FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

March 15, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	: : : : : : : : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0046 A.C. No. 36-07416-527800 Mine: Enlow Fork Mine

DECISION

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

James McHugh, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Consol Pennsylvania Coal Company, LLC ("Consol"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $905.00 for two alleged violations of his mandatory safety standards.

A remote hearing was conducted over Zoom. The following issues are before me: (1) whether Consol's violation of 30 C.F.R. § 75.1725(a) was attributable to the level of gravity alleged; (2) whether Consol violated 30 C.F.R. § 75.1200-1(d); and (3) the appropriate penalties for the violations. The parties' Post-hearing Briefs and Consol's Reply Brief are of record.

For the reasons set forth below, I **AFFIRM** Citation No. 9204073, as modified, and Citation No. 9204074, as modified, and assess penalties against Respondent.

I. Joint Stipulations

The parties have stipulated as follows:

1. Respondent is an operator, as defined in section 3(d) of the Mine Act, at the mine where the citations were issued.

2. Enlow Fork Mine is a mine, as defined in section 3(h) of the Mine Act.

3. The operations of Respondent at Enlow Fork are subject to the jurisdiction of the Mine Act.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to sections 105 and 113 of the Mine Act.

5. Enlow Fork Mine is owned by Respondent.

6. Payment of the total proposed penalty will not affect Respondent's ability to continue in business.

7. The individual whose name appears in Block 22 of each citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

8. True copies of each of the citations at issue in this proceeding were served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated in each citation, as required by the Act.

9. Exhibit A, attached to the Secretary's Petition in this docket, contains authentic copies of the citations at issue in this matter.

10. With regard to Citation No. 9204073, the parties agree to the fact of violation of 30 C.F.R. § 75.1725(a), when the horizontal keeper pins in shields 2, 269, 270, and 271 were not in place.

Tr. I 11-12, 126-27.

II. Factual Background

Consol owns and operates the Enlow Fork Mine ("Enlow Fork"), an underground coal mine in Washington County, Pennsylvania. Jt. Stips. 1, 5. As part of its efforts to comply with the Secretary's mine mapping requirements, Consol contracts with 18 Karat, Incorporated ("18 Karat"), to conduct surface searches for abandoned underground wells that are within 500 feet of active mining. Tr. I 173; Tr. II 53-54, 58-59. 18 Karat utilizes largely inaccurate, hand-drawn oil and gas producer maps and farm-line maps, pre-dating permit requirements and modern GPS technology, depicting wells drilled over 80 to 100 years ago in relation to landmarks that may no longer exist. Tr. I 182; Tr. II 54-57; Ex. R–7. Guided by the old maps, 18 Karat uses metal detectors to search for casings and pieces of exposed pipe above ground. Tr. I 173, 286; Tr. II 53-57. Once a well is found, it is surveyed and added to the mine map by a draftsman and, before Consol is permitted to mine through the well, it must plug it according to MSHA-approved specifications. Tr. I 165, 176, 182; Tr. II 53-54, 109, 131. Oftentimes, because landmarks and surface features have disappeared or been altered, abandoned mines can be difficult, if not impossible, to find; when an alleged "search well" cannot be located, it is designated on the old maps and Consol's mine map by "DNF" ("Did Not Find") and a number placed over a square symbol. Tr. I 32; Tr. II 56-57, 63, 84; Exs. R–8, R–9.

On November 18, 2020, at 3:30 a.m., Consol cut through an alleged uncharted gas well, causing the operator to shut down longwall operations and call in a report to MSHA. Tr. I 26-27, 74. MSHA inspector and ventilation specialist Walter Young traveled to Enlow Fork in response to the report, and examined the record books and a mine map showing gas wells in the vicinity of Consol's active mining on the E-32 longwall section. Tr. I 19, 27, 30; Ex. P–3 at 18. The surface area above the intersected drill hole had been converted into a golf course, which accounts for 18 Karat's failure to locate it despite due diligence, and Consol's best estimate placement of it on its official mine map. Tr. II 84; Exs. R–7 at 11-12, R–10.

Young proceeded underground with Consol's safety supervisor Frank O'Brien. Tr. I 33; Ex. P–3 at 2. At 8:12 a.m., while walking the face with O'Brien and longwall coordinator Justin Higman, Young noticed that a small horizontal keeper pin ("keeper pin") was missing from the clevis of the number 2 headgate shield. Tr. I 59-60, 75. The inspection team continued down the face, Higman went ahead of Young and O'Brien to the tailgate and, when the pair caught up with Higman, Young observed a rock strategically placed on each otherwise "spotless" toe of tailgate shields 269, 270, and 271, where keeper pins should have been located. Tr. I 60-61, 75, 123. Using the toe of his boot, Young kicked the rocks away and, finding keeper pins missing in these clevises also, he issued a citation to Consol for failing to keep mobile and stationary machinery in safe operating condition. Tr. I 60-61, 75; Exs. P–3 at 1, R–1.

Thereafter, Young inspected the intersected alleged gas well, and observed that the 10-inch drill hole was full of water, contained no casing, had no sign of clay, oil, or gas smell, and was located too far away from any gas wells on Consol's mine map to be identifiable as one of them. Tr. I 77-79, 171-72, 217; Ex. P–4 at 8. These factors caused Young some skepticism as to whether the drill hole was actually a gas well. Tr. I 76, 171-72. Believing, with absolute certainty, that Consol had mined through a drill or bore hole that penetrated the coal seam, Young cited Consol for its failure to accurately plot on its official mine map all drill holes that penetrate the coalbed being mined. Tr. I 75-79; Ex. P–4 at 1.

III. Findings of Fact and Conclusions of Law

A. Citation No. 9204073

1. Fact of Violation

Inspector Young issued 104(a) Citation No. 9204073 on November 18, 2020, alleging a "significant and substantial" violation of section 75.1725(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "moderate" negligence.[1] Ex. P–3 at 1. The "Condition or Practice" is described as follows:

> The Company Number 2, 269, 270, and 271 gate shields located inby the number 26 crosscut on the E32 Longwall Working Section were not being maintained in safe operating condition. The horizontal keeper pins which secure the vertical breakaway pins from becoming airborne when they fail under stress were not in place. The LW face was idled due to intersecting an uncharted borehole which penetrated the coal seam at the time of issuance. The horizontal pins were installed into the shield clevises prior to the face resuming.
>
> Standard 75.1725(a) was cited 20 times in two years at mine 3607416 (20 to the operator; 0 to a contractor).

Ex. P–3 at 1. The citation was terminated later that day, when the cited horizontal keeper pins were properly installed. Ex. P–3 at 1.

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). Consol has conceded the fact of violation and the degree of negligence charged, but contests the significant and substantial ("S&S") gravity designation of the violation. Jt. Stip. 10; Resp't Br. at 2, n.5. The Mine Act identifies a significant and substantial violation as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

2. Gravity

The Secretary maintains that the violation was S&S because, absent keeper pins, vertical breakaway pins ("breakaway pins") can work themselves out of position due to the pushing and pulling of the shields, break, become airborne, and injure nearby miners. Sec'y Br. at 11. Respondent counters that breakaway pins only dislodge at the headgate and tailgate in unusual

[1] 30 C.F.R. § 75.1725(a) provides: "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

circumstances, such as an uneven mine floor, which were not present at the time of inspection. Resp't Br. at 6-7; Resp't Reply Br. at 4. Further, Respondent contends that pins do not become airborne when they fail and, even if that were to happen, they would not be reasonably likely to strike a nearby miner. Resp't Br. at 9; Resp't Reply Br. at 4.

The Commission has recently restated the four *Mathies* criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*:

> (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); *see ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-37 (Aug. 2016); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The fact of violation has been conceded, satisfying the first *Mathies* criterion. The second *Mathies* criterion, under the Commission's *Newtown* refinement language, requires the Secretary to prove the reasonable likelihood of the violation causing the occurrence of the hazard that the standard targets. *Peabody*, 42 FMSHRC at 383. The Commission explained in *Peabody* that the judge must determine "whether [the] hazard was reasonably likely to occur given the particular facts surrounding this violation." *Id.* at 382 (quoting *Newtown*, 38 FMSHRC at 2041); *see Consol Pennsylvania Coal Co.*, *LLC*, 43 FMSHRC 145, 147 (Apr. 2021). "Reasonable likelihood" is not an exact standard, but rather an evaluation of risk with "a particular focus on the facts and circumstances presented." *ICG Illinois*, 38 FMSHRC at 2476; *see Newtown*, 38 FMSHRC at 2039. When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Newtown*, 38 FMSHRC at 2045 (citing *Knox Creek Coal Corp*., 811 F.3d 148, 161-62 (4th Cir. 2016)); *Peabody Midwest Mining*, *LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek*, 52 F.3d at 135; *U.S. Steel Mining Co*., 6 FMSHRC 1573, 1574 (July 1984). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). At step four, the judge determines whether any resultant injury would be "reasonably likely to be reasonably serious." *Newtown*, 38 FMSHRC at 2038.

a. Testimony

Inspector Walter Young testified that as he was walking down the face of the longwall, he observed that the number 2 headgate shield and the number 269, 270, and 271 tailgate shields were missing keeper pins in the clevises. Tr. I 59-61, 75, 122-23. He stated that mining operations had ceased at 3:30 a.m., and when he issued the citation later that morning at 8:12 a.m., because he could not find the missing keeper pins anywhere along the longwall, he estimated that they had been missing for at least a couple of passes. Tr. I 74-75, 137. He stated that he did not inspect the wear and tear on the exposed breakaway pins, and that he required Consol to replace the keeper pins in order to abate the condition. Tr. I 59, 75, 137. Young explained that breakaway pins are two inches in diameter, four or five inches long, have round tops, and are placed in the clevises to attach the shields to the relay bar. Tr. I 62-63, 122, 139; see Exs. R–2A-2D, 2G. He noted that these pins are under the pressure of line and gate shields weighing anywhere between 27 and 35 tons. Tr. I 59, 63, 133-34, 140. He further explained that when the shields are left back or fail to advance, the breakaway pins shear to relieve stress on the heavy equipment. Tr. I 63, 67-69, 117, 131, 133-140; Ex. P–3 at 6. Additionally, Young testified that keeper pins are designed to hold breakaway pins in place and that, although they may become dislodged also and fly out of place under certain circumstances, unlike breakaway pins, they only project a foot or two in a very limited area up or down the pan line. Tr. I 66, 113-14. Without keeper pins, he asserted, pieces of breakaway pins can fly at least 15 feet, putting miners at risk even when they are standing two shields away from the shields being operated. Tr. I 70-72, 140, 146, 195. Young asserted that he has seen "thousands" of breakaway pins fail, and explained that broken pieces rarely fly vertically, but rather ricochet off of the shields which, in his opinion, accounts for why some miners are struck without sustaining injury. Tr. I 67, 131, 197-98, 214. He identified possible injuries from direct contact to include lacerations of the wrist and face, loss of eyes or teeth, and bruising. Tr. I 69-70, 73. Young also testified that, as a former miner, himself, he had personally observed a coworker get hit at the headgate by a breakaway pin, resulting in a deep laceration to his face requiring cosmetic stitches. Tr. I 69-70, 118-21. Finally, Young acknowledged that, as an inspector, he had never seen an accident resulting from projectile breakaway pin fragments, nor did he know of any MSHA or Consol accident reports pertaining to injuries caused by airborne pins. Tr. I 127, 128.

Enlow Fork safety supervisor Frank O'Brien testified that the first and last few shields on the longwall at the head and tailgate are moved by procedures different from shield movement in the middle mining zone, rendering the risk of breakaway pin failure much less likely at the gates. Tr. I 259, 272-75, 278. He explained that in the middle mining zone, the shearer is operating at speeds of 45 to 55 feet per minute and, using the SRB automated mode, once the shearer passes, the shields automatically pull in. Tr. I 253, 259, 272, 278-79. He noted that the middle mining zone is where he has seen breakaway pins break when faulty sensors occasionally fail to advance the shields. Tr. I 272-73, 278-79. He also explained that at the gates, the shearer operates at a speed of five to ten feet per minute, and the shields are moved manually at a considerably slower pace. Tr. I 259, 274-75, 278-79. Further, O'Brien testified that when shields are moved at the gates, the computer program prevents miners from operating them any closer than a distance of two shields, about 12 feet, away from an advancing shield. Tr. I 236, 259, 275-76, 280, 298-99. He stated that if a breakaway pin on a gate shield were to work its way out of place in the clevis, it would simply fall to the ground and that, throughout his mining career, he had never heard of or seen a breakaway pin become airborne or hurt a miner. Tr. I 229, 269, 272.

Jeremy Fabery, Enlow Fork's longwall maintenance coordinator, testified that there is a readily available supply of keeper and breakaway replacement pins down the longwall face on the toes of the shields, themselves, on rings welded to the shearer, and on the parts car outby the section. Tr. II 16-17, 39-40, 45-46. He also stated that, without keeper pins in place, when the shields pull and push, the breakaway pins work themselves out of place and eventually fall out. Tr. II 16, 25-26. Fabery explained that breakaway pins typically fail in the main mining zone, where the automated SRB system is operating, rather than at the gate ends; he asserted that this happens when shields are left back due to faulty sensors and the pins, designed to bear the stress instead of the heavy equipment, snap in two rather than shatter. Tr. II 20-23, 28, 43-44, 45-47. He also acknowledged that breakaway pins can fail at the head and tailgates, but only under adverse conditions, such as a roof fall. Tr. II 27-28. He testified that PMC-R computers on the head and tailgate shields allow the shieldmen to pull in the shields at a distance no closer than two shields away from the shields being operated, and that this manual process is much more controlled than automated SRB shield advancement in the main mining zone. Tr. II 23-25, 34. Finally, Fabery averred that he had never seen nor heard of pins becoming projectile and injuring anyone. Tr. II 29-32, 42.

b. Analysis

Focusing on the second *Mathies* criterion, the discrete safety hazard to which the violation contributed is breakaway pin fragments dislodging and forcibly projecting. Resolution of the reasonable likelihood of a hazard occurring must be analyzed through the particular facts surrounding the violation and the evidence established by the record. It is undisputed that breakaway pins fail under extreme stress when shields are left back. The record establishes that the cited shields, without keeper pins, were located at the head and tailgate of the longwall. Gate shields are manually moved using PMC-R computers, a much more controlled process than in the main mining zone, where the automated SRB mode moves the shields at a far faster pace. In the main mining zone, pins fail when faulty sensors cause line shields to be left back while the pan line is pushed. However, for a pin to fail on a gate shield, the shieldman would have to manually leave the shield back. While the parties agree that breakaway pins fail, they disagree about whether they become projectile. The only evidence of a failed breakaway pin forcibly projecting at the headgate was provided by Young; however, the balance of his testimony, respecting projectile pins being commonplace on the longwall, was non-specific as to whether this occurs in the main mining zone or at the gates.[2] Additionally, by his concession that pins are less likely to fail on the gate shields, it is reasonable to infer that pin failure more likely occurs in the faster moving main mining zone.

Despite Consol's contentions, the evidence of a breakaway pin injuring a miner, combined with the fact that breakaway pins are under the extreme pressure of moving shields weighing up to 35 tons, establishes that pin fragments *can* become airborne, even at the gates. However, the Secretary has failed to put forth sufficient evidence to establish the reasonable likelihood of this occurring. Conversely, credible evidence demonstrates that breakaway pins are far less likely to fail at the gates because, except for adverse mine conditions on the longwall, the

[2] Young's conflicting testimony about his actual observance of this incident does not undermine his overall credibility as to its occurrence, and is viewed as an overstatement corrected on cross-examination. See Tr. I 70, 118, 120-21.

slower, more controlled mining process minimizes the likelihood of shields being left back. Even if pins were to fail at the gates, the evidence establishes that the slower shield movement considerably decreases the likelihood of them becoming projectile. The Secretary does not reckon with this evidence whatsoever. Therefore, under the circumstances surrounding this violation, the Secretary has failed to prove, by a preponderance of the evidence, the reasonable likelihood of the breakaway pins on the cited gate shields becoming projectiles without the keeper pins in place. Consequently, I find that the Secretary has failed to satisfy the second *Mathies* criterion and, therefore, this violation was not S&S.

3. Negligence

Consol does not contest the degree of negligence ascribed to the violation. Resp't Br. at 2, n.5. The evidence establishes that the missing keeper pins were plainly visible, and that replacements were readily available. Tr. I 75; Tr. II 40. Indeed, the only noted obstructions on the otherwise clean tailgate shields were a rock over each missing keeper pin, apparently strategically placed to evade Young's detection. Tr. I 60-61, 75. Moreover, Consol had almost five hours between idling the longwall and Young's inspection to replace the missing keeper pins. Tr. I 74-75. Accordingly, I find that Consol was appropriately charged with moderate negligence in violating the standard.

B. Citation No. 9204074

1. Fact of Violation

Inspector Young issued 104(a) Citation No. 9024074 on November 18, 2020, alleging a violation of section 75.1200-1(d) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "low" negligence.[3] Ex. P–4 at 1. The "Condition or Practice" is described as follows:

> The Operator failed to accurately plot all drill holes which penetrate the coalbed being mined on the E32 Longwall Working Section (035-0 MMU). An uncharted borehole was inadvertently mined through at the number 39 shield at plus number 87+28. The Operator believes that the uncharted borehole could be Company Well Number 2057, but this borehole is approximately 125 feet closer to the Headgate and approximately 122 feet inby where the Company Number 2057 Well was plotted on the official mine map.

---

[3] 30 C.F.R. § 75.1200 provides: "[t]he operator of a coal mine shall have in a fireproof repository location in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale."

30 C.F.R §75.1200-1 provides: "[a]dditional information required to be shown on mine maps under § 75.1200 shall include the following:
(d) All drill holes that penetrate the coalbed being mined."

> Standard 75.1200-1(d) was cited 1 time in two years at mine 3607416 (1 to the operator; 0 to a contractor).

Ex. P–4 at 1. The citation was terminated later that day, after the intersected borehole was accurately plotted on the official mine map. Ex. P–4 at 2.

The Secretary maintains that a gas well is a drill hole and, therefore, irrespective of whether the mined-through drill hole was gas well DNF 2057, a violation of section 75.1200-1(d) occurred because it was not accurately plotted on the official mine map. Sec'y Br. at 14-16. Consol makes counter arguments that the wrong standard was cited because a gas well is not a drill hole and, even if it were, it did not have fair notice of such classification. Resp't Br. at 14-18, 24-25. Consol also contends that in order to prove a violation of the standard, the Secretary must produce a copy of the official mine map, and failed to do so. Resp't Br. at 23-24. Further, Consol asserts that by plotting gas well DNF 2057 in accordance with its Plan for Mining Operations Near a Well Believed Not to Exist, it satisfied the mapping requirements of section 75.1200-1(d). Resp't Br. at 20-21. Finally, Consol asserts that the mined-through hole was gas well DNF 2057 and, since it was plotted at the "best estimated" location, the official mine map was accurate. Resp't Br. at 21-23.

a. Testimony

Inspector Walter Young was dispatched to Enlow Fork on November 18 after the mine had reported to MSHA earlier that morning that it had cut through a suspected gas well. Tr. I 26-27. Young testified that when he arrived at the mine, he looked at the pre-shift and on shift record books, and a map that Consol provided to him showing gas wells in the active mining area. Tr. I 30-32; Ex. P–3 at 23. Young, Frank O'Brien, and Justin Higman proceeded underground to the E-32 longwall section where, at the number 39 shield, Young observed the 10-inch diameter drill hole. Tr. I 33, 77, 79. No methane was detected at the top of the drill hole and more than five percent methane was detected at the bottom, it was full of water, contained no casing, and there was no sign of clay, oil, or a gas smell. Tr. I 77-79; Ex. P–4 at 8. Young testified that he elected to cite a section 75.1200-1(d) violation because he could not be 100 percent certain that the uncharted drill hole was a gas well, but that it was certainly a drill hole that penetrated the coal seam. Tr. I 76, 163, 171. He explained that gas or oil wells often have gray clay around them and a musty smell but, in this case, nothing other than the size of the drill hole and the presence of methane at the bottom suggested that it was a gas well. Tr. I 82-84, 171. Young further testified that later in his inspection, he examined the official mine map, as well as the copy hanging on the wall across from the foreman's office, and he confirmed that the drill hole was not accurately plotted on the official map. Tr. I 44, 105, 111-12, 160.

Safety supervisor Frank O'Brien testified that he believed the mined-through hole to be a gas well due to its diameter, and he agreed that it could be classified as a drill hole. Tr. I 283, 299. He opined that the drill hole was DNF 2057, a gas well existing on old producer maps that 18 Karat had not been able to find on the surface, and based his belief on the fact that the drill hole was in the approximate area where the search for DNF 2057 had been conducted. Tr. I 286-91.

Consol project engineer and former 18 Karat project manager Matthew Ruckle also testified that he believed the intersected drill hole to be gas well DNF 2057. Tr. II 85. Ruckle stated that he coordinates contractor 18 Karat's surface searches for old gas wells, and ensures that they are plugged underground for safe mining once they are located. Tr. II 54, 58-59, 115. He explained that old producer and farm-line maps are studied to identify wells within 500 feet of planned mining and, because the maps were hand-drawn and created prior to promulgation of regulations requiring drilling permits, they are not very accurate and make locating the wells particularly difficult. Tr. II 53-56. Ruckle further explained that alleged wells, i.e., those not found by 18 Karat, are marked DNF ("Did Not Find") on the old maps and in their estimated location on Consol's official mine map. Tr. II 56, 64, 145. He testified that the surface search for DNF 2057 had included the area where Consol intersected the drill hole but, since the surface area is now a golf course, no evidence of the drill hole was ever found, even after it had been intersected underground. Tr. II 82, 84. While Ruckle opined that the intersected drill hole was DNF 2057 based on its location and diameter, he acknowledged that the location where Consol mined through it was 122 feet inby and at least 125.4 feet closer to the headgate than where DNF 2057 was plotted on the mine map. Tr. II 86, 88, 137-38, 147; Ex. P–4 at 10, see Ex. R–6.

b. Analysis

The standard at issue is clear on its face, unambiguously imposing a duty to accurately depict on mine maps drill holes penetrating the coalbed being mined. Indeed, in finding a violation of section 75.1200(h), requiring adjacent mine workings within 1000 feet of active mining to be accurately shown on mine maps, the Commission determined that "the plain meaning of section 75.1200 is that a mine map's depiction . . . must be accurate." *Musser,* 32 FMSHRC at 1273-74. This plain reading of the standard is consistent with the legislative history of section 215 of the Coal Act, the predecessor provision to section 312 of the Mine Act, which states that "[r]ecent inundation accidents . . . point up the need for accurate mapping of mines. Active mines often cut through into adjacent mines, or worked out and abandoned areas of the same mine, because of the lack of maps or because of inaccurate maps." S. Rep. 91-411, at 83 (1969).

Consol asserts that "the hole which was intersected underground was unquestionably a gas well," and that section 75.1200(k), requiring producing or abandoned oil and gas wells to be accurately shown on mine maps, was the appropriate standard to have cited; therefore, it contends, the citation should be vacated. Resp't Br. at 14-18. Further, Consol argues that it did not have fair notice that a gas well is a drill hole. Resp't Br. at 24-25. Conversely, the Secretary established that certain characteristics of the drill hole cast some measure of doubt as to whether it was a gas well. It is well settled that more than one standard can be applicable to a violation, and the instant citation should stand as long as the cited standard is broad enough to encompass the violation. *See, e.g.*, *Jim Walter Res., Inc*., 7 FMSHRC 493, 495-98 (Apr. 1985) (finding a regulation governing the transport of "materials" to include the transport of coal, despite the judge's finding that a more appropriate standard existed); *see also Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3077 (Dec. 2014) (noting the ambiguity in the scope of the regulation's application, but finding the dictionary meaning of the term "materials" "sufficiently broad" to encompass a suspended boom). The term "drill hole" is defined broadly as "a hole in rock or coal made with an auger or drill," and is synonymous with the term "borehole."

Drillhole, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (2d ed. 1996). The term "well" is defined as "a borehole or shaft sunk into the ground" for numerous purposes, including "obtaining water, oil, . . . [or] gas," and is "commonly used as a synonym for borehole or drill hole." *Well*, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (2d ed. 1996). The term "drill hole" is "sufficiently broad" to encompass gas wells and, like the Commission in *Dawes*, I "decline to read a limitation into the standard where none exists." 36 FMSHRC at 3077. Further, not only do Consol's own witnesses interchangeably use "gas well," "drill hole," and "bore hole," but the broad definition of "drill hole" should have put Consol on notice that a gas well is one of many types of drill holes. Accordingly, I find that Consol had fair notice of section 75.1200-1(d)'s requirements, and that the standard is applicable to this violation.

Consol also contends that the Secretary could only prove a violation of section 75.1200-1(d) by introducing a copy of its official mine map into the record and, because of its failure to do so, the citation should be vacated. Resp't Br. at 23-24. The record establishes that the official mine map is very large, measuring 12 by 12 feet, and that Young did, in fact, inspect it on-site, as well as the copy hanging outside of the foreman's office, in addition to the smaller map provided to him of the active longwall section where the drill hole was intersected. Further, the smaller maps in evidence are accurate copies, depicting information included on the official mine map by Consol. Moreover, Consol acknowledges that the drill hole was not depicted on any of the maps, official or otherwise, corresponding to the location where it was intersected. See Tr. I 300, 301-03; Tr. II 137-38, 147. Therefore, Consol's argument is unavailing.

Consol further argues that an MSHA-approved modification for section 75.1700 extends to its Plan for Mining Operations Near a Well Believed Not to Exist ("DNF Well Plan"), a part of its MSHA-approved Cut Through Plan and, in essence, transforms the DNF Well Plan, itself, into a "reasonable precautions plan" under the *Musser* "alternative precautions" exception.[4] Resp't Br. at 19-21 (citing In re Petition for Modification, Docket M-2014-011-C (Jun. 16, 2017)); Resp't Reply Br. at 9-10; Ex. P–4 at 25-35. Therefore, according to Consol, by plotting gas well DNF 2057 in accordance with its DNF Well Plan, it met the requirements of section 75.1200-1(d). Rep't Br. at 21; Resp't Reply Br. at 9-10. The Commission noted in *Musser* that an operator may petition the Secretary, under section 101(c) of the Mine Act, to "modify the strict application of section 75.1200" if adequate "alternative precautions" are implemented. 32 FMSHRC at 1275. Beyond Consol's bare assertions in its Briefs, its blanket expansion theory as to how the MSHA-approved modification for section 75.1700 permits modified compliance of section 75.1200 through its DNF Well Plan, is difficult, at best, to discern. Section 101(c) contains specific petition, investigation, and notice requirements which the approved Cut Through Plan, in and of itself, does not satisfy. 30 U.S.C. § 811(c); see Ex. P–4 at 20-24. The record is simply bereft of any indication that Consol petitioned MSHA for a modification of section 75.1200, and Consol advances no authority in support of its position that mere adherence to its DNF Well Plan satisfies the standard's mapping requirements. Consequently, Consol is

[4] Consol's usage of "reasonable precautions" terminology refers to the Commission's "alternative precautions" exception in *Musser.*

held to the strict application of section 75.1200-1(d) unless or until, at some later date, it obtains an approved modification from MSHA.

Finally, Consol asserts that the intersected drill hole was alleged gas well DNF 2057 and, since it was plotted at the "best estimated" location, it was mapped accurately. Resp't Br. at 21-23. The foundation of this argument rests on Consol's misplaced interpretation of the term "accurate." In discussing the mapping violation of section 75.1200(h) in *Musser*, the Commission emphasized that "because the standard requires that the operator maintain an 'accurate and up-to-date map,' it follows that if the mine map fails to meet these requirements, the operator has violated the standard, regardless of whether it did everything possible to locate an accurate historical map of adjacent mine workings." 32 FMSHRC at 1272; *see also Dominion Coal Corp*., 35 FMSHRC 3557, 3594 (Dec. 2013) (ALJ) (noting that section 75.1200 does not require operators to make reasonable efforts to plot gas wells on mine maps, but rather imposes an absolute duty to be accurate). The strict liability nature of the Mine Act attaches liability, irrespective of operators' best efforts at compliance and, consequently, Consol's argument, i.e., that its best estimate is tantamount to accurate plotting, runs afoul of the clear mandate of the standard. Furthermore, resolution of whether the intersected drill hole was, as Consol contends, gas well DNF 2057, has no bearing on Consol's duty to plot the drill hole accurately. Put another way, assuming, *arguendo*, that the drill hole intersected by Consol on November 18 was gas well DNF 2057, it was not accurately plotted on the official mine map. End of story. It follows that Consol violated section 75-1200-1(d).

2. Gravity and Negligence

The record establishes that low levels of methane in the drill hole made it unlikely for there to be an ignition and injury. Tr. I 103-104. Further, Young's testimony was credible, that if there were an ignition, two miners operating the shearer would reasonably be expected to incur lost workdays or restricted duty as a result of burns, smoke inhalation, concussions, or broken bones. Tr. I 105. Accordingly, I find the Secretary's gravity designations for this violation to be appropriate.

The Secretary asserts that Consol's negligence was low in violating the standard due to its extensive efforts to locate old, abandoned gas wells. Sec'y Br. at 19-20. Credible evidence, as Young acknowledged multiple times, demonstrates Consol's diligence in searching for DNF 2057 and, even after the drill hole was mined through, there were no surface indicia of its existence on the golf course. See Tr. I 104-105, 182-84, 200, 286-89; Tr. II 53-56, 83-84; Ex. R–7. Considering the antiquated, inaccurate producer maps and drastically altered surface conditions, no prudent operator, conducting the most exhaustive search, could have likely located the drill hole prior to its intersection, and I find no fault in Consol's fruitless efforts. Therefore, I find that Consol was not negligent in committing the violation.

IV. Penalty

While the Secretary has proposed a total civil penalty of $905.00 for the violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act:

> (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (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) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation.

30 U.S.C. § 820(i); *see Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based on a review of MSHA's online records, I find that Consol is a large operator. The record also establishes that Consol demonstrated good faith in achieving rapid compliance after notice of the violations, and the parties stipulated that imposition of the proposed penalty will not adversely affect Consol's ability to remain in business. Jt. Stip. 6. Consideration of Consol's history of violations, gravity, and negligence factors for each violation follows below.

A. Citation No. 9204073

It has been established that this non-S&S violation was unlikely to cause an injury that was reasonably likely to result in lost workdays or restricted duty, and was caused by Consol's moderate negligence. In the fifteen-month period preceding issuance of this citation for missing horizontal keeper pins, nine violations of section 75.1725(a) became final Orders of the Commission. Ex. P–5 at 15. Given that section 75.1725(a) is a general equipment maintenance standard, and that the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing an appropriate penalty. The Secretary has proposed a penalty of $782.00 by application of his Part 100 penalty table to an S&S violation. Applying the civil penalty criteria, I find that a penalty of $275.00 is appropriate.

B. Citation No. 9204074

It has been established that this non-S&S violation was unlikely to cause an injury that was reasonably likely to result in lost workdays or restricted duty, and that Consol was not negligent in its commission. In the fifteen-month period preceding issuance of this citation for a mapping violation, one violation of section 75.1200-1(d) became a final Order of the Commission, a mitigating factor in assessing an appropriate penalty. Ex. P–5 at 13. The Secretary has proposed a penalty of $123.00 by application of his Part 100 penalty table. Applying the civil penalty criteria, I find that a penalty of $100.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 9204073 is **AFFIRMED**, **as modified**, to delete the "significant & substantial" designation, and that Citation No. 9204074 is **AFFIRMED**, **as modified**, to reduce the degree of negligence to "none," and that Consol Pennsylvania Coal Company, LLC, **PAY** a civil penalty of $375.00 within 30 days of the date of this decision.[5] **ACCORDINGLY**, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Ryan Kooi, Office of the Solicitor, U.S. Department of Labor, 1835 Market Street, Mailstop SOL/22, Philadelphia, PA 19103
kooi.ryan.m@dol.gov

James P. McHugh, Hardy Pence PLLC, P.O. Box 2548, Charleston, WV 25329
jmchugh@hardypence.com

Kenneth Polka, CLR, U.S. Department of Labor, MSHA, 631 Excel Drive, Suite 100, Mt. Pleasant, PA 15666
polka.kenneth@dol.gov

Craig Aaron, CONSOL Energy Inc., 1000 Energy Drive, Suite 100, Canonsburg, PA 15317
craigaaron@consolenergy.com

[5] Payment should be made 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.