henry continued his check of the left side of the machine and was surprised to find dust inside the left-hand muffler, which is the exit point from the system. (Tr. 30:20–31:6, 31:21–32:15.) The muffler is located on the clean side of the machine, past the system’s dust filters, so drill dust should not be present in the muffler. (Tr. 31:25–32:15, 34:4–16.)

Inspector Henry then opened the left side’s dust collection system to see if the filters were functioning properly. (Tr. 34:23–35:2.) There, he discovered that the wing nut attaching the filter had not been completely tightened. (Tr. 35:1–10.) A loosely installed filter could fail to seal properly, leaving a gap through which dust could escape. (Tr. 35:20–22.) Henry was able to tighten the wing nut two full revolutions by hand. (Tr. 35:13–22.) Henry subsequently removed the filter and found loose, dry drill dust behind the filters. (Tr. 35:24–36:4.) Dust located behind the filter would be free to evacuate into the air, exposing miners to respirable quartz. (Tr. 36:5–11.) Based on the amount of visible dust behind the filters and the extent of the dust contamination in the system, Henry estimated that the contamination had persisted for at least one shift, and probably multiple shifts. (Tr. 36:14–37:2.) Using a small kit Henry designed himself, the inspector collected a sample of the dust from inside the muffler and behind the filter. (Tr. 37:6–12, 44:25–45:7.)

Inspector Henry then examined the right side of the roof bolter, first checking the suction hoses and muffler before examining the internal components. (Tr. 43:2–20.) When Henry examined the right-side muffler, he again found drill dust on what should be the clean side of the machine. (Tr. 43:13–17.) Henry discovered that the wing nut attaching the right-side dust filter was also loose, as he was able to tighten the nut by three full rotations. (Tr. 44:8–18.) After removing the filter, Henry again found drill dust contamination behind the filter, on the clean side of the filtration system. (Tr. 44:25–45:13.) Henry similarly took a sample of the dust found in the right side of the machine. (Tr. 45:17–24.)

Based upon his observations, Inspector Henry issued Citation No. 8444102. The condition and practice section states:

The company is not maintaining the dust collection system on the [No.] RR1 double boom Fletcher roof bolter, in unit [No. 3] North panel, MMU 007-0 in a permissible and operating condition. When the dust parameters were inspected for the roof bolter, drill dust was discovered behind the dust filters and dust was visible in the exhaust mufflers. There was also a suction hose fitting damaged and leaking on the left side. This roof bolter is located at cross-cut [No.] 66 in entry [No.] 11.

(Ex. G–1.) Henry marked the citation as S&S and indicated that two miners were likely to be affected. (*Id.*) He determined that this violation was reasonably likely to result in a permanently disabling injury due to Respondent’s moderate negligence. (*Id.*) MSHA proposed a penalty of \$2,901.00 for this violation. The lab results for the sample Inspector Henry submitted for analysis showed a quartz content of 10.7 percent, which is above the 5.0 percent limit for quartz in respirable dust samples. (Ex. G–4; Tr. 53:12–54:6.)

GMS abated the violation by replacing the damaged suction hose and purging the dust collection system to remove any accumulated quartz. (Tr. 62:23–63:19; Ex. G–1 at 2.)

## **2. Analysis and Conclusions of Law**

Section 72.630(b) requires, “Dust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33 . . . are permissible dust collectors for the purpose of this section.” 30 C.F.R. § 72.630(b). According to Part 33 of the Secretary’s regulations, to be permissible, dust collectors must conform to the requirements of Part 33 and receive a certificate of approval to that effect. 30 C.F.R. § 33.2(a). MSHA issues certificates of approval only to dust collection systems as a whole. *See* 30 C.F.R. § 33.9. Therefore, a dust collection system must be maintained as initially approved by MSHA for the system to be permissible. Second, section 72.360(b) requires mine operators to maintain dust collection systems in “operating” condition. 30 C.F.R. § 72.630(b). As I determined when I previously examined this same regulatory provision, “[t]he plain use of the word ‘operating’ is synonymous with ‘functional,’ a word defined as ‘performing or able to perform its regular function.’” *Liggett Mining, LLC*, 33 FMSHRC 1702, 1714 (July 2011) (ALJ) (citing *Webster’s Third New Int’l Dictionary* (Unabridged) 921, 1581 (2002)).

In other words, the Secretary may demonstrate a violation of section 72.630(b) by proving either that: (1) the dust collection system was not maintained as it had been approved; or (2) the dust collection system was not able to perform its regular function, i.e., the system was not functioning regularly.

**i. Violation of 30 C.F.R § 72.630(b)**

The parties acknowledge that the cited roof bolter had received certification from MSHA. To demonstrate a violation of 30 C.F.R. § 72.630(b), the Secretary must prove either (1) the cited machine was not maintained in permissible condition, or (2) the dust collection system was not functioning regularly. The Secretary asserts that the drill dust found in the muffler and on the clean side of the dust filtration system shows GMS violated the standard. (Sec’y Br. at 16.) In contrast, GMS contends the roof bolter was maintained in permissible and operable condition. (Resp’t Br. at 3–4.) GMS asserts that the Secretary failed to produce sufficient evidence to show the roof bolter was not functioning as designed because the visible dust discovered on the clean side of the filtration system has no relevance to the violation. (*Id.* at 4.) Rather, GMS contends only air samples of respirable dust would provide sufficient evidence of a violation. (*Id.*)

In issuing the citation, Inspector Henry found several problems with the roof bolter. First, he discovered a hole in the vacuum suction fitting large enough to be audible when the roof bolter was running. (Tr. 42:8–20.) Henry further found the filters were installed too loosely, allowing dust to escape the filters. (Tr. 35:1–10, 44:8–18.) More critically, Henry found dust in the mufflers and behind the filters on both the left- and right-side dust collection systems. (Tr. 38:12–19, 44:25–45:13.) Inspector Henry credibly testified that the drill dust he found indicated the clean side of the dust control system had been contaminated throughout. (Tr. 38:12–25.) Once the clean side of the system becomes contaminated, the roof bolter expels dust into the air as if no filter were present. (Tr. 39:1–6.) Indeed, the dust samples he collected from the clean side of the filter showed quartz concentrations of 10.7 percent, more than double the maximum permissible level of 5 percent. (Ex. G–4; Tr. 53:12–21.)

Respondent provides no evidence to suggest the roof bolter was functioning as designed. Instead, GMS asks me to disregard the dust samples that Henry collected and deem the Secretary’s evidence insufficient. (Resp’t Br. at 4.) Respondent fails to cite to any legal precedent suggesting MSHA must collect respirable dust samples to prove a violation of section 72.630(b). To the contrary, the D.C. Circuit has found that a respirable dust sample is not necessary to find a violation of a related section of the same regulation. *Jim Walter Resources, Inc. v. Sec’y of Labor*, 103 F.3d 1020, 1024 (D.C. Cir. 1997) (recognizing that respirable air samples are not a prerequisite for determining whether 30 C.F.R. § 72.630(a) has been violated). Commission Judges have similarly found violations of section 72.630(b) without respirable dust samples. *See Genwal Res., Inc.*, 27 FMSHRC 580, 589 (Aug. 2005) (ALJ); *Tri County Coal, LLC*, 34 FMSHRC 3255, 3275 (Dec. 2012) (ALJ).

Given Inspector Henry’s extensive mining experience and training as a dust control specialist, I give significant weight to his testimony and find his dust sample method credible. Accordingly, I find that the roof bolter was expelling drill dust into the air, and that the dust discovered on the clean side of the filter was representative of the dust expelled. *Cf. Tri County*

*Coal*, 34 FMSHRC at 3275 (ALJ) (“If visible dust could bypass the filters, certainly invisible respirable dust could also bypass the filters and would have been exhausted into the mine atmosphere.”). MSHA would not approve as permissible a dust collection system that allowed dangerously high levels of silica to enter the mine’s air. I therefore determine that the Secretary proved the roof bolter was not being maintained in permissible and operating condition, as the dust collection system was not functioning regularly to remove the drill dust from the air.

Given the Secretary has satisfied both elements of a violation, I conclude that GMS violated 30 C.F.R. § 72.630(b).

**ii. Gravity and S&S**

GMS’s violation of 30 C.F.R. § 72.630(b) satisfies the first element of the *Mathies* test. As to the second element, the presence of visible amounts of dust containing 10.7 percent quartz on the clean side of the filter corroborate Inspector Harris’s determination that the expulsion of this drill dust into the mine air would expose miners to hazardous amounts of respirable silica dust capable of causing silicosis. (Tr. 34:12–16, 38:22–25, 59:14–19.) Accordingly, I determine that the second element of the *Mathies* test is also satisfied.

For the third *Mathies* element, the Secretary asserts that the high level of quartz present in the dust sample makes it reasonably likely that a miner exposed to the roof bolter’s exhaust could suffer an injury. (Sec’y Br. at 16–17.) *Cf. Consolidation Coal*, 8 FMSHRC at 899–90 (adopting presumption of S&S, inasmuch as there is a reasonable likelihood the health hazard contributed to will result in an illness, where Secretary proves a respirable dust violation based on samples). GMS contends, however, that the Secretary failed to show an injury was reasonably likely to occur because no miners were working in the roof bolter’s exhaust. (Resp’t Br. at 4.) In support, GMS points to the mine’s ventilation plan, which was designed to carry dust away from the miners. (Resp’t Br. at 4; *See Ex. R–2*.) Yet GMS’s own witness, Mine Coordinator Kittinger, acknowledged that several miners would normally work downwind of the roof bolting machine, including the operators of a continuous miner and a coal scoop. (Tr. 115:8–17.) Also, Inspector Henry unequivocally testified that the two roof bolt operators would be exposed to expelled drill dust as a result of the violation because, due to the location of the back of the machine, the dust leaving the machine’s exhaust was being expelled into the intake air and “going over” the roof bolt operators as air flowed from the intake to the return. (Tr. 66:15–22; Tr. 111:3–20). Based on this evidence, I determine that, given continued mining operations, it is reasonably likely that at least two miners would have been exposed to respirable silica dust, resulting in injury.

Finally, even modest amounts of silica dust can cause silicosis, a deadly respiratory disease. (Tr. 91:4–13.) Therefore, the Secretary has satisfied the fourth *Mathies* element. Based on the evidence before me, I determine that all four *Mathies* elements have been satisfied, and I conclude that Citation No. 8444102 is appropriately designated as S&S.

**iii. Negligence**

Inspector Henry marked GMS’s negligence as moderate. Given the audible hole in the vacuum hose and the extent of the dust throughout the clean side of the roof bolter’s dust control



system, Henry believed the violative condition was obvious and should have been discovered in GMS's on-shift examination of the equipment. (Tr. 36:12–37:2, 42:10–20.) Henry felt the amount of drill dust he discovered took at least one shift to accumulate and likely longer. (Tr. 64:15–65:9.) Nevertheless, Henry credited GMS for previously conducting an on-shift examination of the roof bolting machine and considered this a mitigating factor, even though he found the examination was insufficient. (Tr. 60:20–61:20; Tr. 66:25–67:5.) Given the evidence before me, I agree with Henry's determination and conclude that Citation No. 8444102 was the result of Respondent's moderate negligence. I hereby affirm Citation No. 8444102 as written.

## **B. Citation No. 8444104 – On-Shift Examination**

### **1. Further Findings of Fact**

Inspector Henry met with GMS's Phillip Kittinger to discuss the problems Henry had found with the roof bolter. (Tr. 60:22–61:20.) Although Kittinger informed Henry that GMS's face boss had conducted an on-shift examination of the roof bolter, the examiner had failed to identify either the hole in the suction tube or the drill dust contamination. (Tr. 64:15–65:9.) Given the amount of dust in the dust filtration system's exhaust and the audible hose leak, Henry believed GMS should have discovered both problems in the last on-shift examination. (Tr. 65:2–9.) In light of these observations, Henry issued Citation No. 8444104:

The contractor shall conduct an on[-]shift examination to assure compliance with the respirable dust control parameters specified in the min[e] ventilation plan. The contractor performed an inadequate on[-]shift exam of the [No.] RR1 double boom Fletcher roof bolter located in unit [No. 3] North panel at cross-cut [No.] 66, entry [No.] 11. When an inspection of the roof bolter was performed it was discovered that there was still drill dust behind the filters and contaminating the exhaust and there was also a suction fitting damaged and leaking.

(Ex. G–2.) Henry designated the citation as S&S and indicated that two miners were likely to be affected. (*Id.*) He determined that this violation was reasonably likely to result in a permanently disabling injury. (*Id.*) Henry considered Respondent's negligence to be moderate because the operator had conducted an on-shift examination, but the examination had been merely cursory. (Tr. 65:6–9, 66:23–67:11.) MSHA proposed a penalty of \$2,901.00 for this violation.

### **2. Analysis and Conclusions of Law**

Section 75.362(a)(2) requires a mine operator to: (1) conduct an examination of the mine's respirable dust control parameters specified in the mine ventilation plan; and (2) correct any deficiencies in the dust controls before production begins or resumes. *See* 30 C.F.R. § 75.362(a)(2).<sup>4</sup> In addition to specific items, the examination must include "any other dust

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<sup>4</sup> At the time the citation was issued, section 75.362(a)(2) provided, in pertinent part: "A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan . . . . Deficiencies in

suppression measure required by the ventilation plan.” (*Id.*) Therefore, the Secretary may demonstrate a violation of section 75.362(a) by proving the operator either (1) did not examine a dust suppression measure required in the ventilation plan or (2) did not correct a problem with a dust suppression measure.

The Commission has recognized that workplace examinations are “of fundamental importance in assuring a safe environment underground.” *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995); *see also* 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) (“The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine’s ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.”). Indeed, the Commission has upheld S&S violations for inadequate pre-shift and on-shift examinations even where actual hazards were not detected. *See Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006); *Buck Creek Coal Co.*, 17 FMSHRC 8 (Jan 1995).

**i. Violation of 30 C.F.R. § 75.362(a)(2)**

GMS contends that its face boss, Jamie Jones, conducted an on-shift examination of the roof bolter, satisfying the requirements of section 75.362(a)(2). (Resp’t Br. at 2.) In contrast, the Secretary contends that GSM’s on-shift examination, if performed, was inadequate because Respondent failed to notice the problems Inspector Henry discovered. (Sec’y Br. at 17–18.)

The ventilation plan for the Lively Grove Mine requires GSM to inspect the roof bolter’s dust collection system as part of the on-shift examination, including “dust box doors, door gaskets, latches, *filter*, *muffler*, dump skirt, and *vacuum* on the head.” (Ex. R–1 at 5(a) (emphasis added).) When Inspector Henry examined the roof bolter’s dust control system, he found an obvious hole in the vacuum tube, two dust filters incorrectly installed, and drill dust improperly accumulating in the mufflers and behind the filters on the clean side of the dust control system. (Tr. 42:8–20, 35:1–10, 44:8–18, 38:12–19, 44:25–45:13.) I have already determined that these problems constituted a dust control violation. *See* discussion, *supra*, Part V.A.2.i. GSM failed to note any of these problems in its on-shift examination of the roof bolter’s dust collection system, let alone fix the conditions prior to resuming work with the roof bolter.<sup>5</sup> GSM did not call Jamie Jones to discuss his on-shift examination of the roof bolter’s dust collection system.

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dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and other control device placement, and any other dust suppression measures required by the ventilation plan.” 30 C.F.R. § 75.362(a)(2) (Apr. 2012).

<sup>5</sup> Respondent points to the testimony of Inspector Henry to support its position that GSM complied with section 75.362 by performing the required on-shift examination. (Resp’t Br. at 2.) Yet Respondent’s argument misrepresents the nature of Henry’s testimony. Although Henry credited GSM’s assertion that a miner had performed an on-shift examination, the MSHA inspector clearly felt the examination was not sufficiently thorough. (Tr. 61:11–20, 64:9–65:9.) Moreover, section 75.362(a)(2) requires more than a mere check of the dust control equipment; it also requires the operator to fix any problems with the equipment. 30 C.F.R. § 75.362(a)(2).

By failing to identify and fix the improperly installed filters, as well as the hole in the left-side vacuum hose, GMS did not correct problems with the roof bolter's dust collection system. Even if GMS's Jamie Jones examined the machine, the Secretary has thus proved the second element of a violation of section 75.362(a)(2). I therefore conclude that GMS violated 30 C.F.R. § 75.362(a)(2) by not conducting a proper on-shift examination of the roof bolter.

## ii. Gravity and S&S

GMS's violation of 30 C.F.R. § 75.362(a)(2) establishes the first *Mathies* element. As Inspector Henry noted, the operator's failure to find and fix the problems with the roof bolter's dust control system resulted in miners being exposed to respirable silica dust. (Tr. 90:17–91:16.) Thus, the Secretary has satisfied the second *Mathies* element. Because the roof bolter operators and any miners working downwind of the roof bolter were exposed, it is reasonably likely that they would inhale the silica dust, which in turn can cause silicosis. The Secretary has therefore satisfied the third element of the *Mathies* test. See discussion, *supra*, Part V.A.2.ii. Regarding the fourth element, as noted above the injury likely to result from exposure to respirable dust is silicosis, a dangerous lung disease. See *id.* Given that the Secretary has proven all four *Mathies* elements, I conclude that the Secretary properly designated Citation No. 8444104 as S&S.

## iii. Negligence

The Secretary asserts that this violation of the on-shift examination requirements was the result of GMS's moderate negligence. (Sec'y Br. at 18.) Inspector Henry marked GMS's negligence as moderate because he believed an on-shift examination, although inadequate, did take place. (Tr. 60:20–25.) As previously discussed, I have already found GMS's negligence for the underlying violation—Citation No. 8444102—to be moderate. See discussion, *supra*, Part V.A.2.iii. Considering all the evidence before me, I conclude that Citation No. 8444104 was the result of Respondent's moderate negligence. I hereby affirm Citation No. 8444104 as written.

## C. Citation No. 8443658 – Protection of trailing cables

### 1. Further Findings of Fact

Inspector Gilpin conducted a general E01 inspection at the Lively Grove Mine on September 11, 2013. (Tr. 127:15–24.) Prairie State's compliance officer, Rich Baker, accompanied Gilpin during the inspection. (Tr. 129:4–12.) On the active section, Gilpin examined the mine's feeder, a large machine that breaks coal into smaller pieces and feeds it onto the mine's conveyor belt. (Tr. 131:7–13, 132:21–133:20.) The feeder continually sprays water to suppress dust created by crushing and transferring coal. (Tr. 133:8–20.) Although the feeder generally remains stationary during mining, Prairie State typically moved the equipment once a week during its maintenance shift as coal production advanced deeper into the Lively Grove Mine. (Tr. 155:24–157:10, 167:7–13.) The feeder, which is self-propelled, receives power from a 750-foot-long, 995-volt electrical cable connecting the feeder to a power center. (Tr. 135:3–13.) When Gilpin inspected the feeder, GMS had laced the power cable in long loops on the wall of the crosscut between Entry Nos. 5 and 6. (Tr. 141:1–25.) The power cable was hung approximately 4-1/2 to five feet off the mine floor. (Tr. 145:1–10.)

After examining the feeder's exterior, Inspector Gilpin de-energized the machine so he could closely examine its power cable. (Tr. 134:12–135:2.) Gilpin ran his hands along the cable, searching for any irregularities. (Tr. 135:17–23.) While examining the cable, Gilpin found a cut approximately 1-1/2 inches long. (Tr. 138:11–22.) The chest-high cut had penetrated the hard outer jacket of the cable, exposing the inner insulated power conductors. (Tr. 138:20–139:12.) The cut in the cable had not penetrated the inner insulation to expose any bare wires. (Tr. 140:2–141:15.) Gilpin believed the damage occurred either by the cable being run over by mobile equipment while it dragged on the ground behind the feeder during a move, or by the cable being hit by mobile equipment, such as a scoop or a ram car, pulling into the crosscut while the cable was suspended on the wall. (Tr. 143:6–144:18.) Gilpin also believed that the damage to the cable would worsen over time if left unrepaired. (Tr. 145:13–24.)

Inspector Gilpin observed that miners regularly traveled the area near the damaged section of cable, often congregating around a picnic table approximately 40 feet away. (Tr. 142:11–143:5.) Miners also used hoses nearby to clean mining equipment. (Tr. 142:1–5.) At the time of the inspection, approximately three inches of water had accumulated on the mine floor in the vicinity of the damaged section of cable. (Tr. 142:1–8.)

Based on his observations, Gilpin issued Citation No. 8443658, alleging a violation of 30 C.F.R. § 75.606(a):

When inspected the trailing cable (2/0 3 Conductor) that supplies 995VAC power to the company [No.] 601 feeder that is in service in the 3rd Panel North Unit MMU: 001 & 007) has a cut in the outer jacket approximately 1.5 [inches] in length. This cut is exposing the inner insulated power conductors. The area of the mine where this cable is located has standing water on the mine floor up to 3 [inches] in depth. Trailing cables shall be adequately protected to prevent damage by mobile equipment.

(Ex. G–5.) Gilpin marked the citation as S&S and determined that this violation was reasonably likely to result in a fatal injury to one miner due to GMS's moderate negligence. (Ex. G–5.) MSHA proposed a penalty of \$5,080.00 for Citation No. 8443658.

## **2. Analysis and Conclusions of Law**

Section 75.606 requires that operators adequately protect trailing cables to prevent damage by mobile equipment. 30 C.F.R. § 75.606. Section 75.606 mirrors section 306(f) of the Mine Act, 30 U.S.C. § 866(f). In enacting section 306(f), Congress emphasized the hazardous nature of unprotected trailing cables in mines and recognized the significant danger of shock and mine fires posed by damage to power cables. *Spartan Mining Co.*, 30 FMSHRC 699, 707 (Aug. 2008) (citing S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 197 (1975)). The Commission has similarly emphasized the importance of keeping intact both the inner and outer protective layers of electrical cables. See *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

**i. Violation of 30 C.F.R. § 75.606**

To prove a violation of section 75.606, the Secretary must show that: (1) a trailing cable (2) was not adequately protected from damage (3) by mobile equipment. 30 C.F.R. § 75.606.

For Citation No. 8443658, the Secretary asserts that the feeder's cable was a trailing cable, covered by the regulation, and that mobile equipment caused the 1-1/2-inch cut Inspector Gilpin discovered on the cable. (Sec'y Br. at 19; Sec'y Reply at 6–8.) In contrast, GMS contends that it did not violate section 75.606 because the cable was not a trailing cable and the cut was not substantial enough to constitute a violation. (Resp't Br. at 5.) In support, GMS emphasizes that the feeder is a very large, mostly stationary piece of equipment. (*Id.*)

Although the feeder primarily remained in one place, the machine was self-propelled and moved as frequently as every week. (Tr. 155:20–157:15, 167:7–13, 135:3–13, 136:1–14.) More importantly, Prairie State, owner of the Lively Grove Mine, opted to treat the feeder's cable as a trailing cable for purposes of MSHA regulation rather than as a stationary power cable. (Tr. 137:15–138:5.) By opting to treat the feeder's cable as a trailing cable, Prairie State and GMS were permitted to handle the feeder's cable less carefully, including lacing the cable along the mine ribs and dragging it on the mine floor. (Tr. 137:1–14.) Respondent presented no evidence to contradict the Secretary's proof.<sup>6</sup> Because Prairie State previously informed MSHA of its choice to treat the feeder's cable as a trailing cable, Inspector Gilpin's examination of the feeder's cable under 30 C.F.R. subpart G (Trailing Cables) is reasonable. I therefore find that the feeder's cable is a trailing cable. The Secretary has thus satisfied the first element of a violation under section 75.606.

Although Respondent admits a 1-1/2-inch cut existed in the outer jacket of the trailing cable, it contends this alone cannot constitute a violation of section 75.606 because the inner jacket was not cut. (Resp't Br. at 5.) Respondent's argument runs contrary to Commission precedent. The Commission has emphasized the importance of both the inner and outer jackets of trailing cables for the protection of miners. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284–85 (Dec. 1998) (affirming trailing cable violation as S&S even with no exposed wires); *U.S. Steel Mining*, 6 FMSHRC at 1573–74 (affirming trailing cable violation as S&S where outer jacket was cut but inner jacket wires remained individually insulated at time of inspection). Accordingly, I find that the 1-1/2-inch cut in the trailing cable's outer jacket is sufficient evidence to satisfy the second element of a violation of section 75.606.

Finally, Respondent does not challenge the testimony that mobile equipment caused the damage to the trailing cable. Inspector Gilpin believed the damage to the trailing cable resulted from mobile equipment, like a scoop or a ram car, either hitting the cable suspended on the rib of the crosscut when mobile equipment pulled into the crosscut from the travel way, or running over the feeder's trailing cable as it was being dragged through the mine by the belt moving crew. (Tr. 143:6–144:18.) GMS presented no evidence to contradict Gilpin's testimony and no alternative theory to explain the cable's damage. Based on the evidence before me, I find that mobile equipment caused the damage to the trailing cable, satisfying the third element of a

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<sup>6</sup> Indeed, Respondent declined to call a witness for Citation No. 8443658.



violation of section 75.606. Thus, the Secretary has proven all three elements for a violation of section 75.606. Accordingly, I conclude that GMS violated 30 C.F.R. § 75.606.

## ii. Gravity and S&S

GMS's violation of 30 C.F.R. § 75.606 establishes the first *Mathies* element. The second *Mathies* element requires that the violation contribute to a safety hazard. As Inspector Gilpin explained, the damaged trailing cable contributed to the hazard of a miner being electrocuted. (Tr. 146:21–147:8.) Thus, the Secretary has satisfied the second element of the *Mathies* test.

Regarding the third *Mathies* element, Inspector Gilpin explained that the damage to the cable could reasonably be expected to worsen as mining continued and the feeder advanced further into the mine. (Tr. 145:13–24, 146:8–14.) The cable hung at chest height in an area miners frequented. (Tr. 145:25–146:7.) Moreover, the area around the trailing cable was wet, with hoses and water sprayers nearby causing approximately three inches of water to accumulate on the mine floor. (Tr. 142:1–8.) GMS contends a cut that does not penetrate the cable's inner insulation cannot create a reasonable likelihood of injury. (Resp't Br. at 5.) To the contrary, the Commission has held that damage to a cable's outer jacket could be expected to worsen and reasonably be expected to injure a miner. See *Harlan Cumberland Coal*, 20 FMSHRC at 1284–85 (affirming finding of S&S where outer jacket of trailing cable damaged); *U.S. Steel Mining*, 6 FMSHRC at 1574. In addition, miners at the Lively Grove Mine did not wear gloves capable of protecting them from electric shock. (Tr. 166:5–11.) Given the evidence before me, and considering the harsh environment of an underground coal mine, I determine that the damage to the feeder's trailing cable was reasonably likely to worsen as mining continued and result in injury to a miner. Accordingly, the Secretary has satisfied the third *Mathies* element.

Finally, the trailing cable carried 995 volts of electricity, nine times the amount of voltage that commonly is fatal. (Tr. 146:21–147:8.) Given this evidence, it is reasonably likely that an injury from being shocked by the trailing cable would be fatal. The Secretary has thus satisfied the fourth *Mathies* element. I conclude Citation No. 8443658 was properly designated as S&S.

## iii. Negligence

Inspector Gilpin marked GMS's negligence as moderate because the damaged portion of the trailing cable could not be easily seen. (Tr. 149:15–22.) Nevertheless, Gilpin felt that GMS should have discovered the gash during its weekly electrical examination. (Tr. 160:1–16.) Given this evidence, I conclude that GMS's negligence for Citation No. 8443658 was appropriately designated as moderate. I hereby affirm Citation No. 8443658 as written.

## D. Citation No. 8443659 – Unsupported Roof

### 1. Further Findings of Fact

On October 2, 2013, Inspector Gilpin conducted a spot inspection at the Lively Grove Mine. (Tr. 169:12–170:21.) Gilpin, MSHA Inspector Greg Waldeck, and Prairie State's compliance officer, Dale Pearman, traveled underground together to the active section.

(Tr. 171:4–20.) While checking the section for imminent dangers, Gilpin found six black, circular irregularities in the mine roof in the last open crosscut of the section. (Tr. 172:3–174:14.) Gilpin identified the irregularities as sulfur balls, or kettle bottoms. (Tr. 172:3–23.) Each sulfur ball measured one to two feet in diameter. (Tr. 173:4–15.) Gilpin tested the density of the sulfur balls with a sounding rod and confirmed that the anomalies, when tapped, sounded different than the surrounding shale roof. (Tr. 177:15–178:5.) GMS had installed roof bolts in the intersection with the sulfur balls approximately two hours prior to Gilpin’s inspection, but the mine had failed to install direct support for these roof irregularities. (Tr. 183:14–19.)

Based on his observations, Gilpin issued Citation No. 8443659, alleging a violation of 30 C.F.R. § 75.202(a):

The roof where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the mine roof. 6 carbonate nodules (sulfur balls) were observed unsupported in the immediate mine roof. This area had been previously roof bolted. These sulfur balls were located between entries 1 and 2 at ss: 47+80 of the 3rd North Panel Unit (MMU:001). These sulfur balls measure approximately 1’ to 2’ in diameter and were approximately 7’ from the mine floor.

(Ex. G–7.) Gilpin marked the citation as S&S and reasonably likely to result in an injury causing lost workdays or restricted duty to one miner. (*Id.*) Gilpin characterized GMS’s negligence as moderate because the sulfur balls were obvious, but they had persisted unaddressed for only around two hours. (Exs. G–7, G–8 at 2; Tr. 183:3–24.) MSHA proposed a penalty of \$1,412.00 for Citation No. 8443659.

## **2. Analysis and Conclusions of Law**

Section 75.202(a) requires mine operators to support or otherwise control the roof and ribs of a mine to protect persons from hazards related to roof falls. 30 C.F.R. § 75.202(a). Accordingly, the Secretary may demonstrate a violation by showing (1) that the roof or ribs were not supported to protect persons from hazards related to roof falls, and (2) the insufficiently supported roof or ribs were located in an area where persons work or travel. *See Jim Walter Res.*, 37 FMSHRC 493, 495 (Mar. 2015). Because section 75.202(a) is worded broadly, the Commission has held 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.” *Harlan Cumberland Coal*, 20 FMSHRC at 1277 (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)).

### **i. Violation of 30 C.F.R. § 75.202(a)**

The conditions cited by Inspector Gilpin were located in the last open crosscut, an area recently mined and near the active face. (Tr. 172:16–23, 178:23–179:8, 183:14–19, 198:9–18.) Respondent does not contend that the cited conditions were located in an untraveled area of the

mine. Accordingly, I find that the cited conditions were in an area worked and traveled by miners, satisfying the first element of a violation of section 75.202(a).

Next, Respondent admits that Inspector Gilpin observed several anomalies in the mine roof that were not supported. (Resp't Br. at 6.) Moreover, Respondent agrees that these anomalies appeared to be sulfur balls.<sup>7</sup> (*Id.*) Indeed, GMS's Kittinger testified that when he examined the area after Inspector Gilpin, Kittinger found the six discolored anomalies Gilpin cited. (Tr. 196:11–197:16.) When Kittinger tested the anomalies with a sounding rod, he too noticed that the anomalies sounded different from the rest of the mine roof. (Tr. 197:19–25.) Kittinger agreed that the anomalies were sulfur balls. (Tr. 202:21–24.) Given this evidence, I find that the anomalies in the roof identified by Gilpin were sulfur balls.

Prairie State's roof control plan requires the mine to provide additional support for exposed sulfur balls, such as installing wire mesh. (Tr. 203:14–19.) This additional support is necessary because sulfur balls can fall out of the roof with little or no warning. (Tr. 174:15–22, 192:14–23.) Inspector Gilpin had experienced such a sudden fall firsthand, as a sulfur ball once fell on Gilpin, dislocating his shoulder. (Tr. 178:7–16.) Here, the discovered sulfur balls were in a roof of shale, a weaker rock that has the tendency to flake off and allow sulfur balls to fall out more easily. (Tr. 175: 9–21.) Given this evidence, I determine that a reasonably prudent miner, familiar with the danger posed by unsupported sulfur balls in a shale roof and the requirements of section 75.202(a), would have provided more support for the cited sulfur balls. *See Harlan Cumberland Coal*, 20 FMSHRC at 1277.

The Secretary has proved both elements of a violation of section 75.202(a). Accordingly, I conclude that GMS committed a violation of 30 C.F.R. § 75.202(a) by not supporting the cited sulfur balls in the mine roof.

## ii. Gravity & S&S

GMS's violation of section 75.202(a) establishes the first *Mathies* element. By failing to support six sulfur balls, GMS contributed to the hazard of a miner being hit by material falling from the mine roof. This satisfies the second *Mathies* element because the violation contributed to a discrete safety hazard.

Regarding the third *Mathies* element, Respondent asserts that the Secretary failed to demonstrate the sulfur balls were reasonably likely to fall onto a miner and cause injury. (Resp't Br. at 6.) Specifically, GMS asserts that the Secretary has not provided sufficient evidence regarding the size and weight of the sulfur balls, or regarding how compacted the sulfur balls were in the mine roof. (*Id.*) In support, Respondent points to the testimony of GMS's Kittinger, who had difficulty finding any bulging sulfur balls when he viewed the area after GMS had installed additional wire mesh to support the conditions. (Tr. 196:16–197:6, 203:20–205:1.)

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<sup>7</sup> Although Respondent admits the cited anomalies were sulfur balls, GMS contends the conditions could not be a violation under section 75.202(a) because they were not cited under the mine's roof control plan. As Inspector Gilpin explained, however, he could have cited the unsupported sulfur balls either under section 75.202(a) or as a violation of the mine's roof control plan. (Tr. 176:9–177:11.)



Kittinger checked the roof with a sounding rod and believed the area sounded generally “competent for people to work” under. (Tr. 197:20–198:6.) Yet Kittinger admitted the sulfur balls sounded different from the surrounding roof, and indeed the discoloration ring around the sulfur balls did not sound as solid. (Tr. 197:13–198:2.) Kittinger thus contradicted his own testimony that the roof seemed solid. Moreover, I note that Kittinger examined the cited area only after additional support had been installed, making the roof difficult to examine. (Tr. 203:20–205:1.) In contrast, Inspector Gilpin testified that the sulfur balls reasonably could be expected to fall out if left unsupported. (Tr. 192:14–193:2.) Gilpin had painfully witnessed firsthand how sulfur balls can fall from a mine roof without any warning. (Tr. 178:7–16.) Gilpin further testified that the discovered sulfur balls each measured one to two feet in diameter. (Tr. 173:4–15.) Gilpin estimated the sulfur balls weighed 150 pounds or more. (Tr. 173:4–15, 178:9–22.) Respondent provided no evidence to challenge Gilpin’s estimates. Given the evidence before me, and considering Inspector Gilpin’s extensive mining background and firsthand experience with sulfur balls, I credit Gilpin’s testimony and determine that there was a reasonable likelihood the hazard of the sulfur balls falling from the mine roof would lead to an injury. Accordingly, the Secretary has satisfied the third element of the *Mathies* test.

Finally, Gilpin testified that a falling sulfur ball would at least result in bruises and broken bones, and could even be fatal. (Tr. 178:7–22.) Gilpin himself suffered a dislocated shoulder from being hit by a falling sulfur ball approximately the size of those he cited at the Lively Grove Mine. (Tr. 178:11–14.) Given this evidence, I determine that a miner hit by a falling sulfur ball would suffer a serious injury, satisfying the fourth *Mathies* element. The Secretary satisfied all four elements of the *Mathies* test. Accordingly, I conclude that Citation No. 8443659 was properly designated as S&S. I hereby affirm Citation No. 8443659 as written.

### **iii. Negligence**

Inspector Gilpin marked this citation as moderate negligence because the sulfur balls had been left unsupported for approximately two hours. (Tr. 180:25–181:6.) Gilpin believed a mine foreman had not been in the area since GMS had installed its initial roof support, thus mitigating GMS’s negligence. (Tr. 181:7–15.) Nevertheless, Gilpin felt the miners who bolted the area should have noticed the sulfur balls and corrected the problem because the anomalies were fairly obvious. (Tr. 181:15–182:4.) Given the evidence before me, I agree with the inspector’s determination that GMS demonstrated moderate negligence in failing to support the sulfur balls for two hours. Accordingly, I conclude that the negligence determination for Citation No. 8443659 was properly designated as moderate.

## **IV. PENALTIES**

When assessing a civil penalty, section 110(i) of the Mine Act requires the Commission’s Administrative Law Judges to consider the following six criteria: (1) the operator’s history of previous violations, (2) the appropriateness of the penalty relative to the size of the operator’s business, (3) the operator’s negligence, (4) the penalty’s effect on the operator’s ability to continue business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i).

The Secretary proposes a penalty of \$2,901.00 for Citation No. 8444102, a penalty of \$2,901.00 for Citation No. 8444104, a penalty of \$5,080.00 for Citation No. 8443658, and a penalty of \$1,412.00 for Citation No. 8443659.

For each citation, I have concluded that GMS violated MSHA's regulations and determined each violation to be both S&S and the result of Respondent's moderate negligence. GMS has stipulated that it is large in size and that the Secretary's proposed penalties would not affect its ability to remain in business. (Ex. Jt.-1.) Respondent demonstrated good faith in abating each citation. (*Id.*) I further note that GMS did not receive any citations under sections 72.630(b), 75.362(a)(2), 75.606, or 75.202(a) in the two years prior to these citations being issued. (Exs. G-9, G-10, G-11.)

Given the evidence before me and considering each of the six penalty factors in section 110(i), I determine that the Secretary's proposed penalty assessments are appropriate. Accordingly, I assess a penalty of \$2,901.00 for Citation No. 8444102, a penalty of \$2,901.00 for Citation No. 8444104, a penalty of \$5,080.00 for Citation No. 8443658, and a penalty of \$1,412.00 for Citation No. 8443659.

#### **VI. ORDER**

In light of the forgoing, it is hereby **ORDERED** that Citation Nos. 8444102, 8444104, 8443658, and 8443659, are **AFFIRMED** as written.

**WHEREFORE**, Respondent GMS Mine Repair is **ORDERED** to pay a civil penalty of \$12,294.00 within 40 days of this decision.



Alan G. Paez  
Administrative Law Judge

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