

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
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February 27, 2025

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

v.

GENTRY MOUNTAIN MINING LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2024-0064  
A.C. No. 42-02263-588942

Mine: Gentry Mine #3

**DECISION AND ORDER**

Appearances: Bryan Kaufman, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 515, Denver CO 80204-3516

Kenneth Polka, CLR, U.S. Department of Labor, MSHA, Lakewood District, P.O. Box 25367, DFC, Denver, CO 80225-0367

Paul Cannon, Attorney, 53 West Angelo Ave., Salt Lake City, UT 84115

Before: Judge Simonton

**I. INTRODUCTION**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Gentry Mountain Mining Company (“Gentry Mountain” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.<sup>1</sup> This docket originally contained six 104(a) citations. Citation No. 9159960 was settled prior to hearing. The five remaining citations are associated with a proposed penalty of \$3,333.00 against Gentry Mountain.

The parties presented testimony and documentary evidence regarding the citations at issue at a hearing held on October 28, 2024, in Salt Lake City, Utah. MSHA Inspectors David Turner, Sydel Yeager and Jose Hernandez testified for the Secretary. Gentry Mountain safety director Randy Defa testified for the Respondent. After fully considering the testimony and

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<sup>1</sup> In this decision, the joint stipulations, transcript, Secretary’s exhibits, Respondent’s exhibits, Secretary’s brief, and Respondent’s brief are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. GX–,” “Ex. R–,” “S. Br.,” and “R. Br.,” respectively.

evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation Nos. 9730062 and 9730066 as issued and **AFFIRM** Citation Nos. 9730069, 9730072, and 9730073 as modified herein.

## **II. STIPULATIONS OF FACT**

At hearing, the parties agreed to the following stipulations:

1. Gentry Mountain Mining Company, LLC, was, at all relevant times, the "operator" of Gentry Mine No. 3. ID: 42-02263, as defined in §3(d) of the Mine Act, 30 U.S.C. § 803(d).
2. The Gentry Mine No. 3 is a "mine," as defined in the Mine Act.
3. Gentry Mountain Mining Company, LLC. has been the "operator" of King 6 Mine. ID: 42-01599, as defined in §3(d) of the Mine Act, 30 U.S.C. § 803(d) from July 7, 2024, until present. This mine has been in idle status since before July 7, 2024.
4. The King 6 Mine is a "mine," as defined in the Mine Act.
5. Mine No. 3 is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
6. Gentry Mine No.3 is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1970, 30 U.S.C. §§ 801-965.
7. The citations at issue in this proceeding were properly served upon Gentry Mountain Mining Company, LLC, as required by the Mine Act.
8. The citations at issue in this proceeding may be admitted into evidence for the purpose of establishing the issuance but no stipulation is made regarding their truthfulness or relevancy of any statements asserted therein.
9. Gentry Mountain Mining, LLC, demonstrated good faith in abating the alleged violations.

Tr. 9.

## **III. FINDINGS OF FACT AND CONCLUSIONS**

The citations at issue at hearing were issued by MSHA Inspector David Turner during inspections conducted on May 31, 2023, June 1, 2023, June 7, 2023, and June 8, 2023, at Gentry Mine #3.

## A. Citation No. 9730062

### i. Background

When traveling through the main haulage way during his May 31, 2023, inspection, Inspector Turner encountered loose ribs located at the outby and inby corners of a crosscut. Tr. 43, 45, 47; Ex. GX-1. The outby rib was estimated to be two and a half feet wide, seven feet tall, and up to eight inches thick. Tr. 46. A second loose rib was located at the inby corner of the same crosscut, estimated to be seven feet high, four foot thick, and six feet wide. Tr. 47, 60. As the main haulage way is also the escapeway and primary travel way into the mine, miners would frequently walk beside the ribs. Tr. 47-48. A broken-down roof bolter was parked in the crosscut, between the two loose ribs, requiring employees to walk within two feet of either of the loose ribs to get around the machine. Tr. 48-49, 62. At the time of the inspection, the inspector did not observe anyone working on the bolter. Tr. 63.

When a rib falls, it will either tumble down or crush out. Tr. 64. When the outby rib was removed, it crumbled and fell approximately three feet into the haulage way. Tr. 51-52. The inspector did not witness the removal of the inby rib because it required the use of equipment. Tr. 52. The inspector testified that when he interviewed miners after the inby rib was removed, they informed him that the rib came right down after it had been hit with a scoop and fell into the entry. Tr. 58, 60. Based on this information, the fallen rib would have taken up seven to eight feet of the entry, leaving the remaining eight to ten feet to walk. Tr. 58-59. In addition, sloughage was located near the bad rib; while miners can walk in the sloughage, it does present a tripping hazard. Tr. 59.

Injuries associated with being struck by a falling rib include crushing-type injuries that could potentially be fatal. Tr. 53. The inspector assigned the severity of injury as “permanently disabling,” which he testified was generous and that he gave the operator the benefit of the doubt with this designation. Tr. 53. The inspector also determined that this violation was significant and substantial. Tr. 54. One person, any miner on foot in the working section at any given time, would be affected by a falling rib. Tr. 54. Negligence was assessed as moderate, because it was outby, two breaks of the last open crosscut, and because the lifeline was on the other side of the entry at the time of inspection. Tr. 55. Further, the section boss should be doing pre-shift evaluations in the area to ensure safety. Tr. 55-56. Where miners walk cannot be regulated on a daily basis and they could be walking anywhere in the entry. Tr. 65.

Randy Defa, the safety director at Gentry Mountain, testified for the Respondent. He did not believe the outby rib was as dangerous as the inspector described, because it was leaning inwards and tapered from the bottom up. Tr. 233-235. When it was removed, it slid down the wall. Tr. 235. He also testified that the ribs were located in the air course of the escapeway, and not the escapeway itself, which is only six feet wide. Tr. 235-236. When the rib was brought down, it fell on top of the sloughage lining the edges of the entry. Tr. 237. The Respondent trains its miners to avoid walking on the sloughage because it is a tripping hazard and they were unlikely to be in the area where the rib ultimately fell. Tr. 239, 242-243. He also testified that the bolter was further in than what the inspector described and that it was not within two feet of the bad rib. Tr. 253.

ii. Fact of Violation

The Commission has long held that “[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law and the standard applicable here, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

On May 31, 2023, Turner issued 104(a) Citation No. 9730062, which alleged:

The ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the ribs and coal. At the time of inspection in the intersection of X-cut 14 in the #4 entry of the 5th West Development Section (MMU 001), it was observed to have multiple locations where loose ribs were. On the outby corner, one loose rib was pried down measuring at least 2.5 feet wide, 7 feet tall, and 8 inches thick. The loose rib corners were in the primary escapeway, which is also the main haulage way for 5th West Section. It was also observed that on the inby corner the rib was severely cracked and revealing a potential large piece of the inby corner that was not secured or supported. These areas around the ribs and bad corners are at least 10’ high and the intersection is higher. This area is regularly traveled by any miner working in the 5 West section throughout the day. If these ribs were to fall, they would cause crushing type injuries to a miner passing by the area.

Standard 75.202(a) was cited 13 times in two years to mine 4202263 (13 times to the operator, 0 times to)

Ex. GX-1; Tr. 45.<sup>2</sup>

Turner designated the citation as a significant and substantial violation of 30 C.F.R. § 75.202(a) that was reasonably likely to cause an injury that could reasonably be expected to be “permanently disabling,” would affect one miner, and was caused by Respondent’s moderate negligence.

30 C.F.R. § 75.202(a) states that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.”

The parties do not contest the fact of the violation. Accordingly, I affirm that there was a violation of 30 C.F.R. § 75.202(a).

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2. All errors contained in this narrative of the cited condition or practice are reflective of the language used by the inspector in the issued citation.

iii. Gravity and S&S

The inspector assessed the hazard as reasonably likely to cause an injury or illness, because of the frequent use of the haulage way and because it was a primary escapeway. He designated that the injury would reasonably be expected to be permanently disabling, because falling rib could cause crushing type injuries. The Respondent contends that the likelihood of injury should be reduced to unlikely and the severity of the injury should be reduced to lost workdays or restricted duty because the loose rib was not actually located in the escapeway, but rather adjacent to it, and this location posed no risk to miners who were often protected by the man trip. After reviewing the relevant testimony and evidence, I credit the inspector's testimony and his assessment of the conditions at the time of the violation and affirm these designations. *Buck Creek Coal* 52 F.3d 133, 135-36 (7th Cir. 1995).

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

I have already determined that a violation of a mandatory safety standard occurred, satisfying the first step of the S&S analysis. As Inspector Turner testified, the hazard associated with the violation is crushing injuries from loose rib falling onto a miner. The location of the violation is the main escapeway where miners travel frequently. The inspector described the loose ribs as large and there was uncertainty regarding how they would fall and where they would land. The parked roof bolter also required miners working on the machine or passing through the escapeway to maneuver around the bolter and be in close proximity to the loose ribs. I defer again to the inspector and find that based on these facts, the violation was reasonably likely to cause the occurrence of a discrete safety hazard. It is also reasonably likely given the size of the loose ribs that the injury in question would be of a reasonably serious nature. The S&S designation is affirmed.

iv. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Turner assessed negligence as moderate but acknowledged at hearing that a finding of high negligence could be supported. Management should have recognized the loose rib condition and removed it, but the loose rib condition was located across from the lifeline and there would be no exposure to the ribs when using the lifeline. I reluctantly affirm the negligence level as moderate.

## **B. Citation No. 9730066**

### **i. Background**

On June 1, 2023, Inspector Turner issued a citation for a come-along missing a safety latch. Tr. 67, 69; Ex. GX-4. A come-along is a piece of machinery described as a miniature manual hoist with a handle, chain, two hooks, and a ratcheting mechanism that is used to lift and maneuver heavy objects. Tr. 37. Inspector Turner testified that it was important for equipment like the come-along to have safety latches to secure the load, otherwise the load may detach from the equipment's hooks. Tr. 38, 72, 74. He has never seen a come-along come from the manufacturer without safety latches and believed safety latches are the only safe way to operate a come-along. Tr. 73, 81, 82.

The come-along at issue was found on top of a large tire, estimated to weigh a few hundred pounds, that had been removed from a nearby shuttle car. Tr. 69-70. The come-along would be used to ratchet the tire into a vertical position and move it closer to the car so that it could be reattached. Tr. 71. The shuttle car was parked in the crosscut, leaving minimal room to manipulate the tire. Tr. 75-76. Even though the come-along was designed to swivel, the inspector did not think that this had any bearing on whether the load could detach while the come-along was in operation. Tr. 83. The inspector believed that at the time of the citation the operator either had been working on the shuttle car or had intentions to work on the shuttle car. Tr. 69. He later learned that someone on an earlier shift had worked on the shuttle car. Tr. 69, 78.

He marked the violation as unlikely to cause an injury because the come-along was not in use at the time he observed the condition. Tr. 77. One person, the miner operating the come-along, would be injured. Tr. 78. The injuries associated with this hazard include crushing type injuries such as sprains and strains or otherwise disabling injuries. Tr. 75, 77-78. A miner could be pinned by the tire in the limited space available to work on the shuttle car. Tr. 80. As management was responsible for ensuring that equipment is in safe working order, the violation was cited as moderate negligence. Tr. 78.

Randy Defa again testified for the Respondent regarding this citation but was not present at the time it was issued. Tr. 258. Based on the language of the cited standard, which only references "equipment," he did not believe that the standard applied to the violation because the come-along is a tool and not equipment. Tr. 258, 263. As evidence supporting this interpretation, Defa referenced the analogous standard for metal/nonmetal mines, which explicitly references tools. Tr. 262-263. The analogous OSHA standard also does not explicitly state that the use of safety latches is required, only that slings shall be securely attached to their loads. Tr. 265-266, 277-278. Regarding the come-along at issue, the hooks were deep, which prevented them from slipping off the load while the come-along is in use. Tr. 260. In his own experience, he has never

witnessed a hook slip off a load regardless of whether safety latches were in use or not. Tr. 260, 269. As a safety latch is only one way to securely attach a load, they were in compliance with safety practices. Tr. 278. Defa admitted that the operator is not bound by the OSHA guidelines, and they are merely used as a reference. Tr. 278.

Defa also provided testimony about MSHA policy and guidelines for enforcing the cited standard, which he had never seen cited previously. Tr. 262-263, 271. Referencing a 2008 email that was distributed to MSHA staff about enforcing the analogous metal/non-metal standard, he testified that it was his understanding that in order to find a violation of the cited standard, all five requirements listed in the email must be met: (1) a sling or a come-along has a broken or bent safety latch, (2) safety latch is missing from a sling or come-along hook that was originally equipped with one, (3) the sling and/or come-along hook is in use, (4) the safety latch was damaged or came off during use, and (5) use of the come-along or sling hook without a safety latch affects the safety and that the load could come off the hook creating a hazard to miners. Tr. 263-264; Ex. R-E. Under this analysis, Defa did not think element one had been met because the come-along had no hooks at all and element five had not been met because the load could not come off the hooks of the come-along. Tr. 264-265. No one from MSHA had ever informed Defa that this was official policy, however. Tr. 276. Defa testified that the cited standard was not applicable to the come along, because under MSHA policy the standard should only apply if the load could detach without the use of a safety latch, which was not the case here. Tr. 264.

ii. Fact of Violation

On June 1, 2023, Turner issued 104(a) Citation No. 9730066, which alleged:

Any piece of mobile and/or stationary machinery and/or equipment shall be maintained in a safe operating condition and all unsafe machinery or equipment shall be removed from service immediately. At Xcut 13 in the 5th West section, it was observed that a ¾ ton com-along had missing safety latches on both ends. These safety latches are to assure that the hooks will remain hooked up to whatever is necessary at the time of use. It was evident that the com-along had been recently used on a shuttle car that was also being worked on at Xcut 13. The com-along was found sitting on a shuttle car tire that was lying on the mine floor and was found to be in a ready to use state.

Standard 75.1725(a) was cited 11 times in two years to mine 4202263 (11 times to the operator, 0 times to a contractor)

Ex. GX-4; Tr. 67.

Turner designated the citation as a non-significant and substantial violation of 30 C.F.R. § 75.1725(a) that was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. GX-4.

30 C.F.R. § 75.1725(a) states that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in an unsafe condition shall be removed from service immediately.”

It is uncontested that the come-along did not have safety latches at the time of the violation. The Respondent argues that there was no violation of the cited standard because the standard only references equipment, and the come-along is a tool. The standard for metal/non-metal mines specifically mentions tools, indicating that the references to tools were omitted from the same standard for coal mines and that the coal mine standard does not apply to tools. As noted by the Secretary in her post-hearing brief, equipment has previously been defined as “[t]he implements (as machinery or tools) used in an operation or activity.” *Knife River*, 33 FMSHRC 1456, 1469 (June 16, 2011). I adopt this definition of the word “equipment,” and I find that the cited standard is applicable to the come-along.

The Respondent also argues that the relevant OSHA standard does not explicitly require the use of safety latches to secure a load. I do not give this argument any weight, because the Respondent admitted during the hearing the OSHA standard was only used as a reference and that it is not binding on a mine operator. Additionally, there is no evidence that demonstrates that the Respondent took any action to secure the load.

Finally, the Respondent contends that the MSHA policy email about enforcement of the analogous metal/non-metal standard, presented as Exhibit R-E, requires that all five elements listed be met in order to find a violation. R. Br. at 7; Ex. R-E. Under their interpretation, there cannot be a violation because only one of the elements, a missing safety latch, is satisfied. After reviewing the email, I find this guidance to be confusing at best. From the language of the first two elements, a piece of equipment would need to have both a missing safety latch *and* a broken or bent safety latch in order to find a violation under the Respondent’s interpretation. As the practical outcomes of this interpretation would result in never finding a violation, I decline to adopt the Respondent’s interpretation of this guidance.

I have already determined that the cited standard applies to the come-along, therefore, I find that there was a violation of 30 C.F.R. § 75.1725(a).

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury that would result in lost workdays or restricted duty. The violation was determined to be unlikely because the inspector did not observe anyone operating the come-along at the time of the citation and the injuries likely to result from this violation would be strains and sprains. The testimony from Defa regarding his personal experience and his personal observations regarding the security of loads without the use of safety latches also supports a designation of unlikely. I affirm the citation’s designations as unlikely and lost workdays or restricted duty.

iv. Negligence

The negligence level was assessed as moderate. Inspector Turner testified that it is management’s responsibility to maintain equipment in safe working order. Also, he was told by



Respondent that someone was working on the shuttle car from another shift but he had no idea who that person was. From this testimony I conclude that the mitigating circumstance was that he did not personally observe the come-along in use in the violative condition. I credit the inspector's testimony and rationale and affirm his assessment of moderate negligence.

### **C. Citation No. 9730072**

#### **i. Background**

Inspector Turner issued Citation No. 9730072 on June 7, 2023, for a Jeep truck parked in the haulage way, which also serves as the primary escapeway for the mine. Tr. 86-87. The mine's safety representative who was traveling with the inspector at the time, informed the inspector that the vehicle was down. Tr. 86-87. The truck had not been tagged out, but it still had the ability to run. Tr. 87. The safety representative then moved the truck out of the haulage way. Tr. 87.

The truck was parked directly beneath the lifeline, the guide attached to the roof for miners to use to escape in low-visibility emergency scenarios. Tr. 87-88. A designated escapeway of six feet would lead miners directly into the back of the truck. Tr. 89, 98. The inspector testified that miners in an emergency situation will likely panic and be confused upon encountering the truck, which could cause them to drop the lifeline or otherwise unnecessarily delay while escaping. Tr. 90.

Because the truck was left parked in the escapeway, the inspector determined that the escapeway was not properly maintained. Tr. 92. The citation was marked as unlikely and non-S&S because there were no hazards present underground at the time of the citation and the lifeline could be pulled around the truck. Tr. 92, 99-100. Further, if miners had the right mindset in an emergency situation, the entry was large enough to move around the parked truck and still escape. Tr. 92, 96, 97. While more severe injuries could result from this violation, the inspector marked it as lost workdays due to unnecessary delays from maneuvering around the truck. Tr. 92-93. One person would be affected by this hazard, most likely the lead miner who would be the first person to encounter the truck. Tr. 93. The inspector said that this was generous because it was a shift change at the time of citation with two working sections underground. Tr. 94. Delayed escape could also expose the miners to other hazards for a longer period of time. Tr. 95.

Defa, who did not see the actual condition of the lifeline at the time the citation was issued, testified that the truck did not impact the twelve-foot-wide escapeway, because even with the truck parked there, there was still six feet of space to maneuver. Tr. 280-281, 286, 294. As long as there is a six-foot walkway, it is standard practice to park vehicles along the escapeway. Tr. 286. He also believed that the lifeline did not go over the truck, but just over the edge. Tr. 282, 292; Ex. R-H. Because the lifeline is flexible, it could have been easily pulled around the truck. Tr. 282-283, 291, 295. While escaping, miners would be able to get around the truck quickly and would not be slowed down by the truck, even if they were experiencing nervousness or panic from an emergency situation. Tr. 282, 293. Defa did admit that if a miner could not see the Jeep, he would not know to move the lifeline to the other side until he reached the truck. Tr. 292.

ii. Fact of Violation

On June 7, 2023, Turner issued 104(a) Citation No. 9730072, which alleged:

Each escapeway shall be properly maintained in a safe condition to always assure passage of any miner, including a disabled miner. The #4 entry in Mine 3 is the main haulageway and primary escapeway for the mine. The primary escapeway is in 1st North at Xcut 4 was found not being properly maintained. At the time of inspection, Jeep truck #108 was found parked and left unattended, directly under the lifeline in the entry. This will create confusion and unnecessary delays to the miners who would be trying to get around the truck while using the lifeline in the primary escapeway in a post-accident scenario and smoke infested atmosphere.

Standard 75.380(d)(1) was cited 6 times in two years to mine 4202263 (6 times to the operator, 0 times to a contractor)

Ex. GX-8; Tr. 86-87.

Turner designated the citation as a non-significant and substantial violation of 30 C.F.R. § 75.380(d)(1) that was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. GX-8.

30 C.F.R. § 75.1725(a) states that each escape way shall be "[m]aintained in a safe condition to always assure passage of anyone, including disabled persons."

From the testimony, it is clear that the parked Jeep truck presented an obstacle to a miner using the lifeline in an emergency where visibility is limited. During such an emergency, nothing should impair a miner's ability to evacuate while using the lifeline. At least the first miner in the line of those escaping would need to pull the lifeline down and around the truck. I agree with the Secretary's argument that this can create confusion and delays. While the Respondent argues that there is no violation because the lifeline could easily be pulled down and maneuvered around the truck, this does not detract from the fact that the Jeep parked in the escapeway presents an obstacle for miners to avoid in the event of an emergency. I find that the Respondent violated the cited standard.

iii. Gravity

The inspector assessed the hazard as unlikely to cause an injury or illness that would result in lost workdays or restricted duty because there were no hazards at the time of the citation that would have necessitated use of the lifeline. I defer to the inspector's determination that this violation would only cause minor delays during an emergency evacuation. I affirm that this violation is unlikely and that the severity of the injury would result in lost workdays or restricted duty.

iv. Negligence

Turner assessed the negligence as moderate, which he testified was generous and that the violation could have been assessed as high. When the inspector found the violation, it was during a shift change with two shifts of miners underground. Management passing through should have seen the parked Jeep and removed it rather than allowing the condition to persist. I find it concerning that the Respondent seemingly does not take issue with parked vehicles, especially multiple vehicles, in the escapeway and under the lifeline. This indicates to me that there is little regard for maintaining the escapeway in a safe condition. The cited standard also states that the escapeway should assure the passage of disabled persons. The Respondent does not appear to consider the added complications of evacuating a disabled person when parking vehicles in the path of the lifeline. For these reasons, I increase the negligence from moderate to high.

**D. Citation Nos. 9730069 and 0730073**

i. Background

Both citations arise from similar circumstances involving non-functional methane monitors located on machinery operating in the working face. Methane is an odorless gas that is unpredictable and can appear suddenly. Tr. 114, 127. It presents a hazard during mining because it may ignite in the presence of sparks caused by dull bits on a cutter head or other permissibility issues on machines used in the mining process. Tr. 108, 171. The explosive range for methane is between 5 and 15%. Tr. 106. Levels below 5% are unlikely to cause an explosion, but if coal dust is present, it may lower the explosive range of methane. Tr. 130, 171-172, 192. Even if methane levels are below the explosive range, methane continually poses a hazard because an accumulation may build up anywhere, increasing the concentration in a specific area. Tr. 178-179, 180, 184-185.

The only way to detect methane is by placing a monitor onto operating machinery. Tr. 114, 126, 128, 160. The monitor's display is located at the back of the machine and the sniffer, which detects methane, is located towards the front of the machine. Tr. 105. In this configuration, the operator is at least 30 feet away from the sniffer. Tr. 107. If the monitor registers a methane reading of 1%, it gives the operator a warning comprised of a flashing warning light. Tr. 104, 120. At that reading, the operator should back the machine out of the area, ensure he has ventilation, and liberate the methane out of the working face. Tr. 106. At a 2% methane concentration, the machine automatically shuts down. Tr. 104, 120.

Sydel Yeager, an MSHA inspector and ventilation specialist, testified about the characteristics of Gentry Mine #3. Tr. 150, 152. Bottle samples collected at the mine clearly demonstrate that the mine liberates methane. Tr. 153; Ex. GX-17. He confirmed that methane liberations can be found anywhere in the mine, particularly at the working face, and can appear unexpectedly. Other mines and gas wells located on the same coal seam as Gentry #3 also liberate methane, and other mines have been placed on spot checks. Tr. 162, 164-165; Ex. GX-16. While not currently on a methane spot, the mine has previously been on a 103(i) methane spot in 2009 for elevated levels of methane, indicating more hazards and risks at that time. Tr. 158; Ex. GX-19. Tr. 153-155, 159, 175-176. In addition to methane, the mine also releases other harmful gases, such as ethane. Tr. 155-156, 186-187. The operator had been put on notice in

January 2024 that the mine had been creating more methane than before. Tr. 166; Ex. GX-14, GX-15.

Less than four months prior to the two citations at issue, a possible ignition event of one-second duration occurred on February 28, 2023. Tr. 210-211, 220; Ex. GX-18. MSHA inspector Jose Hernandez testified about the investigation into this event. Tr. 200. Citations were issued to the operator for dull work bits, failure to monitor dust levels, failure to perform 20-minute methane checks, and a lack of ventilation at the working face. Tr. 212-213; Ex. GX-18. Ultimately, the conclusion of the investigation found that an ignition had in fact occurred. Tr. 218. However, the Respondent's safety director, Randy Defa, disputes this conclusion and maintains that the citation issued for the ignition was erroneous. Tr. 302, 310. Because MSHA regulations state that a mine operator has 15 minutes to call in events like an ignition, the operator did not have time to conduct an investigation themselves. Tr. 308. Later, the operator discovered an inexperienced miner mistakenly believed there was one. Tr. 309. When the miner cut into sandstone, the miner mistook sparks for an ignition. Tr. 309.

The first citation at issue in this docket, No. 9730069, was issued by Inspector Turner on June 7, 2023, for a methane monitor that was not functioning properly. Tr. 100-102; Ex. GX-6. When the inspector attempted to simulate a 2.5% methane reading, the display on the back of the monitor did not move from zero. Tr. 102. The inspector testified that monitors that fail to work at all were very rare. Tr. 118. Without a functioning methane monitor, miners may be exposed to a possible methane ignition. Tr. 103. At the time of the citation, no methane was detected in the section. Tr. 110-111. In addition to the methane monitor, there were other violative conditions on the continuous miner that were addressed in other citations that could contribute to an ignition event. Tr. 109-110, 129.

The inspector marked the violation as reasonably likely and S&S because of the confluence of factors, including the two citations issued for other conditions found on the continuous miner. Tr. 115. While Inspector Turner has never detected methane personally using his handheld monitor at the mine, methane samples can vary and without monitoring, the amount of methane liberated in a specific location is unknown. Tr. 123, 144, 146-147. Prior to joining MSHA, Inspector Hernandez worked at the Gentry mine and detected methane in the mine during his employment with the Respondent. Tr. 203-204. Based on his experience, Hernandez believed that it was reasonably likely for an ignition to occur given the condition of the continuous miner. Tr. 219; Ex. GX-6. The only person that would be affected by this violation would be the machine operator; however, it is also common for the operator to have a helper during the mining practice at any given time. Tr. 116. The injuries associated with this violation include skin burns and eye injuries and would result in lost workdays or restricted duty. Tr. 117. Inspector Turner further noted that if there was an ignition of coal dust, the injuries would be more severe. Tr. 117. The citation was marked as moderate negligence because methane has been found occasionally in the mine and because the operator reported an ignition earlier in the year, however given the operator's history it would be possible to support a designation of high negligence. Tr. 116, 118-119.

The second citation, No. 9730073, was issued the next night on June 8, 2023, for a similar violation. Tr. 132; Ex. GX-10. A methane monitor on a different continuous miner was also

found to be non-responsive, with a display that did not move from zero when a 2.5 % concentration of methane was introduced. Tr. 133, 135. There were other violative conditions associated with this miner, which were addressed in other citations, that could increase the severity of an ignition event. Tr. 135-137. Similar to Citation No. 9730069, the citation was assessed as reasonably likely, lost workdays or restricted duty, and S&S due to the repetitiveness of the condition and the confluence of factors. Tr. 142, The negligence cited as moderate, but the inspector testified that it could have easily been cited as high. Tr. 143.

Citations for non-functioning methane monitors were issued frequently at the mine. Tr. 139. Inspector Turner testified about one related citation, No. 9734282, which had been issued for a monitor that had a blue latex glove taped over the sniffer, the part of the monitor that detects methane. Tr. 140-141; Ex. GX-21. In that condition, the sniffer would not be able to detect any methane, which Inspector Turner described as “alarming.” Tr. 141. This indicated to the inspector that the operator was not maintaining the methane monitors or properly considering the hazards of methane. Tr. 140, 144.

Randy Defa testified that prior citations for non-functioning methane monitors had been designated as unlikely and non-S&S because of the mine’s history of low methane liberation, conditions observed, and history of similar citations. Tr. 299, 300-301; Ex. R-L, R-K. Records maintained by the Respondent of weekly air readings, including methane readings, reflect methane levels of zero to low. Tr. 297-298; Ex. R-J. At these levels, which have never constituted a dangerous amount of methane, there would be no likelihood of an explosion. Tr. 312, 313-314, 320.

ii. Fact of Violation

On June 7, 2023, Turner issued 104(a) Citation No. 9730069, which alleged:

All methane monitors shall be maintained in a permissible state and in a proper operating condition. The methane monitor on the continuous mining machine company #CM014 which is located in the 3rd Left pillar section, (MMU002) was found not being maintained in a functional state. When tested with a known air-methane mixture of 2.5%, the methane monitor on the miner did not react and the display on the readout stayed at zero. This condition will not make the operator aware if methane is present while operating the machine in the working faces and will expose the operator to a potential methane ignition.

Standard 75.342(a)(4) was cited 9 times in two years at mine 4202263 (9 to the operator, 0 to a contractor)

Ex. GX-6; Tr. 100.

Turner designated the citation as a significant and substantial violation of 30 C.F.R. § 75.342(a)(4) that was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent’s moderate negligence. Ex. GX-6.

The second 104(a) citation, No. 9730073, was issued On June 8, 2023, and alleged:

All methane monitors shall be maintained in a permissible state and in a proper operating condition. The methane monitor on the continuous mining machine company #CM017 which is located in the 5<sup>th</sup> West Develop section, (MMU001) was found not being maintained in a functional state. When tested with a known air-methane mixture of 2.5%, the methane monitor on the miner did not react and the display on the readout stayed at zero. This condition will not make the operator aware if methane is present while operating the machine in the working faces and will expose the operator to a potential methane ignition. The operator is hereby officially put on notice. This condition has been cited multiple times and appears to be an ongoing issue at this mine. The operator is advised to come up with a solution to this ongoing issue because if this condition continues to be found throughout the mine, then the condition will be cited and a higher enforcement and negligence will be considered justified.

Standard 75.342(a)(4) was cited 9 times in two years at mine 4202263 (9 to the operator, 0 to a contractor)

Ex. GX-10; Tr. 132.

Turner designated the citation as a significant and substantial violation of 30 C.F.R. § 75.342(a)(4) that was reasonably likely to cause an injury that could be expected to result in lost workdays or restricted duty, would affect one miner, and was caused by Respondent's moderate negligence. Ex. GX-10.

30 C.F.R. § 75.342(a)(4) states, in pertinent part, that “[m]ethane monitors shall be maintained in permissible and proper operating condition.”

The parties do not dispute that the methane monitors on the two continuous miners were not functioning at the time the conditions were cited. The fact of violation is affirmed for both citations.

iii. Gravity and S&S

Inspector Turner designated each violation as significant and substantial and reasonably likely to cause an injury that would result in lost workdays or restricted duty. The Respondent argues that the violations should be reduced to unlikely, because there is no evidence that methane levels underground were in the explosive range. Assuming normal mining operations, I find that an ignition was unlikely to occur. The history of methane emissions reflects that methane levels were well below the explosive range and slightly above zero at most. Considering the prior enforcement history of these types of violations, I reduce the likelihood of each violation to unlikely.

I raise the severity of the injury, however, to fatal. The Secretary's witnesses testified at length about the dangers of methane ignition and the impossibility of a machine operator to know the concentration of methane at his location without a working methane monitor.

Further, each of the continuous miners had other violative conditions that would increase the severity of an ignition event were one to occur. Should an ignitable concentration of methane be encountered, the resulting event would cause more severe injuries than burns.

Both violations were marked as significant and substantial. The fact of violation has already been established. But the Secretary has failed to show that the occurrence of an ignition is reasonably likely. The conditions at the mine do not show that either operator of the continuous miners were likely to encounter an ignitable concentration of methane, as the historical levels of methane liberation were either zero or slightly above zero. As the analysis fails at step 2, I reduce both citations to non-S&S.

iv. Negligence

The inspector testified that the negligence of each violation was assessed as moderate. However, given the Respondent's alarming history of similar violations for non-functioning methane monitors, it is obvious that the many dangerous hazards associated with methane are not taken seriously by the operator. This type of violation has been cited far too frequently and in light of the Respondent's indifference towards rectifying this repeated issue, which as discussed above can have severe consequences, I raise the negligence for both citations to high.

**E. PENALTY**

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) 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).

For Citation No. 9730062, the Secretary proposed a regularly assessed penalty of \$1,246.00. Gentry Mountain has a significant history of thirteen prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator's ability to continue in business. As discussed above, I find that this is an S&S violation that is reasonably likely to result in permanently disabling injuries and was caused by the operator's moderate negligence. The operator acted in good faith in abating the violation. In light of these considerations, particularly the number of previous violations, I raise the penalty to \$4,984.00.

For Citation No. 9730066, the Secretary proposed a regularly assessed penalty of \$252.00. Gentry Mountain has a history of twelve prior citations under this standard. There is no

evidence that the penalty associated with this violation will impact the operator’s ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in lost workdays or restricted duty and was caused by the operator’s moderate negligence. The operator acted in good faith in abating the violation. Noting the significant history of similar violations, I increase the penalty to \$504.00.

For Citation No. 9730072, the Secretary proposed a regularly assessed penalty of \$167.00. Gentry Mountain has a history of six prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator’s ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in lost workdays or restricted duty and was caused by the operator’s high negligence. The operator acted in good faith in abating the violation. In light of these considerations, I find an increased penalty of \$334.00 is appropriate.

For Citation No. 9730069, the Secretary proposed a regularly assessed penalty of \$834.00. Gentry Mountain has a history of eight prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator’s ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in fatal injuries and was caused by the operator’s high negligence. The operator acted in good faith in abating the violation. In light of these considerations, I increase the penalty to \$3,336.00.

For Citation No. 9730073, the Secretary proposed a regularly assessed penalty of \$834.00. Gentry Mountain has a history of eight prior citations under this standard. There is no evidence that the penalty associated with this violation will impact the operator’s ability to continue in business. As discussed above, I find that this is a non-S&S violation that is unlikely to result in fatal injuries and was caused by the operator’s high negligence. The operator acted in good faith in abating the violation. In light of these considerations, I increase the penalty to \$3,336.00.

**F. PARTIAL SETTLEMENT**

The parties have filed a motion to approve partial settlement regarding the one settled citation. The originally assessed amount for this single action was \$834.00 and the settlement amount is \$834.00. The settlement includes:

<b>Citation/ Order No.</b>	<b>Originally Proposed Assessment</b>	<b>Settlement Amount</b>	<b>Modifications</b>
9159960	\$834.00	\$834.00	Affirm as Issued
<b>TOTAL</b>	<b>\$834.00</b>	<b>\$834.00</b>	

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED**, the citation is **AFFIRMED** as set forth above.



## G. ORDER

It is hereby **ORDERED** that Citation Nos. 9730062 and 9730066 are **AFFIRMED** as issued, Citation Nos. 9730069 and 9730073 are modified to increase the severity of injury to fatal and the negligence to high, and that Citation No. 9730072 is modified to increase the negligence to high. Gentry Mountain Mining Company is **ORDERED** to pay the Secretary the total sum of \$13,328.00 within 40 days of this order.<sup>3</sup>



David P. Simonton  
Administrative Law Judge

Distribution: (Electronic and Certified mail)

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<sup>3</sup> 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.