

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 18, 2015

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

v.

MACH MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2012-66  
A.C. No. 11-03141-268040-01

Docket No. LAKE 2013-294  
A.C. No. 11-03141-310246

Mine: Mach #1 Mine

**DECISION AND ORDER**

Appearances: Daniel R. McIntyre, Esq., U.S. Department of Labor, Office of the Solicitor,  
Denver, Colorado, for Petitioner;

Christopher D. Pence, Esq., Hardy Pence LLC, Charleston, West Virginia,  
for Respondent.

Before: Judge Paez

This case is before me upon the petitions for the 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, 30 U.S.C. § 815(d). In dispute are four section 104(a) citations issued to Mach Mining, LLC (“Mach” or “Respondent”) at its Mach #1 Mine. To prevail, the Secretary must prove his charges “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

**I. STATEMENT OF THE CASE**

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. LAKE 2012-66 and LAKE 2013-294 to me and I consolidated them for hearing. The Secretary initially charged Mach with a total of seven section 104(a) citations. On August 4, 2014, counsel for the Secretary alerted me that three alleged violations had settled, and I disposed of those citations in a separate decision issued August 28, 2014. Thus, four section 104(a) citations remain at issue.

First, Citation No. 8424601 in Docket No. LAKE 2012-66 charges Mach with violating its ventilation plan under 30 C.F.R. § 75.370(a)(1) for failing to maintain a ventilation curtain within forty feet of the coal face for every cut.<sup>1</sup> The Secretary designated the violation as significant and substantial (“S&S”)<sup>2</sup> and proposed a specially-assessed penalty of \$2,900.00 for Citation No. 8424601 based on 30 C.F.R. § 100.5.

In addition, Citation Nos. 8444918, 8444919, and 8444920 in Docket No. LAKE 2013-294 charge Respondent with a failure to maintain its roof bolting equipment in permissible and operating condition under 30 C.F.R. § 72.630(b).<sup>3</sup> The Secretary has proposed a total penalty of \$1,414.00 for these three violations according to his points system at 30 C.F.R. § 100.3.

Upon proper notice, I held a hearing in Evansville, Indiana.<sup>4</sup> The Secretary presented testimony from Inspectors Danny Ramsey and J. Scott Lee. Mach presented testimony from Foreman Johnnie Dotson, former Superintendent Johnny Robertson, and Roof Bolter Dale Dodd. After requesting extensions, the parties each filed closing briefs and reply briefs.

## II. PARTIES’ ARGUMENTS AND ISSUES

The Secretary argues that the allegations underlying each of the citations are valid and that his proposed penalties are appropriate. (Sec’y Br. at 27.) Although MSHA Inspector Ramsey characterized Mach’s negligence as “moderate” for Citation No. 8424601 (Ex. G–2), the

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<sup>1</sup> Section 75.370(a)(1) provides:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in [section] 75.371 and the ventilation map with information as prescribed in [section] 75.372. Only that portion of the map which contains information required under [section] 75.371 will be subject to approval by the district manager.

<sup>2</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

<sup>3</sup> Section 72.630(b) provides: “Dust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33—Dust Collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.”

<sup>4</sup> In this decision, the hearing transcript, the Secretary’s exhibits, and Mach’s exhibits are abbreviated as “Tr.,” “Ex. G–#,” and “Ex. R–#,” respectively. The parties also admitted a list of stipulations in a joint exhibit, which was admitted as Ex. G–12.

Secretary in his post-hearing brief asks that I modify Mach's level of negligence to "high" for Citation No. 8424601 based on testimony from Mach's supervisors demonstrating their knowledge that no line curtain was installed during the most recent cut. (Sec'y Br. at 14–17, 27.)

In contrast, Respondent contends the citations at issue should be vacated or modified. (Resp't Br. at 10–13, 16.) Specifically, Mach argues that the ventilation plan requirement at issue in Citation No. 8424601 is ambiguous. (*Id.* at 4–10.) Thus, Mach maintains that the alleged violation of 30 C.F.R. § 75.370(a)(1) should be vacated. (*Id.* at 10.) In the alternative, Respondent argues that the citation should be modified to remove the S&S designation because a reasonably serious injury was not reasonably likely. (*Id.* at 12; Resp't Reply at 8–10.) Pointing to the ventilation plan's "ambiguity" and MSHA's previous failures to enforce the plan provision at issue, Mach also claims that it did not act negligently. (Resp't Reply at 7–8.) In addition, Mach argues that Citation Nos. 8444918, 8444919, and 8444920 should be vacated because the Secretary failed to demonstrate that the roof bolting machines in question were not maintained in permissible and operating condition. (Resp't Br. at 13–16; Resp't Reply at 10–11.)

Accordingly, the following issues are before me: (1) whether the cited conditions constituted violations of the Secretary's mandatory health or safety regulations; (2) whether the record supports the Secretary's allegations as to the gravity of each of the cited conditions; (3) whether the record supports the Secretary's allegations regarding Mach's level of negligence, including whether I should increase the level of negligence associated with Citation No. 8424601 to "high"; and (4) whether the proposed penalties for these violations are appropriate.

For the reasons that follow, Citation No. 8424601 is **AFFIRMED** as written, and Citation Nos. 8444918, 8444919, and 8444920 are **VACATED**.

### III. BACKGROUND AND FINDINGS OF FACT

Mach #1 is a longwall, underground coal mine in Johnson City, Illinois. (Tr. 23:3, 26:11–27:25; Ex. G–4 at 1.) Longwall coal panels are extremely large blocks of coal that are mined using a shearing system that creates long cuts of coal along the face of the longwall panel. (Tr. 26:17–27:3.) To do so, Mach must develop corridors that will allow the operator to access the longwall panel. (Tr. 27:4–9, 28:6–18, 56:8–17, 118:13–21; Ex. R–1.) To create these access corridors, Mach uses a continuous mining machine to cut long, parallel pathways—known as entries—through the seam of coal surrounding the longwall panel. (Tr. 27:10–12, 28:12–18, 56:8–17; Ex. R–1.) As mining progresses, Mach also cuts perpendicular access corridors—known as crosscuts—that connect the mine's entries. (Ex. R–1; *see* Tr. 143:3–144:1.) When viewed from above, this network of access corridors resembles an elongated checkerboard. (Ex. G–14; Ex. R–1; Ex. R–2; Ex. R–3.)

Coal mining at Mach #1 Mine requires numerous cuts, which produce harmful dusts and explosive gasses that must be ventilated to protect Respondent's miners. (Tr. 34:6–36:12, 44:1–4.) These cuts create significant rock and coal dust, which is harmful for miners to inhale. (Tr. 35:3–36:12.) Mach #1 Mine is also a "gassy" mine that liberates over 1,000,000 cubic feet of methane in a 24-hour period. (Tr. 23:9–24:14, 94:16–18.) In concentrations of five to fifteen

percent, methane is explosive (Tr. 36:4–7, 45:20–46:1), but the presence of coal dust lowers the explosive range for methane (Tr. 36:4–12).

Given these dangers, the Secretary’s health and safety regulations require mine operators to control methane and respirable dust by proposing and following ventilation plans. 30 C.F.R. § 75.370(a)(1). A ventilation plan must be suitable to the mine’s conditions and mining system, and it must be approved by MSHA. *Id.* Ventilation plans require mine operators to use a variety of mechanisms to direct a specified volume of fresh air through the mine’s entries and crosscuts to its working areas, then sweep harmful and contaminated air out of the mine. *See, e.g.*, 30 C.F.R. § 75.371 (describing the content of ventilation plans). Accordingly, Mach employs a network of barriers and curtains to direct fresh air to the working areas of the mine. (*See, e.g.*, Tr. 33:13–19, 42:23–43:1, 62:7–11.) At the time of these violations, Mach #1 Mine operated on blowing ventilation that forced air through the mine. (Tr. 23:2–8, 39:13–24, 51:10–22, 60:4–61:6, 142:14–20, 151:21–152:20; Ex. G–15.) As part of this system, Mach used “wing” curtains and “line” curtains in conjunction to direct fresh air traveling down an entry or crosscut toward the continuous miner as it cuts into the coal seam. (Tr. 51:1–6, 126:21–127:3, 130:1–15, 144:11–20, 149:20–150:5, 172:16–174:9; *see* Ex. G–15.) The fresh air from the wider corridor would be funneled into a smaller channel between the rib and the line curtain. (Tr. 51:1–6, 144:11–20; *see* Ex. G–15.) In turn, this channel would direct fresh, ventilating air to the area where the continuous mining machine was cutting coal, thus releasing methane and creating dust. (Tr. 51:1–6, 126:21–127:3, 130:1–15, 144:11–20, 149:20–150:5, 172:16–174:9; *see* Ex. G–15.)

Mach’s continuous mining machines also have several mechanisms designed to address dust and methane hazards, including: scrubbers, methane monitors, and water sprays. (Tr. 36:3–14, 45:17–18, 93:10–19, 106:25–108:17, 150:6–22, 151:5–10.) In addition, Mach would periodically check methane levels in its cuts every twenty minutes. (Tr. 93:23–94:6.)

To help secure the ceiling—also known as the roof—of these entries and crosscuts, Mach uses machines to install long metal roof bolts designed to provide support. (*See* Tr. 192:19–25, 213:10–22, 280:23–281:2, 283:9–18.) As part of the process, roof bolting machines drill into the rock roof above them. (Tr. 189:4–6, 214:1–7.) Drilling into the roof creates either silica or coal dust, which are harmful when inhaled. (Tr. 213:10–214:7, 226:13–227:9.) To protect the machine operators, roof bolters use dust collection systems to limit the amount of dust to which miners are exposed. (Tr. 189:4–191:19, 194:2–5, 194:15–18.)

#### IV. PRINCIPLES OF LAW

##### A. 30 C.F.R. § 75.370(a)(1) — Ventilation Plans

Section 75.370(a)(1) requires operators to develop and follow an approved ventilation plan designed to control methane and respirable dust and that is suitable to the mine’s conditions and mining system. 30 C.F.R. § 75.370(a)(1); *see Peabody Coal Co.*, 16 FMSHRC 2199, 2203 (Nov. 1994) (affirming ALJ’s conclusion that a ventilation plan is violated when an operator does not follow its specific terms).

## B. 30 C.F.R. § 72.630(b) — Dust Collectors

Section 72.630(b) requires that mine operators maintain dust collection systems in two ways. *See* 30 C.F.R. § 72.630(b). First, operators must maintain dust collectors in permissible condition.<sup>5</sup> *Id.* Specifically, section 72.630(b) defines “permissible” dust collectors to include collectors approved under 30 C.F.R. part 33 or under Bureau of Mines Schedule 25B. *Id.* According to Part 33 of the Secretary’s regulations regarding dust collectors, the term permissible “as applied to a dust collector means that [the dust collector] conforms to the requirements of [Part 33], and that a certificate of approval to that effect has been issued.” 30 C.F.R. § 33.2(a). Because MSHA issues certificates of approval to dust collection systems as a whole, *see* 30 C.F.R. § 33.9 (indicating that “[i]ndividual parts of dust collecting systems will not be certified for performance”), permissibility therefore requires that dust collection systems be maintained as MSHA approved them. *Cf. Tri County Coal, LLC*, 34 FMSHRC 3255, 3274–75 (Dec. 2012) (ALJ) (concluding that although a hole in a vacuum hose did not render a dust system inoperable because it provided enough suction, the hole rendered the system non-permissible because it would not have been approved with the hole in the hose). Second, section 72.630(b) requires mine owners to maintain dust collection systems in “operating” condition. 30 C.F.R. § 72.630(b). As I observed in *Liggett Mining, LLC*, 33 FMSHRC 1702 (July 2011) (ALJ), “the plain use of the word ‘operating’ is synonymous with ‘functional’, a word defined as ‘performing or able to perform its regular function.’” *Id.* at 1714 (citing *Webster’s Third New Int’l Dictionary* (Unabridged) 921, 1581 (2002)). Thus, the Secretary may demonstrate a violation of section 72.630(b) by proving either (1) that the dust collection system was not maintained as it had been approved; or (2) that the dust collection system was not in operating condition.

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<sup>5</sup> In its briefs, Mach claims that “permissible” as used in section 72.370(b) refers to “permissible” as defined in section 318 of the Mine Act, 30 U.S.C. § 878(i). (Resp’t Br. at 13–14.) Specifically, Mach suggests that I follow the Administrative Law Judge’s reasoning from an unrelated proceeding involving Respondent. *See Mach Mining, LLC*, 35 FMSHRC 2827, 2832–33 (Aug. 2013) (ALJ) (discussing the meaning of “permissible” in the context of section 72.370(b) and vacating the citation.) However, the decision upon which Mach relies is not persuasive. Although “permissible” may *often* be a term of art used to ensure that electrical equipment will not cause a mine explosion or mine fire, it is not *always* so limited. Here, Respondent ignores the second sentence of section 72.630(b), which specifically incorporates the definition of “permissible” used in Part 33 of the Secretary’s regulations. 30 C.F.R. § 72.630(b) (“Dust collectors approved under Part 33—Dust collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.”). Thus, the text of section 72.630(b) *specifically* incorporates 30 C.F.R. part 33—including the definition at 30 C.F.R. § 33.2. Moreover, the regulatory history of section 72.630(b) reveals that the regulation writers were targeting respirable dust rather than potential ignitions. *See Air Quality: Health Standards for Abrasive Blasting and Drill Dust Control*, 59 Fed. Reg. 8318, 8323–25 (1994). In the context of section 72.630(b), the meaning of “permissible” therefore is defined in accordance with Part 33.

### C. Significant and Substantial

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that “an inspector’s judgment is an important element” in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure of danger.*” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Nat’l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission clarified “the correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

### D. Negligence

Although the Secretary’s 30 C.F.R. part 100 regulations are not binding on the Commission, *see Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014), the Secretary’s definitions of negligence in those provisions are illustrative. According to the Secretary, negligence is “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). These standards indicate that high negligence is found where “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* at Table X. Moreover, the standards prescribe moderate negligence where “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.*

## V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW— VENTILATION VIOLATION—CITATION NO. 8424601

### A. Additional Findings of Fact

Inspector Ramsey visited Mach #1 Mine on March 22, 2011, to conduct an inspection and traveled to the South Mains #2 portion of the mine along with then-Mine Superintendent Johnny Robertson. (Tr. 24:15–25:16, 138:17–19.) The South Mains #2 section consisted of six entries numbered consecutively from left to right. (Tr. 28:9–10, 29:11–24, 61:7–23, 115:8–14, 117:1–13, 120:16–121:2; Ex. G–14; Ex. R–1; Ex. R–2; Ex. R–3.) Ventilating air traveled into the section through Entry Nos. 5 and 6, turned to the left to sweep across the section in the crosscut, then turned left again to return to the surface through Entry Nos. 1 and 2.<sup>6</sup> (Tr. 61:24–62:1, 63:10–16, 64:8–68:12, 121:3–20, 142:8–13; Ex. G–14.) A conveyor belt in Entry No. 4 transported coal out of the mine. (Tr. 143:3–10.)

Upon arriving on the section, Inspector Ramsey began an imminent danger run through the area. (Tr. 25:23–24; Ex. G–3 at 1.) By March 22, the operator had progressed nine full crosscuts into the coal seam and was in the process of developing Crosscut No. 10. (Tr. 69:21–70:1.) While standing in the intersection of Entry No. 3 and Crosscut No. 9, Ramsey measured 39,848 cubic feet per minute (C.F.M.) of air, which complied with the requirements of Mach’s ventilation plan. (Tr. 62:20–63:9; Ex. G–14; *see* Ex. G–3 at 1.) At that point, Ramsey observed Mach’s continuous miner developing Crosscut No. 10. (Tr. 25:23–26:3, 32:21–33:12; Ex. G–3 at 3; Ex. G–14; Ex. G–15.) The continuous miner operator had completed his crosscut connecting Entry No. 4 to Entry No. 3, then continued in a straight line to mine the crosscut from Entry No. 3 into Entry No. 2. (Tr. 25:23–26:3, 33:9–10, 70:16–71:3, 120:4–10, 121:21–122:2, 142:21–24; Ex. G–3 at 3; Ex. G–14; Ex. G–15; Ex. R–1; Ex. R–2; Ex. R–3.) Therefore, the miner operator approached the cut head-on (or flush), rather than making a perpendicular turn from Entry No. 3 to cut into the coal towards Entry No. 2. (Tr. 25:23–26:10, 70:16–71:3, 71:20–72:1, 82:1–10, 122:3–24; Ex. G–3 at 3; Ex. R–2.) Based on Mach’s ventilation plan, that meant fresh air coming down Entry Nos. 5 and 6 surged left at Crosscut No. 10 and now was at the miner’s back and contacting the flush face of the coal when Mach began the cut from Entry No. 3 into Entry No. 2. (Tr. 72:9–14, 78:9–15, 122:25–123:2, 128:11–13, 130:20–21, 145:22–24.)

At the time, Mach used a consistent cut pattern as it developed the South Mains to access new longwall panels. (Tr. 30:8–31:25, 125:6–25, 143:3–144:7, 154:14–16; Ex. G–14; Ex. R–1; Ex. R–2; Ex. R–3.) Mach’s mining plans allowed Respondent to cut up to forty feet at a time.<sup>7</sup>

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<sup>6</sup> Neither party introduced evidence suggesting that Entry Nos. 3 or 4 were involved in ventilating the section.

<sup>7</sup> Each forty-foot cut consisted of four smaller cuts. First, Mach cut twenty-feet deep on the right side of the crosscut, then moved over to the left side and made another twenty-foot cut. (Tr. 74:12–17, 98:13–99:11, 124:14–19.) Next, Mach cut an additional twenty feet on the right side of the crosscut, then made a fourth cut on the left side. (Tr. 74:18–23; 98:13–99:11, 124:14–19.) Because the distance between entries at Mach #1 Mine exceeded fifty feet, Respondent needed to complete multiple forty-foot cut cycles to complete each crosscut connection between entries. (Tr. 171:9–11.)

(See Ex. G-4 at 36; Ex. G-13 at A4.) As Mach progressed deeper into the mine, it would then cut its crosscuts to connect the entries in accordance with its ventilation plan. (Tr. 143:3-144:1.) Because Mach wanted to encourage familiarity, consistency, and proficiency with its mining process, Respondent employed the same crosscut procedure for every crosscut. (Tr. 123:22-126:5, 143:22-144:7.) In doing so, Mach did not install any line curtain during the first forty-foot cut it made into a flush coal face with ventilating air at the back of the miner.<sup>8</sup> (Tr. 124:20-126:5, 144:11-14, 148:14-150:5, 154:14-16.) Over the previous three years, Mach had made hundreds of such “flush” cuts. (Tr. 125:6-25.) MSHA had not issued a citation to Mach for this mining process. (Tr. 126:1-9.)

By the time Inspector Ramsey approached the area, the continuous mining machine had cut forty feet beyond the rib line into the coal block separating Entry No. 3 and Entry No. 2.<sup>9</sup> (Tr. 39:21-23, 71:16-19, 73:24-74:6, Tr. 89:24-90:4, 91:16-92:23, 98:13-99:7; Ex. G-3 at 4; Ex. G-15.) Because the roof bolts in Entry No. 3 had been spaced a few feet short of the rib line, this meant that the continuous miner had exceeded the ventilation plan’s forty-foot limit. (See Tr. 86:13-88:24.) As a result, the coal face was located approximately forty-two or forty-three feet from the last row of roof bolts.

No line curtain had been provided at any point to direct air to the front of the continuous miner driving this cut. (Tr. 33:13-34:5, 39:21-24, 51:25, 92:25-93:2, 124:20-125:5, 134:3-135:6, 135:19-22; Ex. G-3 at 3.) However, the continuous miner’s “scrubber” system and water sprays were running and operational. (Tr. 107:10-108:17, 150:6-22.) The atmosphere contained two- to three-tenths of one percent of methane. (Tr. 36:3-14, 44:23-24, 45:17-18, 93:5-9, 151:5-10; Ex. G-3 at 3.)

Based on his observations, Inspector Ramsey issued Citation No. 8424601, providing:

The approved ventilation plan was not being followed in [Crosscut No. 10] between [Entry No. 2 and Entry No. 3] on the South Main[s] #2 unit. A forty (40) [foot] cut had been mined without a ventilating line curtain being installed. The approved ventilation plan requires [a] ventilating line curtain [to] be installed and maintained no further than 40 feet from the deepest penetration.

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<sup>8</sup> Although Foreman Dotson claimed no line curtain was necessary for this first forty-foot cut because it was a “flush” cut, he admitted that he would set the line and wing curtain up at the second to last row of bolts for the *second* forty-foot cut in the crosscut. (Tr. 130:1-15, 136:5-19, 137:1-2; *see also* Tr. 144:14-20, 148:14-149:5 (Superintendent Robertson indicating the same).) Thus, Mach would provide a curtain at the face for every cut *besides* the initial “flush” cut.

<sup>9</sup> In mining terms, the wall of an entry is known as the “rib.” (See, e.g., Tr. 60:24-61:3.) The junction point between the entry’s rib and ceiling is known as the “rib line.” (See Tr. 86:10-86:23, 88:19-89:3, 90:3-4, 134:24-135:1.) When an operator mines its perpendicular crosscuts, it necessarily cuts into the entry’s rib. (See Tr. 86:10-86:23.) Although the entry’s rib has been mined, the rib line forms the intersection point of an entry and a crosscut.



Standard 75.370(a)(1) was cited 21 times in two years at [Mach #1 Mine] (21 to the operator, 0 to a contractor[]).

(Ex. G-2.) Ramsey designated the citation as S&S and indicated that it would affect one miner. (*Id.*) In addition, he characterized Mach's negligence as moderate (rather than high) because he was unsure whether anyone from Mach was aware of the missing line curtain. (Ex. G-2; Tr. 47:24-49:1, 50:5-10.) Ramsey did not take an air reading at the cut or measure the direction of air at that time. (Tr. 100:1-101:10.) Finally, Mach installed a ventilating line curtain at the face to abate the citation. (Ex. G-2; Tr. 43:11-12.)

**B. Violation of 30 C.F.R. § 75.370(a)(1)**

This case turns on whether Mach's ventilation plan required Respondent to install a ventilating line curtain to direct fresh air to the continuous miner for *every* cut.<sup>10</sup> According to the Secretary, Mach's 2008 Plan "unambiguously" required Mach to maintain a line curtain within forty feet of the face for all cuts. (Sec'y Br. at 10-11.) Based on Inspector Ramsey's observations, the Secretary argues that Mach violated its approved ventilation plan when it mined into the crosscut without a line curtain. (*Id.*) In contrast, Mach contends that no line curtain is required for the first forty-foot "flush" cut. (Resp't Br. at 8-9; Resp't Reply at 4-6.) In addition, Respondent claims that Inspector Ramsey's testimony highlighted ambiguity in the plan's provision regarding the use of a line curtain on a forty-foot cut. (Resp't Br. at 6-8, 10; Resp't Reply at 6.)

Looking at the 2008 Plan, the provision explaining the forty-foot cut sequence states that, "Using blowing ventilation[,] the curtain will be no more than 40' from the face." (Ex. G-13 at A4.) Based on the plan's depiction, this provision specifically measures forty feet from the last row of bolted roof. (Ex. G-13 at A4.) Despite Respondent's attempt to create ambiguity about

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<sup>10</sup> At the hearing, the Secretary introduced copies of two different ventilation plans: one approved on March 18, 2008 ("2008 Plan") and another approved, coincidentally, on March 18, 2011 ("2011 Plan"). (Ex. G-4; Ex. G-13.) The ventilation citation in this case was issued on March 22, 2011. (Ex. G-2) It is uncontroverted that Mach did not receive a copy of MSHA's approval until March 26, 2011. (Tr. 54:1-15, 141:7-24, 157:8-12, 158:20-159:6; Resp't Br. at 5.) According to Respondent, I must therefore determine whether the 2008 Plan or 2011 Plan applies. (Resp't Reply at 6.) Given the carefully constructed plan approval process established in 30 C.F.R. § 75.370, *see ICG Knott County, LLC*, 35 FMSHRC 2784, 2810-14 (ALJ) (discussing the "comprehensive process" established by section 75.370 for "ventilation plan proposal, approval, and implementation"), and general principles of fair notice, *see Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), it would appear inequitable to enforce the 2011 Plan against Respondent. Yet Mach also admits that the 2008 Plan and 2011 Plan contain "similar" language regarding the provision of a line curtain during a forty-foot cut. (Resp't Br. at 5-6.) The 2008 Plan states that: "Using blowing ventilation[,] the curtain will be no more than 40' from the face." (Ex. G-13 at A4.) The 2011 Plan provides: "Curtain setback from face — Maximum 40 feet when mining crosscuts and entries." (Ex. G-4 at 13.) Given this admitted similarity, I need not determine whether the 2008 Plan or 2011 Plan applies. For ease of discussion, I will focus on the 2008 Plan.

the treatment of “flush” cuts, Inspector Ramsey credibly testified that “flush” cuts do not differ from turning crosscuts. (Tr. 30:3–7.) Moreover, the 2008 Plan does not include any exception for “flush” cuts. Thus, the text of the provision unambiguously prohibits an operator from mining more than forty feet beyond the last row of bolts without a line curtain. Further, as Superintendent Robertson and Foreman Dotson acknowledged, the “face” moves as mining progresses deeper into the coal seam. (Tr. 133:9–10, 160:3–5.) Accordingly, that provision reflects a continuing obligation: as the face moves deeper into the coal seam—and further from the line curtain—the curtain cannot be *more* than forty feet away from the face.

Mach might comply with this provision in several ways. For example, Respondent could hang a curtain on the last row of roof bolts, which were located approximately two feet from the rib line. Mach could then make an eighteen-foot cut on the right-hand side of the crosscut, an eighteen-foot cut on the left-hand side, a twenty-foot cut on the right-hand side and a twenty-foot cut on the left-hand side. Alternatively, Mach could hang a line curtain twenty feet from the rib line, make an eighteen foot cut on the right and left side, then rehang its line curtain at the last row of bolts, then make twenty-foot cuts on the right and left side.

What would *not* work is precisely what Mach did in this case: a cut sequence that extends forty-two or forty-three feet beyond the rib line without a line curtain. Notwithstanding any seemingly conflicting testimony on the part of Inspector Ramsey, *see* discussion *infra* Part V.D., the unambiguous text of the 2008 Plan precludes Mach from cutting more than forty feet beyond the last row of bolts without a line curtain. Here, the coal face was located more than forty feet away. Mach’s cut into the coal seam exceeded the plan requirement by two or three feet. No line curtain had been provided at any time. Thus, I conclude that Mach’s failure to comply with this provision of its 2008 Plan constitutes a violation of 30 C.F.R. § 75.370(a)(1).

### C. S&S and Gravity

Respondent’s ventilation plan violation has established the first element of the *Mathies* test for S&S. In addition, Inspector Ramsey described the explosion and dust hazards to which this violation would contribute. (Tr. 23:9–13, 34:6–35:2, 35:25–36:20, 44:1–14, 45:22–47:23.) Ramsey is an experienced inspector who had inspected Mach #1 Mine many times. (*See* Tr. 19:7–23:1.) Given his experience, his testimony is entitled to significant weight on this point. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ’s S&S determination). Thus, I determine that the Secretary has also met his burden of proving *Mathies*’ second element.

However, Mach contends that the Secretary has not met his burden of proving that this violation was S&S because there was no “reasonable likelihood of a reasonably serious injury.” (Resp’t Br. at 11.) Mach notes that Inspector Ramsey did not take an air reading in Crosscut No. 10, that more than 39,000 C.F.M. of air was reaching the return entry, and that the methane levels did not exceed 0.3 percent. (Resp’t Br. at 11; Resp’t Reply at 8–9.) In addition, Mach argues that its methane detection and dust suppression measures reduce the likelihood of injury. (Resp’t Br. at 11; Resp’t Reply at 9–10.) Mach also notes that Ramsey did not observe miners working in suspended dust. (Resp’t Reply at 9.) Finally, Respondent claims that the miner

operator would have hung a line curtain before the next cut. (Resp't Br. at 11; Resp't Reply at 9–10.)

Nevertheless, the record before me demonstrates that these hazards were reasonably likely to result in reasonably serious injuries. Here, Inspector Ramsey credibly testified that he did not need to take an air reading at the intersection of Entry No. 3 and Crosscut No. 10 because he did not dispute that approximately 39,000 C.F.M. was present at the intersection. (Tr. 72:22–73:20.) Instead, he was concerned with what would happen without a curtain to direct that air to the face as required by the ventilation plan. (Tr. 73:19–20.) Without the missing line curtain directing air toward the face, he indicated that very little fresh air would reach the farthest reaches of Mach's forty-foot cut. (Tr. 39:15–41:7, 42:16–22; 72:22–73:7, 100:17–101:10; Ex. G–15.) Rather than sweeping the face, the air would short-circuit before reaching the deepest part of the cut. (Tr. 42:16–21, 72:22–73:7, 100:17–101:10; Ex. G–15.) In addition, Ramsey indicated that “sparks” from the mining process provided an ignition source for any accumulating methane. (Tr. 43:17–25.) He also explained that coal dust—which lowers the explosive range for methane ignition and contributes to lung disease—was present when he arrived at the crosscut. (Tr. 34:21–35:21, 44:23–45:2, 45:20–46:1, 107:22–108:5.)

Respondent's emphasis on secondary safety devices, the low level of methane, and Mach's periodic methane checks is inapposite. The Commission has repeatedly rejected operator arguments that additional safety measures prevent an S&S finding. *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369–70 (Oct. 2011), *aff'd*, *Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013); *see also Buck Creek Coal*, 52 F.3d at 136 (“The fact that [Respondent] has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires.”) Thus, I accord little weight to the presence of the scrubber, water sprays, and methane monitor in my S&S analysis.

Moreover, Mach's emphasis on the relatively low concentration of methane and coal dust is similarly misplaced. An S&S analysis is not a mere snapshot. *See, e.g., Knox Creek Coal Corp*, 36 FMSHRC 1128, 1132 (May 2014) (indicating that a Judge erred when he took a “snapshot” approach to the S&S analysis). Instead, the analysis examines the likelihood of injury in the context of continued mining operations. Although the methane concentration may have been relatively minor at the time Ramsey wrote the citation, he credibly testified that Mach #1 Mine was a gassy mine that released more than 1,000,000 cubic feet of methane every twenty-four hours.<sup>11</sup> Notwithstanding Mach's periodic methane checks and Superintendent Robertson's testimony that “*normally* five to six-tenths [of methane] is the most [he had] ever seen” on miner units (Tr. 151:18–20 (emphasis added)), Mach #1 Mine's high rate of methane liberation would allow methane concentrations to build rapidly. In addition, Ramsey specifically

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<sup>11</sup> Mach suggests in its reply brief that its “total methane liberation for purposes of placing the mine on spot inspection is calculated using the gob, which was created from several longwall panels.” (Resp't Reply at 9.) Thus, it appears Mach hopes I will infer that the *rest* of this mine releases relatively little methane. Yet it is unclear why that would be the case or how to quantify the impact of the gob. I therefore decline to draw any such inference.

testified that he saw dust in the crosscut. Although he did not see miners working in the dust, it is reasonably likely that this dust would accumulate without proper ventilation. As mining activities continued, Respondent's miners therefore would be reasonably likely to work in the dust. This dust would simultaneously lower the explosive range for concentrated methane *and* expose miners to dust inhalation injuries.

Lastly, dust inhalation and methane explosions are among the most dangerous hazards that miners face, and I do not doubt that any resulting injuries would be reasonably serious. As Inspector Ramsey noted, dust inhalation can lead to debilitating and fatal lung diseases. (Tr. 35:3–24.) Moreover, Ramsey indicated that methane ignitions can lead to burns. (Tr. 45:3–14.) I therefore conclude that the Secretary has proven *Mathies*' third and fourth elements.

In view of the above, the Secretary has met his burden of proof on all four elements of *Mathies*. Accordingly, I conclude that Citation No. 8424601 was appropriately designated S&S.

#### **D. Negligence**

Based on my review of the 2008 Plan, I have determined that the unambiguous language requires a line curtain within forty feet of the face on every cut. *See* discussion *supra* Part V.B. Thus, “a reasonably prudent person familiar with the protective purpose of the standard” would have ascertained the meaning of the provision. *See Mach Mining, LLC*, 35 FMSHRC 2937, 2942 (Sept. 2013) (describing the factors an Administrative Law Judge should consider in determining whether an operator's good faith belief that its conduct complied with regulations was also objectively reasonable). Based on the text of the provision, Mach reasonably should have known that its failure to provide a line curtain during the flush cut did not comply with its plan provision. This is a serious violation that could expose the miner operator to methane explosion and dust inhalation hazards in the course of continued mining operations. Respondent's conduct did not comport with the high standard of care the Mine Act requires, and it acted negligently when it failed to install the required line curtain.

In the Secretary's posthearing brief, he asks that the negligence designation for Citation No. 8424601 be increased from “moderate” to “high.” (Sec'y Br. at 14.) The Secretary notes that Inspector Ramsey initially designated Respondent's negligence as “moderate” because he believed Mach's “foreman was not actually aware of the condition.” (*Id.*) Pointing to testimony from Foreman Dotson and Superintendent Robertson, the Secretary states “the failure to maintain a ventilation curtain within 40 feet of a [‘flush’] cut was a deliberate and ongoing practice.” (*Id.* at 15.) Thus, the Secretary now claims Mach's level of negligence was high.

The Secretary apparently believes that the foreman's knowledge of the condition is the only factor bearing on negligence in this case. (*See* Sec'y Br. at 16–17 (citing cases regarding negligence and supervisor knowledge).) But supervisor knowledge is only one piece of the negligence analysis. *See, e.g., Mach Mining, LLC*, 35 FMSHRC at 2941–43 (indicating an operator's objectively reasonable, good faith belief that its conduct complied with regulations constitutes a mitigating factor). MSHA's prior interpretations and enforcement are also properly considered as mitigating factors. *See Sierra Rock Prods., Inc.*, 37 FMSHRC \_\_\_, slip op. at 4–5,

No. WEST 2010-1390-RM *et al.* (Jan. 13, 2015); *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1547 (Aug. 1993).

Here, Dotson and Robertson each credibly testified that Respondent employed this mining process for flush cuts as a matter of course. The 2008 Plan was in effect for three years. Mach had completed hundreds of flush cuts. Given the length of time and the frequency with which Mach employed this flush-cut system, it is reasonable to infer that an inspector would have observed this process at some point during MSHA's regular visits to the mine. Yet, it appears MSHA never issued a similar flush-cut citation in the three years the 2008 Plan was in effect. (*See* Tr. 126:1–9.) Despite his opportunity to present rebuttal testimony and evidence, the Secretary neither disputed the consistency of Mach's mining process nor presented evidence of similar citations for engaging in this process.

If anything, the record in this case suggests that MSHA's enforcement may have hindered, rather than helped, the proper implementation of this plan provision. For example, Inspector Ramsey had some difficulty explaining the provision at issue. Notwithstanding the unambiguous text of Mach's ventilation plan, Ramsey initially appeared to testify that a line curtain was not necessary for the first twenty feet of a flush cut. (Tr. 74:24–76:8, 82:15–24.) Later, he clarified his testimony: although the plan did not *specifically* require a line curtain for the first twenty feet of a cut, Mach would need to provide a curtain within twenty feet of the face at the *beginning* of a cut to ensure it complied with the overall forty-foot requirement *after* it completed this initial twenty-foot cut. (*See* Tr. 165:21–176:16.) Having heard Ramsey's initially muddled explanation firsthand, I can easily envision how a listener might incorrectly surmise that no line curtain was necessary during a flush cut in spite of the otherwise unambiguous text of the provision. I can likewise envision over the course of three years a similarly contradictory explanation from MSHA reinforcing Mach's misguided interpretation in this case.

In one sense, Mach's repeated and long-running application of a plan interpretation that is objectively unreasonable highlights the extent of Respondent's negligence. But in another, it suggests that MSHA unintentionally reinforced Mach's long-held interpretation. After three years and hundreds of cuts, it is unsurprising that Mach may have interpreted MSHA's silence as validation. Although Mach has the primary responsibility for the health and safety of its miners, MSHA's seemingly nonexistent—or, at least, inconsistent—enforcement of this plan provision somewhat mitigates Mach's negligence in this case. *See* 30 C.F.R. § 100.3(d) at Table X (characterizing negligence as moderate where mitigating circumstances are present). Accordingly, I conclude that the Secretary has not demonstrated a "high" level of negligence in this case.

Given the above, I determine that Mach's negligence in this case was moderate.

## **VI. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW— ROOF BOLTER VIOLATIONS—CITATION NOS. 8444918, 8444919, AND 8444920**

### **A. Additional Findings of Fact**

On November 27, 2012, Inspector Lee visited Mach #1 Mine to conduct inspections and sample dust pumps on the mining units. (Tr. 186:2–15; Ex. G–7 at 1.) After traveling to the No. 2 section of the mine, Lee examined the dust collection system on Mach’s #4 Fletcher roof bolter. (Tr. 211:9–21; Ex. G–7 at 1, 6.)

Mach’s roof bolting machines include dust collection systems. *See* discussion *supra* Part III. Acting like a large vacuum cleaner, the dust collection systems on Mach’s roof bolters suck dust away from the drill pot—which is the part of the machine that drills into the roof—and into a large hose. (Tr. 201:3–202:13, 208:5–16, 246:16–248:11; Ex. G–11; Ex. G–16; Ex. G–17.) The hose weaves through the body of the machine and eventually connects to a sealed dust box. (Tr. 208:5–16; 210:9–12, 246:16–21; Ex. G–11; Ex. G–16; Ex. G–17.) At junction points along the hose, clamps are used to help ensure a secure connection. (Tr. 189:18–22, 190:9–25, 194:2–5, 197:1–4, 197:20–198:13, 199:21–200:11, 208:17–23; Ex. G–11; Ex. G–16; Ex. G–17.) Inside the dust box, the roof bolter then sucks the dust-filled air through a replaceable dust filter. (Ex. G–11; Ex. G–16; Ex. G–17; Ex. R–5.)

This cylindrical filter consists of paper-like filter material and is hollow on the inside to allow air to pass through it. (Tr. 203:2–8, 248:12–24; Ex. R–4; Ex. R–5.) The filter material is encased in a metal framework. (Tr. 203:2–8, 248:12–14; Ex. R–4; Ex. R–5.) Throughout the outer body of the filter, this metal casing is a woven-wire mesh that allows air to reach the paper-like filter. (Tr. 203:2–8, 204:18–205:3, 248:12–14; Ex. R–4; Ex. R–5.) On each flat end of the cylindrical filter, the framework is solid metal, and one of these ends contains a gasket to ensure a secure seal with the dust box. (Tr. 203:2–8, 203:24–204:12, 252:23–256:1; Ex. R–4.) When functioning properly, the filter makes an airtight seal that releases now-filtered air from the roof bolter’s muffler. (Tr. 201:3–202:2; 203:9–17, 222:2–9, 282:8–283:4.) Given the dual drill pots on Mach’s roof bolters, they include two dust boxes and two filters. (Ex. G–16; Ex. G–17.)

Because certificates of approval from MSHA are required for dust collection systems, *see generally* 30 C.F.R. part 33 (discussing permissibility and approval of dust collection systems), manufacturers of roof bolters work closely with MSHA when designing their machines. (Tr. 194:13–195:7, 235:7–9.) Thus, manufacturers submit design plans to MSHA. (Tr. 193:17–194:1, 195:24–196:6, 233:21–24, 234:23–235:5.) An MSHA technical support group in Triadelphia, West Virginia oversees the approval process and issues certificates for approved systems. (Tr. 196:7–19, 232:12–18.)

During Lee’s November 27 inspection, he observed that the bolter’s hose was connected to the drill pot. (Tr. 211:9–21; Ex. G–7 at 6.) However, he noticed that the clamp securing the hose to the left drill pot was not in use. (Tr. 211:9–21, 242:20–243:5; Ex. G–7 at 6.)

Based on his observations, Inspector Lee issued Citation No. 8444918, providing:

The dust collection system on the roof bolter was not being maintained in a permissible, and operational condition. The suction hose for the left drill pot was not secured to the drill pot[']s union where the hose is attached. This condition was observed on the #4 roof bolter in Main East [No 2] working section, MMU 002.

Standard 72.630(b) was cited 13 times in two years at [Mach #1 Mine] (13 to the operator, 0 to a contractor).

(Ex. G-6.) To abate the citation, Mach installed a hose clamp. (*Id.*)

Lee continued his inspection of Mach #1 Mine on November 28 and traveled to the Head Gate 6 area of the mine. (Ex. G-10 at 1.) He again examined the dust collection systems on Respondent's roof bolting machines. (Tr. 218:9-12; Ex. G-10 at 5-6.) First, he examined Mach's #3 roof bolter. (Tr. 218:13-19; Ex. G-10 at 5-6.) Again, he observed that a clamp had not been used to secure the control system's hose to the left drill pot. (Tr. 218:20-219:23, 244:14-16; Ex. G-10 at 5.) In addition, he inspected the filters inside the dust control boxes and found that the filters showed small indentations and "dings" from when Mach's machine operator struck them against a metal object to clean them rather than replace them. (Tr. 220:7-17, 262:4-19, 281:5-22; Ex. G-10 at 5.) Given his observations, Lee issued Citation No. 8444919, providing:

The dust collection system on the roof bolter was not being properly maintained in permissible condition. The filters in both dust boxes were damaged and showed signs of being struck against an object[,] creating indentations in the mesh and ends of the filters. Also, the left suction hose was not secured to the left drill pot. This condition was observed on the [#3] roof bolter located in Head Gate 6, MMU 003.

Standard 72.630(b) was cited 14 times in two years at [Mach #1 Mine] (14 to the operator, 0 to a contractor).

(Ex. G-8 at 1.) Mach installed new filters to abate the citation.<sup>12</sup> (*Id.* at 2; Ex. G-10 at 6.)

That same day, Lee also inspected Respondent's #1 roof bolter in the same section of the mine. (Ex. G-10 at 1, 6.) Again, he examined the bolter's dust collection system. (*Id.* at 6.) He again found indentations in the bolter's dust filters. (*Id.*) Based on his inspection, he issued Citation No. 8444920, providing:

The dust collection system on the roof bolter was not being properly maintained in permissible condition. The filters in both dust boxes were damaged and showed signs of being struck against an object[,] creating indentations in the mesh and ends of the

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<sup>12</sup> Lee did not explain how Respondent abated the clamp deficiency on the #3 bolter.

filters. This condition was observed on the #1 roof bolter located in Head Gate 6, MMU 003.

Standard 72.630(b) was cited 14 times in two years at [Mach #1 Mine] (14 to the operator, 0 to a contractor).

(Ex. G–9.) To abate the citation, Mach again installed new filters. (*Id.*)

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

The Secretary contends that Citation Nos. 8444918, 8444919, and 8444920 constitute violations of section 72.630(b) because Mach’s roof bolter’s were not in permissible or operating condition. (Sec’y Br. at 21.) However, Inspector Lee admitted at the hearing that all three roof bolters were in operational condition at the time of his inspection. (Tr. 242:20–243:12, 244:12–245:1, 262:20–264:6.) Based on Lee’s testimony, I conclude that each roof bolter was capable of “performing . . . its regular function” of “absorb[ing] air contaminated with dust at the drill head, filter[ing] and contain[ing] the dust before it reach[ed] the clean side of the system, and produc[ing] clean air on the return side of the machine.” (*See* Sec’y Br. at 21 (quoting *Liggett Mining, LLC*, 33 FMSHRC 1702 at 1714).) Accordingly, this case turns on whether the Secretary has met his burden of proving that the roof bolters in question were permissible under 30 C.F.R. § 72.630(b).

Permissibility in the context of dust collection systems requires the Secretary to demonstrate that the system was not maintained as it had been approved. *See* discussion *supra* Part IV.B. In this case, the Secretary presented testimony from Inspector Lee, as well as schematics depicting roof bolters similar to the roof bolters Respondent employed at the Mach #1 Mine. (Ex. G–16; Ex. G–17.) In addition, the Secretary introduced portions of a recent manual for the roof bolting machines at issue. (Ex. G–11.) I admitted the manual for the purpose of understanding the parts of a roof bolter. However, I refused to admit the manual for the written guidance it included because the manual clearly states “Revised 7/2013” on its cover page, which is more than eight months *after* Lee issued the citations before me.

Thus, the Secretary must depend on Inspector Lee’s testimony for the proposition that MSHA’s approval required securing clamps and placing new filters in the dust collection systems at issue. (Sec’y Br. at 22–25; *see* Tr. 189:18–24, 193:17–194:12, 197:1–25, 206:12–14, 219:25–221:9.) I note that Lee is an experienced miner and inspector who is familiar with dust collection systems on roof bolting machines. (Tr. 183:4–186:1.) In addition, his testimony appears somewhat sensible on its face. MSHA drafted section 72.630 to protect miners, and it seems sensible that the agency might require miner operators to apply clamps and replace filters rather than cleaning them.

Yet, looking closely at the Secretary’s actual evidence, I note that Lee provided no foundation for his testimony regarding the approved condition of these roof bolters. *See* Fed. R. Evid. 602 (requiring witnesses to testify based on personal knowledge). Although Lee has many years of experience working in and inspecting mines, he has never worked in MSHA’s approval office in Triadelphia or participated in the approval process. (Tr. 232:9–23.) He also has never



reviewed the plans the manufacturer submitted to MSHA for approval of the roof bolters in question. (Tr. 233:17–234:22, 235:10–24.) Instead, he relied on his review of manuals he received from the manufacturer to form his opinions. (Tr. 205:6–9; 234:7–22.) Without knowledge of the approval process and final results—or even hearsay testimony about his conversations with MSHA officials in Triadelphia—I cannot credit Lee’s testimony on this point.

Moreover, I cannot follow Judge Zielinski’s approach in *Tri County Coal. Cf.* 34 FMSHRC at 3275 (“[T]he certificate of approval would not have been issued for a system with a hole in the vacuum hose.”) Although it is implausible that MSHA would approve a dust control system with a hole in its hose, MSHA *might* approve a system that included optional clamps and reusable filters as long as the system’s effectiveness had not been compromised. Here, it is uncontroverted that the dust control systems were providing adequate suction. Accordingly, it is the Secretary’s burden to prove that MSHA’s approval required that the clamps be affixed and the filters changed rather than cleaned and reused as long as they remained functional.

This case is problematic. I believe Lee testified truthfully as to what he assumed MSHA had approved. His testimony appears sensible and *may* even be accurate. I am cognizant of the serious danger that respirable dust presents, and I understand the Secretary’s diligence in enforcing his provisions. Judges must be circumspect about the evidence before them, but I recognize that a “see no evil” approach that discounts common sense does not serve the health and safety interests of miners. It is a fine line between healthy circumspection and suspension of disbelief, and this case places that line in sharp relief.

But the Secretary’s diligence in enforcement must be matched by his diligence in prosecution. Here, the Secretary presented *no* evidence demonstrating what was included in that approval. Lacking any sort of approval documents, contemporaneous manuals, or other indications of the condition in which MSHA approved the roof bolter, the Secretary has not met his burden in this case. I cannot infer that clamps and new filters were required for permissibility merely because Inspector Lee’s testimony seems sensible. To do so would substitute a plausible theory for actual evidence. Based on the unique—and ultimately deficient—record before me, I determine that the Secretary has failed to demonstrate by a preponderance of the evidence that the three roof bolters in this case were not being maintained in permissible condition.

In view of the above, I can only conclude that the Secretary has not proven that the cited conditions violated 30 C.F.R. § 72.630(b). Accordingly, Citation Nos. 8444918, 8444919, and 8444920 are hereby **VACATED**.

## VII. PENALTY AND ORDER

Although the Secretary proposes penalties, the Commission assesses penalties for violations of the Mine Act *de novo*. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including: the operator’s history of previous violations, the appropriateness of the penalty relative to the size of the operator’s business, the operator’s negligence, the penalty’s

effect on the operator's ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Jim Walter Res., Inc.*, 36 FMSHRC at 1979.

In the case before me, I vacated Citation Nos. 8444918, 8444919, and 8444920 and affirmed Citation No. 8424601 as written. I have concluded that Citation No. 8424601 was sufficiently grave to be characterized as S&S and that Mach's level of negligence was moderate. Looking at the violation history report for Mach #1 Mine, I note that nine section 104(a) citations for violations of 30 C.F.R. § 75.370(a)(1) became final orders in the twenty months prior to Citation No. 8424601. (Ex. G-1.) Five of those violations were designated as S&S. As I previously noted, none of these prior violations under section 75.370(a)(1) were shown to have involved the type of "flush" cut violation at issue in Citation No. 8424601.

In addition, the parties stipulated that the Secretary's proposed penalties will not affect Respondent's ability to continue in business and that Mach demonstrated good faith in abating the violations. (Ex. G-12 at 2.) The parties also stipulated that Mach #1 Mine produced nearly six million tons of coal in 2010 and more than seven million tons of coal in 2012. (*Id.*) Moreover, the mine's controlling parent produced more than 8 million tons of coal in 2010 and nearly 11 million tons of coal in 2012. (*Id.*) Although I am not bound by the Secretary's penalty criteria, I note that his regulations characterize Mach's levels of production on the high end relative to its competitors. *See* 30 C.F.R. § 100.3(b) at Tables I & II. I therefore determine that the Secretary's proposed penalty appears appropriate for the size of Mach's business. In considering all of the facts and circumstances of this matter, I determine that the Secretary's proposed penalty of \$2,900.00 is appropriate in this case.

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8424601 be **AFFIRMED** as written and that Citation Nos. 8444918, 8444919, and 8444920 be **VACATED**. Mach Mining, LLC, is **ORDERED** to **PAY** a civil penalty of \$2,900.00 within forty days of the date of this decision.



Alan G. Paez  
Administrative Law Judge

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