FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

MAR 31 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. AMFIRE MINING CO., LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2013-374 A.C. No. 36-09033-330197 Mine: Gillhouser Run Mine

DECISION AND ORDER

Appearances: Kenneth Polka & Jessica R. Brown, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA, for the Secretary

Patrick W. Dennison, Esq., Jackson Kelly, Pittsburgh, PA, for the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This civil penalty proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the "Mine Act" or "Act"). This matter concerns two citations (Nos. 7041173 and 7041179) issued against Respondent Amfire Mining Co., LLC. A hearing was held in Pittsburgh, Pennsylvania on December 4, 2014, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

JOINT STIPULATIONS[1]

The parties have stipulated to the following:

1. The parties agree that jurisdiction for this matter exists because Amfire Mining Company, LLC, ("Respondent" or "Operator") was an operator of a mine, as defined in Section 3(d) of the Act, 30 U.S.C. §802(d), and the products of the subject mine entered the stream of commerce within the meaning and scope of Section 4 of the Act, 30 U.S.C. §803.
2. Amfire Mining Company, LLC, operates the Gillhouser Run Mine where the citations in contest (hereafter "the citations") were issued.
3. Gillhouser Run Mine (the "Mine") is an underground coal mine in Indiana County, Pennsylvania.
4. The Mine produced 255,712 tons of coal in 2013.
5. The Mine produces coal using the continuous miner method.
6. Amfire is an "operator" as defined in §3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Act"), 30 U.S.C. §803(d), at the coal mine at which the citation at issue in this proceeding were issued.
7. Operations of Amfire at the coal mine where the citations were issued in the proceeding are subject to the jurisdiction of the Act.
8. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.
9. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
10. True copies of the citations at issue in this proceeding were served on Amfire as required by the Act.
11. The R-17 Assessed Violation History Report is an authentic copy reflecting the Mine's history of violations and may be admitted as a business record of the Mine Safety and Health Administration.
12. The proposed civil penalty will not affect Amfire's ability to remain in business.
13. Citation No. 7041173 was issued on January 23, 2013, and citation 7041179 was issued on February 5, 2013, by MSHA Inspector Joseph A. Wagner.

---

[1] The following stipulations are contained in Joint Exhibit No. 1. Joint exhibits will hereinafter be designated JX followed by a number; the Secretary's exhibits will be designated as GX followed by a number; and Respondent's exhibits will be designated as RX followed by a letter. Pages of the official hearing transcript are designated "Tr." followed by the appropriate page reference(s).

14. Inspector Wagner was accompanied by company representative, Troy Lewarchik, on January 23, 2013.

15. Inspector Wagner was accompanied by company representative, Rich Kinter, on February 5, 2013.

16. Citation No. 7041173 was issued with respect to the Ocenco EBA 6.5 Self Contained Self Rescuers.

17. Citation No. 7041179 was issued with respect to the roof control plan previously approved by MSHA on October 13, 2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Citation No. 7041173 (SCSRs)

On January 23, 2013, MSHA Inspector Joseph Wagner inspected the Gillhouser Run Mine as part of a quarterly inspection.[2] Tr. 25-26. During the inspection, Wagner traveled along the 9 South alternate escapeway, which is a belt air course, and served as the primary travelway for everybody going inby and outby of the mine using a rubber trial mantrip. Tr. 26, 27.

Wagner issued Citation No. 7041173 to mine superintendent Norman Gardner[3] after he found three Ocenco 6.5 self-rescuers (SCSRs) that had lost pressure on the Damascus mantrip.[4]

---

[2] At the time of hearing, Joseph Wagner had worked as an underground coal mine inspector for MSHA for approximately three and a half years. Tr. 24. He had 10 years of mining experience, working in a variety of jobs underground, including outby supply guy and outby foreman. Tr. 24-25. Wagner had Pennsylvania mine foreman and mine examiner papers, as well as certifications in machine runners and gas detection. Tr. 25. Wagner had previously worked for Amfire. Tr. 50.

[3] At the time of hearing, Norman Gardner had been the superintendent and mine foreman at the Gillhouser Run Mine for several years. Tr. 153. Prior to starting at the Gillhouser Run Mine in 2006, he worked for DLR Mining. Tr. 153. Prior to that, he worked for over 19 years at Greenwich Colliers. Tr. 153. He had 42 years of total mining experience. Tr. 153. He has all available state certifications, except electrician, has several certifications from the federal government, and is trained as an EMT. Tr. 153-154.

Tr. 27-28; GX-1. The mantrip was a MAC-8, which carried eight persons. Tr. 68. Therefore, according to the regulations contained in 30 C.F.R. §75.1714-4(b) it was required that there be eight SCSRs on the mantrip. Tr. 68. The mantrip had a total of 12 SCSRs, with three that were non-compliant. Tr. 68-69.

The manufacturer's recommended pressure range for the Ocenco 6.5 SCSR was between 2,500-3,000 pounds per square inch (PSI). Tr. 33.[5] According to the Ocenco 6.5 instruction manual, the gauge pressure readings should at no time be below 2,150 PSI. Tr. 32; GX-14. Therefore, three of the SCSRs met the manufacturer's removal criteria. Tr. 32. In order to terminate the citation, the Respondent removed the three noncompliant SCSRs. Tr. 69.

At hearing, Wagner referred to photographs he took of the non-compliant SCSRs and testified that the pressure gauge of SCSR number 10120485 was at 1,500 PSI; the pressure gauge of number 10120408 was at 1,400 PSI; and the pressure gauge of number 10120557 was at 1,000 PSI. Tr. 33-34; GX-8. Two of the three noncompliant SCSRs were on the outside box of the mantrip, and one was on the box inside. Tr. 41.Wagner testified that because of the limited room between the mantrip box and the mine roof, the noncompliant SCSRs would be more accessible and may have been utilized first in case of an emergency. Tr. 42-43. Any type of emergency, including an explosion, fire, or inundation, could require use of the SCSRs. Tr. 43. Wagner testified that this posed a problem because if there was smoke, the miners would be using the SCSRs on the mantrip to make it to the surface. Tr. 34.

MSHA rates the Ocenco 6.5 SCSRs as lasting one hour, so that a miner can make it to fresh air. Tr. 34. However, according to Ocenco advertisements, the 6.5 unit provides over 90 minutes of oxygen in demand mode—such as in an escape situation—and up to 8 hours in conservation mode. Tr. 115.

The mine had other SCSRs available in addition to those on the mantrip. Tr. 34-35. Based on the coal seam height of 42-48 inches, MSHA has permitted the caches of SCSRs at Gillhouser Mine to be 3,300 feet apart. Tr. 26, 73, 121. It was presumed that miners could travel this distance in approximately half an hour. Tr. 73. The next cache of SCSRs is approximately 3,000 feet away. The Emergency Response Plan (ERP), required that there had to be a cache of 26 SCSRs every 3,300 feet.[6] Tr. 157-158. Twenty six SCSRs were required per cache because it was determined that 26 would be the most men that would be underground at any given time, including if the men were "hot seating."[7] Tr. 158.

---

[4] At Gillhouser Mine, two types of SCSRs are used: the belt-worn Ocenco M-20 and the Ocenco 6.5 in the cache. Tr. 114. The M-20 is lighter and more maneuverable than the 6.5, and miners can keep it on them at all times while running the equipment. Tr. 114-115.

[5] When the SCSR is within the manufacturer's recommended pressure range, it is sometimes referred to being "in the green." Tr. 33.

[6] The ERP provides instructions and other relevant materials in case of an evacuation. Tr. 156-157.

[7] "Hot seating" is the industry term used for when section coal crews switch out at the face. Tr. 158.

In case of emergency, miners were trained to meet in specific places underground, which were determined by the escapeway plan. Tr. 70. Gillhouser Mine safety representative, Richard Kinter testified that he conducts annual electrical and rescuer training every 90 days.[8] Tr. 70-71, 127. During this training, Kinter teaches miners how to use the belt-worn rescuers, including performing a manual inspection to make sure everything is in order before donning the SCSR. Tr. 128-129. Kinter believed that his men were well-trained enough so that the non-compliant SCSRs would not have been an issue. Tr. 130-132.

Kinter described the procedures miners were trained to follow in case of emergency. At the first sign of an event, a miner would first use the 10-minute SCSR on his belt in order to get to a one-hour SCSR. Tr. 35, 36, 69. The miner would have to travel a distance of approximately 100-300 feet by either crawling or duck-walking. Tr. 37, 39, 51-52. Assuming that miners can travel approximately 150 feet per minute, it would take the miners approximately 10 minutes to travel the distance from the escapeway caches. Tr. 76. During an emergency situation, smoke may lead to little or no visibility.[9] Tr. 40. Furthermore, a miner cannot talk while donning an SCSR. Tr. 45-46.

Wagner determined that three persons would be affected because that was how many units were noncompliant. Tr. 47. There was no way to determine how long the violation existed. Tr. 47. Amfire had a policy of preoperational checks on the SCSRs, fire extinguishers, and brakes, and Wagner believed that they should have seen the units during that check. Tr. 48.

Kinter testified that he performed an examination on the SCSRs on December 12, 2012. Tr. 117; RX-11. He described the process by which he normally examines the SCSRs. Kinter would pull the rescuer out of the case and inspect the expiration date, whether the seal had popped, whether there was any swelling, whether the bands were in place, whether the gauges were in the correct position, whether there were any cracks or obstructions, and whether there was any bulging in the middle. Tr. 118-119. If an SCSR needed attention, Kinter would remove

---

[8] Richard Kinter testified at hearing for Respondent. At the time of hearing, Kinter had worked for Amfire for seven years as a safety representative. Tr. 110. He has worked at Gillhouser Mine, Ednola Mine, Barrett Mine, and Dora Mine. Tr. 111. Prior to that he worked for two years at R&P in a variety of positions including general laborer and miner operator. Tr. 111. Prior to R&P, Kinter worked for 21.5 years with Bethlehem as a general laborer, mine examiner, shuttle car operator, miner operator, temporary face washer, and assistant chief mine operator. Tr. 111-112. Kinter has a Pennsylvania State mine electrician certificate, a Pennsylvania State diesel instructor certificate, a Pennsylvania mine examiner certificate, and he is a certified EMT and MSHA approved instructor and mine rescue instructor. Tr. 112. In January and February of 2013, Kinter was employed as the safety representative for Gillhouser Mine. Tr. 112-113. In this capacity, Kinter was responsible for training miners in self-rescue, accompanying inspectors to accident violation investigation, and filling out tracking sheets on all violations. Tr. 113.

[9] During a training event that Wagner witnessed, miners told him that they could not see the SCSR gauges because the smoke was too thick. Tr. 40-41.

it and replace it. Kinter testified that during the December 12, 2012 examination he did not find any SCSRs on the MAC-8 that needed to be removed from the mine. Tr. 118.

Kinter testified that the SCSRs with a reading of 1,000 PSI, 1,300 PSI, and 1,500 PSI would have provided "plenty enough oxygen" for a miner to get to the next cache. Tr. 125-126. Kinter further testified that contrary to MSHA's estimates that the M-20 SCSR only provides 10 minutes of oxygen, he has been able to get 30 minutes of oxygen from one, and 20 minutes with a guy running around an outside parking lot. Tr. 126. He estimated that the 6.5 Ocenco at 1,000 PSI would have provided approximately 30 minutes of oxygen. Tr. 126.

Kinter performed an investigation following the issuance of Citation No. 7041173. Tr. 113. He testified that he has tested the SCSRs at issue and at 2,000 pounds of pressure, they lasted 45 minutes to one hour. Tr. 116. However, his testing was not performed in a smoke-filled environment or in one where miners were crawling out of the mine. Tr. 138-139. Kinter conceded that when a person is under stress he will often breathe heavier, and that under such conditions it may not last as long as his tests indicated. Tr. 139.

ANALYSIS

1. Contentions of the Parties

The Secretary argues that the Respondent violated 30 C.F.R. §75.1714-3(a) by not properly maintaining three of the SCSRs on the mantrip. It encourages this Court to employ the definition of "maintain" that the Commission has used in interpreting other regulations, i.e. "to keep in state of repair, efficiency, or validity: preserve from failure or decline." *See Secretary of Labor, Mine Safety And Health Administration v. Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011); *Secretary of Labor, Mine Safety And Health Administration v. Sedgman & David Gill, Employed by Sedgman*, 28 FMSHRC 322 (June 2006). The Secretary argues that the three SCSRs violate §75.171-3(a)'s maintenance requirement. Furthermore, the Secretary argues that the violation was S&S because in the case of an emergency, the use of an SCSR without sufficient oxygen would lead to serious injury. The Secretary further argues that the violation was a result of moderate negligence because the Respondent was negligent in allowing three SCSRs to become noncompliant, but their negligence was somewhat mitigated by the fact that none of them were found to have been unsafe at the time of the last inspection.

Respondent argues that it did not violate the regulation by having three SCSRs that were not in the green. Specifically, it argues that the regulation is a performance-based standard that covers only the reasonableness of the operator's efforts to maintain, test, repair, or keep records. The Respondent argues that a mere existence of SCSRs that were not in the green, without a showing of a defect in the procedures, does not constitute a violation. The Respondent further argues that if the violation did exist, it was not properly designated as S&S because even in the context of an emergency, it was unlikely miners would use the SCSRs not in the green or that those SCSRS would have run out of oxygen. The Respondent further argues that the inspector's designation of moderate negligence was excessive and that no negligence was proven by the Secretary.

2. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.1714-3(a)

On January 23, 2013, Inspector Wagner issued Citation No. 7041173 for a violation of 30 C.F.R. §75.1714-3(a). Section 8 of that Citation, Condition or Practice, reads as follows:

> Three of the twelve Ocenco EBA 6.5 Self Contained Self Rescuers provided on the company #4 Mac 8 mantrip, located at survey station 3559 along the 9 South Alternate Escapeway, were not being maintained in a safe operable condition. The gauge on Ocenco SCSR serial number 10120557 was reading approximately 1000 PSI, the gauge on serial number 10120485 was reading approximately 1500 PSI, and the gauge on serial number 10120408 was reading approximately 1300 PSI. The "green" operating range on the Ocenco EBA 6.5 is between 2500 PSI and 3000 PSI.
>
> Standard 75.1714-3(a) was cited 1 time in two years at mine 3609033 (1 to the operator, 0 to a contractor).

GX-1. The Citation was terminated that same day by removing the three SCSRs at issue from the mine. *Id.*

In the instant case, the operator was required to have eight functioning SCSRs on the cited mantrip—one for each miner. Tr. 68. The issue is that in addition to the eight functioning SCSRs, they had three that were not "in the green." Tr. 32-34. The manufacturer's recommended pressure range was between 2,500-3,000 PSI, and the three SCSRs were at 1,000 PSI, 1,300 PSI, and 1,500 PSI. Tr. 32; GX-14. Such readings indicate that the SCSRs did not contain enough breathable air to function for the hour required by MSHA regulations. Tr. 126. Therefore, they were below the manufacturer's minimum of 2,150 PSI, and met the manufacturer's removal criteria. Tr. 32.

The Respondent argued that although the pressure gauges of the SCSRs indicated a lack of pressure, the SCSRs would likely have provided enough oxygen for miners who utilized them. At hearing, Kinter testified that he examined the SCSRs on December 12, 2012, and they appeared to be in good working condition. Tr. 117-119. Furthermore, he stated that the three SCSRs would have provided "plenty enough oxygen" for a miner to get to the next cache of SCSRs. Tr. 125-126. He based this assertion on tests he conducted in the parking lot where the belt-worn M-20 SCSR provided a miner with 20-30 minutes of oxygen, and not the 10 minutes that MSHA estimates. Tr. 126. He testified that the 6.5 Ocenco SCSR, even at 1,000 PSI, would have provided a miner with an additional 30 minutes of oxygen. Tr. 126.

Giving all due regard to Kinter's parking lot experiments, I find that the three SCSRs were not being maintained in a safe condition. The purpose of the pressure gauges is to ensure that there is sufficient oxygen and pressure in the SCSR to provide the miner air during an emergency. Such gauges and other safety signals serve an important role in notifying users whether the equipment is likely to work. The pressure gauges were well below the manufacturer's suggested range, and met the manufacturer's removal criteria. Tr. 32; GX-14. As such, I find that they were not in working order. I do not find Kinter's testimony persuasive

concerning how much the non-compliant SCSRs may have provided because the conditions of a parking lot are quite unlike the conditions of a mine. The mine at issue had a height of 42-48 inches, meaning that the miners would have had to crawl or walk stooped over. If the miners had to utilize the SCSRs in the mine during an emergency, it is likely that there would have been smoke and other conditions that would have made mobility, visibility, and communications difficult. The parking lot, presumably, did not have these same conditions.

The Respondent argues that even if the SCSRs are found to be noncompliant, this does not prove that the regulation was violated. The cited standard, titled "Self-rescue devices; inspection, testing, maintenance, repair, and recordkeeping," provides that "[e]ach operator shall provide for proper inspection, testing, maintenance, and repair of self-rescue devices by a person trained to perform such functions." 30 C.F.R. 75.1714-3(a). The Respondent contends that it fulfilled its duty to maintain the SCSRs as required by the regulations.

"Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. Unites States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted)). Only when the meaning of a regulation is ambiguous does the Secretary's interpretation warrant deference from the court. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

In this instance, the meaning of the regulation is clear. Although not interpreted in the context of 75.1714-3(a), "the Commission has consistently construed 'maintain' in relation to other standards to require a continuing functioning condition." *Secretary of Labor, Mine Safety and Health Administration v. Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011). Accordingly, the Commission has defined "maintain" as "to keep in state of repair, efficiency or validity: preserve from failure or decline." *Sedgman*, 28 FMSHRC 322, 329 (June 2006); *Jim Walter Res.*, 28 FMSHRC 983, 987-88 (Dec. 2006); *Lopke Quarries*, 23 FMSHRC 705, 707-08 (July 2001); *Jim Walter Res.*, 19 FMSHRC 1761, 1765 (Nov. 1997); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997).

In applying this ordinary meaning of "maintain," the Commission has repeatedly held that standards including such a provision require that the item to be maintained be operating properly. In *Alan Lee Good*, the Commission affirmed the judge's finding that an inoperative parking brake violated the requirement in 30 C.F.R. §56.14101(a)(3) that braking systems "be maintained in functional condition." 23 FMSHRC 995, 996 (Sept. 2001). Similarly, in *Nally & Hamilton Enterprises*, the Commission reversed the judge's ruling and held that where the operator had a truck back-up alarm that was not working it violated the requirement of 30 C.F.R. §77.410(c) that "warning devices shall be maintained in functional condition." 33 FMSHRC at 1763-1765. The Commission further explained:

> Inclusion of the term "maintain" makes clear that warning devices shall be capable of performing on an uninterrupted basis and at *all* times. Congruent with our holding in *Lopke Quarries*, to "maintain" imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.

Id. at 1763 (emphasis in original).

The Commission has held that where the regulation requires the operator to maintain equipment, knowledge of a defect is not an essential element of violation. Quoting *Peabody Coal*, the Commission in *Nally & Hamilton* held that "what the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred." 33 FMSHRC at 1764 (*quoting Peabody Coal*, 1 FMSHRC 1494, 1495 (Oct. 1979). The Commission further pointed out that imputing such a knowledge requirement would create "perverse incentives" for the operator to overlook problems during examinations. *Id.* The same is true in the instant case. The maintenance requirements of 30 C.F.R. §75.1714-3(a) mean that the SCSRs must be in proper working order. The three SCSRs that were found with low pressure were not in such working order and therefore constituted a violation of the standard.

It is no defense to argue that because the operator had the required number of compliant SCSRs, the three non-compliant SCSRs did not constitute a violation. Such an argument presumes that no harm occurs from having non-compliant or inoperative safety equipment in the mine. It completely ignores the reliance that miners might place on defective equipment, assuming that it was in working condition. Miners should not be required to roll the dice in an emergency situation and hope that a tank intended to provide air actually provides such life-saving air. If during an emergency, a miner accidentally grabbed an SCSR with insufficient pressure or air, it does him no good to know that there was a better working SCSR behind it. This argument also permits no principled line drawing. If three of twelve SCSRs may be noncompliant, so long as the required eight are compliant, then it would seem to be allowable to have eight of sixteen noncompliant. Or twenty of twenty eight noncompliant. Or one hundred of one hundred and eight noncompliant. It is easy to draw this argument to absurd lengths because the argument is based upon an absurd premise. Miners must be able to rely on all of the safety and emergency equipment available to them. Any other holding would place the entire Mine Act in jeopardy.

3. <u>The Violation Was Reasonably Likely to Result in a Fatal Injury and Was Significant And Substantial In Nature</u>

Inspector Wagner marked the gravity of the cited danger in Citation No. 7041173 as being Reasonably Likely to result in Fatal injuries to three persons, as well as S&S. These determinations are supported by a preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the 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., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is,

a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984).

The Commission has held that determining whether emergency lifeline standards are S&S "necessarily involve[s] consideration of an emergency situation." *MSHA v. Cumberland Coal Res. LP*, 33 FMSHRC 2357, 2364 (Oct. 5, 2011), *affirmed* 717 F.3d 1020 (D.C. Cir. 2013). It explained that such standards "are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs." *Id.* at 2367. The Commission has similarly held that when considering the S&S nature of an escapeway violation, the judge must presume the existence of an emergency. *MSHA v. Spartan Mining Co., Inc.*, 2013 WL 6792689 (Dec. 11, 2013). In the instant case a similar emergency standard is at issue, and therefore the analysis requires the presumption of an emergency situation of the type that the standard is intended to address.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. § 75.1714-3(a). Similarly, the second element of *Mathies*, a discrete safety hazard contributed to by the violation – was met. Using an SCSR during an emergency situation that does not have sufficient air or pressure under the manufacturer's guidelines could contribute to the discrete safety hazard of not having sufficient air during an emergency. In the instant case, if an emergency arose with eight miners in the mantrip, these miners would face a 25%-60% chance of grabbing a non-compliant SCSR.[10]

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS"). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Id.* at 1281. Importantly, it stated that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.* The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The likelihood of the hazard being realized must be considered assuming normal continued mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (Jun. 1986). If a miner utilized and relied upon a noncompliant SCSR during an emergency, that miner could suffer smoke inhalation or death. Under *Mathies,* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6

[10] This back-of-the-envelope calculation assumes that the first miner would have a 3/12 chance of grabbing a non-compliant SCSR. Then, assuming a best-case scenario where the first seven miners grabbed working SCSRs, the final miner would have a 3/5 chance of grabbing a non-compliant SCSR.

FMSHRC 1573, 1574 (July 1984). Smoke inhalation and death are injuries that are reasonably serious in nature.

4. The Violation Was the Result of Moderate Negligence

The Secretary defines Moderate negligence as when the "operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d), Table X. The Commission has made it clear that judges, however, are not bound by the Secretary's "formulaic approach" to negligence, and instead should look to whether the operator has failed to meet the high standard of care established under the Act. *Sec'y of Labor, MSHA v. Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *Wade Sand & Gravel*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015). "In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody*, 37 FMSHRC at 1702. The judge is to apply a "totality of the circumstances" analysis that need not focus on mitigating circumstances. *Id.* at 1702-1703.

In the instant case, the operator had a duty to maintain the SCSRs in the mantrip. As has been explained *supra*, the operator fell short of this duty in allowing three of the 12 SCSRs—a full quarter of those available—to become non-compliant. The Respondent had an internal policy that required preoperational checks of all mantrips, including SCSRs and fire extinguishers. Tr. 48. Though there is no evidence that the operator or its agents knew of the deficient SCSRs, it is inconceivable that with all proper checks a full quarter of the SCSRs on the mantrip would be deficient. Therefore, I find that the violation is the result of Moderate negligence.

Citation No. 7041179 (roof control plan)

On February 5, 2013, while conducting the quarterly inspection of the Gillhouser Run Mine, Inspector Wagner issued a citation for a roof control violation. Wagner was traveling the 10 South belt drive with Kinter.[11] Tr. 52-53, 134-135. At 10 South, there was 24-47 inches of roof that had been cut for a total roof height of six to eight feet. Tr. 53-55. The width was 20 feet, with 13 feet of rib that wasn't bolted. Tr. 55. There was approximately 36 inches of clearance between the rib and the structure. Tr. 55.

Wagner issued Citation No. 7041179 because there were no bolts or posts in an area where more than two feet of rock was cut.[12] Tr. 56-57. According to the approved roof control

[11] A belt drive is taller than a normal belt structure and requires that rock is cut either from the roof or the bottom. Tr. 53. The transcript incorrectly has the date of inspection as February 15, 2013, but this appears to be a typographical error.

[12] Under Section 8, "Condition or Practice," the Citation reads:

> The operator failed to comply with the current approved roof control plan (No. 40239-B8) page 27 which states the Procedures for Rib Control at Boom Hole Locations where 24" or more roof has been removed. There was an area, located at the 10 South belt drive boom hole along the tight side of the 1 South Belt, that measured approximately 13' in

plan, posts were supposed to be set on five foot centers, or rib bolts and cribs were supposed to be utilized. Tr. 58, 93; GX-10. Wagner testified that there was no support installed in the cited area. Tr. 58. When more than two feet of rock is cut, it puts more pressure on the coal pillar, and additional supports are necessary. Tr. 56-57.

According to Wagner's notes, the ribs on the clearance side of the belt showed signs of failure and there were large pieces of rock that were either pulled down or had fallen down. Tr. 61-62; GX-4. Wagner cited the area on the tight side of the belt, where miners only travel when they have to clean the belt. Tr. 86. Wagner believed that at minimum the cited area had been mined for approximately a month before the citation was issued, meaning that the condition existed for at least a month. Tr. 64, 67.

According to the roof control plan approved on April 17, 2014, unbolted ribs are permitted for up to one week. Tr. 99; RX-13. The one week delay in putting in the bolts would have been before the belt drive was installed. Tr. 101. Therefore, mine management would have been present during parts of the belt drive installation. Tr. 101. Even if there was a one-week delay when the rib was unbolted, there were at least three weeks when it remained unbolted. Tr. 102. The area that was cited as not adequately supported was near a turn where bolts sometimes get pulled out during mining. Tr. 91. Wagner did not ask anyone whether the area had been bolted because there were no signs of it having ever been bolted. Tr. 91.

Wagner determined that the citation was S&S because roof and rib problems are the leading cause of injuries in mines.[13] Tr. 64-65. In this instance, the miners had to walk an area that was three feet wide between the belt structure and the rib. Tr. 65. A falling object could cause fatal injuries, or cause someone to fall onto the belt. Tr. 65. Wagner testified that such injuries would be fatal. Tr. 65. Wagner testified that the condition was very obvious because it was painted with dots, and examiners and management would have been well aware of the condition. Tr. 66.

Kinter testified that he saw red spots on the rib where there were no rib bolts, meaning that they were either not installed or were removed. Tr. 135. It appeared to Kinter that the bolts had been pulled out.[14] Tr. 135. Kinter described the condition of the rib as "okay," with no movement, sloughage or cracks. Tr. 135. He disagreed with Wagner's assessment that the roof had been cut as much as 47 inches, and said it was likely 27 inches. Tr. 135-137. Kinter further

---

length where the roof removed measured from 24" to 47" that had no additional support provided.

Standard 75.220(a)(1) was cited 2 times in two years at mine 3609033 (to the operator, 0 to a contractor).

[13] This standard is on the Rules to Live By list, meaning that the condition has led to a high level of injuries. Tr. 67.

[14] If a roof bolt was pulled out, evidence of it would have been visible to an examiner and should have been recorded in the pre-shift examination. Tr. 147.

did not agree that the violation was reasonably likely to cause fatal injuries to one person because the rib condition in the area did not show any visual defects. Tr. 137. Furthermore the roof was slate and there was no breakage on the roof. Tr. 137-138.

ANALYSIS

1. Contentions of the Parties

The Secretary argues that Respondent violated 30 C.F.R. §75.220(a)(1) by not complying with the mine roof control plan and installing additional rib supports in a 13 by 20 foot area in the 10 South Belt Drive Area. The Secretary argues that the violation was S&S because a rib fall caused by unsupported ribs was reasonably likely to lead to a serious injury. The Secretary further argues that the violation was the result of high negligence, rather than moderate (as originally assessed), because the Respondent had marked the areas that needed additional roof support, and these markings were visible for at least a month without any action. As a result of the change in negligence, the Secretary requests that the civil penalty be increased from $1,412.00, as originally assessed, to $5,159.00.[15]

Respondent concedes the fact of violation, but argues that it was not S&S, and that the gravity, negligence, and assessed penalty should be reduced. The Respondent argues that there was no credible evidence presented that demonstrated a reasonable likelihood of serious injury, or that the cited condition adversely affected the immediate roof or ribs, or that there was any exposure to the condition. For these reasons, the Respondent argues that the Fatal and S&S designations were improper. Further, the Respondent argues that there was no evidence that anyone in management was aware of the condition, or that the condition existed for the length of time presumed by the inspector. For these reasons, the Respondent argues that the level of negligence should be lowered from Moderate, rather than raised, as the Secretary proposed.

2. The Violation Was Reasonably Likely to Result in a Fatal Injury and Was Significant And Substantial In Nature

Regarding the first element of S&S—the underlying violation of a mandatory safety standard—the Respondent has conceded that it violated §75.220(a)(1).[16] Similarly, the second element of *Mathies*, a discrete safety hazard contributed to by the violation, was met. The unsupported rib area was thirteen feet long and the width of the entry was 20 feet. Tr. 55. There

---

[15] The original assessed penalty was $1,569.00, however the Secretary reduced it by 10% to $1,412.00

[16] Section 75.220(a)(1) "Roof Control Plan" states:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

30 C.F.R. § 75.220(a)(1).

were signs of rib failure, such as large pieces of rock that had come down onto the mine floor across from the unsupported rib. Tr. 62. This condition significantly contributed to the safety hazard of a rib fall.

The third and fourth elements of the *Mathies* test—a reasonable likelihood that the hazard contributed to will result in a serious injury—was also met. A rib fall is reasonably likely to lead to an injury as serious as death. Tr. 65. MSHA has identified rib falls as one of the categories of accidents most frequently cited by MSHA following a fatal accident. Rules to Live By.[17] A falling rock from a rib or roof has been repeatedly held to meet the third and fourth elements of the Mathies test. *See Sec'y of Labor, MSHA v. Maryan Mining LLC*, 37 FMSHRC 1715 (ALJ) (Aug. 2015); *Sec'y of Labor, MSHA v. Consolidation Coal Co.*, 36 FMSHRC 615, 634 (ALJ) (Feb. 2014). I therefore find that the violation met the *Mathies* test and was properly designated as S&S.

Furthermore, the citation was properly designated as "Fatal." Inspector Wagner credibly testified that when more than two feet of rock is cut, it places additional pressure on the coal pillar, requiring extra supports. Tr. 56-57. Though the unsupported rib was on the tight side of the belt, miners would travel in this area when cleaning the belt. Tr. 86. Such a miner could easily have a large rock fall on him, leading to fatal injuries. Therefore, I find that the Secretary carried his burden by a preponderance of the evidence that the citation should be marked as "Fatal."

3. The Violation Was the Result of Moderate Negligence

The Secretary argues that the negligence of the citation should be "High," rather than "Moderate" (as originally assessed) because there were no mitigating circumstances present. However, the Commission has made clear that judges are not bound by the Secretary's definitions of negligence, and rather than focusing purely on mitigating circumstances, the judge should consider the totality of the circumstances. *Brody*, 37 FMSHRC at 1701-1702.

In the instant case, Inspector Wagner believed that the condition existed for at least one month, whereas the roof control plan only allowed unbolted ribs for one week. Tr. 64, 67, 99. However, Kinter testified credibly that it appeared to him that the bolts had been pulled out. Tr. 135. Whether the bolts were never installed or pulled out is irrelevant to whether the violation existed, but highly relevant to the negligence determination. Though Wagner's assessment is reasonable, because of the presence of red spots where bolts should have been, there is also a possibility that the bolts had been pulled out. Therefore, I find that the negligence should remain at "Moderate" and not be raised as the Secretary requests.

PENALTIES

The principles governing the authority of the Commission's administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i)

[17] The Rules to Live By are available at available at http://arlweb.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp.

of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §2700.28. The Act requires that in assessing civil monetary penalties, the Commission and its judges shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation

30 U.S.C. § 820(i)

The Secretary seeks civil penalties in the amounts of $1,795.00 for Citation No. 7041173 and $5,159.00 for Citation No. 7041179.[18] Given all of the evidence and my findings above, I find that the penalty for Citation No. 7041173 is appropriate, but the penalty for Citation No. 7041179 should remain at the originally assessed amount of $1,412.00.

In assessing a $3,207.00 total penalty, I have given full consideration to the Section 110(i) criteria. Specifically, I note that Respondent had been cited once in the previous two years for violations of §75.1714-3(a) and two times for §75.220(a). Respondent is a large operator and the Gillhouser Run Mine is a large mine and therefore the penalty is appropriate to the size of the business. The parties stipulated that this penalty amount would not affect Respondent's ability to stay in business. Both citations were properly assessed as S&S and Moderate negligence. Further, the dangers cited with respect to each violation were highly likely to result in fatal injuries of miners.

[18] The Secretary originally assessed a penalty of $1,412.00 for Citation No. 7041179, but sought an increase in its Post-Hearing Brief.

ORDER

It is **ORDERED** that Citation No. 7041173 is **AFFIRMED** as written, and Citation No. 7041179 is **AFFIRMED**, with Moderate negligence. It is further **ORDERED** that Amfire Mining Co. LLC, **PAY** the Secretary of Labor the sum of $3,207.00 within 30 days of the date of this Decision.[19] Upon receipt of payment, this case is hereby **DISMISSED**.

John Kent Lewis
Administrative Law Judge

Distribution:

Jessica R. Brown, Esq., Office of the Solicitor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Kenneth J. Polka, CLR, 631 Excel Dr., Suite 100, Mt. Pleasant, PA 15666

Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Ave., Pittsburgh, PA 15222-1000

[19] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390