FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 23, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0009 A.C. No. 36-07230-543018
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	:	Mine: Bailey Mine

DECISION

Appearances: Erik Unger, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, and Kenneth J. Polka, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Mt. Pleasant, Pennsylvania, for Petitioner; James P. McHugh, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. In dispute is a single section 104(a) citation issued to CONSOL Pennsylvania Coal Company, LLC ("CONSOL" or "Respondent").[1]

To prevail, the Secretary must prove any cited violation "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 quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

[1] In this decision, the hearing transcript and the Secretary's, Respondent's, and Joint exhibits are abbreviated as "Tr.," "Ex. P–#," "Ex. R–#," and "Jt. Ex. #," respectively. The parties' post-hearing briefs and reply briefs are abbreviated as "Br." and "Reply," respectively.

I. STATEMENT OF THE CASE

Citation No. 9075606 alleges CONSOL violated 30 C.F.R. § 77.400(a)[2] by failing to guard moving machine parts, consisting of a spinning metal shaft on an industrial water pump. The Secretary proposed a penalty of $355.00, which CONSOL timely contested.[3] I held an in-person hearing on July 7, 2022, in Pittsburgh, Pennsylvania, where counsel for the Secretary appeared remotely via Zoom for Government due to elevated levels of COVID-19 infections.

At the hearing, the Secretary presented testimony from MSHA Inspector Craig Mikulsky. CONSOL presented testimony from two witnesses: Matthew Criado, CONSOL's Refuse Coordinator who accompanied the inspector, and Tyler McMillan, the Contract Technician for Hollowood Heating, Inc., assigned to grease the fittings on the cited water pump. In addition to the parties' submissions of documentary and photographic evidence, the Secretary submitted three short videos taken by Inspector Mikulsky at the time of his inspection of the cited water pump. During the hearing I granted counsel for CONSOL permission to review MSHA's history of violations for the Bailey Mine and raise any discrepancies in his post-hearing brief, but he reported no issues. Due to a delay in receiving the transcript, the parties requested and were permitted to submit their post-hearing briefs and reply briefs several months later.

II. ISSUES

Based on Citation No. 9075606 the Secretary asserts that CONSOL violated section 77.400(a) by failing to guard the spinning metal shaft of the booster pump that pressurizes water flowing to the Bailey Prep Plant. (Exs. P–1-1, P–5-1; Tr. 26:18–19, 99:4–9, 130:5–11.) The citation characterizes the likelihood of injury to be reasonably likely to result in lost workdays or restricted duty of one miner, designates the citation as significant and substantial ("S&S"),[4] and marks CONSOL's degree of negligence as low. The Secretary argues the violation should be upheld as written and the proposed penalty affirmed. (Sec'y Br. at 3; Exs. P–1-1, P–2-2.) CONSOL originally contested the fact of the violation, the S&S designation, and the amount of the penalty. (Resp't Am. Prehr'g Report at 2.) However, in its post hearing brief, CONSOL no longer argues against the fact of a violation but asserts the citation should be modified to drop the S&S designation along with a penalty reduction based on the penalty charts under 30 C.F.R. part 100.3. (Resp't Br. at 2, 8, 21.)

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[2] Section 77.400(a) provides: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 77.400(a).

[3] This docket originally contained three section 104(a) citations. The parties settled two of the three violations prior to the hearing, and only Citation No. 9075606 remains.

[4] The S&S terminology comes 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 . . . ." 30 U.S.C. § 814(d)(1).

Accordingly, I determine the following issues are before me: (1) whether CONSOL violated the guarding provisions of 30 C.F.R. § 77.400(a) as alleged in Citation No. 9075606; (2) whether the citation was properly designated as S&S; and (3) whether the proposed penalty is appropriate for any such violation.

For the reasons set forth below, Citation No. 9075606 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Parties' Stipulations

At the hearing the parties stipulated in a joint exhibit to the following items, verbatim:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 802(d), at the mine at which the citations at issue in this proceeding were issued.
2. At all times relevant to these proceedings, Bailey Mine (ID 36-07230) is a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Operations of the Respondent at the mine at which the citations were issued 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 Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Bailey Mine is owned by the Respondent.
6. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.
7. The individual whose name appears in Block 22 of the citations 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 that are 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 the citations, as required by the Act.
9. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 202[2]-00[0]9 contains authentic copies of the citations at issue in this matter with all modifications or abatements, if any.

(Jt. Ex. 1.)[5]

B. Operations of Bailey Mine 960 Booster Pump Area

CONSOL operates the Bailey Prep Plant for coal processing at the surface of the Bailey Mine in Greene County, Pennsylvania. (Tr. 37:1–6.) The Bailey Prep Plant uses water for various tasks and employs large industrial pumps to transport it through water lines around the

[5] The parties incorrectly listed the docket number for this case in their last stipulation (Item 9) which I have corrected.

4,000-acre mine site. (Tr. 27:2–4, 96:9–11, 130:5.) Two such industrial water booster pumps sit in a semi-circular metal Quanset hut (Tr. 35:4–7) in an isolated area of the mine called Coal Refuse Disposal Area No. 5, located approximately two miles from the prep plant. (Tr. 36:25–37:4, 130:23–25, 140:6–9.) These 960 Booster Pumps fill a water tank supplying makeup water to the prep plant. (Tr. 36:25–38:14, 46:4–46:22; *see* Ex. P–3.) The booster pumps exert 110 pounds per square inch (PSI) of pressure that forces water through two-foot diameter water lines. (Tr. 37:19–22, 38:17–21, 57:25–58:5; Ex. P–3-13.) Each "large" booster pump motor exerts 500 horsepower (Tr. 35:12–36:23, 65:18–20, 195:21–22) which in turn rotates a shaft that completes between 300–900 rotations per minute. (Tr. 34:23–35:17–18, 65:18–20.)

For maintenance, the 960 Booster Pumps have grease fittings. (Tr. 39:1–2, 73:3–6, 74:3–10, 112:1–10, 166:23–25; Exs. P–2-1, P–3-24, R–3-A.) One of the grease fittings on the 960 Booster Pump sits five inches from its spinning metal shaft. (Tr. 34:12–17, 122:19–21, 123:10–124:6.) Miners known as "greasers" visit Coal Refuse Disposal Area No. 5 approximately monthly to add grease to this grease fitting to lubricate the booster pump motor. (Tr. 38:9–13, 50:19–20, 85:23–86:3, 141:13–21, 152:21–22, 160:10–18.) The greaser walks down the 43-inch-wide walkway through the pumps to approach this fitting. (Tr. 40:21–42:15, 145:2–6; Ex. P–2-1.) Because this grease fitting sits approximately 60 inches, or five feet, above the floor, the greaser must climb the pump to grease the fitting. (Tr. 39:1–2, 73:3–6, 74:3–10, 112:1–10, 166:23–25; Exs. P–2-1, P–3-24, R–3-A.) To reach the fitting, the miner pulls himself closer to the pump with both hands, reaches out 24 inches, and hovers over the spinning shaft. (Tr. 36:21–23, 38:21–24, 51:21–23.)

The contract miner, Tyler McMillan, assigned to service the grease fitting of the 960 Booster Pump in Citation No. 9075606 provided a detailed description on how to perform the greasing task. McMillan greases the fitting from the side, with the motor on his left and the pump on his right. (Tr. 159:13–22; Ex. R–3-A.) While holding the grease gun in his left hand, he steps his left foot in front of the yellow leg on the flat surface with metal tread, grabs the nut and bolt with his right hand, and pulls up. (Tr. 148:21–151:25, 152:19–24, 157:2–20; Ex. R–3.) Then, he places his right foot on the ledge next to the metal frame, leans his thigh against the structure of the motor, and leans his waist against the cast iron ledge while reaching out over the grease fitting. (Tr. 148:25–150:16, 167:2–10; Ex. R–3.) The miner then pushes down on the rigid handle of the 20-inch-long grease gun to lock on the fittings at the end of the grease gun. (Tr. 154:2–9; Ex. R–2f.) If the grease gun does not snugly fit the bearing, grease leaks out from the sides. (Tr. 163:13–16.) Prior to greasing, the miner may clean the fitting with a rag, his gloves, or his hands. (Tr. 66:22–67:1, 155:24–156:19; Ex. P–2-1.) Water sprays in the area of the pump and gets onto the miner's protective glasses. (Tr. 168:24–169:8.)

C. Mikulsky's Inspection of Booster Pump Area

MSHA Inspector Craig Mikulsky arrived at the Bailey Mine on August 18, 2021, for a routine EO1 inspection. (Tr. 22:2–19, 26:5–10, 118:11–14.) Matthew Criado, CONSOL's Refuse Coordinator, accompanied Inspector Mikulsky for part of the inspection (Tr. 27:13–28:2, 196:1–6), whereby Mikulsky traveled to the Coal Refuse Disposal Area No. 5. (Tr. 28:3–28:20, 34:23–35:3, 141:2–12, 140:6–9, 188:3–11; Exs. P–1, P–3-23.) Upon entering the Quonset hut containing the 960 Booster Pumps, Mikulsky heard the "very loud" machinery and observed

water spraying around the hut and dripping from the ceiling. (Tr. 35:19–23, 39:20–23, 47:6–7, 59:15–16, 62:15–21, 72:7–9, 79:5–15, 82:8–9; Ex. P–3-1, R–4 (video 3).) The flooring around the pumps sloped downward to allow water to drain from the building. (Tr. 99:25–100:5.) While standing in the doorway of the hut, Inspector Mikulsky noticed one pump to his left and another pump to his right with a wash down hose draped between them. (Tr. 39:11–25, 43:17–20.)

As Inspector Mikulsky walked past the 960 Booster Pump (the pump that appears on the right side of the photo in Exhibit P–3-1), he glanced over and observed a 3-to-4.5-inch opening exposing the spinning shaft's "teeth." (Tr. 34:8–11, 64:1–7, 104:13–16, 132:25–133:1; Exs. P–1, P–2-1, P–3-1, P–3-9, P–3-10, P–3-17, P–3-24.) These teeth consisted of keyed, or protruding and jagged, bits of rusty metal sticking out from the rotating shaft. (Tr. 34:12–13, 123:5–8, 132:25–133:1.) To Mikulsky the opening was large enough where "a miner can easily, if his hand slips [sic] down, his hand could easily get into this spinning shaft." (Tr. 38:16–19.) A semi-circular, yellow guard covered some of the shaft, and a hose draped over the guard and through the handle. (Tr. 41:20–24, 47:9–12, 132:2–8; Exs. P–3-3, P–3-5.) Mikulsky wrote in his notes that a portion of the hose was directly above the exposed spinning shaft. (Ex. P–2-1.) Metal legs, which extended from the floor, propped up the guard. (Exs. R–3a, P–3-15.) Upon being notified of the condition, Criado observed that the guard "was lifted up on one side of the pedestal." (Tr. 175:8–10.) A grease fitting for the 960 Booster Pump sits in between the yellow leg of the pump's steel frame and the blue rusted metal to the left of the picture in Exhibit P–3-15. (Ex. P–3-15; Tr. 61:22–62:4, 134:20–4.) Inspector Mikulsky observed the cutout in the recessed guard (where the miner's grease gun fits into the grease fitting) hangs almost directly above the shaft, so a greaser would work almost directly above the spinning shaft. (Tr. 37:17–22, 39:11–13, 43:8–9, 53:23–54:13.)

D. Issuance of Citation No. 9075606 and its Abatement

In Citation No. 9075606 (Ex. P–1-1), Inspector Mikulsky wrote:

> A portion of the spinning shaft on the motor output side of the 960 Booster Pump was not guarded to prevent miners from contacting the high speed moving shaft parts. The unguarded opening of the spinning shaft ranged from approximately 3 to 4.5 inches wide around the top portion of the shaft. The spinning shaft is rusted, with protruding and keyed metal sections. The exposed spinning shaft is approximately 4ft to 5ft above the floor and within approximately 5 [sic] inches from a grease fitting. In addition, the entire guard/cage system covering other sections of the motor output side of the spinning shaft was not secure. The entire guard/cage system moved when bumped.
>
> Standard 77.400(a) was cited 5 times in two years at mine 3607230 (5 to the operator, 0 to a contractor).

(Ex. P–1-1; Tr. 28:6–24, 34:5–21.)

Inspector Mikulsky issued Citation No. 9075606 at 8:30 a.m. for a failure to guard the spinning shaft on the 960 Booster Pump per section 77.400(a). (Tr. 28:5–30:16, 182:17–20.) He designated the citation as low negligence and as S&S, inasmuch as he determined the failure to guard this portion of the shaft was reasonably likely to lead to an injury resulting in lost workdays or restricted duty. (Tr. 81:15–82:11, 84:13–85:1–10; Exs. P–1-1, P–2-2.) He determined the hazard in question could affect one person, likely the greaser. (Tr. 80:1–3.) Mikulsky stated that guarding should fit "tightly" to prevent injury (Tr. 38:14–15), yet here Mikulsky observed the guarding slid away from the spinning shaft because the bolts had rusted. (Tr. 59:10–12, 77:17–21.)

Inspector Mikulsky notified Criado of the condition, and Criado arrived in the area, though management did not previously know about this gap in the guarding. (Tr. 85:69, 118:7–10, Tr. 119:2–18; Ex. P–2-2.) While Inspector Mikulsky examined the condition, filmed video, and took photographs, Criado attempted to slide the guarding to its previous position; but when Criado bumped the guarding, its legs wobbled, the entire guarding frame moved, and the gap exposing the moving shaft lengthened. (Exs. P–1, P–2-1, P–3-3, R–4; Tr. 58:22–60:6, 67:21–22, 68:21–24, 78:3–78:8, 112:19–113:6, 132:25–133:3, 135:515, 148:21–152:16, 191:2–5.) In his contemporaneous notes, Inspector Mikulsky wrote that the "footing of the cage [guarding frame] was off and could [be] moved around easily." (Ex. P–2-1.) Inspector Mikulsky determined CONSOL needed to weld the unstable legs of the guarding frame. (Tr. 113:5–6.)

To abate the citation, Criado initially shut off the pump. (Tr. 64:11–21.) CONSOL required additional time to establish an adequate guard. (Ex. P–1-2.) Therefore, Inspector Mikulsky extended the citation, and CONSOL restricted access to the unguarded area to allow the pumps to continue operating. (Tr. 73:8–13; Ex. P–1-2.) MSHA terminated the citation on August 24, 2021, when CONSOL stabilized and adequately adjusted the guard to prevent injuries to miners by bolting the guard and welding the legs. (Exs. P–1-2, P–1-3, P–3-27; Tr. 59:19–24, 72:12–16, 75:11–12.)

IV. ADDITIONAL FINDINGS OF FACT, PRINCIPLES OF LAW, ANALYSIS, AND CONCLUSIONS OF LAW

A. Violation of 30 C.F.R. § 77.400(a) – Failure to Adequately Guard Spinning Shaft on 960 Booster Pump

The Secretary alleges that CONSOL violated section 77.400(a) requiring "[s]hafts . . . which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 77.400(a). The Commission has held a "minimal" likelihood of contact to be sufficient to uphold a violation of this standard. *Thompson Bros. Coal*, 6 FMSHRC 2094, 2096–97 (Sept. 1984) (concluding "section 77.400(a) contemplates guarding of machine parts subject to the standard where there is a *reasonable possibility* of contact and injury" and upholding the ALJ's finding of a "minimal" likelihood of contact to be sufficient for "reasonable possibility of contact") (emphasis added). CONSOL points to the "reasonable possibility" test in *Thompson Brothers*, which takes into consideration the possibility of "contact stemming from inadvertent

stumbling or falling, momentary inattention, or ordinary human carelessness," but emphasizes *Thompson Brothers* did not involve any S&S determination. (Resp't Br. at 9–10.) CONSOL also argues that Mikulsky's photos distort the measurements he made. (Resp't Br. 3–4.)

Here, Inspector Mikulsky observed a 3-to-4.5-inch gap in the guarding that exposed the rusted, keyed spinning shaft on the 960 Booster Pump. (Tr. 34:8–11, 64:1–7, 104:13–16, 132:25–133:1; Exs. P–1, P–2-1, P–3-1, P–3-9, P–3-10, P–3-17, P–3-24.) This shaft contains metal fins, or "teeth", that could reasonably snag clothing, straps, or limbs. (Exs. P–1, P–2, P–3, P–4; Tr. 36:12–36:24, 37:23–38:24, 133:25–134:1.)

CONSOL generally questions the accuracy of Mikulsky's measurements and takes issue with some of the photographic evidence. Mikulsky is an experienced inspector who has worked for MSHA for the last nineteen years, including work as an accident investigator; he received a Bachelor of Science in geology from the University of Pittsburgh, as well as a degree in mine safety from Marshall University. (Tr. 22:15–19, 24:4, 25:15–24.) In response to CONSOL questioning his measurements, Mikulsky explained the difficulty of photos showing accurate depth in a two-dimensional photograph, which I credit. (Tr. 42:17–43:1, 53:13–18, 55:8–10, 62:10–14, 104:7–20, 106:11–12, 107:8–10, 110:2–7.) I also credit Inspector Mikulsky's testimony that while greasing the fitting, "[t]he greaser is exposed, and his hand could easily, if it slips, it could easily get down into that guard." (Tr. 79:25–80:3.) Because the pump's jagged, rusty, 20-inch diameter shaft spins at a rate of 300-900 rotations per minute, and a miner greasing the fitting works five inches from the shaft, contact would reasonably cause injury.[6] (Tr. 34:12–35:18, 65:18–20, 123:5–8, 132:25–133:1; Ex. P–2-1.) Indeed, Inspector Mikulsky who has experience as a greaser stated, "if [a miner's] hand slips in there, a serious injury is going to happen, and it could possibly be permanently disabling" or even something "catastrophic" such as cutting off the miner's hand. (Tr. 50:3–4, 83:2–7.)

Based on the record, I determine that CONSOL failed to adequately guard the shaft of the 960 Booster Pump while in operation, and the gap from the missing guarding exposed miners to a spinning, keyed shaft due to its proximity to the grease fitting miners serviced. Therefore, I conclude that the Secretary has met his burden of proving CONSOL violated section 77.400(a).

B. Significant and Substantial Determination

A violation is S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove:

[6] Unlike in *Mach Mining* where the Commission Judge determined the lack of guarding caused no reasonable likelihood of contact since the miner could get no closer than four feet from the moving part, in this case the greaser must work within five inches of the moving machine part. (Ex. P–2-1); *Mach Mining, LLC*, 33 FMSHRC 763, 776 (Mar. 2011) (ALJ) (vacating guarding violation "where a miner could get no closer than four feet from the missing cover" and therefore contact with the moving part would be "completely impossible").

> (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, 42 FMSHRC 379, 383 (June 2020) (citing *Newtown Energy*, 38 FMSHRC 2033, 2037–38 (Aug. 2016)); *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 the application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* test).

I now analyze these elements of the *Mathies* test to determine if the violation is S&S.

1. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. I determined CONSOL violated section 77.400(a) because it failed to guard the entire shaft of the 960 Booster Pump causing a reasonable possibility of contact and injury. *See* discussion *supra* Part IV.A. Thus, the Secretary has satisfied the first element of the *Mathies* test.

2. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard Is Directed

For the second *Mathies* element, the Secretary must establish that "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC 2033, 2038 (Aug. 2016). Here, the hazard is the possibility of miners contacting the exposed spinning shaft (Tr. 36:18–21), because Inspector Mikulsky observed a 3-to-4.5-inch "opening in the guard where a miner can easily, if his hand slips down, his hand could get into this spinning shaft with these protruding fins . . . ." (Tr. 38:16–21, 80:1–3); *see Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2243, 2244 (Nov. 1993) (noting section 77.400(a) aims to prevent persons from contacting moving parts).

The parties disagree whether a finger, hand, or loose clothing would reasonably contact the quickly moving shaft based on the proximity of the grease fitting to the shaft, the size of the gap exposing the shaft, and the ergonomics of how a miner accesses the grease fitting while the shaft spins. To reach the grease fitting, the greaser ascends the pump frame, and climbs on it in a highly specific manner, as described by CONSOL's contract greaser McMillan.[7] (Tr. 39:1–2, 73:3–6, 74:3–10, 112:1–10, 166:23–25, 167:2–10; Exs. P–2-1, P–3-24, R–3-A.) Grease covers

[7] Though CONSOL notes that the Quanset flooring slopes (Tr. 99:25–100:5) and has braille to prevent slipping (Tr. 157:2–9, 186:2–187:5), these facts are irrelevant to the analysis because CONSOL's McMillan testified he stands on the pump frame when greasing the fitting.

the frame because the guns leak grease from the sides.[8] (Tr. 50:4–10, 66:15–16, 69:25–70:2, 163:13–16.) Indeed, Mikulsky noted that grease guns, especially older models, often do not fit the bearings well causing grease to leak (Tr. 50:4–10), and, therefore, "it's common to have grease around in the conditions." (Tr. 66:15–16, 69:25–70:2.) In the area of the 960 Booster Pump, water sprays onto the metal frame and drips from the ceiling as noted by McMillan, as well as evidenced by the photographs and videos showing spraying water around the 960 Booster Pump. (Tr. 169:6–8; Exs. P–2-1, P–3-24, R–4 (video 3).)

In these wet conditions the greaser, McMillan, explained how he climbs onto the pump and contorts his body to balance on the ledge of the pump. (Tr. 148:21–152:24.) This description comports with Mikulsky's description that a miner will not work with his arms fully stretched out, but instead will pull himself closer to the pump to work with bent elbows in a more comfortable position; the "miner works really close to [the] moving part," as miners usually pull themselves closer to the unguarded area so they can work with bent elbows and enhanced dexterity. (Tr. 52:3–9, 82:3–5.) A miner would lean and perhaps reach with both hands out beyond the frame over at least 20 inches. (Tr. 51:7–52:9.) Meanwhile, water would spray on the miner's safety glasses, potentially obstructing his view of the fitting or location of his hands. (Tr. 47:12–14, 82:6–9; Ex. P–2-1.) The miner may get even closer to the fitting to clean the fitting with his hands or guide the head of the grease gun onto the fitting. (Tr. 49:10–12, 50:8–10, 66:15–67:1, 125:25–126:14; Ex. R–2f.) With the jagged "teeth" of the spinning shaft merely five inches below the miner's arms and torso, Inspector Mikulsky noted "how easy [miner's clothing or a rag] can get caught in that opening." (Tr. 34:12–17, 49:8–13, 83:16–18, 122:19–21, 123:10–124:6; Ex. P–2-1.)

Further, given the noisy environment, the wetness, and the awkward position a miner uses to access the grease fitting, it is reasonably likely that a miner could become distracted, slip, or lose his balance. Because a miner holds the grease gun in one hand or both, it is conceivable that a miner would struggle to properly catch himself if he slipped or lost his balance. *See Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2243, 2245 (Nov. 1993) (remanding to the ALJ for failing to properly address all the evidence in S&S analysis, including consideration of the hazard of carrying an object which would have made catching oneself from a fall difficult).

Despite the proximity of the grease fitting to the unguarded part of the shaft, CONSOL asserts a hand could not fit though the 3-to-4.5-inch gap exposing the spinning shaft. (Resp't Br. at 3–4, Resp't Reply at 6–7; Exs. P–1, P–3-9, P–3-10, P–3-16, P–3-18, P–3-24.) Yet, Inspector Mikulsky testified a hand could fit through the gap. (Tr. 50:3–4, 57:6–8, 83:2–7.) Specifically,

[8] The Commission considers the surrounding conditions when determining whether the occurrence of the hazard is reasonably likely. For example, in *Mathies*, the Commission considered the "damp conditions in the mine, the wet track, and the fact that the mantrip's route traversed curves and grades" in determining that the violation was S&S. *Cumberland Coal*, 33 FMSHRC 2357, n.10 (Oct. 2011) (*citing Mathies Coal Co.*, 6 FMSHRC 1, 2, 4 (considering the wet conditions of the mine in affirming the ALJ's conclusion that the violation was S&S)); *see Pittsburg & Midway Coal Mining Co.*, 15 FMSHRC 2243, 2245 (Nov. 1993) (remanding to the ALJ for failure to properly address all the evidence in his S&S analysis which should have included consideration of the pathway's wet and dusty nature).

Inspector Mikulsky observes, "[I]f your hand's on the edge of something, it doesn't fall rigid. It bends." (Tr. 57:6–8.) Therefore, the gap need not be large enough for a miner's splayed hand to fit through. Rather, consistent with Mikulsky's testimony, if you rotate that splayed hand ninety degrees with the thumb pointed to the sky, it is quite reasonable that hand could slip through a 3-to-4.5-inch gap in the guarding. CONSOL's witnesses never refuted Inspector Mikulsky's testimony that a hand could fit through this gap. Moreover, Mikulsky observed the instability of the guarding frame and the likelihood it would be bumped by a miner, whereby "that opening is going to get, you know, could easily get larger." (Tr. 59:19–24.) Therefore, I determine a miner's rag, clothing, hand, fingers, or portion of the arm could reasonably fit through the gap in the guarding and contact the spinning shaft, creating the reasonable likelihood of the occurrence of a hazard which section 77.400(a) is designed to prevent.

CONSOL makes several additional arguments challenging the S&S determination. First, CONSOL argues that even if a miner's hand, arm, or clothing could fall through the gap in the guarding, no miner could contact the moving machine part because no miners regularly enter the area. (Resp't Br. at 8.) While Inspector Mikulsky admitted he observed no miners in the immediate vicinity at the time of his inspection (Tr. 99:2–3), the record demonstrates greasers come to the area approximately once monthly to grease the fittings of this 960 Booster Pump. (Tr. 38:9–13, 50:19–20, 85:23–87:12, 128:1–129:17, 160:10–18.) Matthew Criado, the refuse coordinator at the time of the inspection, worked at CONSOL from 2014 until November 2021.[9] (Tr. 171:19–172:20, 188:24–189:17.) Criado acknowledged that "a plethora of different people," including electricians, and the contractor who laid the hose over the pump, regularly work in the booster pump area. (Tr. 39:4–42:1, 43:2–42:16, 83:10–12, 114:19–117:22, 193:8–193:25, 197:11–20; Exs. P–2-1, R–3a.) Although CONSOL emphasizes that Mikulsky saw no miners in the immediate vicinity at the time he issued the citation (Tr. 99:2–3), this is not legally relevant because S&S determinations are made in the context of normal, continuous mining operations. *See, e.g.*, *Knox Creek Coal Corp*., 36 FMSHRC 1128, 1132 (May 2014), *aff'd*, 811 F.3d 148 (4th Cir. 2016) (indicating that the ALJ erred when he took a "'snapshot' approach" to the S&S analysis). Thus, I find under normal mining operations that miners in addition to the greasers visit the area of the 960 Booster Pump.

CONSOL also seems to posit that fewer miners working in proximity to this guarding violation negates an S&S determination. However, the Commission stated that "'reasonable likelihood' is not an exact standard" when it wrote that "a Judge cannot calculate the degree of risk of the occurrence of a hazard or a reasonably serious injury in precise percentage terms. Rather, the 'reasonable likelihood' standard is a 'matter of degree' evaluation with particular

[9] Criado operated heavy equipment before going to college then earned a master's degree in mechanical engineering, and at the time of the hearing was a Ph.D. candidate in mechanical engineering. (Tr. 171:19–172:20.) I note that Criado's approach to examinations of the 960 Booster Pump area did not inspire much confidence in his ability to identify potential safety issues. At the hearing, Criado said his safety examinations of the Quanset hut housing the 960 Booster Pump consisted of opening the door, sticking his head in, and making sure there was no smoke, no big leaks, or no weird noises, and he would very rarely if at all venture more than ten feet in the door. (Tr. 184:14–19, 191:13–19.)

focus on the facts and circumstances presented regarding these risks." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2039 (Aug. 2016) (reversing the ALJ's decision dropping the S&S designation and instead finding that failure to lock out a shuttle car during electrical repairs was S&S). Indeed, I am persuaded by Commission and ALJ cases finding violations to be S&S when a miner is in the cited area infrequently. *See, e.g.*, *Eagle Nest Inc.*, 14 FMSHRC 1119 (July 1992) (vacating and remanding the ALJ's non-S&S determination where mine examiner was exposed to water accumulations in entry during weekly examinations), *on remand* 14 FMSHRC 1800 (Nov. 1992) (ALJ) (holding on remand that violation was S&S where one miner examined area weekly); *Original Sixteen to One Mine, Inc*., 36 FMSHRC 2224, 2227–28 (Aug. 2014) (ALJ) (affirming S&S designation where only one miner visited area of mine with violation once monthly). Thus, I am not persuaded by CONSOL's arguments that a violation where a miner visits the cited area monthly to grease the 960 Booster Pump cannot be S&S.

Second, CONSOL argues that the hazard would not reasonably occur because of its employees' knowledge, experience, safety training, and prudence. Specifically, CONSOL argues that its contract greasers do not wear loose clothing or use loose rags to wipe up grease spills (Tr. 98:5–7, 126:21–127:20, 146:2–10, 156:2–13; Resp't Br. at 8, 19), would know to power down the machine before greasing the pump (Tr. 115:8–19; Resp't Br. at 4), and would not grease the fitting with a loose or dislodged guard. (Tr. 158:24–159:8.) McMillan, a contract greaser, said he has never observed the guard "pulled back" when he greased the fitting. (Tr. 161:6–8.) And CONSOL points to McMillan's testimony that he normally tucks in his clothing when he greases the fitting. (Tr. 146:4–9.) However, the Commission has held a miner's knowledge, experience, and prudence, or mine operator's redundant safety measures are irrelevant to the S&S analysis, as "[t]he Court cannot assume that S&S miners would exercise caution." *CONSOL Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021) (affirming ALJ's S&S finding and noting that a miner's caution when traversing near and under unsupported roof is irrelevant in S&S analysis of missing reflector).

In interpreting section 77.400(a), the Commission further notes "the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Bros. Coal*, 6 FMSHRC at 2097 (emphasizing the importance of considering "the vagaries of human conduct" in standards involving miner's behavior in affirming the ALJ's finding of a violation of 30 C.F.R. 77.400(a) for failure to guard fan blades where the inspector observed contact could stem from "sudden movement, stumbling, or momentary distraction or inattention."); *Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 116, 118 (D.C. Cir. 2018) (holding that safety measures, including company policy not to access area of unsupported roof, are irrelevant to S&S analysis); *Sec'y of Labor v. Ohio Valley Coal Co.*, 359 F.3d 531 (D.C. Cir. 2004) (noting miner's failure to turn off machine when assessing for maintenance led to severing of his arm and subsequent fatality).

Given the record as a whole, including the credible testimony of Inspector Mikulsky as well as the photographic and video evidence of the cited area, I determine it is reasonably likely that a miner could come in contact with the spinning shaft of the 960 Booster Pump. *See Mathies*, 6 FMSHRC at 5 (noting "an inspector's judgment is an important element" in an S&S

determination) (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that the ALJ did not abuse his discretion in crediting opinion of experienced inspector). Thus, I determine the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed, and, therefore, the Secretary has satisfied the second element of the *Mathies* test.

3. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. Inspector Mikulsky testified the raised, keyed fins on the spinning shaft "can easily cut or grab a miner if he slips down into this." (Tr. 65:12–16; Ex. P–3-17.) Mikulsky stated that in his experience jagged fins on spinning shafts "historically [] can and ha[ve] caused injuries." (Tr. 65:21–66:1.)

Additionally, in his post-violation notes, Inspector Mikulsky writes "[i]f [the miner] contacted [the shaft], lacerations, blunt force trauma, sprains, strains, [or] broken bones could reasonably occur." (Ex. P–2-2.) Mikulsky, who previously worked as a greaser, stated "if [a miner's] hand slips in there, a serious injury is going to happen, and it could possibly be permanently disabling" or even something "catastrophic" such as cutting off the miner's hand. (Tr. 50:3–4, 83:2–7.) Mikulsky has experience as an accident investigator (Tr. 24:3–9), and based on a miner's exposure to the hazard of the unguarded spinning shaft, Mikulsky "believe[s] that if a miner's hand contacted this, if a miner – if a miner was pulled into this by a loose piece of clothing or even holding a rag, that it would reasonably likely cause severe injury . . ." (Tr. 81:23–84:7.)

Consequently, I determine that the hazard of contacting the spinning shaft—either through the direct contact of the hand, fingers, or arm or by being pulled into the shaft due to loose clothing or rags—is reasonably likely to cause injury, thus satisfying the third element of the *Mathies* test.

4. Likelihood Resulting Injury Would Be of Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood the resulting injury would be of a reasonably serious nature. An injury of a "reasonably serious nature" does not require a specific type of injury, and a mere sprain or finger or wrist fracture may be "reasonably serious. *S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element). The Commission found a finger or wrist fracture to be a reasonably serious injury. *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (reversing the ALJ's finding of non-S&S and noting that a finger or a wrist fracture are reasonably serious to fulfill the fourth *Mathies* element). The spinning shaft is large enough, spanning 20 inches in diameter (Ex. P–2-1), and fast enough at 300-900 rotations per minute that if an incident occurred, "something serious would happen" and the "500 horsepower moving shaft would definitely cause some serious injury" according to Inspector Mikulsky, who previously worked as a greaser. (Tr. 80:4–5, 82:24–25.)

CONSOL's witnesses did not dispute Inspector Mikulsky's testimony that such injuries could include cutting off the miner's hand. (Tr. 50:3–4, 83:2–7.) A severed hand is more serious than a finger or wrist fracture, which the Commission previously determined were "reasonably serious." *Buffalo Crushed Stone, Inc.* 19 FMSHRC at 238. I determine that the injuries expected to result from contacting the spinning shaft are reasonably likely to be of a reasonably serious nature, thus satisfying the fourth *Mathies* element. For the same reasons, I affirm the Inspector's gravity determination as reasonably likely to result in lost workdays or restricted duty.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9075606 is appropriately designated as S&S.

C. Penalty

The Secretary has proposed a penalty of $355.00. The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

CONSOL is a large operator with a low to moderate violation history. In the two years preceding the issuance of this citation, MSHA issued to CONSOL's Bailey Mine three violations of section 77.400(a) that became final orders of the Commission. (Ex. P–6-18.) The Secretary determined CONSOL's negligence to be low, and the operator does not contest that decision. CONSOL has not alleged that the proposed penalties would adversely affect its ability to continue in business. I determined the gravity of the violation to be S&S with the number of persons affected to be one, the likelihood of injury as reasonably likely, and the expected severity as lost workdays or restricted duty. Finally, CONSOL demonstrated good faith in attempting to achieve rapid compliance when its employees used tape to "danger[] off" the area around the pump and then bolted the guard and welded the guarding frame's legs to stabilize them. (Ex. P–1-2; Tr. 59:19–24, 72:7–16, 75:11–12.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $355.00.

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9075606 is **AFFIRMED** as written.

Respondent CONSOL Pennsylvania Coal Company, LLC is hereby **ORDERED** to **PAY** a penalty of $355.00 within 40 days of this decision.[10]

Alan G. Paez
Administrative Law Judge

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[10] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.