FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 27, 2020

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2018-0243
Petitioner	:	A.C. No. 36-07230-467980
	:	
v.	:	Docket No. PENN 2018-0255
	:	A.C. No. 36-07230-470217
CONSOL PENNSYLVANIA COAL CO., LLC,	:	
Respondent	:	Bailey Mine

DECISION

Appearances: Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

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

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Consol Pennsylvania Coal Company, LLC ("Consol"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $11,067.00 for ten violations of his mandatory safety standards.[1]

A hearing was held in Pittsburgh, Pennsylvania. The following issues are before me: (1) whether the violations were attributable to the level of gravity alleged; (2) whether the violations were attributable to the degree of negligence alleged; and (3) the appropriate penalty. The parties' Post-hearing Briefs and Consol's Reply Brief are of record.

For the reasons set forth below, I **AFFIRM** two citations, as issued, and three citations, as modified; and assess penalties against Respondent.

[1] The parties reached a settlement on five of the ten contested citations. The total civil penalty proposed for the remaining five citations adjudicated in this proceeding is $7,409.00.

I. Joint Stipulations

The parties have stipulated as follows:

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

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

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

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

5. Bailey Mine is owned by Respondent.

6. Payment of the proposed penalties will not affect Respondent's ability to remain in business.

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

8. The citations were properly issued and served by a duly authorized representative of the Secretary upon an agent of Respondent at the date, time, and place stated in each citation, as required by the Act.

9. Exhibit A to each of the above-captioned dockets contains authentic copies of the citations at issue.

10. Respondent stipulates to the authenticity and admissibility of the R–17 certified mine history forms (P–9).

Tr. 14-16.

II. Factual Background

Consol owns and operates the Bailey Mine, an underground coal mine in Wind Ridge, Greene County, Pennsylvania. On May 17, 2018, Walter Young, an MSHA inspector and ventilation specialist, conducted an E02 methane spot inspection of the mine, accompanied by his supervisor Jeremy Williams, Consol respirable dust coordinator John Opfar, and Consol safety inspector Cody Rogers. Tr. 270-72. Young cited Consol for two worn high pressure shield hoses on the 6-J longwall working section; and wet accumulations of combustible materials at the 6-J working section conveyor belt storage unit. Exs. P–5, P–6.

On June 28, 2018, Inspectors Young and Williams returned to the mine for another methane spot inspection, accompanied by Consol safety inspectors James Jones and Matt Cunningham. Tr. 58-60. Young observed several conditions for which he cited Consol: an inadequately ventilated charging battery in the No. 3 crosscut, between the No. 3 belt and No. 2 track entries; an energized ISE box on the pump car in the No. 2 track entry with the outby door ajar and disconnected external control levers; and an unsupported area of mine roof between the last longwall shield and the 5-L tailgate travelway. Exs. P–2, P–3, P–4.

III. Findings of Fact and Conclusions of Law

1. Citation No. 9077362

A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077362 on May 17, 2018, alleging an "S&S" violation of section 75.1725(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "moderate" negligence.[2] The "Condition or Practice" is described as follows:

> The Mine Operator failed to maintain the high pressure shield to shield hoses on the 6-J Longwall Working Section (039-0 MMU), inby the number 10.5 crosscut in safe operating condition at the following locations:
>
> 1. Between the numbers 62 and 63 shields. The outer jacket of the hose was worn off for an area measuring 2 inches long by 3 inches wide exposing the inner wire braiding to damage. The inner braiding was rusted and deteriorating from oxidation and rubbing on the pontoons of the shields when they were advanced.
>
> 2. Between the numbers 64 and 65 shields. The outer jacket of the hose was worn off for an area measuring 24 inches long by 3 inches wide exposing the inner wire braiding to damage. Broken strands were present. The inner braiding was rusted and deteriorating from oxidation and rubbing on the pontoons of the shields when they were advanced. The Operator immediately removed the shields from service until the condition could be corrected. Both outer protective hose sleeves were damaged at the cited locations.

[2] 30 C.F.R. § 75.1725(a) provides that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

> Standard 75.1725(a) was cited 16 times in two years at mine 3607230 (16 to the operator, 0 to a contractor).

Ex. P–5. The citation was terminated on May 17, when both damaged high pressure hoses were replaced. Ex. P–5. Consol has conceded the violation, but contests the S&S designation and the degree of negligence ascribed to the violation. Resp't Br. at 18.

B. Gravity

In *Mathies Coal Co.*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) 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. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The Commission has explained that the second *Mathies* criterion requires the judge to define the hazard to which the violation contributes, and then determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016); *see ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016). When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Newtown Energy*, 38 FMSHRC at 2045 (citing *Knox Creek Coal Corp.*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek*, 52 F.3d at 135)); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The Secretary maintains that the violation was S&S because the damaged hoses created a risk of highly pressurized fluid leaks and, because the hoses were facing the pan line, they "could break loose entirely and whip through the air" in an area where miners travel. Sec'y Br. at 6-7. Additionally, the Secretary argues that the pressure tests on the damaged hoses offered by Consol should be discounted because they do not account for continued degradation and repeated pressurization during the normal course of mining. Sec'y Br. at 5-7. Consol makes the counter argument that despite the damage, the pressure testing performed at Fairmont Supply Company ("Fairmont") demonstrated that the hoses could withstand pressure far exceeding that to which they were subjected during normal mining. Resp't Br. at 18-21. Consol also contends that if one or both hoses were to fail, it would be highly unlikely for a miner to be in close proximity to

either because of Consol's automated system for moving the longwall shields. Resp't Br. at 19-20.

Inspector Young testified that he identified damaged high pressure hoses between the numbers 62 and 63, and 64 and 65 shields, with braiding visible through the outer jackets and oxidation on the exposed steel braiding. Tr. 273, 289, 299-300, 334. Young explained that the hoses use hydraulic fluid to pressurize the shield system, and that the cited hoses carry 2,500 psi of static pressure and approximately 5,000 psi of operating pressure when the shields are advancing. Tr. 274-75, 293, 304. He noted that there was slack in the hoses, which caused rubbing on the longwall pontoons. Tr. 292-93, 307. He testified that high pressure leaks at 4,000 psi can pierce human flesh and that if a "hose blows off" and swings, it could kill miners traveling or working along the pan line. Tr. 299. Young explained that the longwall shields are moved manually when there are bad roof conditions, and that miners can override the computer program ensuring that they are two shields away from an advancing shield. Tr. 310-14, 321-323. Additionally, Young acknowledged that, under some circumstances, oxidation can occur quickly, that it usually turns steel a dark color, and that the outer jacket of the cited hoses is black. Tr. 309, 334, 340. Finally, he stated that the only way to determine the extent of damage to a hose is to send it out for testing, and that MSHA did not test the cited hoses. Tr. 308, 334.

Consol respirable dust coordinator John Opfar explained that the longwall operation is supported by over 200 shields, each equipped with three hoses. Tr. 545-46, 591. He testified that, typically, the longwall shields are advanced automatically, and that they only begin to advance once the shearer has passed and is approximately 10 shields further along the working face. Tr. 588-90. Additionally, he explained that when conditions require that shields be moved manually, miners can only advance a shield using a computer program that operates two shields away from the advancing shield; this keeps miners approximately 11 feet from the advancing shield and the highly pressurized hoses. Tr. 588-90. Opfar acknowledged that when the longwall shields advance, the hoses can pull and rub, and he identified the location of the deterioration as facing the shields. Tr. 587.

Consol conference officer Robert Gross testified that the cited hoses carried approximately 5,000 psi when pressurized to advance the longwall shields. Tr. 625, 642, 654, 666. He stated that Consol had the hoses proof and burst pressure tested at Fairmont's facility.[3] Tr. 633, 644-45. He also stated that both hoses passed the proof pressure test, that neither hose burst, and that the burst test established that one could withstand 19,000 psi without leakage, while the other began to leak at 17,000 psi. Tr. 645-47, 652-55. Finally, Gross explained that, despite the damage to the outer jackets, both hoses had internal layers of intact braiding. Tr. 649-50.

Todd Clyde, the distribution center manager at Fairmont, testified that the company assembled and sold the cited hoses to Consol. Tr. 672-73, 685. He also stated that Consol had

[3] Gross and Fairmont employee Todd Clyde explained that the proof pressure testing procedure doubles the maximum pressure determined by the manufacturer for 30 seconds to ensure that hoses are in safe operating condition; burst pressure testing pressurizes hoses to four times the pressure that they would undergo during normal mining conditions. Tr. 643, 674.

the hoses tested at Fairmont, and that the testing methods at its facility are accepted by hose manufacturers. Tr. 672, 682.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, continued operation of the damaged hoses contributed to their failure, i.e., highly pressurized fluid leakage and uncontrollable detachment from the shields.

The Secretary seeks to discredit Consol's pressure testing, contending that it does not take into account wear and tear from continued friction and pressure changes occurring during the normal course of mining. Sec'y Br. at 6-7. The Commission has explained that, in evaluating the contribution of a violation to the cause and effect of a hazard, "it is assumed that normal mining operations will continue." *Mach Mining, LLC*, 40 FMSHRC 1, 4 (Jan. 2018) (citing *U.S. Steel*, 6 FMSHRC at 1574-75); *see also U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Accordingly, continued stress on the hoses and highly pressurized fluid leakage must be considered when evaluating the risk of hose failure, alongside evidence of their condition at the time that they were cited by Young. While the record establishes that many layers of braiding remained intact and that the hoses could withstand pressure far greater than that utilized to move the shields, continued operations subjected them to rubbing the pontoons as the longwall advanced. While the test results indicated the unlikelihood of the hoses failing at the time that Young observed the damage, given the extent of exposed braiding and oxidation, along with wear and tear in the context of continued mining, I find it reasonably likely that these hoses would fail. Accordingly, the second step of *Mathies* is met.

Regarding the third step of *Mathies*, Consol argues that miners would not have been exposed to the hazard arising from the damaged hoses. The record indicates that shield hoses are only pressurized to 5,000 psi when the longwall advances and, under normal circumstances, automated longwall advances do not require miners to be located in the immediate area. However, under adverse roof conditions, when Consol elects to advance the longwall manually, it utilizes a computer program that precludes advancement unless miners are 11 feet away from the pressurized hoses that are advancing the shield. Other than the Secretary's bare contention that miners can override the manual system, the Secretary does not rebut or reckon with this evidence in any meaningful way. Moreover, the Secretary has not identified any scenario in which a miner would be exposed to the hazard created by the failed highly pressurized hoses. Accordingly, the Secretary has failed to establish a reasonable likelihood of injury and, therefore, this violation was not S&S.[4]

[4] The Secretary's cite to *Mountain Coal*, in support of his contention that the violation was reasonably likely to result in an injury, cuts the other way. *See* Sec'y Br. at 5-7 (citing *Mountain Coal Co., LLC*, 31 FMSHRC 1220, 1238 (Oct. 2009) (ALJ) (the judge's non-S&S finding was based, in part, on the cited hoses being located behind the shields where miners did not regularly travel)). Similarly, the non-S&S finding in this matter is premised upon the Secretary's failure to place miners in close proximity to the pressurized hoses under either computer program, automated or manual.

C. Negligence

The Secretary contends that Consol was moderately negligent in committing the violation. Sec'y Br. at 7. Consol argues that its negligence should be low because there were hundreds of hoses used to operate the longwall, and the condition was difficult to identify. Resp't Br. at 21. The evidence establishes that the damage was on the non-visible back side of the hoses facing the shields, and that the oxidation on the inner steel braiding and the hoses' outer jackets were similar in color; therefore, their cited condition was not readily observable from the travelway. Additionally, only two out of approximately 600 hoses were cited. Finally, the Secretary did not establish how long the condition had existed. I find these factors mitigating and, accordingly, that Consol's negligence was low in violating this standard.

2. Citation No. 9077364

A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077364 on May 17, 2018, alleging an "S&S" violation of section 75.400 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "moderate" negligence.[5] The "Condition or Practice" is described as follows:

> Damp to wet accumulations of combustible materials consisting of loose coal, coal fines and coal dust, black in color, were permitted to accumulate under the rear of the 6-J Working Section Conveyor Belt Storage Unit and 0.5 crosscut. These accumulations measured 13 feet long by 6 feet wide by 2 to mostly 12 inches in depth. These accumulations were in contact with the return side of the bottom conveyor belt and the stationary roller (outby roller). These accumulations were packed and worn smooth from the conveyor belt being operated overtop of them. The accumulations were built up to the point were [sic] the conveyor belt was almost rubbing the tight side of the take-ups [sic] frame.
>
> The Operator removed the Conveyor Belt from service immediately after the issuance of this citation until the condition could be corrected.
>
> Standard 75.400 was cited 109 times in two years at mine 3607230 (109 to the operator, 0 to a contactor).

[5] 30 CFR § 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

Ex. P–6. The citation was terminated on May 17, after the operator removed the accumulations from the area. Ex. P–6. Consol has conceded the violation, but contests the S&S designation and the degree of negligence ascribed to the violation. Resp't Br. at 22.

B. Gravity

The Secretary argues that the citation was S&S, and that the hazard is a "mine fire from the combination of heat from the belt and combustible coal." Sec'y Br. at 8. Consol maintains that an ignition was unlikely to occur because of the wet conditions in the area, the mixed nature of the accumulations, and the presence of water sprays, an overhead fire suppression system, a CO monitor, a fire resistant belt, and a nearby attendant. Resp't Br. at 22-23.

Inspector Young testified that he observed accumulations underneath the 6-J working section conveyor belt storage unit that extended 6 feet in width, 2 to 12 inches in depth, and 12 feet in length. Tr. 347. He stated that the accumulations were in contact with the belt and rollers in several places, noting that multiple rollers were under pressure, that accumulations were underneath the take-up structure, and that the belt had polished the accumulations. Tr. 347, 353, 374. He also noted that none of the rollers were damaged, and that the belt was not in contact with the take-up structure. Tr. 347, 353, 373-74. Young testified that he observed chunks of coal within the wet mixture of dirt, rocks, and other debris, and that the accumulations were not rock dusted. Tr. 347, 350, 364-65, 385. In his opinion, the quantity indicated that the accumulations had existed for two to three shifts, and that it would have taken time for the belt to have polished them. Tr. 347, 351-52. He noted that the outside guarding was clean, which he believed to be another indication that a spill had not occurred recently. Tr. 393-94. In Young's opinion, continued mining operations could dry out the accumulations and cause a fire, and the accumulations had almost built up enough to cause the belt to rub against the frame of the take-up structure. Tr. 350-51, 374-75. Finally, Young explained that the mine was subject to a five-day spot inspection cycle for methane, and that he did not cite Consol for elevated levels of methane that day. Tr. 58-59, 258.

Consol respirable dust coordinator John Opfar testified that the belt was in contact with the accumulations, that the belt was functioning at least intermittently at the time that the accumulations were cited, and that there was coal in the accumulations. Tr. 561-62, 564-65. He explained that spillage can occur when the belt is turned off and on. Tr. 564. He noted that the accumulations were wet and contained a mixture of materials. Tr. 561. He also testified about the fire prevention equipment employed by the mine, which includes an overhead fire suppression system, a CO monitor, fire resistant belts, and sprinklers. Tr. 553-54, 561-67. Opfar also noted that an attendant was stationed near the accumulations, and that he could have addressed any smoldering or fire. Tr. 561-62, 565-567.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, the discrete safety hazard against which section 75.400 is directed is fire or explosion contributed to by accumulations of combustible materials.

In cases involving combustible accumulations, the Commission has clarified that when considering the second and third steps of the *Mathies* analysis, "the likelihood of an injury

resulting depends on the existence of a 'confluence of factors' that could trigger the ignition or explosion." *Mach Mining*, 40 FMSHRC at 3-4 (citing *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014)). "Factors include any potential ignition sources, the presence or potential for presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area." *Id.* at 4; *see also Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 971 (May 1990); *Texasgulf*, 10 FMSHRC at 501-03. Belt rollers contacting accumulations can be potential ignition sources even if the belt is not rubbing against any structure and there are no broken rollers. *See id.* at 4-6; *see also Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1139-42 (May 2014). Additionally, equipment operating in coal accumulations constitutes an ignition source for S&S purposes, even absent any defects in the equipment. *See Buck Creek*, 52 F.3d at 135. Finally, it is well established that a fire in an underground coal mine poses a significant risk of injury to miners. *Id.* at 135-36; *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985).

Consol argues that the wetness of the accumulations made it unlikely for a fire to occur. Resp't Br. at 22-23. However, the Commission has long explained that "wet coal accumulations pose a significant danger in underground coal mines" because they can dry out through frictional contact with the belt or rollers, and propagate a fire or explosion. *Mach Mining*, 40 FMSHRC at 4-6 (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013); *Black Diamond*, 7 FMSHRC at 1120-21).

Consol next contends that the presence of an overhead fire suppression system, a CO monitor, sprinklers, and fire resistant belts reduce the likelihood of the hazard causing an injury. Resp't Br. at 22-23. However, it is well settled that these safety measures are not valid considerations in determining whether a violation is S&S. *Buck Creek*, 52 F.3d at 135-36 (the court rejected the operator's contention that other fire prevention safety measures mitigated the S&S nature of an accumulation); *see also Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 118 (D.C. Cir. 2018); *Knox Creek*, 811 F.3d at 162; *Cumberland Coal Res., LP*, 717 F.3d 1020, 1028-29 (D.C. Cir. 2013), *aff'g* 33 FMSHRC 2357 (Oct. 2011); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015). Furthermore, as the Commission has recognized, adopting the position that redundant safety measures provide a defense to an S&S finding "would lead to the anomalous result that every protection would have to be nonfunctional before a[n] S&S finding could be made." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

Consol also maintains that a fire was unlikely because the accumulations were a mixture of combustible and noncombustible materials. Resp't Br. at 22. On this point, I credit Young's testimony, based on his experience and observation of the coal in the accumulations, that there was sufficient coal to provide a fuel source.

Finally, Consol advances the argument that the nearby attendant could prevent an ignition from occurring or clean up any accumulations. Resp't Reply Br. at 5. However, the Commission requires that an S&S determination be made at the time that a citation is issued, "without any assumptions as to abatement," and in the context of "continued normal mining operations." *Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015); *U.S. Steel*, 6 FMSHRC at 1574. In the present case, the evidence establishes that the accumulations had accrued over a few shifts because of the quantity, that they had been polished by the belt, and that there was no

spillage on the guarding; in that timespan, no one, including the attendant, had addressed them. It follows, therefore, that the attendant had no effect on the likelihood of a fire or explosion occurring.

The cases cited by Consol in support of a non-S&S designation are premised upon facts that are distinguishable from the facts at hand. *See* Resp't Br. at 22-23. In *Brody Mining, LLC*, the judge found a non-S&S violation where the accumulations were loose and not compacted, they were wet with water rather than hydraulic oil, there was no evidence of heat coming from the belt, and redundant safety measures made ignition unlikely. 33 FMSHRC 1329, 1382, 1384-85 (May 2011) (ALJ). Here, the accumulations were packed and polished by the belt to the point that they had become smooth, indicating that there had been significant contact and friction with the belt. In *Mach Mining, LLC*, the judge found that the accumulations could have accrued in a relatively short time, that approximately half of the material was noncombustible rock, and that the roller contacting the accumulations was no longer in use. 33 FMSHRC 763, 773 (Mar. 2011) (ALJ).[6] In this case, by contrast, the cited accumulations were present significantly longer than a shift, the mixture was black and contained chunks of coal, and the accumulations were in contact with functioning rollers.

The evidence establishes that there were numerous points of contact between the accumulations and the belt, and there were multiple rollers under pressure, all of which created points of friction.[7] Moreover, there were chunks of coal in the accumulations, and the belt had polished them. Furthermore, despite no evidence of excessive methane levels on the section at the time that Young cited the accumulations, the fact that Bailey is subject to a five-day spot inspection cycle for methane heightened the potential for an ignition in the context of continued normal mining.[8] Finally, at least one miner, the attendant, would have been in close proximity to a fire. Based on these facts, I find that the coal accumulations contributed to the reasonable likelihood of a fire, a hazard that would be reasonably likely to result in an injury. Accordingly, the second and third *Mathies* criteria have been satisfied.

As the Seventh Circuit expressed in *Buck Creek*, a finding that "a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation" is a common sense conclusion. 52 F.3d at 135-36; *see also Black Diamond*, 7 FMSHRC at 1120 (recognizing that "ignitions and explosions are major causes of death and injury to miners"). Based on the facts in this case and the relevant precedent, I find a reasonable likelihood that any injury arising

[6] In both cases, the judges' reliance on redundant safety measures was misplaced and, to the extent that their non-S&S findings were based on the wetness of the accumulations, such reasoning has been rejected by the Commission. *See Cumberland Coal*, 717 F.3d at 1028-29; *Mach Mining*, 40 FMSHRC at 4.

[7] I also note that, had this condition continued unabated, there was a heightened likelihood of the belt coming into contact with the take-up structure, creating another source of friction and increasing the potential for an ignition.

[8] The Commission has recognized that methane liberation can compound the likelihood of ignition in accumulation cases. *Mach Mining*, 40 FMSHRC at 4.

from a mine fire would be of a reasonably serious nature, satisfying the fourth *Mathies* criterion. Accordingly, I find that this violation was S&S.

C. Negligence

The Secretary asserts that Consol was moderately negligent in committing the violation because the accumulations were not caused by spillage, and had been building up for two to three shifts. Sec'y Br. at 8. Consol argues that its negligence should be low because the accumulations were hard to identify, they could have accrued between examinations, and they could have been caused by the belt being turned off and on. Resp't Br. at 23. The evidence establishes that the accumulations had existed for at least two shifts and had not been caused by a sudden event, and that no action had been taken to remove them. Based on these facts, I find that Consol was moderately negligent in violating the standard.

3. Citation No. 9077374

A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077374 on June 28, 2018, alleging an "S&S" violation of section 75.340(a)(1)(i) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "moderate" negligence.[9] The "Condition or Practice" is described as follows:

> The battery scoop charging station located in the 5-L Longwall Working Section (008-0 MMU) between the numbers 1 and 2 entries at the number 3 crosscut was ventilated with intake air that was not coursed into a return air course or to the surface and was being used to ventilate working places. When smoked with a chemical smoke tube the air being used to ventilate the scoop batteries was being coursed inby to the 5-L Longwall Working Section's last open crosscut (4 crosscut). This smoke tube reading was taken at the track entry side of the battery being charged, 18 feet inby the ribline of the track entry (number 2 entry).
>
> Standard 75.340(a)(1)(i) was cited 11 times in two years at mine 3607230 (11 to the operator, 0 to a contractor).

Ex. P–2. The citation was terminated on June 28, when the ventilation was corrected by hanging a piece of line brattice across the opening to the crosscut and enlarging the hole in the stopping. Ex. P–2. Consol has conceded the violation, but contests the S&S designation, the number of persons affected, and the degree of negligence ascribed to the violation. Resp't Br. at 7, 23.

[9] 30 C.F.R. § 75.340(a)(1)(i) provides, in relevant part that "battery charging stations . . . shall be housed in noncombustible structures . . . . When a noncombustible structure or area is used, these installations shall be . . . [v]entilated with intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places."

B. Gravity

The Secretary contends that this violation was S&S because the improper ventilation would expose miners to toxic fumes and smoke from the battery charging station, and urges the assumption of an emergency, i.e., a battery fire, in the *Mathies* analysis. Sec'y Br. at 9-10 (citing *Cumberland Coal*, 717 F.3d at 1028-29). Alternatively, the Secretary asserts that, even if a fire were not assumed, the conditions in the mine on the day in question would render the ventilation dangerous to miners. Sec'y Br. at 10.

Consol maintains that it would be inappropriate to assume an emergency in the *Mathies* analysis because section 75.340(a)(1)(i) is not an emergency standard. Resp't Reply Br. at 5-6 (citing *Cumberland Coal*, 717 F.3d at 1028-29; *ICG Illinois*, 38 FMSHRC at 2473). Moreover, Consol contends that determining whether a fire was likely to occur is an essential part of the S&S analysis and that, given the good condition of the cited battery, a fire was unlikely. Resp't Br. at 7-9. Additionally, Consol explains that, even if a fire were to occur, miners' exposure would be limited because intake air coming from the primary escapeway would dilute any smoke or contamination coming from the No. 2 track entry before it reached the working face. Resp't Br. at 8, 23-24.

Inspector Young testified that he encountered a noticeable increase in temperature near the No. 3 crosscut, and found that the heat was coming from a battery charging in the crosscut and the connected charger. Tr. 60-61, 70-71. He testified that the battery was located near the stopping in the crosscut, that there was no ventilation curtain at the charging station, and that there was a disconnected charger also sitting in the crosscut. Tr. 60-61, 64, 82-83, 90, 94, 130. The battery in the No. 3 crosscut was connected to a charger mounted on the train in the No. 2 track entry, and Young explained that MSHA does not cite chargers that are mounted on trains. Tr. 65, 70, 91-92. He opined that charging batteries are dangerous because if they catch fire, they can create toxic smoke and carbon monoxide. Tr. 64, 141. Young stated that he released multiple smoke tubes 13, 15, and 18 feet from the ribline of the track entry to determine whether the area was properly ventilated. Tr. 63-64, 68, 125, 127. He explained that when he took a smoke test at the 18 foot mark at the front edge of the battery, some smoke went through the stopping in the crosscut to the return belt entry and some went toward the ribline, continuing up the track entry toward the face. Tr. 116, 122, 124-25, 127, 130. When he released smoke at the 15 foot mark, he observed the smoke swirling; at the 13 foot mark, he observed the smoke traveling toward the face. Tr. 127. Young then explained that, in the event of contamination coming from the battery, once intake air from the No. 1 primary escapeway met the contaminated air in the No. 2 track entry, some of the combined air would be siphoned off at the last open crosscut into the return belt entry, but there would be no way to quantify the amount of contamination ventilating the face. Tr. 76, 80-81, 116. He noted that in assessing the gravity of the violation, he took into account other ventilation in the mine and the potential for dilution of any contaminated air, and he acknowledged that Consol employs a fire suppression system, CO monitors, and a fire resistant curtain over the battery. Tr. 117-18, 131, 154.

Consol safety inspector Justin Jones testified that he observed Young perform the smoke test over the battery, and that the smoke remained stagnant; however, he also stated that the smoke split and some traveled toward the face when Young performed smoke tests closer to the

ribline. Tr. 417-19, 430. He explained that any air traveling toward the face would get diluted by intake air coming from the primary escapeway, that some of the contaminated air would get siphoned off, and that there was no damage to the charger or the battery at the time of inspection. Tr. 418, 422-23, 425. Finally, he noted that miners are equipped with self-contained self-rescue devices ("SCSR"), and that Consol utilizes fire suppression systems, CO monitors, and a fire resistant curtain over the battery. Tr. 418-19.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, the discrete safety hazard that section 75.340(a)(1)(i) is intended to prevent is "delivery of smoke or other products of combustion to the working place by the intake air current." 57 Fed. Reg. 20868-01, 20888 (May 15, 1992).

Addressing the Secretary's position as to the second *Mathies* criterion, the Commission and the D.C. Circuit have applied *Cumberland Coal* to standards that only become relevant in emergency situations, such as lifelines, escapeways, and refuge chambers. *See e.g.*, *Cumberland Coal*, 717 F.3d at 1026-28; *ICG Illinois*, 38 FMSHRC at 2476; *Small Mine Dev.*, 37 FMSHRC 1892, 1900-01 (Sept. 2015); *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1123 (May 2014); *Spartan Mining Co.*, 35 FMSHRC 3505, 3508-09 (Dec. 2013). The standard at issue, section 75.340(a)(1)(i), is not within the ambit of the situations that would render it an emergency standard. Therefore, at this juncture, the particular facts attendant this violation are analyzed to determine the reasonable likelihood of smoke and other products of combustion reaching the working face, irrespective of any emergency.

In support of its contention that the charging battery posed no risk of fire because it was not found to be defective, Consol cites several cases for the proposition that the S&S designation is primarily premised upon the likelihood of a battery fire occurring. Resp't Br. at 8 (citing *Rebco Coal, Inc.*, 36 FMSHRC 181, 186 (Jan. 2014) (ALJ); *Roxcoal, Inc.*, 33 FMSHRC 2303, 2313 (Sept. 2011) (ALJ); *Zeigler Coal Co.*, 14 FMSHRC 203, 219 (Jan. 1992) (ALJ); *Mathies Coal Co.*, 4 FMSHRC 2222, 2234-35 (Dec. 1982) (ALJ)). These cases, involving similar violations but different facts, are of limited value. In *Roxcoal*, in finding that a battery fire was unlikely and that the violation was non-S&S, the judge noted that any contaminated air in the travelway would be coursed quickly to the return. 33 FMSHRC at 2313. There is no such indication in the present case. In *Zeigler Coal* and *Rebco Coal*, the inspectors did not designate the violations S&S, and the judges did not make findings on S&S. *See* 14 FMSHRC at 219; 36 FMSHRC at 186. In *Mathies Coal*, the cited battery charging equipment was not in use, whereas here, the battery was being charged. *See* 4 FMSHRC at 2234-35.

Additionally, MSHA has explained that section 75.340 requirements are designed "to protect miners if a fire originates at underground transformer stations, *battery charging stations*, substations, rectifiers and water pumps." 57 Fed. Reg. at 20888 (emphasis added). MSHA has also explained that the requirements are "necessary to safely operate [battery] chargers, regardless of the location" because charging batteries liberate hydrogen, and "[t]here is a

demonstrated history of fires caused by battery chargers." 61 Fed. Reg. 9764-01, 9786 (Mar. 11, 1996).[10]

In the present case, the evidence establishes that the air at the charging battery in the No. 3 crosscut split, some ventilating through the stopping into the return belt entry, and some migrating inby the track entry and mixing with intake air from the primary escapeway before coursing the working face. Accordingly, the second *Mathies* requirement has been satisfied.

Regarding the third *Mathies* criterion, Consol's contention, that its overhead fire suppression system, CO monitors, fire resistant curtain, and SCSRs for its miners would reduce the likelihood of injury, is clearly contrary to long held precedent. The Commission and Federal Courts of Appeals have explained that redundant safety measures are not valid considerations in determining whether an injury is reasonably likely to occur. *See e.g.*, *Knox Creek*, 811 F.3d at 162; *Cumberland Coal*, 717 F.3d at 1029; *Brody Mining*, 37 FMSHRC at 1691.

While the evidence establishes that contaminated air originating in the No. 3 crosscut and traveling inby the track entry was diluted by intake air from the primary escapeway, and that some of the combined air was siphoned off at the last open crosscut and ventilated into the return belt entry, an unknown quantity of residual contaminants reached the working face and, in the event of a fire at the charging battery, smoke and other products of combustion would be reasonably likely to reach the entire crew, resulting in serious respiratory and other injuries. Accordingly, I find that the third and fourth *Mathies* criteria have been satisfied, and that this violation was S&S.

C. Negligence

The Secretary contends that Consol was moderately negligent in violating the standard because the heat emanating from the battery and charger was obvious. Sec'y Br. at 10. Consol argues that its negligence was low because there were no defects found on the battery or the charger, and the Secretary did not establish how long the condition had existed. Resp't Br. at 11. The evidence establishes that the charging battery and charger were generating noticeable heat. Additionally, the hole in the stopping was insufficient for adequate ventilation of the charging battery into the return belt entry, and there was no other ventilation control at that location. Based on these facts, I find that the Consol was moderately negligent in violating the standard.

4. Citation No. 9077375

A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077375 on June 28, 2018, alleging an "S&S" violation of section 75.512 that was "reasonably likely" to cause an injury that could

[10] Consol acknowledges that charging batteries liberate hydrogen. Resp't Reply Br. at 6 (citing *Lion Mining Co.*, 16 FMSHRC 921, 923-24 (Apr. 1994) (ALJ); *Nats Creek Mining Co.*, 17 FMSHRC 115, 129-30 (Feb. 1995) (ALJ); *Bethenergy Mines, Inc.*, 11 FMSHRC 1999, 2002-06 (Oct. 1989) (ALJ)).

reasonably be expected to be "fatal," and was caused by Consol's "moderate" negligence.[11] The "Condition or Practice" is described as follows:

> The energized 480 A.C. Volt control panel containing the VFD#1 and VBD#2 breakers on the ISE Pump Car located in the number 2 entry, just outby 3 crosscut, in the 5-L Longwall Working Section (008-0 MMU) was not frequently examined, tested, and properly maintained by a qualified person to assure safe operating condition. When inspected the outby door was not closed and after further investigation neither of the breaker control levers on the outside of this panel were not [sic] operational. The metal extensions that fit between the actual machine breaker and the exterior breaker control reset handles were not connected. Due to this condition, a person would have to reset these breakers manually by inserting the bare metal square stock and using a tool to turn/reset the breakers, exposing them to contacting the energized components inside the control box.

Ex. P–3. The citation was terminated on June 28, after the breaker control levers were properly reinstalled and the control panel door was closed securely. Ex. P–3. Consol has conceded the violation, but contests the S&S designation and the reasonably expected injury, and the degree of negligence ascribed to the violation. Resp't Br. at 12, 24.

B. Gravity

The Secretary maintains that the violation was S&S because the open door on the ISE pump circuit breaker ("ISE box") exposed miners to 480 volts of electricity as they passed through the area. Sec'y Br. at 10. Furthermore, the Secretary contends that miners and electricians could have been electrocuted if they had attempted troubleshooting at the ISE box. Sec'y Br. at 10-12.

Consol argues that the alleged hazard was not reasonably likely to occur because miners did not travel on the tight side of the track entry where the ISE box was accessed. Resp't Br. at 12. Additionally, Consol contends that unqualified miners would be unlikely to operate the breakers because such behavior is contrary to their training, mechanics and electricians are on-site to perform electrical tasks, the conditions requiring resetting the breakers were not present at the time in question and, were de-energizing the panel necessary, qualified miners could do so at the load center rather than the control panel. Resp't Br. at 14-15. Finally, Consol maintains that the reasonably expected injury should be reduced from "fatal" to "lost workdays or restricted duty" because only electricians wearing protective gloves would be expected to encounter the hazard while troubleshooting, the power could be turned off prior to

[11] 30 C.F.R. § 75.512 provides, in relevant part, that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected."

troubleshooting, and the Secretary "failed to produce any evidence demonstrating the relationship between volts and amps[,] and the number of amps required to make 480 volts lethal." Resp't Br. at 24-25.

Inspector Young testified that he observed the outby door open approximately three inches on the ISE box, and that the breaker control levers were disconnected; he found one of the control lever connector rods lying on the bottom of the box, six inches from the energized components, and the other lying a couple of feet away from the ISE box in another car. Tr. 166-67, 174, 190-91, 194. He opined that vibrations from the pump could have opened the door, but that at least one of the disconnected control rods had been removed intentionally. Tr. 204-05. He explained that contact with the live components would cause fatal injuries because the ISE box is energized by 480 volts of electricity from the load center, which is used, in part, to power the ISE pump, that the pump was most likely plugged into a 600 or 800 amp breaker inside the box, and that contacting even 480 volts at half an amp would be fatal. Tr. 168-69, 185-86, 201-02. Young asserted that the ISE box was in a "high traffic area," that miners traveled on both sides of the equipment, and that they could accidentally contact the live control panel by tripping. Tr. 167-68, 188, 192. According to him, despite miner training and availability of qualified mechanics and electricians, unqualified miners could have attempted troubleshooting at the box which, without the control rods, would expose them to the energized components. Tr. 167-68, 173-74, 183, 194-95, 197-203. He also acknowledged that only electricians, wearing protective gloves, are permitted to troubleshoot at the ISE box when energized, that the power to the box could have been shut down at the load center, and that there were no conditions on the day in question that required resetting the breakers. Tr. 167-69, 175, 194-96.

Consol safety inspector Justin Jones testified that one of the control panel doors was open only a few inches, and that miners do not travel on the tight side of the track entry where the ISE box was located because the hydraulic lines running along that side make travel "inconvenient." Tr. 469, 473-74, 483-84. However, he testified that even if a miner were to fall where the box was located, it would likely close the door to the box. Tr. 483. Jones explained that in the event that the breakers required resetting, a mechanic or electrician with protective gear could access the ISE box control panel or turn off the power to the box at the load center for the longwall train, and that miners are trained not to troubleshoot electrical equipment. Tr. 474, 477, 490-92.

The fact of violation has been conceded. Regarding the second *Mathies* criterion, the discrete safety hazard against which section 75.512 is directed is serious electric shock or electrocution.

The cases relied upon by the Secretary to establish that the violation was S&S are distinguishable. In *Big Ridge*, the judge affirmed an S&S finding where a 480-volt power cable was damaged in three places, and there was substantial evidence that miners were active in the area. *See* Sec'y Br. at 12 (citing *Big Ridge, Inc.*, 36 FMSHRC 999, 1021-24 (Apr. 2014) (ALJ)). In the instant matter, by contrast, the door on the ISE box was open three inches at best, and the box was located in an infrequently traveled area, significantly reducing the likelihood of accidental contact with the energized components. In *McElroy Coal*, the judge affirmed an S&S finding where a power center could have electrocuted miners not in direct contact with the live components, because the electricity could "track" to objects, such as steel-toed boots, in close

proximity to the exposed power source, and there was evidence that clothing, lunch pails, and other items were stored on top of the power center. *See* Sec'y Br. at 12 (citing *McElroy Coal Corp.*, 30 FMSHRC 45, 57-58 (Jan. 2008) (ALJ)). Here, the evidence indicates that the danger was confined to the energized components inside the ISE box.

Consol cites to *Zapata Coal*, in which the judge found a non-S&S violation where covers on three electrified 480-volt breaker boxes were open two to three inches and not properly secured, because exposure to the hazard was minimal and injury was unlikely. *See* Resp't Br. at 12 (citing *Zapata Coal Corp.*, 6 FMSHRC 2639, 2646-47 (Nov. 1984) (ALJ)). This case presents similar facts. It is uncontested that one of the doors accessing the energized control panel inside the ISE box was open a few inches, that the box was located on the tight side of the track, and that travel on that side was inconvenient. The Secretary has failed to establish that unqualified miners would be traveling the tight side with any frequency, or that they would reset the breakers in the box. Moreover, the Secretary has not rebutted evidence that qualified mechanics and electricians troubleshoot electrical equipment, or that qualified miners could shut down power to the ISE box at the load center. Consequently, I find that accidental contact with the energized components was unlikely. Therefore, the Secretary has failed to establish the second *Mathies* criterion, and this violation was not S&S.

Regarding the injury that would reasonably be expected, Consol contends that by failing to demonstrate the relationship between voltage and amperage, the Secretary has not established that 480 volts of electricity would be lethal. Consol does not challenge that the ISE box was energized with 480 volts from the load center, or that the power for the ISE pump ran through the box. Furthermore, Consol does not rebut that, in all likelihood, the pump was connected to a 600 or 800 amp breaker, or that contacting 480 volts at even half an amp would be fatal. Consequently, the only evidence on this point stands. Therefore, in the unlikely event that an unqualified miner were to contact the energized components, the reasonably expected injury would be fatal.

C. Negligence

The Secretary argues that Consol was moderately negligent in committing the violation because weekly examinations were required, the condition was obvious, and the state of the control rods indicated improper handling of the equipment. Sec'y Br. at 12. Consol contends that low negligence is appropriate because the latches on the door could have come loose inadvertently, the box was located in a non-obvious location, there was no evidence that the door was open at the time of the last examination and it was not reported, and Consol was not cited for an inadequate examination. Resp't Br. at 15. Balancing the evidence that the door was only ajar rather than wide open, and that the condition was not readily observable and of unknown duration, against the evidence of equipment mishandling indicated by one of the disconnected breaker control levers being found in another car, I find that Consol was moderately negligent in violating the standard.

5. Citation No. 9077376

A. Fact of Violation

Inspector Young issued 104(a) Citation No. 9077376 on June 28, 2018, alleging an "S&S" violation of section 75.202(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "moderate" negligence.[12] The "Condition or Practice" is described as follows:

> The mine roof in areas where persons work or travel was not adequately supported or otherwise controlled to protect persons from hazards related to falls of the mine roof, between the last tailgate shield (#273 at spad number 11+11) and the 5-L Tailgate Travel way on the 5-L Longwall Working Section. The unsupported area measured 5.5 feet wide by 18.5 feet long and would not allow face personnel to safely access the tailgate travelway in the event of an emergency.
>
> Standard 75.202(a) was cited 13 times in two years at mine 3607230 (13 to the operator, 0 to a contractor).

Ex. P–4. The citation was terminated on June 28, after the mine roof was supported with posts, making the tailgate safely accessible. Ex. P–4. Consol has conceded the violation, but contests the S&S designation and the degree of negligence ascribed to the violation. Resp't Br. at 15-17.

B. Gravity

The Secretary, arguing that the violation was "almost *per se*" reasonably likely to cause an injury, contends that the violation was S&S because "there were signs of pressure in the roof and actual material falling off the roof." Sec'y Br. at 12-13. He contends that the foreman would be exposed to the hazard because he is required to pass through the cited area to take air readings every four hours. Sec'y Br. at 12-13. The Secretary also asserts that some miners might travel to the face through the tailgate, and that an emergency might force the entire crew to evacuate through the tailgate. Sec'y Br. at 12-13. On the other hand, Consol argues that it would be unlikely for a miner to be in the cited area at the precise time of a rock fall and that, outside of emergency situations, only a foreman would travel in the area. Resp't Br. at 16-17.

Inspector Young testified that the area of unsupported roof was roughly 5.5 feet wide and 18.5 feet long between the end of the longwall and the tailgate, and that the condition likely arose from the longwall getting "off sights." Tr. 212-13, 234. He stated that he observed unconsolidated pieces hanging and large chunks of material falling from the roof in that area. Tr. 210. Young opined that miners could travel through the cited area to reach the working face,

[12] 30 C.F.R. § 75.202(a) provides that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

or could be required to escape through the tailgate in an emergency. Tr. 215-16, 257. He explained that because the mine has two escapeways located on the headgate side, the mine is required to maintain a passable travelway to the tailgate and that, under normal conditions, the section foreman would cross from the longwall into the tailgate to take air readings. Tr. 235, 259-61. He also testified that it takes two hours for the longwall to complete a round trip, and he was of the opinion that whether the longwall advancing would terminate the condition is speculative; he admitted, however, that the cited condition can arise unexpectedly, and come and go as longwalls advance. Tr. 246, 249, 253-54, 256.

Consol safety inspector Justin Jones testified that the foreman would take an air reading in the area between the end of the longwall and the tailgate every four hours. Tr. 406, 514-15. He explained that the advancing longwall would have resolved the roof condition within the hour because, when the longwall shearer completed its next pass, it would have "knocked out" the cited area and the shields would have advanced. Tr. 515. He testified that under normal circumstances, miners would not travel to and from the longwall face through the tailgate, but acknowledged that in the case of an emergency, escape through the tailgate might be necessary. Tr. 514, 520. He noted that there had not been an emergency requiring usage of the tailgate as an escapeway during his six years working at the mine. Tr. 520. In his opinion, the roof appeared "in fine condition to pass under." Tr. 530. Additionally, he noted that miners had been setting posts in the tailgate earlier in the shift. Tr. 510-11; Ex. R–20.

The fact of violation has been conceded. Considering the second step of *Mathies*, the roof was unsupported and fairly large chunks were already falling when the inspector came upon the area. The discrete safety hazard contemplated by this standard is roof falls in areas where persons work or travel. Accordingly, the second *Mathies* step is met.

Consol identifies cases in which judges made non-S&S findings based upon considerations of the likelihood of hazards occurring, i.e., roof falls, in conjunction with the unlikelihood of miners being at those precise locations when the hazards occurred, in concluding that injuries were unlikely. Resp't Br. at 16; Resp't Reply Br. at 9 (citing *Peabody Midwest Mining LLC*, 35 FMSHRC 2419 (Aug. 2013) (ALJ); *Freedom Energy, Mining Co.*, 32 FMSHRC 1809, 1829 (Dec. 2010) (ALJ); *Ohio Cty. Coal Co.*, 31 FMSHRC 1486, 1489 (Dec. 2009) (ALJ)). However, the Commission has indicated that when considering the likelihood of injury under the third *Mathies* criterion, the hazard is assumed to have occurred. *Newtown Energy*, 38 FMSHRC at 2038.

The Secretary does not refute Consol's contention that the hazard would have been resolved within the hour. The evidence establishes that it would have taken roughly an hour for the longwall shearer to compete the second half of its roundtrip at the time in question, and that the cited condition can arise unexpectedly and is not unusual; it can come and go. Accordingly, I find that the longwall's advance would have cut away and corrected the unsupported roof by 12:30 that afternoon.

The Secretary's assertion that miners could travel through the tailgate to reach the working face is contradicted by evidence that miners would only travel through the tailgate if there were an emergency that rendered the primary escapeways unusable. Moreover, the

Secretary has failed to establish any emergency conditions present during the longwall cycle that was underway. Additionally, while miners setting timbers in the tailgate earlier in the shift were nearby, the Secretary has not shown that they worked in the unsupported area between the end of the longwall and the tailgate, or that they traveled through it while the condition existed. Ex. R–20; Tr. 510-11. The evidence establishes that the assistant foreman took a methane reading in the tailgate at 9:20 in the morning. See Ex. R–5 at 4; Ex. P–4. It follows that the next reading would have occurred sometime around 1:20 that afternoon, well after the hazard would have been cut away and the longwall advanced. Despite the evidence of falling rock from the unsupported roof at the time of inspection, I find that the Secretary has failed to establish that anyone would have been exposed to the hazard between the longwall and the tailgate during its duration. Consequently, I find that the hazard was unlikely to result in an injury. Therefore, the Secretary has failed to establish the third *Mathies* criterion, and this violation was not S&S.

C. Negligence

The Secretary contends that Consol was moderately negligent in violating the standard because miners were working in the area and failed to address the condition. Sec'y Br. at 13. Consol contends that its negligence was low because this condition can arise in the ordinary course of longwall mining, and the condition was not reported. Resp't Br. at 17. There is no evidence that miners were working or traveling directly under the unsupported roof, or that Consol was aware of the hazard before the inspector identified it. Moreover, the evidence establishes that unstable roof conditions can arise unexpectedly as the longwall operates. I find that these factors mitigate the negligence and, therefore, that Consol's negligence was low in violating this standard.

IV. Penalties

While the Secretary has proposed a total civil penalty of $11,067.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based on a review of MSHA's online records, I find that Consol is a large operator. The record also indicates that Consol demonstrated good faith in achieving rapid compliance after notice of the violations, and consideration of its history of violations, from the Assessed Violation History Reports, follows for each citation. Consol has stipulated that imposition of the proposed penalties will not adversely affect its ability to remain in business. Jt. Stip. 6.

The remaining criteria involve consideration of the gravity of the violations and Consol's negligence in committing them. These factors have already been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

1. Citation No. 9077362

It has been established that this violation was unlikely to cause an injury and non-S&S, and that Consol's negligence was low. In the fifteen-month period preceding issuance of this citation for damaged shield hoses, 10 violations of section 75.1725(a) became final orders of the Commission. Ex. P–9 at 1-2. Given that section 75.1725(a) is a general equipment maintenance standard, and that the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. The Secretary has proposed a penalty of $749.00. Applying the civil penalty criteria, I find that a penalty of $200.00 is appropriate.

2. Citation No. 9077364

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, and that Consol was moderately negligent. In the fifteen-month period preceding issuance of this citation for combustible accumulations, 67 violations of section 75.400 became final orders of the Commission. Ex. P–9 at 8-10. Given the volume of coal produced at Bailey, I find Consol's violation history significant, but not an aggravating factor in assessing the appropriate penalty. Applying the civil penalty criteria, I find that a penalty of $1,211.00, as proposed by the Secretary, is appropriate.

3. Citation No. 9077374

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that six persons would be exposed to the hazard, and that Consol was moderately negligent. In the fifteen-month period preceding issuance of this citation for inadequate ventilation of a charging battery, 10 violations of section 75.340(a)(1)(i) became final orders of the Commission. Ex. P–9 at 11-12. Given that section 75.340(a)(1)(i) is a general standard relating to ventilation of underground electrical instillations, and the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. Applying the civil penalty criteria, I find that a penalty of $1,539.00, as proposed by the Secretary, is appropriate.

4. Citation No. 9077375

It has been established that this violation was unlikely to cause a fatality and non-S&S, and that Consol was moderately negligent. In the fifteen-month period preceding issuance of this citation for inadequate ISE box maintenance, 33 violations of section 75.512 became final orders of the Commission. Ex. P–9 at 5-6. Given that section 75.512 is a general standard relating to maintenance of electrical equipment, and that the record is lacking as to the specific nature of those violations, I find Consol's violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. The Secretary has proposed a penalty of $3,161.00. Applying the civil penalty criteria, I find that a penalty of $1,000.00 is appropriate.

5. Citation No. 9077376

It has been established that this violation was unlikely to cause an injury and non-S&S, and that Consol's negligence was low. In the fifteen-month period preceding issuance of this citation for inadequate roof support, 9 violations of section 75.202 became final orders of the Commission, and I find Consol's violation history neither a mitigating nor aggravating factor in assessing the appropriate penalty. Ex. P–9 at 3-4. The Secretary has proposed a penalty of $749.00. Applying the civil penalty criteria, I find that a penalty of $200.00 is appropriate.

IV. Approval of Settlement

The Secretary has filed Motions to Approve Partial Settlement respecting five of the ten citations involved in these dockets. A reduction in penalty from $3,658.00 to $2,005.00 is proposed. The citations, initial assessments, and proposed settlement amounts are as follows:

Docket No.	Citation No.	Initial Assessment	Proposed Settlement
PENN 2018-0243	9076103	$336.00	$184.00
	9079127	$1,118.00	$559.00
	9076446	$502.00	$326.00
	9074941	$953.00	$524.00
	TOTAL:	**$2,909.00**	**$1,593.00**
PENN 2018-0255	9077570	$749.00	$412.00
	TOTAL:	**$749.00**	**$412.00**
	GRAND TOTAL:	**$3,658.00**	**$2,005.00**

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act, and I conclude that the proffered settlement is appropriate under section 110(i) of the Act, and is in the public interest. Specifically, regarding Citation No. 9076103, the Secretary has found the gravity to be less than originally assessed based upon Respondent's contentions that no copper wire was exposed, and that the area was not regularly traveled. Regarding Citation No. 9079127, the Secretary has found the gravity and negligence to be less than originally assessed based upon Respondent's contentions that three jacks would continue to stabilize the bucket if the pin failed, and that the condition could have arisen at any time. Regarding Citation No. 9076446, the Secretary has found the gravity to be less than originally assessed based upon Respondent's contentions that there were no problems with the ventilation or permissibility, and that the area was adequately rock dusted. Regarding Citation No. 9074941, the Secretary has found the gravity to be less than originally assessed based upon Respondent's contention that the hose had been pressure tested and could withstand five times the operating pressure. Regarding Citation No. 9077570, the parties believe that the violation was issued under the incorrect standard, and the Secretary has found the gravity to be less than originally assessed based upon Respondent's contentions that the shuttle car was not in operation

at the time of inspection, that it was not energized, and that a pre-operational exam had not been performed.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 9077364 and 9077374 are **AFFIRMED**, as issued; and that Citation Nos. 9077362, 9077375 and 9077376 are **AFFIRMED**, as modified.

WHEREFORE, the Secretary's Motions to Approve Partial Settlement are **GRANTED**, and it is further **ORDERED** that the Secretary **MODIFY** Citation Nos. 9076103 and 9074941 to reduce the level of gravity to "unlikely" and remove the "significant and substantial" designation; Citation No. 9079127 to reduce the level of gravity to "unlikely" and remove the "significant and substantial" designation, and reduce the degree of negligence to "low;" Citation No. 9076446 to reduce the level of gravity to "2 persons affected;" and Citation No. 9077570 to allege a violation of 30 C.F.R. § 75.517, and reduce the level of gravity to "unlikely" and remove the "significant and substantial" designation.

WHEREFORE, it is further **ORDERED** that Consol Pennsylvania Coal Company, LLC, **PAY** a civil penalty of $6,155.00 within 30 days of the date of this Decision.[13] **ACCORDINGLY**, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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

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