FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 16, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0074 A.C. No. 36-07416-532307 Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Ryan Kooi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner

Patrick W. Dennison, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Young

SUMMARY

Citation No. 9203910, 30 C.F.R. § 75.904: Failure to properly identify a high-voltage (995-volt) circuit breaker. Two continuous miner machines were plugged into adjacent circuit breakers, each marked with the same number.

Facts		p. 4 (Slip Op.)
Fact of violation	Affirmed	p. 5
S&S	Affirmed	p. 6
Negligence	Moderate	p. 10
Penalty	$700	p. 10

Citation No. 9204098, 30 C.F.R. § 75.370(a)(1): Failure to maintain bleeders safe for travel due to standing water, violating the approved Ventilation Plan. Deep water was allowed to accumulate in travelway used to examine the bleeders.

Facts		p. 11
Fact of violation	Affirmed	p. 13
S&S	Affirmed	p. 14
Negligence	None	p. 16
Penalty	$150	p. 17

I. INTRODUCTION

This case is before me upon petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of

1977, as amended ("Mine Act" or "Act"), 30 U.S.C. § 815(d). At issue are two citations under section 104(a), issued to Respondent, Consol Pennsylvania Coal Company, LLC ("Consol" or "Respondent").[1] The parties presented testimony and documentary evidence at a video conference hearing on September 28–29, 2021, and filed post-hearing briefs.

Consol owns and operates the Enlow Fork Mine, located in Greene and Washington counties, Pennsylvania. Jt. Stips. 1, 2, 5; S. Post-Hearing Br. at 3 (Jan. 7, 2022) ("S. Br."). The mine is an underground coal mine and is subject to the jurisdiction of the Mine Act and the Commission. Jt. Stips. 3, 4; S. Br. at 3. Citation No. 9203910 alleged that Respondent failed to properly identify a 995-volt circuit breaker, posing a risk of miners inadvertently removing power from the wrong equipment. Citation No. 9204098 alleged that Respondent failed to comply with its approved Ventilation Plan ("Plan") by permitting the accumulation of standing water that prevented safe travel. For reasons set forth below, I **AFFIRM** both citations with their assessed gravity, but I **MODIFY** the degree of negligence for Citation No. 9204098 from "moderate" to "none."

II. STANDARDS

A. Violation

The Secretary must prove the elements of an alleged violation by a preponderance of the evidence. *See Jim Walter Res.*, 28 FMSHRC 983, 992 (Dec. 2006); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

The requirements of a MSHA-approved ventilation plan are enforceable in the same manner as mandatory safety standards. *See Prairie State Generating Co. v. Sec'y of Lab.*, 792 F.3d 82, 93 (D.C. Cir. 2015) (citing *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)) ("*Zeigler* recognizes, as do we, both the regulatory character of mine-specific plans, and the Secretary's paramount control over the responsibility for mine-specific plans, which 'must also be approved by the Secretary.'"). Mine operators are generally strictly liable for mandatory safety standard violations. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 361 (D.C. Cir. 1997); *Nally & Hamilton Enters., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011).

B. Gravity

The "likelihood" contemplated within the assessment of gravity is that of the resulting injury. A severity assessment of "lost workdays or restricted duty" is defined as "[a]ny injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty." 30 C.F.R. § 100.3(e) (2022).

Specifically, a gravity evaluation is different from S&S analysis because it assumes the occurrence of the hazard. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996)

[1] This docket included ten section 104(a) citations. Eight were settled by the parties and approved prior to hearing. *See* Decision Approving Partial Settlement at 3 (Oct. 26, 2021).

(comparing S&S inquiry, which focuses on "the reasonable likelihood of serious injury," with gravity inquiry, which focuses on "the effect of the hazard *if* it occurs") (emphasis added).

C. Significant and Substantial ("S&S")

A violation is properly designated as S&S if, "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)). The four elements required for an S&S finding are expressed as follows:

> (1) [T]he 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 the 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, LLC, 42 FMSHRC 379, 383 (June 2020) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).

An S&S determination must be based on the assumed continuation of normal mining operations. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jan. 1984)) ("A determination of 'significant and substantial' must be based on the facts existing at the time of issuance and assuming continued normal mining operations, absent any assumption of abatement or inference that the violative condition will cease.").

D. Negligence

Judges may use a traditional negligence analysis, rather than relying upon Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–02 (Aug. 2015) (citing *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) ("*JWR*"); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984)) (Part 100 regulations apply only to the proposal of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way on Commission proceedings."). The reasonable prudent person standard should be that of one "familiar with the mining industry, the relevant facts, and the protective purposes of the regulation." *Id.* at 1702.

E. Penalty

The Commission considers the following factors, from Section 110(i) of the Act, in assessing penalties under the Act:

> [T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator

> was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i) (2006).

III. CITATION NO. 9203910

A. Factual Findings

This citation was issued by Inspector Robert Hutchison on February 17, 2021. Ex. P-1. He assessed the gravity as "reasonably likely," "lost workdays or restricted duty," "S&S," and one person affected. *Id.* He assessed negligence as "moderate." *Id.* The inspector stated:

> The 995 volt circuit breaker servicing the Co. # 25 continuous miner is improperly identified as the Co. # 43 continuous miner. This condition could cause a miner to inadvertently remove power from the wrong machine which would cause lost work day injuries including electrical shock or burns. Both cables are plugged into the power center between the #4 and #3 entries at 36 crosscut of 2 South Left section (MMU#050-0).

Id. Two of the circuit breakers were marked as the #43 continuous miner—one was #43, and the other was actually #25. *See* Tr. Volume I at 59, 131 (Sept. 28, 2021) ("Tr. I"). Mr. Heffelfinger, Consol's safety inspector, acknowledged that the #25 continuous miner was not identified properly at the top of the breaker. *Id.* at 146. He did state, however, that there was a brass tag affixed to the cable, where it was plugged into the breaker, that properly identified the cable as that of the #25. *Id.*

In his testimony, the inspector acknowledged this tag, but he also stated that it was difficult to find or read because it was a "half-inch thick diameter brass tag that did have mud and debris on it" and was located under the plug instead of on top. *Id.* at 62, 131, 142. Mr. Heffelfinger acknowledged that the breaker marking and cable tag should match. *Id.* at 148.

The #25 had been brought into the mine between three and four days prior to the inspection. *Id.* at 86, 132. The #25 was not in operation, and there was no testimony as to whether it was fully assembled or whether the cable was plugged into the continuous miner itself. *Id.* at 99–100, 133. The #25 breaker was not switched on at the time of inspection. *Id.* at 71. The #43 was in operation. *Id.* at 77. The breakers were located next to one another. *Id.* at 87. Neither machine was within sight of the load center. *Id.* at 65.

The inspector did not observe damage to cables. *Id.* at 90. However, he described the likely need to fix cables damaged in the course of continued normal mining operations by making a splice or reentering the cable—both of which require handling exposed conductors. *Id.* at 65–68. He stated that cables often get damaged by mobile equipment, shuttle cars, or scoops, when they are over roadways, and that he generally finds damaged cables about once per month. *Id.* at 65, 104. These cables carry 995 volts. *Id.* at 69. While the inspector acknowledged that

people have been killed by such voltage, *id.*, he believed the most likely injury would be severe burns or shock. *Id.* at 75.

Mr. Heffelfinger testified that he brought the #25 into the mine a few days prior. *Id.* at 132. He stated that it had not yet been examined. *Id.* at 135, 138. He noted, and the inspector acknowledged, the existence of "lockout, tagout, tryout" procedures, that the cable would be "blocked" before maintenance, and that an exam would be conducted before using the #25. *Id.* at 93–94, 138, 139. Further, he stated that permissibility exams are done in the normal course of mining. *Id.* at 149. Section foremen inspect the load center twice per day. *Id.* at 76, 96.

B. Disposition

1. Violation

The cited standard states, "Circuit breakers shall be marked for identification." 30 C.F.R. § 75.904 (2022). The Secretary argues that the standard requires *proper* labeling. S. Br. at 12. I find that this is a reasonable interpretation of the regulation.

The Secretary's interpretation is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *Gen. Elec. Co v. U.S. Env't Protection Agency*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Here, the Secretary has interpreted this regulation "without the aid or constraint" of rulemaking procedures, so he is entitled to deference to the extent that it has the "power to persuade." *See Knox Creek Coal Corp. v. Sec'y of Lab.*, 811 F.3d 148, 160 (4th Cir. 2016) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). I therefore weigh its thoroughness, validity, and consistency. *See id.*

The Secretary provided credible testimony that a miner intending to deenergize one piece of equipment might deenergize another because another circuit breaker was marked with the correct equipment's identification. *See* Tr. I at 72. First, this interpretation is consistent with the language because the regulation requires the breakers to be marked *for identification*. Plain meaning dictates that breakers should be identified. The only logical reason for such a requirement is to enable the control of power to the specific equipment that a miner intends to operate or maintain.

Second, this interpretation serves a permissible regulatory function. The Secretary's reasoning is valid because the regulation is intended to protect miners—in this case, from the danger of electrocution or serious injury.

I find that the Secretary proved the violation by a preponderance of the evidence. There were two breakers marked as #43. One connected to the #43, but the other was for the #25. Therefore, the breaker for the #25 was improperly identified. This is sufficient to establish a violation under the strict liability applied to mandatory safety standards.

2. Gravity

a. Likelihood

The Secretary asserts that the injury is reasonably likely. If the hazard—attempting to repair a cable that had not been properly deenergized—occurred, it is reasonably likely to result in electrocution or serious injury if a miner contacts bare conductors. I have found that a miner may contact bare conductors while repairing cables. I therefore affirm the assessed likelihood.

b. Severity

The Secretary provided credible testimony that contact with uninsulated conductors while repairing an energized cable could result in severe burns or shock, or even death. I find that electric shock or burns could reasonably result in a miner missing at least a full day of work. I affirm the assessed severity.

c. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. I agree that, logically, one miner would be repairing the cable to contact exposed conductors. Further, I find it reasonable that another miner would not contact the cable after finding that the other miner was injured during that activity. I affirm the assessed number of persons affected.

3. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The Violation has Been Established.

An improperly marked circuit breaker is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section III.B.1.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—a miner deenergizing the wrong equipment.

Mathies Step 2 is a two-step process: (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on "the particular facts surrounding the violation." *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016).

Here, the standard requires proper identification of circuit breakers to inform miners which equipment they are powering or deenergizing. Thus, the hazard is the deenergizing of the wrong equipment prior to conducting maintenance on the equipment or cable.

The Secretary provided testimony that two breakers at the power station were labeled as continuous miner #43 (though one was in fact the #25), that cables are often damaged during normal mining operations, and that repair requires handling bare conductors. The Secretary argues that the Commission acknowledges danger even when there are no exposed copper conductors. S. Br. at 14–15; *see Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284–86 (Dec. 1998); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1575 (July 1984).

The Secretary's reliance on these decisions is misplaced because both cases involved exposure to *damaged* cables and different regulatory standards.[2]

Nonetheless, I find that the violation was reasonably likely to result in a miner deenergizing the wrong equipment, risking electric shock. The inspector described the methods of cable repair requiring contact with bare wires. He credibly stated that cable damage and subsequent repair are common.

The fact that another breaker was labeled #43 is sufficient for me to conclude that a miner might reasonably deenergize the wrong cable before conducting a repair. A miner who finds what he is looking for might stop looking and would fail to notice that there was another breaker marked with the same number. A miner might not look for or see the mismatched tag, especially if it was below the cable and obscured by mud. Therefore, the violation—failure to properly identify a breaker—is reasonably likely to result in the discrete safety hazard against which the regulation is directed—deenergizing the wrong equipment before repair.

Respondent cites two ALJ cases to assert that Step 2 requires actual—not just theoretical—potential of the proffered event. These decisions do not control my decision here. As ALJ decisions, they are non-precedential. Further, neither case involved an S&S evaluation. Both cases instead dealt with imminent danger orders. *Jim Walter Res., Inc.*, 29 FMSHRC 1043, 1043 (Nov. 2007) (ALJ); *Consol of Ky., Inc.*, 30 FMSHRC 1, 1 (Jan. 2008) (ALJ).[3] Here, the

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[2] The operator in *U.S. Steel Mining Co.* failed to fully cover a gash in a cable, but the wires inside still had insulation apparently intact. 6 FMSHRC at 1573. The Commission affirmed the judge's S&S finding because the lack of both layers was sufficient to put miners at risk of electric shock. *Id.* at 1575.

The Commission in *Harlan Cumberland Coal Co.* affirmed a judge's S&S finding where a splice was not completely insulated. 20 FMSHRC at 1285, 1286. The Commission rejected the argument that reasonable likelihood of injury could not be established where there were not exposed copper leads. *Id.* at 1286. Both cases are inapposite to my evaluation here. There is no cable damage alleged for me to apply the Commission's finding that danger exists because of the protection degradation and lack of knowledge about the integrity of the internal wire insulation.

[3] Imminent danger orders presume that if normal mining continues, there will be a danger of severe injury or death from a known hazard it can be abated. Here, we must determine whether a hazard not yet present may develop, and we presume that it will not be discovered or abated if so. But even if I applied the standard suggested by respondent, the case here is distinguishable.

dangerous condition would be created by deenergizing the wrong equipment before conducting repairs. The #43 miner was operating at the time. If a miner needed to repair the cable on the #43 miner—a fairly common occurrence—it is reasonably foreseeable that he could deenergize the mislabeled #25 instead—creating the contemplated hazard.

Respondent argues that the Secretary failed to demonstrate that the #25 was energized or would be without an examination, or that miners would be exposed to an energized, damaged cable in normal mining operations. Resp't Post-Hearing Br. at 8 (Jan. 7, 2021) ("Resp't Br."). In support, it states: the #25 was brought underground only recently; the #25 breaker was not powered; no cables were damaged; the #43 was identified correctly; and it would have conducted an examination before use. *Id.*

The recent installation may support a modification in negligence, but it does not negate the fact that the #25 is plugged into a breaker marked #43. The proper identification of the #43 adds nothing because the danger is the possibility that a miner wanting to deenergize the #43 will deenergize the #25 because it is improperly marked as #43. That Respondent would conduct an exam first relies on miner precaution, which is irrelevant to an S&S analysis. *See Sec'y of Lab. v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018)

The contentions that the violative breaker was not powered, and that no cables were damaged at the time of inspection, are overcome by the requirement to assume the continuation of normal mining operations. The #25 was already plugged in, and the cables were running to the machine. Therefore, I assume, in normal operations, that the improperly marked #25 would be energized, and that the cables would require eventual repair from common mining operation damage. *See U.S. Steel Mining Co.*, 6 FMSHRC at 1574 (holding that, in the *Mathies* analysis, one "cannot ignore the relevant dynamics of the mining environment or processes").

The inspector in *Jim Walter Resources, Inc.* improperly assumed a possible roof fall as a potential ignition source. 29 FMSHRC at 1045 (failing to note any indications of imminent roof fall or other roof hazards). This was, therefore, pure conjecture. *Id.* at 1048. Where it is incorrect to assume a roof fall, the standard here is logically aimed at ensuring equipment can be properly deenergized, which is necessary for movement or maintenance of the equipment or cables. I have found the reasonable likelihood of damage to the cables, and the necessity for deenergizing them for repair, to be supported by credible testimony about the conditions and practices in the mine environment.

A withdrawal order was issued in *Consol of Kentucky, Inc.* because of speculation that electrical equipment and cables *could* be left in the area as an ignition source. 30 FMSHRC at 1, 6, 7 (noting no credible evidence that such equipment was left in the area, making ignition, at best, a theoretical possibility). A judge cannot assume the presence of an ignition source that is not established as present or imminent when reviewing an imminent danger order, but may find that conditions arising in the continuance of normal mining operations may result in the emergence of a hazard in the future.

c. Step 3: It is reasonably likely that a failure to deenergize the correct equipment would cause an injury—electrocution.

Mathies Step 3 asks whether the hazard, not the violation itself, is reasonably likely to cause an injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010). In evaluating the likelihood of injury, judges must assume the occurrence of the hazard. *See Newtown Energy, Inc.*, 38 FMSHRC at 2037.

I assume the occurrence of the hazard—a miner conducting repairs on an energized cable because he deenergized the wrong [improperly marked] continuous miner at the breaker. The Secretary provided undisputed testimony that contact with a live cable during repairs could result in electrocution. I therefore find that the hazard is reasonably likely to result in an injury.

Respondent correctly notes that the Commission has held it insufficient that a violation "could" result in an injury. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010) (remanding for more precise discussion of potential injuries). However, I do not find only that an injury *could* occur. I find that one is reasonably likely to occur during normal mining operations because of the improperly identified breaker.

I reject Respondent's contentions:

a) That the #43 was identified properly. Resp't Br. at 10. While true, the hazard of injury results from the improper marking of the #25 breaker as #43.

b) That the breakers at issue were next to each other, so that a miner could see both and would deenergize both or look at the cable tag to be safe. *Id.* This all relies on miner precaution—irrelevant to *Mathies* Step 3. *Consolidation Coal*, 895 F.3d at 118.

c) That the #25 was recently brought in and was not energized. Resp't Br. at 10. The machine would be energized during continued normal mining operations because it was brought into the mine to be used in those operations. *See supra* Section III.B.3.b.

d) That the #25 would have been properly identified prior to use. Resp't Br. at 11. This again assumes miner precaution.

e) Finally, that there were no issues with any of the equipment. *Id.* I assume the necessity of repairs based on credible inspector testimony and the "relevant dynamics of the mining environment or processes." *See U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature—severe burns or shock.

An inspector's conclusion that a possible injury is of a reasonably serious nature has been held sufficient for *Mathies* Step 4. *See Consol Pa. Coal Co.*, 43 FMSHRC 145, 149 (Aug. 2021) (finding it sufficient that the inspector characterized the potential injury as "serious" and noted potential injuries). The Commission also does not require a specific type of injury for it to be considered serious. *See S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013).

Here, the Secretary provided credible, undisputed testimony that that the hazard could result in severe burns or shock, or even death. Respondent only addressed the *likelihood* of

injury, *see* Resp't Br. at 9–11, making no assertions about the severity of the injury if it occurred. I find it is reasonably likely that an injury that could include electrocution would be a reasonably serious injury.

4. Negligence

I find that negligence was properly assessed as "moderate." The foremen charged with inspecting the load center are familiar with the mining industry and relevant facts. They should have been familiar with the protective purpose of labeling the breaker properly to identify which equipment it powers. Therefore, I find that a reasonable prudent person in their position should have known about the violative condition and acted to remedy it.

Respondent clearly could have known of the condition because it provided no rebuttal to the inspector's contention that the foreman inspects the load center twice per day.[4] While it is possible that the #25 miner was only brought into the mine within the last inspection cycle, it was plugged into a breaker with the wrong marking, the same as another breaker in that load center, and nobody noticed it during the installation or subsequent examinations. Further, the existence of a small tag on the cable with the correct marking does not negate the obvious violative condition of the more apparent, improper identification on the breaker.

5. Penalty

The Secretary has entered Respondent's violation history [MSHA Directorate of Assessments, Assessed Violation History Report] into evidence. *See* Ex. P-6. I have reviewed Respondent's general and repeat violations, and I find that the Secretary has properly considered Respondent's minimal violation history in his calculation. I agree that the Secretary has properly evaluated the size of the mine in his calculation. The parties have stipulated that payment of the penalty will not affect Respondent's ability to continue in business. Jt. Stip. 6; S. Br. at 2.

The proposed penalty was based, in part, on the negligence [moderate] and gravity [reasonably likely] assessed in the citation. While I affirm the negligence and gravity as assessed, I do find that the operator's negligence here was at the low end of the moderate scale due to its proactive adoption of a program, not required by the regulations, to "lock-out, tag-out, try-out" equipment. The inspector acknowledged that he was aware of the program. One cannot rely on this program, and the miner cooperation and precaution upon which it depends, as an absolute protection against injury. But it seems logical that the program would reduce the likelihood of injury in these circumstances, and I find that the operator should be credited for that.

[4] It is somewhat ironic that the operator asserts that a miner would have noted and avoided the hazard, yet a foreman charged under the Act with the responsibility of identifying hazardous conditions failed to do so in this case. This is not a criticism of the foreman, but an observation on the dangers of confirmation or other biases and the possible effect of time and other pressures and distractions on miners working in a challenging, dynamic underground environment.

The citation was terminated almost immediately by properly marking the breaker as #25, so the operator rapidly complied upon notification. Thus, Respondent demonstrated good faith in achieving rapid compliance following citation. Taking into account both the gravity of the violation—particularly, the S&S finding—and the mitigation of that gravity by the "lock-out, tag-out, try-out" initiative, I assess a penalty of $700.

C. Conclusion

For the above reasons, I affirm the citation as written and assess a penalty of $700.

IV. CITATION NO. 9204098

A. Factual Findings

This citation was issued by Inspector Walter Young on February 8, 2021. Ex. P-3. He assessed gravity as "reasonably likely," "lost workdays or restricted duty," "S&S," and one person affected. *Id.* He assessed negligence as "moderate." *Id.* The description read, in part:

> The Mine Operator failed to comply with their approved mine Ventilation Plan . . . in that, the perimeter of the Bleeder system was not maintained safe for travel. Accumulations of dark, orange, murky, standing water were permitted to accumulate . . . at various locations[]. These areas contain tripping hazards in the form of yellow air lines, slick lines, suction hoses, rocks, coal sloughage, crib blocks, rocks and other debris which could not be seen under the surface of the colored water.

Id. Respondent's Plan was approved by MSHA on February 26, 2020. Ex. P-5, MSHA0065. Section AA is the provision Respondent is alleged to have violated, and reads in part:

> The means for maintaining the bleeder safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter bleeder system. . . . Standing water shall be pumped and or drained down below the top of elevated walkways to assure for safe passage around the perimeter of the bleeder system.

Ex. P-5, MSHA0067.

In bleeder systems measuring several miles, the inspector was only able to enter approximately 40 feet before having to stop because of "murky," "dirty dark orange water" that came above his 16-inch boot. Tr. I at 206, 208, 214, 228; Tr. Volume II at 45–46 (Sept. 29, 2021) ("Tr. II"); Ex. P-4, MSHA0018. The inspector took depth measurements of 1.6 and 1.8 feet by reaching as far into the bleeder as he could, noting that he also observed fresh water stains up to three feet high. Tr. I at 208, 211, 217.

The inspector testified that he could not see below the surface of the water in the two inspection areas. *Id.* at 214. Mr. Verbosky, Consol's safety inspector, acknowledged that he

could not see through the water and would not be able to see obstacles underneath, *see* Tr. II at 52–53, 65, though Mr. Houchins, Consol's assistant mine foreman, stated that a lot of the water was clear, *id.* at 168.

The inspector said that the bleeders were not maintained to be safe for travel. Tr. I at 170. Tripping hazards associated with the presence of standing water include rip sloughage, rocks, loose crib blocks, suction lines, discharge lines, air lines, slick lines, and generally uneven terrain. *Id.* at 170, 197. Possible injuries include slip and fall injuries, strains, sprains, concussions, contusions, and broken bones. *Id.* at 198, 208. He also noted the possibility of cellulitis from skin or wound contact with contaminated water. *Id.* at 208, 288–91.

While acknowledging that it was possible to drown in an inch of water, *see id.* at 234, the inspector assessed the most likely severity of the injury to be "lost workdays or restricted duty" from a slip and fall injury. He also noted that examiners normally travel in pairs, but that the practice would not prevent one person from tripping. *Id.* at 235.

The standing water had no effect on the ventilation. Tr. II at 23, 141; Ex. R-5. The bleeder is not a place where miners regularly work—it is only traveled by examiners, and nobody was conducting exams at the time of the inspection. *Id.* at 32, 86. Mr. Baker, Consol's mine examiner, stated that miners, including examiners, are supposed to walk carefully while doing their work. *Id.* at 115. Similarly, Mr. Houchins stated that the presence of standing water makes you walk more carefully. *Id.* at 158, 183.

Multiple bleeders had standing water, at different levels, for six weeks. *See* Tr. I at 188, 190–94; Ex. P-4, MSHA0027, 0030–34. Consol continuously pumped the water and added equipment—pumps, compressors, discharge lines, sumps—as necessary. Tr. II at 35, 63–64, 89, 112, 136, 164. Mr. Verbosky testified that water had been pumped down below the cited levels at dates prior to the inspection. *Id.* at 40. Mr. Baker testified that water had previously been pumped down to ankle depth or lower (calling it a "minimum level"), but that unforeseen circumstances and problems with pumps contributed to the cited standing water. *Id.* at 104, 121; *see also* Tr. I at 265–68; Ex. P-4, MSHA0027–30.

Respondent expended significant effort to remove water. Messrs. Verbosky and Houchins testified about installing multiple compressors on the surface. *Id.* at 63, 136, 161. They each also noted the creation of sumps to move water. *Id.* at 72–73, 136, 137, 176–77. Mr. Tajc, Consol's ventilation engineer, and Mr. Houchins each described carrying new or repaired pumps several miles to abate the accumulation. *Id.* at 93, 146, 151, 152–53, 154.

Witnesses also described compounding problems. First, the inspector acknowledged that the bleeders in this mine were predominantly very wet, and that there is water in the bleeders all the time that is impossible to remove. *See* Tr. I at 170, 270. There were continuous equipment failures, but Respondent replaced, repaired, and installed additional pumps. *See id.* at 229–31, 255–567; Ex. P-4, MSHA0007–08. Finally, a water pipe broke around the time of the citation, and Mr. Houchins attested to previously changing broken pipes. *See* Tr. II at 114, 146.

B. Disposition

1. Violation

The cited standard requires development of and compliance with an approved ventilation plan. 30 C.F.R. § 75.370(a)(1) (2022). Required contents include the means of maintaining bleeders free of standing water. *See id.* § 75.371(aa) (2014).

The requirements of a MSHA-approved ventilation plan are treated as mandatory safety standards for the purposes of inspection. The cited standard requires the operator to follow the contents of the approved plan. The approved plan required pumping to remove standing water specifically to make travel safe. *See supra* Section IV.A.; Ex. P-5, MSHA0067.

Respondent asserts that there is no violation because it complied with the Plan, stating, "[N]owhere in the mine's ventilation plan does it state that the mere presence of standing water [of] any depth or color is a violation." Resp't Br. at 23. Respondent argues that because the Plan "does not establish any criteria for when a certain depth or color of water constitutes a violation," it lacked notice of the criteria the inspector used to assess the violation. *Id.* at 27.

The Plan requirements are enforceable as mandatory safety standards. Respondent was not without notice of the applicable standard. First, precedent provides that such a violation and corresponding S&S designation have been affirmed against this operator. *See Consol Pa. Coal Co.*, 39 FMSHRC 1893, 1899 (Oct. 2017) ("Consol does not contest the finding that the accumulations of water violated the ventilation plan's requirement that bleeders be maintained safe for travel, thus satisfying the first element of the *Mathies* test.").

Second, per the *Skidmore* standards, I am persuaded that the Secretary's interpretation of the regulation—that a violation occurs when standing water is at a depth and darkness that obscures possible obstacles—is reasonable. First, this interpretation is consistent with the regulation's language requiring the removal of standing water to ensure safe travel. *See* Ex. P-5, MSHA0067. Plain language dictates that safe travel is hindered by the presence of standing water. This is due to the presence of obstacles obscured from view.

Second, this interpretation serves a permissible regulatory function. The Secretary's reasoning is valid because the regulation is intended to protect miners—in this case, from slip and fall hazards.

I find that the Secretary proved the violation by a preponderance of the evidence. Standing water existed in the violative bleeders. The water went above the inspector's boots even before deeper points in the water. Testimony from the inspector *and* Consol employees demonstrated that the water was "murky" and darkly colored to the point that they could not see obstacles under the water. This is sufficient for a violation under the strict liability for mandatory safety standards.

2. Gravity

a. Likelihood

The Secretary asserts that the injury is reasonably likely. If the hazard—inability to see obstacles while traveling through standing water—occurred, it is reasonably likely to result in tripping and falling. I affirm the assessed likelihood.

b. Severity

The Secretary provided credible testimony that tripping over an obscured obstacle would result in a sprain, broken bone, or head injury. I find that such an injury would reasonably result in a miner missing at least a full day of work. I affirm the assessed severity.

c. Number of Persons Affected

The inspector assessed that only one miner would be affected by the hazard. I find this reasonable because only examiners and inspectors travel the bleeder systems. Further, while examiners usually do this in pairs, it is likely that one would see the other fall and avoid the hazard. I affirm the assessed number of persons affected.

3. S&S

I affirm the S&S designation for the following reasons.

a. Step 1: The violation has been established.

The failure to keep a bleeder clear of standing water that obscures fall hazards is sufficient to constitute an underlying violation of a mandatory safety standard for the purposes of *Mathies* Step 1. *See supra* Section IV.B.1.

The Commission has affirmed a judge's S&S finding against this operator in sufficiently similar circumstances. *See Consol Pa. Coal Co.*, 39 FMSHRC at 1901. The facts in that case are almost identical to those here. In that case, the same inspector cited Consol for a violation of section 75.370(a)(1) because water was taller than his 18-inch boot, extended over a large area, was discolored, and contained tripping hazards. *Id.* at 1897. I find that the remaining *Mathies* factors were also established by a preponderance of the evidence.

b. Step 2: The violation was reasonably likely to result in the discrete safety hazard against which the regulation is directed—inability to travel safely because of obscured obstacles.

Unsafe travel is the discrete safety hazard against which the Plan's violated provision intended to protect. I find the inspector's description of the depth and color of the water credible. Even accepting Mr. Houchins' statement that a lot of clear water existed, that fact could not negate the presence, in other locations, of deep and "dark, orange, murky, standing water" as cited.

Further, the description mirrors the violative conditions already held to be sufficient for Step 2. In the previous similar Consol case, the Commission accepted the inspector's explanation that there were uneven floors and debris, that some water was so murky that a miner could not see his feet, and that it was reasonably likely that a miner would trip and fall walking through that hazard. *Consol Pa. Coal Co.*, 39 FMSHRC at 1899.

The Commission also expressly found that "[t]he requirement of a safe travelway is inextricably intertwined with the ventilation plan requirements of section 75.370." *Id.* at 1900 (acknowledging that examiners are required to travel bleeders). This negates a defense that miners do not work in the area, because examiners are required to walk the bleeders in the course of their work, and it is the operator's duty to ensure that they may travel there safely.

It is reasonably likely that a miner working in the area would not be able to see obstacles while traveling through the violative bleeders. Logic dictates that a person might reasonably trip over such an obstacle or unknown terrain and fall, or that the miner might step on or into an unseen obstacle, leading to a foot or leg injury. This possibility is sufficient to meet the requirement for Step 2. Therefore, the violation—failure to maintain bleeders free of standing water—is reasonably likely to result in the discrete safety hazard against which the regulation is directed.

c. Step 3: It is reasonably likely that inability to see obstacles in the standing water would result in an injury.

At this stage, the hazard caused by the inability to see obstacles in standing water has been established. For the reasons below, I find that the evidence establishes a trip, stumble, or fall due to obscured obstacles is reasonably likely to result in an injury.

Based on similar facts, the Commission has credited competent testimony that a miner who trips and falls is, "at a minimum, reasonably likely to suffer reasonably serious injuries such as broken bones." *Consol Pa. Coal Co.*, 39 FMSHRC at 1900. It is sufficient here that the inspector credibly testified that individuals could trip over many hidden obstacles in the murky, standing water, resulting in sprains, broken bones, or concussions. This testimony was bolstered by the fact that Mr. Verbosky acknowledged that there were places at which he could not see beneath the water's surface and would not be able to see obstacles.

I reject Respondent's assertions to the contrary. First, the operator contends that water in the bleeders never impeded or affected the ventilation. Resp't Br. at 34. This is irrelevant to the particular provision of the Plan that requires removal of standing water to permit safe travel.

Second, the operator argues that examiners are trained to walk through water in a bleeder cautiously. *Id.* at 34–35. Mr. Baker and Mr. Houchins testified to the caution employed in traveling the bleeders to take ventilation readings and facilitate water removal. This testimony is irrelevant, however, because the Commission has stated that miner precaution is not a defense in a Step 3 analysis. *See Consol Pa. Coal Co.*, 39 FMSHRC at 1900–01 (quoting *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992)) ("[T]he exercise of caution is not an element in determining the likelihood of injury once the reasonable likelihood of the occurrence of the

hazard is established, because '[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe working conditions.'").

d. Step 4: It is reasonably likely that such an injury would be of a reasonably serious nature—broken bones, sprains, or concussions.

An inspector's assessment of an injury as reasonably serious has generally been accepted. *See supra* Section III.B.3.d. Here, the Secretary has provided credible testimony that falling over obscured obstacles in standing water can result in strains, sprains, concussions, contusions, broken bones, and even death from drowning.

Respondent mostly addresses the *likelihood* of injury. *See* Resp't Br. at 34–36. Most relevant, Respondent contests the inspector's basis for his testimony that there are also hazards associated with the presence of contaminants that could cause cellulitis if the water contacted existing skin wounds. I need not address this, however, because it is sufficient for Step 4 that a trip, stumble, or fall over obstacles obscured by standing water would lead to the reasonably serious injuries cited by the inspector, and by the Commission and its judges in similar cases.

4. Negligence

I find that negligence was improperly assessed as "moderate." This is supported under a reasonable prudent person standard specific to mine operators. Respondent is familiar with the mining industry and relevant facts, and it has explicit familiarity with the protective purpose of this particular regulation. *See supra* Section IV.B.3.a. (noting that Respondent's similar violation has been affirmed as S&S by the Commission within the last five years). Therefore, I find that a reasonable prudent person in Respondent's position should have known about the violative condition.

The operator knew of the violative condition, but I find that the operator conducted every reasonably expected action to abate the standing water condition, even in the face of compounding problems. The Commission has affirmed a finding of no negligence where the Secretary failed to describe any actions not taken to meet the standard of care. *See JWR*, 36 FMSHRC at 1977. There, the Commission found no failure to act, noting that the inspector explained the citation was issued because "MSHA believed there was negligence and JWR 'did not do everything [it] could' to see that the contractor was following regulations." *Id.*

Here, the inspector acknowledged that Respondent implemented all means of removing water, noting that so long as all the equipment continued to run, those methods would have been sufficient. Tr. I at 274. He stated that the measures were clearly insufficient because everything should not have been failing at once. *Id.* at 238.

This is similar to *JWR* because no specific failed actions were described. As with the broad failure to "do everything [it] could," the Secretary here asserts that the failure of the measures taken equals negligence. I disagree.

While the presence of standing water existed for six weeks, the evidence demonstrates that considerable work was done to pump the water, that the number and severity of violative areas decreased over time, and that water was often pumped to acceptable levels before recurrence.

This was no small feat under the circumstances. Employees hand-carried replacement water pumps miles to remove water. Respondent installed more compressors when the existing were insufficient, and it built sumps to facilitate removal in steps. I find it noteworthy that Mr. Houchins, the assistant mine foreman, was personally involved in extraordinary efforts to correct the problem. *See* Tr. II at 146–54; Ex. R-6, CONSOL 022.

Numerous compounding problems also existed. Respondent dealt with constant wet conditions, broken pumps, and broken water pipes adding to the natural accumulation. It was reasonable to progressively address the problem as attempts proved inadequate, and there was no evidence that the operator was insufficiently focused on the problem. *See* Tr. I at 254–57; Tr. II at 101–06, 115–16, 135–37, 146; Ex. P-4, MSHA0037–40; Ex. R-5, 6; *see also* Resp't Br. at 38. Indeed, the inspector conceded that every corrective measure used to lower the water to acceptable levels had already been implemented by the operator before the inspection. *See* Tr. I at 200–01, 241–42, 274; *see also* Resp't Br. at 38.

The Secretary argues that grossly inadequate actions should not be considered mitigating circumstances. *See* S. Br. at 18; *Maple Creek Mining, Inc.*, 26 FMSHRC 539, 553 (June 2004) (ALJ), *aff'd in part & rev'd in part on other grounds*, 27 FMSHRC 555 (Aug. 2005). There, the judge affirmed the negligence finding because she found that the pumping conducted was "grossly inadequate." 26 FMSHRC at 553. The Commission affirmed her negligence finding, agreeing that the testimony indicated a "lack of seriousness" on the operator's part with respect to water accumulation in an escapeway. 27 FMSHRC at 566.

Accepting the Secretary's contention, I find that the record in this case does not support a lack of seriousness on Respondent's part. While previously inadequate, the measures employed made bleeder travel safe intermittently, and Respondent made continuous efforts, including the addition of a surface pump, before the inspection cited the violation. A senior mine manager was personally involved in these extensive efforts. The facts here are thus clearly distinguishable. For the above reasons, I reduce the negligence finding from "moderate" to "none."

5. Penalty

I have previously recognized the Secretary's proper consideration of the operator's business size and ability to continue in business. *See supra* Section III.B.5. These Section 110(i) considerations remain the same here.

Respondent's history of violations is reflected in Exhibit P-6. Its history consists of six repeat violations during the inspection period. Accordingly, this factor has already been properly considered and is of no consequence in my decision to modify this assessed penalty.

I affirm the violation's gravity as assessed. I found that injury is reasonably likely, is likely to result in lost workdays or restricted duty, is S&S, and would affect one person. Accordingly, this factor did not affect my decision to reduce the penalty.

Following the citation, Respondent pumped the accumulations of water down and made the area safe for travel within nine days. Considering this fact with its demonstrated continuous mitigation, I find that the operator demonstrated good faith in attempting to achieve rapid compliance after notification.

The proposed penalty was based, in part, on the negligence assessed in the citation. Because I find that a reduction in negligence is warranted, *see supra* Section IV.B.4., I also find that a penalty reduction is appropriate. The proposed penalty was $674.00, based in part on the Secretary's finding of moderate negligence. Because I find that the operator was not negligent, I assess a penalty of $150.00.

C. Conclusion

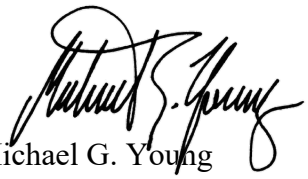
I affirm the citation and gravity. I find a reduction in negligence from "moderate" to "none." I therefore assess a penalty of $150.00 in accordance with the modification.

V. CONCLUSION

It is **ORDERED** that Citation No. 9203910 be **AFFIRMED** as issued.

It is also **ORDERED** that Citation No. 9204098 be **AFFIRMED** with the assessed gravity, and that the level of negligence be **MODIFIED** from "moderate" to "none."

Finally, it is **ORDERED** that the Respondent pay the Secretary of Labor the assessed penalty of **$850.00** within 30 days of the date of this decision.[5]



Michael G. Young
Administrative Law Judge

[5] 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.

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