FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
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March 30, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2021-0047 A.C. No. 36-10045-527805
v.	:	
CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	:	Mine: Harvey Mine

DECISION

Appearances: Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Patrick W. Dennison, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, 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 (hereinafter, "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, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. GX–#," and "Ex. R–#," respectively.

I. STATEMENT OF THE CASE

In separate orders, Chief Administrative Law Judge Glynn F. Voisin assigned me both Docket No. PENN 2021-0047 on April 14, 2021, and Docket No. PENN 2021-0058 on May 12, 2021. On August 16, 2021, I consolidated these dockets and set them for hearing. The parties settled five of these six violations prior to the hearing, and only Citation No. 9203483 in PENN 2021-0047 remains.[2]

MSHA Inspector Jason Detrick issued Citation No. 9203483 at CONSOL's Harvey Mine on November 17, 2020. The citation alleges CONSOL violated 30 C.F.R. § 75.1722(a) by failing to guard the area in front of the 5B tailgate belt drive roller. The Secretary designated the citation as significant and substantial ("S&S"),[3] characterized CONSOL's degree of negligence as low, and determined the likelihood of injury to be reasonably likely to result in lost workdays or restricted duty. The Secretary proposed a penalty of $298.00 which CONSOL timely contested. The parties filed prehearing reports.

I held a remote hearing on November 17, 2021, via Zoom for Government. At the hearing, the Secretary presented testimony from MSHA Inspector Jason G. Detrick. CONSOL presented testimony from its Lead Safety Inspector Chase Shaffer and Safety Inspector William Hockenberry. I requested post-hearing briefs and permitted CONSOL to raise any objections to the Mine Violation History exhibit (Ex. GX–9) by the briefing deadline. Both parties submitted post-hearing briefs on January 18, 2022, and CONSOL raised no objection to the exhibit. I left the record open until February 2, 2022, for the parties to file reply briefs but received none.

II. ISSUES

In Citation No. 9203483, the Secretary asserts that CONSOL violated section 75.1722(a) by failing to guard the area directly in front of the 5B tailgate belt drive roller of the 5B tailgate belt line at crosscut zero. (Tr. 17:15–21, 27:8–10; Ex. GX–1-1.) The Secretary believes the violation should be upheld as S&S, reasonably likely to result in lost workdays or restricted duty, and the result of a low degree of negligence. (Tr. 17:21–24, 18:4–8; Ex. GX–1-1; Sec'y Post-hr'g Br. at 5–11.) CONSOL contests the fact of the violation, the gravity and negligence determinations, the S&S designation, and penalty. (Resp't Post-hr'g Br. at 5–14; Tr. 18:12–15.)

[2] Upon receiving the Secretary's motion for a partial settlement, I issued a Decision Approving Partial Settlement on September 16, 2021, resolving three of the six citations contained in consolidated Docket Nos. PENN 2021-0047 and PENN 2021-0058. Thereafter, at the hearing the parties entered a settlement on the record for two section 104(a) citations, one of which disposed of the sole remaining citation in Docket No. PENN 2021-0058. I issued my Decision Approving Second Partial Settlement for the two citations on November 24, 2021, resulting in the full disposition of Docket No. PENN 2021-0058.

[3] 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, the following issues are before me: (1) whether CONSOL violated the guarding provisions of 30 C.F.R. § 75.1722(a) as alleged in Citation No. 9203483; (2) whether the gravity of such a violation would result in "lost workdays or restricted duty"; (3) whether the citation was properly designated as S&S; (4) whether CONSOL's negligence in committing the violation is "low"; and (5) the appropriate penalty for the violation, if any.

For the reasons set forth below, Citation No. 9203483 is **AFFIRMED**.

III. FINDINGS OF FACT

At the hearing, the parties stipulated to the following items verbatim in a joint exhibit (Jt. Ex. 1; Tr. 83:3–10):

1. CONSOL Pennsylvania Coal Company, LLC ("CONSOL") is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
2. At all times relevant to these proceedings, Harvey Mine, Mine ID 36-10045, was and is a mine, as defined in section 3(h) of the Mine Act.
3. CONSOL's operations at the Harvey 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 section 105 and 113 of the Mine Act.
5. True copies of each of the citations that are at issue in this proceeding were served on the Respondent or its agent as required by the Mine Act.
6. Exhibit A, attached to the Secretary's petition in the above-referenced dockets, contains authentic copies of the citations that are at issue in this proceeding with all appropriate modifications or abatements, if any.

A. Operations at the Harvey Mine

CONSOL operates the Harvey Mine, an underground coal mine in Greene County, Pennsylvania that utilizes both continuous mining and longwall mining. (Ex. GX–9; Tr. 93:20–23, 106:24–107:9.) Continuous miner machines drive into the coal seam and advance to create entryways used for travel into and out of the mine and to set up longwall operations. (Tr. 106:24–107:9.) The continuous miners also create passageways perpendicular to the entryways, called crosscuts, which connect the entryways, and when viewed from above these entryways and crosscuts resemble a grid. (Ex. R–5.) In one of these entryways, CONSOL constructed the 5B tailgate belt line. (Tr. 23:18–24:3, 93:14–23.) The 5B tailgate belt line dumps coal onto the "mother" belt that brings mined coal up to the surface for processing. (Tr. 23:25–24:7.) The 5B tailgate belt line utilizes a conveyor belt made of many splices, or pieces of belt, patched together that circulates around the length of the belt line. (Tr. 38:1–2, 108:2–8; Ex. GX–2-1.) The belt line must be lengthened by adding new splices every few days as the continuous miner machine cuts deeper into the coal seam. (Tr. 37:22–38:5, 106:25–107:23.)

The 5B tailgate belt line is constructed to sit closer to one side of the entryway to provide miners a passageway, and CONSOL built wooden walkways along the wide side of the belt line for miners to traverse the 5B tailgate belt entryway. (Tr. 30:8–17, 31:5–32:4.) In addition,

CONSOL built a wooden walkway in front of the 5B tailgate belt drive roller—perpendicular to the wide side walkway—which goes underneath the bottom of the conveyor belt that revolves around the belt line. (Tr. 24:19–25:4, 57:10–24.) This wooden walkway provides access to the opposite or "tight" side of the belt line. (*Id.*; 58:20–25, 59:18–21; Exs. GX–3-1-2.) The tight side is the narrow side closest to the rib (or mine wall) where miners cannot traverse the walkways without turning sideways due to the narrow clearance. (Tr. 36:2–9.) The record indicates a wooden walkway was also built on the tight side. (Tr. 58:18–59:8; Ex. GX–3-1.)

The perpendicular wooden walkway in front of the 5B tailgate belt drive roller is constructed of wooden planks and rests about six inches off the ground with a width of two-and-a-half to three feet. (Tr. 30:6–7, 16–17, 31:9–10, 21–25, 32:1–4.) The vertical distance from this walkway to the bottom of the conveyor belt running overhead is approximately five and a half feet. (Exs. GX–1-4, GX–3-2; Tr. 33:7–9, 67:22–25, 76:13–77:9, 105:12–18, 119:22–120:1.) A miner would need to bend down to get under the belt line here. (Tr. 68:3–4, 76:25–77:9.) The bottom conveyor belt travels towards the 5B tailgate belt drive roller. (Tr. 33:11–16, 35:3–6; Ex. GX–2-1.) The 5B tailgate belt drive roller is part of the machinery that powers the conveyer belt and is located approximately at crosscut one on the 5B tailgate belt line. (Tr. 25:22–26:3, 26:12–27:2.) The drive roller is some four feet in diameter and spans the width of the belt, which is some 52 inches. (Tr. 81:9–13, 100:10–15; Ex. GX–1-3.) The perpendicular wooden walkway sits no more than three and a half feet from the 5B tailgate belt drive roller. (Tr. 33:17–20, 67:8–17, 103:8–10; Exs. GX–1-4, R–1 at 002, R–4 at 015.)

B. Preshift Examinations and Repair of Ripped Belt

As required by law, CONSOL's preshift examiners survey the conditions at the Harvey Mine three times a day prior to the start of the day, afternoon, and midnight shifts. (Tr. 38:9–17, 44:3–6, 51:16–52:14.) During the day shift on November 16, 2020, around 1:00 p.m., workers shut down the 5B tailgate belt line to repair the conveyer belt, which was ripped in two. (Tr. 50:18–21, 51:3–18, 97:2–15; Exs. GX–1-3, R–1 at 002.)

To repair the ripped belt, miners made two complete splices of belt fragments to create one long conveyer belt. (Ex. R–1 at 002; Tr. 38:1–2.) After splicing the torn belt, miners on the midnight shift began training the belt. (Ex. R–3 at 013; Tr. 73:4–9, 108:5–8.) "Training the belt" means adjusting the rollers under the conveyor belt so it runs in the middle of the belt structure, thus preventing damage to the conveyer belt from rubbing against the stands. (Tr. 36:21–25, 72:24.) Training the belt occurs at the tailpiece area of the 5B tailgate belt line closest to the working face, which lies at the opposite end of the drive roller's location where Inspector Detrick issued the citation. (Tr. 111:15–112:18, 113:1–7.) Soon after miners on the midnight shift trained the 5B tailgate conveyer belt (Ex. R–3 at 013), CONSOL's preshift examiner traveled the area to examine the belt line in preparation for the day shift that began at 8:00 a.m., yet had staggered miner arrival times of 7:15 a.m., 7:30 a.m., and 7:45 a.m. due to COVID-19 restrictions. (Tr. 51:19–52:7, 73:21–24; Ex. R–2 at 003.) The 5B belt line was idle during the preshift examination that took place on November 17 from 5:00 a.m. to 6:53 a.m. (Tr. 50:12–14; Exs. GX–1-6, R–2 at 003.) At some point prior to the preshift examination the guarding around the 5B tailgate drive roller was removed. (Tr. 43:6–17, 53:6–14; Ex. GX–1-3.) The 5B tailgate

belt line was turned back on around 7:30 a.m. on November 17, 2020, just prior to Inspector Detrick's inspection at 8:15 a.m. (Tr. 43:8–13, 97:19–21.)

C. Detrick's Inspection of the Harvey Mine

MSHA Inspector Jason Detrick inspected the Harvey Mine for a routine quarterly inspection. (Tr. 17:13–14, 23:10–12, 43:12–13, 47:10–12.) Detrick has served as an MSHA Inspector for the last eight years. (Tr. 22:15–16.) Prior to his work as an MSHA Inspector, Detrick worked approximately fifteen years in underground mines with experience in a myriad of positions, including equipment operator, shuttle car operator, and beltman, for a combined total of 23 years in mining. (Tr. 22:22–25.) Harvey Mine's Lead Safety Inspector Chase Shaffer and Safety Inspector William Hockenberry accompanied Detrick during his inspection. (Tr. 85:22–23, 117:16–20.) Shaffer has worked at Harvey Mine for six years and in the mining industry for over ten years with all his roles focused on mine safety. (Tr. 84:16–21, 85:24–86:2.) Hockenberry has worked in the mining industry for eight years. (Tr. 115:9–15, 24–25, 116:1–5.)

Inspector Detrick arrived at the Harvey Mine at 7:30 a.m. on November 17, 2020. (Tr. 17:13–14, 23:10–12, 43:12–13, 47:10–12.) He first checked the mine map and preshift examination records. (Tr. 48:2–5; Ex. GX–1-6.) The preshift records listed no upcoming maintenance tasks. (Tr. 71:9–12, 72:6–7; Ex. GX–1-6.) Detrick started the inspection of the 5B tailgate belt at 8:15 a.m. (Tr. 43:12–13.) Inspector Detrick and Shaffer began at the zero crosscut of the 5B tailgate section. (Tr. 24:2–7, 16–20.) They proceeded along the side of the belt line facing the exit. (*Id.*) Both Inspector Detrick and Shaffer took notes as they walked. (Tr. 29:10–14, 92:6–18; Exs. GX–1-2–4, GX–1-5, R–1.) They walked to the 5B tailgate drive motor area, which was wet, muddy, and "sloppy," as indicated by the sight of dark ground instead of white rock dust. (Tr. 29:24–30:5, 41:21–24; Ex. GX–3-2.) Inspector Detrick observed that the bottom of the 5B tailgate conveyer belt was in operation and running in the direction of the drive roller. (Tr. 24:11–13, 33:13–16.) Inspector Detrick noted the belt contained no coal since the belt line had just recently started running. (Tr. 43:8–13, 94:3–4; Ex. GX–1-6.) No guarding stood in front of the 5B belt drive roller adjacent to the walkway leading to the tight side, nor was there any guarding above that walkway to protect miners from the bottom of the conveyer belt overhead. (Tr. 33:21–34:2; Ex. GX–1-1.) Inspector Detrick issued Citation No. 9203483 which only addressed the guarding missing in front of the 5B belt drive roller. (Ex. GX–1-1; Tr. 25:2–6.)

D. Issuance of Citation No. 9203483 and its Abatement

In Citation No. 9203483 (Ex. GX–1-1), Inspector Detrick wrote:

> The 5B Tail Gate Belt Drive roller located at 0xc of the 5B Belt Conveyor is not guarded to prevent miners from coming into contact with moving belt components. If this condition continues to exist, it will increase the likelihood of injuries to those miners of a serious nature. All machine parts which may be contacted by persons and which may cause injury shall be guarded.

Inspector Detrick issued Citation No. 9203483 at 8:30 a.m. for missing guarding in front of the 5B belt drive roller per section 75.1722(a). (Tr. 27:8–10, 73:4–5; Ex. GX–1.) He designated the citation as S&S, as reasonably likely to lead to an injury resulting in lost workdays or restricted duty, and as low negligence. (Tr. 17:21–24; Ex. GX–1-1.) Inspector Detrick determined the hazard in question could affect one person, likely either a mine examiner or a belt person. (Tr. 38:20–22; Ex. GX–1-1–3.)

Shaffer and Hockenberry found guarding panels nearby leaning up against the mine rib. (Tr. 96:14–18, 123:22.) To abate the citation, they turned off the 5B belt line and installed the six-foot guarding panel in front of the 5B belt roller. (Tr. 75:16–22, 108:19–21, 123:13–18; Exs. GX–1-1, GX–1-4.) Although the citation only addressed the missing guarding in front of the belt drive roller, Shaffer and Hockenberry also installed overhead guarding above the walkway in front of the 5B drive roller (*id.*), creating a cross-under so miners could safely go under the belt to the tight side while the belt line ran. (Tr. 99:7–11.)

IV. PRINCIPLES OF LAW

A. Elements for an S&S Violation

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:

> (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* criteria); *CONSOL Pa. Coal Co.*, __ FMSHRC __, 2022 WL 489572 (Feb. 10, 2022) (holding substantial evidence must support the theory of hazard under the second *Mathies* element). The Commission has specified that evaluation of the likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence Determinations

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Labor*, 809

F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically," including factors such as the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Mach Mining*, 809 F.3d at 1264 (quoting *Brody Mining, LLC*, 37 FMSHRC at 1703).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Violation of 30 C.F.R. § 75.1722(a) – Failure to Guard Belt Drive Roller

The Secretary alleges that CONSOL violated section 75.1722(a) which requires that "exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." (Tr. 27:8–10); 30 C.F.R. § 75.1722(a).[4] CONSOL appears to contend no violation occurred but offered no supporting arguments at the hearing other than the missing guarding posed no hazard. (Resp't Post-hr'g Br. at 4; Tr. 19:1–2.)

Both MSHA Inspector Detrick and CONSOL's Shaffer agree the 5B tailgate belt line was actively running. (Tr. 24:11–13, 94:1–4.) They, as well as CONSOL's Hockenberry, also agree that at the time of the citation, the 6-foot guarding was missing from the area directly in front of the moving, exposed 5B belt drive roller. (Tr. 33:21–24, 119:13–20, 123:13–16; Ex. R–1.) The drive roller spans some four feet in diameter and is the width of the belt, which is 52 inches or over four feet wide. (Tr. 81:9–13, 100:10–15.) The walkway in front of the drive roller, used to access the tight side, sits no more than three to three-and-a-half feet from the 5B belt drive roller. (Tr. 33:17–20, 67:8–17, 103:8–10; Exs. R–1 at 002, R–4 at 015.) Given this exposure, miners may come in contact with the drive roller and suffer injury. (Tr. 42:7–16.) Based on the record, I determine that CONSOL failed to guard the 5B belt drive roller while the belt line was operating, and the sizeable gap from the missing guarding exposed moving machine parts that, due to their proximity to the walkway, may be contacted by persons. Therefore, I conclude that the Secretary has met his burden of proving CONSOL violated section 75.1722(a).

B. Significant and Substantial Determination

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 have determined that CONSOL violated section 75.1722(a), because it failed to guard the 5B tailgate belt drive roller. *See* discussion *supra* Part V.A. Thus, the Secretary has satisfied the first element of the *Mathies* test.

[4] Section 75.1722(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. § 75.1722(a).

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*, 38 FMSHRC at 2038. Here, the hazard is the possibility of miners contacting the moving 5B tailgate belt drive roller, the issue against which the standard is directed. (Tr. 42:17–43:5); *see* Electric Equipment and Safeguards for Mechanical Equipment, 37 Fed. Reg. 11,777, 11,779 (June 14, 1972) (proposing section 75.1722 "in order to prevent to the greatest extent possible, accidents in the use of mechanical equipment") (implemented Feb. 23, 1973, at 38 Fed. Reg. 4,976, codified at 30 C.F.R. § 75.1722).

CONSOL argues no miner would be near the exposed moving parts because no grease fittings nor maintenance were in this area and the 5B tailgate belt line had no dedicated belt attendant. (Tr. 75:13–15, 102:4–9, 22–25, 103:5–6, 104:18–105:5; Resp't Post-hr'g Br. at 8–9.) While Inspector Detrick observed no miners in the immediate vicinity at the time of his inspection, 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) (indicating that the Judge erred when he took a "'snapshot' approach" to the S&S analysis). Contrary to CONSOL's assertion, miners would be in the area throughout the workday as examiners inspect the area before the day, afternoon, and midnight shifts. (Tr. 38:16–17.) While CONSOL argues a mine examiner normally stays on the walkway side to do a preshift examination, I credit as reasonable Detrick's testimony that a "mine examiner might have to go over [to the tight side] in order to do his exam if he suspects there's something wrong on th[e] tight side of the belt." (Tr. 36:12–17, 55:19–22, 62:15–16, 64:18–20, 103:5–6.) I also find Detrick's statement credible that "miners may shovel spillage from the belt," as this area is near the transfer point to the "mother" belt. (Tr. 24:1–7; Ex. R–5.) Detrick also stated that miners may be assigned to rock dust or perform other work in the area. (Tr. 36:12–17, 55:15–19, 101:19–102:9, 22–25.) Although CONSOL's Shaffer noted that the 5B tailgate belt did not have a dedicated belt attendant like two other belts had, Shaffer acknowledged that CONSOL had other beltmen called "rovers" who would go to wherever they were assigned work for the day. (Tr. 104:18–105:5.) Looking at CONSOL's own work log shows miners were assigned work along the 5B belt line during the afternoon shift of November 16, 2020. (Ex. R–3 at 009, 010.) Indeed, the very existence of the walkway to the tight side in front of the 5B belt roller shows miners would need to access this area (Tr. 57:6–20, 101:19–102:9), and one can also reasonably infer that removal of the guarding in front of the belt drive roller indicates some work had already been performed here. Thus, I find under normal mining operations that miners would have assigned work in this area.

With regard to the occurrence of the hazard, miners traversing this area in front of the 5B belt roller would be on a walkway that spans only two and a half to three feet in width. (Tr. 30:6–7.) Miners going into this area would also encounter the exposed bottom of the conveyor belt, which is only some five and a half feet above the wooden walkway. (Tr. 33:7–9.) Thus, a miner of average height wearing boots and a hardhat—not to mention a six-foot-tall miner like Inspector Detrick—must bend down to go under the belt. (Tr. 68:3–4, 76:25–77:1.) Not only does the route require a miner to bend down, but Detrick observed this area around the wooden walkway to be wet, muddy, and could "get slippery" as was apparent from CONSOL's

photographs of the dark mine bottom instead of the usual white rock dusk. (Tr. 41:22–24, 64:23–25, 65:4–5; Exs. GX–1-3, GX–3-2.)

To get to the tight side, a miner would traverse under a moving belt in this bent over or stooped position. The missing guarding in front of the 5B belt drive roller created an unguarded space measuring approximately six feet high by four and a half feet wide. (Tr. 95:19–96:10, 100:13–14, 119:7–14, 123:10–19; *see* Exs. GX–3, R–4.) As Inspector Detrick determined, a miner could fall through the unguarded space next to the wooden walkway and come in contact with the drive roller, which could occur in two ways: Either the miner could slip and fall directly from the walkway into the moving and exposed drive roller, or the miner's hardhat could come in contact with the bottom of the unguarded conveyer belt[5] overhead and be thrust toward the 5B tailgate drive roller. (Tr. 41:13–42:3.)

In the first instance, a miner could slip on the wooden walkway in front of the belt drive roller, given that the area around this wooden walkway was wet and muddy and thus slippery. (Tr. 41:22–24, 64:23–65:5, 69:16–70:6; Exs. GX–1-3, GX–3-2.) In the second instance, a miner attempting to traverse under the conveyer belt would not be aware how close he was to contacting the bottom of the belt, especially when walking in a stooped position. CONSOL argues this is all speculative as a miner would not necessarily fall in the direction of the belt drive roller, nor would a miner fall upwards. Yet, if a miner slips in a bent over position, the miner is reasonably likely to jerk upwards or straighten up to try to regain his balance. In such an instance, he would be unable to see how close he is to the bottom of the conveyer belt and could reasonably contact the unguarded moving belt[6] and be thrust in the direction of the drive roller. The "miner's hardhat would be knocked off his head or he would be pulled into the belt." (Tr. 33:6–10, 19–20, 41:18–25; Exs. GX–1-4, GX–2-1.) Moreover, a miner would be exposed to

[5] The citation only considers the violation of the missing guarding around the 5B belt drive roller. (Ex. GX–1-1.) Therefore, I do not consider the possibility of direct injury from contact with the overhead belt in my S&S analysis. Nevertheless, *Mathies* requires an analysis of the circumstances as the inspector found them at the time of the violation. *Peabody*, 42 FMSHRC at 382.

[6] CONSOL wisely requires its miners to lock-out and tag-out the belt, or turn off the machine and render it inoperable, before proceeding under the belt. (Tr. 99:22–25.) While a prudent miner should lock-out and tag-out the belt line before walking under the belt, "[t]he Court cannot assume that miners would exercise caution." *CONSOL Pa. Coal Co.*, 43 FMSHRC 145, 148 (Apr. 2021). Inspector Detrick notes "there [are] accidents that happen every day because people weren't prudent in their personal safety," as well as "numerous fatalities" in the mining industry, that lead him to believe that miners would traverse under a belt without turning off, locking out, and tagging out the belt. (Tr. 62:21–23, 63:4–10); *see 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). Here, however, CONSOL's lock-out and tag-out policy is a redundant safety measure and is therefore irrelevant to the S&S analysis. *Sec'y of Labor v. Consolidation Coal Co.*, 895 F.3d 113, 116, 118 (D.C. Cir. 2018) (holding safety measures, including company policy not to access area of unsupported roof, are irrelevant to S&S analysis).

the hazardous condition first when traversing towards the tight side and again when inevitably the miner must retrace his steps to return to the walkway side. Indeed, doing so in a bent down position over a wet, muddy, and narrow wooden walkway increases the likelihood of the miner slipping and falling towards the exposed drive roller. Either slipping and falling into the opening, or having the miner's hardhat come in contact with the bottom conveyer belt overhead thereby knocking the miner towards the exposed drive roller, could catch the limbs or clothing of a miner and pull the miner into the moving machinery. (Tr. 42:20–25.)

Given the testimony, the photographic evidence of the cited area, and the record as a whole, I determine it is reasonably likely that a miner could slip and/or come in contact with the unguarded conveyer belt, thereby falling towards and contacting the exposed 5B belt drive roller. *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 Judge did not abuse discretion in crediting opinion of experienced inspector).

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 *Mathies*.

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. As discussed in the section above, if a miner slipped and fell because of the wet wooden walkway or tripped on the walkway, then the miner could reasonably fall into this six- by four-and-a-half-foot unguarded area and contact the moving machine parts. The miner's entire body would not need to contact the drive roller to cause injury. The approximately four-foot-diameter drive roller that spans the 52-inch width of the 5B belt spins swiftly, so contact with it is reasonably likely to cause injury to limbs. (Tr. 42:20–43:5, 41:19–42:3, 20–25, 81:11–13); *see* discussion *supra* Part V.B.2.

Consequently, I determine that the hazard of contacting the unguarded belt roller was 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 similar injury may be "reasonably serious." *S&S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the Judge 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). Yet the drive roller is large enough, at around three and a half to four feet in diameter, and fast enough to crush limbs and otherwise cause a serious injury according to Inspector Detrick, who previously worked as a Beltman. (Tr. 42:7–16, 81:11–12.) CONSOL's witnesses did not dispute Inspector Detrick's testimony that such injuries could include damage to limbs. (Tr. 42:1–4, 20–25.) I determine that the injuries expected to result from contacting the drive

roller 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. 9203483 was appropriately designated as S&S.

C. Negligence

Inspector Detrick assigned low negligence to Citation No. 9203483. (Ex. GX–1.) In support, the Secretary asserts that the preshift examiner should have anticipated the 5B tailgate belt would resume operation and thus needed to have the guarding reinstalled. (Tr. 79:9–17.) CONSOL argues for no negligence because the 5B tailgate belt line lay idle when the preshift examiner on the midnight shift examined the area. (Resp't Post-hr'g Br. at 13–14; Tr. 120:15–16.)

The record indicates that CONSOL trained the 5B tailgate conveyer belt during the midnight shift, whereby the belt would be allowed to run. (Tr. 97:18–21; Exs. GX–1-3, R–3 at 013.) The parties agree that adding new splices and training the 5B belt would occur in the tailpiece area near the face where active mining takes place—this is the opposite end of the belt line from the 5B head roller where the guarding was missing. (Tr. 107:17–108:8, 111:13–112:3, 112:24–113:7.) Though CONSOL could remove guarding in the tailpiece area to train the 5B belt under the maintenance exception, 30 C.F.R. § 75.1725(c), the guarding in front of the 5B belt drive roller on the opposite end of the belt line would not be removed to train the belt. (Tr. 74:18–25.) Thus, while miners may need to remove a different piece of guarding in a different area of the mine to train the 5B belt, miners would not do this in the area around the 5B drive roller. Therefore, I am unpersuaded that this evidence lowers the negligence.

No evidence suggests that CONSOL was aware of the missing guarding while the belt operated and willfully ignored the violation. Still, CONSOL should have known of the violative condition since one of its employees or contractors removed the guarding. (Tr. 53:6–54:25; Ex. GX–1-3.) Moreover, Inspector Detrick observed that a reasonable preshift examiner on the midnight shift would expect the belt line to run again soon after the completion of repairs to the torn conveyer belt, and therefore should have noticed and reinstalled the missing guarding. (Ex. GX–1-3; Tr. 79:9–17.); *see* 30 C.F.R. § 75.360(b)(11)(v) (guarding moving machine parts).

I determine that CONSOL should have known of the violative condition, but there were mitigating circumstances. Therefore, I conclude low negligence is appropriate.

D. Penalty

The Secretary has proposed a penalty of $298.00. 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 fifteen months preceding the issuance of this citation, MSHA issued to CONSOL's Harvey Mine three violations of section 75.1722(a) that became final orders of the Commission. (Exs. GX–1-1, GX–9-1, GX–9-6.) I determined CONSOL's negligence to be low. *See* discussion *supra* Part V.C. CONSOL has not alleged that the proposed penalties would adversely affect its ability to continue in business. I also determined the gravity of the violation to be S&S, 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. *See* discussion *supra* Part V.B. Finally, CONSOL demonstrated good faith by quickly installing the missing guard to comply with the cited standard. (Tr. 75:16–22.) 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 $298.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9203483 is **AFFIRMED**.

Respondent CONSOL Pennsylvania Coal Company, LLC is hereby **ORDERED** to **PAY** a penalty of $298.00 within 40 days of this decision.[7]

Alan G. Paez
Administrative Law Judge

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[7] 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.